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LETTER FROM THE EDITOR-IN-CHIEF

CATHERINE JULIETTE STANLEY

The law has always been a classroom. Every ruling teaches something about who matters. Every silence instructs. Every precedent upheld or dismantled sends a lesson about power, worth, and belonging. Volume LXIX is a chapter in a story that Howard University School of Law has been telling for generations, a story about the power of the law to affirm dignity, disrupt injustice, and demand more from the world, carried forward in the spirit of Wiley A. Branton, who understood better than most that the courtroom and the classroom were never separate endeavors. I came to that understanding hearing the stories of my own parents, Dr. Wayne and Catherine Stanley, who as children were the first to integrate their schools and sat in classrooms in the Deep South that the law had only just pried open. They understood before they could name it that education and justice have always been the same fight.

It is that understanding, and the charge of those who came before us that ignited the theme for the 22nd Annual Wiley A. Branton Symposium: *Good Trouble: Unleashing Power, Policy, and the Voice of the People in Education*. For twenty-two years, the Branton Symposium has served as a conduit for students, scholars, and advocates to engage in discussion and debate in furtherance of the ongoing fight for social justice, honoring the legacy of our beloved former dean and civil rights hero, Wiley A. Branton, and the moral charge of Congressman John Lewis.

The Symposium was the culmination of a full week of Good Trouble. On October 16, the *Howard Law Journal* and the HUSL Education Law Society opened the week with *Origins of Good Trouble*, a historical and legal primer on education and equality led by Professor Lisa Crooms, attorney Namita Brown, and HUSL third-year scholar Na'Quan Bush. On October 20, the *Journal* brought the community together for *Echoes of Good Trouble*, an open mic night of art and resistance, where poets, musicians, and storytellers took the stage in the spirit of John Lewis's call to make justice visible and untenable. On October 21, Professor Harold A. McDougall led *Educating Power from the Ground Up*, a session exploring the role of grassroots education and community-led institutions in the fight for liberation and self-determination.

The Symposium itself convened on October 23 in the Honorable Damon J. Keith Moot Court Room. The morning opened with our first panel, *Seizing the Reins of Power: From Classroom to Courtroom*, where Dean Cedric M. Powell, Professor Fred Smith, Professor Brenda Gibson, and Dr. David Johns, moderated by Professor Lia Epperson, examined the throughline from legal education to courtroom advocacy and the responsibility of lawyers to wield institutional power in service of liberation. Our second Panel, *Policy as Resistance: Engineering Advocacy from Every Angle*, brought together Attorney Danielle Conley, Professor Madiba K. Dennie, and President Danielle Holley under the moderation of Professor Tuneen Chisolm to explore how policy itself is a form of resistance and how social engineers can build advocacy in a hostile environment.

Following was a Lunch and Lecture Series that sent attendees into four simultaneous classrooms to engage with Professor Justin Hansford on defending educational freedom from censorship and historical suppression, Dr. Preston Green on educational privatization and policy reform, Professor Charise Cheney on the history of student rights and educational activism, and Professor Brenda Gibson on educational equity in the aftermath of *SFFA*.

The afternoon brought a keynote by Lisa Holder of the Equal Justice Society on education as reparations, and a fireside chat with Dean Roger A. Fairfax, Jr. and Dr. Joyce Ladner, a veteran of the Student Nonviolent Coordinating Committee who stood on the stage at the March on Washington. The 2025 Wiley A. Branton Scholar Award was presented to Jordan Bermudez, Class of 2027, whose excellence in her first year of study honored the legacy of Dean Branton.

A special note of gratitude is owed to Rachelle Domond, Executive Solicitations and Submissions Editor of the *Howard Law Journal*, whose vision, precision, and relentless dedication made this Symposium what it was. From the earliest planning stages to the closing remarks, Ms. Domond poured herself into every detail, and this *Journal* is better for it. Her closing remarks did what the best advocacy always does: they left the room changed, sending every person in attendance back into the world with a clearer sense of what it means to get into Good Trouble and a renewed commitment to do exactly that.

Because of her hard work and the dedication of the entire Editorial Board, the Symposium week, in its entirety, was a demonstration of what this institution has always known: that the work of justice is taught, practiced, and passed forward. This issue is this publication's contribution to that tradition. Since 1869, Howard University School of Law has trained generations of social engineers who have redefined justice and equality. These five pieces are proof that the work continues.

Professor Brenda Gibson opens the issue by tracing the arc from *Plessy v. Ferguson* to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (“SFFA”) through the lens of Social Dominance Theory, demonstrating that a dual and unequal system of education has never truly been dismantled, only rebranded. At a time when diversity in higher education rests primarily on the shoulders of HBCUs, Gibson argues that fully funding these hierarchy-attenuating institutions is a democratic imperative. In the absence of affirmative action and race-conscious practice, HBCUs must move to

the front lines, and to do so, they must be strengthened. The next generation of social engineers depends on it.

Associate Dean and Professor Cedric Powell's essay takes Gibson's structural argument into the classroom, insisting that how we teach determines our destiny. Powell demands that legal education reject neutrality as a professional posture and embrace Good Trouble as a pedagogical commitment. The dissents of Justice Sotomayor and Justice Jackson in *SFFA* are acts of reclamation, reframing what the law is and beginning the restoration of the Court's institutional legitimacy. Powell's charge is clear: lawyers must be trained to understand what the law should be, to teach in opposition to distorted norms, and to recognize that this moment is a third attempt at multiracial democracy, one that requires strategic disruption rather than incrementalism.

The third piece, by Professor Preston Green and Professor Suzanne Eckes, confronts what happens when the Roberts Court's expansion of religious liberty collides directly with the constitutional promise of equal access to education for every child. The Court has systematically dismantled the barrier between church and state, expanding Free Exercise rights for private religious schools while dismissing Establishment Clause concerns, leaving students and families vulnerable to exclusion by publicly subsidized institutions that claim religious liberty as a license to discriminate. This piece arrives in direct conversation with the Branton Symposium's animating charge because the classroom Powell envisions and the institutions Gibson fights to fund cannot fulfill their liberatory promise if the law permits public money to construct a separate and unequal system under the cover of religious freedom.

Dr. David Johns closes the scholarly section with a call to action that refuses the comfort of abstraction. The charge, to teach all the babies, is a pedagogical and political commitment: to demystify legal knowledge, center the marginalized as collaborators rather than case studies, challenge harmful precedent by name, and build movements alongside legal arguments. Johns demands that every person who holds the privilege of a law degree recognize it for what it

is: a responsibility to teach those whose lives are shaped by legal decisions every single day, even those who will never set foot in a law school. As someone who spent six years in a high school chemistry classroom before law school, I understand that knowledge hoarded is power wasted, and that the most transformative thing you can do with what you know is give it away.

This issue closes with a reflection from the Branton family. Wiley A. Branton's daughters, Beverly Branton Lamberson, Wylene Branton Wood, and Debra E. Branton, remind us that the Symposium is more than an academic occasion. It is a practice of *Sankofa*: reaching back to fetch what was left behind so that we may carry it forward.

It has been the highest honor of my legal education to serve as Editor-in-Chief of the *Howard Law Journal*, Volume LXIX. I leave with gratitude to my Executive Editorial Board: Josephina Nimarko, whose character and steadfastness served as the glue for this Volume, Cameran Hyde, whose precision and commitment to excellence grounded every page, Rachelle Domond, whose vision structured the impact we achieved, and Antonia Izuogu, whose consistency pushed staffers to rise to the occasion of greatness. To the senior and junior staff of the Editor Staff: your brilliance and dedication made this work possible, and I am proud to know and work with each of you. To my unwavering advisors, Professor Crichton and Professor Ifill: thank you for standing beside me and behind me, pushing me toward this moment.

Guided by the legacy this publication carries, we honor the past, confront the present, and imagine a more just future together. To all who contributed to the success of this Volume in large and small ways, thank you for making Good Trouble with me.

In Truth and Service to all,

CATHERINE JULIETTE STANLEY
EDITOR-IN-CHIEF
VOLUME 69

Hierarchy Maintenance Through
Constitutional Law: How *SFFA* Retrenches
Unequal Access to Higher Education and
Why HBCUs are Essential for Change

BRENDA D. GIBSON

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Hierarchy Maintenance Through Constitutional Law: How *SFFA* Retrenches Unequal Access to Higher Education and Why HBCUs are Essential for Change

BRENDA D. GIBSON[‡]

Introduction

In its 1954 *Brown v. Board of Education*¹ decision, the U.S. Supreme Court held that separate educational facilities for Black children were inherently unequal, which effectively ended *de jure* segregation in this country.² Significantly, the Court had been signaling this change for more than a decade, rejecting the separate but equal doctrine, codified by *Plessy v. Ferguson*,³ in several higher education decisions.⁴ For more than a decade after these seminal decisions, however, resistance to integration

[‡] Brenda D. Gibson is a Professor of Legal Analysis, Writing and Research at Wake Forest University School of Law. I am deeply grateful for the invaluable research support provided for this project by Wake Law Library Liaison, Lance Burke; Law Library research assistants, Sydney Basden, Heidi Keiderling, and Taylor Speri; and my research assistants, Christine Pangborn ('23) and Andy Harp. Special thanks to the Lutie Lytle Faculty Workshop for listening to my early ideas and providing constructive feedback on subsequent drafts. A very special thanks to the Writing as Resistance, aka W.A.R., Legal Writing Professors of Color Collective, for providing support and giving me feedback as I wrote this emotionally taxing article; to Professors Bryan Dearing and Maria Termini, who gave me such valuable feedback and encouragement as a part of the Association of Legal Writing Directors' Summer Feedback Circles; and to my Wake Law scholarship mentor, Ron Wright, for always being available to give my pieces a final review before they are offered for publication. In this Article, I capitalize "Black" and "White" to reflect their status as formal racial categories within the American legal and social framework. Treating both terms as proper nouns serves to name and deconstruct the systemic nature of racial identity, rather than treating "white" as a descriptive, invisible norm.

1. 347 U.S. 483 (1954).

2. Travis Michalak, *Separate but Equal? A Look at Michigan Public School Districts* (May 6, 2019) (Master's dissertation, Eastern Michigan University) (on file with Digital Commons at Eastern Michigan University).

3. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that racial segregation in public facilities, commonly known as "separate but equal," is permissible).

4. See generally *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that separate but equal treatment of a Black graduate and professional school students in various states was unconstitutional); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (same); *Sweatt v. Painter*, 339 U.S. 629 (1950) (same); *McLaurin v. Okl. Regents*, 339 U.S. 637 (1950) (same).

persisted.⁵ And only after the Supreme Court intervened in several subsequent desegregation cases did it seem that the White majority ideology of separate but equal had shifted.⁶

The fight for equality in education, however, continues. Despite gargantuan effort, segregation remains a threat for many of our secondary schools, and unequal access to higher education is a constant because our country has failed to successfully grapple with the issue of race and equal access to educational opportunities. Whether through racial segregation or unequal access, a dual and unequal system of education persists in America.⁷ The continued low enrollment of Black and other minoritized students at predominantly White institutions (“PWIs”)⁸ and disparate funding of historically Black colleges and universities (“HBCUs”)⁹ and their law schools are illustrative of this phenomenon in higher education. While Black students make up approximately 13% of all postsecondary enrollment in the U.S. and 53% attend PWIs, they are still underrepresented on predominantly White campuses when compared to White students.¹⁰ Moreover, according to a 2023 analysis by the

5. See Sara Rimer, *Resistance to Racial Integration*, EQUAL JUST. INITIATIVE, (Dec. 18, 2024), <https://ejl.org/news/resistance-to-racial-integration> [<https://perma.cc/89GB-EP56>] (detailing the southern states’ resistance to the Court’s mandate in *Brown* for more than a decade). Rimer writes, “[w]hile its best-remembered images are of White mobs shouting racial slurs at Black schoolchildren in Little Rock, Arkansas, and Birmingham, Alabama, the resistance was powered by a broad swath of segregationists whose tactics included legal maneuvering, school closures, intimidation, and economic reprisals as well as violence.” *Id.*

6. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958) (ordering Arkansas to follow federal court orders mandating desegregation in public schools); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (holding Virginia’s attempt to evade desegregating by closing public schools after the *Brown* decision violated the Fourteenth Amendment); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968) (holding that the district court is permitted to assess the effectiveness of the county’s desegregation plans and steps made towards achieving said plan); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19 (1969) (rejecting “deliberate speed” desegregation and ordering schools to desegregate immediately, effectively ending race based dual school systems); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (finding that district courts have broad powers to eliminate all vestiges of school segregation, including busing students); *Milliken v. Bradley*, 418 U.S. 717 (1974) (Milliken I) (holding that redistricting school zones to remedy segregation was unconstitutional absent evidence that the affected districts had engaged in segregation); *Milliken v. Bradley*, 433 U.S. 267 (1977) (Milliken II) (finding that intra-district remedial programs including compensation are permissible to address the lingering effects of segregation). It was not until the late 1960s, after the Civil Rights Act had been passed, that the Supreme Court ordered school districts in New Kent County, Virginia and Holmes County, Mississippi to develop more viable and extensive desegregation plans, which vested lower federal courts with authority to enforce *Brown II*. Thereafter, in 1971, the Supreme Court decided *Swann* which mandated busing (for both Black and White children) in Charlotte Mecklenburg County, North Carolina schools to achieve desegregation.

7. Michalak, *supra* note 2, at 2.

8. PWI is an abbreviation for predominantly White institutions. A PWI is described as an institution of higher learning where Whites account for 50% or greater of student enrollment. *Predominantly White Institutions*, ENCYCLOPEDIA OF AFR. AM. EDUC. 524–26 (ed., Kofi Lomotey, Sage Publications, Inc. 2010), <https://doi.org/10.4135/9781412971966.n193> [<https://perma.cc/2SWH-BPUQ>].

9. HBCU is an abbreviation for Historically Black Colleges and Universities. Jenn Hatfield & Monica Anderson, *A Look at Historically Black Colleges and Universities in the U.S.*, PEW RSCH. CTR. (Oct. 2, 2024), <https://www.pewresearch.org/short-reads/2024/10/02/a-look-at-historically-black-colleges-and-universities-in-the-u-s/> [<https://perma.cc/YLG8-9ATD>] (“Congress defines HBCUs as accredited institutions of higher education that were founded before 1964 and have a primary mission to educate Black students.”).

10. While calculating Black student enrollment at traditional PWIs (excluding online and private, for-profit minority-serving institutions) is complex because of variations between institutions, by definition, PWIs consist of at least 50% White students. Accordingly, while 53% of Black students attend PWIs, they generally represent less than 13% of the student populations, with the numbers being on the lower end at the more elite PWIs. POSTSECONDARY NAT’L POL’Y INST., *Black Students in Higher Education* 1 (Feb. 2025), https://pnpi.org/wp-content/uploads/2025/02/BlackStudent_FactSheet_Feb25.pdf

Departments of Education and Agriculture, “historically Black land-grant institutions received about \$12.6 billion less in state funding than other land-grant institutions between 1987 and 2020.”¹¹

In 1974, Justice Thurgood Marshall aptly noted, unless we “learn together, there is little hope that our people will ever learn to live together.”¹² In July 2023, when the Supreme Court handed down its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (“SFFA”),¹³ it not only struck down the use of race-based admission, i.e., affirmative action in higher education,¹⁴ it virtually ensured that it would be more difficult to do both of these things—learn together and learn how to live together.

After years of touting the idea that diversity was a compelling interest,¹⁵ the Court signaled a willingness to follow the shift in American society. At the very least, the Court signaled a willingness to maintain the hierarchy of the White majority. In its decision, split along conservative and liberal lines and authored by Chief Justice John Roberts, the Court effectively sounded the death knell to many of the admissions policies, diversity programs, and scholarships that countless college admissions personnel had relied on to diversify their populations.¹⁶ Following closely

[<https://perma.cc/C2FJ-7HME>]; NAT’L CTR. EDUC. STATS., U.S. DEP’T OF EDUC., NCES 2007-156, *Characteristics of Minority-Serving Institutions and Minority Undergraduates Enrolled in These Institutions* (2007), <https://nces.ed.gov/pubs2008/2008156.pdf> [<https://perma.cc/8CL5-SVK3>]. By comparison, HBCUs only enrolled about 9% of the Black student population, but accounted for 16% of bachelor’s degrees earned by Black students in 2022. Hatfield & Anderson, *supra* note 9. As to law school graduates, HBCU law schools produce approximately 25% of the law degrees earned by Black students in the United States, despite representing only 3% of all law schools nationwide. *HBCU Law Schools*, COLL. ESSAY GUY, <https://www.collegeessayguy.com/blog/hbcu-law-schools> [<https://perma.cc/Y73R-MVBV>] (last visited July 12, 2024). Of note, in 2024, the Black first-year law student population fell to 7.71% (down from 7.95% in 2023) across all ABA-Approved Law Schools. Mike Spivey & Anna Hicks-Jaco, *New Law School Admissions Data from the 2024 ABA-Required 509 Disclosures: Thoughts & Analysis*, SPIVEY CONSULTING GRP. (Dec. 18, 2024) <https://www.spiveyconsulting.com/blog-post/2024-509-data/> [<https://perma.cc/95DV-67G6>].

11. Hatfield & Anderson, *supra* note 9.

12. *Milliken I*, 418 U.S. at 783 (Marshall, J., dissenting). Indeed, science supports the importance of education in changing prejudices and biases. Jim Sidanius et al., *Social Dominance Theory: Its Agenda and Method*, 25 POL. PSYCH. 845, 855 (2004) (“Cross-sectional and longitudinal studies show that prejudice against subordinates usually decreases with increased higher education.”) (citing Lawrence Bobo & Frederick Licari, *Education and Political Tolerance: Testing the Effects of Cognitive Sophistication and Target Group Affect*, 53 PUB. OP. Q., 285 (1989)).

13. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) [hereinafter *SFFA*] (holding that universities’ consideration of race in admitting students violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964).

14. *Id.* at 231.

15. Robert A. Garda, Jr., *Students for Fair Admissions Through the Lens of Interest-Convergence Theory: Reality, Perception, and Fear*, 77 SMU L. REV. 93, 98 (2024) (noting that “[d]espite the significant benefits White students receive from educational diversity, the Court ended affirmative action”). See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (discussing the benefits of affirmative action for White students). Interestingly, *SFFA* was decided just shy of seventy years since *Brown*.

16. Scholars disagree as to whether the decision actually ended affirmative action. Compare Harvey Gee, *Unprecedented: Asian Americans, Harvard, the University of North Carolina, and the Supreme Court’s Striking Down of Affirmative Action*, 51 U.C. LAW SF. CONST. Q. 187, 189 (2024) (“Last term, the Supreme Court’s conservative Justices effectively ended the use of affirmative action . . .”), with Kimberly West-Faulcon, *Affirmative Action after SFFA v. Harvard: The Other Defenses*, 74 SYRACUSE L. REV. 1101, 1105–06 (2024) (asserting that universities only must strengthen their justification for affirmative action in admissions). I posit that if the *SFFA* decision did not end affirmative action, it certainly crippled it to the point that it is no longer a viable tool to fight against systemic racism in higher education.

on its heels, in 2024, the country re-elected Donald Trump, and the march to resegregation (or whatever the will of the White majority is) seems all but certain.¹⁷

Affirmative action and HBCUs have long been the two most widely utilized tools in achieving diversity in the disproportionately White higher education landscape. Though affirmative action admissions practices were admittedly far from perfect,¹⁸ they certainly provided a workable framework to assist in diversifying and providing equal access to higher education. Moreover, despite chronic and systemic underfunding, HBCUs have educated a large majority of Black and other underrepresented populations in the United States, thereby assisting in diversifying higher education.¹⁹ This has been particularly true of HBCU law schools and the legal profession.²⁰

In the absence of affirmative action as an admission tool and considering the historic underfunding of HBCUs, undoubtedly the landscape of higher education and the legal profession will begin to look significantly different, closer to the White monolith of old. Alarming for higher education, generally, this change is untenable for the legal academy, which is the gateway to the justice system. Without a diverse legal profession, this nation is left to repeat its history—a dual and disparate higher education system to a retrenchment of outright racism in its systems produced by its White majority.

17. All the rhetoric touting a fully “American” workforce, deportation of all Black and Brown immigrants, the threat to birthright citizenship, and the cry that Medicaid recipients should replace deported farm workers leaves little doubt that the White majority will move this country back towards less diversity in higher education and professional jobs. And for those who read this and consider me to be an alarmist, I would point those people to the fall of Rome and the Holocaust. In each instance, the belief that some horrible people would not act contrary to the interest of the country, or its citizens, led to the fall of the Roman Empire and mass killings of Jewish people in Germany, respectively.

18. See Brenda D. Gibson, *Affirmative Reaction: The Blueprint for Diversity and Inclusion in the Legal Profession after SFFA*, 104 B.U. L. REV. 123, 144–45 (2023) (discussing the complexity of affirmative action).

19. See Jasmine N. Cooper, *Battle of the Lands: The Creation of Land Grant Institutions and HBCUs – Fostering a Still Separate and Still Unequal Higher Education System*, 30 WASH. & LEE J. CIV. RTS. & SOC. JUST. 247, 252–54 (2024). Data from the National Center for Education Statistics show that HBCUs enrolled 219,327 Black people (of their 289,426 total enrollment) in 2022. See NAT’L CTR. FOR EDUC. STAT., *Digest of Education Statistics*, tbl. 313.20 (2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_313.20.asp [<https://perma.cc/9Y9L-3G43>] (including fall enrollment for degree-granting institutions (associate’s or higher degrees) that participate in Title IV federal financial aid programs, compared to the 18,580,026 total number of post-secondary students reported for that same year); NAT’L CTR. FOR EDUC. STAT., *Digest of Education Statistics*, tbl. 313.10 (2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_303.10.asp?current=yes [<https://perma.cc/A62G-H2MK>] (listing the total number of post-secondary students enrolled). As of 2025, there were more than one hundred HBCUs spanning nineteen states, the District of Columbia, and the U.S. Virgin Islands, with just over half being public institutions. *HBCU Colleges List: 107 Great Education Options to Consider*, HBCU LIFESTYLE, <https://hbculifestyle.com/hbcu-colleges-list/> [<https://perma.cc/EWB8-2DWB>] (last visited May 28, 2025). Reem Haikal, *Professors Cure, Academic Support Cares: The Potential Role of Academic Support in Increasing Graduation Rates at Law Schools at Historically Black Colleges and Universities*, 52 U. BALT. L.F. 63, 71 (2021).

20. See Cooper, *supra* note 19, at 253. The 2024 ABA Standard 509 Report reflects a total of 39,689 first-year law students, of which 3,060 (7.71%) students are Black. Of those 3,060 Black first-year students, 602 (or 19%) were enrolled at an HBCU. See A.B.A. LEGAL EDUC. & ADMISSION TO THE BAR, 2024 STANDARD 509 INFORMATION REPORT DATA OVERVIEW, (2024), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2024/2024-standard-509-information-report-data-overview.pdf [<https://perma.cc/CQ58-YMLS>].

At a time when diversity in higher education is resting primarily on the shoulders of HBCUs, strengthening and fully funding these institutions is critical.²¹ This Article makes this case. To aid in this endeavor, this Article utilizes the lens of Social Dominance Theory (“SDT”), a synthesized combination of several psychological theories that explains the interrelationship between individuals and the groups they form, particularly around race and gender, in maintaining societal hierarchies.²² By means of SDT, the Article takes a didactic look at the history of segregation—including the separate but equal doctrine of *Plessy* to the seminal *Brown* decision and its higher education forerunners that were supposed to bring us together—to better understand the current place in which we find ourselves in higher education, particularly the legal academy, and the urgency with which we must move to strengthen HBCUs and their law schools.

The Article begins in Section I with an introduction to SDT, which will be used as a tool to explain the perniciousness of segregation in American education, especially higher education (for purposes of this Article). In Section II, the Article gives an overview of segregation in education, particularly higher education, before discussing the creation, evolution, and importance of HBCUs, particularly HBCU law schools, in Section III. In Section IV, the Article briefly discusses the *SFFA* decision and how it reflects the White majority’s subjugation of Black (and other minoritized) populations,²³ before discussing those impacts on HBCUs and their law schools in Section V. Also, in Section V, the Article ponders the need to strengthen HBCUs and their law schools and examines some mechanisms to do so.

I. The Social Dominance Theory View

SDT is utilized in this Article to assist the discourse about past (and more recent) racial tensions in this country, and to make plain why these tensions will likely persist in the absence of meaningful change in how race is viewed and discussed. Through the lens of SDT, it becomes much clearer how the separate but unequal construct in higher education threatens to reemerge after *SFFA*.

To begin, race relations in this country have a storied history. Despite its reputation of being a “melting pot,”²⁴ there has long been racial tension between the majority and minority populations, especially with people

21. While changes in the dual structure of higher education, which deifies elite institutions and their graduates and largely ignores (and sometimes vilifies) all others, are needed, this Article focuses on strengthening HBCUs. Other reforms in higher education will be saved for another day.

22. JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 31 (1999).

23. Note that *SFFA* is not intended to be the focus of this Article, but it is discussed herein as a watershed event that marks a visible shift in White majority ideology and one of America’s most powerful institutions—the American judiciary—back to a time when American education was separate, but (un)equal.

24. William Alan Reinsch, *The Melting Pot Boils Over*, *CTR. FOR STRATEGIC INT’L STUD.* (Jan. 24, 2024), [https://www.csis.org/analysis/melting-pot-boils-over#:~:text=For decades%2C our historical metaphor,culture and tradition found elsewhere \[https://perma.cc/BL5W-ZTSF\]](https://www.csis.org/analysis/melting-pot-boils-over#:~:text=For decades%2C our historical metaphor,culture and tradition found elsewhere [https://perma.cc/BL5W-ZTSF]).

of African descent²⁵ in the United States.²⁶ A byproduct of this tension has been segregation, which is a tool long used to control the spaces that Black people are allowed to occupy.²⁷ While overt racism is no longer as prevalent as it once was and *de jure* segregation in education was struck down in *Brown* more than seventy years ago, America has been an expert at covertly continuing its separatist (and unequal) ways.

Social scientists have been instrumental in ferreting out some of the mechanisms used by White people to control access to spaces of power and learning.²⁸ For example, sociologist and author Katherine Beckett “exposed how political and media elites socially constructed the *war on crime* and the *war on drugs* in the latter 20th century to stoke racial anxieties and advance a conservative agenda.”²⁹ Additionally, authors Tali Mendelberg (a psychologist and political scientist), Ian Haney López (a constitutional law professor), and Dylan Bennett and Hannah Walker (political scientists) all showed in their respective writings “how strategic actors imbue race-neutral words like *fundamental rights*, *gun ownership*, *welfare*, *crime* and *criminal justice*, and *states’ rights* with racial meaning to seek political, economic, and ideological gains.”³⁰ Also, Jessica López-Espino (a legal and linguistic anthropologist) has “expose[d] how legal professionals create covert discourses to racialize and coerce obedience from parents in child welfare cases through techniques of silencing, voicing figures of disbelief and labeling their speech as lies and excuses.”³¹ In the time-honored tradition of utilizing social science theory to engage in discourse about a legal issue,³² this Article utilizes SDT to probe the persistent nature of unequal access to education in America.

25. To be consistent, I will use the term “Black people” throughout this Article. I will use the term “White people” to refer to the majority population.

26. See generally REBEKA L. MAPLES, THE LEGACY OF DESEGREGATION: THE STRUGGLE FOR EQUALITY IN HIGHER EDUCATION (2014) (discussing the relationship between the politics of racial oppression and public education in American democracy).

27. See Tia Sherée Gaynor, Seong C. Kang, & Brian N. Williams, *Segregated Spaces and Separated Races: The Relationship Between State-Sanctioned Violence, Place, and Black Identity*, 7 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCI. 50, 50–51 (2021).

28. See Deirdre Pfeiffer & Xiaoqian Hu, *Deconstructing Racial Code Words*, 58 L. & SOC’Y REV. 294, 296–97 (2024). Co-authors, social scientist Deirdre Pfeiffer and legal scholar and economist Xiaoqian Hu, point out that “[t]he legal realist movement in the early [twentieth] century and the law and society movement in the latter [twentieth] century have made it a common and honored practice to apply social science insights to legal issues.” *Id.* at 297.

29. *Id.* at 297 (citing KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1st ed. 1997)).

30. *Id.* (citing TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY (2001); IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014); Dylan Bennett & Hannah Walker, *Cracking the Racial Code: Black Threat, White Rights and the Lexicon of American Politics*, 77 AM. J. ECON. & SOC’Y 689 (2018)). We are currently seeing this tactic with the vilification of “DEI” by the White majority in America.

31. *Id.* (citing Jessica López-Espino, *Giving and Taking Voice: Metapragmatic Dismissals of Parents in Child Welfare Court Cases*, 49 L. & SOC. INQUIRY 1 (2023)).

32. *Id.* at 297 (noting that “[t]he legal realist movement in the early [twentieth] century and the law and society movement in the latter [twentieth] century have made it a common and honored practice to apply social science insights to legal issues.”).

