Barry Law Review

Volume 24 | Issue 2 Article 3

5-1-2019

REFRAMING THE AFFIRMATIVE ACTION DEBATE TO MOVE BEYOND ARGUMENTS FOR DIVERSITY AND INTEREST CONVERGENCE

Adrian Jamal McLain

Steven L. Nelson

REFRAMING THE AFFIRMATIVE ACTION DEBATE TO MOVE BEYOND ARGUMENTS FOR DIVERSITY AND INTEREST CONVERGENCE

Adrian Jamal McLain[*]

Steven L. Nelson[**]

ABSTRACT

Critical race theorists have long accepted the interest convergence dilemma as indispensable in discussions of civil rights in the United States. In this paper, we argue that the interest convergence dilemma is insufficient to account for outcomes that show persistently and consistently inequitable academic, social, and occupational opportunities and outcomes for Black students. In particular, we analyze federal courts' handling of affirmative action cases to showcase how federal courts' efforts to apply the diversity rationale rather than the historical rationale serve to infuse antiblackness into higher education policy. We first analyze Supreme Court of the United States cases involving affirmative action policies. We reframe earlier cases aimed at ensuring that black students had access to institutions of higher education to argue that affirmative action policies existed as early as the 1930s. Next, we discuss the antiblackness of the diversity rationale and how the diversity rationale impacts black and white students differently. We thereafter suggest that the interest convergence dilemma is flawed in that black students' interests cannot and do not converge with those of white students. Indeed, the interests of white students are paramount, and Black students' interests are not only secondary but are actually only entertained as they relate to white students' interests. We showcase the continued antiblackness of affirmative action policies by explaining how recent federal cases have resulted in white students being prioritized even at historically Black colleges and universities (HBCU).

* Adrian Jamal McLain is a doctoral student in the Department of Leadership & Policy Studies at the University of Memphis. He earned his Bachelor of Arts degree in Political Science from Alcorn State University and his Master of Science degree in Higher Education Administration from Mississippi College. His research agenda interrogates the impact of whiteness and antiblackness on educational leadership, Historically Black Colleges and Universities, and postsecondary access.

** Steven L. Nelson is the Assistant Professor of Education Law and Education Policy in the Department of Leadership & Policy Studies at the University of Memphis. He earned his Ph.D from the Department of Education Policy Studies at the Pennsylvania State University and his J.D from the University of Iowa's College of Law. His research considers how education reform policies purporting to pursue equitable educational opportunities and outcomes for Black students, families, and communities often result in the continued racial subjugation of Black peoples.

I. INTRODUCTION

Historically Black colleges and universities are essential educational institutions within the higher education community. In 2015, the Thurgood Marshall College Fund reported that 40% of black engineers, 50% of Black professors who teach at nonhistorically Black institutions, and 80% of Black judges are graduates of HBCUs, despite HBCUs enrolling only 9% of Black college students.[1] Overall, college enrollment rates for black students are under 40%—at roughly 36%.[2] Black students are typically the objects of damage-centered research[3] or are often represented by statistics as being less educated and less likely to attend college.[4] However, these outcomes correlate to the marginalizations that result from the histories and political economies of Black, particularly low-income Black, communities operating within a white-dominated society.[5]

To remedy historical wrongs of the discriminatory past faced by Black people in the United States, institutions of higher education adopted affirmative action admissions policies to address persistently and consistently lower enrollments of Black students.[6] While students from marginalized communities, particularly Black students, were given access to traditionally white institutions of higher education, white Americans perceived that increased efforts at diversity at and in institutions of higher education would have forced white students to compete against marginalized students who were previously precluded from attending from admission to the most competitive state-sponsored institutions of higher education. For example, when denied admission into the University of Texas at Austin, Abigail Fisher of the *Fisher v. University of Texas*[7] case felt she was qualified (or at least more qualified than students from marginalized communities) and chose to sue to earn a spot at a competitive state university; the federal courts agreed to hear Fisher's case although she failed to meet the academic qualifications of admittees on most objec-

1. *Historically Black Colleges and Universities*, THURGOOD MARSHALL COLLEGE FUND, https://www.tmcf.org/about-us/our-schools/hbcus (last visited February 4, 2018); *see also* TELL THEM WE ARE RISING: THE STORY OF BLACK COLLEGES AND UNIVERSITIES (Firelight Films 2018).

2. *Historically Black Colleges and Universities*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=667 (last visited, February 4, 2018).

3. *See generally* Eve Tuck, *Suspending Damage: A Letter to Communities*, 79 HARV. EDUC. REV. 409 (2009) (distinguishing damage-centered versus desire-based research). We side with Eve Tuck, asserting that research must envision communities subjected to marginalization, disenfranchisement, and oppression as creating cultures that express a desire other than to replicate the dominant culture, whiteness.

4. Walter R. Allen, *Black Students in U.S Higher Education: Toward Improved Access, Adjustment, and Achievement*, 20 URB. REV. 165, 185 (1988) For instance, Walter R. Allen asserts "[B]lack students lag behind their Asian, American Indian, Hispanic, and white peers in terms of high school grades, SAT scores, and college grades." In fairness, Allen does go on to identify institutions of higher education's role in sustaining inequitable educational opportunities and outcomes.

5. *See generally* JEAN ANYON, RADICAL POSSIBILITIES: PUBLIC POLICY, URBAN EDUCATION, AND A NEW SOCIAL MOVEMENT (2d ed. 2015).

6. Kristen M. Glasener, Christian A. Martell, & Julie R. Posselt, *Framing Diversity: Examining the Place of Race in Institutional Policy and Practice Post-Affirmative Action*, 12 J. DIVERSITY HIGHER EDUC. 3 (2019); *see also,* Dorothy F. Garrison-Wade & Chance W. Lewis, *Affirmative Action: History and Analysis*, 185 J. C. ADMISSIONS 23 (2006).

7. Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198 (2016).

tive admission criteria used at the University of Texas at Austin.[8] The *Fisher* case, in concert with the history of both school desegregation and affirmative action in higher education admissions, is a demonstration of what happens—historically—whenever white supremacy is challenged.[9] Ultimately, Black people benefit very little and, instead, the heavy oppression of Black people follows.

It is relatively simple to understand affirmative action's diversity rationale through the lens of critical race theory. Interest convergence, a tenant of critical race theory, asserts that white Americans' interests have prevailed in affirmative action policy and legal cases.[10] Our primary thesis in this article is that the Supreme Court of the United States's preference for the diversity rationale over the historical rationale maintains white supremacy as affirmative action is applied to higher education. In making this argument, we also argue that the diversity rationale of affirmative action policies and judicial decisions is, in no way, a convergence of interests between white and Black stakeholders. We, instead, proffer that interest convergence is only applicable to the extent that white stakeholders, powerbrokers, and citizens get to set the agenda for Black people. We argue that the diversity rationale, without historical content, reproduces colorblind policies and procedures that aim to silence and erase Black suffering.[11] This and other antiblack policies are problematic for Black people because affirmative action higher education policies ultimately only serve to accommodate the interests of white students.[12] However, as opponents of affirmative action continue to create correlating policies that continue to advantage white students at the expense of Black students, HBCUs are in a prime position to offer postsecondary opportunities for Black and other underrepresented minority students. Further, in a society that continues to lean toward the reproduction of colorblind policies, HBCUs have the opportunity to combat the antiblackness of affirmative action by reproducing pro-Black ideologies within Black and Brown student bodies.

This paper includes three major segments. The first segment of this paper will address early affirmative action lawsuits and how these cases have shaped affirmative action policy. The second segment will focus on the relationship between antiblackness and the diversity rationale of affirmative action coupled with how the term *diversity* has been redefined by whiteness, which is not in the best interest of Black people. We then problematize the understanding that affirmative action and diversity are or can be the convergence of Black and white interests. Finally, we discuss the potential impact of HBCUs, especially as these potential impacts can serve to advance a liberatory educational agenda for Black people.

---

8. *See* Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases,* 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 297, 320 (2016).

9. *See generally id.* (arguing that the Supreme Court of the United States' acceptance of white people's attacks on affirmative action is a continuation of white people's interposition to desegregation).

10. Glasener, *supra* note 6, at 4.

11. Rican Vue, Siduri Jayaram Haslerig, & Walter R. Allen, *Affirming Race, Diversity, and Equity Through Black and Latinx Students' Lived Experiences*, 54 AM. EDUC. RES. J. 868, 869 (2017).

12. Nelson, *supra* note 8, at 321.

II. HIGHER EDUCATION AFFIRMATIVE ACTION COURT CASES

For decades following *Plessy v. Ferguson*[13], the *separate but equal* doctrine dominated American society. Separate but equal—the Supreme Court's infamous and oppressive precedential ruling—embraced and reproduced systemic discrimination and segregation and dominated educational institutions, workplaces, and life. *Brown v. Board of Education* was a watershed moment in equity-oriented precedent, for it explicitly overturned the *Plessy* decision, making segregation unconstitutional.[14] Less known, however, is that cases about access to higher education paved the way for *Brown*. The cases that preceded *Brown* focused on creating equitable educational opportunities and outcomes for Black people and had considerable impacts on the landscape of higher education admission policies for Black students. As early as 1938, in *Missouri ex rel. Gaines v. Canada,*[15] followed by *Sipuel v. Board of Regents of the University of Oklahoma*[16] in 1948, and *Sweatt v. Painter*[17] and *McLaurin v. Oklahoma State Regents*[18] in 1950, the Supreme Court of the United States ruled in favor of Black students. In these cases, the Court forbade state-supported institutions of higher learning from denying admission to Black students to graduate and professional programs on the basis of race alone, holding that such actions violated the Fourteenth Amendment of the Constitution. *Missouri ex rel. Gaines* and *Sipuel* guided the decisions of *Sweatt*[19] and *McLaurin*[20] and ultimately set the premise for the explicit overturn of the *Plessy* decision in *Brown*.

