The Future of the Historically Black Colleges and Universities: Reframing the Debate

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INTRODUCTION..................................................................................................................146
I. HISTORY OF HIGHER EDUCATION IN AMERICA............................................................150
II. EXAMINING THE CASE AGAINST HBCUs.................................................................157
   A. Failure to Graduate in Acceptable Numbers.........................................................158
   B. Analyzing the Data.................................................................................................159
   C. Six year graduation rates......................................................................................160
   D. Race as a Factor......................................................................................................162
   E. Declining Enrollment..............................................................................................165
      1. Enrollment up at HBCUs....................................................................................165
      2. Enrollment trends at all institutions....................................................................166
      3. Enrollment trends of blacks in higher education.............................................168
      4. Enrollment of whites at HBCU schools............................................................169
III. THE OBAMA “COLOR BLIND SOCIETY” MISCONCEPTION......................................170
   A. Does Policy Favoring Integration eliminate the need for HBCUs?......................170
      1. Should African Americans be Educated?............................................................171
      2. Urban Myth........................................................................................................171
      3. Employment Salary Gap between Graduates of HBCUs and HWCUs..............173
   B. Constitutional Implications of Closing All HBCUs..............................................175
      1. The Fourteenth Amendment..............................................................................176
      2. Fordice Rules.......................................................................................................178
      3. The Civil Rights Act of 1964..............................................................................179
   C. Distinguishing Past from Present..........................................................................181
   D. Racial Neutrality in America..................................................................................183

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INTRODUCTION

A recent article that questioned the relevance of Historically Black Colleges and Universities (HBCU) energized the long running debate about the continuing need for these congressionally legislated institutions. The article’s author states that “black colleges need a new mission,” and while HBCUs were “once an essential response to racism, they are now academically inferior.” The author goes on to identify three basis for his position that there is no longer a need for HBCUs: (1) declining enrollment in HBCUs, (2) poor graduation rates, and (3) lack of necessity to continue redressing past discrimination and disparities in education that existed when HBCUs were mandated.

America has a historical ambivalence to educating its citizens, particularly its citizens of African descent and those who were not wealthy. Thus, the suggestion that there is no need for institutions that are committed to educating African Americans and other disenfranchised groups is nothing new.

HBCUs were originally established prior to the Civil War to provide educational opportunities to black persons who were legally denied education. Prior to the enactment of the Emancip-

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2. Id.
3. Id.
tion Proclamation, most blacks in America were enslaved and were denied access to education as a matter of law. Slave codes were enacted to ensure that blacks remained a suppressed class by, among other things, prohibiting them from learning to read and write. Despite the enactment of numerous laws and other attempts to keep blacks from being educated, HBCUs continued to thrive. Congress began allocating funding for higher education with the passage of the Morrill Act of 1862. It was not until the Civil Rights Movement and the passage of the Higher Education Act of 1965, which was expressly designed as part of the effort to redress past discriminatory practices in education for blacks, that HBCUs began receiving a fairer share of such funds. Whether past discrimination has been redressed has supported the challenge to the continuing viability of the HBCU. The debate is predicated on the shifts in governmental policy and laws against se-

7. Id.
8. See e.g., 1740 South Carolina Slave Code, http://www.teachingushistory.org/ttrow/1740slavecode.htm (follow "Transcription" hyperlink); See also, WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE, STATUTES, JUDICIAL DECISIONS & ILLUSTRATIVE FACTS 232-236; 333-345 (Clarke, Beeton, and Co. 1853.) According to WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE, PT. 2; NEW YORK: AMERICAN & FOREIGN ANTI-SLAVERY SOCIETY (1853), the prohibitions were generally a result of fear "that black literacy would prove a threat to the slave system -- which relied on slaves' dependence on masters -- whites in many colonies instituted laws forbidding slaves to learn to read or write and making it a crime for others to teach them". See also, Danielle Boaz, Equality Does Not Mean Conformity: Reevaluating the use of Segregated Schools to Create a Culturally Appropriate Education for African American Children, 7 CONN. PUB. INT.L.J. 1, 18-20 (2007). See also, Kimberly Sambol-Tosco, Slavery and the Making of America, The Slave Experience: Education, Arts, & Culture, Historical Overview, PBS, http://www.pbs.org/wnet/slavery/experience/education/history2.html ("Concerned that literate slaves would forge passes or convince other slaves to revolt, Southern slaveholders generally opposed slave literacy. In 1740, South Carolina enacted another response to the events that occurred at Stono by passing one of the earliest laws prohibiting teaching a slave to read or write. In other parts of the South the mid-eighteenth century saw an expansion of earlier laws forbidding the education of slaves.")
gregation, and favoring social and cultural tolerance, as well as laws favoring integration arguably eradicating the continued need for the HBCU. However, while HBCUs represent only about three percent of colleges in the U.S., they enroll twelve percent of all black college students and produce twenty-three percent of all black college graduates. Remarkably, this small group of colleges confers forty percent of all science, technology, engineering and mathematics (STEM) degrees, and sixty percent of all engineering degrees earned by black students. HBCUs also educate half of the country’s black teachers and forty percent of all black health professionals. The U.S. Census Bureau reports that the earning power of people who graduate with a college degree is far higher than people who earn only a high school diploma. The study revealed that over an adult’s working life, high school graduates can expect, on average to earn $1.2 million, and those with a bachelor’s degree, $2.1 million. People with a master’s degree can expect to earn $2.5 million; people with doctoral degrees can expect to earn $3.4 million, while people with professional degrees can expect to earn $4.4 million. Moreover, statistical evidence shows that crime rates are inversely proportional to the educational level of the individual. In December 2010, it

13. Id. See BUREAU OF LABOR AND STATISTICS, Current Population Survey (Reporting that the typical full-time year-round worker with a four-year college degree earns more than 60 percent more than high school graduates over their working lives. Those with master’s degrees earn almost twice as much, and those with professional degrees earn almost three times as much.) See also, Staff Writer, College Increases Earning Potential, STATE FARM INSURANCE COMPANY, http://learningcenter.statefarm.com/family/teens/college-increases-earning-potential/. See also, What Every Parent Should Know About Paying for College, COLLEGE BOARD TRENDS IN HIGHER EDUCATION SERIES (2009), http://professionals.collegeboard.com/profdownload/trends-2009-what-parents-should-know-one-page.pdf.
was widely reported that the United States had fallen from top of the class to average in world education rankings. Based on the three-yearly Organization for Economic Co-operation and Development (OECD) Programme for International Student Assessment (PISA) report, which compares the knowledge and skills of fifteen year-olds in seventy countries around the world, the U.S. ranked fourteenth (14) in reading skills, seventeenth (17) in science and a below average, twenty-fifth (25), in mathematics.

The HBCU debate masks the centuries’ long education policies against educating large groups of Americans by being couched in a shroud of attaining a color blind society. The real issue seems apparent. It is not whether American colleges and universities should exist, but how many more institutions are needed to adequately respond to America’s declining academic performance and global competitiveness.

This paper suggests that we must reframe the debate to focus on increasing the number and improving the quality of all our academic institutions. This paper will also focus on continuing to educate and graduate more people in order to promote stronger academic and economic stability for society as a whole. The question is not whether the HBCU should continue to exist, but how America can expand and improve its higher educational system for its citizens and continue viability as a world leader. Part One of this paper reviews the history of higher education in America with a significant focus on disparity based on race. Part Two explores the case against HBCUs. Part Three considers the need for more institutions of higher education in America. Finally, Part Four concludes by reframing the debate and proposing a singular agenda – Educating America.
I. HISTORY OF HIGHER EDUCATION IN AMERICA

“The masses are wrong to say that only freeborn men are entitled to an education; believe the philosophers instead, who say that only educated people are entitled to be called free. ... What confidence, then, can we have in our own dear legislators when they say that only freeborn people are entitled to an education, when the philosophers contend that only people already educated can be considered free?”

Throughout various eras, higher education in America has evolved over time to reflect the current national views of society. Beginning in the colonial era of the 1600s, when the first settlers arrived in America, education was believed to be essential to promote religious based civil leadership. Education was emphasized to expand the exportation and cultivation of crops such as tobacco and rice that flourished in America and were believed to be essential to agricultural development. The idea that agriculture was a commodity that impacted the national affairs taking shape in America led to the establishment of the first institute of higher education in America. In 1636, Harvard College was founded to educate the elite wealthy class who were most influential in the political and economic growth in America. This opportunity to matriculate and contribute to a legacy of future generational leaders was limited to only white Christian males.

In sharp contrast, Africans who had arrived in Jamestown in 1619 were treated as servants who traded several years of labor in exchange for passage to America. This indentured status

19. Id.
20. Id.
21. Id.
22. Id.
evolved into the institution of slavery which prohibited access to almost all opportunity, including education, under laws called slave codes. Although a few free blacks attended school in the north, access to education was rare to nonexistent for slaves in the south.\textsuperscript{24} With education being vital to the advancement potential of individuals, a dramatic system of inequality began to take shape, creating a large and lasting gap in the American class system between whites and blacks.\textsuperscript{25}

Launched from the backs of this enduring legacy of slavery, inequality, and the denial of education opportunity to blacks, the Reconstruction Era was expected to redress these past discriminatory policies.\textsuperscript{26} The 1863 signing of the Emancipation Proclamation was to ensure slaves in areas of the confederacy acquired their freedom, and marked a shift in the federal government's efforts to create equality under the law.\textsuperscript{27} Cheyney University, founded in 1837, and Wilberforce University, founded in 1856, were the first two black colleges established, but it was by government fiat that the opportunity for blacks to go to college was expanded to a broader population.\textsuperscript{28}

The Morrill Act of 1862 allocated land grants to states that established programs for agriculture and engineering programs at academic institutions. However, financial support for black colleges came primarily from the American Missionary Association, the Freedman Bureau, and black church groups.\textsuperscript{29} The black colleges had to rely on sources of funding, other than the funds

\begin{flushright}

\textsuperscript{25} Id.