Initially espoused in 1999 by social scientists Jim Sidanius and Felicia Pratto,³³ SDT is an integration of a number of social science theories used to explain “intergroup conflict, stereotyping, and group oppression.”³⁴ SDT was heavily influenced by personality psychology, social psychology, and political sociology, and therefore, defies description as “strictly a psychological or a sociological theory.”³⁵ Rather, SDT is described by its creators as “an attempt to connect the worlds of individual personality and attitudes with the domains of institutional behavior and social structure.”³⁶

Accordingly, SDT views all of the familiar forms of “group-based oppression, e.g., group-based discrimination, racism, ethnocentrism, classism, sexism, as special cases of a more general tendency for humans to form and maintain group-based hierarchy.”³⁷ In particular, SDT focuses on deepening the “understanding of the recurrent realities of actual human existence, including the universal realities of patriarchy, ethnocentrism, and dominance/submission.”³⁸ To that end, SDT asks the salient question, focusing on social groups instead of individual behaviors: why do human societies tend to organize as group-based hierarchies?³⁹ SDT begins with the basic premise that “all human societies tend to be structured as systems of group-based social hierarchies” with at least one “dominant” and “hegemonic” group at the top and at least one “subordinate” group at the bottom.⁴⁰ Relatedly, SDT distinguishes between two types of forces that shape group-based social hierarchies.⁴¹ Hierarchy-enhancing forces tend to reinforce and strengthen existing inequalities, while hierarchy-attenuating forces work to undermine them.⁴² Sidanius and Pratto explain, “Among other things, the dominant group is characterized by its possession of a disproportionately large share of *positive social value*, or all those material and symbolic things for which people strive.”⁴³ The dominant group is more likely than not to use their disproportionate share of positive social value to reinforce and strengthen society’s existing hierarchy, while the subordinate group works tirelessly to weaken and undermine it.⁴⁴

33. SIDANIUS & PRATTO, *supra* note 22, at 31.

34. *Id.*

35. *Id.*

36. *Id.* (explaining that SDT is a synthesis of several well-recognized models, listing the most important sources as “(a) authoritarian personality theory, (b) Rokeach’s two-value theory of political behavior, (c) Blumer’s group positions theory, (d) Marxism and neoclassical elite theories, (e) results from political attitude and public opinion research, (f) social identity theory (SIT), and (g) modern thinking within evolutionary psychology.”).

37. Sidanius et al., *supra* note 12, at 846.

38. *Id.* at 847.

39. *See id.* at 846–47 (contrasting theories that ask more individualistic questions such as why people are prejudiced, or why they discriminate, or why they hold a certain belief about justice and fairness).

40. SIDANIUS & PRATTO, *supra* note 22, at 31.

41. *Id.* at 38.

42. *Id.*

43. *Id.* at 31.

44. *See id.* at 43.

SDT provides an important theoretical context to the continued unequal access to higher education that presents in America. First, SDT recognizes the strong relationship between “chronic group-based oppression” and systemic, institutional, and individual discrimination.⁴⁵ Sidanius and Pratto explain:

[M]any social institutions (e.g., schools, organized religions, marriage practices, financial houses) and many powerful individuals disproportionately allocate desired goods—such as prestige, wealth, power, food, and health care—to members of dominant and privileged groups, while directing undesirable things—such as dangerous work, disdain, imprisonment, and premature death—toward members of less powerful groups.⁴⁶

Thus, under SDT, institutional discrimination (like segregation or unequal access to education in this case) is considered one of the major forces that create, perpetuate, and recreate “systems of group-based hierarchy.”⁴⁷

Furthermore, SDT recognizes that discrimination amongst groups is premised on individual social ideologies, which then inform both individual and institutional actions.⁴⁸ Sidanius and Pratto point out that this coordination occurs because people, as social creatures, share knowledge and beliefs to legitimize discrimination, most often behaving in ways that endorse those discriminatory ideologies, which results in “people support[ing] institutions that allocate resources in accordance with those ideologies.”⁴⁹ Moreover, as individuals, they distribute resources consistent with those ideologies, especially in terms of social contexts that prompt these ideologies.⁵⁰ Significantly and perhaps predictably, to ensure their survival and hierarchal status, members of the more dominant group generally act in their own best interests more than those of the subordinate group.⁵¹

Finally, SDT recognizes the part that the desire for group-based dominance plays in individuals accepting “ideologies that legitimize inequality and behaviors that produce inequality[.]”⁵² Using this construct, called Social Dominance Orientation (“SDO”), SDT parses some of the factors involved in group-based hierarchy at various levels of analysis, “including psychological orientations, the discriminatory behaviors of individuals, the legitimizing ideologies that permeate entire social systems, and the social allocations of groups and social institutions.”⁵³ SDO levels are scaled from high to low, with dominant (or majority)

45. Sidanius et al., *supra* note 12, at 847.

46. *Id.*

47. *Id.* (noting that institutions control the distribution of resources on a far larger scale and more stable basis than individuals).

48. *Id.*

49. *Id.*

50. *Id.* at 848.

51. *Id.* (calling this “phenomenon” behavioral asymmetry).

52. *Id.*

53. *Id.*

population members having higher SDO than those of subordinate (or minority) populations.⁵⁴ Interestingly, social dominance theorists find that SDO levels are sensitive to both “transitory and chronic differences in perceived social power” between subordinate and dominant social groups.⁵⁵ Numerous experiments have illustrated this sensitivity: (1) in one experiment, scientists found that people higher in SDO tended to be most discriminatory against the out-group, especially when the in-group was “one with which they could highly identify”; (2) in another experiment, results showed that people, regardless of their position on the SDO scale, seemed equally discriminatory until they were put under group threat; but once under threat, “high-SDO people became highly discriminatory and low-SDO people failed to discriminate”; and (3) in a third type of experiment, researchers found that once negative perceptions of immigrants were reduced, prejudice against them was reduced by those low in SDO, but no reduction occurred after such an intervention for those high in SDO.⁵⁶

In sum, SDT explains in and out-group dynamics and how they affect institutions in America, particularly why the U.S. Supreme Court—as one of the institutions built by and upon White majority ideology—acted to preserve White homogeneity and the existing hierarchy in America in *SFFA*. SDT’s synthesized theoretical framework provides startling insight into segregation of old and continued unequal access to higher education— “[f]rom the creation of anti-literacy laws, HBCUs in the North founded by White missionaries to spread the Gospel, Southern states refusing to integrate, to federal and state governments continuing to control the funding of many HBCUs”⁵⁷—and why White control over Black literacy and education still persists today. Finally, SDT provides insight into higher education’s critical role in changing the narrative that surrounds race in America, and its importance in challenging existing hierarchies in this country and creating a diverse and inclusive society.

II. Overview of Segregation in American Education

Having introduced SDT and the role it plays in understanding the racial dynamics of segregation, this section discusses the history of segregation in American education, from the “separate but [un]equal” of *Plessy v. Ferguson*,⁵⁸ to its demise in *Brown* and its higher education forerunners. Additionally, this section also discusses the creation and evolution of HBCUs, which were created as an instrument of segregation but have become a powerful tool in diversifying higher education and professional occupations, most particularly, the legal profession.

54. *See id.* at 850.

55. *Id.* (“For example, we have predicted and found that members of dominant groups (e.g., European Americans), because of their privileged positions within the social hierarchy, tend to have higher levels of SDO than do members of subordinate groups (e.g., African Americans . . .).”).

56. *Id.* (noting that those with higher SDO are usually White or European Americans).

57. Cooper, *supra* note 19, at 254.

58. *Plessy*, 163 U.S. at 552.

A. Education in America Before Brown

Viewing the history of education through the SDT lens, it is not surprising that education, as with other inalienable rights guaranteed by the U.S. Constitution, was once a privilege enjoyed by only free White men, who have long been the majority population in America that subjugated all others, including White women and Black people.⁵⁹ Because education has long been viewed as the pathway to success,⁶⁰ access has been closely guarded by the White male majority,⁶¹ who controlled its distribution to other subordinate groups.⁶² Access to higher education was even more closely guarded.⁶³

SDT demonstrates how dominant groups actively shape and impose their ideological beliefs about minority groups, systematically embedding these beliefs into society's foundational institutions and power structures.⁶⁴ American history starkly demonstrates this dynamic: the White majority systematically embedded their racist ideologies into the very foundations of the institutions they created. For example, the White majority codified into law and policy the fabricated notion that Black people possessed inferior intellectual capabilities and work ethic compared to White people.⁶⁵ Sadly, if you speak with some White people today, they still hold these views.

Further, in light of the relationship between individual and group ideology and society's systems and institutions, it is not surprising that, even before *Plessy*, U.S. courts, as hierarchical-maintaining institutions built by White majority ideology, upheld institutional segregation as non-violative of the Fourteenth Amendment's Equal Protection Clause.⁶⁶ SDT also explains the ebb and flow of seeming progress amongst subjugated groups: although there were times in history when the subjugated group seemed to be making progress, the majority group acted to reinforce and

59. See Benjamin Justice, *Schooling as a White Good*, 63 HIST. EDUC. Q. 154, 156 (2023) (arguing that education has been "a White good, designed to promote White advantage."); See generally Francis E. Kendall, *Understanding White Privilege* 1 (2002), <https://www.american.edu/student-affairs/counseling/upload/understanding-white-privilege.pdf> [<https://perma.cc/B385-LWZF>] (examining White privilege and its purposeful construction); see also Cooper, *supra* note 19, at 287.

60. See Justice, *supra* note 59, at 165; see also Cooper, *supra* note 19, at 250–51.

61. See Kendall, *supra* note 59, at 1.

62. While tax-supported schools for White girls began as early as 1767 in the North (though it was optional), Kathryn Kish Sklar, *The Schooling of Girls and Changing Community Values in Massachusetts Towns, 1750–1820*, 33 HIST. EDUC. Q. 511, 525 (1993), in colonial America, White women were not allowed access to higher education. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783* 196–97 (1st ed. 1970). Most educational opportunities were preparatory schools to teach young White women how to fit into their place in society. Barbara Matthews, *Women, Education and History*, 15 THEORY INTO PRAC. 47, 47–48 (1976). Oberlin College, founded in 1833, was the first coeducational institution of higher learning to admit White women in 1837, a full 200 years after Harvard College opened to educate White men. FAUSTINE C. JONES-WILSON ET AL., *ENCYCLOPEDIA OF AFRICAN-AMERICAN EDUCATION* 339 (1996). Anecdotally, Oberlin College offered admission to Black men in 1835. *Id.*

63. See Cooper, *supra* note 19, at 251.

64. See SIDANIUS & PRATTO, *supra* note 22, at 123–25.

65. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* xix–xx (2001).

66. See, e.g., *Roberts v. City of Bos.*, 59 Mass. (5 Cush.) 198 (1850) (upholding school segregation and establishing the "separate but equal" principle later adopted by the U.S. Supreme Court in *Plessy v. Ferguson*); *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment's Equal Protection Clause did not prohibit private racial discrimination, thereby limiting the Amendment's reach before *Plessy*).

maintain the existing hierarchy.⁶⁷ As seen in American history, during Reconstruction (1865-1877), freed slaves made some progress—participating in politics and even attending integrated schools.⁶⁸ However, southern legislators (the White majority) began adopting laws that limited Black opportunity, including access to education.⁶⁹ State constitutional changes and other Jim Crow laws or Black Codes decimated Black people’s participation in politics and banned their participation in public education.⁷⁰

These racist ideologies birthed and justified a dual education system that perpetuated inequality throughout the U.S.⁷¹ As James D. Anderson explained, this system created parallel tracks: one for “democratic citizenship” and another for “second-class citizenship.”⁷² The “normal schools” established in the South to train Black teachers—themselves limited to basic education—became the foundation for the separate and unequal system of higher education that would persist in the United States.⁷³

America’s dual education system persisted and was “codified” by the hierarchy-maintaining U.S. Supreme Court in *Plessy*. In *Plessy*, the Court reaffirmed the color line that had become firmly entrenched by the White majority in American society—a line drawn because of fear and misunderstanding of Black Americans—and an ideology that promoted White superiority and Black inferiority.⁷⁴ As Rebeka Maples notes in her book, *The Legacy of Desegregation: The Struggle for Equality in Higher Education*, “[t]he *Plessy* . . . decision virtually helped to create a ‘racial caste’ system for separate-and-unequal development on all levels of participation” in American society.⁷⁵ Though the decision legalized the separation of people by race or color in the context of public transportation, *Plessy*’s mandate extended to other contexts, with an “overriding” intention to limit Black people’s participation in public education.⁷⁶

67. See SIDANIUS & PRATTO, *supra* note 22, at 300.

68. MAPLES, *supra* note 26, at 15.

69. PAUL FINKELMAN, *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896 TO PRESENT: FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY* 121 (2009). After the removal of federal troops from the South in 1876, many states rewrote their constitutions to include poll taxes and literacy tests that resulted in a shocking reduction in the number of Black voters. MAPLES, *supra* note 26, at 16.

70. MAPLES, *supra* note 26, at 16. By 1897, there were primarily three regional varieties of segregation: (1) Southern, which focused on access to public facilities and housing location; (2) Northern, which was best known for its rigid residential segregation; and (3) Western, which was best known of restrictions on land ownership and control over voting rights. See FINKELMAN, *supra* note 69, at 187; see also Eleanor Marie Brown, *On the Evolution of Property Ownership Among Former Slaves, Newly Freedman*, PENN. ST. [DICK.] L. RSCH. PAPER 101, 131 (2016); see also Nedra Rhone, *Black homesteaders*, THE ATLANTA J.-CONST. (Feb. 21, 2021), <https://www.ajc.com/life/in-decades-after-civil-war-promise-of-west-lured-black-homesteaders/PPBJ663JCJBENET32SAT55FUGY/> [<https://perma.cc/4535-TL5R>].

71. PATTERSON, *supra* note 65, at xvii. Significantly, because White people were far more interested in the “separate” part, educational facilities and systems for Black people were most often unequal.

72. MAPLES, *supra* note 26, at 91.

73. *Id.* at 15–17; see Cooper, *supra* note 19, at 287 (explaining that HBCUs in the South were initially founded as “normal schools”).

74. MAPLES, *supra* note 26, at 17.

75. *Id.* at 17–18 (noting that “historians concur that ‘separate-but-equal’ actually meant “separate-but-unequal””).

76. *Id.* at 17.

In sum, the systemic entrenchment of segregation in public education served as a cornerstone of Jim Crow, devastating the lives of over ten million Black Americans through ruthless social, economic, and political oppression that permeated every aspect of life across the South and border states.⁷⁷ Significantly, many had hoped that dismantling *de jure* segregation in education would be the beginning of freeing both Black and White people from racist oppression.⁷⁸

B. *Brown v. Board of Education* and Higher Education Forerunners: The End of Legal Segregation

Despite signs that many White people in the North and other areas of the country (except the South) were cooling to the segregationist ideologies of the past, *Plessy* continued to be the law of the land until the U.S. Supreme Court overruled it in *Brown v. Board of Education* on May 17, 1954.⁷⁹ However, change was inevitable as industrialization replaced an agricultural economy and World War II soldiers, who had fought together irrespective of race, returned from war.⁸⁰ Even more saliently, White majority ideologies were shifting as more of the White underclass gained access to higher education.⁸¹ As individual ideologies shifted, explicable, group and institutional ideologies began to shift as well.⁸²

Between 1938 and 1950, the Supreme Court issued a series of landmark decisions that systematically dismantled segregation in higher education. In *Missouri ex rel. Gaines v. Canada* (1938),⁸³ the Court rejected Missouri's practice of sending Black students to out-of-state schools rather than admitting them to White institutions, holding that states must provide substantially equal educational opportunities within their borders.⁸⁴ A decade later in *Sipuel v. Oklahoma State Regents* (1948),⁸⁵ the Court reinforced this principle, ruling that Oklahoma's hastily created separate law school for Black students—merely classrooms in the State Capitol—failed to provide equal educational opportunity.⁸⁶

77. *Id.* at 18. Patterson notes that after years of educational disenfranchisement, some wondered whether they were "as Whites maintained, inadequate or inferior." PATTERSON, *supra* note 65, at xvi–ii.

78. See PATTERSON, *supra* note 65, at xviii. Here, it is assumed that Whites are also oppressed by "the curse" of their racist perceptions. *Id.* at 12 ("Racial segregation—and the inequality that had long been associated with it—was an evil for people of all colors.").

79. *Brown*, 347 U.S. at 494–95.

80. See FINKELMAN, *supra* note 69, at 167.

81. Susan Pace Hamill, *A Moral Perspective on the Role of Education in Sustaining the Middle Class Symposium on the Rise & Fall of the Middle Class: Essay*, 24 NOTRE DAME J. L., ETHICS, & PUB. POL'Y 309, 314–15 (2010). SDT embraces the role that education plays in hierarchy-attenuating behavior in those with a high Social Dominance Orientation ("SDO").

82. See SIDANIUS & PRATTO, *supra* note 22, at 32–34.

83. *Gaines*, 305 U.S. at 351.

84. In *Gaines*, plaintiff Lloyd Gaines was a Black graduate of Lincoln University, an HBCU that was founded and attended by only Black students in Missouri. *Id.* at 342. After applying to the state's all-White university, the University of Missouri Law School, he was denied because Missouri had segregation laws in place that prohibited Black students from attending White institutions. *Id.* at 342–43. However, the state offered to pay Gaines' tuition at an out-of-state law school, but he refused. *Id.* at 353.

85. *Sipuel*, 332 U.S. at 632–33.

86. *Id.* at 632. Plaintiff Ada Sipuel, a Black student, was denied admission to the only state-supported law school in Oklahoma at the time because of her race. *Id.* She subsequently filed suit, after refusing to attend a separate law school that Oklahoma created for Black students at Langston University, which was no more than classrooms set up in Senate rooms of the Oklahoma State Capitol. See MAPLES, *supra* note 26, at 22.

The Court delivered the final blows to “separate but equal” in higher education with *Sweatt v. Painter*⁸⁷ and *McLaurin v. Oklahoma State Regents* (1950).⁸⁸ *Sweatt* required Texas to admit Black students to its all-White law school rather than maintain a separate facility,⁸⁹ while *McLaurin* went further, holding that even when admitted, Black students could not be segregated from their White classmates as such separation inherently impaired learning and violated the Equal Protection Clause.⁹⁰

Finally, in 1954, the Supreme Court unanimously held in *Brown* that “separate is inherently unequal” in the context of secondary education.⁹¹ At the time of the Court’s decision, the shift in attitude and ideology about race relations in America, much like more recent times (but in opposite ways), had resulted in a reconstitution of the Supreme Court.⁹² Contrary to its composition during *Plessy*, the Court was composed of political liberals or moderates who had been appointed by Presidents Roosevelt or Truman.⁹³ In addition, much like some of the criticisms of the Court presently, during that time, there was criticism that the *Brown* Court no longer respected the rule of law, and the justices were being guided by personal agendas.⁹⁴ Though it seemed unlikely at the time,⁹⁵ the justices agreed on a compromise in *Brown* and delivered a unanimous decision.⁹⁶

87. *Sweatt*, 339 U.S. at 635–36.

88. *Id.*

89. Plaintiff Herman Marion Sweatt was granted admission to the all-White University of Texas School of Law after being denied admission and filing suit. MAPLES, *supra* note 26, at 22–23. The Court held that, under the Equal Protection Clause, in states where public graduate and professional schools existed for White students but not for Black students, Black students must be admitted to the all-White institutions. *Id.* Of note, Texas, like Oklahoma in *Sipuel*, attempted to provide a separate but unequal law school for Black students by creating a separate institution, a historically Black College or University now known as Texas Southern University Law School—but the Supreme Court ruled that the separate law school was not equivalent to the University of Texas School of Law. *Id.*

90. In *McLaurin*, plaintiff George W. McLaurin, a Black graduate student, was admitted to the University of Oklahoma’s graduate program in education but was segregated from the rest of his classmates. *McLaurin*, 339 U.S. at 640–41. The Court subsequently held that such segregation impaired and inhibited his ability to learn, making it unequal and unconstitutional under the Equal Protection Clause. *Id.*

91. *Brown*, 347 U.S. at 495.

92. PATTERSON, *supra* note 65, at 2 (touting “rising militancy among [B]lack[] [people],” including more than 900,000 young veterans and many others who were leaving “the Jim Crow South for jobs in the North or West,” along with increasing support of White liberals and “the activism of [Thurgood] Marshall and others who led legal campaigns for civil rights” as reasons for the shift in American race relations). Note that the more recent shift in race relations seems to be with White Americans believing that Black Americans and other underrepresented populations have unfairly benefited from social and economic programs that were meant to provide equal opportunities for all races—not just Black, White or Brown—which has resulted in backlash, much like that seen post-1965 against President Lyndon Johnson’s liberal Great Society programs, when Richard Nixon was elected. *See id.* at xxi–xxii.

93. PATTERSON, *supra* note 65, at 46–47 (explaining that “[s]ince the late 1930s, the Court had consistently upheld laws that expanded the role of government, such as the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act,” drawing complaints from those on the Right (just as liberals had complained when the Court was skewed to the Right)).

94. *See id.* at 47–49 (describing difficult personal and professional dynamics that made it difficult for the justices of the Supreme Court to find consensus in the late 1940s and the early 1950s, before the arrival of Chief Justice Warren in 1953).

95. *Id.* at 47 (noting that while the conservative Court that existed prior to 1930 was able to reach consensus in 85% of its cases, the new Left had only reached consensus in 26% of its decisions before *Brown*).

96. *Id.* at 80–87. Historians suggests that this consensus occurred because the justices knew what was at stake and were not blind to probable southern resistance to a reversal of the law on legal segregation.

Brown was a consolidated action of five lawsuits.⁹⁷ The plaintiffs in *Brown* were all Black people seeking relief from racial segregation that was characterized by a disproportionate lack of resources, resulting in low teacher pay, sub-standard facilities, and overcrowding, among other things.⁹⁸ Accordingly, they argued that separate educational facilities were inherently unequal.⁹⁹ Notably, the Topeka, Kansas lawsuit, *Brown*, which became the first listed case in the consolidated action, was the only case that rested on the psychological effect that segregation had on Black children.¹⁰⁰ To no surprise, the plaintiffs in all of the cases lost at trial level, and they were appealed to the Supreme Court.¹⁰¹ The Court was reportedly “[n]ervous about ruling on such an inflammatory issue,” so the appeal was heard twice: first, in December 1952 and again in December 1953 on an *ex mero motu* order for rehearing.¹⁰²

The plaintiffs and counsel were hopeful but anxious. The unequal distribution of resources in these cases and the plaintiffs’ losses at the trial level are easily explained by the White majority’s dominance of resources and American courts being used as a tool to maintain the existing hierarchy, respectively.¹⁰³ However, as SDT suggests, change is made possible when ideologies shift in the majority group, and this change is reflected in its institutions¹⁰⁴—in this case, the White House and the U.S. Supreme Court. At that time in history, there was also hope that the shift in ideologies of the White majority in the North would cancel out the long-held racist ideology of the White majority in the South in order to afford the subjugated Black population equal education rights.¹⁰⁵

Chief Justice Warren drafted the Court’s opinion. Though it has been described as “short and unemotional,”¹⁰⁶ it did something that no other political institution seemed willing to or capable of doing at that time in history: change the White dominance long-held in the South over

97. The first was *Briggs v. Elliott*, which grew out of abominable school conditions in Clarendon County, South Carolina. The other four suits involved similar concerns in Prince Edward County, Virginia, Washington, D.C., Wilmington, Delaware, and Topeka, Kansas. See PATTERSON, *supra* note 65, at 24–25, 27.

98. See *id.* at 23–35.

99. *Id.*

100. *Id.* Counsel for the plaintiffs’ legal arguments were buttressed by the research of well-known psychologists Drs. Kenneth and Mamie Clark that showed that segregation negatively impacted Black children. *Id.* at 34, 43–44. Though the Kansas trial court had ruled against the plaintiffs in *Brown*, concluding that the Black and White facilities in Topeka were virtually equal, one of trial court’s findings of fact paid particular attention to the psychological theories proffered by plaintiffs:

Segregation of White and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Id. at 35.

101. *Id.* at 37 (noting that none of the trial courts dared rule against *Plessy*).

102. *Id.* at 57.

103. See SIDANIUS & PRATTO, *supra* note 22, at 204–05.

104. See *id.* at 204.

105. See PATTERSON, *supra* note 65, at 37.

106. *Id.* at 65.

Black people.¹⁰⁷ Slightly more than one year later, on May 31, 1955, the Supreme Court announced its implementation guidelines in what became known as *Brown II*.¹⁰⁸ In *Brown II*, Chief Justice Warren was again brief in announcing the Court's decision. The decision provided that desegregation cases would be remanded to federal district and appellate courts in the South and border states, with directions that they implement desegregation "with all deliberate speed" through appropriate orders ensuring racially nondiscriminatory school admissions.¹⁰⁹ However, this intentionally flexible language, which was again designed to allow gradual shifts in "deeply established racial patterns in the South" and lead to eventual compliance with the new law of the land,¹¹⁰ resulted in resistance and ad hominem interpretations of just what the Court meant by "all deliberate speed."¹¹¹

Indeed, *Brown* and its higher education forerunners signaled change in America: the grip of legal segregation (also known as racism) in the South was loosened and the rigid interpretation of the Constitution would be modified to embrace the changing times.¹¹² However, these cases could not erase the harm that the dual education system had perpetrated upon Black people and arguably society writ large. To no surprise, while *Brown* ended legal segregation, ardent segregationists, holding firmly to their racist ideology, worked tirelessly to impede desegregation.¹¹³ In the South, while Black children and their parents remained hopeful that segregation would end, they found out quickly that only legal segregation had ended.¹¹⁴ Many critics of the Court's decision in *Brown* describe it as "legally weak and lack[ing] enforceability."¹¹⁵ For its proponents, the decision was an important step in the right direction, despite taking years of litigation, surviving the Civil Rights Movement, and seeing the passage of the Civil Rights Act of 1964 to bring about the reforms that the Court envisioned in 1954.¹¹⁶

107. *Id.* at 69; see *A Return to Separate but Equal? Why Who Occupies the Bench Matters*, ALL. FOR JUST. (Feb. 25, 2020), <https://afj.org/article/a-return-to-separate-but-equal-why-who-occupies-the-bench-matters/> [<https://perma.cc/C4EB-L3NX>] (explaining the Court's emphasis on the negative implications that segregation would have on African American students if it persisted and quoting Warren "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

108. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

109. *Id.* at 301; see PATTERSON, *supra* note 65, at 103.

110. PATTERSON, *supra* note 65, at 84.

111. *Id.*

112. *Id.* at 69.

113. Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 55–87 (2006). Like many of the racist tropes and pandering to fear of the unknown that we hear today, White leaders in various states railed against desegregation, balking at the thought of their children ever being educated alongside Black children. See PATTERSON, *supra* note 65, at 73.

114. See PATTERSON, *supra* note 65, at 100–13 (discussing resistance to desegregation efforts and describing the challenges faced by Black children selected for integration).

115. Cooper, *supra* note 19, at 266–67 (noting that the Court's failure to "specifically state what it meant by discrimination based on race," or "define what equality looks like or detail the parameters of what that equality would mean for the desegregation of schools," instead leaving states "with unchecked autonomy to interpret and apply the law on their own, leading to slow desegregation.").

116. See PATTERSON, *supra* note 65, at 86–146 (detailing the struggles in the courts, the work of Civil Rights activists, and finally the signing of the Civil Rights Act to bring about court-ordered desegregation). In particular, Title VI of the Civil Rights Act requires that "[n]o person in the United States shall, on the

As time would tell, the vestiges of the *de jure* segregation in education would become hard to erase. Though some ideologies of the White majority seemed to be shifting, the institutions that had been borne of those old, racist ideologies were very much still operating to maintain the hierarchies of the past. Particularly, as it pertained to higher education, despite *Brown*, the cases decided before it, and the passage of the Civil Rights Act of 1964, there was little change in the firmly entrenched dual education system that was fostered by the creation of separate institutions, once called “normal schools” (which evolved into HBCUs) for Black students.¹¹⁷

III. Segregation in Higher Education and the Evolution of HBCUs

A dual education system did not just exist in secondary education. It also existed and, to this very day, persists in higher education.¹¹⁸ Nowhere is it more apparent than in the creation and evolution of HBCUs. HBCUs, which were originally founded in the South as “normal schools” to provide a limited education for Black students,¹¹⁹ are illustrative of the actualization of the majority population’s control and disparate distribution of resources to a subordinate group. Nonetheless, HBCUs have evolved and play an important role in diminishing the hierarchy of the White majority. This role as a hierarchy-attenuating institution in America is perhaps the reason for continued public and private disparate funding, which threatens HBCUs’ accreditation and, consequently, their very existence.

A. Creation of HBCUs

As mentioned in Section II.A, for some time in our country’s history, education (including higher education) was for the elite.¹²⁰ As access to education was controlled by the White male majority, “[w]omen, Jewish people, Irish Americans, Black and Brown people were intentionally barred from entering these spaces of higher education.”¹²¹ Initially, private schools such as Oberlin College, which offered admission to women and Black people as early as 1837 and 1835, respectively, opened up opportunities for higher education to the lower echelon of society.¹²² Additionally, there were five private HBCUs established prior to the

ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Title VI of the Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2024).

117. Faith Joseph Jackson & Edith Y. Wu, *Must We Deploy Drones in the Twenty-First Century to Target Under the Radar Discrimination Against Minority Women at Law Schools at Historically Black Colleges and Universities (HBCUs)?*, 31 COLUM. J. GENDER & L. 164, 165 (2015) (noting the difference in educational purpose for White students, which was to provide knowledge).