The following section will discuss Supreme Court of the United States cases that are related to the use of affirmative action in higher education. *Missouri ex rel. Gaines*, S*ipuel* ,*Sweatt*, and *McLaurin* are the cases that shaped pre-affirmative action higher education policies before the *Brown* decision. We will follow this discussion with an overview of affirmative action cases that the Court heard after *Brown*: *Regents of the University of California v. Bakke*, *Hopwood v. Texas*, *Gratz v. Bollinger*, *Grutter v. Bollinger*, and *Fisher v. University of Texas.*

The University of Missouri Law School denied a Black student by the name of Lloyd Gaines admission under the purported auspices of a Missouri state law banning Black students from attending law school in the State of Missouri.[21] While Gaines graduated from his alma mater, Lincoln University, an HBCU located in Jefferson City, Missouri, with stellar credentials, there was no established school of law in the state for Black students to attend.[22] The State of Missouri so strongly felt the need to keep the law school all white that the state offered to pay for Gaines's

13. Plessy v. Ferguson, 163 U.S. 537 (1896).
14. Brown v. Board of Education, 347 U.S. 483 (1954).
15. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).
16. Sipuel v. Bd. of Regents of Univ. of Okl., 332 U.S. 631 (1948).
17. Sweatt v. Painter, 339 U.S. 629 (1950).
18. McLaurin v. Okl. State Regents for Higher Ed., 339 U.S. 637 (1950).
19. *Sweatt*, 339 U.S. at 635.
20. *McLaurin,* 339 U.S. at 638.
21. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 343 (1938).
22. *Id.* at 342.

law school tuition if he chose to attend a nearby state's school.[23] The Supreme Court of the United States turned back the law school's actions, ruling that the University of Missouri's law school must offer admission to Gaines.[24] The Supreme Court of the United States stated that the State of Missouri has an obligation to "provide [Black students] with advantages for higher education substantially equal to the advantages afforded to white students."[25] The *Gaines* decision is significant because it marked the beginning of the Court's reconsideration of *Plessy*. While it did not explicitly overturn the *separate but equal* doctrine, Chief Justice Hughes's opinion discusses how states can not offer only one institution of higher learning that focuses on a specific field and deny admission to Black students.[26]

A decade later, the Supreme Court of the United States would rebuke the University of Oklahoma's law school in a case with issues similar to those presented in *Gaines*.[27] In the case of *Sipuel*, Ada Sipuel applied to the University of Oklahoma's law school, the only public law school in the state, and the law school denied her application for admission based solely on her race.[28] The Supreme Court of the United States would, once again, have to instruct white people that state statutes and higher education admission policy could not discriminate against Black students if the state offered only one institution dedicated to a particular field of study for its citizens.[29] A unanimous Supreme Court of the United States ruled in favor of Sipuel, stating that she must be admitted into the University of Oklahoma.[30]

Next, Oklahoma's southern neighbor, Texas, would attempt to scheme its way to masking apparent racism in higher education. Heman Marion Sweatt, a black man who worked for the United States Postal Service, and five other Black prospective students filed suit against the University of Texas Law School due to the law school's policy and state's constitutional policy that actively precluded Black people from admission into or enrollment at the law school.[31] Sweatt intended to challenge the Texas Constitution, which stated that the law school was reserved for the education of white students only.[32] In a ploy to appease Sweatt and other Black students interested in pursuing law degrees, Texas's all-white male legislative body allowed for the creation of a separate Black law school which would ultimately become the Thurgood Marshall School of Law housed at Texas Southern University, an HBCU located in Houston, Texas. Black prospective law students were to travel to an institution for Black students over a hundred miles away from the

23. *Id.* at 342–43.
24. *Id.* at 352 (reversing the decision of the supreme court of Missouri and remanding the case for proceedings consistent with the Supreme Court's decision).
25. *Id.* at 344.
26. *See generally id*.
27. Sipuel v. Bd. of Regents of Univ. of Okl., 332 U.S. 631, 631 (1948).
28. *Id.* at 632.
29. *Id.* at 632–33.
30. *Id.* at 633.
31. Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 LAW & SOC. INQUIRY 507, 507 (2000).
32. William C. Kidder, *The Struggle for Access From Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000,* 19 HARV. BLACKLETTER L. J. 1, 4 (2003).

state's all-white law school that enjoyed overwhelming support.[33] Although the white Texas legislature presumed that the Black law school fell under the parameters of the *separate but equal* doctrine, the inequalities faced at the Black law school were too disproportionate for the Supreme Court of the United States to ignore. According to *Sweatt*,[34] Texas Southern's law school "only had five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas bar" whereas "the University of Texas' law school had 16 full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an order of the Coif affiliation, distinguished alumni, tradition, and prestige."[35]

Lawmakers in Texas must have somehow thought that the Thurgood Marshall School of Law, which was dedicated exclusively to the legal education of Black students and had only been established four years prior to the Supreme Court of the United States's decision in *Sweatt*, could have had the opportunity to acquire the same prestige as the all-white institution that had been established for decades. One must consider how the Texas lawmakers could have reached this conclusion when the newly minted Thurgood Marshall School of Law was founded in and operated under an anti-black atmosphere. Not surprisingly, that white people managed to deny admission to the University of Texas Law School to Black students and ultimately built an entirely new law school to accommodate Black students interested in law (while maintaining the all-white population of the University of Texas Law School) did not please the Supreme Court of the United States.[36] The Supreme Court of the United States found the apparent inequities and the facial denial of Black students' applications to the University of Texas Law School impermissible under the U.S. Constitution.[37] Furthermore, the establishment of the Thurgood Marshall School of Law assisted the outcome of the ruling, highlighting how desperate white people were to avoid the equitable treatment of Black people.[38] Moreover, the Court reasoned that it was necessary to desegregate legal education, stating:

> Although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose

33. *Id.* at 3.
34. Sweatt v. Painter, 339 U.S. 629 (1950).
35. *Id.* at 632–33.
36. *Id.* at 636 (reversing the decision of the Supreme Court of Texas and remanding the case for proceedings consistent with the Supreme Court of the United States's decision).
37. *Id.* at 635.
38. *Id.* at 631–32 (discussing the elaborate pathway by which the State of Texas employed delay and disguise to build an all-black law school, effectively avoiding the mixing of races at the University of Texas' Law School).

> to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[39]

It goes without saying that the previous *Missouri ex. rel. Gaines* and *Sipuel* decisions impacted the unanimous decision of the Supreme Court of the United States in the *Sweatt* case.

It was not long before the State of Oklahoma would again try its hand at racial segregation and the exclusion of Black people in graduate and professional school. In *McLaurin v. Oklahoma State Regents*, the University of Oklahoma admitted George McLaurin into its graduate education program.[40] On his first attempt to seek admission, the University denied McLaurin admission based on an Oklahoma state law that made it illegal for Black and white students to receive educational services together.[41] The U.S. district court held the University of Oklahoma's actions violated McLaurin's Fourteenth Amendment rights.[42] According to *McLaurin*, the State of Oklahoma passed a law granting the education of Black and white students at the same institutions if such programs were not offered at Black institutions so long as the provision of educational services was offered in a segregated manner.[43] Such a law resembles what the Supreme Court of the United States previously stated was illegal in the *Sweatt* decision.[44] As a result of this new law, the University of Oklahoma chose to humiliate McLaurin by only allowing him to sit at a certain table in the cafeteria, although he could not eat lunch at the same time as white students, and to sit at a specific desk outside of class during lectures and in the library.[45] The University of Oklahoma provided its own rendition of *separate but equal*. In Chief Justice Vinson's opinion, he stated, "Our society grows increasingly complex, and our need for trained leaders increases correspondingly."[46] The University was ordered to cease the separate conditions imposed on McLaurin.[47]

Affirmative Action Court Cases Post-Brown

Beginning with the decision in *Regents of the University of California v. Bakke*,[48] the Supreme Court of the United States's embrace of the diversity rationale of affirmative action has become problematic for Black people due to its reproduction of anti-black higher education admissions policies. According to Amy Stuart Wells and colleagues, "Instead of supporting a *racial equality* goal in this case, the [Supreme] Court relied almost solely on the diversity rationale when upholding the limited use of racial classifications in higher education admissions pol-

39. *Id.* at 634.
40. McLaurin v. Okl. State Regents for Higher Ed., 339 U.S. 637, 639–40 (1950).
41. *Id.* at 638.
42. *Id.* at 639.
43. *Id.*
44. *See generally* Sweatt v. Painter, 339 U.S. 629 (1950).
45. *McLaurin*, 339 U.S. at 640.
46. *Id.* at 641.
47. *Id.* at 642 (concluding that the conditions under which George McLaurin received his education were a violation of the Fourteenth Amendment of the Constitution).
48. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

icies."[49] Moreover, the *Bakke* decision marked the shift from affirmative action as a remedy for past historical discrimination to the promotion of diversity.[50]