\textsuperscript{28} Id.

\textsuperscript{29} JULIAN B. ROEBUCK & KOMANDURI S. MURTY, \textit{HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION} 26 (1993).
\end{flushright}
under the Morrill Act, because southern white elite ensured that the millions of dollars received by southern states through the Morrill Act were used to support white land-grant colleges only.\textsuperscript{30} Since blacks were legally excluded from attending white institutions, the education of blacks was limited to mainly vocational training.\textsuperscript{31}

To remedy the misdirection of the Morrill Act funds, Congress adopted the Morrill Act of 1890.\textsuperscript{32} The 1890 revision expanded the federal government's involvement with education.\textsuperscript{33} It required that states either admit blacks to existing institutions of higher education or create separate institutions for blacks. It also provided for the division of land-grant subsidies between institutions for white students and institutions for black students in those states where segregation was enforced.\textsuperscript{34} All of the southern states opted to create separate educational facilities for blacks in order to continue to receive federal funds to support white land-grant colleges. Funding pursuant to the Morrill Act allowed for the establishment of seventeen colleges that were created to educate blacks primarily in the south.\textsuperscript{35}

Even though the Morrill Act mandated equitable division of funds between black and white land-grant schools, states routinely denied funding to black land-grant colleges. When black colleges did receive funds, it was typically only a fraction of what they were legally entitled to.\textsuperscript{36} Black colleges continued to receive unequal funding from state treasuries and other sources of federal funds well into the twentieth century.\textsuperscript{37} The Smith Lever Act of 1914, which gave the states discretion to decide which schools would receive federal aid for agricultural extension programs,

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. at 27.
\item \textsuperscript{32} See 7 U.S.C. 322 et. seq. (1890) (That specified that states that maintained separate colleges for different races had to propose a just and equitable division of the funds to be received under the act. Any states that had used their 1862 funds entirely for the education of white students was forced to either open their facilities to black students or to provide separate facilities for them).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Roebuck, \textit{supra} note 29, at 6.
\item \textsuperscript{35} Id. at 27.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 29.
\end{itemize}
resulted in black schools receiving little funding, if any at all.\textsuperscript{38} To illustrate this, statistics show that in 1933, black schools were legally entitled to federal-state funds in the amount of $2,293,573; however, they received a mere $77,995.\textsuperscript{39}

The primary purpose of the black college was to help educate newly freed slaves by teaching basic literacy skills.\textsuperscript{40} Even after the failure of the Emancipation Proclamation and Reconstruction to afford equal opportunity to blacks overall, segregation policies ensured that education institutions would be separate for blacks and whites.\textsuperscript{41} Jim Crow laws reinforced segregation policies, and the judicial system legitimized segregation by finding that separate but equal access to public facilities was constitutionally permissible.\textsuperscript{42} Change became evident in 1948, when the United States Supreme Court ruled that a state was required to offer schooling for blacks as soon as it provided it for whites.\textsuperscript{43} The \textit{Plessy} doctrine of separate but equal was clarified in \textit{McLaurin v. Oklahoma State Regents}, when the court ruled that black students must receive the same treatment as white students.\textsuperscript{44}

More than sixty years after the United States Supreme Court endorsed segregation; the constitutionality of separate but equal education facilities was challenged in \textit{Sweatt v. Painter}, when a prospective student was denied admission into The University of Texas Law School because he was black.\textsuperscript{45} A unanimous Supreme Court decision overturned \textit{Plessy} and yielded a lethal blow to segregation in institutions of higher education.\textsuperscript{46} In 1954, the United States Supreme Court expanded the \textit{Sweatt} ruling to include primary and secondary schools.\textsuperscript{47}

\begin{footnotes}
\footnote{38. ALBERT L. SAMUELS, \textsc{Is Separate Unequal? Black Colleges and the Challenge to Desegregation}}\textsc{37} (2004).
\footnote{39. Id.}
\footnote{40. Id}
\footnote{41. Smith, \textit{supra} note 27, at 179-181.}
\footnote{42. Karla Mari McKanders, \textit{Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws}, 26 \textsc{Harv. J. Racial & Ethnic Just.} 163 (2010).}
\footnote{43. Sipuel v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948).}
\footnote{44. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950).}
\footnote{45. Sweatt v. Painter, 339 U.S. 629 (1950).}
\footnote{46. \textit{Id. See also}, \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).}
\end{footnotes}
The Sweatt decision tolled the death bell for segregated colleges and universities so that essentially what were once black colleges and universities became historically black rather than presently black. Similarly, what were once white only institutions became historically white. Notwithstanding the newly opened doors for blacks to attend historically white schools, HBCUs continued to enroll a large number of black students, and governmental funding for the HBCU increased after the United States Congress passed the Civil Rights Act of 1964 (CRA)\(^{48}\) through the Higher Education Act of 1965.\(^{49}\) The CRA, under Title VI, was enacted to ensure equal opportunity in federally assisted programs, including educational institutions. States were slow to desegregate educational institutions, prompting the establishment of the Office for Civil Rights (OCR) in order to protect persons from discrimination in programs receiving federal funds. The OCR is a part of the Department of Education which was established in October 1979.\(^{50}\)

By 1969, OCR had completed an intensive investigation of states' higher education systems and found many states in violation of Title VI for failure to dismantle their racially segregated systems of higher education. In 1970, the Department of Housing, Education and Welfare was sued for permitting the separate but equal regime to continue, particularly with the resulting funding disparity that burdened the HBCU.\(^{51}\)

In 1978, the federal government established new, uniform criteria for statewide desegregation.\(^{52}\) In response, the OCR published specific criteria for the states to follow in developing desegregation plans.\(^{53}\) Among other things, the criteria called for the improvement of HBCUs through facilities, plant, and funding

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enhancements in recognition of the unique role HBCUs played in meeting the educational needs of black students. Looking forward, the OCR criteria also called for expanding enrollment of white students at HBCUs, thus enforcing the goal of desegregation at all colleges and universities receiving federal support.

In 1980, President Jimmy Carter established a federal program "... to overcome the effects of discriminatory treatment and to strengthen and expand the capacity of historically black colleges and universities to provide quality education." The following year, President Ronald Reagan established the White House Initiative on Historically Black Colleges and Universities, which expanded President Carter's program and set into motion a government-wide effort to strengthen America's HBCUs. In 1989, President George H. W. Bush established a Presidential Advisory Board on Historically Black Colleges and Universities to advise the President and the Secretary of Education on methods, programs, and strategies to strengthen the institutions. In 1993, President William Jefferson Clinton required a senior level executive in each agency to have oversight in implementing the order, and that the Office of Management and Budget be involved in monitoring the implementation of the order. Almost ten years later, President George W. Bush signed Executive Order 13256. This executive order transferred the White House Initiative on Historically Black Colleges and Universities to the Office of the Secretary within the U.S. Department of Education. Previously, the White House Initiative was housed in the Department's Office of Post-secondary Education.

54. Id.
55. Id.
61. Id.
President Barack Obama’s administration has continued the federal government’s support of HBCUs by signing an executive order, the White House Initiative on Historically Black Colleges and Universities, which allocated $20.5 million for repair, renovation, construction, and acquisition of HBCU educational facilities; and in 2011, the order allocated $279 million in new loans to HBCUs.63

While historically the HBCU may have only served black student populations, it was never their mission to exclude students of other races.64 On the other hand, a fundamental element of the Historically White Colleges and Universities (HWCU) was racial exclusion, which they fought for almost fifty years to retain. Today, student diversity at HBCUs is greater overall than diversity at HWCU65. Moreover, the faculty at HBCUs, both public and private institutions, has always been diverse.66 HBCUs have opened their doors to the best faculty, regardless of racial or ethnic background, and continue to do so. Among HBCUs, blacks (including Africans, Caribbean, and African Americans) make up roughly sixty percent of the faculty, with


64. Historically Black Colleges and Universities: Recent Trends AM, ASS'N OF UNIV. PROFESSORS (2007); http://www.aaup.org/AAUP/comm/rep/HBCUTrends.htm. (Stating “although black colleges have always accepted students of different racial and ethnic backgrounds, their institutional missions have focused mainly on the education and uplift of African Americans”).

65. See Frequently Asked Questions, HOWARD UNIVERSITY, http://www.dll.org/HBCUs/gateway_files/FAQs.aspx#HowBlack. (Of the 300,000 undergraduates enrolled in HBCUs, 20 percent are non-black and of the 11,330,585 undergraduates enrolled in HWCU, less than 2 percent, about 210,433, are black). See also Enrollment in Postsecondary Institutions, Fall 2007; Graduation Rates, 2001& 2004 Cohorts; and Financial Statistics, Fiscal Year 2007, NATIONAL CENTER FOR EDUCATION STATISTICS, INSTITUTE FOR EDUCATION SCIENCES 1, 5, Table 1 (2009), http://nces.ed.gov/pubs2009/2009155.pdf.

whites accounting for thirty percent, and Latinos and Asians the remaining ten percent. It would be very hard to find this kind of diversity at most HWCUs. Moreover, since the 1970s and 1980s, HBCUs have acted affirmatively to increase the admission of non-black students in compliance with the criteria promulgated by the OCR and reinforced with each Presidential Executive Order.