118. See MAPLES, *supra* note 26, at 26–28.

119. See *supra* Section II.A.; MAPLES, *supra* note 26, at 17.

120. See Justice, *supra* note 59, at 156. This is not surprising, as education has been a hierarchical-attenuating institution. See SIDANIUS & PRATTO, *supra* note 22, at 178, 181–85. To maintain control, the White majority, therefore, had to restrict who was educated and to what extent. See *id.*

121. Cooper, *supra* note 19, at 251.

122. JONES-WILSON et al., *supra* note 62, at 339–40.

Civil War.¹²³ The remaining HBCUs (private and public) were established after the Civil War and the Emancipation Proclamation formally ended slavery.¹²⁴

In 1862, during a period of significant shift in political and economic ideologies, Congress passed the Morrill Act, which President Abraham Lincoln signed into law to democratize higher education by extending access beyond the wealthy elite.¹²⁵ These schools would be known as “land-grant” institutions because they were established by monies raised from the sale of federally gifted land.¹²⁶ However, the ideologies about Black people did not shift to the point that the federal government was willing to extend equality to their education.¹²⁷ Accordingly, the Act did not make provision for the education of Black people.¹²⁸ Instead, these first land-grant institutions were meant to educate “poor White workers to become a new middle class of managers”¹²⁹ and, thus, support the White majority. It was not until Congress passed the Second Morrill Act of 1890, which required states that funded or established all-White land-grant institutions through the first Morrill Act to either admit Black students or to use the new funding to create equitable higher-education institutions for Black students.¹³⁰ Notably, only six states actually created new institutions for their Black students, while “others either fund[ed] already established private Black colleges or designat[ed] existing normal schools as their second Morrill Act land-grant institution.”¹³¹

123. The first four HBCUs were founded by White people—allies who held beliefs different from the majority group and who were willing to risk their lives to educate Black people: Cheney University of Pennsylvania (1837), formerly the African Institute/Institute for Colored Youth established by Quaker philanthropist and abolitionist Richard Humphreys; the University of the District of Columbia (UDC) (1851), formerly known as the Miner School for Colored Girls (UDC, n.d.) founded by Myrtilla Miner, an abolitionist who was a leader in teacher training for free African American women; and the Ashmun Institute (1854), now known as Lincoln University, created as a private institution in Pennsylvania by Presbyterian minister and Quakers John Miller Dickey and Sara Cresson to “provide a higher education in the arts and sciences for male youth of African descent.” Cherrelle Lawrence, *Strengthening HBCU Partnerships: A Narrative Inquiry Study of HBCU Leaders’ Collaboration with External Corporate Partners* 14–15 (Mar. 11, 2024) (Ed.D. dissertation, North Carolina State University) (on file with North Carolina State Repository, North Carolina State University). Finally, the first private HBCU founded and operated by Black people through the AME Church, Wilberforce University (1856) (formerly Wilberforce College), was established in Ohio. *Id.* at 15.

124. *Id.* at 16–21 (listing HBCUs established after the Civil War).

125. Cooper, *supra* note 19, at 261; see also Lawrence, *supra* note 123, at 19. Arguably, this shift in ideology was due to the increased access to education by White women, Black people, and other minoritized populations. See *Historical Timeline of Public Education in the US*, RACE FORWARD, <https://www.raceforward.org/reports/education/historical-timeline-public-education-us> [https://perma.cc/EQ5Y-LQLF] (last visited July 17, 2025).

126. Lawrence, *supra* note 123, at 19 (The Act authorized the use of funds raised from the sale of federally gifted land to be used by the states to establish or create public universities that included within their curriculum (among the classics) technical training like agricultural and mechanical arts).

127. See Cooper, *supra* note 19, at 261–65. Note that the federal government is an institution established by the White majority population, and therefore, is a hierarchy-maintaining institution. See SIDANIUS & PRATTO, *supra* note 22, at 204–05.

128. Cooper, *supra* note 19, at 261. In Southern states, Black students were denied access to these land-grant universities, although South Carolina, Virginia, and Mississippi did share some of the federal land-grant endowment with colleges that were educating Black students. *Id.* at 262.

129. *Id.* at 252.

130. *Id.* at 262 (requiring that funds be distributed in a just and equitable manner).

131. *Id.* at 263.

While the intent of the Second Morrill Act may have been to create “just and equitable funding”¹³² for Black student education, as with most matters concerning Black people and the creation of race equity in America, the Second Act failed miserably, at least in part, due to the long-held racist ideologies of the White majority.¹³³ As a result, the dual education system continued with underfunded and inequitable Black institutions, which became known as HBCUs.¹³⁴ As with many race-related social constructs in America, instead of minimizing or addressing segregation, the Second Morrill Act had “the paradoxical consequence of contributing to the segregation of educational institutions’ in America.”¹³⁵ Student-author Jasmine Cooper astutely points out in her note, *Battle of the Lands: The Creation of Land Grant Institutions and HBCUs—Fostering a Still Separate and Still Unequal Higher Education System*:

Because of the Morrill Act, the child of the poor White overseer gets to attend the University of Maryland and the former slave child attends Baltimore Normal School. The poor White child is being educated at a school intended to train him to become a member of a newfound middle class[,] while the former slave child only has remedial classes available to him at a school with a completely different purpose.¹³⁶

Additionally, Congress’s traditional funding structure, rooted in White majority dominance and used to maintain it and which provided that funds be sent to the states for disbursement to the individual institutions, perpetuated disproportionate funding to Black institutions.¹³⁷ As observed by Cooper in her note, “[b]y giving states the opportunity to either create Black colleges or underfund them, the federal government in essence created the doctrine of separate but equal six years before it was firmly established in *Plessy v. Ferguson*.”¹³⁸

This funding structure remains in place to this very day. And while HBCUs long ago moved away from their limited curricula as “normal schools,” it is no surprise that this historical inequity has made it virtually impossible for HBCUs to close this funding gap.¹³⁹ This funding gap is but one example of the systemic resource deprivation visited upon the subjugated Black population by the White majority. Further, this gap is

132. Haikal, *supra* note 19, at 68.

133. Cooper, *supra* note 19, at 263.

134. *Id.*

135. *Id.* (quoting Earnest N. Bracey, *The Significance of Historically Black Colleges and Universities (HBCUs) in the 21st Century: Will Such Institutions of Higher Learning Survive?*, 76 AM. J. ECON. & SOCIO. 670, 673 (2017)).

136. *Id.* at 252. The purpose of “normal schools” was to help previously enslaved people “gain employment through an industrial education,” not provide knowledge as was the primary purpose of predominantly White institutions (“PWIs”). *Id.*; Jackson & Wu, *supra* note 117, at 165.

137. Cooper, *supra* note 19, at 263 n.66 (“Public HBCUs remained disproportionately underfunded White land-grant institutions were still receiving state appropriations at a rate of 26 times more than Black colleges The per pupil state expenditure rate for African Americans equaled about one-fourth the rate for Whites.”).

138. *Id.*

139. *Id.* at 263, 265.

analogous to, and because of, the ideological gap between the White majority population and the Black minority population and its allies.¹⁴⁰ Fortunately, while a hindrance, this systemic deprivation of equitable funding has not, however, prevented HBCUs from positively impacting the Black community¹⁴¹ (and arguably the larger community as well).

B. The Evolution, Significance, and Struggles of HBCUs, Especially HBCU Law Schools

As American higher education has evolved, so too have HBCUs (to a certain extent). Like many of the rights extended and institutions shaped by the White majority, HBCUs have enjoyed success strategically limited by dominant group control. While HBCUs began as Southern “normal schools” created to prepare freed slaves for work outside the plantation, they have long since expanded their mission and curricula.¹⁴² America’s perception of them as less prestigious than PWIs, however, has persisted, affecting how they are funded and ultimately accredited.

1. HBCUs’ Evolution and Significance

HBCUs were founded to educate Black people in a manner quite different from that of White people. Even the Quakers and other allies who established private HBCUs before the end of the Civil War were driven by White majority ideologies, and the education in those institutions was limited.¹⁴³ Later, especially after the Civil War, the curricula of many HBCUs broadened to provide an industrial education to freed African slaves, so they could obtain jobs.¹⁴⁴ Hence, HBCUs have long served the communities in which they are located.¹⁴⁵ However, unlike the “unspoken curriculum” of White institutions, which historically perpetuated racist ideologies to fortify White supremacy, as posited by SDT, the “unspoken

140. Not to overgeneralize here, because White and Black people certainly have different beliefs and ideologies. However, the overarching ideological gap (or difference) noted here is that White people are superior and that Blacks are inferior, which then motivates in-group actions by white people against the out-group (Black people) to control access to resources. See SIDANIUS & PRATTO, *supra* note 22, at 33.

141. Cooper, *supra* note 19, at 253. See Haikal, *supra* note 19, at 68 (noting that Alcorn State University was the first Black land-grant institution established under the Morrill Act of 1862).

142. Cooper, *supra* note 19, at 252.

143. See Lawrence, *supra* note 123, at 17 (noting that the first private HBCUs were founded to “eliminat[e] any societal deficiencies among Black people by providing them with education and instilling Christian values in them, thus preventing them from posing a threat to society.”).

144. Jackson & Wu, *supra* note 117, at 165. See Haikal, *supra* note 19, at 71 (noting some of the distinct reasons for establishing HBCUs in the North versus the South: “In the north, HBCUs were founded based on Caucasians’ need for African Americans in the labor force and the African Americans desire to advance their people through education. In the south, however, public HBCUs were created for a number of reasons—so states could receive millions of dollars in federal funds, reduce vocational training in African American communities, and limit African Americans enrollment in TWIs.”).

145. Kamille Wolff, *From Pipeline to Pipe Dream: The HBCU Effect on Law School Deans of Color*, 14 J. GENDER RACE & JUST. 765, 771 (2011) (explaining that HBCUs also have historically had a “socially responsible mission” of “serving our growing and underserved communities.”). Notably, and unsurprisingly, most HBCUs were placed in Black neighborhoods, where property values were lower. See HBCU Colleges List: 107 Great Education Options to Consider, HBCU LIFESTYLE, <https://hbculifestyle.com/hbcu-colleges-list/> [<https://perma.cc/AME6-3PVR>] (last visited July 16, 2025); Jonathan Rothwell & Andre M. Perry, *Biased Appraisals and the Devaluation of Housing in Black Neighborhoods*, BROOKINGS INST. (Nov. 17, 2021), <https://www.brookings.edu/articles/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/> [<https://perma.cc/CB8Q-TBAX>].

curriculum” of HBCUs was never anti-White.¹⁴⁶ Instead, HBCUs focused on creating safe and affirming spaces for Black students, where they could develop their professional identities away from racial animus.¹⁴⁷

Often, the only means to receive a higher education for Black students in the past, HBCUs quickly evolved to include “providing access to higher education for society’s underprivileged and disenfranchised.”¹⁴⁸ Few could argue against HBCUs’ role in diversifying the higher education pipeline. As law professor and author Kamille Wolff stated in her article, *From Pipeline to Pipe Dream: The HBCU Effect on Law School Deans of Color*, “[t]he pipeline to racial diversity within higher education would be virtually non-existent without the HBCU effect, which continues to train, educate, and prepare thousands of African American, Latino, and Asian candidates for their journey into the pipeline.”¹⁴⁹

Currently, HBCUs only represent three percent of higher education institutions in America, which is not surprising given that the White majority systems (directly and indirectly) control the funding and growth of these institutions.¹⁵⁰ However, HBCUs continue to educate a large portion of Black students.¹⁵¹ To add, despite enrolling twice the number of Pell Grant recipients, i.e., students having lower income status when compared to predominantly White institutions (“PWIs”), HBCUs are responsible for incredible success stories in America.¹⁵² First, fifty-one percent of HBCU graduates are likely to move into higher economic brackets versus those who attend PWIs.¹⁵³ More importantly, HBCUs are a pipeline to professional and graduate schools, responsible for “eighty percent of all Black judges, fifty percent of all Black lawyers, forty percent of all Black engineers, forty percent of all Black U.S. Congress members, and 12.5 percent of Black CEOs.”¹⁵⁴ Although detractors argue that HBCUs are no longer necessary in the absence of *de jure* segregation, *de facto* segregation, often still seen in primary and secondary education systems in this country, supports an argument to the contrary.¹⁵⁵ In fact,

146. Jennifer M. Smith & Elliot O. Jackson, *Historically Black Colleges & Universities: A Model for American Education*, 14 FLA. A&M U. L. REV. 103, 210–211 (2021).

147. *Id.* at 211 (“HBCUs promote Black culture, Black life, Black professors and Black history, debunking stereotypes and building student confidence, career skills and survival skills, all without the pressure of Black students being perceived as a threat.”); see Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. PA. J.L. & SOC. CHANGE 351, 367–73 (2021) (recounting the impressive track records of HBCUs in educating Black students. Indeed, SDT shows that minority groups often focus their energy on empowering the members of their groups.)

148. Jackson & Wu, *supra* note 117, at 165; see Smith & Jackson, *supra* note 146, at 211; see also Wolff, *supra* note 145, at 770–71.

149. Wolff, *supra* note 145, at 771.

150. Cooper, *supra* note 19, at 252, 254 (noting that White majority systems directly control funding and growth of HBCUs as they still depend on state or some form of federal funding, which provide inadequate support for these hierarchy-attenuating institutions; and these majority systems indirectly control HBCUs’ funding and growth as private philanthropy patterns favor elite, hierarchy-maintaining institutions). See SIDANIUS & PRATTO, *supra* note 22, at 182–85.

151. Cooper, *supra* note 19, at 252 (noting that HBCUs represent 10% of the Black student population). See NAT’L CTR. FOR EDUC. STAT., *supra* note 19.

152. Cooper, *supra* note 19, at 253.

153. *Id.*

154. *Id.*

155. Jerlando F.L. Jackson, Michael T. Snowden & Suzanne E. Eckes, *Fordice as a Window of Opportunity: The Case for Maintaining Historically Black Colleges and Universities (HBCUs) as Predominantly Black Institutions*, 161 ED. L. REP. 1, 14 (2002) (noting that “HBCUs help equal the playing field for the students who received an inequitable primary and secondary education.”).

in light of recent attacks on higher education and the adulteration of diversity, equity, and inclusion, the safe, affirming spaces provided by HBCUs to Black and other underrepresented populations are more vital than ever.

Most particularly, HBCU law schools are hierarchy-attenuating, as they are not only instrumental in creating pathways to the legal profession outside the traditional elite law schools, but are also critical to diversifying the legal profession by fostering professional identities resistant to maintaining existing hierarchies.¹⁵⁶ There are six HBCU law schools in the U.S.: Florida A&M University College of Law (1951), Howard University School of Law (1869), North Carolina Central University School of Law (1939), Southern University Law Center (1947), Texas Southern University Thurgood Marshall School of Law (1946), and the University of the District of Columbia School of Law (1996).¹⁵⁷ Since their founding, HBCU law schools have been instrumental in producing Black lawyers, today in near-historic numbers.¹⁵⁸ HBCU law schools historically graduate “upwards of ninety percent of Black law school graduates.”¹⁵⁹ And while that percentage has decreased, currently, HBCU law schools still play a major role in diversifying the profession.¹⁶⁰ In fact, even if their mission statements no longer mention Black people explicitly, there is still an implied duty to serve the Black community.¹⁶¹ In that role and as a “part of the very fabric of the African American community,” HBCUs are in an opportune position to solve some of the problems uniquely experienced by Black people in America.¹⁶²

2. Financial and Resulting Accreditation Struggles

Assuming a leading role in the fight for continued diversity and equal access to higher education may be difficult for HBCU law schools, as they are and have always been disproportionately underfunded.¹⁶³ While it may have made more sense when they were founded as “normal schools” in the nineteenth century, in light of the White majority ideology of the subjugated and newly freed slaves, it strains reasoning why this problem

156. SDT identifies some institutions as hierarchy-attenuating and HBCUs have this function in American higher education. See SIDANIUS & PRATTO, *supra* note 22, at 46. For this reason, they often incur the ire and wrath of the White majority population, which views them as a threat. Walter R. Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present, and Future Perspectives on Historically Black Colleges and Universities*, 25 REV. HIGHER EDUC. 241, 242–43 (2002).

157. Robert F. Smith, *The Top HBCU Law Schools: Defying Barriers in Legal Education*, ROBERT F. SMITH BLOG (Aug. 1, 2023), <https://robertsmith.com/blog/hbcu-law-schools/> [https://perma.cc/LM9J-KBT2]; *Our History*, HOW. UNIV. SCH. OF L., <https://law.howard.edu/about/our-history> [https://perma.cc/N8QU-3W64] (last visited Feb. 17, 2026).

158. Kemit A. Mawakana, *Historically Black College and University Law Schools: Generating Multitudes of Effective Social Engineers*, 14 J. GENDER RACE & JUST. 679, 681 (2011).

159. *Id.* at 689.

160. *Id.* at 689–90 (noting that “each HBCU law school has a minority or woman as Dean.”).

161. *Id.* at 692.

162. *Id.* at 694.

163. *Id.* at 681–82; Cooper, *supra* note 19, at 276 (“Presently, HBCUs continue to be severely underfunded compared to their historically White peer institutions, creating a financial strain on HBCUs, especially those that are publicly funded.”); see also Alexis Marshall, *HBCUs Have Been Underfunded by \$12 Billion, Federal Officials Reveal*, NPR (Oct. 9, 2023, at 05:06 ET), <https://www.npr.org/2023/10/09/1204614576/hbcus-have-been-underfunded-by-12-billion-federal-officials-reveal> [perma.cc/JF7G-B772] (noting that HBCUs have been underfunded by at least \$12 billion dollars when compared to their PWI sister schools, according to federal estimates), cited in Cooper, *supra* note 19, at 254 n.24.

of underfunding persists. Or does it? While there have been some shifts in individual ideologies since that time, one need only look at the institutions and systems built by the White majority to see that, for the most part, they have withstood change. By their very existence and their focus on educating Black and other disenfranchised people, HBCUs run counter to White majority hegemonic spaces and threaten the existing power structure in America.¹⁶⁴ Hence, their systemic underfunding is yet another tool of the White majority to ensure that the existing power structure holds in America.

At the federal level, Congress's attempts to provide more equitable funding for HBCUs stand as a testament to the difficulty in shifting institutional and systematic impediments to diversity. Much like the Morrill Act, which was intended to provide some form of equity in the formation of land-grant institutions,¹⁶⁵ Title III of the Higher Education Act ("HEA") was intended to provide some level of equity in funding for HBCUs.¹⁶⁶ Title III specifically serves "minority-serving institutions" and "focuses on equalization of opportunity at institutions catering to large percentages of minority and low-income students."¹⁶⁷ Congress added Part B to Title III, titled the HBCU Aid Act, in its 1986 reenactment of the HEA, "acknowledg[ing] HBCUs as a defined class of institutions" and "recognizing these institutions' collective contribution to the 'effort to attain equal opportunity through postsecondary education for Black, low-income, and educationally disadvantaged Americans.'"¹⁶⁸ With the 1986 iteration of the HEA, Congress sought to provide some stability and support the mission of HBCUs.¹⁶⁹ However, these efforts have not been sufficient to fully finance and sustain HBCUs at the same level as PWIs, and will probably never be so if one looks at the social dominance of the White majority in America.

As a preliminary matter, while Title III funding is helpful, Title III funding is limited to specific categories of expenses,¹⁷⁰ which will not fully cover all the financial needs of HBCUs. Further, Title III funding cannot close the historic gap in funding between PWIs and HBCUs for

164. See Allen & Jewell, *supra* note 156, at 244–48.

165. See *infra* Section III.A; Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 42–44, 46–50 (1987) (explaining that Senator Morrill had no intent to limit land-grant institutions to White populations when he proposed the Morrill Act of 1862, which led to a subsequent Morrill Act of 1890 that funded HBCUs; however, due to state legislatures being given oversight over distributing federal funds, great inequity occurred between PWIs and HBCU land-grant colleges).

166. Jamie Wershbale, *Collaborative Accreditation: Securing the Future of Historically Black Colleges*, 12 BERKELEY J. AFR. AM. L. & POL'Y 67, 71–73 (2010).

167. *Id.* at 72. Note that initially Title III, as enacted in 1965, was titled "Strengthening Developing Institutions" and did not specifically reference HBCUs. *Id.* at 73. Instead, the original, 1965 version spoke more generally of supporting institutions "'which[,] for financial and other reasons[,] [were] struggling for survival and [were] isolated from the main currents of academic life.'" *Id.* at 73 n.33–34. (citing Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1229 (current version at 20 U.S.C. § 1051 et. seq. (2008))).

168. *Id.* at 73. Under Title IIIB, HBCUs were known as part B institutions. *Id.* By definition, these institutions' primary mission was to provide "postsecondary educational opportunities to black Americans." *Id.*

169. *Id.*

170. 20 U.S.C. § 1057(c). Note that Title III lists a finite number of categories of expenses that it will support, including construction and maintenance of academic facilities, development of academic programs, purchase of academic materials, and equipment acquisition. *Id.*

several reasons, including disparities in state funding between the two, smaller endowments at HBCUs, lower alumni giving, and the politics of race and general lack of support, especially by the White majority, for HBCUs.¹⁷¹ Much of the funding for public HBCUs emanates from, or is controlled by, the states in which they exist. As the majority of HBCUs are located in the South,¹⁷² funding for those HBCUs has always been disproportionately lower than that of PWIs due to politics and systemic racism that persist there.¹⁷³ The White majority still views HBCUs as a threat to their institutional monopoly in higher education.¹⁷⁴ Moreover, as Black people and other minoritized populations tend to have less wealth than White people, that wealth gap generally translates into an alumni giving gap as well.¹⁷⁵ This public and private disproportionate funding has even more dire consequences for HBCUs, including their law schools, as it also impacts their ability to remain accredited.

For too long, HBCUs and their law schools, in particular, have struggled to remain solvent and accredited, in contrast to the elite private or public law schools whose funding has generally increased. Law school is expensive, and therefore, it is not surprising that law students select those institutions that will allow them to repay their student loans after law school.¹⁷⁶ For that reason, elite private and public law schools attract the best and brightest, meet their admissions goals easily, and can charge higher tuition because their graduates will obtain higher-paying jobs upon graduation and will be able to afford larger student loan debt loads.¹⁷⁷

171. Wershbae, *supra* note 166, at 86–87. For example, in 2008, “[f]ewer than five HBCU[s] ha[d] endowments that exceed[ed] \$500,000 and only [Howard University] exceed[ed] \$1 million.” *Id.* at 86. To put that into context, “[t]he combined sum total of HBCU endowments nationwide is less than one-tenth of the Harvard University endowment alone.” *Id.*

172. *Id.* at 73.

173. See, e.g., River Alexander, *Beyond Affirmative Action: HBCUs and the Time for Equitable Funding*, COLUM. POL. REV. (Sep. 3, 2024), <https://www.cpreview.org/articles/2024/9/beyond-affirmative-action-hbcus-and-the-time-for-equitable-funding> [https://perma.cc/WNA4-ZY48]; Katherine Knott, *States Underfunded Historically Black Land Grants by \$13 Billion Over 3 Decades*, INSIDE HIGHER EDUC. (Sep. 20, 2023), <https://www.insidehighered.com/news/government/2023/09/20/states-underfunded-black-land-grants-13b-over-30-years> [https://perma.cc/WFX2-G9BS]; Susan Adams & Hank Tucker, *How America Cheated Its Black Colleges*, FORBES (Sep. 22, 2022, at 08:15 EDT), <https://www.forbes.com/sites/susanadams/2022/02/01/for-hbcus-cheated-out-of-billions-bomb-threats-are-latest-indignity/> [https://perma.cc/CDA3-GY3S]; Kelly Elliott & Tim Kellison, *Budgeting for Success: Comparing Finances Between Historically Black Colleges and Universities and Predominantly White Institutions*, 12 J. INTERCOLLEGIATE SPORT 25, 25, 27 (2019).

174. See, e.g., Jordan Nellums, *How Racial Animus Has Locked HBCUs Out of Capital Markets*, CENTURY FOUND. (June 3, 2024), <https://tcf.org/content/report/how-racial-animus-has-locked-hbcus-out-of-capital-markets/> [https://perma.cc/EY46-NSW5]; Jorge Burmicky et al., *Historically Black Colleges and Universities and Performance-Based Funding: A Systematic Review of the Literature*, 3 J. POSTSECONDARY STUDENT SUCCESS 81, 82 (2024); Krystal L. Williams & BreAnna L. Davis, *Public and Private Investments and Divestments in Historically Black Colleges and Universities*, AM. COUNCIL ON EDUC. & UNITED NEGRO COLL. FUND 5 (Jan. 2019), <https://www.acenet.edu/Documents/public-and-private-investments-and-divestments-in-hbcus.pdf> [https://perma.cc/D8B6-7FUA].

175. See, e.g., Misty Evans, *The Fight for Funding Equity for HBCUs*, INSIGHT INTO ACADEMIA (June 30, 2025), <https://insightintoacademia.com/the-fight-for-funding-equity-for-hbcus/> [https://perma.cc/M642-NNTZ]; PGIM, *UNCF Study Finds Private HBCU Endowments Need Investment Support*, UNITED NEGRO COLL. FUND (Jan. 29, 2024), <https://uncf.org/news/pgim-uncf-study-finds-private-hbcu-endowments-need-investment-support> [https://perma.cc/5TMM-BT8K]; Denise Clay-Murray, *The HBCU Endowment Gap: Why Black Colleges Lag So Far Behind PWIs*, BET (Oct. 7, 2022), <https://www.bet.com/article/3d5ktm/black-colleges-endowment-gap> [https://perma.cc/VPB3-UFZC].

176. George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORN. J.L. & PUB. POL’Y 637, 650–51 (2003).

177. *Id.* at 651.

However, lower-ranked schools, like HBCUs, must charge less tuition as their graduates earn much less upon graduation and, therefore, cannot afford a large debt load.¹⁷⁸ This creates a related problem with the American Bar Association (“ABA”), the organization that accredits law schools.

First, some critics have alleged that ABA accreditation doubles law school costs: “accreditation standards effectively fix and raise faculty salaries, limit faculty teaching loads, require high numbers of full-time faculty rather than less expensive part-time adjuncts, and require expensive physical facilities and library collections.”¹⁷⁹ HBCU law schools must then pass along these increased costs to their students to remain solvent, and as previously discussed, most HBCU law schools do not have the enormous endowments and other private funding that more elite schools enjoy.¹⁸⁰ Moreover, because HBCU law schools typically enroll students with lower performance indicators, these schools also struggle to meet certain accreditation standards, which places them under a continued cloud of uncertainty.¹⁸¹ For example, in 2017, Texas Southern University’s Thurgood Marshall School of Law was strongly encouraged to raise its admitting LSAT score, or face losing accreditation.¹⁸² Similarly, North Carolina Central University School of Law has grappled with a low bar passage rate, which many posited was tied to the admission of students with lower LSAT scores.¹⁸³ To retain its accreditation, NCCU set a minimum LSAT score for the first time in its existence in 2017.¹⁸⁴

To add, the ABA’s accreditation process (and its effect) is a good example of how changes in individual ideologies are often insufficient to change the institutional culture of organizations. While many of the more recent members of the ABA governing body have hierarchy-attenuating ideologies, whether as minorities themselves or learned through many years of interacting with others who are members of other minority out-groups or addressing their own in-group biases, the organization itself is still very much hierarchy-maintaining.¹⁸⁵ Indeed, the ABA has made strides towards becoming more sensitive to fostering diverse professional

178. *Id.* at 650.

179. *Id.* at 648–49 (citing George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2176–89 (1998)).

180. *Id.* at 651 (noting that tuition at public HBCUs are generally below \$10,000.96 to be affordable for their students but explaining that this is only possible with taxpayer subsidy, i.e., state-level funding). Significantly, for most HBCUs, an increase in their tuition above this level would prevent most of their students from enrolling, which explains why private HBCU (or mission-driven) law schools that have no taxpayer subsidies inevitably become insolvent. *Id.*

181. Kia H. Vernon, Dorothy Nachman & Don Corbett, *Bridging the Gap: Developing Pedagogical Solutions for Underrepresented Law Students*, 22 RUTGERS RACE & L. REV. 37, 42, 45–47 (2020). In fact, HBCU law schools are always afraid of being closed or somehow consolidated with their larger PWI public law school due to fiscal or accreditation issues.

182. A.B.A., NOTICE OF DIRECTED SPECIFIC REMEDIAL ACTIONS, TEXAS SOUTHERN UNIVERSITY, THURGOOD MARSHALL SCHOOL OF LAW (2017), https://www.tsulaw.edu/aba/ABA_Letter_Response-Appendix B.pdf [<https://perma.cc/4CXE-7CFL>].

183. See *Enrollment and Admission Standards*, LAWHUB, <https://www.lawhub.org/trends/admissions-standards> [<https://perma.cc/3YGD-VB7J>] (last visited July 17, 2025).

184. Stephanie Francis Ward, *NCCU Law raises LSAT cut score after ABA accreditation noncompliance finding*, A.B.A. J. (Feb. 28, 2018, at 02:08 CST), https://www.abajournal.com/news/article/nccu-law-raises_lsat_cut_score_after_aba_noncompliance_finding [<https://perma.cc/26XU-BY48>].