Alan Bakke, a white student, applied to the University of California's medical school in Davis, California.[51] Due to the medical school's attempt to address its small number of students from underrepresented populations, the institution had a separate admissions process for underrepresented minority students.[52] After being denied admission on two occasions, Bakke filed suit against the medical school claiming that the admissions policies were discriminatory and his test scores alone should be grounds for admission.[53] Although Bakke's admission test scores were considered high, his academic performance and campus interviews gave the admissions committee pause, suggesting that he may not be the best fit for matriculation into their program.[54] In summary, a white male felt discriminated against because, regardless of what minority applicants possessed, his test scores alone were superior.[55] That the medical school offered admission to a student from a marginalized group was unacceptable to Bakke.[56] The Supreme Court of the United States agreed with Alan Bakke, ruling that utilizing racial quotas in admissions policies violated the Fourteenth Amendment.[57] The Court, thereafter, sanctioned colleges' and universities' efforts to promote diversity on their respective campuses, rather than colleges' and universities' efforts to offer relief from the systemic oppression that peoples of color encountered daily, which, in turn, impacted the ability of peoples of color to achieve admission into the most competitive state-sponsored colleges and universities.[58]

The *Bakke* decision effectively rendered three results. Firstly, the right to admission into higher education was given to white students over minority students.[59] Secondly, "the Court rejected the use of race-conscious preferences as a means of remedying past societal racial discrimination" in all but the most limited circumstances.[60] This is exemplified through Justice Powell's claim that remedying injustices rested on an "amorphous concept of injury that may be ageless in its reach into the past."[61] Thirdly, Black applicants would have to be superb, almost beyond reproach and with impeccable applications, in the admissions process by satisfying both objective and subjective criteria, yet white applicants could be mediocre and

49. Amy Stuart Wells, Jacquelyn Duran, & Terrenda White, *Refusing to Leave Desegregation Behind: From Graduates of Racially Diverse Schools to the Supreme Court*, 110 TCHR. C. REC. 2532, 2539 (2008).
50. Marlo Goldstein Hode & Rebecca J. Meisenbach, *Reproducing Whiteness Through Diversity: A Critical Discourse Analysis of the Pro-Affirmative Action Amicus Briefs in the Fisher Case*, 10 J. DIVERSITY HIGHER EDUC. 162, 163 (2017).
51. *Bakke*, 438 U.S. at 276.
52. *Id.* at 272–73.
53. Nelson, *supra* note 8, at 311–12.
54. *Id.* at 311.
55. *Id.* at 312.
56. *Id.*
57. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1977).
58. *Id.* at 321–24 (highlighting the Harvard diversity program as an idyllic state interest in the context of higher education).
59. Nelson, *supra* note 8, at 314.
60. Wells, *supra* note 49, at 2539.
61. *Bakke*, 438 U.S. at 307.

choose which criteria to satisfy in the admissions process.[62] Allowing white applicants to have so much flexibility screams white privilege.[63] Assuming that white applicants are inherently better prepared and more qualified than Black applicants is the crux of white supremacy.[64] Pre-*Brown*, the Court repeatedly highlighted the importance of creating opportunities for Black students at the graduate and professional level.[65] Ironically, the Supreme Court of the United States, less than 30 years after the decisions in *Sweatt* and *McLaurin*, had already determined that institutions of higher education must have become more inclusive and the need to create access for black applicants was no longer a priority.[66]

Nearly two decades later, race-based admissions policies would again come under question. Cheryl Hopwood and three other white applicants applied to the University of Texas Law School, but based on the law school's admission policy that favored a certain number of minority students, Hopwood and the other three applicants were denied admission.[67] Hopwood argued that she was better qualified than students from marginalized communities who received affirmative admissions decisions, citing that her law school admission test scores and grade point average were higher than most of the minority students who were admitted over her.[68] Hopwood and her co-racists filed suit alleging that the affirmative action admission policy favored minority students and was discriminatory, violating the U.S. Constitution.[69] The U.S. Fifth Circuit Court of Appeals agreed and prohibited the use of race in admissions policies.[70] *Hopwood* resulted in higher education admission reform and the need for colleges and universities to address *diversity* on its campuses.[71] The Supreme Court of the United States would overturn *Hopwood* less than a decade after the Fifth Circuit rendered its opinion on the case.[72]

62. Nelson, *supra* note 8 at 323.

63. For a definition of white privilege, see Jason Swanson & Anjale Welton, *When Good Intentions Only Go So Far: White Principals Leading Discussions About Race*, 53 URB. EDUC. 1, 6 (2018) (explaining that a component of white privilege is having the ability to be un-raced).

64. For a definition of white supremacy, see Ricky Lee Allen & Daniel D. Diou, *Managing Whiteness: The Call for Educational Leadership to Breach the Contractual Expectations of White Supremacy*, 53 URB. EDUC. 1, 2 (2018) (suggesting that white supremacy is a social system that, despite the appearance of racial progress, ensures that white people maintain control and higher statuses than people of color).

65. *See supra* notes 21–47.

66. Of course, much was happening in the racial politics of the Supreme Court of the United States. Important to this analysis is that the Supreme Court of the United States found itself increasingly addressing race and racism outside of the U.S. South, which was presumed to be the epicenter of racial bigotry in the United States. Quite frankly, race and racism was an issue of the U.S. South rather than a national issue. For more information on this topic, see DAVISON DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 (2d ed. 2012).

67. Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996).

68. *Id.* at 935–38.

69. *Id.* at 938.

70. *Id.* at 962.

71. Sandra E. Black, Kalena E. Cortez, & Jane Arnold Lincove, *Efficacy Versus Equality: What Happens When States Tinker with College Admissions in a Race-Blind Era?*, 38 EDUC. EVALUATION & POL'Y ANALYSIS 336, 338 (2016).

72. *See* Grutter v. Bollinger, 539 U.S. 306 (2003*)*; Gratz v. Bollinger, 539 U.S. 244 (2003). The Supreme Court of the United States decided both cases pertaining to the use of affirmative action admissions policies at the University of Michigan in 2003. The Fifth Circuit Court of Appeals decided *Hopwood* in 1996.

In 2003 the Supreme Court of the United States heard two cases involving the University of Michigan's affirmative action based admissions policies—*Grutter v. Bollinger*[73] and *Gratz v. Bollinger*.[74] In *Grutter*, Barbara Grutter, yet another white applicant who felt that she had the right to be admitted into a traditionally white institution over her minority counterparts despite not explicitly arguing that her academic credentials were markedly better than her black and brown counterparts, filed suit against the University of Michigan Law School after being denied admission.[75] The law school used race in its admissions policies as part of a holistic review of all applicants.[76] The law school claimed that due to a compelling interest to achieve diversity, its policies were necessary.[77] This argument coincides with the beneficial effects that racial and ethnic diversity play in a diverse world.[78] The Supreme Court of the United States, claiming that student body diversity is important, agreed with the law school by opining that as long as the means of achieving diversity is narrowly tailored, both race and ethnicity may be considered as part of the law school's admissions policies.[79] The Supreme Court of the United States's decision in *Grutter* also reiterated the need for the use of strict scrutiny, just as the Supreme Court of the United States set forth in *Bakke*.[80]

The early 2000s are the most obvious instance of when the interests of white people converge with the benefits of diversity. On the contrary, when the University of Michigan denied Jennifer Gratz and Patrick Hamacher admission into their undergraduate programs, the Supreme Court of United States ruled that the University's use of racial preferences violated both the Equal Protection Clause and Civil Rights Act of 1964 because the race-based policies were not "narrowly tailored."[81] The undergraduate admissions process differed from the law school's admissions practices.[82] During the law school's process, candidates were admitted after a holistic review that included race as a component.[83] At the undergraduate level, applicants from marginalized racial and ethnic backgrounds were offered 20 points on a scale on which 100 points guaranteed admission into the university.[84] This process resulted in practically all students from racial or ethnically marginalized communities receiving positive admissions decisions.[85] The University's undergraduate ad-

73. *Grutter*, 539 U.S. at 316–17.
74. *Gratz*, 539 U.S. at 244.
75. *Grutter*, 539 U.S. at 316–17, 327–28.
76. *Id.* at 337 (expounding upon the admissions process that the University of Michigan Law School employs).
77. *Id.* at 329 (stating that the law school sought to construct incoming classes that contained a critical mass of minority students).
78. Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study,*
50 AM. EDUC. RES. J. 251, 252 (2013).
79. *Grutter*, 539 U.S. at 333–34. Although we note that Justice O'Connor suggests that the Supreme Court of the United States suspects there will be no need for affirmative action a quarter century after the Court's decision in *Grutter*. *Id.* at 343.
80. *Id.* at 333–34.
81. Gratz v. Bollinger, 539 U.S. 244, 270 (2003)
82. *Grutter*, 539 U.S. at 337.
83. *Id.*
84. *Gratz*, 539 U.S. at 255.
85. *Id.* at 272.

mission process and its practice of admitting applicants just because they were from an underrepresented minority ran afoul of the U.S. Constitution.[86]

Since rendering decisions in *Gratz* and *Grutter*, the Supreme Court of the United States has entertained the case of *Fisher v. University of Texas,*[87] the most recent case pertaining to the actual use of affirmative action policies.[88] Not even a generation after the Supreme Court of the United States's sanctioning of the use of race in the Michigan affirmative action cases, *Fisher* threatened to end affirmative action policies at the urging of a disgruntled white applicant who was denied admission into a university.[89] Abigail Fisher applied to the University of Texas at Austin and was denied admission.[90] It is important to note that UT Austin automatically admitted all students who graduated within the top 10% of their graduating class from Texas high schools.[91] Abigail Fisher did not graduate in the top 10% of her class; therefore, she had to take her chances in the general admission pool with thousands of other applicants.[92] The alternative path to admission into the University of Texas at Austin is considerably more competitive than the process which automatically admitted students enjoy.[93] Although she had several bites at the proverbial apple, Abigail Fisher's academic qualifications were insufficient, inadequate, and non-competitive against the more competitive pool of applicants; thus, the University of Texas at Austin denied Fisher's bid for admission.[94] Fisher then claimed that the University of Texas at Austin favored Black and other underrepresented students in the admission process, arguing that these students took *her* place at the competitive state university.[95]