II. EXAMINING THE CASE AGAINST HBCUs

Much of the case against HBCUs is rooted in claims that these institutions perform poorly on various levels and are not being held accountable. Detractors argue that (A) the failure of the HBCU to graduate students in acceptable numbers, (B) declining enrollment at HBCUs generally, and (C) shifts in social policy favoring integration, have resulted in an Obama era of race neutrality eliminating the need for the HBCU. Based in large part on these positions, the current debate centers on the question of whether HBCUs, as a remnant of a failed policy of racial segregation, should be eliminated. While HBCUs, like all other institutions, should be held accountable for their performance, the need to improve the quality of our nation's institutions as a whole is crucial to social and economic mobility.

67. Id.
68. Id.
69. Riley, supra note 1; see also Richard Vedder, Why Do We Have HBCU's?, THE CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY (Oct. 19, 2010), http://collegeaffordability.blogspot.com/2010/10/why-do-we-have-hbcus.html.
70. Id.
71. See generally, TIM WISE, COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY (2010). Discussing race-neutrality in the context of post-racial liberalism which identifies less a transcendence or eradication of racism than an adaptation to a more advanced racism.
society. Therefore, any decision to close academic institutions should be well grounded in fact and law.

A. Failure to Graduate in Acceptable Numbers

The scrutiny that many HBCUs have been subjected to is often attributed to poor graduation rates. The federal standard for measuring graduation rates is determined by considering the number of students who enroll and graduate over a six year period, and comparing these numbers among different universities.\(^73\) The national graduation rate for all students who attend four year universities and graduate in six years is fifty-seven percent.\(^74\) Across all schools, an average of forty percent of students graduated in four years.\(^5\) While some universities report rates above ninety percent; no HBCU reports a graduation rate of ninety percent or above.\(^76\) In fact, the highest six-year graduation rate at a HBCU is reported at Spelman College with a seventy-eight percent graduation rate.\(^7\) Of the one hundred American colleges and universities with the highest overall graduation rates, none are HBCUs.\(^77\) However, of the fifty American colleges and universities with the lowest graduation rates, twenty-eight percent are

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\(^75\) Katy Hopkins, *10 Colleges with Highest 4-Year Graduation Rates*, U.S. NEWS & WORLD REPORT (May 2011) available at http://www.usnews.com/education/best-colleges/articles/2011/05/03/10-colleges-with-highest-4-year-graduation-rates. (The universities, Williams College (private), Yale University (private), University of Notre Dame (private), Princeton University (private), Carleton College (private), Davidson College (private), Pomona College (private), Bowdoin College (private), United States Naval Academy (public) and Duke University (private)).

\(^76\) Id.


\(^78\) However, Spelman reports a 77 percent graduation rate and could have been included in the calculation. Had they been less than 1 percent of the schools boasting the highest graduation rates is a HBCU.
HBCUs. Of the fourteen schools with the lowest graduation rates, five (ten percent) are publicly funded. The average graduation rate for blacks from all colleges and universities in America is about forty-one percent.

B. Analyzing the Data

Various reasons are offered to explain the graduation disparity. For example, as a percentage of their student bodies, the schools with the lowest graduation rates enroll twice as many part-time students, nearly twice as many students from low-income families, and around fifty percent more blacks and Hispanics than the average American college or university. These institutions are more likely to admit most of their applicants who are mainly from the local communities. These institutions have far less money than the more prestigious colleges.

Of the ten colleges and universities with the highest four-year graduation rates, only five have graduation rates at ninety percent or above, with the highest being ninety-three percent. They are Williams College (ninety-three percent), Franklin W. Olin College of Engineering (ninety-one percent), and Yale University, University of Notre Dame and Princeton University, each at ninety percent. Of the five, all are rated most competitive, with the exception of Olin College of Engineering, which was not rated. Schools are ranked most competitive when they accept only those students whose high school rank is in the top ten to

80. Id' (Those schools are Southern Univ. (La), Univ. DC, Texas Southern University, Coppin State Univ (MD), Harris-Stowe State Univ (MO)).
81. NCES, supra note 65, at 11, Table 65.
84. Id.
twenty percent with high school grade averages of B+ to A. The average freshman test scores ranged between 655 and 800 on the SAT; the average ACT score was a 29.\textsuperscript{86} The average four year-graduation rate for the most competitive colleges and universities is eighty-seven percent.\textsuperscript{87}

Noncompetitive schools, commonly referred to as open-admissions schools, generally require only evidence of graduation from an accredited high school to be admitted.\textsuperscript{88} The least competitive schools admit students who generally fall below the national average on the SAT and ACT, have an average high school grade below C, and who rank in the top sixty-five percent of their graduating class.\textsuperscript{89}

C. \textit{Six year graduation rates}\textsuperscript{90}

A report of six-year graduation rates shows sixteen schools that had rates of ninety percent or better. Of the sixteen, twelve were ranked as most competitive. Those schools were Harvard (97\%), Amherst (96\%), Yale (96\%), Brown (95\%), Princeton (95\%), Stanford (95\%), University of Notre Dame (95\%), University of Pennsylvania (95\%), Williams College (95\%), Duke (94\%), Pomona (94\%) and Swarthmore (94\%). Two of the schools, Atlantic Union (98\%) and Paul Quinn College (93\%--HBCU) were ranked less competitive and two schools, Arkansas Baptist (100\%) and Concordia College-Alabama (97\%) were ranked non-competitive. All of the schools were described as private institutions.

The overall average six-year rate for most competitive schools is about ninety-five percent, highly competitive is about eighty-seven percent, very competitive is about eighty-one percent, competitive about seventy-seven percent, less competitive seventy-four percent and non-competitive seventy-four percent. For the same categories, the lowest performing schools averaged about seventy-two percent, fifty-five percent, twenty-nine per-

\textsuperscript{86} Id., at 6. (The essay exam consists of three parts: Critical Reading, Mathematics and Writing. The scores from each section range from 200 to 800. The average score for each section is about 500).

\textsuperscript{87} Id. at 9.

\textsuperscript{88} Id.

\textsuperscript{89} Hess, supra note 85, at 26.

\textsuperscript{90} Id.
cent, fifteen percent, fourteen percent and thirteen percent over the same period.

It is logical that schools that require more rigorous admission standards admit the highest performing students. Accordingly, those students will be more likely to graduate. Since the typical HBCU has less to non-competitive admission standards, it should not be surprising that their graduation rates are lower. The numbers show that the HBCU is far from alone in its limited success at achieving high graduation rates. While about ninety percent of HBCUs had six-year graduation rates lower than fifty percent in 2008, at least forty-seven percent of the almost 1500 colleges and universities reporting had graduation rates of fifty percent or below. Despite this statistic, the current debate suggests that only those low performing schools that are historically black should be closed. This position is at least counterintuitive. If the debate was re-centered on ensuring that quality educational opportunities are available to all, then the question would be what should become of all American academic institutions that fail to meet minimally acceptable graduation standards, whether historically black, historically white, historically Hispanic, historically tribal or otherwise.

This “new” debate should take into account various factors that address graduation rates, including the competitiveness of the institution and the academic prowess of its matriculates. Not all colleges and universities should seek to enroll exclusively the top academic achievers. Indeed, most students rank at an average performance level with others in lower performance categories. If America is to reclaim its position in world academic excellence, it needs to educate all of its people and it will need to provide institutional diversity. Courts have recognized that not all institutions of higher learning will be flagship schools. Other

91. Id. (Showing that Hispanic serving institutions fared slightly better with 17 percent of its institutions graduating students at the rate of 50 percent and above).


93. Data that follows a normal distribution pattern will show the greatest amount to constitute an average or mean
institutions have missions and purposes that are not designed for “keeping-up” with or “competing” with the highly competitive universities. What we should do is require these institutions to meet minimum performance measures based in part on their unique characteristics.

Institutions that have a mission of providing opportunity for disadvantaged students who might not otherwise go to college might have performance measures different from those institutions with other missions. However, unless we believe that the disadvantaged student cannot learn, then there is no reason they cannot graduate. Indeed, there is ample evidence that while these students might need more remediation than high performing students, they can graduate, and at better than average rates.

D. Race as a Factor

On average, fifty-one percent of Hispanic students and around forty-two percent of black students graduated from college compared to about sixty percent of white students. Demographics have a strong influence on graduation patterns, and the fact that blacks and Hispanics lag behind their white counterparts, regardless of the competitiveness of the institution, calls into question the issue of race as an influence on graduation rates.

Overall the percentage of black students in America’s twenty-four leading universities with the most diverse populations ranges from less than one percent (California Institute of Technology) to a little over ten percent (Emory University at 10.4 %). At all of these institutions, except one (Rice University), black

students lag behind white students in graduation rates. Based on an average six-year graduation rate for black students at the twenty-four most prestigious schools, about 86.39% or 11,718 black students graduate. On the other hand, at the twenty-five most populous HBCUs, the average six-year graduation rate is only 37.8%, but 44,707 black students graduate, about four times the number from the most prestigious schools.