185. See *id.*; see also Shepherd & Shepherd, *supra* note 176, at 2183–85.

ideologies,¹⁸⁶ but the organization was built upon many of the White majority ideologies of long ago.¹⁸⁷ Hence, many of its accreditation standards, perhaps unintentionally, are hierarchy-maintaining as well, because they favor elite law schools that are better funded by their state legislatures and/or enjoy robust contributions from their alumni and other philanthropic organizations, and are, therefore, better able to meet all the required ABA Standards.¹⁸⁸

In sum, there has always been opposition and threats to HBCUs and HBCU law schools' very existence,¹⁸⁹ which is not surprising considering their hierarchy-attenuating nature. Even after Jim Crow and before the more recent attacks against higher education as a whole by the Trump administration, HBCUs have been scrutinized as being duplicative, substandard, or just wrong.¹⁹⁰ But particularly, HBCU law schools are the heart of diversity in legal education and are no less necessary today than they were in 1869, when the first HBCU law school, Howard University, opened its doors. A view of this country's higher education system(s) through the lens of SDT makes the continued importance of HBCUs in America crystal clear. In the absence of affirmative action, HBCUs will be needed to hold the line against the retrenchment of racist dominant group ideologies.

IV. *SFFA* and its Criticisms and Implications

Having set forth the theoretical framework and the historical backdrop of segregation in American higher education, this section discusses *SFFA* to illustrate its importance as a watershed event in present-day White majority ideology and this country's move backwards to once again embrace unequal access to higher education. Here, the Article provides particular insight into how the Supreme Court's opinion was not only

186. *Commission on Racial & Ethnic Diversity in the Profession*, A.B.A., <https://www.americanbar.org/groups/diversity/DiversityCommission/> [<https://perma.cc/BX93-Q3VL>] (last visited July 17, 2025). The ABA in the recent past has included standards that require law schools to be attentive to diversity, equity, and inclusion, professional identity development, and cultural competencies—all concepts that tend to be hierarchy-attenuating mechanisms. For this reason, the Trump administration has targeted the ABA, along with other accrediting bodies that have adopted other hierarchy-attenuating accreditation standards.

187. See Shepherd, *supra* note 176, at 640–43 (recounting the ABA's dubious history in accrediting HBCU and other minority-serving institutions).

188. *Id.* at 640–47.

189. Mawakana, *supra* note 158, at 681–82.

190. *Id.* (citing Mikyong Minsun Kim & Clifton F. Conrad, *The Impact of Historically Black Colleges and Universities on the Academic Success of African-American Students*, 47 RSCH. HIGHER EDUC. 399, 400 (2006). According to Mawakana:

Notwithstanding HBCUs' historic contribution to educational opportunities for African-Americans, questions continue to be raised about their educational quality and value. In the 1992 case of *United States v. Fordice*, the U.S. Supreme Court raised questions regarding the educational quality and value of HBCUs. The legitimacy of HBCUs has also been called into question by, among others, policymakers in states such as Mississippi, who have called for mergers between HBCUs and HWCUs (Historically White Colleges and Universities) and, in some instances, the closure of some HBCUs.

Id. A similar story of disproportionate funding is on full display in North Carolina, where North Carolina Central University School of Law has withstood several challenges to its existence by the North Carolina General Assembly and has been disproportionately underfunded compared to the PWI land-grant law school University of North Carolina Chapel Hill School of Law. Joe Killian, *Students, lawmakers advocate for HBCUs in day of advocacy*, NC NEWSLINE (Feb. 20, 2019, at 02:15 ET), <https://ncnewsline.com/briefs/students-lawmakers-advocate-for-hbcus-in-day-of-advocacy/> [<https://perma.cc/4Y7D-LV2S>].

traditional constitutional analysis but also a majority-created and serving vehicle to “disproportionately allocate desired goods” to members of the White majority.¹⁹¹ Through the lens of SDT, it appears that in *SFFA*, the Court functioned not merely as a legal interpreter but also as a hierarchy-maintaining institution. To that end, *SFFA* represents institutional discrimination in its most sophisticated form—using constitutional principles to achieve hierarchy-maintenance goals.

With a stroke of a pen, in *SFFA*, the U.S. Supreme Court once again legalized unequal access to higher education. The myths of the “colorblind constitution,” “merit-based college admissions,” along with “individualism being better than group treatment” were on full display.¹⁹² As the belief that demographic and political power shifts were threatening White people’s perch atop the racial hierarchy,¹⁹³ the fear that elite universities were becoming too diverse,¹⁹⁴ and the sense that affirmative action was indeed a threat to White education began to bubble up in the country,¹⁹⁵ the Court acted to preserve the White majority social dominance. After all, SDT research shows that individuals who are high in SDO (like our Supreme Court justices) will act in a discriminatory manner when their majority group is threatened.¹⁹⁶ Under these circumstances, the Court’s opinion was inevitable.

A. A Summary of the *SFFA* Decision

SFFA consists of two cases, *Students for Fair Admissions v. Harvard* and its companion case, *Students for Fair Admissions v. University of North Carolina*.¹⁹⁷ In both cases, the plaintiff, an organization created by Edward Blum, challenged the consideration of race in college admissions.¹⁹⁸ Significantly, Blum is a “conservative legal strategist” who has worked tirelessly to reverse more than forty years of legal precedent that allowed such consideration.¹⁹⁹ For a time, Blum seemed to be a lone

191. Sidanius et al., *supra* note 12, at 847.

192. See *SFFA v. Harvard and SFFA v. University of North Carolina FAQ*, LEGAL DEF. FUND, <https://www.naacpldf.org/case-issue/sffa-v-harvard-faq/> [<https://perma.cc/5K8V-T5Y3>] (last visited June 9, 2025) (hereinafter LEGAL DEFENSE FUND *SFFA* FAQ).

193. Garda, Jr., *supra* note 15, at 130.

194. *Id.*

195. *Id.*

196. Sidanius et al., *supra* note 12, at 850 (noting that “people higher in SDO were most discriminatory against the out-group when the ingroup was one with which they could highly identify”).

197. See *SFFA*, 600 U.S. at 190–91 (“In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina . . . are lawful under the Equal Protection Clause of the Fourteenth Amendment.”).

198. Edward J. Blum: President, *Students for Fair Admissions*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/edward-blum> [<https://perma.cc/NF57-E6GS>] (last visited June 9, 2025). The stated mission of Students for Fair Admissions is “to eliminate racial and ethnic classifications and preferences in school admissions.” *Id.*

199. *Id.* Blum is also the president of another, newly formed organization, American Alliance for Equal Rights (“AAER”), “which has filed over a dozen lawsuits challenging the use of race by corporations, law firms, venture capital firms and cultural institutions.” *Id.* Notably, in 2005, Blum also founded the Project on Fair Representation, a nonprofit legal foundation that provided counsel in a number of race-related U.S. Supreme Court cases including, *Shelby County v. Holder*, *Fisher v. University of Texas (I and II)*, and *Evenwel v. Abbott*. *Id.*

voice, spouting White majority ideologies of old. But after failed attempts in several cases, including *Shelby County v. Holder*, *Fisher v. University of Texas (I and II)*, and *Evenwel v. Abbott*,²⁰⁰ Blum scored big in *SFFA*.

In the case against Harvard College (“Harvard”), *SFFA* alleged that, “as a federally funded program, Harvard’s consideration of race in admissions, as one of many factors, violated Title VI of the Civil Rights Act of 1964.”²⁰¹ In the case against University of North Carolina (“UNC”), *SFFA* alleged that “UNC’s race-conscious admissions policy violated the [Fourteenth] Amendment to the U[nited] S[tates] Constitution.”²⁰² Both institutions had an admissions scheme that included race, along with many other factors, to assess a candidate’s application for admission.²⁰³ To be clear, before implementing these race-conscious admissions policies, both institutions had a long history of excluding racial minorities.²⁰⁴ In terms of its procedural posture, both admissions programs were found to be permissible under the Equal Protection Clause and the Supreme Court’s precedent.²⁰⁵ In the Harvard case, the First Circuit affirmed the trial court’s decision, and the Supreme Court granted certiorari.²⁰⁶ And in the UNC case, the Supreme Court granted certiorari before judgment in the court below.²⁰⁷

At the time of the Court’s October 2022 hearing of the two cases, for some forty-five years, the law of the land had permitted race-conscious admissions policies, (also known as affirmative action programs) so long as it was narrowly tailored to accomplish a compelling governmental interest, i.e., passed strict scrutiny.²⁰⁸ However, in *SFFA*, with Chief Justice John Roberts writing for the majority,²⁰⁹ the Court introduced a new level of “strict scrutiny” to conclude that the policies, “however well-intentioned and implemented in good faith,” did not pass constitutional

200. *Shelby Cnty v. Holder*, 570 U.S. 529, 556–57 (2013) (deeming portions of the Voting Rights Act of 1965 unconstitutional); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314–15 (2013) (*Fisher I*) (holding that racial considerations in college admissions standards must be analyzed under strict scrutiny); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 388 (2016) (*Fisher II*) (holding that the University’s use of an admissions policy that included the consideration of race did not violate Equal Protection Clause); *Evenwel v. Abbott*, 578 U.S. 54, 57–58 (2016) (holding that states may draw elector maps based on total population).

201. LEGAL DEFENSE FUND *SFFA* FAQ, *supra* note 192.

202. *Id.*

203. *Id.* For a full explanation of Harvard and UNC’s admission’s process see the syllabus of the *SFFA* opinion. See *SFFA*, 600 U.S. at 192–97.

204. *See id.*

205. *Id.* at 198.

206. *Id.*

207. *Id.* Despite the First Circuit Court of Appeals affirming the trial court’s judgment, which comported with well-settled law, in the *Harvard* case, the Supreme Court granted certiorari. *Id.* More disturbingly, the Court granted certiorari to hear the case before the Fourth Circuit Court of Appeals even entered judgment in the *UNC* case. *Id.*

208. *See id.* at 201–08; LEGAL DEFENSE FUND *SFFA* FAQ, *supra* note 192.

209. *SFFA*, 600 U.S. at 189. Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joined Chief Justice Roberts in the majority opinion; Justices Thomas and Kavanaugh filed concurring opinions, and Justice Gorsuch filed a concurring opinion in which Justice Thomas joined; Justice Sonia Sotomayor filed a dissenting opinion, joined Justices Elena Kagan and Ketanji Brown Jackson (as it applies to the UNC case); and Justice Jackson filed a dissenting opinion in the UNC case, joined by Justices Sotomayor and Kagan. *See id.* at 231, 287, 310, 317, 384. Justice Jackson recused herself from any consideration of the Harvard case. *Id.* at 231.

muster.²¹⁰ Until the Court's decision, many institutions of higher education had been using race as one of many factors, in a holistic fashion, to ensure some modicum of diversity in their admissions process.²¹¹

Significantly, diversity has long been held to be a compelling governmental interest,²¹² and despite a conclusion that was incongruent with this long-held premise, the Court seemed reticent to disavow this position. Instead, the Court took issue with the manner by which Harvard and UNC sought to achieve it.²¹³ While the Court applauded both the institutions' stated "educational benefits of diversity" as "commendable,"²¹⁴ it criticized their affirmative action policies for being insufficiently coherent and measurable to justify giving any preference based on race, even if race was one of many considerations.²¹⁵ In particular, the Court criticized the plus factor given to an applicant based merely on their checking the box for race (even if that factor was one of dozens considered).²¹⁶ The Court also criticized the six racial categories used by Harvard and UNC to identify minoritized applicants—(1) Asian, (2) Native Hawaiian or Pacific Islander, (3) Hispanic, (4) White, (5) African American, and (6) Native American—as "imprecise and arbitrary" as well as stereotypical.²¹⁷ Nonetheless, the Court asserted that

210. *Id.* at 213. Strict scrutiny has always required that the state/actor show a compelling state interest to pass Constitutional muster, and diversity in education has always met that standard. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1978); *Grutter*, 539 U.S. at 343–44; and *Fisher II*, 579 U.S. at 388 (all upholding race conscious admissions in higher education under the strict scrutiny standard). The Court also articulated a third element specific to race-based admissions that it seems to have "culled from the *Grutter* opinion; specifically, race-conscious admissions programs must have a time limit." *Affirmative Action in Admissions: The Students for Fair Admissions Opinion*, BRICKER GRAYDON (July 13, 2023), <https://www.bricker.com/insights/publications/Affirmative-Action-in-Admissions-The-Students-for-Fair-Admissions-Opinion> [https://perma.cc/Q27E-YSNP] [hereinafter *Affirmative Action in Admissions*].

211. *See* George C. Hlavac & Shanna R. Fegely, *U.S. Supreme Court Strikes Down Affirmative Action in College Admissions: How the Decision Impacts Institutions of Higher Education*, NACE (Sep. 6, 2023), <https://www.naceweb.org/public-policy-and-legal/legal-issues/us-supreme-court-strikes-down-affirmative-action-in-college-admissions-how-the-decision-impacts-institutions-of-higher-education/> [https://perma.cc/WXE4-LM76].

212. *See, e.g.*, *Grutter*, 539 U.S. at 326 ("Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest.").

213. *See SFFA*, 600 U.S. at 213 ("[W]e have permitted race-based admission only within the confines of narrow restrictions Respondents' admissions systems—however well-intentioned and implemented in good faith—fail each of these criteria.").

214. *Id.* at 214. Note that the stated educational benefits of Harvard's affirmative action policies included the following: (1) "training future leaders in the public and private sectors;" (2) preparing graduates to "adapt to an increasingly pluralistic society;" (3) "better educating its students through diversity;" and (4) "producing new knowledge stemming from diverse outlooks." *Id.* at 214. Similarly, UNC articulated the following benefits, which were identified by the Court: "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Id.*

215. *Id.* at 214–15.

216. *See id.* at 214. Of specific note was that the stated educational benefits of Harvard's affirmative action policies included the following: (1) "training future leaders in the public and private sectors;" (2) preparing graduates to "adapt to an increasingly pluralistic society;" (3) "better educating its students through diversity;" and (4) "producing new knowledge stemming from diverse outlooks." *Id.* Similarly, UNC articulated the following benefits, which were identified by the Court: "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Id.*

217. *Id.* at 216; *see also Affirmative Action in Admissions*, *supra* note 210.

“nothing in [its] opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”²¹⁸ The Court explained that an applicant’s experiences with race could show “courage and determination,” or “that student’s unique ability to contribute to the university”—things that were certainly germane to their admissions application.²¹⁹ The Court submitted, “the student must be treated based on his or her experiences as an individual—not on the basis of race.”²²⁰ This analysis seemed to legitimize the myth that somehow the treatment of race by group or category was flawed and that individualism in this instance would eliminate systemic discrimination.

There were three separate concurrences. Justice Gorsuch (joined by Justice Thomas) argued that Title VI of the Civil Rights Act categorically prohibits any consideration of race in admissions at federally funded institutions.²²¹ His broad analysis suggested that race-conscious DEI programs could also be unconstitutional.²²² Justice Kavanaugh acknowledged ongoing racial discrimination but cautioned against indefinite use of race-based policies, suggesting alternative approaches like civil rights laws and race-neutral measures.²²³ In his separate concurrence, Justice Thomas took an originalist view that the Constitution is colorblind and that all racial considerations, including affirmative action, violate the Fourteenth Amendment.²²⁴ Though the majority did not explicitly overrule *Grutter*, Justice Thomas noted that the Court’s holding in *SFFA* effectively made it irrelevant.²²⁵

Finally, in a dissent almost as long as the majority opinion, Justice Sotomayor, joined by Justices Kagan and Jackson (only in the UNC case), engaged in a didactic exhortation of the majority opinion. As anticipated, the liberal justices sought to pull the Court back from its return to unequal access to higher education.²²⁶ Justice Sotomayor sagely warned that the majority’s vision of race neutrality “will entrench racial segregation in higher education because racial inequality will persist so long as it is

218. *SFFA*, 600 U.S. at 230.

219. *Id.* at 231.

220. *Id.*

221. *Id.* at 287–310 (Gorsuch, J., concurring) (arguing that Title VI of the Civil Rights Act categorically prohibits any consideration of race in admissions at federally funded institutions). Focusing on the plain language of Title VI, he emphasized the need to examine the consideration of race in higher education under the same strict scrutiny applied to race generally under the Fourteenth Amendment. *Id.*

222. *Id.* at 301. Gorsuch’s concurrence more broadly encompassed consideration of race in other contexts, e.g., employment, where Title VII prevents discrimination based on race, color, or national origin. *Id.* at 256.

223. *Id.* at 316–17 (Kavanaugh, J., concurring) (suggesting alternative approaches like civil rights laws and race-neutral measures to race-based admissions). Kavanaugh advocated for adherence to the 25-year limit espoused in *Grutter* to eliminate race-based affirmative action in higher education admissions. *Id.* at 315 (Kavanaugh, J., concurring).

224. *Id.* at 232–33, 244, 246–47 (Thomas, J., concurring) (arguing that the Constitution is colorblind and that all racial considerations, including affirmative action, violate the Fourteenth Amendment). Note that the majority and Thomas’s “colorblind” analysis is little more than a legitimization of the myth that ignoring race will achieve equality. *See id.* at 205, 233.

225. *Id.* at 287 (Thomas, J., concurring). He argued that *Grutter* had allowed universities to discriminate against applicants based on race, which he considered unconstitutional. *Id.*

226. The liberal justices support of affirmative action is not surprising as it reflects lower SDO and hierarchy-attenuating attitudes of subordinated groups and their allies. *See* SIDANIUS & PRATTO, *supra* note 22, at 46–47.

ignored.”²²⁷ Reminding the majority of Harvard and UNC’s institutional history of racism, Justice Sotomayor emphasized the positive impact that race-conscious admissions policies have had on educational opportunities and campus diversity for *all* students.²²⁸ Curiously, much like the majority, the dissent also highlighted the potential for universities to continue using other methods to achieve diversity, such as focusing on applicants’ experiences and contributions to their communities.²²⁹ Most importantly, the dissent advised that while it is an impediment, *SFFA* could not permanently halt America’s progress towards racial equality.²³⁰

Such an opinion, as divided as the country and its politics seem to be at this time in history, has been met with criticism and approval. And regardless of the Court’s intent, *SFFA* has had tremendous impact on American society and higher education, particularly.

B. Criticisms and Implications of *SFFA*

The *SFFA* opinion has been criticized for both procedural and substantive flaws. Additionally, the opinion has a plethora of implications, especially for HBCUs and their law schools. Just two years have passed, but America is still feeling the reverberations from the Court’s seismic shift in constitutional jurisprudence.

1. Criticisms of *SFFA*

First, there were two core procedural criticisms: the Court’s decision to grant certiorari to review the cases in light of its procedural posture²³¹ and the integral standing issue.²³² From the outset of the majority opinion, it appeared that the Court was straining to reach an intended result, as if to set the stage for a return to racial segregation. Not only was there an issue with *SFFA*’s standing,²³³ procedurally, the Court had to reverse two lower courts’ decisions in the Harvard case and one in the UNC case, finding the usage of race-based admissions permissible, based on the facts presented during the respective trials and years of legal precedent.²³⁴ Many posit that the conservative composition of the Supreme Court prompted the Court’s decision to grant certiorari in these two cases, not any pressing legal issue(s).²³⁵

227. *SFFA*, 600 U.S. at 383–84.

228. *Id.* at 318 (Sotomayor, J., dissenting).

229. *Id.* at 355.

230. *Id.* at 361.

231. See Stephen I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 533, 538 (2024) (observing that the Court is increasingly resolving high-profile and consequential cases in preliminary procedural postures, with such rulings comprising up to fifteen percent of its merits docket in recent Terms).

232. *SFFA*, 600 U.S. at 182–83.

233. *Id.* The Court rejected UNC’s argument that *SFFA* lacked standing because it is not a “genuine” membership organization, agreeing with lower courts that *SFFA* is “indisputably a voluntary membership organization with identifiable members who support its mission and whom *SFFA* represents in good faith” under the *Hunt* test. *Id.* (citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342 (1977) (holding that an organization can still qualify as a genuine membership organization if it satisfies the three-part *Hunt* test)).

234. *Id.* at 182.

235. See, e.g., Joan Biskupic, *Challenge to Harvard’s Use of Affirmative Action Was Designed by a Conservative to Reach a Friendly Supreme Court*, CNN (Oct. 31, 2022, at 12:39 EDT), <https://www.cnn.com/2022/10/30/politics/scotus-affirmative-action-college-admissions-edward-blum> [<https://perma.cc/V3UG-RDLM>] (“[T]his high court venue now appears more promising to the challengers The bench is now dominated by six conservatives, with only three liberal justices.”).

Indeed, peering through the SDT lens, the answer becomes clear. Once again, the Court, at a time of high White majority anxiety, chose the agenda of the White majority over that of the minoritized and underrepresented. To explain, justices with higher SDO (typically those from dominant groups) are more likely to support decisions that maintain existing hierarchies.²³⁶ Moreover, the conservative majority is composed of those justices with higher SDO tendencies.²³⁷ Here, because knowledge is power, what better mechanism to ensure that power remains vested in the majority population than cutting off equal access to education (or any mechanism meant to ensure that access).

Regarding the opinion's more substantive weaknesses, critics have decried the majority's discussion of the Constitution as colorblind, its "burying Title VI;" its sloppy handling of the twenty-five-year directive in *Grutter*; its "cherry-picking non-education affirmative action cases" to support its analysis; and its complete disregard of well-settled legal precedent.²³⁸ Additionally, critics point to the Court's "ignoring the big picture of the majority decision in *Fisher II*, reducing the holding as *sui generis*;" its reliance on "hypothetical future actions" of the respective schools versus the known facts; the Court's failure to discuss legacy and wealthy donor admissions; and most importantly, the "pointed and heightened" vitriolic exchanges between justices in the Court's opinion.²³⁹

Again, almost like contortionists, the majority ignored decades of its own precedent to reach its decision. Particularly, the Court's discussion of the Constitution as colorblind is puzzling, especially in light of years of case law that shows quite the opposite and social science data that point to the dangers of utilizing a colorblind analysis in racial discourse.²⁴⁰ Ironically, as much as the Court portends to avoid it, this colorblind construct still requires some recognition of race, because "as a racial ideology, . . . [c]olorblindness must assume that racial meanings exist before it can refuse to acknowledge their existence."²⁴¹ In fact, as explained by SDT, the majority does little but seek to legitimize the myth that ignoring race will achieve equality, as well as peddle the White majority fiction that current systems are (or should be) based purely on merit.²⁴²

Moreover, while the Court referenced *Grutter* and acknowledged the twenty-five-year timeline discussed there, the majority clumsily disregarded that timeline without real reason, seemingly determining that in our "colorblind" society, the protections of *Grutter* were simply no

236. See SIDANIUS & PRATTO, *supra* note 22, at 89.

237. See *id.* at 77.

238. Diane Heckman, *U.S. Supreme Court Issues Fatal Knock-Out Punch as to the Use of Race as a Factor in a Holistic Approach in College and University Admissions Policies: Phase Two Affirmative Action Cases Eradicating Such Usage in College Admissions*, 416 EDUC. L. REP. 1, 22 (2024).

239. *Id.* at 22–23.

240. See, e.g., Victoria C. Plaut et al., *Do Color Blindness and Multiculturalism Remedy or Foster Discrimination and Racism?*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 200, 201–02 (2018).

241. Jamie L. Crook, *From Hernandez v. Texas to the Present: Doctrinal Shifts in the Supreme Court's Latina/o Jurisprudence*, 11 HARV. LATINO L. REV. 19, 22 (2008).

242. See SIDANIUS & PRATTO, *supra* note 22, at 45–46.

longer necessary.²⁴³ Its analysis was similarly devoid of any real discussion of Title VI (beyond noting its likeness to the Fourteenth Amendment)²⁴⁴ and the incongruence of legacy and wealthy donor admissions, despite the arguments of the respondents.²⁴⁵ Furthermore, *Fisher II* and other precedent were ignored or short-shifted in favor of the use of less analogous, non-education cases and a discussion of hypothetical possibilities. From the opening paragraphs to the end, the majority's decision seemed very result-oriented, more so than well-reasoned. While many Americans were surprised and a bit disappointed by the Court's opinion in *SFFA*, the SDT framework forecasts such a response. In light of the Court's majority right-leaning composition, the shift in White majority ideology, and peak demographic racial anxiety, the Court's decision to maintain the existing hierarchy was certain.

2. Implications of SFFA

After *SFFA*, many asked whether affirmative action was dead. They wondered had the Supreme Court's decision to support the existing White majority ideology and maintain the existing hierarchy set this country on a course back to resegregation. Right after *SFFA* was decided, the sentiment was pessimistically hopeful. Based on the decline in underrepresented populations in the more elite public universities in California and Michigan after those states amended their respective constitutions to prohibit the consideration of race in college admissions decisions,²⁴⁶ most experts were sure that there would be "[d]eclines in Black, Hispanic/Latino, and Native American enrollment at highly selective colleges," but they acknowledged that these declines would "depend on how institutions interpreted the decision and guidance issued by the United States Departments of Education and Justice."²⁴⁷ Admittedly, experts agree that

243. See *SFFA*, 600 U.S. at 281. Indeed, many conservatives felt like the 25-year time limit was almost up, so the Court's decision to hold the respondents' race-conscious admissions practices unconstitutional was fine. See, e.g., Curt Levey, *Courthouse Steps Decision: SFFA v. Harvard*, FEDERALIST SOC'Y (June 30, 2023, at 03:00 ET), <https://fedsoc.org/events/courthouse-steps-decision-sffa-v-harvard> [<https://perma.cc/MPL3-Y6DL>].

244. See Heckman, *supra* note 238, at 28.

245. Note that just weeks after the *SFFA* opinion was filed, litigants filed a lawsuit challenging legacy and children of wealthy donor admissions. See Complaint Under Title VI of the Civil Rights Act of 1964 at 2–3, 5–6, *Chica Project v. President & Fellows of Harvard Coll.* (Off. for C.R., U.S. Dep't of Educ., filed July 3, 2023), <https://lawyersforcivilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf> [<https://perma.cc/62DE-Y8PR>] (challenging Harvard's legacy admissions policy, arguing that it violates Title VI of the Civil Rights Act by disproportionately favoring White applicants who are relatives of alumni or wealthy donors) [hereinafter *Chica Project Complaint*].

246. See generally *Affirmative Action in Admissions*, *supra* note 210 (discussing the decline in minority admissions in California and Michigan elite institutions of higher education after Proposition 209 and Proposal 2, respectively, which amended their state constitutions to eliminate the use of race and gender in admission decisions); see Nancy L. Zisk, *Students for Fair Admissions v. Harvard: How the United States Supreme Court Reinforced Barriers to Equal Protection While Leaving Open the Possibility of Breaking Down Those Barriers*, 24 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 23 (2024) (noting that minority enrollment at UCLA "plummeted," resulting in university administrators declaring the situation a "crisis" after California's ban on race-conscious admission took affect). Significantly, neither state has been able to achieve the levels of minority admissions since their bans on race-conscious admissions. See generally *Affirmative Action in Admissions*, *supra* note 210.

247. Sarah Reber, Gabriela Goodman & Rina Nagashima, *Admissions at most colleges will be unaffected by Supreme Court ruling on affirmative action*, BROOKINGS INST. (Nov. 7, 2023), <https://www.brookings.edu/articles/admissions-at-most-colleges-will-be-unaffected-by-supreme-court-ruling-on-affirmative-action/> [<https://perma.cc/UBG2-FE7N>]; see also Sarah Wood, *What the Supreme Court's Affirmative Action Ban Means for College Admissions*, U.S. NEWS & WORLD REP. (Aug. 8, 2024),

it will be some time before the true impact of *SFFA* on minority enrollment in higher education is known. However, in the first year after the decision, data from a 2024 *New York Times* study of enrollment trends at sixty-six elite institutions shows that both Black and Hispanic student enrollment decreased an average of one percent, despite having trended upwards every year for more than a decade.²⁴⁸

After *SFFA*, the Biden administration was clear in committing “to equal access and educational opportunity for all students” and noted that it would “support higher education institutions in their pursuit of lawful practices to enhance student body diversity.”²⁴⁹ However, more recently, under the Trump administration, it has become clear that *SFFA* was the lynchpin to the retrenchment of segregation (or at the very least, unequal access) in higher education.

Additionally, whether intended by the Supreme Court, the decision has spawned additional litigation challenging race-conscious programs used by employers,²⁵⁰ especially law firms,²⁵¹ heightened the vitriol of far-right politicians,²⁵² and spurred state governments to cancel race-conscious practices in public institutions (including universities).²⁵³ SDT certainly supports this result: with the Court’s support of the White majority ideology in *SFFA*—an ideology that seems to back away from approximately forty-five years of Court precedent that held race-

<https://www.usnews.com/education/best-colleges/applying/articles/how-does-affirmative-action-affect-college-admissions> [https://perma.cc/7XE4-ZAKA] (noting the continued decline seen in nineteen public universities in states that had affirmative action bans since the mid-1990s and predicting that those declines would be steeper after *SFFA*).

248. Aatish Bhatia et al., *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. TIMES: UPSHOT (Jan. 15, 2025), <https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html>? [https://perma.cc/BCV9-K8TC] (explaining that of the 66 schools, 59 schools shared data that was sufficiently significant for longitudinal analysis). Comparatively speaking, there did not appear to be a corresponding increase in Asian and White student enrollment at those same institutions. *Id.* Significantly, an increasing number of students—from two to four percent—did not share their race, a number which had been decreasing since 2010. *Id.*

249. See generally *Affirmative Action in Admissions*, *supra* note 210. The U.S. Education Department subsequently issued a Fact Sheet 2, which outlined President Biden’s plan to support higher education institutions in navigating admissions post-*SFFA*. *Id.* In keeping with the Supreme Court’s decision, the Biden-Harris Administration called on institutions “to consider an applicant’s financial background, geographic location, and personal hardships or adversities.” *Id.* The Education Department (Biden Administration) later published some guidance “to clarify the kinds of admissions programs and practices that remain[ed] lawful” and also convened a National Summit on Educational Opportunity “to discuss strategies and best practices for expanding access to postsecondary educational opportunities.” *Id.*

250. See Chica Project Complaint, *supra* note 245 (challenging Harvard’s use of legacy preference in admissions under Title VI of the Civil Rights Act of 1964 in a civil action filed on July 3, 2023, with U.S. Department of Education).