Fisher's argument failed to acknowledge that white applicants dominated the population of admitted students in both the automatic and secondary admissions processes.[96] Moreover, Fisher failed to acknowledge that few, if any, admittees, the majority of whom were white, shared her underwhelming academic credentials.[97] The University, for its part, claimed that it was merely trying to achieve a diverse campus through narrowly tailored means.[98] The U.S. Fifth Circuit Court of Appeals upheld the University of Texas at Austin's admissions procedures claiming the policies were in line with the requirements of *Grutter*.[99] On appeal, the Supreme Court of the United States required the lower court to use strict scrutiny to ensure

86. *Id.* at 275–76.
87. Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).
88. We do not highlight *Schuette v. BAMN*; however, see Nelson*, supra* note 8 for an argument that considers *Schuette* as part and parcel of the Court's affirmative action jurisprudence.
89. *See* Nelson, *supra* note 8, at 323–28 (arguing that Fisher's attack on affirmative action was, in fact, motivated by her attempts to protect whiteness).
90. *Fisher*, 136 S. Ct. at 2207.
91. *Id.* at 2218.
92. *Id.* at 2207.
93. Nelson, *supra* note 8, at 322–23.
94. *Id.*
95. *Id.* at 320.
96. *Id.* at 325.
97. *Id.* at 323.
98. *Fisher*, 136 S. Ct. at 2214.
99. *Id*.

the University of Texas at Austin's admission processes were constitutional; again, the University's policies were found constitutional.[100]

As a result of *Fisher*, higher education affirmative action survived yet another white person's attempt to end it. However, the policy had become watered down, stripped of its social justice component, which focused on addressing historical wrongs imposed on Black and Brown people, and *diversity* had become the primary focus.[101] *Fisher* exemplifies how white America can challenge any attempt to favor underrepresented minorities in the college admissions process even if their claims are nothing more than confusion about how a minority can ever be favored over them.[102] The diversity rationale of affirmative action has become a problem for Black people.

III. ANTIBLACKNESS AND THE DIVERSITY RATIONALE

Just as critical race theory asserts that racism is ingrained into the fabric of the United States and our global society, antiblackness is woven into the national and global structures that impact Black people.[103] Michael J. Dumas, scholar of race and education at the University of California, Berkeley, describes antiblackness as how society views Black people as something other than human and articulates that slavery, which dehumanized Black people by treating Black people as chattel property, continues to be identified with Black people.[104] The struggles of Black people are seen as trivial in the eyes of white supremacist people and structures and are only considered worthy of attention if the interest of white people is benefitted. Antiblackness explains why resisting the diversity rationale (as well as multiculturalism) is a social justice issue as it relates to Black people.[105] Without parsing words, diversity is antiblack. Lawrence Blum further explains that diversity, "severed from any corrective justice," does not "explain why race should be privileged among other forms of diversity."[106] Moreover, diversity does not see Black people as being capable of intragroup diversity.[107] However, Black people, separate from other races, are already diverse because we have different religions, political ideologies, sexual orientations, living situations, upbringings, and so forth.[108]

Our collective oppressions at the hand of white people, whiteness, and white-dominated society are, nevertheless, a cultural artifact, reality, and tie that binds. White supremacy knows the worth of Black people, and by defining diversity by the colonizer's standards, whiteness fails to take into account the differences within

100. *Id.* at 2215.
101. To be clear, diversity became the focus of affirmative action policies in *Bakke*.
102. Nelson, *supra* note 8, at 319–28.
103. T. Elon Dancy II, Kirsten T. Edwards, & James Earl Davis, *Historically White Institutions and Plantation Politics: Anti-Blackness and Higher Education in the Black Lives Matter Era*, 53 URB. EDUC. 176, 179 (2018).
104. Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 THEORY INTO PRACTICE 11, 13 (2016).
105. *Id.*
106. Lawrence Blum, *Affirmative Action, Diversity, and Racial Justice: Reflections from a Diverse, Non-Elite University*, 14 THEORY & RES. EDUC. 348, 351 (2016).
107. Nelson, *supra* note 8, at 326–27.
108. Blum, *supra* note 106, at 351–52.

the blackness.[109] The diversity rationale, as implemented by the white masses, aims to erase Black suffering by choosing to focus on the individual rather than our group experience.[110] This explains white people's increased need to claim and pursue diversity. As long as white people can boast and define the parameters of the term, they own it. What cannot be forgotten is that racial identities are a product of white supremacist ideology.[111] Moreover, Black people and, to that extent, diversity are under attack by whiteness.

As our American society grows less white, white people have colonized the term *diversity*. It is now being used as a co-opting tool to promote colorblind ideologies.[112] As the Supreme Court of the United States's embrace on diversity grows tighter, diversity as acknowledged in traditionally white institutions as colorblindness remains at the core of American educational culture.[113] This is true in instances of white people's efforts at overt racism *and* more broadly, liberal white agendas that embrace abstract liberalism, or the notion that one can espouse liberal ideologies while rejecting any and all concrete applications of those same liberal ideologies.[114] As discussed in the previous section, in a pre-*Brown* society diversity was frowned upon—Ada Sipuel of Oklahoma and countless others lived a harsh reality where they had to fight for even the most basic concepts of equality. Today, as long as diversity can be used by white supremacy to exploit Black people, it is and will be celebrated. White ideology, or whiteness, specifically as applied to education policy, remains a tool for whites to oppress Black people.[115]

Furthermore, Black students are wanted at traditionally white institutions so that the schools may fulfill abstractly liberal criteria for obtaining and retaining diverse student populations where the interests of white people are prioritized, promoted, and achieved. Simultaneously, however, the interests of Black students are marginalized, shunted, or otherwise ignored. Diversity without social justice on college campuses, as seen through whiteness as a critical theory, is a diluted term meant to maintain rather than transform organizational norms and values that have kept systemic inequalities strong.[116] The United States's traditionally white institu-

109. *Id.* at 351.

110. *See generally* Michael J. Dumas, *'Losing an Arm': Schooling as a Site of Black Suffering*, 17 RACE ETHNICITY & EDUC. 1 (2014) (describing schools as a site of collective social struggle and strife for black people in the United States).

111. Goldstein Hode, *supra* note 50, at 171.

112. Glasener, *supra* note 6, at 3.

113. Vue, *supra* note 11, at 869.

114. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 76 (5th ed. 2017) (defining and applying the concept of abstract liberalism).

115. *See generally* David Gillborn, *Education Policy as an Act of White Supremacy: Whiteness, Critical Race Theory, and Education Reform*, 20 J. EDUC. POL'Y 485 (2005); *see also* Steven L. Nelson, *Racial Subjugation by Another Name? Using the Links in the School-to-Prison Pipeline to Reassess State Takeover District Performance*, 9 GEO. J. L. & MOD. CRIT. RACE PERSP. 1 (2017); Steven L. Nelson, *Could the State Takeover of Public Schools Create a State-Created Danger? Theorizing at the Intersection of State Takeover Districts, the School-to-Prison Pipeline, and Racial Oppression*, 27 NAT. BLACK. L.J. 1 (2018); Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked Out of Challenging Disproportionately Low Charter School Board Representation: Assessing the Role of the Federal Courts in Building a House of Cards*, 12 DUKE J. CONST. L. & PUB. POL'Y 153 (2016) (arguing that state policies requiring the reconstitution of schools and school districts result in the racial subjugation of black students, parents, and communities).

116. Glasener, *supra* note 6, at 6.

tions have adopted the business case for diversity model.[117] According to Goldstein, Hode, and Meisenbach, the business case for diversity is how corporate America saw increased diversity as a way to use minorities to achieve advantages in a global marketplace.[118] If Black students wanted access to selective and highly selective colleges, this meant that white students could benefit and be prepared to compete in the global marketplace. Non-white, racialized identities, therefore, become the property of whiteness.[119] As white people continue to battle between opposing affirmative action as a tool for the restitution and reparation of Black people and embrace diversity as a benefit to white interests, a specific group of colleges and universities stand to benefit—HBCUs.

The Ayers Case: A Case Study of the Antiblackness of Affirmative Action

In the decades that followed *Brown*, many educational entities took advantage of the Supreme Court of the United States's all but deliberate speed decree. School districts and public colleges and universities schemed to thwart desegregation efforts, and the State of Mississippi's very own higher education governing board was no different.[120] As evidence of our previous statement, by the middle of the twentieth century, eight institutions of higher education served the State of Mississippi. See Table 1 for more details on these schools.

117. *Id.* at 8.
118. Goldstein Hode, *supra* note 50, at 164.
119. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1742 (1992).
120. *Ayers v. Allain*, 674 F. Supp. 1523, 1525 (D. Miss. 1987).