The new discussion should consider why the overall graduation rate for students at the most competitive schools fails to reach ninety-five percent or above after six years. Additionally, we should consider the reasons students at any four-year school graduate at rates less than seventy percent after six years. The gaps in graduation rates between races, ethnicities and genders at all schools should also be addressed. The one thing that is clear is that graduation rates are an insufficient reason to target HBCUs for closure.

98. Id. See also, The Education Trust, Graduation Rates by Race, 2008 6-year graduation rates, COLLEGE RESULTS ONLINE, http://www.collegeresults.org/search2d.aspx?signup=1&sec=1%2c2&is1=0&is2=300000&gcar=BL%2cML%2cRI&y=2008&key=17434824.

99. Id. (With calculations by author).

100. Id.

101. 70 percent is an arbitrary number selected because it generally commutes to a score of “average” or grade of “C”.
102. **Barron’s Profiles of American Colleges (29th Ed., Barron’s Educational Series, Inc., 2011)**. (Schools ranked highly competitive generally admit students with a B+ or higher GPA who rank in the top 20-35 percent of their class, who scored 620-654 SAT, 27-28 ACT. These schools accept one-third to one-half of all applicants. Schools that are rated Most Competitive accept less than one-third of all applicants. Their students ranked in the top 10-20 percent of their high school class with B+ and up GPAs, scoring 655-800 SAT and 29+ ACT).
Chart showing the 24 most diverse prestigious American schools

<table>
<thead>
<tr>
<th>SCHOOL</th>
<th>TOTAL BLACKS</th>
<th>GRADUATION RATE</th>
<th>RANKING*</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA A &amp; M UNIV</td>
<td>4,325</td>
<td>32.5%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>ALABAMA STATE UNIV</td>
<td>4,253</td>
<td>21.2%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>ALBANY STATE UNIV</td>
<td>3,105</td>
<td>50.2%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>BETHUNE-COOKMAN</td>
<td>3,083</td>
<td>40.7%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>BOWIE STATE</td>
<td>3,508</td>
<td>41.3%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>CLARK ATLANTA</td>
<td>3,006</td>
<td>44.5%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>DELAWARE STATE</td>
<td>2,498</td>
<td>35.9%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>FAYETTEVILLE STATE</td>
<td>4,037</td>
<td>37.9%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>FLA A &amp; M</td>
<td>8,334</td>
<td>40.8%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>GRAMBLING STATE</td>
<td>4,002</td>
<td>35.1%</td>
<td>NON COMPETITIVE</td>
</tr>
<tr>
<td>HAMPTON UNIV</td>
<td>4,551</td>
<td>51%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>HOWARD UNIV</td>
<td>4,489</td>
<td>65.2%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>JACKSON STATE UNIV</td>
<td>6,068</td>
<td>42.5%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>MORGAN STATE UNIV</td>
<td>5,465</td>
<td>32.5%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>NORFOLK STATE</td>
<td>4,235</td>
<td>32.4%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>NORTH CAROLINA A &amp; T</td>
<td>7,903</td>
<td>47.9%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>NO CAROLINA CENTRAL</td>
<td>4,917</td>
<td>47.9%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>PRAIRIE VIEW A &amp; M</td>
<td>5,399</td>
<td>36.8%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>SO CAROLINA STATE</td>
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</tr>
<tr>
<td>SOUTHERN UNIVERSITY</td>
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<td>29.2%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>TENNESSEE STATE</td>
<td>5,455</td>
<td>35.7%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>TEXAS SOU UNIVERSITY</td>
<td>6,164</td>
<td>12.5%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>UNIV OF MD-E SHORE</td>
<td>2,874</td>
<td>38.2%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>UNIV OF DC</td>
<td>2,282</td>
<td>7.9%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td>VIRGINIA STATE</td>
<td>3,855</td>
<td>39.3%</td>
<td>COMPETITIVE</td>
</tr>
<tr>
<td>WINSTON-SALEM STATE</td>
<td>4,275</td>
<td>39.3%</td>
<td>LESS COMPETITIVE</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>118,272</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

E. Declining Enrollment

1. Enrollment up at HBCUs

As recently as September 2010, those arguing for the elimination of HBCUs assert that declining enrollment rates are a key indicator of the waning necessity of these institutions.104 They

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103. \textit{Id.} (Non competitive schools require evidence of gradation from accredited high schools; these colleges accept 98% of their applicants. \textit{Less competitive} schools accept 85%-+ of their applicants and students score below 500 on SAT, below 21 on ACT with GPAs below "C" who rank in the top 65percent of their high school class. \textit{Competitive} schools accept between 75-85percent of their applicants who score between 500-572 on SAT, 21-23 ACT, who graduated in the top 50-65percent of their class with a minimum "C" GPA).

104. Riley, \textit{supra} note 1, at A21.
point specifically to the decrease in African American students who choose to matriculate at these HBCUs. This position seems to suggest that a mere decline in interest by the population that these special purpose institutions were created to serve is yet another nail in the proverbial coffin of HBCUs. To support this position, opponents state that "nearly 90 percent of black students spurn such schools." However, a careful review of HBCU enrollment data reveals that HBCUs are not experiencing this alleged wave of declining enrollment, rather the opposite is true.

A Thurgood Marshall College Fund study, relying on data generated by the National Center for Educational Statistics (NCES), reveals that HBCUs are experiencing increasing enrollment. The annual "Thurgood Marshall College Fund Demographic Report," is based on the 2005-06 academic year and reveals an enrollment growth trend at public HBCUs. In 2002, public HBCUs enrolled 206,000 students; that number increased significantly by 2006, totaling 235,000. In 2009 that number continued to increase, totaling approximately 300,000, representing a sixty percent increase in enrollment at these historical institutions in the last seven years.

2. Enrollment trends at all institutions

The enrollment at degree granting institutions has steadily inclined since the late 1980s. During the ten-year period from

105. Id. See also, Enrollment, supra note 63, at 5. (Reporting that about 28 percent of the 1,052,166 black students in American colleges attend HBCUs; about 72 percent attend HWCUs an increase from the 13 percent HBCU reported in 2004 by the Department of Education).

106. THURGOOD MARSHALL COLLEGE FUND, THURGOOD MARSHALL COLLEGE FUND DEMOGRAPHIC REPORT (2006-2007), available at http://www.thurgoodmarshallfund.net/images/pdf/demographic-report-2006-2007.pdf. (Reporting that while HBCUs represented 3 percent of all American colleges, nearly 1 in 7 bachelor's degrees, 9.1 percent of all master's, 11.7 percent of all first professional degrees and 10 percent of all doctorate earned by African Americans in 2006-2007 were earned at HBCUs.)

107. See Enrollment data obtained from the U.S. Department of Education's College Navigator's IPEDS database, enrollment data for the Fall 2009 semester, http://nces.ed.gov/ipeds/datacenter/ (last visited May 13, 2011). (The grand total is less than 105 because Navigator did not display enrollments for six small HBCUs because of lack of accreditation or other issues when this table was updated on 10/2/10. Enrollments for the other 99 HBCUs can be found on the Gateway's Profiles page, http://nces.ed.gov/collegenavigator/).
1989-1999, college enrollment increased by nine percent. The next ten year period from 1999-2009 showed that enrollment increased at an even faster rate of thirty-eight percent. In whole numbers, the increase is from 14.8 million students to 20.4 million students. Forty-five percent of the students who enrolled during 1999-2009 were full-time students, and the number of female students rose by forty percent to thirty-five percent for males. The number of students between 18 to 24 has increased less rapidly than students over age 25. Between 2008-2009, students under the age twenty-five increased by twenty-seven percent, while those over twenty-five rose by forty-three percent.

Enrollment trends differed among undergraduate, graduate, and professional students. During the 1970s, undergraduate enrollment generally increased, but slowly dropped from 10.8 million to 10.6 million between 1983-1985. Undergraduate enrollment increased yearly between 1985-1992, rising eighteen percent before dropping two percent, and remaining stable thereafter. Enrollment increased 39 percent from 1999-2009.

At the graduate level, the steady increase during the 1970s and 1980s rose significantly to about a seventy-three percent increase between 1985-2009. The rate of students seeking professional degrees rose sixty percent in the 1970s before stabilizing in

110. Id.
111. Id.
112. Id.
113. Id.
115. Id.
116. Id.
117. Id.
the 1980s. The increase in the 1990s marked an eighteen percent increase between 1997-2007.

The thirty-seven percent average increase in college enrollment patterns for all levels provides convincing evidence that college level degree attainment is in high demand.

3. Enrollment trends of blacks in higher education

According to the U.S. Department of Education, there were 2.2 million black students enrolled in higher education during the 2007 academic year. This number represents the highest number of blacks enrolled in higher education in history. Overall, blacks make up 13.1 percent of all students enrolled in higher education. Research shows that more blacks are attending college today than the previous generation. Almost one-third of all blacks aged eighteen to twenty four are enrolled in higher education. In 1981, less than twenty percent of blacks in that same age group were enrolled in higher education.

The number of blacks who hold a four-year college degree has significantly increased. In 1920, one in 1,000 blacks, or approximately 10,000, were college educated. Today, one in every 8.5 blacks, or approximately 4.5 million, holds a four-year de-

118. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
This increase in college-educated blacks has shown continuous growth increase every since the nineties. In 1990, 11.3 percent of blacks completed a four-year degree program, and 13.8 percent of blacks held a four-year degree in 1996. The solid progress continued and in 2008, 19.6 percent of blacks over age 25 held a four-year degree. Blacks earned 146,653 four-year degrees in 2007, which was 2.5 times the number of bachelor's degrees awarded to blacks in 1990.