251. See Tatyana Monnay, *Ed Blum’s Anti-DEI Group Takes Aim at ABA Diversity Scholarship*, BLOOMBERG L. (Apr. 13, 2025, at 05:22 EDT), <https://news.bloomberglaw.com/business-and-practice/ed-blums-anti-dei-group-takes-aim-at-aba-diversity-scholarship> [https://perma.cc/NN3N-F7VH] (detailing Blum’s prior suits against law firms that “were dropped after the firms changed the eligibility criteria for its [diversity] programs.”).

252. See Haley Chi-Sing, *GOP Lawmakers Applaud Supreme Court Affirmative Action Ruling: ‘Great Day for All Americans’*, FOX NEWS (June 29, 2023, at 01:25 EDT), <https://www.foxnews.com/politics/gop-lawmakers-applaud-supreme-court-affirmative-action-ruling-great-day-all-americans> [https://perma.cc/WFT4-QHUJ].

253. See Laura Spitalniak, *A surge of DEI cuts hits colleges across the US*, HIGHER ED DIVE (Feb. 27, 2025), <https://www.highereddive.com/news/surge-dei-cuts-wave-colleges-ohio-state-upenn-iowa/741191/> [https://perma.cc/VUG6-MSVD].

conscious admissions in higher education to be constitutional²⁵⁴—others will certainly be emboldened to extend its reach to other institutions beyond higher education. Many argued that *SFFA* would support further investigation into the admissions policies of the more elite PWIs if their minoritized populations increased after the decision,²⁵⁵ but few could predict what is occurring at this time in American higher education.

Arguably, the decision served as impetus for Trump Era executive orders that are nothing short of an all-out assault on any vestiges of minority-serving, race-conscious admission practices.²⁵⁶ Since the beginning of his second term in office, President Trump has signed approximately forty executive orders that impact higher education, four of which are directly related to diversity, equity, and inclusion. In fact, under the auspices of equal treatment for everyone, there has been a decided retrenchment of pre-Civil Rights principles under Trump's second presidency.²⁵⁷ There has been a reinterpretation of Civil Rights laws and governmental reorganization that virtually ensures that the protections secured many years ago will be inaccessible to the populations who most desperately need them.²⁵⁸ Currently, there seems to be more concern for the majority population than minority populations that have been historically underrepresented in higher education as well as in the middle and upper-class of American society. After *SFFA*, all roads seem to lead back to separate but (un)equal, or at least, an increased inequality in the access to higher education.

Many of the White majority misunderstood race-conscious admissions as some sort of “a guarantee of results, as opposed to an effort to equalize opportunity.”²⁵⁹ Though the numbers of minority students admitted at more selective institutions were, in truth, relatively small,²⁶⁰ for many like Blum and his specially constructed group, they were apparently too many.²⁶¹ Indeed, SDT clarifies that such a response is to be anticipated

254. Prior to *SFFA*, the Supreme Court had allowed consideration of race as one factor among many in higher education to promote diversity beginning with *Regents of the University of California v. Bakke*. See *Bakke*, 438 U.S. at 265.

255. See Liam Knox, *Re-Evaluating the 'Essay Carveout'*, INSIDE HIGHER ED (May 20, 2024), <https://www.insidehighered.com/news/admissions/traditional-age/2024/05/20/examining-admissions-essays-post-affirmative-action> [<https://perma.cc/J753-C7GG>] (suggesting that higher levels of racial diversity in elite colleges and universities post-*SFFA* could be a cause to investigate them).

256. See *President Trump's Executive Orders (EOs) and Actions Impacting Higher Education*, AM. COUNCIL ON EDUC., <https://www.acenet.edu/Documents/Trump-EO-Summary.pdf> [<https://perma.cc/D8NE-XS6T>] (last visited June 10, 2025).

257. See Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES MAG. (June 27, 2025), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html> [<https://perma.cc/23D8-AMM7>].

258. See *id.* (“By deploying the Civil Rights Act against the very people it was created to protect, conservatives hope to get as close to their ultimate goal as possible: repealing it.”).

259. Janjay Innis, *Speakers explain impact of U.S. Supreme Court decision on affirmative action in admissions*, UMASS CHAN MED. SCH. (2024), <https://www.umassmed.edu/news/articles/archives/2024/05/speakers-explain-impact-of-u.s.-supreme-court-decision-on-affirmative-action-in-admissions> [<https://perma.cc/56RX-ZL4J>] (May 22, 2024).

260. See Richard Arum & Mitchell L. Stevens, *For Most College Students, Affirmative Action Was Never Enough*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/interactive/2023/07/03/opinion/for-most-college-students-affirmative-action-was-not-enough.html> [<https://perma.cc/MQP3-3ARG>].

261. Note that Blum formed another non-profit organization, the AAER, which he has used to challenge law firms' use of diversity. Heckman, *supra* note 238, at 47. Specifically, in August 2023, AAER sued two law firms in: *AAER v. Morrison & Foerster LLP* and *AAER v. Perkins Coie LLP*, over its fellowship programs. *Id.* at 48. These suits used Section 1981 of the Reconstruction-era Civil Rights Act of 1866,

under the circumstances. Though, for a time, the interests of the majority and the minority populations converged in America,²⁶² when the White majority population began to see diversity as a threat to their dominance, a notable shift in ideology was seen.²⁶³ Predictably, fearmongering and dog whistle politics took center stage in ensuring that the White majority population remained just that.²⁶⁴ Further, the Supreme Court, one of this country's most powerful institutions, when faced with an opportunity to halt this shift, chose to double down and maintain the hierarchical structure of old. And in its midst, any gains in equal access to higher education will be lost. For this reason, the continued existence of HBCUs, particularly HBCU law schools and their equal financial funding, becomes even more critical to American democracy.

V. HBCUs After *SFFA*: impacts And Moving forward

In the more recent past, many people questioned the continued need for HBCUs as admission to PWIs was offered to minoritized populations.²⁶⁵ However, in the wake of *SFFA* and the current political climate, it is questionable whether minoritized applicants will continue to be admitted to those institutions. And if so, there is little doubt that their admissions will be at a lower rate.²⁶⁶ Inevitably, in the absence of affirmative action,²⁶⁷ HBCUs will bear the burden of educating Black students and other minoritized populations, and ensuring diversity in higher education.²⁶⁸ For the legal profession, specifically, HBCU law schools will be at the forefront of creating alternate power structures in America, producing the next generation of “social engineers” to challenge unjust social hierarchies and work against dominant group interests.²⁶⁹

However, to take the lead on ensuring the continued diversity of higher education and various professions, including the legal profession, HBCUs will need better support and perhaps some thought given to legal education reform in order to address elite law school dominance. Otherwise, the wishes of the White majority will once again be allowed to overshadow the interests of the democratic good of all Americans—the in- and out-groups of our society. Consequently, any progress made in the fight for diversity and racial equality will certainly be lost, and we will all lose.

which prohibits racial discrimination in contracts and alleged that the firms' diversity fellowship programs for summer associates discriminated on the basis of race. *Id.* Of note, AAER did not target any of the New York “white shoe firms.” *Id.* Instead choosing to sue an international law firm, using its Miami, Florida office, placing the case in the Eleventh Circuit, a very conservative appellate court, rather than the Second Circuit. *Id.*

262. Garda, Jr., *supra* note 15, at 98–101.

263. *Id.* at 130.

264. *Id.* at 130–33.

265. Wershbae, *supra* note 166, at 74–75.

266. Garda, Jr., *supra* note 15, at 158.

267. In the wake of *SFFA* and subsequent Trump-era policies, there is little doubt that affirmative action is dead. See Cindy Irani et al., *Impact of Recent Executive Orders Regarding DEI and Affirmative Action in Higher Education*, JD SUPRA (Feb. 6, 2025), <https://www.jdsupra.com/legalnews/impact-of-recent-executive-orders-4340035/> [<https://perma.cc/BW5S-XJ7Q>].

268. See Wolff, *supra* note 145, 770–71.

269. See Mary Wright, *Mission Accomplished: The Unfinished Relationship Between Black Law Schools and Their Historical Constituencies*, 39 N.C. CENT. L. REV. 2, 7 (2016) (discussing the continuing need for HBCU Law Schools).

A. Impacts on HBCUs, Including HBCU Law Schools

The additional workload that must now be borne by HBCUs, in the absence of affirmative action, comes with costs and impacts. First, those minoritized students, who are denied admission to some of the more selective schools—PWIs that can no longer use race-conscious admission practices—may increasingly seek admission to HBCUs. While this increase seems positive, most HBCUs do not have the infrastructure to support the larger population due to historically disproportionate funding.²⁷⁰ Moreover, those students who may have long been almost assured admission to HBCUs may find themselves denied admission as other minoritized applicants (with higher indicators) take those seats.²⁷¹ Even more alarming, it is well settled that our nation's leaders are most often educated at the more elite colleges and universities.²⁷² The same is true of leaders in the legal profession.²⁷³ Accordingly, under the auspices of *SFFA*, the leadership of our country and the legal profession will become even more monolithic than it is currently.²⁷⁴ As one expert noted, America may begin to resemble a post-Apartheid South Africa more than a mature democracy.²⁷⁵ Action must be taken to ensure that this does not occur.

1. More Students without More Resources

SFFA, along with the messaging of the political right and the Trump administration's seeming retrenchment of segregation, virtually guarantees that more minoritized students will seek admission to HBCUs, including HBCU law schools.²⁷⁶ Although increased applications and admissions may be a greater source of income, the fiscal well-being of these institutions will remain unstable as historically weak governmental funding and inadequate endowments and alumni giving will not be sufficient to keep up with the demand. In cases where state government funding is based on performance-rated enrollment, there is often a funding

270. See Sara Weissman, *After Federal Grant Losses, HBCUs Put Hope in Executive Order*, INSIDE HIGHER ED (Apr. 28, 2025), <https://www.insidehighered.com/news/institutions/minority-serving-institutions/2025/04/28/after-federal-grant-losses-hbcus-put> [https://perma.cc/JEY7-56CK] (noting that historic underfunding makes HBCUs especially vulnerable to federal funding cuts).

271. See Liam Knox, *A Silver Lining for HBCUs in Affirmative Action's Demise*, INSIDE HIGHER ED (Sep. 11, 2024), <https://www.insidehighered.com/news/admissions/traditional-age/2024/09/11/interest-hbcus-surges-after-affirmative-action-ban> [https://perma.cc/LF6Q-2WL4] (highlighting the increase in HBCU applicants post-*SFFA* while also noting potential exclusivity concerns, with one HBCU president saying, "HBCUs have always been about giving opportunity to the most people possible. We don't want to lose sight of that as we start to become more competitive.").

272. Reber, Goodman & Nagashima, *supra* note 247; see also Jonathan Wai et al., *The most successful and influential Americans come From a surprisingly narrow range of 'elite' educational backgrounds*, 11 HUMANS. & SOC. SCIS. COMM'NS 1129 (2024), <https://doi.org/10.1057/s41599-024-03547-8> [https://perma.cc/MNW2-LUM8] (showing that access to elite educational institutions remains highly concentrated and strongly associated with later influence).

273. See Jack Crittenden, *How Elitism is Killing Legal Education, Diversity and American Society*, NAT'L JURIST (Sep. 10, 2023), <https://nationaljurist.com/national-jurist-magazine/how-elitism-is-killing-legal-education-diversity-and-american-society/> [https://perma.cc/N6TL-97Q7] ("Fifteen law schools dominate when it comes to landing graduates the country's most prestigious jobs.").

274. Mohamed Akram Faizer, *The Opportunity Presented by the End of Race-Conscious Admissions in Higher Education*, 27 CUNY L. REV. 220, 225–26 (2024).

275. *Id.* at 226.

276. See Weissman, *supra* note 270. Enrollment is almost certainly going to increase at HBCU law schools as minoritized students consider ways to combat the Trump administration's rollback of civil rights and other threats to hard-fought freedoms.

lag of at least one year after the influx of new students.²⁷⁷ As well, the political climate and current economic forecast make it improbable that alumni giving and endowments will increase.²⁷⁸ Along with the historical financial impediments, eroding infrastructures, insufficient technology, and the increasing costs of enrollment make any increase in student population more of a hazard than a benefit to HBCUs' bottom lines.

Of late, the news media has highlighted student protests about HVAC problems in campus buildings and housing shortages, as well as deficiencies that are sure to be exacerbated by increased enrollment post-*SFFA*.²⁷⁹ And it is not that PWIs do not also have these problems, but they usually have necessary resources to address them in a timely and effective manner.

Relatedly, these fiscal and physical setbacks often lead to adverse accreditation action.²⁸⁰ At the undergraduate level, though HBCUs comprised less than ten percent of the schools in the region, more than twenty-five percent of them were under some type of accreditation sanction by the Southern Association of Colleges and Schools ("SACS"), the accrediting body for all of the HBCUs located in the South.²⁸¹ The same is true for HBCU and mission-driven law schools.²⁸² Because some

277. See, e.g., *Performance-Weighted Enrollment Change Funding Model User Manual*, UNIV. OF N.C. SYS. (July 2023), https://www.northcarolina.edu/wp-content/uploads/reports-and-documents/academic-affairs/academic-programs/2023-enrollment-user-manual_final.pdf [https://perma.cc/C7BT-CA4M].

278. Compare Steven Bloom & Jack Nicholson, *No, Endowments Are Not the Answer to Federal Attacks on Higher Ed*, HIGHER EDUC. TODAY (Apr. 22, 2025), <https://www.higheredtoday.org/2025/04/22/no-endowments-are-not-the-answer-to-federal-attacks-on-higher-ed/> [https://perma.cc/6PJ6-BDMB], with Alan Blinder & Vimal Patel, *Can Donors Fill the Major Budget Holes That Colleges Face Under Trump?*, N.Y. TIMES (June 28, 2025), <https://www.nytimes.com/2025/06/28/us/donors-universities-funding-gaps-trump-administration.html> [https://perma.cc/4SKB-5LG3] (stating the arguments for and against using alumni giving and endowments in substitute of federal funding).

279. See, e.g., Tamilore Oshikanlu & Donovan McNeal, *One Year Later: How Howard Has Addressed the Demands of the Blackburn Takeover Protest*, HILLTOP (Apr. 11, 2023), <https://thehilltoponline.com/2023/04/11/one-year-later-how-howard-has-addressed-the-demands-of-the-blackburn-takeover-protest/> [https://perma.cc/UN2N-76KQ] (Howard University student newspaper discussing students' 2021 protest housing conditions); see also Myles Manor, *The Fallout of N.C. A&T's Recent Maintenance Problems*, A&T REG. (Feb. 23, 2024), <https://ncatregister.com/22183/the-yard/the-fallout-of-n-c-ats-recent-maintenance-problems/> [https://perma.cc/FA4W-KCTK] (North Carolina A & T student newspaper discussing heat outages in 34 campus buildings); see also *Housing Rally Leads to March, Public Outrage, Five Detained*, CAMPUS ECHO (Apr. 17, 2025), <https://campusecho.com/housing-rally-leads-to-five-arrests-march-public-outrage/> [https://perma.cc/U9QU-VK52] (North Carolina Central University student newspaper discussing student protest of housing conditions).

280. See, e.g., Christopher A. Burnett, *Diversity Under Review: HBCUs and Regional Accreditation Actions*, 45 INNOVATIVE HIGHER EDUC. 3, 6 (2020); Jerry Crawford, II, *Historically Black Colleges and Universities: Accreditation, Governance, and Survival Challenges in an Ever-Increasing Competition for Funding and Students*, 2 J. RSCH. INITIATIVES 1, 3–4 (2017); Rachel Fester, Marybeth Gasman & Thai-Huy Ngyien, *We Know Very Little: Accreditation and Historically Black Colleges and Universities*, 43 J. BLACK STUD. 806, 813 (2012).

281. Wershbaile, *supra* note 166, at 87 (noting that a majority of HBCUs are located in the South and are subject to SACS accreditation standards). To that end, Wershbaile quotes, "Many . . . HBCUs have been sanctioned by SACS and other regional accrediting agencies, and continue to operate in a fiscally 'at-risk' posture that threatens their continued existence and viability." *Id.* at 86 (quoting America's Black Colleges and Universities: Models of Excellence and Challenges for the Future: Hearing before the House Education and Labor Committee, 110th Cong. 20 (2008) (testimony, President of Johnson C. Smith University Dr. Dorothy Cowser Yancy)).

282. The six accredited HBCU law schools are Florida A&M University College of Law, Howard University School of Law, North Carolina Central University School of Law, Southern University Law Center, Texas Southern University Thurgood Marshall School of Law, and the University at the District of Columbia David A. Clarke School of Law. All are accredited by the American Bar Association; Florida A&M, North Carolina Central, Southern, and Texas Southern are also accredited by SACS. See

of the accreditation standards address the fiscal health of the institution and the facilities, HBCUs find themselves at a disadvantage during the reaccreditation process.²⁸³ While none of the ABA-accredited HBCUs²⁸⁴ are currently in imminent jeopardy of losing their accreditation, most have been (in the recent past) the target of investigation or probe by the ABA or the university's Board of Governors about its accreditation or very existence, respectively.²⁸⁵ In this very circuitous (but not unintended) way, the dominate group's funding model negatively impacts the law school's finances as well as its ability to exist.

In short, without sufficient funding, the influx of students at HBCUs after *SFFA* could be the undoing of this very important weapon in the fight for diversity. As hierarchy-attenuating institutions that educate lawyers to challenge rather than maintain existing hierarchies, HBCUs (and their law schools, especially) are critical to turning back the tide of unequal access to higher education and, more generally, retrenchment of segregation and its many ills in our society.

ABA-Approved Law Schools, ABA, https://www.americanbar.org/groups/legal_education/accreditation/approved-law-schools/ [https://perma.cc/7PLT-HFYP] (last visited Aug. 13, 2025); *Institutions*, SACSCOC, <https://sacscoc.org/institutions/> [https://perma.cc/Q92T-645Z] (last visited Aug. 13, 2025). For a discussion on the underfunding of HBCU law schools, see Christine Charnosky, *HBCU Law Schools Face Severe Underfunding: 'Do We Have a Belt' Left to Tighten?*, LAW.COM (June 15, 2022, at 18:01 ET), <https://www.law.com/ctlawtribune/2022/06/15/hbcu-law-schools-face-severe-underfunding-do-we-have-a-belt-left-to-tighten-391-66687/?slreturn=20260403173349> [https://perma.cc/A2WU-5YPC].

283. SDT supports a position that accrediting bodies, which were built by the White majority, are another hierarchy-maintaining institution. See Garda, Jr., *supra* note 15, at 157.

284. See *supra* note 282 and accompanying text.

285. Florida A&M University School of Law has faced threats to eliminate its law school from the Florida Board of Governors, due to the school's low bar pass rate. See Tarah Jean, *'Unacceptable': Florida Board of Governors Threatening to Eliminate these FAMU programs*, TALLAHASSEE DEM. (July 1, 2024, at 17:04 ET), <https://www.tallahassee.com/story/news/local/famu-news/2024/06/28/state-says-florida-am-law-nursing-pharmacy-programs-in-jeopardy/74243639007/> [https://perma.cc/ZL2J-WB34] (saying only 41% of students passed the bar exam during their first attempt in 2023). In addition, the ABA told North Carolina Central University School of Law that the law school was "significantly out of compliance" with ABA standards prior to its reaccreditation in 2018. See Jane Stancill, *NCCU law school announces accreditation decision*, NEWS & OBSERVER (last updated July 24, 2018, at 14:12 ET), <https://www.newsobserver.com/news/local/article215375565.html> [https://perma.cc/MLV5-V767]. Further, in 2024, Southern University Law Center was found to be below the ABA-required 75% bar passage rate, with a 72.15% two-year pass rate. See Debra Cassens Weiss, *New bar passage stats show several law schools below ABA cutoff*, A.B.A. J. (Mar. 11, 2024, at 17:45 CT), <https://www.abajournal.com/web/article/cooley-law-school-has-lowest-2-year-bar-passage-rate-among-aba-accredited-law-schools-new-data-indicates> [https://perma.cc/AU3K-CXYC]. Also, Texas Southern's Thurgood Marshall School of Law faced ABA scrutiny in 2020 over admissions standards and fraud allegations. See Stephanie Francis Ward, *Law school still out of compliance with ABA admissions standard and dealing with fraud allegations*, A.B.A. J. (May 21, 2020, at 14:35 CT), <https://www.abajournal.com/news/article/amid-fraud-allegations-law-school-still-out-of-compliance-with-aba-admissions-standard> [https://perma.cc/C7UB-SRHF]. Additionally, the school requested money from the state legislature to build a new facility in light of subsequent ABA concerns. See Jessica Priest, *Texas Southern University asks for \$120 million to replace aging law school*, TEX. TRIBUNE (Mar. 13, 2025, at 10:14 CT), <https://www.texastribune.org/2025/03/13/texas-southern-university-thurgood-marshall-law-school/> [https://perma.cc/L697-FMMZ]. Finally, the University of the District of Columbia was found to be out of compliance with ABA required bar passage rates in 2020, with only a 64.06% pass rate in 2017. Subsequently, the law school was one of the first to demonstrate compliance in 2020. See Stephanie Francis Ward, *2 law schools dinged for bar pass standard are now found to be in compliance*, A.B.A. J. (Aug. 25, 2020, at 15:14 CT), <https://www.abajournal.com/news/article/two-law-schools-dinged-for-bar-pass-standard-now-found-to-be-in-compliance> [https://perma.cc/CBP2-E3EY].

2. Decrease in Black Lawyers and Leaders

Another, more dire, consequence of *SFFA* is the decrease in Black lawyers and leaders writ large. First, the end to race-conscious admissions will mean that some Black law students from elite law schools will be displaced to the second tier, including public university law schools with excellent learning outcomes,²⁸⁶ but those seats will become limited as well by the dictates of *SFFA*. In fact, the “trickle-down effect” of the loss of seats for Black students in elite and other PWI law schools means that seats that were usually filled by Black and other minoritized students at HBCU schools and law schools will be filled by those Black, and other minoritized, students who can no longer gain admission to PWIs, which will result in a population of students who would normally gain entrance to HBCUs being denied admission there.²⁸⁷ Further, because HBCUs historically have been institutions of last resort for many Black students,²⁸⁸ those students may lose their access to higher education. Hence, the loss of diversity at PWIs will cause a net loss in opportunities for higher education for Black and other minoritized students.²⁸⁹

Furthermore, there will also be a net loss of diversity in the legal profession and in other leadership positions in this country since HBCUs traditionally serve as feeder schools for many Black professionals—lawyers, doctors, PhDs—and with losses there (as well as PWIs), there will be fewer Black professionals.²⁹⁰ More pointedly, since elite law schools are the gateway to most federal clerkships, judgeships, and top law firms,²⁹¹ the loss of race-conscious admissions in those institutions will certainly mean that the few opportunities that were once available for their Black, and other minoritized, graduates will be lost, and any progress made, though admittedly little, will be lost.²⁹² This loss benefits the White majority and maintains the existing hierarchy

286. Faizer, *supra* note 274, at 253 (noting that second-tier law schools bar passage and employment rates will likely suffer because these second-tier schools have fewer resources available to them per pupil).

287. *Id.* at 267 (“[F]or most underrepresented minorities, the end of race-conscious admissions could lead to collapsed admissions at non-selective colleges, universities and professional schools that currently enroll a disproportionate share of underrepresented minority students.”).

288. Denise A. Smith, *The Facts on HBCUs: Top 10 Facts about Historically Black Colleges and Universities*, CENTURY FOUND. (Sep. 19, 2022), <https://tcf.org/content/commentary/the-facts-on-hbcus-top-10-facts-about-historically-black-colleges-and-universities/> [<https://perma.cc/7XBH-3QRW>] (“HBCUs [] serve to provide Black college students—any of whom are first-generation college attendees from low-income, low-wealth families—a place to pursue higher education in a welcoming environment that recognizes and honors the history, experience, and accomplishments of Black Americans.”).

289. Faizer, *supra* note 274, at 222.

290. See U.S. COMM’N ON C.R., *THE EDUCATIONAL EFFECTIVENESS OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES* 3 (2010), https://www.usccr.gov/files/pubs/docs/HBCU_webversion2.pdf [<https://perma.cc/U5DL-JB6X>] (“African-American graduates of certain HBCUs . . . successfully gained entry into graduate, medical, engineering, law schools and other fields, in percentages and numbers equaling or exceeding those of African-American students that attended wealthier, longer established, and predominantly-White institutions.”).

291. Faizer, *supra* note 274, at 253.

292. See *id.* at 220–21 (detailing law firm culture: only hiring Black associates from the country’s most elite law schools, but exhausting them with meaningless work before failing to promote them, while White junior associates—sometimes from middle of the class and lower-ranked law schools—have their work recognized and are more likely promoted and attain partnership, which accounts for the stark percentage of Black partners in Big Law). Faizer also anecdotally notes that these numbers would be similarly stark in law schools (Black students and faculty), but for the ABA’s mandate in Standard 206, requiring that law schools “demonstrate . . . a commitment” to diversity with respect to gender, race and ethnicity. *Id.* at 221.

in America. Thus, peering through the SDT lens at *SFFA*, the decision appears to be more predictable and hierarchy-maintaining behavior than just constitutional interpretation.

B. Moving Forward

While SDT provides insight into what is happening and why it is happening, it cannot solve the problem. Despite the many challenges, some scholars see this moment in history as an opportunity to “fix” the broken higher education system—to recalibrate so that a small number of elite institutions no longer determine the professional trajectory of so many.²⁹³ They point to *SFFA* as a watershed moment in higher education to recognize that less selective schools enroll and graduate many highly capable students and hiring these graduates for prestigious jobs is a viable, thus improving diversity. HBCUs, including HBCU law schools, are an excellent example of those less selective schools that graduate stellar students who can help to improve the diversity of high-level jobs and professions, like the legal profession.²⁹⁴

However, as institutions birthed out of separative politics that are at the forefront of society’s more integrative goals, HBCUs will need to be strengthened for the struggle. They will need assistance to shore up funding deficiencies that continue to affect their infrastructure and capacity to be maximally efficient. More equitable funding and creative funding models, along with changes or modifications in the accreditation process, would make a profound difference in the trajectory of HBCUs and their law schools.

1. A Shift in Funding Models and Expectations

As noted in Section II, funding levels at HBCUs, generally, and their law schools, specifically, have long been significantly lower than PWIs. An obvious solution to this problem is to mandate that all institutions of higher learning receive equal or equitable funding. In fact, several HBCUs have filed such lawsuits to do just that—and they have been successful.²⁹⁵ Mississippi and, more recently, Maryland HBCUs successfully sued their respective state legislatures alleging that historic funding inequities

293. See *id.* at 224 (“This monographic focus on elite credentials as a gatekeeper to positions of power and influence needlessly inhibits socioeconomic mobility and acculturates most of us to a counterproductive zero-sum worldview that hinders social progress. A far better approach would be to recognize that there are many highly capable students and graduates from less selective schools that merit consideration for prestigious jobs.”).

294. For example, I am a proud graduate and former faculty member of an HBCU law school. I have seen firsthand the challenges of educating minoritized students, who have enormous potential, with limited resources.

295. For an overview on successful and unsuccessful lawsuits ruling on HBCU funding inequalities, as well as how successful suits could pave the way for HBCUs in other states to file suit, see John K. Pierre & Gail S. Stephenson, *Remedies for Decades of HBCU Underfunding: Can Coalition v. Maryland Serve as a Model, or is Government “Persuasion” Needed?*, 22 U.C. LAW S.F. RACE & ECON. JUST. L.J. 81 (2025).

jeopardized their very existence.²⁹⁶ But such litigation is expensive and time-consuming, without any guarantee of success, especially in light of the political climate in our state and federal governments.

Further, more equitable public funding for HBCUs (without litigation) is not likely to occur anytime soon for several reasons: the intricacies and variety of funding formulas used by their respective states to distribute funds to public colleges and institutions;²⁹⁷ the current racial and political dynamics of governmental funding agencies;²⁹⁸ and the current tenuous nature of grants and endowment funding (government and private) because of a less stable economy.²⁹⁹ Accordingly, while HBCUs wait for state and federal governments to recover from the Trump-era retrenchment in racism and segregation, corporate sponsorships and partnerships will be critical to HBCUs.³⁰⁰

296. The original Mississippi HBCU lawsuit was heard by the Supreme Court, which ruled that the State of Mississippi had failed to prove it had ended de jure segregation in its higher education system. *See United States v. Fordice*, 505 U.S. 717, 743 (1992) (consolidated with *Ayers et al. v. Fordice*, Governor of Mississippi, et al., also on certiorari). The State eventually settled, agreeing to provide more equitable funding to Mississippi HBCUs. For information on the settlement and its impact on Mississippi HBCUs, see Lemondra V. Hamilton, *Implementing the Ayers Case Settlement: A Multiple Case Study of Three Historically Black Institutions in Mississippi* (July 23, 2015) (Ph.D. dissertation, University of Memphis), <https://digitalcommons.memphis.edu/cgi/viewcontent.cgi?article=2324&context=etd> [<https://perma.cc/WD2K-7KRS>]. As of 2022, more money had been added to the settlement. *See* Molly Minta, *Mississippi not done spending historic settlement for HBCUs*, *MISS. TODAY* (June 17, 2022), <https://mississippitoday.org/2022/06/17/hbcu-historic-settlement-unsent-funds-ihl/> [<https://perma.cc/BFH8-PGX7>]. The Maryland lawsuit was settled in 2021 after the state legislature passed a law giving \$577 million to HBCUs via scholarships, financial aid support services, and overall university development. To read the judge's initial order, see *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 977 F. Supp. 2d 507, 544 (D. Md. 2013). For details on the settlement, see *Settlement Agreement and Release, Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 977 F. Supp. 2d 507 (D. Md. 2013), https://lawyerscommittee.org/wp-content/uploads/2021/05/Docket-682-1-Settlement-Agreement-Ex.-A-Legisn-Ex.-B-statement-re-Atty-Fees_2021.04.27.pdf [<https://perma.cc/CQ78-69QJ>]. *See also* Brian White, *Maryland finalizes \$577M settlement for HBCU federal lawsuit*, *AP NEWS* (Apr. 28, 2021, at 10:49 ET), <https://apnews.com/article/larry-hogan-maryland-lawsuits-legislation-education-d9a76565b03653234200033bed7a5862> [<https://perma.cc/N622-AF5X>].