Table 1

Name	Year Established	Location
The University of Mississippi	1844	Oxford, MS
Alcorn State University (Originally Alcorn College)	1871	Lorman, MS
Mississippi State University (Originally Mississippi Agricultural and Mechanical College)	1878	Starkville, MS
Mississippi University for Women (Originally the Industrial Institute and College)	1884	Columbus, MS
The University of Southern Mississippi (Originally Mississippi Normal College)	1910	Hattiesburg, MS
Delta State University (Originally Delta State College)	1924	Cleveland, MS
Jackson State University (Originally Jackson State College)	1940/1877	Jackson, MS
Mississippi Valley State University (Originally Mississippi Valley State College)	1946	Itta Bena, MS

According to *Ayers v. Allain*, until 1962 Black students could only attend one of the three historically Black universities in Mississippi: Alcorn State University, Jackson State University, and Mississippi Valley State University.[121] Throughout the 1960s, Mississippi's public universities would begin to admit students other than each campus' dominant race, but differences between the state's HBCUs and traditionally white institutions remained.[122] The *Meredith v. Fair* decision allowed for James Meredith, a Black man, to not only become the first Black student to enroll at the University of Mississippi but to be the first Black student to enroll at a

121. *Id.* at 1529.
122. *Id.* at 1525.

traditionally white institution in Mississippi.[123] Once again the federal court needed to intervene to address an issue of racism in the admissions practices of an institution on higher education. In 1969, the U.S Department of Health, Education, and Welfare asked the State of Mississippi to submit a plan of action detailing how the state would dismantle *de jure* segregation in its higher education system.[124] However, this plan, through its multiple iterations, did not prove to address educational racism in Mississippi's segregated higher education system, forcing Black Mississippians to seek litigation against the State of Mississippi for violation of federal laws by supporting and maintaining *de jure* segregation in the State's institutions of higher education.

In 1975, James Ayers and other Black Mississippians filed a class-action suit alleging that Mississippi and its higher education governing board, known as the Board of Trustees of State Institutions of Higher Learning, maintained a racially segregated system of higher education.[125] The *Ayers* litigation proceeded for over twenty-five years, and its remnants can be felt today at Alcorn State University, Jackson State University, and Mississippi Valley State University.[126] There are three reasons why the various iterations of *Ayers* exhibit antiblackness. Firstly, the time taken for the original case to go to trial coupled with following years of retrial allowed for white people to set the pace of remedy, which is similar to desegregation efforts post-*Brown*.[127] Also, certain ramifications of the litigation, such as the standardized admission policy, unfairly and disproportionately disadvantaged HBCUs. Furthermore, although white people in Mississippi, specifically those in charge of the state's institutions of higher education, were the alleged racists, HBCUs could only receive the majority of funding resulting from the *Ayers* settlement if white students occupied ten percent of the enrollment of each respective HBCU.

Months after the original filing in which the plaintiffs called out the State of Mississippi and its higher education governing board for violating the Fifth, Ninth, Thirteenth, and Fourteenth Amendments as well as civil rights legislation, the United States intervened as a plaintiff in the *Ayers* Case.[128] Instead of going to trial, a majority white male state legislature and governing board were given the opportunity to remedy their wrongs, leading to the creation of mission statements distinguishing the purpose of each public university in the state, and the State, thereafter, claimed that it had eradicated laws pertaining to race and higher education admis-

123. *Id.* at 1529.

124. Molly L. Mitchell, *A Settlement of* Ayers v. Musgrove*: Is Mississippi Moving Towards Desegregation in Higher Education or Merely a Separate But 'More Equal' System*, 71 MISS. L.J. 1011, 1013 (2002).

125. *Id.* at 1011.

126. Laurence Parker, *From* Brown *to* Ayers v. Fordice*: The Changing Shape of Racial Desegregation in U.S. Higher Education*, 13 J. EDUC. POL'Y 669, 701 (1998).

127. *See generally* Steven L. Nelson & Alison C. Tyler, *Examining* Pennsylvania Human Relations Commission v. School District of Philadelphia: *Considering How the Supreme Court's Waning Support of School Desegregation Affected Desegregation Efforts Based on State Law*, 40 SEATTLE U. L. REV. 1040 (2017) (discussing how the Supreme Court of the United States' delay tactics, a result of its waning support, allowed for white people to resist desegregation and ultimately led to the end results of a civil rights lawsuit looking dissimilar to the plaintiffs' initial request for relief).

128. *Ayers*, 674 F. Supp. at 1524.

sion.[129] Twelve years after the original filing, the U.S. District Court for the Northern District of Mississippi finally heard the case and referenced two previous cases—*Bazemore v. Friday*,[130] which considered student choice and *Green v. County School Board of New Kent County*,[131] a case pertaining to eradicating policies that upheld segregated education.[132] Based on these previous cases, along with the State's claim that it removed segregative laws coupled with the court's claim that students had freedom to choose the university of choice, the Mississippi District Court ruled in favor of the State and the Fifth Circuit Court of Appeals upheld that decision.[133]

However, the Supreme Court of the United States disagreed and asserted in *United States v. Fordice* that voluntary student choice and race-neutral laws and admission policies do not abolish segregated higher education systems. [134] The Supreme Court of the United States, moreover, found four policies that were remnants of *de jure* segregation in institutions of higher education in Mississippi.[135] The first policy dealt with admission policies that excluded Black students from predominately white institutions (PWI).[136] The second policy pertained to the missions of the eight public universities.[137] While the University of Mississippi, Mississippi State University, and the University of Southern Mississippi were all designated as comprehensive universities, no state HBCU held the designation as a comprehensive university, a *de facto* limitation on the resources that Black universities received.[138] Thirdly, the number of duplicated programs between the HBCUs and PWIs continued *de jure* segregation.[139] Fourthly, the Court questioned the need for eight public universities in the state.[140] The Supreme Court of the United States sent the case back to lower courts.[141]

However, two problematic assertions come from *Fordice*. The first is, upon remand to the Fifth Circuit Court of Appeals, the lower court ruled that a standard admission policy for Mississippi's eight public universities was necessary.[142] However, such a change would drastically affect Black student's access to higher education within the state.[143] It would also lead to increased competition between the

129. John Michael Lee, Jr., United States v. Fordice: *Mississippi Higher Education Without Public Historically Black Colleges and Universities,* 79 J. NEGRO EDUC. 166, 168 (2010); *see also,* Mitchell, *supra* note 124, at 1015.
130. Bazemore v. Friday, 478 U.S. 385 (1986).
131. Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968).
132. Lee, *supra* note 129, at 168.
133. *Id.*; *see also*, Mitchell, *supra* note 124, at 1017.
134. United States v. Fordice, 505 U.S. 717 (1992).
135. *Id.* at 733.
136. *Id.* at 733–38.
137. *Id.* at 739–41.
138. *Id.* at 740.
139. *Id.* at 738–39.
140. *Fordice*, 505 U.S. at 741–42.
141. *Id.* at 743. To our overarching point, the Supreme Court rejected the idea of creating black enclaves that would presumably be free of harassment and racism at the hands of white people.
142. Ayers v. Fordice, 879 F. Supp. 1419, 1481 (N.D. Miss. 1995).
143. *Id.*

HBCUs and PWIs, competition that HBCUs could neither afford nor win.[144] Mississippi HBCUs catered to underserved populations, and continue to do so, and attempts to alter admission policies did not benefit that population.[145] Black students would also stand to lose from the change, and it would have a negative effect on Black Mississippians' finances, job placement rates, and well-being. Once again, Black citizens were to receive the short end of the stick in a matter in which the original aim was to reprimand a racist higher education system.

In addition, the Supreme Court of the United States claimed that Mississippi had too many public universities given its population size and economic makeup.[146] The logical next step to this argument was that HBCUs had outlived their pre-*Brown* purposes.[147] Such an assertion reproduces whiteness for it claims that HBCUs are no longer needed. Moreover, this argument suggests, incorrectly, that traditionally white institutions can or will accommodate Black students' individual and collective cultures in the same ways that (or perhaps better than) HBCUs accommodate the interests of Black students. Just as white people challenged affirmative action, prompting changes in the intent and impact of such policies not even three full decades after the policies' enactments, the Supreme Court of the United States put forth the idea that any successful institution aimed at sustaining the culture or collective interests of Black peoples should be eliminated. If the Supreme Court of the United States found remnants of *de jure* segregation, it should have been apparent that many Black Mississippi students only had three choices within the state and eliminating either Alcorn State University, Jackson State University, or Mississippi Valley State University would have grave consequences for the Black community.

Shortly after the beginning of the twenty-first century, the parties in the *Ayers* case reached a settlement.[148] Attempts at settlement were unsuccessful in the early to mid-1980s and the early and later 1990s.[149] The agreed upon settlement consists of $503 million that will be paid to Mississippi's HBCUs until 2022, of which $245 million has gone towards academic programs, $75 million to capital improvements, $55 million in public endowment funds, $35 million in private endowment funds (a fund of which the Mississippi higher education board of trustees has failed to raise), and $83 million toward case-related fees.[150] To remain in the scope of this paper, we only focus on three major actions that have come from this settlement. While a number of academic programs—bachelor's, master's, and doctoral—were added to the three public Mississippi HBCUs, these programs are duplicates of what were already established at the state's traditionally white institutions.[151] The result of the *Ayers* case was that HBCUs saw their academic offerings

144. Lee, *supra* note 129, at 169.
145. *Fordice*, 505 U.S. 717 at 741–42.
146. *Id.* at 742 (suggesting that the closure of some schools might alleviate the State of Mississippi's discriminatory admissions policies).
147. Mitchell, *supra* note 124, at 1019.
148. Ayers v. Thompson, 358 F.3d 356, 359 (5th Cir. 2004).
149. *Id.*
150. *Id.*; *see also*, Mitchell, *supra* note 124, at 1019.
151. *Thompson*, 358 F.3d at 361.

expanded and bolstered, but traditionally white institutions held on to nearly all of their academic programs.[152] Also, Jackson State University's designation changed from an urban university to a comprehensive university; the board did not change Jackson State University's mission statement nor did the HBCU receive the same amount of funding for its comprehensive status unlike the comprehensive, traditionally white institutions in the state.[153] Worst of all, Mississippi's HBCUs faced requirements to recruit and retain a student body that is at least 10% white for at least three consecutive years.[154] Also, Alcorn State University, Jackson State University, and Mississippi Valley State University were to use other-race marketing and recruitment, employ other-race recruiting staff, and award other-race student scholarships.[155] The *Ayers* settlement funding depended on these *other-race* requirements.[156] White people stood to benefit from their historical and contemporary bigoted actions, and these benefits accrued at the expense of Mississippi HBCUs.