The number of blacks earning graduate level degrees has also shown positive growth as 65,062 master's degrees were awarded to blacks during the 2007-2008 academic year. This number represents an increase from the previous academic years 2005-2006 and 2006-2007 with 58,976 and 62,574 graduate degrees awarded in the 2005-2006 and 2006-2007 academic years, respectively. Throughout the past few decades, there has been a significant increase in black student enrollment and degree attainment. This increase supports the continued need to provide greater opportunity to respond to the demand of students seeking higher education.

4. Enrollment of whites at HBCU schools

For a number of years, HBCUs existed for the sole purpose of educating blacks who were denied enrollment into other institutions. While race was never a determining factor in the acceptance of students, HBCUs attracted a relatively small number of white students. However, recent trends suggest that more white students have begun to enroll in historically black colleges. Between 1980 and 1990, the total number of whites enrolled in

128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
HBCUs increased to more than 10,000 students. In 1995, white enrollment at HBCUs peaked at 35,963. According to 2001 data gathered from the National Center for Educational Statistics, white student enrollment at HBCUs consistently remained around 35,000 students. Many attribute the increased white enrollment to the Fordice decision, which mandated increased diversity at black colleges. However, sound education combined with relatively lower tuition may have contributed as well. Some have argued that increased enrollment of white students at HBCUs threatens the core mission of these colleges to educate blacks. However this argument is baseless. HBCUs' mission of providing educational opportunity to any student, regardless of race, color, sex or origin, suggest that these institutions have transcended racial barriers and are viewed as suitable educational institutions for all students.

III. THE OBAMA “COLOR BLIND SOCIETY” MISCONCEPTION

A. Does Policy Favoring Integration eliminate the need for HBCUs?

Those who oppose HBCUs argue that the Civil Rights Movement has resulted in a color blind society that has no room for HBCUs. There are several reasons why this argument is at best, naïve, and at worst, racist. First, upon looking at all the U.S. colleges and universities that rank below average, most are not HBCUs. Thus, to suggest that we reach within this pool to eliminate only historically black colleges and universities ironically argues against the position that we live in a color blind society. Second, the fact that a college or university is historically black, historically white, historically one gender or historically otherwise is simply a recognition of its history. It does not mean that the school is segregated based on race or gender today.

134. MaryBeth Gasman, et. al., Historically Black Colleges and Universities Recent Trends (2007), 93 ACADEME 1, 69-78, 1, 9 available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1045&context=gse_pubs.
135. Id.
136. Id.
139. Id.
Third, while the election of President Barack Obama is surely evidence that America is moving forward toward realizing equality, statistics show that we are not there yet.

1. Should African Americans be Educated?

The absurdity of such a question lingers as part of the American landscape. Historically, laws prohibited education of African Americans in many states until after the Civil War. Following the Civil War, it took various acts of Congress to secure the creation and funding for institutions of higher education for African Americans. It has taken even longer to secure HBCU funding equitable to other institutions. The clear implication is that there is little to no national interest in educating African Americans.

2. Urban Myth

The idea that historically black schools offer an inferior education when compared to historically white schools emerged from traditional theories of white supremacy. When universities were segregated and black students were not admitted into traditionally white colleges, HBCUs provided a culturally supportive, intellectually vigorous learning environment. In light of relaxed laws and anti-segregationist policy, an urban myth developed that students are attracted to HBCUs solely for social and cultural reasons rather than educational programs. It is a myth rooted in white supremacy. It suggests that in this purportedly post-segregation era, students would only seek intellectual fulfillment in an all or predominately white environment because black environments cannot be intellectual. Indeed, one of the more recent arguments made for the annihilation of HBCUs is rooted in this myth, as it specifically states that the HBCU offers its students an inferior education.

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141. Id.
142. Riley, supra note 1, at A21 (quoting economists Roland Fryer of Harvard and Michael Greenstone of MIT who “have found that black colleges are inferior to traditional schools in preparing students for post-college life”).
Like many such myths, there may be elements of truth in its foundation. However, contrary to naysayers' arguments, the social and cultural ties that attract students to HBCUs only serve to enhance the educational experience. Quoting Tonya Pendleton,

[I]t is inescapable that many African-Americans interested in preserving their cultural identity feel alienated and isolated at predominately white schools . . . . While there are many African-American graduates of Ivy League schools who had great experiences, most HBCU [alumni] speak of their college years as the highlight of their lives. They cite the rich social life and the bonding of individuals with a shared identity.143

In addition, many HBCU alumni found that the faculty at HBCUs was supportive of the challenges that students faced and had a greater desire to educate and empower its students.144

There is no evidence that HBCUs have either abandoned or subjugated their role as educators of higher learning in favor of becoming social and cultural gathering places. HBCUs have maintained their goals as related to the education and advancement of their students. In fact, while HBCUs make up only three percent of all institutes of higher education, they enroll fourteen percent of all African American undergraduate students.145 Twenty-eight percent of all African Americans who earn undergraduate degrees attend HBCUs.146 Furthermore, HBCUs play a vital role in placing African Americans in graduate and professional schools.147 Among the top ten colleges that graduate African Americans that go on to receive a MD/PhD, nine are HBCUs.148 Of those ten, eight are responsible for graduating the most African Americans in the math and science fields.149 Of the twelve top producers of African American graduates in the physi-

143. Id.
144. Id.
145. JBHE, supra note 129.
146. Id.
147. Id.
148. Id.
149. Id.
The role that HBCUs continue to play in education, particularly for its minority students, makes it a vital instrument of higher education in America. The government’s efforts to rectify past injustices, in favor of a race blind society are meritorious and should remain part of the new debate. However, this debate must also be contextualized by racial and economic realities.

3. Employment Salary Gap between Graduates of HBCUs and HWCUs

Another attempt to measure the relative values of an education at HBCUs and HWCUs is an analysis of the salaries that students from each institution can expect after graduation. A 2007 study by two economists challenge the continuing relevancy of HBCUs based on post-graduation salaries. The study found that the financial gains of blacks who attended black colleges, as opposed to those who attended traditionally white colleges, declined significantly from the 1970s to 1990s. The study reported that in the 1970s, students who attended historically black colleges had an eleven percent advantage over their peers at traditional white colleges in terms of financial gain. By the 1990s, blacks who attended HBCUs salaries lagged by fourteen percent. Critics of these findings argue that the results may have been skewed in favor of traditionally white institutions and that the researchers failed to make clear that the comparisons may not have been legitimate. These arguments are apparently based on the fact that HBCUs educate a significant portion of low income, Pell Grant eligible students, which would have suggested

150. Id.
153. Id.
154. Id.
155. Id.
a disparity among control factors and would have made a difference in the outcome.\footnote{156}

For example, some argue that statistics show that HBCUs, with even fewer resources, are at least as effective in graduating African Americans as HWCUs.\footnote{157} In addition, the large number of HBCU graduates entering the non-profit sector combined with prejudices on the part of employers, who prefer hiring graduates from HWCUs as opposed to HBCUs, could account for much of the disparity.\footnote{158} The researcher's attempts to control for a selection of bias, including such factors as family income, educational background of students, standardized test scores, and grade point averages failed to convince critics that biases had been appropriately controlled.\footnote{159} Moreover, a 2007 study reported by two researchers at Virginia Tech University concluded that black men who graduate from HBCUs achieve higher lifetime earnings than black men who go to HWCUs.\footnote{160} Using data from the National Longitudinal Surveys, an analysis of the study found that black males have no initial advantage in attending an HBCU, but their wage increased 1.4 percent to 1.6 percent faster per year after attending HBCUs compared to other black males who attended other colleges or universities.\footnote{161} According to the study, the faster growth generates discounted career earnings for black males that are 9.6 percent higher for HBCU graduates, 8.9 percent higher for all other graduates.\footnote{162}

While the results give rise to possible issues that may impact earning potential, the benefits of providing post-secondary education to historically underrepresented groups and expanding beyond racial barriers, provides greater insight to the advantages that HBCUs offer. Among all else, there is one thing not contro-

\footnotesize
\begin{itemize}
    \item \footnote{156}{\textit{Id.}}
    \item \footnote{157}{\textit{Id.}}
    \item \footnote{158}{Walker, \textit{supra} note 159.}
    \item \footnote{159}{\textit{Id.}}
    \item \footnote{161}{\textit{Id.}}
    \item \footnote{162}{\textit{Id.}}
\end{itemize}
verter and that is obtaining a post grad degree increases salary over not obtaining a degree.\textsuperscript{163}

B. \textit{Constitutional Implications of Closing All HBCUs}

I think perfect objectivity is an unrealistic goal; fairness, however, is not.
- Michael Pollan\textsuperscript{164}

In 2008, America elected its first African American president.\textsuperscript{165} It is reasonable to ask, in light of that fact whether racism is dead and a thing of the past. As a consequence, we might also ponder whether we should strike down all institutions that are vestiges of a shameful, inhumane, and racist past. HBCUs developed under a repugnant system of segregation. A decision to eliminate only those institutions that were designed primarily for blacks, raises a question of constitutional proportion. While HBCUs face intense scrutiny, other educational institutions, must not be overlooked. The question posed is whether it is constitutional to strike down historically black institutions because of their history, but not historically white institutions because of theirs? The Supreme Court has held:

\begin{quote}
["[E]ducation [is] pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society . . . [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as \textit{amicus curiae}, affirms that "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. . . Nowhere is the
\end{quote}


\textsuperscript{164} Barack Obama Elected 44\textsuperscript{th} president, \textit{WHITEHOUSE.GOV}, http://www.whitehouse.gov/administration/president-obama.
importance of such openness more acute than in the context of higher education.\textsuperscript{166}

It is upon this backdrop that we discuss the constitutional implications of adopting legislative policies that would favor closing HBCUs.