297. *See* Marybeth Gasman, *HBCU Funding Matters: Fighting for Equity*, *FORBES* (Mar. 11, 2025, at 13:49 ET), <https://www.forbes.com/sites/marybethgasman/2025/03/11/hbcu-funding-matters-fighting-for-equity/> [<https://perma.cc/GT23-QEBJ>].

298. *See* Marquise Francis, *Many HBCUs need government funding, but some are preparing for a future without it*, *NBC NEWS* (Apr. 16, 2025, at 16:22 ET), <https://www.nbcnews.com/news/nbcblk/many-hbcus-need-government-funding-are-preparing-future-rcna201380> [<https://perma.cc/HC6N-NDVN>].

299. *See Many HBCUs Need Government Funding, but Some Are Preparing for a Future Without It*, *NBC News* (Apr. 17, 2025), <https://www.nbcnews.com/news/nbcblk/many-hbcus-need-government-funding-are-preparing-future-rcna201380> [<https://perma.cc/SRG9-ZFR5>]; *After Federal Grant Losses, HBCUs Put Hope in Executive Order*, *Inside Higher Ed* (Apr. 28, 2025), <https://www.insidehighered.com/news/institutions/minority-serving-institutions/2025/04/28/after-federal-grant-losses-hbcus-put> [<https://perma.cc/P8CF-37N4>]. This becomes an even harder argument to make in light of the continued unstable nature of our economy due to any number of recent events—President Trump's capricious imposition of tariffs, the passage of his Big Beautiful Bill, and his administration's various other unpredictable policies.

300. Although the American Association of State Colleges & Universities ("AASCU") identifies three primary types of partnerships—community-driven, partnerships with other educational institutions, and P3s (public-private partnerships) in its 2008 report. *See* Lawrence, *supra* note 123, at 29. This Article focuses on P3s, particularly partnerships with for-profit corporations. Further, while nonprofit and philanthropic organizations have successfully partnered with HBCUs. *See id.* at 35. This Article also focuses on those corporate partnerships that can be leveraged for funding as well as jobs for post-graduates, as HBCUs are very student centric. Admittedly, an argument for such partnerships become even harder to make in light of the continued unstable nature of our economy due to any number of recent events in our political system—President Trump's capricious imposition of tariffs, the passage of his One Big Beautiful Bill, and his administration's various other unpredictable policies.

Although corporate sponsorships and partnerships are currently a source of funding for HBCUs, research shows that they are ranked below federal and state funding and alumni donations.³⁰¹ To better meet the needs of HBCUs today, that order must change, so that corporate sponsorships and partnerships become a larger part of their funding sources.³⁰² Indeed, as HBCUs continue to push for more equitable federal and state funding and grow its alumni giving, current trends support the continued growth of “strategic alliances” with corporate entities.³⁰³ Saliently, “such partnerships not only bring financial support,” which is key for HBCUs, but they also engender benefits beyond mere monetary gain, offering “opportunities for collaborative research, internships, and workforce development.”³⁰⁴

To develop such sponsorships and partnerships, HBCUs must be clear about their goals for these relationships, i.e., their motivation and context for them.³⁰⁵ Once the institution has identified the potential corporate partner, the stakeholders from each organization will need to be identified, and will need to meet and begin communication to build a relationship, as trust is important in these partnerships.³⁰⁶ Both the HBCU’s and the corporation’s goals will need to be discussed and communicated in writing, perhaps by way of a traditional contract or memorandum of understanding.³⁰⁷ Finally, the lines of communication must be kept open, discussing the successes and challenges that are encountered to ensure the sustainability of the relationship.³⁰⁸

To form successful and sustainable sponsorships or partnerships, HBCUs and their corporate partners may need to adjust their respective operations.³⁰⁹ Initially, HBCUs may need to bolster their offices of institutional advancement to include personnel who understand corporate models.³¹⁰ They may also need to designate specific members of the HBCU President’s leadership team to work on the collaboration as HBCU leadership tends to have a wider range of daily responsibilities, which may slow down response rates to critical decision-making.³¹¹ Such

301. Robbie L. Smith, *Financial Management of Historical Black Colleges and Universities: A Modified Delphi Study*, 79 (2024) (Ph.D. dissertation, University of Phoenix) (ProQuest Dissertations & Theses).

302. *See id.* at 84 T.18 (showing that 100% of the surveyed HBCU Presidents and CFOs “strongly agree[d]” or “agree[d]” that increasing “Strategic Partnerships with Corporations and Foundations” should be a goal for the survival of their institutions).

303. *Id.* at 98 (noting that current literature supports this action as universities are increasingly forming “strategic alliances with external entities”).

304. *Id.*; *see also* Lawrence, *supra* note 123, at 29 (“Partnerships offer several advantages to higher education institutions, including financial support, expanded educational opportunities for students, staff, and faculty, improved public relations, bolstered operational infrastructure, and facilitation of new knowledge development.”).

305. *See* Lawrence, *supra* note 123, at 39–43 (discussing Amey, Eddy & Ozaki’s 2007 Partnership Development Model).

306. *Id.*

307. *Id.*

308. *Id.*

309. *See id.* at 39–40 (discussing the following considerations when institutions engage in partnerships—“external pressures, technology requirements, the sharing of facilities and resources, and leveraging personal connections.”).

310. *See id.* at 38–39 (suggesting that HBCUs should invest in their offices of institutional advancement, which could leverage their unique strengths and assets, to assist in forming corporate partnerships and other mechanisms to diversify their revenue streams).

311. *See id.* at 38–40.

inefficiencies may jeopardize corporate sponsorships and partnerships. To that end, corporate partners will need to know (and appreciate) “the unique nature” of their partner HBCUs, by “understanding their organizational structure,” so they can “meaningfully engage, foster effective collaboration, and contribute positively to the growth and development of these institutions.”³¹² The corporation must be willing to furnish not only the expected funding, but also human capital, where HBCUs may oftentimes be deficient.³¹³ These considerations and actions will foster understanding about the needs of each entity, and both the HBCU and its corporate partner are more likely to see the relationship as mutually beneficial, which will make the collaboration sustainable.³¹⁴

HBCUs are attractive partners because of their diverse populations,³¹⁵ despite the new push in America to jettison all DEI programs. Globally, corporations cannot deny the value of having a diverse workforce.³¹⁶ Such corporate partnerships are already at work. For various socially-motivated and other strategic reasons, major companies, such as Bank of America, Coca-Cola, General Motors, Google, Home Depot, IBM, Microsoft, Verizon, and Walmart have all made sizable investments in HBCUs.³¹⁷ In fact, there was a surge in socially-motivated partnerships after George Floyd’s killing in 2020,³¹⁸ and HBCUs must work hard to ensure that those numbers increase (not decrease) in light of the recent political shift in this country and resulting cuts to federal and state-level funding.

HBCUs should be meeting with their existing corporate partners to discuss (and ease) any concerns about their partnerships violating any of the Trump-era anti-DEI mandates. If possible, they should seek to grow those partnerships—extending them in terms of years or increasing the funding levels. Notably, HBCUs do not discriminate and are open to all races, so doing business with them should not violate any anti-DEI mandates. Moreover, these same companies undoubtedly have similar partnerships with PWIs. Corporate responsibility is no less important today than it was under the last few administrations. Additionally, HBCUs should be discussing ways to establish new corporate partnerships with other companies, perhaps some outside of the United States. The appeal of a global society may have been temporarily lost in America, but other countries are forging ahead of us. Hence, HBCUs should start looking for partnerships internationally. What HBCUs cannot afford to do is fail; as hierarchy-attenuating institutions, HBCUs and their law schools must persist in their effort to strengthen themselves for the journey ahead. The next generation of Black leaders depends on them.

312. *Id.* at 39.

313. *Id.* at 115.

314. *Id.* at 115–17.

315. *Id.* at 116.

316. Gibson, *supra* note 18, at 132–33.

317. Lawrence, *supra* note 123, at 34.

318. *Id.* at 34–35.

2. Collaborative Accreditation

Because the lack of funding has interfered with many HBCUs' ability to meet accreditation standards,³¹⁹ a closer look at the interplay between funding inequities and accreditation problems must also be interrogated as we seek to strengthen HBCUs.³²⁰ There must be some reason beyond chance that despite only representing a "small minority" of institutions in the South, "between the years 1996 and 2005, HBCUs represented twenty-five percent of all postsecondary institutions in [that] region facing accreditation sanctions."³²¹ And though institutions may appeal these sanctions or loss of accreditation, the process is long and costly.³²² Further, without accreditation, neither institutions nor their students can receive federal funds,³²³ and without sufficient endowments and other revenue sources, closure is almost certain, especially for smaller, private institutions.³²⁴

As argued by attorney and author Jamie L. Wershbale, in her article, *Collaborative Accreditation: Securing the Future of Historically Black Colleges*, accrediting bodies should take steps to collaborate with these institutions to better support them in the accrediting process.³²⁵ "Collaborative accreditation," as posited by Wershbale, would require that accrediting bodies and institutions work together to develop some accreditation standards that are not only "in line with legislative funding goals," but which also "promote HBCUs and encourage long-term financial independence and increased student achievement."³²⁶ These standards would consider various factors that make accreditation challenging for HBCUs, including the need for structural rehabilitation and remedial education, as well as the institution's continuing financial concerns.³²⁷ This collaboration would require that both parties communicate about the needs and deficiencies of the HBCU and would enable the accrediting organization to witness firsthand the disparate fiscal and physical health of the HBCU versus its PWI mate.³²⁸

To be more effective, these collaborative standards will need to be institution-specific, designed to "focus on problem areas, such as deteriorating infrastructures, lack of financial controls, insufficient technology, and dwindling [or nonexistent] endowments," as well as "student achievement, considering elements such as curricula, post-graduation job placements, and faculty and administrative capabilities."³²⁹ Significantly, these collaborative accreditation standards would not be

319. Wershbale, *supra* note 166, at 86.

320. *See id.* at 67 (explaining that under the current HEA, institutions of higher education must be accredited to receive student and institutional federal financial aid). For HBCUs, where the majority of their students need federal aid to matriculate and the institution itself needs federal aid to operate and maintain its facilities, the lack of accreditation almost certainly will result in closure. *See id.* at 67–68.

321. *Id.* at 87 (listing nine more HBCUs that were found to be in violation of standards in 2008).

322. *Id.* at 90.

323. *Id.* at 89.

324. *Id.* at 89–90.

325. *See* Wershbale, *supra* note 166, *passim* (stating that the HEA would first need to be amended to allow for such collaborative accreditation for HBCUs).

326. *Id.* at 68.

327. *Id.*

328. *Id.* at 91–92.

329. *Id.* at 92.

permanent and would only be implemented “for a relatively short period of time,” to allow the HBCU to gain better structural and fiscal footing while working earnestly towards meeting accreditation standards.³³⁰ And “to ensure good faith during the collaborative process,” Wershbale suggests that there would be a “limited cause of action for HBCUs.”³³¹

I posit that these collaborative standards should be implemented either by the respective HBCU or the accrediting body when it becomes clear that the institution’s accreditation is in peril. Thereafter, during the period of time that the collaborative accreditation standards are in place, HBCUs should be given increased support from the accrediting body: a consultant to assess the institution’s academic and technological needs and progress towards meeting them, a consultant to assist with funding and fundraising, and perhaps a consultant to assist with research and future curriculum development. The institution should also be assured of continued federal funding during that time, and any adverse accreditation action should be held in abeyance during the collaboration period.

Admittedly, there will be those who will oppose collaborative accreditation. First, there are those who do not think that HBCUs or their law schools are worth saving, whether it is because they are reminders of the past or simply unnecessary, regardless of the effect that the absence of affirmative action has had on higher education admissions and what that effect means to diversity in those and other professional spaces.³³² To them, that viewpoint is well taken, but rejected by most of what has already been said in this Article.

Additionally, some may point to the fact that there are other small colleges that will also want to be accommodated by their accreditors, and that collaborative accreditation is no more than another affirmative action mechanism.³³³ While there may be other small colleges that are experiencing fiscal challenges in the current economic climate and may want to engage in collaborative accreditation practices, the parameters established by Congress in a revised HEA could address that issue at the outset.³³⁴ After all, Congress has recognized that a broader range of minority-serving postsecondary institutions, which include HBCUs, are struggling under financial and infrastructure deficiencies.³³⁵ Accordingly, it would be appropriate for Congress to determine whether those other minority-serving institutions should be entitled to collaborative accreditation under a revised HEA, and in doing so, avoid any labeling as a prohibited affirmative action mechanism.

Ultimately, strengthening HBCUs and their law schools is essential for providing higher education opportunities to underserved students who will challenge entrenched power structures and pioneer innovative solutions

330. *Id.*

331. *Id.*

332. *See id.* at 104–105.

333. *See id.* at 105 (acknowledging in 2010 collaborative accreditation as “a soft form of affirmative action”).

334. Note that this Article is solely focused on methods to strengthen HBCUs.

335. *See Wershbale, supra* note 166, at 95–96 (explaining that Congress’s creation of a new defined class of institutions—predominantly Black institutions (“PBIs”), which are distinct from, though similar to HBCUs—and provision for their funding under the 2008 HEOA shows the recognition of the need to support them as well).

to systemic inequalities. The transformative impact that these institutions have on students, communities, and the American democracy far outweighs any financial investment required. Collaborative accreditation is not only an equitable method, but it is also a manageable method to bolster HBCUs' academic, social, political, and economic health. To that end, collaborative accreditation ensures continued equal access to education for Black and other minoritized students and prevents the retrenchment of separate but equal (or at the least, unequal access) in American higher education.

Conclusion

*"Education is a means of power; without access to education, people are at a disadvantage to compete for, or participate in, the resources that are made available, even in democratic systems."*³³⁶

Even Congress recognizes the power of and need for education. However, as with so many rights in America, minority groups' access to education ebbs and flows according to the will of the White majority.³³⁷ If the best predictor of future behavior is past behavior, America and its minority populations are in trouble.

As law professor Nancy Zisk asserts:

The reality remains that race still carries great weight in our society and continues to carve out opportunities and disadvantages based solely on the color of one's skin. Unfortunately, this remains true across our society, including in our nation's schools, where race continues [to] divide educational opportunities inequitably and distort perceptions with stereotypes and prejudice.³³⁸

Even former Supreme Court Justice Antonin Scalia, a renowned conservative, recognized, "From racist principles flow racist results."³³⁹ And unless we do more to fix it, it will persist.

To that end, the urgency of this moment cannot be overstated. It has been estimated that land-grant HBCUs are owed more than \$13 billion for systemic underfunding from 1987 to 2020.³⁴⁰ Further, data tends to show that both private and public HBCUs across the country continue to lag behind their PWI counterparts in terms of endowments anywhere

336. MAPLES, *supra* note 26, at 3 (citing W.E.B. DUBOIS, *THE EDUCATION OF BLACK PEOPLE* (Herbert Aptheker, ed., Monthly Rev. Press 2001) (1973); J.D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935* (1988)).

337. See generally Melvin J. Kelly IV, *Interpreting Equal Protection Clause Jurisprudence Under the Whiteness-Bell Curve: How Diversity has Overtaken Equity in Education*, 21 J. GENDER RACE & JUST. 135 (2017) (noting this cyclical access to racial equity and education in the U.S. as a function of White majority control).

338. Zisk, *supra* note 246, at 21.

339. Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 157 (1979). The quotation in Scalia's subtitle is drawn from Justice Blackmun's concurring opinion in *Bakke*. See *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring).

340. See Knott, *supra* note 173.

between \$17,000 (public) and \$150,000 (private) per student annually.³⁴¹ Moreover, recent actions of the Trump administration’s Department of Education, including the January 2025 executive order prohibiting federal funding for diversity initiatives in higher education³⁴² and the more recent cancellation of \$350 million in HBCU grants, show the precarious nature of current funding trends for HBCUs and other minority-serving institutions.³⁴³ Ultimately, these trends will only further jeopardize minority populations’ access to higher education in this country.

Based on history, present day occurrences, and principles of SDT, the retrenchment is upon us. Majority members of the American populace will seek to push their agenda and continue to minoritize those who are not like them, further oppressing all subordinate groups. They will continue to under-resource, undervalue, and under-educate those groups. The systems and institutions that have been put in place by the White majority population will continue in the same vein—supporting the majority population and oppressing Black people and other minoritized populations.

In the absence of affirmative action and other race-conscious practices, HBCUs must move to the front lines to provide access to higher education and to save American democracy. But to do so, HBCUs and their law schools must be strengthened. Innovative corporate partnerships and sponsorships and collaborative accreditation are just two ways to address the longstanding deficiencies created by systematic, disparate funding of these hierarchy-attenuating institutions. In strengthening HBCUs and their law schools, we enable them to better fight against current societal forces that would preserve the existing monolithic hierarchy. Indeed, we enable them to produce the next generation of “social engineers” to nudge us further along the “arc of . . . justice” touted by Martin Luther King, Jr. not so long ago.³⁴⁴

HBCUs are America’s gateway to opportunity and excellence. In a time when access to higher education is under threat, they stand as beacons of hope and engines of social mobility. As traditional pathways to justice and equity narrow, HBCUs and their law schools must not only remain open, but they must also be fortified as essential incubators of leadership, innovation, and justice, guiding this country toward a more diverse and inclusive future.

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341. Misty Evans, *The Fight for Funding Equity for HBCUs*, INSIGHT INTO ACADEMIA (June 30, 2025), <https://insightintoacademia.com/the-fight-for-funding-equity-for-hbcus/> [https://perma.cc/2M3C-FT56] (citing to Denise A. Smith, *Achieving Financial Equity and Justice for HBCUs*, CENTURY FOUND. (Sep. 14, 2021), <https://tcf.org/content/report/achieving-financial-equity-justice-hbcus/> [https://perma.cc/PL8T-5F4D]).

342. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025).

343. Natalie Schwartz, *Education Department Cancels \$350M in Grants for Minority-Serving Institutions*, HIGHER ED DIVE (Sep. 11, 2025), <https://www.highereddive.com/news/education-department-cancels-350m-in-grants-for-minority-serving-instituti/759960/> [https://perma.cc/PPB6-5KWS].

344. Martin Luther King, Jr., *Our God Is Marching On!*, Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965) (transcript available at Stanford Univ. Martin Luther King, Jr. Rsch. & Educ. Inst., <https://kinginstitute.stanford.edu/our-god-marching> [https://perma.cc/S5W7-LFBR]).

Seizing the Reins of Power from Classroom to Courtroom: Good Trouble as Power Imperative

CEDRIC MERLIN POWELL

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Seizing the Reins of Power from Classroom to Courtroom: Good Trouble as Power Imperative

CEDRIC MERLIN POWELL[‡]

We already have power; the reins are in our hands. But we must use that power, especially in these existential times with democratic institutions under siege and education under attack. Good trouble means claiming our power to advance a movement that halts this anti-democratic onslaught and empowers activists on all levels of society to use the law to advance our own self-determination.

Look at where we are. THE MECCA.¹ This is the Black intellectual capital of the world and the law school that engineered the primacy of the Fourteenth Amendment as a founding amendment of the Second Founding and our constitutional democracy. We gave meaning to the Reconstruction Amendments, we opened all avenues of society, we gave meaning to substantive equality, and we fostered hope for a true multiracial democracy.² In this Third Reconstruction,³ we are facing something quite different from the first two. The first, saw the Supreme Court actively dismantling all the civil rights gains emanating from Congress' enforcement power in the name of states' rights—the first incarnation of post-racial federalism⁴—where the Court expands state

[‡] Associate Dean for Academic Affairs and Professor of Law at the Howard University School of Law.

1. Donald W. North, *The President's Friend*, 30 S. UNIV. L. REV. 75, 80 (2002); Luke C. Moore & Thelma Wyatt Cummings, *Justice Thurgood Marshall and His Legacy: A Living Legend's Unceasing Commitment to Justice and Equality*, 35 HOW. L.J. 37, 39 (1991).

2. Sherrilyn Ifill, *Reviving the Promise of the 14th Amendment*, 68 HOW. L.J. 333, 333 (2025).

3. See generally PENIEL E. JOSEPH, *THE THIRD RECONSTRUCTION: AMERICA'S STRUGGLE FOR RACIAL JUSTICE IN THE TWENTY-FIRST CENTURY* (2022) (chronicling the period of time from the election of President Barack Obama through the Black Lives Matter movement).

4. See generally Cedric Merlin Powell, *Re-casting Brown: Post-Racial Federalism and the Demise of the Anti-Subordination Principle*, 18 GEO. J.L. & MOD. CRITICAL RACE PERSP. (forthcoming 2026) (on file with author) (theorizing *Brown* and its progeny as examples of state power with the Court limiting oppressive state power under *Brown I* and *II*, *Green*, and *Swann*, but then expanding state power under a local autonomy rationale so that from 1974 to the present day, schools remain segregated); see also CEDRIC MERLIN POWELL, *POST-RACIAL FEDERALISM: RACE, LIBERTY, AND THE DEMOCRATIZATION OF OPPRESSION* (forthcoming) (on file with author) (conceptualizing post-racial federalism, an analogue to post-racial constitutionalism, and positing how state power expands or contracts based upon the Court's preference for post-racial formalistic equality—the ultimate goal of the Court is to dismantle anti-

power under the guise of neutrality to preserve the color line and caste-based oppression. It would take fifty-eight years after *Plessy*, in *Brown v. Board of Education* to eradicate the color line. But the constitutional mandate had to be implemented—a reality that left *Brown II* a stunted legacy seventy years later. Retrogression, retrenchment, and reification are the defining features of racism in American society.⁵ And that brings us to today.

This symposium takes on added significance because we are conceptualizing our own empowerment through engagement and enlightenment which bring us to *Seizing the Reins of Power: From Classroom to Courtroom*.

The classroom is a site of power that leads to the courtroom. If you look at some of the pictures around the law school, you see powerful manifestations of the classroom: a young Spottswood Robinson as an assistant professor; Thurgood Marshall as a law student; Pauli Murray as a law student;⁶ Julia Cooper Mack as a law student;⁷ and Charles Hamilton Houston as dean working with the first generation of Howard University School of Law (“HUSL”) social justice engineers.⁸

We use the title “social justice engineer” in a manner that is all encompassing; it reaffirms our legacy as the epicenter of the transformation of America from an apartheid nation to a nation that aspires to inclusion. But the obliteration of the color line was only the beginning. We have moved from dog whistle rhetoric, to post-racialism, to an authoritarian state built on the foundation of white supremacy. The concept of the social justice engineer must be fully conceptualized to address structural inequality and systemic racism—there must be critical discernment in our self-determination. Thus, how we teach determines our destiny.

Classrooms and courtrooms are complex spaces. They are sites of learning, empowerment, and advocacy, yet they also normalize neutrality and rationalize the present-day effects of past discrimination.⁹ *Stare decisis*, process, and procedure are elemental to the law, providing notice,

5. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384 (1988).

6. Patricia A. Broussard, *Unbowed, Unbroken, and Unsung: The Unrecognized Contributions of African American Women in Social Movements, Politics, and the Maintenance of Democracy*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 631, 656 (2019).

7. Judge Mack graduated from HUSL in 1951 and is the first African American woman to serve on a court of last resort. Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291, 291–92 (1997); Julia Cooper Mack, *Freedom of Gay Citizens from Discrimination*, in REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 231, 231–33 (J. Clay Smith Jr. ed., 1998) (providing an excerpt of Judge Mack’s majority opinion in *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 33–36 (D.C. App. 1987)). I served as Judge Mack’s law clerk.

8. JOSÉ FELIPÉ ANDERSON, *GENIUS FOR JUSTICE: CHARLES HAMILTON HOUSTON AND THE REFORM OF AMERICAN LAW* 49–51, 54 (2022).

9. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 16 (2004) (“Because most students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about the world. This is the link-back that completes the system: students do more than accept the way things are, and ideology does more than damp opposition. Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicitly into everyone’s life story. Resist!”). Kennedy’s polemic is a full-on critique of neutrality and the legitimizing power of the law in maintaining hierarchy, but it does not fully address racism and

consistency, and finality as legitimizing features of our legal system. But these features often dilute power. HUSL is a unique space because it is institutionally skeptical of neutrality but must still educate law students within the traditional legal canons. There is a tension here. *Good Trouble*¹⁰ means completely disrupting hierarchy and the pedagogical underpinnings that advance it in legal education.

There is a strain of American exceptionalism that resonates within American legal education—vaunted democratic constitutional principles like free speech, the rule of law, and equal justice under law are presented as bedrock principles notwithstanding the emergence of totalitarianism in an upside-down democracy where abnormality is rationalized as custom. This is achieved through perpetual misrepresentation, rationalization of distorted norms, and erasure of historical meaning. The classroom must be a bulwark against erasure.

This Essay offers some observations about the classroom as a site of empowerment and enlightenment, connects it to the courtroom as a site of impactful advocacy, and then suggests that there must be something more especially in these existential times of anti-democratic movements. A new model so to speak.

Conceptualizing how power must move from the classroom and courtroom to the struggle for substantive equality, this Essay posits that neutrality must be rejected in the classroom and pedagogy refocused so that the emphasis is on concurrences and dissents that challenge the democratization of oppression. Further, the courtroom is a stabilizing force, but only the starting point in the struggle for substantive equality. Finally, the structural Constitution must be reimagined so that the legislative, executive, and judicial branches are accountable with real consequences for undermining bedrock constitutional principles.

From the Classroom

The classroom is a site of power at HUSL because our historical legacy resonates. Here, perhaps more than any law school in America, we understand the present-day effects of past discrimination. We understand the irony of history, even in our own institutional birth as a racist president, Andrew Johnson—actively engaged in subverting Reconstruction—signed our University’s charter in 1867.¹¹ The power is in the classroom.¹² I witness this every class session: whether in Constitutional Law or the Critical Race Theory seminar, students are engaged, seeking not only to learn fundamental doctrinal concepts but also to understand how they evolve in the law and in these times. They

10. Robert M. Franklin, *Justice and Good Trouble*, 37 J.L. & RELIGION 27, 28 (2022) (describing the concept of good trouble as a call to action and moral claim embodying the power of resistance: “[T]he claim that some forms of disruptive moral action are deserving of praise and emulation . . .”).

11. Colbert I. King, *Andrew Johnson’s Ghost Haunts the White House*, WASH. POST (June 11, 2017), https://www.washingtonpost.com/opinions/the-president-whose-ghost-is-haunting-the-white-house/2017/06/09/2c465786-4c93-11e7-a186-60c031eab644_story.html [https://perma.cc/K3A6-GHKW] (“One hundred and fifty-one years ago, [President] Johnson vetoed a bill renewing the charter of the Freedmen’s Bureau . . . Howard’s charter, awarded by Congress in 1867, was signed by Johnson, but only because Congress overrode [Johnson’s] veto . . . and forced the Freedmen’s Bureau down his throat.”).

12. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 12 (1994)

are learning not only to “think like lawyers,” but to think like public citizens who cherish democratic principles. They are learning that the highest calling of the lawyer as a public citizen is to embrace, preserve, and advocate for the rule of law. It says it on the front cornice of the United States Supreme Court: EQUAL JUSTICE UNDER LAW.

There is something disconcerting in the classroom—constitutional principles are disappearing. I feel like a constitutional used-car salesman hawking doctrinal vehicles that have substantive meaning but faulty doctrinal engines under the hood. It’s like saying, “that used to be the law,” but now it’s changed.¹³ Or “that’s the constitutional principle,” but it’s next on the chopping block. And we navigate the nuances of decisions, concepts, and doctrines with increasing frustration—we know what’s coming, and we are trying to explain it within a rational framework through precedent, *stare decisis*, the rule of law, and institutional legitimacy. Some constitutional scholars have decided that teaching Constitutional Law is a futile endeavor,¹⁴ but this cannot be so. We must embrace our own liberation through self-determination.