History indeed repeated itself in the *Ayers* litigation. The Supreme Court of the United States' lack of guidance and the State of Mississippi's lack of urgency (or simple will to act) resulted in the outcomes of *Ayers* repeating the outcomes of *Brown*; when all was said and done, more was said than done, with the exception of positive outcomes for white people. For comparison's sake, we offer the following points. Firstly, the Supreme Court of the United States ruled that "separate but equal" was unconstitutional and American schools had to desegregate.[157] Secondly, in lieu of establishing a timeframe for states to desegregate public education, the Supreme Court of the United States vaguely let the interest of white people dominate by stating that desegregation would occur with "all deliberate speed"[158] and, more importantly, that desegregation would move at a pace that would not disrupt the public's expectations.[159] Ultimately, the federal government allowed the issues in the *Ayers* case to linger until the plaintiffs and other watchdogs tired, allowing for the end results to hardly resemble the original requests for relief.[160] The *Ayers* litigation mirrored, in many ways, the federal government's double talk on desegregation. In all, the Supreme Court of the United States appears to come to the defense of Black Mississippians by calling out Mississippi's segregated higher education system, yet its implications negatively affected Mississippi's Black universities and allowed for white people to determine how long the litigation would proceed as well as the length of time to reach a settlement. The interests of white people were repeatedly courted and privileged.

---

152. *Id.*
153. Mitchell, *supra* note 124, at 1021.
154. *Thompson*, 358 F.3d at 366.
155. *Id.*
156. *Id.*
157. Brown v. Board of Education, 347 U.S. 483, 495 (1954).
158. Brown v. Board of Education, 349 U.S. 294, 301 (1955).
159. *Id.* at 300. The Court ordered that the desegregation of public schools should occur at a pace that is acceptable for public and private interests. Moreover, the Court suggested that the desegregation should happen as soon as practicable, suggesting that immediacy was not of the Court's utmost concern.
160. *See* Nelson*, supra* note 127 (explaining how a desegregation case ended without any focus on desegregation).

IV. THE INTEREST CONVERGENCE THESIS AND THE AFFIRMATIVE ACTION DEBATE

The decision in *Brown v. Board of Education* was a radical break from the Supreme Court of the United States's history of denying Black children access to the better-supported schools that white students attended. Indeed, Professor Derrick Bell asserted that the Supreme Court of the United States's decision in *Brown* was most motivated by the United States' need for credibility in the fight against communism.[161] Furthermore, *Brown* maintained the illusion of potential for Black soldiers returning from World War II.[162] Finally, the *Brown* decision paved the way for the industrialization of the South.[163] Aside from Professor Bell's critique, other scholars have argued that the *Brown* decision rested on inadequate and conflicting social science data rather than the principle that racial segregation was inherently a denial of equality for Black people who are the targets of state-sponsored segregation.[164] Despite these critiques, *Brown* has become a linchpin for Black litigants (and others) pursuing civil rights claims. Litigants' overreliance on and heralding of *Brown* persists although the Court's effort to desegregate public schools and equalize educational opportunities and outcomes for Black students has failed.[165] The Supreme Court of the United States's decision in *Brown* appears unassailable in contemporary academic writings. That *Brown* is untouchable neglects the fact that civil rights scholars, immediately after the *Brown* decision, critiqued the white majority's stance on civil rights policies: mostly arguing that white people were not willing to sacrifice any privilege for the equality of Black people.[166]

From Professor Bell's critique of the *Brown* decision arose the interest convergence dilemma.[167] Professor Bell's interest convergence dilemma thesis can be extracted from two separate passages in his 1980 article, *Brown v. Board of Education and the Interest Convergence Dilemma*. Professor Bell states, "The interest of Blacks in achieving racial equality will be accommodated only when it converges with the interest of whites."[168] Bell later adds:

> It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least

161. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).
162. *Id.*
163. *Id.*
164. *Id.* at 520–21.
165. *Id.* at 518–19.
166. *Id.* at 522. See Professor Bell's discussion of Professor Black's response to Professor Wechsler's critique of *Brown*.
167. *See generally* Bell, *supra* note 161.
168. *Id.* at 523.

> not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.[169]

What has happened in the years after *Brown* may be most important in proving Professor Bell to be at least somewhat accurate in his assessment of the outcomes in *Brown*. Although *Brown* was and is heralded for its promise of educational equity, the case and the implementation of its decision has always faced political pushback.[170] Desegregation, the ostensible outcome of *Brown* at the primary and secondary education levels, has done little to improve the academic outcomes of Black students.[171] *Brown* and its progeny have done relatively little to improve access to equitable educational opportunities or outcomes at the primary and secondary level of education.[172] Most disappointingly, *Brown* and its progeny have not effectively desegregated public schools at the primary and secondary level. Public primary and secondary schools are no less segregated than they were in 1968.[173] As early as the 1970s, cases, such as *Milliken v. Bradley*[174], proved to be a death knell for desegregation policies as well as any other policies that aided in stymieing *Brown*-motivated desegregation activities. Moreover, these cases assured that superior educational opportunities would be reserved for whites.[175] Research suggests that the rollback of efforts to desegregate public schools at the federal level impacted more vigorous efforts to effectuate educational equity for Black students in some of the more progressive states.[176]

Critical race theory, as an analytical tool, has migrated from legal studies to educational research.[177] Much of critical race theory in education follows the appli-

---

169. *Id*.

170. *Id.* at 519.

171. *See generally* Theodore J. Davis, Jr., *The Politics of Race and Educational Disparities in Delaware's Public Schools*, 49 EDUC. & URB. SOC'Y 135 (2017) (articulating how in Delaware, a state originally party to the *Brown* lawsuits, race and racial politics continues to play a role in the diminished outcomes of black students); *see also* Nelson, *supra* note 127 (detailing how the politics of race influenced a civil rights case to the point where academic achievement was hardly an aim of the resultant consent decree).

172. *See generally* Dumas, *supra* note 104 (recounting the how black students are still dehumanized in purportedly desegregated schools post-*Brown*).

173. GARY ORFIELD, JOHN KUCSER & GENEVIEVE SIEGEL-HAWLEY, E PLURIBUS…SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (2012). For a more recent and specific study, see Stephen Kotok, Brian Beabout, Steven L. Nelson, & Luis E. Rivera, *A Demographic Paradox: How Public Schools in New Orleans Have Become More Racially Integrated and Isolated since Hurricane Katrina*, EDUC. & URB. SOC'Y (2017).

174. Milliken v. Bradley, 418 U.S. 717 (1974).

175. Bell, *supra* note 161, at 526.

176. *See generally* Nelson, *supra* note 127 (suggesting that the Supreme Court of the United States' lack of vigor in pushing the desegregation of public schools negatively impacted the state of Pennsylvania's more progressive efforts at desegregation).

177. *See generally* Gloria Ladson-Billings, *Just What is Critical Race Theory and What's It Doing in a Nice Field Like Education*, 11 INT'L J. QUALITATIVE STUD. EDUC. 7 (1998); Tyrone C. Howard, *Who Really Cares? The Disenfranchisement of African American Males in PreK-12 Schools: A Critical Race Theory Perspective*, 110 TCHR. C. REC. 954 (2008) (discussing the use of critical race theory as a research methodology and analytical framework). *But see* Nolan L. Cabrera, *Where is the Racial Theory in Critical Race Theory? A Constructive Criticism of the Crits*, 42 REV. HIGHER EDUC. 209 (2018) (arguing that the use of Critical Race Theory has been used primarily as an analytical framework—as is the case in legal studies—as opposed to a research methodology).

cation of critical race theory as an analytical tool in legal studies.[178] Interest convergence is a critical component or tenet of critical race theory.[179] Both education and legal scholars have argued that interest convergence is a prominent pathway to practical racial progress.[180] This argument seems particularly aspirational given the general lack of racial progress in schooling and educational systems in the United States (as measured by access and outcomes).[181] The prominence and unassailability of the interest convergence thesis prompted Professor Justin Driver to offer a critique of Professor Bell's arguments from his 1980 article.[182]

To date, Driver's critique is the most scathing critique of the interest convergence thesis. In particular, Professor Driver argues that the use of the interest convergence thesis artificially limits efforts to pursue racial equity.[183] Professor Driver's most notable critiques are that interest convergence ignores intragroup differences in interests, suggests that racial groups are static rather than dynamic, treats Black people and some white people as if they lack agency in the fight for civil rights, and is treated as irrefutable.[184] Driver further notes that racial remedies are limited by the interest convergence thesis. Perhaps more tongue-in-cheek, Driver hints that the arguments for interest convergence as a theory has prompted a conspiracy theory nature in Black Americans. More troublingly, Driver's overall conclusion of the article is easily read as a dismissal of Black suffering as merely a conspiracy theory.[185] Other scholars have offered more loving critiques of the interest convergence thesis. For instance, multicultural scholar and educator, Taharee Apirom Jackson, adds depth to Bell's thesis, arguing that there are four distinct forms of interest that must be explored when assessing the convergence or divergence of racial interests: material (having), emotional (feeling), psychological (thinking), and moral (doing).[186] Likewise, Dana N. Thompson Dorsey and Terah T. Venzant Chambers proffer a theory of convergence, divergence, and reclamation in which Professor Bell's interest convergence dilemma is coupled with Professor Cheryl I. Harris's whiteness as property thesis.[187] In this provocative piece, Thompson Dorsey and Venzant Chambers note that a second tenet of Bell's interest convergence thesis suggests that any civil rights advanced or won by Black

178. *See generally* Adrienne D. Dixson & Celia K. Rousseau, *And We Are Still Not Saved: Critical Race Theory in Education Ten Years Later*, 8 RACE ETHNICITY & EDUC. 7 (2005).