1. The Fourteenth Amendment

The major hindrances to a national policy supporting closure of HBCUs include the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964. The Fourteenth Amendment states, in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{167}

The Fourteenth Amendment right to equal protection protects an individual from discriminatory treatment from similarly situated individuals, based on impermissible considerations such as "race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."\textsuperscript{168} The Equal Protection Clause is "essentially a direction that all persons similarly situated be treated alike."\textsuperscript{169} If a state action interferes with a "fundamental right" or discriminates against a suspect class, it must be reviewed under the strict scrutiny analysis.\textsuperscript{170}

Strict scrutiny review is reserved for laws that categorize individuals on the basis of race, racial classifications, or national


\textsuperscript{167} U.S. CONST. amend. XIV, § 1.

\textsuperscript{168} Quinn v. Nassau County Police Dept., 53 F.Supp. 2d 347 (E.D.N.Y. 1999); Lewis v. Thompson, 252 F.3d 567, 590 (2d Cir.2001).


origin, or that infringe on a fundamental right.\textsuperscript{171} Under this standard, "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."\textsuperscript{172} The Supreme Court has explained that strict scrutiny is particularly appropriate to laws involving racial classifications, because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."\textsuperscript{173} Any law or policy that would close only HBCUs because they traditionally enrolled black students is not only pernicious; it is unjustifiable on its face.

To achieve racial equality in law, the Supreme Court employs the highest standard of judicial review—strict scrutiny—when governmental actors subject individuals to unequal treatment based on race.\textsuperscript{174} Governments must justify racial classifications by showing a compelling state interest and demonstrating that the racial classification has been narrowly tailored to meet that compelling interest.\textsuperscript{175} The Court has held only two compelling interests to satisfy this standard: remedying past discrimination and achieving diversity in higher education.\textsuperscript{176} The Supreme Court has recognized a diversity justification for race-based classifications in two distinct contexts.\textsuperscript{177} First, in higher education, the Court has ruled that student body diversity is a compelling governmental interest because it promotes better understanding and helps to break down racial stereotypes.\textsuperscript{178} Second, the Court

\textsuperscript{171} Ozan O. Varol, \textit{Strict in Theory, but Accommodating in Fact?}, 75 Mo. L. Rev. 1243, 1246-1250 (2010) (Positing that recent Supreme Court decisions lean favorably toward the government in determining whether it met its burden when using race as an essential part of its policy so that the strict scrutiny test is intended to "smoke out illegitimate uses of race.").


\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Rosalie Berger Levinson, \textit{Gender-Based Affirmative Action And Reverse Gender Bias: Beyond Gratz, Parents Involved, And Ricci}, 34 Harv. J. L. & Gender 1, 24 (2011).

\textsuperscript{178} Id.
has recognized that awarding preferential treatment to minority-owned businesses in licensing broadcast stations will help ensure that a diversity of viewpoints are heard.\(^{179}\)

2. Fordice Rules

In the 1992 *United States v. Fordice* decision, the Supreme Court created a standard to determine whether the existence of a public HBCU is constitutional.\(^{180}\) The Court specifically addressed the issue of whether a state can satisfy its duty to dismantle its prior “separate but equal” university system merely by adopting and implementing race-neutral policies.\(^{181}\) In *Fordice*, the Court reviewed the Mississippi University system which remained segregated for more than thirty years after the Brown Supreme Court ordered all states to desegregate their schools.\(^{182}\) The Mississippi University system argued that it had fulfilled the obligation to dismantle its segregated school system by imposing race-neutral policies in admissions, hiring and operating so that any remaining segregation in the schools was by choice.\(^{183}\) The Court imposed a new standard to measure whether race-neutral policies were enough to satisfy a state’s duty to dismantle formerly segregated systems.\(^{184}\) The Court stated:

> If the State perpetuates policies and practices traceable to its prior system [(of segregation)] that continue to have segregative effects whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably be eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.\(^{185}\)

The Court found that the Mississippi University system had surviving aspects of a prior discriminatory segregated system

\(^{179}\) *Id.*


\(^{181}\) *Id. See* Jerome Dees, *supra* note 5, at 235.


\(^{183}\) *Id.*, at 719-720.

\(^{184}\) *Id.*

\(^{185}\) *Id.*, at 732-733.
that did not withstand constitutional scrutiny.\textsuperscript{186} Similarly compelling was the Court's dicta that seemed to support closing or merging HBCUs as a vestige of slavery.\textsuperscript{187} The Court implied that maintaining a racially identifiable university bordered on unconstitutionality.\textsuperscript{188} This has suggested to some that all public colleges and universities identifiable by race might be unconstitutional.\textsuperscript{189} However, such a conclusion runs afoul of the Supreme Court's ruling "that an institution is predominantly white or black does not in itself make out a constitutional violation."\textsuperscript{190} This is especially compelling when scrutinizing institutions of higher education, primarily because these are institutions of choice. The Court recognized that students who qualify for admission enjoy a wide range of choices in selecting which institution to attend.\textsuperscript{191} If racially identifiable universities do not violate the Equal Protection Clause, eliminating universities on the basis of their racial identity would.\textsuperscript{192} The closing of only HBCUs without discerning criteria would certainly constitute a discriminatory practice because the only criteria used is a history based on race. While it is true that most HBCUs do not perform at levels described as highly competitive and none are classified as highly selective institutions, there are many more HWCUs performing at and below these same levels that are not even being considered for closure. Targeting HBCUs, rather than similarly situated universities or colleges contravenes the right to equal protection under the Fourteenth Amendment.

3. The Civil Rights Act of 1964

The Civil Rights Act of 1964 was enacted in response to racial discrimination and segregation. Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from

\begin{itemize}
  \item \textsuperscript{186} Id., at 734.
  \item \textsuperscript{187} Id., at 738.
  \item \textsuperscript{188} \textit{U.S. v. Fordice}, 505 U.S. 717 (1992).
  \item \textsuperscript{189} L. Darnell Weeden, \textit{Historically Black Colleges Advance Reverse Academic Diversity}, 13 N.Y. CITY L. REV. 1, 9 (2009).
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} \textit{U.S. v. Fordice}, 505 U.S. 717 (1992).
\end{itemize}
participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Congress passed Title VI of the Act with two objectives in mind. First, Congress wanted to prevent the use of federal funds to support racial discrimination. Second, Congress sought to provide individuals with a private remedy for discrimination.” Entities that receive federal assistance, whether directly or through an intermediary are [statutory recipients].” In determining what types of entities would be subject to the anti-discrimination provisions of Title VI of the Civil Rights Act, courts developed various categories that include direct recipient, indirect recipient and beneficiary. A number of cases have held that the Civil Rights Act expressly covers school desegregation. Quoting President Kennedy:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.

193. Mumid v. Abraham Lincoln High Sch., 618 F.3d 789 (8th Cir. 2010).
195. Id.
196. Id., at 1385.
197. Id.
Consequently, direct discrimination that would eliminate choice by segregating students because of their race is just as invidious as eliminating choice by wrongfully targeting historically black colleges and universities based on historical racial patterns. Accordingly, such state action would be subject to judicial review under Title VI of the Civil Rights Act.

C. Distinguishing Past from Present

We are the prisoners of history. Or are we?

*Robert Penn Warren, Segregation*

In 1956, Autherine Lucy officially enrolled at the historically white University of Alabama. It took a court order to secure the admission, but it did not secure her retention, and just three days after her enrollment she was expelled for her own safety. By 2004, 12.4 percent of the University of Alabama's students were African American. Today, while that number is slightly declined, African Americans make up more than eleven percent of its student body.