As law teachers and Constitutional Law scholars, it is our obligation to be constitutional stewards of a post-modern *Marbury v. Madison*.¹⁵ We must teach our students not only “what the law is,” but also what the law should be in the preservation of substantive equality.¹⁶ In *Students for Fair Admissions v. Harvard* (“*SFFA*”), the Court overturned over forty years of precedent, concluding that diversity is not a compelling interest and race cannot be considered in college admissions decisions.¹⁷ An inspiring example of this is Justice Jackson’s stirring dissent in *SFFA*, which I have termed the first structural inequality dissent in the Court’s history.¹⁸

When I teach this decision, I make sure to connect both Justice Sotomayor’s dissent,¹⁹ which is a comprehensive and expansive reclamation of the anti-subordination principle at the core of the Fourteenth Amendment, and Justice Jackson’s narrative-based structural

13. JUSTIN DRIVER, THE FALL OF AFFIRMATIVE ACTION: RACE, THE SUPREME COURT, AND THE FUTURE OF HIGHER EDUCATION 188 (2025) (“An honest appraisal of *SFFA* requires acknowledging . . . that it overturned decades of precedent, perhaps most glaringly in its assessment that the universities had failed to provide even a compelling government interest for affirmative action. That determination represented nothing less than an abrupt volte-face not just from *Bakke* and *Grutter*, but from *Fisher II*, which had been decided only seven years before *SFFA*.”).

14. See Jesse Wegman, Opinion, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024, at 10:08 ET), <https://share.google/k2rw05WXGawOgbcEj> [<https://perma.cc/7JUR-64KP>] (“Larry Kramer, a widely respected legal scholar and historian . . . called it quits in 2008, on the heels of the Supreme Court’s divisive decision in *District of Columbia v. Heller* . . .”) (emphasis in original); Eric Segall, *Goodbye and Good Riddance to 2025: Let’s Stop Accepting Frivolous Constitutional Arguments*, DORF ON L. (Dec. 29, 2025), <https://www.dorfonlaw.org/2025/12/goodbye-and-good-riddance-to-2025-lets.html> [<https://perma.cc/RK5J-FGVD>] (discussing the Supreme Court’s bad faith legal reasoning and the “current terrible state of constitutional law” based on the justices’ willingness to “adopt any reasoning to get where they want to go without any shame.”).

15. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

16. *Id.*

17. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 206, 230 (2023) (“Eliminating racial discrimination means eliminating all of it.”).

18. *Id.* at 410 (Jackson, J., dissenting); Cedric Merlin Powell, *The Post-Racial Deception of the Roberts Court*, 77 SMU L. REV. 7, 51 (2024) (“Her dissent is a constitutional landmark in its scope and eloquence, and it is the first comprehensive structural inequality dissent in the Court’s 234-year history.”).

inequality dissent. In times of retrogression, it is imperative for students to see that the law evolves—this is a long-term struggle for the soul of America and our third attempt at a multi-racial democracy.

To advance this struggle, classroom discourse must be re-imagined by rejecting neutrality and rule-based orthodoxy as guiding tenets in legal instruction. Of course, students must receive a well-grounded education rooted in depth and breadth so that they are prepared to pass the NextGen Bar, but this reimagining of pedagogical purpose is fundamentally distinct; beyond the Black Letter rules, there should be a critique of the law's role in normalizing subordination.

Seizing the reins of power from the classroom means teaching law so students learn the complexities of structural inequality and how it is advanced through the law. This will empower the student and future lawyer to view the law with appropriate skepticism and to understand how it evolves, ensuring that foundational principles are upheld in our constitutional system. This pedagogical goal has been further impacted by the Court's aggressive assault on anti-discrimination law, voting rights, and reproductive freedom, and by its expansion of religious freedom, leaving the Establishment Clause's requirement of state neutrality toward religion (or non-religion) virtually eliminated.²⁰ This means not only that our teaching methods must adapt to the constitutional reality of a Court dismantling protections for discrete and insular minorities, but also that the materials we use to teach Constitutional Law must change. There are now Constitutional Law casebooks that foreground the legislative history of constitutional amendments so that students learn the full history and its applicability to current constitutional debates.

For example, whether the Fourteenth Amendment is a color-blind amendment or a race-conscious amendment enacted to dismantle caste-based oppression is an issue that the Court currently addresses with dramatically different viewpoints, from Justice Thomas' unique brand of post-racial constitutionalism rooted in textualism, originalism, and the Declaration of Independence, to Justices Sotomayor and Jackson's interpretation of the Fourteenth Amendment with its race-conscious and anti-subordination underpinnings derived from the legislative history of the Reconstruction Amendments. A casebook cannot do all this work, so we must use history, Critical Race Theory, and other materials outside of traditional Constitutional Law to break the doctrinal and canonical barriers within it.

Because the law is a rule-based discipline, there is an analytical predisposition to parse even profoundly wrong decisions for some semblance of rationality as a means of preserving the legitimacy of the rule of law and the interpretive primacy of the Supreme Court. There is a clear jurisprudential brightline between what the law is and is not. *SFFA*²¹ provides a paradigmatic example of teaching to transgress.²² This is an

20. See Powell, *supra* note 4 (manuscript at 1); CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY 18–21 (2023).

21. 600 U.S. at 318–19 (Sotomayor, J., dissenting) (transgressing the instinct to preserve the Court's majority holding by explicitly condemning its opinion as devoid of legal or factual legitimacy).

opinion that cannot be taught in class as if nothing is wrong, because this would be a feat of intellectual and pedagogical dishonesty that would rationalize systemic exclusion and structural inequality.²³ In the classroom, *SFFA* must be deconstructed with an “oppositional analytic,”²⁴ a skeptical review of the majority opinion with an emphasis on how the dissents of Justices Sotomayor and Jackson reaffirm precedent while it is being erased. The dissents give analytical clarity to distorted constitutional reasoning.

SFFA should be taught as a flawed, ill reasoned, and constitutionally illegitimate decision based on the Court’s own affirmative action jurisprudence. In this manner, the law is taught as a pedagogical transgression—“a movement against and beyond boundaries”²⁵—so that the Court’s post-racialism is fully critiqued as disconnected from the reality of race—historically, doctrinally, and practically. Historically, the legislative history of the Fourteenth Amendment establishes that state-mandated subordination is prohibited, but not the positive and limited use of race;²⁶ doctrinally, diversity is a compelling interest as established by Supreme Court precedent; and, finally, in reality, the “intergenerational transmission of inequality” perpetuates subordination.²⁷ The majority opinion intentionally ignores these propositions, which is a clear indication of the post-racial deception of the Court:

SFFA is the ultimate post-racial deception: it creates a reverse injury, which is the protection of white privilege, based on reading the anti-subordination principle out of the Fourteenth Amendment; it stigmatizes African-American and Latino college, graduate, and professional school students as the unworthy beneficiaries of racial preferences; it foregrounds Justice Thomas as a Black proxy for post-racial formalism; and, all of this is belied by the fact that the opinion’s author, Chief Justice Roberts, is forced to acknowledge the salience of race but only as a convenient afterthought. His duplicity is further evinced in his arms services exception for diversity. This has created disarray, uncertainty, and massive retreat based on the impending threat of further action by conservatives. There have been recent attacks on affirmative action, in light of

23. The Court is writing its own anti-canon advancing post-racial constitutionalism and post-racial federalism. See Powell, *supra* note 4 (manuscript at 2–6).

24. HOOKS, *supra* note 12, at 21–22 (quoting Chandra Talpade Mohanty, *On Race and Voice: Challenges for Liberation Education in the 1990s*, in CULTURAL CRITIQUE, WINTER, 1989-1990, No. 14, THE CONSTRUCTION OF GENDER AND MODES OF SOCIAL DIVISION II (WINTER, 1989-1990) 179, 189 (Univ. of Minn. Press, 1990)).

25. *Id.* at 12.

26. 600 U.S. at 353 (Sotomayor, J., dissenting) (state mandated subordination is prohibited by the Fourteenth Amendment, but not the “limited use of race in college admissions” as “the text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures.”).

the Court's ruling, and this will certainly intensify. This post-racial deception has had a chilling effect across the nation.²⁸

This is the pedagogical template for teaching *SFFA*, in which each ostensibly neutral aspect of the decision must be critiqued and discarded so that the holding and Black Letter rule of the decision are put into context. This is an acknowledgement that there is a rule, but it is based on the Court's contrived post-racial constitutionalism. The Court says what the law is by changing what the law means—diversity is no longer a compelling interest because the Court erases it from its jurisprudence. This is why the dissents of Justices Sotomayor and Jackson are so pivotal. They reframe what the law is (returning the Court to its own precedent) and begin the reclamation of the Court's institutional legitimacy as the final interpreter of the Constitution.

This constitutional reclamation project begins in the classroom. In advancing an oppositional critique of *SFFA*, students would be asked whether there was a cognizable injury in *SFFA*. This is a bedrock principle that is at the core of the Court's Article III power. The Court's legitimacy is derived from its ability to adjudicate cases and controversies, and the reverse discrimination plaintiffs (white and Asian American applicants) did not have standing in the absence of an injury.²⁹ Students would then critique formalistic equality, which holds that the color-blind Constitution forbids any consideration of race. Since discrimination has been officially eradicated, race cannot be used to distribute benefits or burdens.

Formalistic equality is the doctrinal hallmark of the Roberts Court. It acknowledges the existence of societal discrimination, which is a general description of inequality disconnected from the present-day effects of past discrimination, but erects significant proof barriers to establishing it. The discriminatory intent requirement requires more than disproportionate impact; there must be clear, identifiable discrimination by the state. In *SFFA*, the Court discarded diversity as a compelling interest and concluded that race could be used to avoid a prison riot.³⁰

Another question is whether the anti-subordination principle is embodied in the Fourteenth Amendment³¹—the legislative history of the Reconstruction Amendments establish that it is. Diversity is a compelling interest because inclusion and substantive equality are essential to the multiracial democracy promised by the Second Founding.³² Finally, the inherent doctrinal contradiction in *SFFA* would be explored. While the

28. Powell, *supra* note 18, at 10.

29. *Id.* at 11 (discussing the elasticity of the Court's standing requirements when it comes to race).

30. 600 U.S. at 207 (citing *Johnson v. California*, 543 U.S. 499, 512 (2005)).

31. Compare 600 U.S. at 246–52, 271–72 (Thomas, J., concurring) (“Despite the extensive evidence favoring the colorblind view . . . it appears increasingly in vogue to embrace an ‘antisubordination’ view of the Fourteenth Amendment. . . .”), with *id.* at 322 (Sotomayor, J., dissenting) (chronicling the race conscious history of the Fourteenth Amendment as a commitment to the anti-subordination principle).

32. *Id.* at 332 (Sotomayor, J., dissenting) (“This compelling interest in student body diversity is grounded not only in the Court’s equal protection jurisprudence but also in principles of ‘academic freedom,’ which

decision holds that race cannot be considered in the admissions process, it nevertheless can be considered because race cannot be ignored. The Court cannot erase an applicant's whole identity by excising race.³³

From the classroom, students learn the role of the lawyer. Our profession is the only one exclusively charged with the duty to protect and preserve the rule of law. That is our power. We are essential to the preservation of democracy—we must protect a free, robust, and uninhibited free press,³⁴ we must protect the right to assemble and protest,³⁵ protect the freedom to believe (or not),³⁶ and empower and protect those who simply do their jobs in preserving and observing the rule of law.

While these fundamental rights have not been explicitly overruled, they have been substantively undermined by the expansion of unilateral presidential power and a compliant Congress and Supreme Court. It seems counterintuitive, after discussing how pedagogy must be reinvented, that we move to the courtroom. The courtroom is yet another site of neutrality where the purportedly neutral doctrines and canons learned in the classroom are tools of argument and persuasion. The advocacy model is important and essential, but limited, in these existential times as a tool for transformative social change because it is primarily rooted in the law as it is. This is effective in normal times when the rule of law is respected, but when there is no good faith respect for the rule of law, litigation and advocacy are merely pauses to an expanding imperial executive, a complacent legislative branch, and a judiciary committed to post-racialism. Courtroom advocacy must be re-conceptualized as well.

To the Courtroom

Of course, we need advocacy to preserve the rule of law. But I think that the courtroom is acutely important, not because of some judicial ideology or partisan plan for realignment and exclusion, but because our power must be employed for the survival of democracy. Our fight is one for survival to ensure that our democracy is preserved—the restoration of our constitutional order means that lawyers will be at the forefront for advocating for well-settled principles like the right to have your vote count, to be free to articulate your views without fear of suppression of the content of your speech, and to live in a world without the crushing burden of surveillance and retribution. But this is just a stabilizing measure so

33. *See id.* at 230 (“At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”). *But see New Report Analyzes Post-Affirmative Action Enrollment Outcomes at Over Three Thousand U.S. Institutions*, THE J. OF BLACKS IN HIGHER EDUC. (Feb. 9, 2026), <https://jbhe.com/2026/02/new-report-analyzes-post-affirmative-action-enrollment-outcomes-at-over-three-thousand-u-s-institutions/> [<https://perma.cc/AHN8-CRKD>] (discussing the real-life impact on admissions).

34. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (affirming the “[P]rofound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .”).

35. Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection*, 107 CORN. L. REV. 229, 232–33 (2021) (arguing for civil disobedience protection under the First Amendment).

36. Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1465 (2016) (“The First Amendment protects and promotes everybody’s freedom of thought, belief,

that the democratic order is not overturned, the response must be far more robust than this—there must be a claim for the eradication of structural inequality and an assertion of empowerment by the people. Action must meet advocacy.

Seizing the reins of power to the courtroom means that advocacy must not only be specifically tailored to the case at bar but to the far-reaching consequences of precedent and *stare decisis*. The transgressive teaching project of the classroom must be actualized through connecting courtroom advocacy to movement lawyering. Much of our work as law teachers will be teaching in opposition to distorted norms.

Connecting the *Good Trouble* pedagogical goals of the law school classroom to the communities directly impacted by structural inequality will create a liberation dialectic based on the expertise of lawyers and the lived experiences of their grassroots collaborative partners in advocacy and action. The clinical classroom is the traditional site of movement lawyering pedagogy, but how traditional doctrine is taught must be framed as the foundation for transformative advocacy. Alexi Freeman and Lindsey Webb state, “[m]any of the skills essential to effective movement lawyering are embedded in legal education, but students often do not recognize their applicability outside of litigation and other legal avenues unless those connections are made clear.”³⁷ The classroom connects to the courtroom and beyond. If the classroom is a site of engaged empowerment to disrupt the law that preserves and rationalizes structural inequality, then our teaching should embrace movement lawyering principles to expand how we address inequality.

This can be done by foregrounding the central tenets of movement lawyering³⁸ into teaching in the classroom so that advocacy in the courtroom becomes a function of education, freedom, and empowerment. The courtroom is a starting point, a site that must be broadened so that advocacy is not an effort to partially disrupt the status quo for incremental change (or limited progress that will ultimately recede to previous systemic inequality), but a claim for transformative social change.³⁹

Re-imagining Power

But it does not end in the courtroom; that is just the beginning of our struggle. And it goes beyond grassroots movements, protests, and movement lawyering; all of these are essential components of our liberation, but our focus must be on reimagining our democracy.

37. Alexi Freeman & Lindsey Webb, *Yes, You Can Learn Movement Lawyering in Law School: Highlights from the Movement Lawyering Lab at Denver Law*, 5 HOW. HUM. & C.R. L. REV. 55, 68 (2020).

38. *Id.* at 68–69 (describing this type of lawyering as “develop[ing] a wide range of advocacy and problem-solving approaches in service to their movement partners” a practice that involves “gaining competency in multi-modal strategies” rather than solely legal solutions; “consider[ing] multiple pathways to change”; and employing strategic communications, data analysis (this can include powerful narratives), legislative advocacy to enact transformative laws and dismantle structural inequality, and simultaneously addressing issues as they arise and focusing on long term radical change).

39. *Id.* at 78–79 (“While [grassroots] communities will always need lawyers to represent members in court on individual matters, their needs do not end there. If communities and lawyers truly want to contribute to large-scale transformative change that challenges traditional notions of power, lawyers must be willing to step outside the courtroom, look beyond an individual case, and offer multi-faceted support

Something is not working if we look at where we are. We relied too much on good faith, American exceptionalism (“it can’t happen here, this is not America”), and rationalizing everything as hyperbole without critically assessing the deceptive allure of neutrality.

We, as lawyers and public citizens, must help America wake up. We can begin by conceptualizing how to rebuild a government with institutional mechanisms that are not merely procedural guardrails but substantive barriers to anti-democratic principles across all three branches of government. We cannot constitutionalize or codify good faith; our recent experience confirms this as the American citizenry continues to wait and hope for a return to American democratic norms. This is the allure of American exceptionalism, flawed though it is. We keep parroting the rhetorical phrase “this is not America,” without acknowledging that this is precisely what America is.

While we cannot constitutionalize good faith, we can institutionalize it by making accountability enforceable through Articles I (the Legislative Branch), II (the Executive Branch), and III (the Judicial Branch) of the Constitution. We must re-imagine the structural Constitution. The foundational principle of the structural Constitution is a system of checks and balances, which works well when there is a shared belief in democratic principles and the rule of law, but in the face of an onslaught of authoritarianism and repression, the Constitution must be strengthened with more substance.

Unleashing power, policy, and the voice of the people in education—Good Trouble—means that the classroom rejects neutrality and that advocacy advances substantive claims and eschews incrementalism. There must be a reclamation of the structural Constitution. While there are limitations on the scope and exercise of power between the three co-equal branches of government, accountability is largely premised on good faith.⁴⁰ We have seen that in the face of a leader who disregards constitutional norms and democratic first principles, there is not much that the Constitution provides as a deterrent other than the politicized process of impeachment.

The checks and balances in the constitutional system must be robust, not merely deferential to the exercise of institutional power. The question, then, is how we reimagine the structural Constitution so that institutional accountability is a substantive and normative principle that stands as a constitutional bulwark against totalitarianism, tyranny, and fascism.

We unleash power and reclaim it through what is learned in the classroom, advocated in the courtroom, and connected to the grassroots and movement lawyering, and then reimagined as a structural Constitution with defined norms of enforceability. There must be a move away from the exclusive reliance on the good-faith enforceability of constitutional norms toward enforceable standards with institutional consequences—the substantive enforcement of the separation of powers.

40. Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian*

The impetus for this institutional shift from simple good faith adherence to constitutional norms to substantive enforceable norms is necessitated by the context that we are in. Specifically, “the rise of multiracial democracy has triggered an authoritarian reaction among a partisan minority. And our Constitution is empowering that partisan minority, and that has magnified rather than checked the authoritarian reaction. We are trapped by our institutions.”⁴¹ The way out of this trap is to empower the electorate to compel legislators to comply with constitutional norms.

Thus, institutional reform should be broad and all encompassing: voting rights should be reaffirmed and protected with the passage of the John Lewis Voting Rights Act (Good Trouble);⁴² the Electoral College should be discarded in favor of direct elections;⁴³ and Congress should be empowered to provide legislative responses to the unitary executive theory which is unfolding and eroding our constitutional democracy. Perhaps that power could be vested in the Necessary and Proper Clause of the Constitution which is a broad enumerated power to legislate on behalf of the people—preservation of our multiracial democracy is at the core of this legislative purpose. The general welfare⁴⁴ and well-being of the citizenry is directly related to a fully functioning and inclusive multi-racial democracy. There should be a substantive remedy rooted in institutional accountability for interference with the democratic process.⁴⁵

If an action of the Article II Executive is extra-constitutional and illegal, the first response should be from Congress exerting its power to halt the illegal action. If presidential action needs congressional approval, the president should not be able to act unilaterally,⁴⁶ and Congress should not acquiesce to the executive’s anti-democratic actions. Neither should the Supreme Court. Thus, any extra-constitutional action should not be legitimized by either the legislative or judicial branch. There should be an institutional stop mechanism that halts presumptively unconstitutional action which must be reviewed by either an appropriate legislative entity or the judicial branch.

Our re-imagining of the structural Constitution does not end here. There must be a check on executive power, especially in this era of anti-democratic authoritarianism, which aggrandizes the executive branch and shrinks the co-equal legislative and judicial branches. At best, the Supreme Court has given conflicting signals of saying what the law

41. *Id.* at 2002.

42. *See generally* John R. Lewis, Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021) (proposing the restoration of vital federal voter protections).

43. Levitsky, *supra* note 40, at 2003.

44. This, of course, is an argument for the expansion of federal power to preserve democracy and directly address any anti-democratic action by the Executive. *See* Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 29 (2005) (“Finding a general power to provide for the common defense and general welfare is consistent with our constitutional practices.”).

45. *See* Richard C. Boldt & Donald G. Gifford, *Interference with the Democratic Process as Public Nuisance*, 84 MD. L. REV. 747, 751–52 (2025).

46. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (discussing the scope of presidential power from its maximum authority to its “lowest ebb”: when the president acts against

is⁴⁷—a contradiction discussed earlier in this Essay—at worst, the Court has been a willing institutional collaborator advancing the President’s conception of the unitary executive theory.⁴⁸ The Court has failed to preserve our constitutional democracy. It has dismantled the discretionary infrastructure of the administrative state⁴⁹ and anti-discrimination law, both are manifestations of post-racial federalism.⁵⁰

The Court’s failure underscores the need for institutional accountability. “Courts are an absolutely fundamental institution within any democratic regime Courts can serve as barricades against democratic erosion, but they can also serve as effective tools in its deconstruction.”⁵¹ The Court has been less of a barricade and more of a deconstructive tool of democracy, and efforts at reform have been neutral and incrementalist, which is the hallmark of how the American polity views change.⁵² The need for structural Supreme Court reform is especially compelling in the context of the emergence of an authoritarian state. There must be a constitutional stop valve, either in a constitutional amendment or an independent institution with oversight and compliance power, to ensure that the Court does not reify the unitary executive and obliterate separation of powers principles. Certainly, it is paradoxical to advance a theory of oversight authority of the Court of last resort in our constitutional system, but these times call for a structural intervention. The recent discussion about an ethics code for Supreme Court justices confirms this.⁵³

Reconceptualizing accountability will be a complex task because the Court’s stature as the final authority on the Constitution must be balanced with the scope of its power to render judgments which could be viewed

47. In a rare loss for the Trump Administration before the Supreme Court, the Court invalidated global tariffs. There is no delegation of the taxing power from Congress to the Executive. *See* Learning Res. Inc., v. Trump, Nos. 24-1287 & 25-250, 2026 WL 477534, at *13–14 (U.S. Feb. 20, 2026). This holding directly checked the expansion of executive power and reaffirmed separation of powers principles. Mark Joseph Stern, *John Roberts’ Rebuke of Trump’s Tariffs is Withering, Confident, and Genuinely Encouraging*, SLATE (Feb. 20, 2026), <https://slate.com/news-and-politics/2026/02/supreme-court-analysis-john-roberts-trump-tariffs-fail.html> [<https://perma.cc/8XM3-EDNH>].

48. *Trump v. United States*, 603 U.S. 593, 642 (2024) (“The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.”). This blanket immunity blunts the jurisprudential impact of *Learning Resources v. Trump*. *See supra* text accompanying note 47.

49. Jenny Breen, *Democracy’s Fundamentals: Efficacy, Equality, and the Supreme Court*, 104 NEB. L. REV. 33, 43 (2025).

50. POWELL, *supra* note 4 (manuscript at 2) (“Post-racial federalism is a way of deploying the expansion of state power, or the contraction of it, when it fits the Court’s conception of the American polity which is a post-racial democracy with limited (or severely diluted voting rights); a libertarian state buttressed by ever expanding gun rights and circumscribed state (or administrative) regulatory power; state defined privacy, bodily autonomy, and reproductive freedoms fostered by a radical reinterpretation of substantive due process; a new post-racial theocratic orthodoxy privileging the free exercise of religion over the neutrality mandate of the Establishment Clause; and, compounding all of this is the Court’s rigid formalism constitutionalizing the reverse discrimination suit to gut the Fourteenth Amendment’s anti-subordination principle.”).

51. Breen, *supra* note 49, at 52.

52. Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609, 2626 (2022).

53. Cedric Merlin Powell, Opinion, *Alito’s Inverted Flag Makes a Mockery of the Supreme Court’s Code of Ethics*, THE HILL (May 21, 2024), <https://thehill.com/opinion/judiciary/4675218-alitos-inverted-flag->

as anti-democratic and perpetuating centralized power in the Executive Branch. Good faith, legitimacy, and the rule of law are defining features of our constitutional democracy, but they are presumed rather than enforced.

Final Thoughts: Good Trouble as Power Imperative

This Essay offered some critical observations on the law school classroom as a site of empowerment, rejecting neutrality and the rationalization of hierarchy and oppression through the law. It argued that teaching must be oppositional in facing entrenched doctrine that legitimizes subordination; it highlighted the rhetorical, narrative, and persuasive power of dissents as essential to restoring precedent and evolving law; and it posited a reconceptualization of courtroom advocacy as directly connected to movement lawyering. Building upon these propositions, it advanced the concept of institutional accountability for the Legislative, Executive, and Judicial branches of government.

Good Trouble means disrupting structural inequality and systemic racism and the laws and institutions that perpetuate subordination. The Good Trouble power imperative is a call to unleash the power in our hands through a series of substantive reclamation projects.

A reclamation project to push back against historical revisionism and erasure. An education project that includes deep and critical analysis of legal doctrines that perpetuate the present-day effects of past discrimination and theorizes new approaches to restore the potency of anti-discrimination law. Advancing policy beyond the classroom to the courtroom with advocacy directly connected to grassroots movements (a rejection of neutrality and incrementalism). Although amending the Constitution is an arduous process, reinterpreting it so that it reflects the realities of the 21st century polity and produces substantive safeguards against minority entrenchment, voter suppression, and totalitarianism is imperative. We need to reaffirm the structural Constitution.

Articles I, II, and III of the Constitution should include compliance mechanisms so that separation of powers is more than a good faith institutional prerogative, but a substantive condition of the exercise of co-equal power. There should be constitutional provisions for oversight to prevent the rise of authoritarianism and democratic decay. The Executive branch must exercise power within constitutionally defined limits, and there should be substantive institutional consequences for failure to do so. Anti-unilateralism should be a substantive constitutional principle and guardrail. Notwithstanding its institutional stature as the final appellate authority, the Supreme Court, as a co-equal branch of government, must adhere to ethical standards and institutional norms that protect our democracy, not undermine it through the sophistry of neutrality. To preserve democracy, the Court must protect the rights of the people.

We unleash our power by advancing substantive equality, empowering the voices of the people in education, and embracing Good Trouble to affirm our own self-determination. This symposium centers HUSL's special place in American legal education, it is the epicenter of social justice lawyering through scholarship, activism, and practice. From the classroom, we train social justice engineers who can critically assess the underpinnings of protest and principle; to the courtroom, we acknowledge how advocacy must be reimagined to include the claims of the people

incrementalism; and, beyond, we seize, embrace, and unleash our power when we take up John Lewis' call to engage in Good Trouble which is an affirmation of democratic principles and activism to counter autocracy.

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Tension Between States' Rights and Religious Rights

PRESTON C. GREEN III, SUZANNE E. ECKES

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Tension Between States' Rights and Religious Rights

PRESTON C. GREEN III[‡], SUZANNE E. ECKES^{‡‡}

Introduction

Under the Roberts Court, the barrier between church and state in K-12 public education has significantly weakened. Over the past ten years, Supreme Court rulings have enabled private religious schools to receive public funding, even when there are legitimate Establishment Clause concerns at issue. At the same time, states have sought to guard against discriminatory practices by making eligibility for publicly supported education funding contingent on compliance with non-discrimination laws. Courts are now increasingly considering whether private religious schools that participate in such state-funded programs must also adhere to these non-discrimination requirements.¹

Generally, when private schools accept state funds, the government can require the schools to comply with certain mandates. For example, if a private school is a state funding recipient, a state might choose to require that the school not discriminate against students based on race, sex, or disability in admissions.² This is not entirely surprising, as states generally control education and have much leeway in regulating PK-12 schools.³ As the *Brown v. Board of Education* decision underscored, a free public education “is perhaps the most important function of state and local governments.”⁴ Indeed, states have a primary role in educating children in the U.S.⁵

[‡] Preston Green is the John and Maria Neag Professor of Urban Education and Professor of Educational Leadership and Law at the University of Connecticut.

^{‡‡} Suzanne Eckes is the Susan S. Engeleiter Professor of Education Law, Policy and Practice at the University of Wisconsin-Madison. The authors would like to thank Maggie Paino at the University of Wisconsin for her thoughtful feedback on this essay.

1. *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 48 (D. Me. Aug. 8, 2024); *Darren Patterson Christian Acad. v. Roy*, 765 F. Supp. 3d 1194, 1197 (D. Colo. 2025); *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752, 756 (10th Cir. 2025).

2. For example, private schools that accept federal funds must abide by some requirements in § 504 of the Rehabilitation Act of 1973.

3. *The Federal Role in Education*, U.S. DEP'T OF EDUC. (2005), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/7AFD-3L9R>].

4. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

5. *United States v. Lopez*, 514 U.S. 549, 564 (1995) (acknowledging the historical and role of states in

Questions have arisen, however, about whether these state non-discrimination laws apply to private *religious* schools that receive state money.⁶ Some states assert that if a private religious school receives taxpayer money, it must adhere to its non-discrimination provisions. Several private religious schools, however, contend that some aspects of a state's non-discrimination law may offend their sincerely held religious beliefs. This raises the question: can private religious schools be given unfettered access to taxpayer money without complying with a state's non-discrimination laws? In this Article, we explore the distinct question about whether a state can be compelled to fund discrimination—a question that has not been specifically addressed by the U.S. Supreme Court when reviewing state-funded voucher programs.