179. Taharee Apirom Jackson, *Which Interests Are Served by the Principle of Interest Convergence? Whiteness, Collective Trauma, and the Case for Antiracism*, 14 RACE ETHNICITY & EDUC. 435, 437 (2011).

180. *E.g.*, Sheryll D. Cashin, *Shall We Overcome–Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 280 (2005); Shaun R. Harper, *Race, Interest Convergence, and Transfer Outcomes for Black Male Student Athletes*, 147 NEW DIRECTIONS FOR COMMUNITY C. 29, 31 (2009).

181. *See generally* Tyrone C. Howard & Oscar Navarro, *Critical Race Theory 20 Years Later: Where Do We Go From Here?* 51 URB. EDUC. 253 (2016); Nelson*, supra* note 8.

182. *See generally* Justin Driver, *Rethinking the Interest Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

183. *Id.* at 157.

184. *Id.* at 165–168.

185. *Id.* at 189–197.

186. Jackson, *supra* note 179, at 439.

187. Dana N. Thompson Dorsey & Terah T. Venzant Chambers, *Growing C-D-R (Cedar): Working the Intersections of Interest Convergence and Whiteness as Property in the Affirmative Action Legal Debate*, 17 RACE ETHNICITY & EDUC. 56 (2014).

people can be and are often abrogated when these advances threaten white supremacy.[188] The primary argument in convergence-divergence-reclamation (CDR) analysis suggests, therefore, that white stakeholders—at any point—envision civil rights for Black people;[189] however, we argue that there is never benevolence and always malicious intent (or at least self-interest) when white stakeholders purport to advance Black people's civil rights. In particular, we adopt Bell's argument that white people have little or no intention or, worse, ability to imagine and comprehend the sacrifice they must make to make room for the pursuit of equity for Black people.[190]

Scholars have applied the interest convergence thesis (and other tenets of critical race theory) beyond primary and secondary education.[191] In the context of post-secondary education, the lion's share of critical race theory analyses has considered admissions (affirmative action) and intercollegiate athletics.[192] Amy and Robert McCormick's analysis of Division I athletics as interest convergence is one notable example.[193] Despite the salience of their argument, McCormick and McCormick's emphasis on the interest convergence thesis never directly addresses, evaluates, nor studies the true interests of Black student-athletes.[194] McCormick and McCormick do manage to accurately assert that the NCAA's interests guarantee that the predominately Black workforce (student-athletes in revenue generating sports) receives relatively little of the financial windfall of college athletics while, at the same time, the school and white athletic coaches and administrators profit immensely.[195] The work of Shaun R. Harper, noted scholar in critical race theory in higher education, further casts doubt on the academic experiences, outcomes, and benefits of integrated Division I athletics in the most profitable and highly-ranked athletics programs in basketball and football.[196] Without evidence of the expressed interests of Black student-athletes, we suggest that white stakeholders, rather than Black student-athletes, are privileged to determine and announce the interests of Black student-athletes. To this point, the NCAA overtly and incessantly argues that sports are not the goal of its athletes.[197] Jamel K. Donnor, however, suggests that Black students are more likely than white students to see sports as the endgame of

188. *Id.* at 61.

189. Admittedly, Thompson Dorsey & Venzant Chambers never explicitly make this argument. Here we are reading beyond the words presented by the authors. In doing so, we suggest that the article, while theoretically and logically sound, fails to account for the fact that racism is inherently irrational. Thus, it is hard of us to understand how racism would not already be cured if white people—en masse—were behaving rationally or intended to eradicate racism.

190. Bell, *supra* note 161, at 522–23. Although he is not often given credit for this, Bell's statement is the precursor to Bonilla-Silva's Abstract Liberalism Thesis.

191. *See generally* Amy C. McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL'Y 18 (2012).

192. *Id.* at 28 n.59.

193. *See id.* at 17.

194. *Id.*

195. *Id.* at 24.

196. *See* Harper, *supra* note 180, at 32.

197. McCormick, *supra* note 191, at 21.

their participation in intercollegiate athletics.[198] Although scholars have argued that the interest convergence thesis is a pathway to a more equitable existence for Black people, the work of McCormick and McCormick and others highlights the ways in which the interest convergence thesis might fail to fulfill the interests of Black people (individually or collectively), especially as compared to white interests.[199] The same issue of a lack of true interest convergence is apparent in the area of higher education admissions.[200]

Lori D. Patton asserts that the use of critical race theory in higher education must highlight the racism and white supremacy of higher education through the acknowledgement of the violent, imperialistic, and oppressive history of higher education.[201] From their respective beginnings, institutions of higher education have benefited from existing legislation to effectuate racial oppression; this is still a reality for contemporary institutions of higher education.[202] For instance, many of the purportedly most prestigious institutions of higher education were involved in or supported slavery.[203] Many of these institutions have endowments that dwarf institutions dedicated to educating Black people; these endowments are the relics of the institutions' involvement with the enslavement of Black people.[204]

HBCUs face other barriers to offering equitable educational opportunities and outcomes for their students. Historically, the federal government refused to fund or support the earliest HBCUs.[205] As such, missionaries and philanthropists supported the higher education of Black people while white institutions of higher education enjoyed the support of the federal and state governments as well as the support of missionaries and philanthropists.[206] Ironically, HBCUs' collective and individual relevance and continued existence is continuously questioned with little acknowledgement of how law and policy have aided in the oppression of HBCUs and their students.[207] White people often criticize efforts aimed at altering or destroying macrostructures that maintain the advantages and privileges that sustain disproportionately white enrollment at state-sponsored colleges and universities. Without evidence—and often against irrefutable evidence to the contrary—white litigants, such as Abigail Fisher, argue that efforts to level the playing field are reverse racism.[208] Thus, some scholars have argued that white people's recent attacks on af-

198. Jamel K. Donnor, *Towards an Interest-Convergence in the Education of African American Football Student-Athletes in Major College Sports*, 8 RACE ETHNICITY & EDUC. 45, 48 (2005).

199. *See generally* McCormick, *supra* note 191, at 31.

200. *See* Nelson, *supra* note 8 (providing more information on this topic, and constructing challenges to affirmative action policies as white people's continued interposition to equity for and inclusion of black people).

201. Lori D. Patton, *Disrupting Postsecondary Prose: Toward a Critical Race Theory of Higher Education*, 51 URB. EDUC. 315, 317 (2015).

202. *See id.* at 319–21.

203. *See generally* CRAIG STEVEN WILDER, EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES (2013).

204. *Id.*

205. Patton, *supra* note 201, at 331.

206. *Id.*

207. *Id.*

208. Jamel K. Donnor, *Lies, Myths, Stock Stories, and Other Tropes, Understanding Race and Whites' Policy Preferences in Education*, 51 URB. EDUC. 343, 344 (2016).

firmative action programs can be viewed as a strategic white racial project to subjugate Black people.[209]

There is relatively little scholarship on the impact of interest convergence on HBCUs. We will hereafter discuss the interest convergence thesis in relationship to HBCUs. We ultimately argue that future work on the interest convergence thesis must explicitly explore the core interests of Black people. We further argue that the interest convergence thesis falters in that white people never (chiefly) have the interests of Black people in mind or at heart when making decisions. Finally, we showcase how white people, especially policymakers and agenda setters, hijack, displace, and otherwise dismiss the interests of Black people. We employ the *Ayers* case, a long-running higher education equity federal lawsuit in Mississippi, as a case study. We now briefly recount the *Ayers* case having already provided a more in-depth discussion of the interplay between affirmative action policies and the subjugation of Black people.