More than a decade after the Supreme Court struck down racial segregation in institutions of higher education, the Fifth Circuit Court of Appeals granted James H. Meredith's application for an injunction to secure his admission to the historically white University of Mississippi. When Meredith attempted to enter the university, Mississippi Governor Ross Barnett blocked her access and declared, "No school in our state will be integrated while I am your Governor. . ." Meredith finally gained en-

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201. Id. (Ms. Lucy's expulsion was overturned in 1988).
203. Id. (Ms. Lucy's expulsion was overturned in 1988).
206. James H. Meredith, on behalf of himself and others similarly situated v. Charles Dickson Fair, President of the Board of Trustees of the State Institutions of Higher Learning., 305 F. 2d 343 (5th Cir 1962).
207. Id.
trance to the school under escort of United States Marshals.\textsuperscript{208} Today black students constitute about thirteen percent of the University of Mississippi's undergraduate enrollment.\textsuperscript{209}

When Heman Sweatt applied to attend the University Of Texas School Of Law, rather than integrate its law school, a segregated school for blacks was built in an effort to enforce the state's separate but equal policy.\textsuperscript{210} The Supreme Court struck down Texas' segregation laws and Sweatt was permitted to enroll at the law school.\textsuperscript{211} In 1990, the University of Texas-Austin enrolled African American students at the rate of 3.7 percent, a rate that has increased to 4.5 percent today.\textsuperscript{212}

To argue that a university's segregated history requires its closure is to be enslaved by our history rather than moving forward from it. Furthermore, it is the history of segregation at white colleges and universities that made it necessary to establish historically black colleges and universities. Since the United States Supreme Court's decision in 1968, there has been an affirmative duty on the states to eliminate all of the "vestiges" or effects of de jure segregation "root and branch".\textsuperscript{213} Thus, the modern indignation that "the idea of race-based institutions of higher education [is] very disturbing in this day and age," and simply confuses the present with history.\textsuperscript{214} It would be no less a violation of the Constitution to build a historically black institution just so African American students would have a better school to

\textsuperscript{208} Id. \\
\textsuperscript{209} Id. \\
\textsuperscript{210} Id. \\
\textsuperscript{211} Id. \\
\textsuperscript{212} Id. \\
\textsuperscript{214} Vedder, supra note 69.
attend, as it would be to build up a historically white institution just so that white students would have a better university to attend.\footnote{215}{Ayers v. Fordice, 40 F.Supp.2d 382, 385 (N.D. Miss., 1999).}

To suggest that the nation’s history of segregation is a vestige of slavery that supports eliminating black institutions without similarly impacting historically white institutions is bizarre. One cannot reach the conclusion to eliminate the historically black institution because of its roots in segregation without reaching the conclusion to eliminate the historically white institution with similar roots. Furthermore, as recognized by the court in \textit{Adams v. Richardson}, to suggest that eliminating HBCUs would result in desegregated institutions of equal opportunity and equal rights is merely speculative.\footnote{216}{Id.} Nevertheless, for more than forty years, the overriding goal has been to dismantle the historical segregated university systems.\footnote{217}{U.S. v. Fordice, 505 U.S. 717, 717 (1992).} For some, that dismantling would be attained by closing all HBCUs.

\textbf{D. Racial Neutrality in America}

\textit{We have to acknowledge the progress we made, but understand that we still have a long way to go. That things are better, but still not good enough. Our goal is to have a country that's not divided by race. And my impression, as I travel around the country, is that that’s the kind of country that most people want, as well.}\footnote{218}{BARACK OBAMA, \textit{Larry King Live}, Oct. 19, 2006}

Despite our differences, there is significant evidence that Americans have become more tolerant of each other. In 2009, a Washington Post/ABC News poll reported that a majority of Americans, fifty-three percent, say gay marriages held legally in another state should be recognized as legal in their states.\footnote{219}{Changing Views on Social Issues: Allemande Left. Allemande Right, ABC News/Washington Post Poll: Hot Button Issues (April 2009), http://abcnews.go.com/images/PollingUnit/1089a6HotButtonIssues.pdf. See also, ABC News/Washington Post Poll: Hot Button Issues (2011), at http://abcnews.go.com/images/Politics/1121a6%20Gay%20Marriage.pdf.} That is up from thirty-six percent only five years ago, with the trend expected to accelerate. Two out of three people under thirty sup-
port same-sex unions, which is twice the rate of Americans over sixty-five. The poll also showed that more than half of Americans support giving persons who immigrated to this country illegally the right to live here subject to payments of fines and or other conditions. In 1961, the year in which President Obama’s parents were married, less than 1 in 1,000 new U.S. marriages were between a black person and a white person. By 1980, that share had risen to 1 in 150 new marriages. By 2008, it had risen to 1 in 60.

There are forty-four African American members of the 112th U.S. Congress; all serve in the House of Representatives. Over one million businesses in America are owned by African Americans with sales and receipts, totaling about $90,000,000,000. Six African Americans serve as CEOs of Fortune 500 companies. More than 250 African Americans serve as directors at Fortune 500 Companies.

In addition to the social progress in U.S. history, there have been significant advances in higher education. For example, in 1990, there were 1,247,000 African Americans enrolled in higher education. Today, that number has doubled.

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220. Id., at 5.
221. Id.
223. Id.
224. Id.
230. Id.
were nine percent of all enrollments in higher education.\footnote{232} Today, the figure is 13.1 percent, roughly equivalent to the black percentage of the college-age population.\footnote{233} In 1993, 81.6 percent of blacks ages twenty-five to twenty-nine had completed twelve or more years of schooling.\footnote{234} Today, the figure is eighty-eight percent.\footnote{235} In 1993, 11.5 percent of blacks ages twenty-five to twenty-nine had obtained a four-year college degree.\footnote{236} By 2009, the figure was nineteen percent.\footnote{237} Also, in 1993, there were 42,886 two-year associate’s degrees, 65,338 bachelor’s degrees, 16,136 master’s degrees and 951 doctoral degrees awarded to African Americans.\footnote{238} The 2009 figures show that these numbers have more than doubled as 91,529 associate’s, 146,653 bachelor’s, 62,574 master’s and 2,030 doctoral degrees have been awarded to African Americans.\footnote{239} In 1993, just over one quarter of all African Americans ages eighteen to twenty-four were enrolled in college. By 2009, the figure was thirty-two percent.\footnote{240} In 1993, the college graduation rate for Black males was thirty percent.\footnote{241} By 2009, it had increased to thirty-eight percent.\footnote{242} For Black females, the college graduation rate has increased from forty-one percent to fifty percent during the 1993-2009 period.\footnote{243} However, all recent African-American trends are not so positive. In March 2011, while the overall national unemployment rate dropped from 8.9 percent to 8.8 percent, the unemployment rate for African Americans increased from 15.3 percent to 15.5 percent.\footnote{244} There is not a single African American in the United

\footnote{231. Id.}
\footnote{232. Id.}
\footnote{233. Id.}
\footnote{234. Cross, supra note 235.}
\footnote{235. Id.}
\footnote{236. Id.}
\footnote{237. Id.}
\footnote{238. Id.}
\footnote{239. Id.}
\footnote{240. Cross, supra note 235.}
\footnote{241. Id.}
\footnote{242. Id.}
\footnote{243. Id.}
States Senate.245 There are more black men in prison today than were enslaved in 1850.246 There are more Asian and Hispanic owned businesses than African American owned businesses and their sales and receipts were $327,000,000,000 (3.7 times that of African American owned businesses) and $222,000,000,000 (about 2.5 times that of African American owned businesses), respectively.247 About 87 percent of all U.S. businesses are owned by whites.248 Incomes of black men have been fluctuating without improvement and were lower in 2004 than 1974.249 Blacks have lower incomes than whites at all age levels with the largest gaps being at the bottom of the income distribution.250

Despite many social gains for African Americans during the past fifty years, there significant disparities based on race continue. Thus, while racial neutrality remains a goal rather than reality, the progress toward reaching that goal is unmistakable.251 Reframing the debate on HBCUs would be a further step in that direction as the new discussion would embrace substantive issues across the board regardless of race. This new debate would center on the academic role institutions play in improving the lives of individuals as well as the country.

Integration has been viewed by many supporters as nothing more than a disguised form of racism. Historically, HBCUs have been highly scrutinized for issues affecting its academic viability, while little has been publicized about similar issues surrounding

245. Id.
247. U.S. CENSUS BUREAU, supra note 204.
250. Id.
251. Significant debate ensues over the concept of color-blindness, especially as perceived in and by the United States Constitution but that debate is outside the scope of this paper. See generally, Ralph Richard Banks, Beyond Colorblindness: Neo Racialism and the Future of Race and Law Scholarship, 25 HARV. BLACKLETTER L.J. 41, 50-51 (2009); Charles R. Lawrence, III, The Epidemiology of Color-Blindness: Learning to Thin and Talk about Race Again, 15 B.C. THIRD WORLD L.J.1 (1995).
other institutions. HBCU supporters take offense to solely merging HBCUs into HWCU institutions to cut back on costs, and improve academic quality, while little has been discussed about merging similarly situated historically white colleges into HBCUs or making calls for their closure. In 1995, a Mississippi district court addressed the proposed merger of two HWCU Mississippi University for Women and Mississippi State University and of the separate merger of the HBCU Mississippi Valley State University into a HWCU Delta State University. Finding no constitutionally mandated reason for merging the two HWCU, the trial court rejected the planned merger. The court also rejected the planned merger of the HBCU and HWCU. In doing so, it noted that:

Evidence also suggests that as an institution with a baccalaureate mission and enrollment below 2500 students, MVSU [Mississippi Valley State] is not an "inefficient" institution where efficiency is measured in terms of achieving higher education for educationally under-served blacks at the lowest possible cost. MVSU consistently has a high percentage of its entering class enrolled in developmental education. Because of the institution's location in one of the poorest regions in the country, MVSU has a high density of academically under-prepared blacks within its service area. Because of this historic fact, MVSU has developed a strong commitment to serving students from socioeconomic backgrounds which, in the main, are vastly different from those of the clientele of the other public institutions of higher learning in the state, including its neighbor DSU. One probable result of MVSU's commitment to serving its present constituency is its poor retention rate relative to the other universities. As noted earlier, of the first-time entering freshman class of 1985-86, DSU's graduation/retention rate for black and white students combined is 45 percent. The comparable MVSU retention rate is only 24 percent. Because of the mul-

tiple educational deficiencies of its traditional clientele, it is difficult to conclude from this data, however, that the institution is ineffective in performing its mission as an institution of higher learning. Over a seven-year period (1986-1993) MVSU has produced more black baccalaureates than DSU, MUW and UM combined. While certainly a function of its predominant racial composition, the number of blacks completing higher education at MVSU is significant in and of itself as to whether the university's continuance is educationally sound.\textsuperscript{253}

To eradicate HBCUs that continue to educate a vastly underserved populace would severely handicap our entire society.

\section*{IV. NEED FOR EDUCATION}

A continuously well-educated and well-trained population is essential for the social and economic well-being of countries. Education plays a key role in providing individuals with the knowledge, skills and competences needed to participate effectively in society and in the economy. It also contributes to the expansion of scientific and cultural knowledge. Educational attainment is a commonly used proxy for the stock of human capital, that is, the skills available in the population and the labor force.\textsuperscript{254}

Internationally, governments are seeking ways to expand and enhance educational opportunities for their people.\textsuperscript{255} These governments recognize that investment in education produces

\textsuperscript{253} Id., at 1492.
\textsuperscript{254} ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION AT A GLANCE 2010, OECD INDICATORS, available at http://www.oecd.org/dataoecd/45/39/45926093.pdf (Members of The Organization for Economic Co-Operation and Development (OECD) are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States).
\textsuperscript{255} Id.
long term growth potential for their countries. Internationally, education results in greater tax revenues, longer time in the work force, increased employability, and increased social contributions. One of the ways that a country measures its educational success is by looking at the levels of education achievement. On average across OECD countries, thirty-five percent of twenty-five to thirty-four year olds had completed post-secondary education. The United States has exceeded this with about forty-two percent of its population of twenty-five to thirty-four year olds having attained post-secondary education. However, the United States trails eleven countries in educational attainment.

One study, in particular, concluded that higher education provides considerable value to individuals, the economies where educated individuals work and live and society in general. It reported that while stocks historically return seven percent annually to the investor, college education returns twelve percent per year over and above inflation. Yet, despite the value of a college education, only one-quarter of the U.S. adult population has obtained at least a bachelor’s degree. Additionally, significant societal benefits accrue as the population becomes more educated. These benefits include higher worker productivity, lower crime rates, greater informed civic participation, and an increased likelihood of college attainment in future generations to name a few.

Texas has three of the largest degree granting institutions of higher education in the United States. More than 1,187,145
students attended Texas colleges and universities in 2005. Yet during the 1999-2005 period, the Texas budget was cut by 19.92 percent per student for funding at universities and 35.29 percent per student for funding at community colleges. Over the same six year period, Texas increased its funding of criminal justice by 16.9 percent. In 2000, sixty-two percent of Texas prisoners had not earned a high school diploma or GED; of that number forty-four percent were functionally illiterate and 16 percent read below the fourth grade level. The state’s prison school district reported that prisoners who earned their GED while incarcerated, recidivated at 11.6 percent less than those who had not attained their diploma. Compared to a system-wide recidivism rate of forty-three percent, prisoners who completed an associate’s degree recidivated at the rate of 27.2 percent and those who completed a baccalaureate degree recidivated at the rate of 7.8 percent. Nationally, statistics support a strong correlation between education and recidivism.


269. See CHIS TRACY, ET. AL., THREE YEAR OUTCOME STUDY OF THE RELATIONSHIP BETWEEN PARTICIPATION IN WINDHAM SCHOOL SYSTEMS PROGRAMS AND REDUCED LEVELS OF RECIDIVISM (June 1994).


271. See, e.g., Education as Crime Prevention, Providing Education to Prisoners, Criminal Justice Initiative, Research Brief (Occasional Paper Series No. 2, Sept. 1997 p. 5) (stating that The overall recidivism rate for degree holders leaving the Texas Department of Criminal Justice between September 1990 and August 1991 was 15%, four times lower than the general recidivism rate of 60%. A two year follow-up report found that the higher level of degree awarded was inversely related to the level of recidivism – individuals with associate's degrees had a recidivism rate of 13.7%, those with bachelor's degrees had a rate of 5.6%, and those with master's degrees had a rate of zero available at http://www.prisonpolicy.org/scans/research_brief_2.pdf (last visited May 13,
V. CONCLUSION

The importance of education, particularly post-secondary education, is recognized throughout the world. The United States has fallen in the international rankings on educational attainment, achievement and literacy. While the international community is working to ensure that it produces a strong academic system that produces measureable outcomes, America can ill-afford to examine its own educational systems along lines of racial bias. Instead, it must look to improve the performance of its education system fairly and comprehensively.

2011). See also Cindy Hendricks et. al., Criminal Activity and Recidivism, http://www.americanreadingforum.org/yearbook/yearbooks/01_yearbook/pdf/12_Hendricks.pdf; Rattrick A. Langan & David Levin, Recidivism of Prisoners Released in 1994, Bureau of Justice Statistics, Special Report, June 2002 available at http://www.prisonpolicy.org/scans/bjs/rpr94.pdf. Also see THE PEW CENTER ON THE STATES, State of Recidivism: The Revolving Doors of America's Prisons, (Apr 2011) pg. 3, available at http://www.pewcenteronthestates.org/uploaded Files/Pew_State_of_Recidivism.pdf (the percentage does not include California because it significantly skews the numbers) finding that nationally, recidivism has been a concern for every level of government. The national recidivism rates between 1994 and 2007 remained stable at roughly 40% of inmates returning to prison within three years. See also, Stephen J. Steurer et. al., Three State Recidivism Study, Correctional Education Agency 1, 40 (2001), available at http://www.ceanational.org/PDFs/3StateFinal.pdf (Reporting that in a three state study, the re-arrest, the re-conviction, and the re-incarceration rates were lower for the correctional education participants compared to the non-participants. There was a 29% percent decrease in recidivism rates for corrections education participants as compared to the non-participating counterparts.) See Nicholas Johnsonet. al., An Update on State Budget Cuts: At Least 46 States Have Imposed Cuts That Hurt Vulnerable Residents and Cause Job Loss, CENTER ON BUDGET AND POLICY PRIORITIES (Feb. 9, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=1214 (“In the United States, at least 43 states have implemented cuts to public colleges and universities and/or made large increases in college tuition to make up for insufficient state funding. Also, at least 34 states and the District of Columbia have implemented cuts to K-12 education. Only forty nine percent prison inmates had obtained a high school diploma or a high school equivalency certificate before the start of their current incarceration, which is lower than household average.”) See also, Elizabeth Greenberg et. al., Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey, NATIONAL CENTER FOR EDUCATION STATISTICS (2007) http://nces.ed.gov/pubs2007/2007473.pdf ???(Reporting that Texas statistics show that education has a substantial effect on recidivism rates.)
As a nation, we permit too many of our citizens to be under-educated. We imprison our citizens in outrageous numbers, many of whom are illiterate and undereducated. We have spent the last thirty years prioritizing incarceration and minimizing education. It is time for a change.

The recent revival of the debate on HBCUs continues to divide the populace on whether we should close HBCUs on grounds of low graduation rates, low enrollment, and an outlived historical mission to educate African Americans. These grounds are meritless because they blame HBCUs for failures in the larger education system. Furthermore, these claims are not supported by statistics, the United States Constitution, or common sense.

Low graduation rates are not only symptomatic of the HBCU. In fact, a number of American colleges and universities struggle with unacceptable graduation rates. Even among top tier schools, where one might anticipate a greater than ninety-five percent graduation rate in four years, the actual rates are lower for four years and only begin to approach the expectation over six years.

HBCUs are enjoying higher and more diverse enrollment rates as are HWCUs. As one court recognized, "[h]igher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries."\(^{272}\)

The significant improvement in the overall available opportunities to African Americans and other minority populations should not be ignored. However, the continuing and increasing education and graduation gaps among racial and ethnic communities are clear evidence that we have not yet achieved a color blind society. Instead, we must focus our collective attention on bridging these gaps and fulfilling our quest for excellence. The traditional debates of the prudence of educating African Americans of slavery and the growing post-civil rights debate of the prudence of retaining HBCUs are both rooted in the belief of racial superiority. Paraphrasing the *Plessy* court, legislation is powerless to change this belief.\(^{273}\) The underlying fallacy persists in


\(^{273}\) *Plessy v. Ferguson*, 163 U.S. 537,551 (1896).
the assumption that the historical separation of the two races stamps one race as inferior to the other. If this be so, it is not by reason of fact but found solely in the fact that some people choose to put that construction upon it . . . . . . . . social prejudices may not be overcome by legislation. To achieve social equality, there must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals to associate. 274

Historically, white colleges and universities are the only higher education institutions established to be racially exclusive. Their missions ensured that the races would be separate and that the opportunities they provided hoarded by the white, and often, the wealthy. To the contrary, HBCUs were established with doors open to the historically disenfranchised and those excluded from the HWCUs. 275 The HBCU policy of inclusion was illustrative of the democratic ideals on which this nation was arguably founded. Thus, if any institution should be merged or closed because of their tainted history it should be the HWCU. Closing HBCUs in order to revise the nation's history of inhumanity is an absurdity. We can no more change the inclusive history of the HBCU than we can the exclusive history of the HWCU.

It is time to reframe the debate away from eliminating institutions of higher learning toward determining how best to improve and enhance our education systems, to yield a better product and embrace a larger population. As a nation, we must be committed to ensuring educational opportunities to all children from the youngest age through higher education. If we are to truly embrace the principles of human dignity and freedom that we profess in the name of democracy, America must engage its poor, as well as its wealthy, and it must be willing to empower the disenfranchised.

274. Id.