The *Ayers* case is a relatively rare case in higher education equity. The plaintiffs in the *Ayers* case requested, as relief for state-sponsored segregation, equitable financing of HBCUs and the dismantling of admissions and recruitment policies that produced *de jure* segregation.[210] Because the *Ayers* case arrived on the federal docket near the end of the civil rights era, the argument in the case suggests that litigants realized that traditional desegregation litigation—aimed at integrating the student body of traditionally white institutions—often resulted in outcomes that were limited in scope as compared to litigation aimed at funding equity—which has a better track record of building the infrastructure necessary for sustained educational equity and quality education.[211] The result of the *Ayers* case was that both traditionally white institutions and HBCUs were required to attempt to attract students of the opposite race.[212]

However, the court's reliance on the diversity rationale neglected multiple important facts. Firstly, HBCUs had no documented or earnestly alleged history of discriminatory admissions practices against white applicants. The same could not be said of traditionally white institutions. Likewise, there was a dearth of white applicants—a nod to racism—applying for admission into HBCUs.[213] As evidence of this, HBCUs were initially designed and developed to maintain the all-white enrollment at Mississippi's traditionally white institutions. Furthermore, HBCUs were woefully underfunded, making them unattractive to white applicants. Still, the presidents of Mississippi's HBCUs had historically marketed their institutions as being a lower cost alternative to the state's traditionally white institutions for all Mississippians.[214] The ultimate solution to Black people's complaints in the *Ayers* case focused on enhancing the enrollment of white students at Mississippi's

209. *See id.*; *see also* Nelson, *supra* note 8, at 309–10.
210. Crystal Gafford Muhammad, *Mississippi Higher Education Desegregation and the Interest Convergence Principle: A CRT Analysis of the '*Ayers *Settlement'*, 12 RACE ETHNICITY & EDUC. 319, 323 (2009).
211. *Id.* at 323.
212. *Id.* at 328.
213. *Id.* at 324.
214. *Id.* at 325.

HBCUs.[215] To that end, a supermajority of the slightly more than half-billion dollars allocated to Mississippi's HBCUs as a result of the *Ayers* case was directed towards the recruitment and retention of white students at HBCUs.

Furthermore, some monies awarded after the *Ayers* settlement were open to all colleges and universities in Mississippi, even those whose policies and actions created the need for a federal lawsuit to secure the equitable treatment of Black people and HBCUs.[216] Under the settlement in the *Ayers* case, Mississippi's HBCUs could be denied their entitled funds if their respective white student enrollments fell below 10%.[217] The end of the *Ayers* case resulted in Mississippi's HBCUs receiving the lion's share—or nearly all—of the judicial sanctions.[218] On the other hand, traditionally white institutions escaped with little discipline, reprisal, or shaming for their discriminatory behaviors. At the end of the day, HBCUs were charged with effectuating the justice for which the original plaintiffs fought.[219] Despite contestation from some Black people, including some of the original plaintiffs in the *Ayers* case, the Fifth Circuit Court of Appeal referred to the state's obligation in the settlement as generous.[220]

V. THE IMPORTANCE AND POTENTIAL OF THE HBCU

HBCUs are institutions of higher learning that have a history unique to the Black community. HBCUs are colleges and universities that were founded prior to the civil rights movement, and all HBCUs have the mission of educating Black students.[221] The earliest HBCUs were established in the 1800s, and the First and Second Morrill Acts played tremendous roles in the number of HBCUs that were established through much of the later nineteenth and early twentieth centuries.[222] Moreover, the passage of the Fourteenth and Fifteenth Amendments aided in the opening of many HBCUs.[223] It was the passage of the Second Morrill Act of 1890 that allowed for, and supported, segregation in higher education.[224] According to M. Christopher Brown,

> The act specifically prohibited payments of federal funds to states that discriminated against blacks in the admission to tax-supported colleges or who refused to provide "separate but equal" facilities for the two races. It was this latter clause that led to the

215. *Id.* at 323.
216. *See* Muhammad, *supra* note 210, at 327.
217. *Id.* at 331.
218. *Id.* at 328.
219. *Id.*
220. *Id*.
221. THURGOOD MARSHALL COLLEGE FUND, *supra* note 1.
222. Nicole C. Barnett, Sydney Freeman, Jr., & Melissa L. Freeman, *Higher Education as a Field of Study at Minority Serving Institutions*, 40 W.J. OF BLACK STUD. 205, 207 (2016); *see also* M. Christopher Brown & James Earl Davis, *The Historically Black College as Social Contract, Social Capital, and Social Equalizer*, 76 PEABODY J. EDUC. 31, 34 (2001).
223. Brown, *supra* note 222, at 35–36.
224. *Id.* at 36.

> immediate establishment of [black] public land-grant institutions in seventeen of the nineteen southern states.[225]

Southern states, for agriculture was a major contributor to the economies in many former confederate states, ultimately benefitted from creating separate and unequal institutions of higher learning for Black students because they were able to further reproduce white segregationist ideology.

HBCUs also provide access to higher education for Black students and create spaces where black students benefit academically and socially; Black students are also more culturally comfortable at HBCUs.[226] There are 102 HBCUs—51 public and 51 private—located in 19 states, Washington, D.C., and the U.S. Virgin Islands.[227] Black HBCU students received 81% of bachelor's degrees and 70% of master's degrees conferred in spring 2016.[228] Moreover, HBCU enrollment is on the rise at many institutions.[229] During the 2016-2017 academic year, Alcorn State University of Lorman, Mississippi saw an increase of 38%; America's largest HBCU, North Carolina Agricultural and Technical State University, had the highest enrollment in the institution's then 127-year history, and Kentucky State University had a striking 160% increase in enrollment.[230]

HBCUs, familiar with Black culture's value of community have additionally reproduced social relationships and networks where Black people have been able to maximize social capital.[231] HBCUs have trained leaders, such as Dr. Martin Luther King, Jr., Thurgood Marshall, and Ella Baker, all of whom were civil rights leaders in the Black community.[232] HBCU-graduated leaders are so important due to being indigenous to their communities. The HBCU community often aids in leaders' abilities to connect with, influence, and lead multiple communities.[233] HBCUs afford Black people the opportunity to live in, learn in, and contribute to the diversity of the Black experience. Furthermore, Black people often embrace concepts of leadership that are divergent from the concepts of leadership that are prominent in the white community. Black leaders further understand the community's culture and history and are truly committed to adding capital within those communities, which is key in raising influence of Black institutions within the Black community.[234] HBCUs, as potentially fertile ground for growing these leaders, have the potential to contribute to the development of these leaders. Therefore, Black HBCU gradu-

---

225. *Id.*
226. Robert Palmer, *The Perceived Elimination of Affirmative Action and the Strengthening of Historically Black Colleges and Universities,* 40 J. BLACK STUD. 762, 764 (2010).
227. NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 2.
228. *Id.*
229. Paula Rogo, *HBCU Enrollment Numbers Continue to Grow Another Year*, ESSENCE (Oct. 26, 2017), https://www.essence.com/news/hbcu-enrollment-increase/.
230. *Id.*
231. Brown, *supra* note 222, at 42.
232. Palmer, *supra* note 226, at 763.
233. *See* Ijeoma E. Ononuju, *Legacy, Loyalty, and Leadership: Creating a Pipeline of Indigenous Black Educational Leaders*, 12 J. URB. LEARNING 99, 100 (2016).
234. *See id.* at 104.

ates can and do play a significant role in combating antiblack policies, especially antiblack policies in education.

Further, enrollments of underrepresented groups at state flagships and many other traditionally white institutions have declined.[235] Affirmative action bans and the Supreme Court of the United States's embrace of the diversity rationale have resulted in the greatest decrease of enrollment for underrepresented populations in undergraduate and graduate fields of study at larger traditionally white research universities.[236] Also, as the courts have limited the use of race-conscious admissions policies, Black students are less likely to apply to selective colleges and universities if race is not considered.[237] Attempts by traditionally white institutions to create alternative admissions policies to boost enrollment numbers of Black and underrepresented students have not been as successful.[238] Therefore, HBCUs have the opportunity to recruit these students. As HBCUs continue to produce leaders based on graduating large numbers of Black students and preparing these individuals to compete globally, HBCU graduate programs that focus on leadership are essential in molding current and future Black leaders that challenge whiteness and focus on the Black worldview as the dominant lens in dealing with Black success and issues.

VI. CONCLUSION

Affirmative action higher education policy will continue to be in the interest of white people for whiteness colonizes anything it feels will benefit its own group. When the historical elements of affirmative action are disregarded, antiblack policies that aim to silence and erase Black suffering are reproduced. To combat such policies, Black people must continue to reproduce an ideology that focuses solely on the Black worldview. HBCUs have great potential in this regard because of their genuine connections to Black students. HBCUs continue to educate a disproportionate number of Black college graduates and more importantly, career professionals. HBCUs are, in general, safer spaces for Black students to learn, especially individuals from low-income environments.[239] Furthermore, the HBCU network is an interwoven system made up of individuals that can be used to increase access—at the collegiate and professional level—for Black students, which is key to fighting against antiblack policies, including antiblack affirmative action policies.[240]

However, as the number of Black students at more highly selective PWIs continues to fall due to the limitations of affirmative action policies, HBCUs can use this phenomenon to increase resources from state and federal governments.[241] As

235. Glasener, *supra* note 6, at 2.
236. Garces, *supra* note 78, at 252.
237. Glasener, *supra* note 6, at 3.
238. *Id.*
239. Adam Harris, *Black College Renaissance: Students Are Once Again Flocking to HBCUs*, THE CHRON. HIGHER EDUC. (Mar. 4, 2018), https://www.chronicle.com/article/Why-Many-Black-Colleges-Are/24267.
240. *See* id.
241. Palmer, *supra* note 226, at 772.

more Black students flock to HBCUs, these institutions must be supported to be able to recruit and retain these students as well as faculty and staff. HBCU alumni and communities should also buy into being a part of the Black colleges' continued commitment to serving underrepresented peoples. Although we do not here assert that HBCUs are a place of equity and inclusion for all Black people, we do assert that HBCUs are necessary in ensuring access for Black students to higher education even in a society of antiblack affirmative action policies aimed to benefit white people.