First, we briefly discuss state and federal constitutional provisions and U.S. Supreme Court decisions that intersect with this issue. After setting the context, we examine more recent cases that squarely address whether states can require private religious schools to adhere to state non-discrimination laws that allegedly offend their religious beliefs. Of particular interest is a 2025 Tenth Circuit decision, *St. Mary Catholic Parish in Littleton v. Roy*, that upheld a state's non-discrimination law even though it offended the religious beliefs of private religious schools that received public funds.⁷ In addition to this 2025 opinion, there are three federal district court cases on appeal that also address this topic.

Legal Context

In order to understand the novel legal issues at hand, it is important to provide some background information on how this matter intersects with state and federal constitutional provisions as well as previous Supreme Court decisions. The relevant legal framework is briefly highlighted.

A. State Constitutional Provisions

Over thirty-five state constitutions include no-aid provisions that generally forbid the channeling of public funds to religious entities, including religious schools.⁸ These state constitutional provisions are often called “Blaine Amendments”—the original “Blaine Amendments” were named after Representative James G. Blaine who in 1875 proposed a federal constitutional amendment that forbid public money to be used in religious entities.⁹ While the federal proposition failed, states introduced and enacted similar constitutional amendments prohibiting religious entities from accessing public funds. Modern legal interpretations of these

6. See Aaron Tang, *Who's Afraid of Carson v. Makin?*, 132 YALE L.J. F. 504, 526 (2022) (arguing that because Maine's law treats every private school identically to how it treats religious schools, no such school may discriminate, which is permissible under current free exercise doctrine). *But see* Nelson Tebbe et al., *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html> [<https://perma.cc/RL22-5QEG>] (contending that the separation of church and state has almost disappeared when it comes to the public funding of religious activities).

7. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 756–57.

8. *Answers to Frequently Asked Questions about Blaine Amendments*, INST. FOR JUST. (2025), <https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/#:~:text=What are Blaine Amendments%3F,found in 37 state constitutions> [<https://perma.cc/EBC6-73ZX>].

no-aid provisions have been used to challenge school choice initiatives, and specifically voucher programs, that allow public funds to be used in private religious schools.¹⁰ As will be discussed, recent Supreme Court decisions have limited the application of these state-level restrictions. Beyond state constitutional provisions, some states have enacted laws that try to maintain separation of church and state when it comes to public funds.¹¹

B. Federal Constitutional Provisions

The Establishment Clause in the First Amendment of the federal Constitution prohibits the government from making a law “respecting an establishment of religion.”¹² Within the context of U.S. public schools, the U.S. Supreme Court has generally prohibited direct government support for religion.¹³ Further, the Free Exercise Clause of the First Amendment limits the state’s ability to restrict religious exercise, providing that “Congress shall make no law . . . prohibiting the free exercise [of religion].”¹⁴ Since the 1960s, the U.S. Supreme Court has applied “strict scrutiny” review in all cases involving free exercise of religion.¹⁵ Under strict scrutiny review, the Court requires that a burden on religious exercise must be outweighed by a compelling state interest and “narrowly tailored” to accomplish the state’s goal.¹⁶ In 1990, the Court subsequently ruled in *Employment Division v. Smith* that strict scrutiny review does not apply when the state’s actions are “neutral” and “generally applicable.”¹⁷ If a law is neutral and generally applicable, it “need only be rationally related to a legitimate governmental interest to survive a constitutional challenge.”¹⁸ This is known as rational basis review. It is much easier for a policy or law to be upheld when a court is employing rational basis review than strict scrutiny.

After *Smith*, a state’s action infringing upon one’s free exercise of religion is permissible if it only has an “incidental” effect on religious practice.¹⁹ *Smith* underscored that the state must be able to enforce the law equally against everyone, no matter an individual’s beliefs.²⁰ However, in *Church of the Lukumi Babalu, Aye, Inc. v. City of Hialeah* and *Fulton v. City of Philadelphia*, the Court clarified its *Smith* holding. In *Lukumi*, the Court ruled that governmental restrictions that displayed hostility toward religious groups were not neutral.²¹ Furthermore, in *Fulton*, the Court

10. *Id.*

11. *Id.*

12. U.S. CONST. amend. I.

13. *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947).

14. U.S. CONST. amend. I.

15. Annie Henning, *Developments in Constitutional Law: Free Exercise of Religion*, WIS. LEGIS. COUNCIL (Dec. 2021), https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2021/constitutional_law/ib_free_exercise_religion_ah_2021_12_08 [<https://perma.cc/F3W3-LKRU>].

16. *Id.*

17. *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

18. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006).

19. *Id.*; see also Henning, *supra* note 15.

20. *Id.*; see also *Smith*, 494 U.S. at 878–79.

found that laws imposing a “system of individualized exceptions,” were not generally applicable.²² In such instances, strict scrutiny review also applied.²³

C. U.S. Supreme Court Decisions

In 1947, the Supreme Court wrote that “no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”²⁴ In this decision, the Court upheld a state program that supported the transportation of students to all schools, including religious schools. However, it also emphasized that transportation services, like ordinary police and fire protection, were “so separate and so indisputably marked off from the religious function.”²⁵ In other words, this transportation program did not directly support a religious mission. A year later, the Court ruled that allowing religious instructors from various denominations into public schools violated the Establishment Clause.²⁶ Since 1948, the Court has shifted its stance on public aid to religious schools.

Specifically, there are three more recent U.S. Supreme Court decisions that illustrate this shift. In *Trinity Lutheran v. Comer*, the Court ruled in 2017 that a church-related preschool program should be eligible on the same basis as secular organizations to compete for a state grant that provided funds for a playground resurfacing project.²⁷ Because the Missouri State Constitution prohibited the use of public money to aid religion, the religious preschool’s application was denied. The church sued the State alleging that the exclusion of churches from an otherwise neutral and secular aid program violated their free exercise rights.²⁸ The Court found that a generally available government benefit cannot be denied solely on the basis of religion. This case was surprising to many because prior decisions by the Court rejected Free Exercise challenges raised by religious schools that were denied state aid.²⁹ Specifically, *Trinity Lutheran* was the Court’s first decision finding free exercise rights for a sectarian institution to participate in a publicly funded program.

The Supreme Court rendered another decision in 2020 that further expanded the reach of the Free Exercise Clause. In *Espinoza v. Montana Department of Revenue*, the Court analyzed whether a state agency in Montana could prohibit religious schools from participating in a state tax

22. *Fulton v. City of Phila.*, 539 U.S. 522, 523 (2021).

23. *Id.* at 541.

24. *Everson*, 330 U.S. at 16.

25. *Id.* at 18.

26. *McCullum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 205, 211 (1948).

27. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 453–54, 467 (2017); see also Martha M. McCarthy, *Trinity Lutheran v. Comer: A New Church/State Standard with Far-Reaching Implications*, 352 EDUC. L. REP. 425, 427 (2018); William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of Trinity Lutheran v. Comer*, 346 EDUC. L. REP. 1, 6–8 (2017).

28. *Trinity Lutheran Church*, 582 U.S. at 454.

29. For example, in *Locke v. Davey*, the Supreme Court ruled that a state did not violate a student’s free exercise rights when it funded secular college majors while excluding devotional theology majors. The Court reasoned that states have a “historic and substantial state interest” in excluding religious activity

credit scholarship program. Due to the Montana Constitution's no aid provision, the state agency thought it should deny religious schools from participation. The Court, however, found that the application of the no-aid provision violated the Free Exercise Clause.³⁰ The Court reasoned that once a state decides to subsidize private education, it cannot deny schools solely because they are religious.³¹

Only two years later, the Supreme Court ruled in *Carson v. Makin* that a state could not exclude private religious schools from a tuition-assistance program.³² Maine's statewide tuitioning program allowed school districts that did not operate a public school to pay a portion of tuition for students to attend an approved private school of their parent's choice. This program was started because parts of Maine are sparsely populated and many of its smaller communities did not have the resources to operate public schools. As such, Maine permitted private schools to deliver a public education in place of public schools for some municipalities. However, the state required that these schools provide an education that was equivalent to the public school system, meaning that private religious schools were excluded from the program.³³ The state asserted that this "non-sectarian" requirement addressed its Establishment Clause concerns and helped avoid the public funding of religious instruction. According to the Court, however, the state was prohibited from subsidizing some private schools but not others because of their religious character.³⁴

A few of the justices seemed to forecast what might lie ahead. For example, during the oral arguments of this case, Justice Breyer noted that one of the private religious schools involved in the case believes that the "man is the boss of the women" and raised concerns if public funds should be funneled to schools with anti-LGBTQ+ policies in place.³⁵ In her dissent, Justice Sotomayor wrote, "[w]hile purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of [another] kind[.]"³⁶ Both Justices Breyer and Sotomayor were correctly concerned that allowing taxpayer money to be used in private religious schools could lead to a state's funding of discrimination.

In sum, the U.S. Supreme Court's three most recent opinions have expanded free exercise rights for private religious schools.³⁷ In each case, the Court expanded rights under the Free Exercise Clause while simultaneously dismissing concerns that the Establishment Clause limited policymakers' discretion. These recent decisions contradict previous precedent as religious beliefs seem to outweigh restrictions on the

30. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 488–89 (2020).

31. *Id.* at 487.

32. *Carson v. Makin*, 596 U.S. 767, 789 (2022).

33. *Id.* at 774.

34. *Id.* at 789.

35. *Carson v. Makin*, OYEZ (Dec. 8, 2021), <https://www.oyez.org/cases/2021/20-1088> [<https://perma.cc/7DPV-E7YE>].

36. *Carson*, 596 U.S. at 809 (Sotomayor, J., dissenting).

37. See Martha M. McCarthy, *State Aid to Religious Schools: The Saga Continues*, 394 EDUC. L. REP. 13, 17 (2021); Martha McCarthy, *Espinoza v. Montana Department of Revenue: The Demise of State No-Aid Clauses*, 378 EDUC. L. REP. 598, 613 (2020); Suzanne Eckes et al., *Chartering Religion: Examining the Implications for Educators' Civil Rights in Religious Charter Schools*, 424 EDUC. L. REP. 715, 725–26

Establishment Clause.³⁸ Finally, while these cases limited some use of state constitutional “Blaine Amendments,” their future is still being examined.³⁹ It would not be entirely surprising if lawsuits are eventually filed to challenge specific state Blaine Amendments.⁴⁰ Moreover, the Court has not squarely addressed the issues that Justices Breyer and Sotomayor raised.

State Non-discrimination Requirements and Recent Challenges

Since the Supreme Court issued its decision in *Carson v. Makin*, there have been three federal district court cases and one decision from the Tenth Circuit Court of Appeals that touch upon whether states must subsidize discrimination in K-12 schools and educational programs. In this section, we briefly explore this new line of post-*Carson* litigation. Although the plaintiffs have alleged different First Amendment claims (free speech, free exercise, and Establishment Clause), this Article focuses specifically on the free exercise arguments. We also exclude the discussion of any employment issues raised in the cases examined.

A. The Colorado Preschool Choice Program

In Colorado, two federal courts addressed whether private religious schools that accept taxpayer money are bound by the state’s non-discrimination requirements.⁴¹ This controversy began when Colorado created a Universal Preschool Program that allowed both public and private preschools within the state to participate.⁴² Colorado preschools were not required to participate in this state program.

The preschool program provided for a “mixed delivery system” to offer preschool services, specifically including religious-based preschools, through a combination of school- and community-based preschool providers funded by a combination of public and private money.⁴³ To meet the goals of the program, the implementing Department in Colorado was tasked with prescribing uniform quality standards, such as teacher qualifications and classroom sizes. The Colorado legislature also required a non-discrimination requirement.⁴⁴

38. Peter Greene, *Oklahoma AG Declares Taxpayer Funded Religious Charter Schools Legal*, FORBES (Dec. 2, 2022), <https://www.forbes.com/sites/petergreene/2022/12/02/oklahoma-ag-declares-taxpayer-funded-religious-charter-schools-legal/?sh=114d498c2c75> [https://perma.cc/V39G-N8MD].

39. Dov Kesselman & Daniel Small, *U.S. Supreme Court Landmark Decision Prohibits States from Limiting Aid to Religious School that is Available to Secular Schools*, SEYFARTH (July 2, 2020), <https://www.seyfarth.com/news-insights/us-supreme-court-landmark-decision-prohibits-states-from-limiting-aid-to-religious-schools-that-are-available-to-secular-schools.html> [https://perma.cc/SR2K-RDTX].

40. *Id.*

41. See Anna Schimke, *Inside Colorado’s High-Stakes Preschool Lawsuit Pilling Religious Liberty Against LGBTQ Rights*, CHALKBEAT (Sep. 19, 2024), <https://www.chalkbeat.org/colorado/2024/09/19/catholic-preschool-lawsuit-appeal-lgbtq-non-discrimination-rules/> [https://perma.cc/4Q6K-9HT5] (discussing whether private schools are bound by non-discrimination requirements).

42. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 757.

43. *Id.* Colorado voters passed this proposition in 2020, which would allow the state to provide funding for the preschools. COLO. REV. STAT. § 26.5-4-202(1)(a)(V). The Colorado General Assembly implemented the plan when it passed the Early Childhood Act, H.B. 21-1304 (Colo. 2021). The newly created Colorado Department of Early Childhood was tasked with the implementation of the law.

In order to participate, Colorado conditioned participation on compliance with an “equal opportunity” rule where children would be permitted to enroll regardless of certain characteristics, including race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.⁴⁵ The equal opportunity rule ensured that children and families would not face discrimination.⁴⁶ In other words, preschools that chose to participate needed to abide by the state’s non-discrimination laws.

The Archdiocese of Denver did not want most of its preschools to participate in the state-funded program if they were required to follow the state’s non-discrimination provisions.⁴⁷ The plaintiffs in the Tenth Circuit case, *St. Mary Catholic Parish in Littleton v. Roy*, claimed that the Archdiocese did not recognize same-sex relationship or transgender status, which would have created conflicts with their religious beliefs with regard to admitting LGBTQ+ students or admitting a child from a same-sex family.⁴⁸

In response, Colorado’s governor initially tried to compromise and allow only members of the congregation to attend these schools.⁴⁹ The state later voluntarily repealed this regulation related to congregation preference because the district court found it to be unlawful.⁵⁰

Families enrolled in the choice system through an online portal that used an algorithm to match families with one of their five ranked choices of preschools.⁵¹ In response to preschool complaints, the department added a preference system enabling preschools to set different preferences in how the algorithm matched students. For example, preschools could prefer to be matched in a manner that aligned with school district boundaries.⁵² This list of preferences included a catchall, permitting individual preschools to request new matching preferences.⁵³ But the school still had to comply with the non-discrimination provision.⁵⁴

Additionally, the choice program permitted the state to temporarily waive certain “quality standards” during the rollout of the complex mixed-delivery system.⁵⁵ For example, preschools might be given extra time to train teachers.⁵⁶ However, that provision did not permit the state to waive the non-discrimination requirement.⁵⁷

45. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 757.

46. Amanda Pampuro, *Colorado Cleared to Deny Funding to Anti-LGBT Catholic Preschools*, COURTHOUSE NEWS SERV. (Sep. 30, 2025), <https://www.courthousenews.com/colorado-cleared-to-deny-funding-to-anti-lgbtq-catholic-preschools/> [https://perma.cc/6E2U-S5C9].

47. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 760.

48. *Id.* at 759.

49. *Id.* at 760.

50. See generally Brief of Professors Nelson Tebbe & Lawrence G. Sager as Amici Curiae Supporting Appellants, No. 25-1187 (Sep. 16, 2025), <https://www.aclu-co.org/app/uploads/2025/10/2025-09-16-Professors-Tebbe-Sager-Amicus-Brief.pdf> [https://perma.cc/NR32-DLFC] (discussing the state repealing the regulation as it relates to congregation preference).

51. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 757–58.

52. *Id.* at 758.

53. *Id.*

54. *Id.* at 759.

55. *Id.* at 770.

56. *Id.* at 771.

Two Catholic schools as well as two parent parishioners brought a lawsuit challenging the constitutionality of Colorado's equal-opportunity requirement. A federal district court ruled in favor of the state, but the plaintiffs appealed.⁵⁸ In 2025, the Tenth Circuit Court of Appeals affirmed the district court's decision denying the preschool an injunction and upholding the state's right to require non-discrimination provisions at publicly funded preschools.⁵⁹ According to the court, the state "did not exclude faith-based preschools from participating."⁶⁰ The three-judge panel underscored that the non-discrimination policy "applies to all preschools regardless of whether they are religious or secular."⁶¹ The court rejected the plaintiffs' attempt to equate the non-discrimination requirement with religious-use restrictions on account that they limited religious exercise.⁶² Unlike the state policies reviewed in *Trinity Lutheran*, *Espinoza*, and *Carson*, Colorado's non-discrimination requirement did not exclude religious institutions based on their status or religious use of funds.⁶³ Furthermore, the program was different from *Carson* because the preschools that took part in this program *could use state funds* to educate students on matters of faith.⁶⁴

The circuit court also found that the non-discrimination policy was neutral and generally applicable. The requirement was facially neutral because it applied to all schools and did not mention religion "except to prohibit discrimination based on religious affiliation."⁶⁵ The court also rejected the plaintiffs' assertion that the department's recalibration of the congregation preference was evidence of hostility toward religion. If anything, the court reasoned, the initial congregation preference was designed to actually assist the religious preschools.⁶⁶ As such, the department's actions were far from the religious gerrymander that existed in the *Lukumi* case.⁶⁷

With regard to neutrality, the plaintiffs asserted that the catchall preference and temporary waiver provision were systems of individual exemptions.⁶⁸ The court rejected both claims.⁶⁹ The court acknowledged that the catchall preference resembled a system of individualized exemptions because it enabled preschools to request a unique preference, which the department could decide to approve or reject. Therefore, the catchall preference could be seen as "an individualized addition to a list of preferences."⁷⁰ However, the court countered that the preference system did not give preschool the authority to contravene the choice program's non-discrimination provision. Because the preference system could not be used as an exception to the non-discrimination requirement,

58. *St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 964 (D. Colo. 2024).

59. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 757.

60. *Id.* at 764.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 766.

66. *Id.* at 767.

67. *Id.*

68. *Id.* at 768–71.

69. *Id.* at 771.

Fulton was inapplicable. The voluntary waiver system, giving preschools extra time to meet quality standards, could not be “reasonably understood to authorize even a temporary exception to the non-discrimination requirement.”⁷¹ While preschools might need some time to comply with certain quality standards (e.g., training staff), they did not need time to work toward complying with the non-discrimination requirement.⁷² They could simply choose to stop discriminating in admissions.⁷³ Therefore, the department had no discretion to waive the requirement, even temporarily.⁷⁴

Because the choice program was generally applicable and neutral, the circuit court applied rational basis review. The non-discrimination requirement was rationally related to the legitimate purpose of “protecting equal access to preschool education for Colorado children.”⁷⁵

In an earlier Colorado case, *Darren Patterson Christian Academy v. Roy*, a preschool associated with Darren Patterson Christian Academy also sued Colorado over its non-discrimination law.⁷⁶ The preschool initially signed the state’s non-discrimination statement but was concerned about having to hire employees who were from the LGBTQ+ community and who did not share the same faith as the Academy.⁷⁷

This preschool was successful in obtaining a preliminary injunction that blocked Colorado from enforcing the non-discrimination law.⁷⁸ In rejecting the state’s motion to dismiss, a federal district court reasoned that Colorado’s law would force the school to choose between adhering to its religious beliefs at the risk of being excluded from the choice program or complying with the department’s rules.⁷⁹ By forcing the school to make this choice, the court reasoned that the program violated the *Trinity Lutheran*, *Espinoza*, and *Carson* trinity of free exercise cases.⁸⁰ The court also found that the state’s rules were likely neither neutral nor generally applicable.⁸¹ The choice program failed the general applicability requirement because the department provided exemptions to other schools while denying an exemption to the plaintiff school.⁸² Consequently, strict scrutiny applied, and the law was likely unconstitutional because there was no sufficiently compelling reason for infringing upon the school’s free exercise rights.⁸³

In a subsequent proceeding, the federal district court again sided with the Christian school, finding the state’s requirement was neither “neutral” nor “generally applicable” because the state included a temporary waiver, which allowed an exception from the “quality standards” and also because it created a preference for faith-based schools to reserve space for their

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 777.

76. *Darren Patterson Christian Acad.*, 699 F. Supp. 3d at 1169.

77. *Id.* at 1171.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1185.

82. *Id.* at 1185–86.

own members.⁸⁴ The court granted the school's motion for summary judgment on this issue and granted the school a permanent injunction against enforcing the quality standards provision against the school. The state of Colorado has appealed this decision to the Tenth Circuit.

B. Maine Human Rights Act (MHRA)

In 2021, while the *Carson v. Makin* decision was pending, Maine amended its Human Rights Act ("MHRA"). Prior to the 2021 changes, MHRA's educational non-discrimination provisions did not include gender identity, religion, ancestry, or color.⁸⁵ MHRA's non-discrimination provisions currently prohibit discrimination based on religion, sexual orientation, gender identity, disability and ancestry, national origin, race, color or religion.⁸⁶ Any school that participates in the tuition-assistance program and violates the non-discrimination act is subject to a \$100,000 fine. Saint Dominic Academy and Bangor Christian Schools, the plaintiff in *Carson v. Makin*, each filed separate federal lawsuits challenging the MHRA.

In *St. Dominic Academy v. Makin*, the plaintiffs (the archdiocese, a Catholic high school, and parent parishioners) argued that the State's MHRA non-discrimination law violated the schools' free exercise rights because some of its practices put the school at risk of being ineligible to participate in the tuition program.⁸⁷ In 2024, the federal district court denied the plaintiffs' motion for a preliminary injunction.⁸⁸ The court found that the MHRA was neutral because insufficient evidence was presented to show that the state was motivated by hostility toward religion.⁸⁹ However, the court found that the law was not generally applicable because it did not apply extraterritorially (i.e., Maine paid for students to attend private schools out-of-state), and it did not apply to private postsecondary institutions in Maine.⁹⁰

Nevertheless, the court found that prohibitions withstood strict scrutiny review. The state had a compelling interest in eliminating discrimination with respect to publicly funded institutions.⁹¹ Unlike *Fulton*, the state did not provide a system of individual exceptions at the discretion of an official.⁹² The challenged provisions were also narrowly tailored because there was no evidence that the challenged policies prevented the school from conducting prayers, teaching from a Catholic perspective, or promoting Catholicism at the expense of other religions.⁹³

84. *Darren Patterson Christian Acad.*, 765 F. Supp. 3d at 1194.

85. ME REV. STAT. ANN. TIT. 5 § 4602(1), (5)(C)(2022). The MHRA also said prohibitions based on sex or gender identity did not apply religious corporations.

86. Also, the MHRA initially exempted single-sex schools from the prohibitions of discrimination but in 2023 the MHRA was amended to remove the exclusion of single-sex schools.

87. *St. Dominic Acad.*, 744 F. Supp. 3d at 63.

88. *Id.* at 84.

89. *Id.* at 77.

90. *Id.* at 73.

91. *Id.* at 78.

92. *Id.*

The second case in Maine, *Crosspoint Church v. Makin*, was also decided in 2024.⁹⁴ Crosspoint operates Bangor Christian Schools, which openly discriminated by denying admission to students on the basis of their faith, sexual orientation, and gender identity. Crosspoint filed for a preliminary injunction, alleging that the changes to the MHRA violated the Free Exercise Clause.⁹⁵ The school subscribes to religious beliefs that uphold marriage as a union between one man and one woman, and its code of conduct prohibits students from engaging in immoral conduct, including sexual activity outside of marriage, or identifying as a gender other than their biological sex. Also, school employees must be co-religionists and agree with the school's statement of faith.⁹⁶

Because of Crosspoint's discriminatory policies, it could not participate in Maine's school tuitioning program. Thus, Crosspoint alleged that Maine's non-discrimination provisions violated the schools' right to free exercise. Maine argued that the MHRA is religion-neutral and generally applicable, and that the state law regulates conduct not speech.⁹⁷ A federal district court denied the school's motion for a preliminary injunction.

Regarding Crosspoint's free exercise claims, the federal district court concluded that Maine's amendments to the MHRA were done for legitimate interests, namely, preventing discrimination in education. Moreover, Maine's decision to add further protections to the MHRA aligned with similar Maine laws on employment, housing, and education, which likewise prohibit sexual orientation/gender identity discrimination, but also generally exempt religious organizations that do not receive public funding. The court found that the MHRA provisions were reasonably related to the state's interest in preventing discrimination and applied generally to all schools receiving public funding.⁹⁸ Although Crosspoint did not prevail in its challenges to the MHRA, the district court did explain that this case presents new constitutional questions that the appellate court will likely eventually resolve.⁹⁹ Both cases are being appealed to the First Circuit.¹⁰⁰

Discussion

While the current Supreme Court seems to have moved in another direction when it comes to free exercise jurisprudence, it is unclear whether a state's interest in protecting all children from discrimination would outweigh religious rights. As Professor Tebbe wrote after *Carson v. Makin*: "With respect to public funding of religion, the separation of church and state has all but disappeared, without a bang or even a

94. *Crosspoint Church*, 719 F. Supp. 3d at 103. In a subsequent proceeding, the court determined that the newly submitted evidence, which included interrogatory answers and other materials, did not impact the court's initial denial of a preliminary injunction. See *Crosspoint Church v. Makin*, No. 1:23-cv-00146, 2024 U.S. Dist. LEXIS 98630, at *2 (D. Me. June 4, 2024).

95. As discussed, it is beyond the scope of this Article to discuss the free speech and Establishment Clause issues.

96. *Crosspoint Church*, 719 F. Supp. 3d at 109.

97. *Id.* at 110.

98. *Id.* at 116–20.

99. *St. Dominic Acad.*, 744 F. Supp. 3d at 43.

100. See *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 84 (D. Me. 2024), *appeal docketed*, No. 24-1739 (1st Cir. Aug. 16, 2024); *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 126 (D. Me. 2023), *appeal*

whimper.”¹⁰¹ The cases from Colorado and Maine might provide further guidance on whether or not religious rights have been truly elevated above any other rights.

Although the Maine and Colorado decisions are asking a different legal question than what was raised in the earlier decisions discussed, these recent cases are particularly significant because they are the first to analyze whether state law can prohibit discrimination in private religious schools after *Trinity*, *Espinoza*, and *Carson*. Indeed, after *Trinity*, *Espinoza*, and *Carson*, some observers contended that a private religious schools’ free exercise rights might override students’ civil rights.¹⁰² The Tenth Circuit’s decision and the two federal district court decisions from Maine suggest that this may not hold entirely true.

It is important to highlight that the Court has long observed that states have a compelling or important interest in protecting its citizens from invidious discrimination, even by private parties.¹⁰³ Moreover, the Free Exercise Clause does not demand a state provide financial assistance that inflicts discriminatory harm on its fellow taxpayers.¹⁰⁴ For example, in the past, private schools¹⁰⁵ and private religious schools¹⁰⁶ that discriminated based on race due to sincerely held religious beliefs lost their free exercise cases. To illustrate, both a private religious university and a private religious K-12 school barred Black students from enrolling due to the schools’ sincerely held religious beliefs.¹⁰⁷ When the IRS threatened to suspend the schools’ tax-exempt status, the two private religious schools sued. The Supreme Court rejected the schools’ free exercise arguments and found that the government has a “fundamental, overriding interest in eradicating racial discrimination in education.”¹⁰⁸ It should be noted that the preschools involved in the Tenth Circuit opinion discussed did not

101. Nelson Tebbe et al., *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020). See also Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021).

102. See Derek Black, *When Religion and the Public-Education Mission Collide*, 132 YALE L.J. F. 1 (2022); Vania Blaiklock, *The Unintended Consequences of the Court’s Religious Freedom Revolution: A History of White Supremacy and the Private Christian Church Schools*, 114 NW. UNIV. L. REV. ONLINE 46 (2022); Preston Green et al., *Racial and Religious Discrimination in the U.S. in a Post-Carson World*, 99 PEABODY J. 4 (2024); Phoebe Petrovic, *False Choice: Wisconsin Taxpayers Support Schools that Discriminate*, WIS. WATCH (May 5, 2023), <https://pbswisconsin.org/news-item/false-choice-wisconsin-taxpayers-support-schools-that-can-discriminate/> [https://perma.cc/K2T6-YLD4].

103. See, e.g., N.Y. State Club Ass’n v. New York City, 487 U.S. 1, 14 n.5 (1988); Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Runyon v. McCrary, 427 U.S. 160, 179 (1976).

104. Brief for Nat’l Educ. Assoc. et al. as Amici Curiae Supporting Respondents, *Carson v. Makin*, 596 U.S. 767 (2022) (No. 20-1088), https://www.supremecourt.gov/DocketPDF/20/20-1088/198216/20211029141644595_2021-10-29_-_Carson_Amici_Curiae_Brief_of_NEA_et_al_in_Support_of_Respondent.pdf [https://perma.cc/CK3V-J3YM].

105. See *Runyan*, 427 U.S. at 213 (upholding application of non-discrimination law to a private school that accepted only white students).

106. See *Bob Jones Univ.*, 461 U.S. at 603–04.

107. *Id.*; see also Bekah McNeel, *Some Christian Schools are Finally Grappling with Their Racist Past and Segregated Present*, THE HECHINGER REP. (Aug. 26, 2020), <https://hechingerreport.org/christian-schools-grapple-with-demographic-change-and-their-racist-past/> [https://perma.cc/8PUF-L6XV] (noting that “[m]any” religious “schools were created to preserve racial segregation”).

appreciate being compared to segregation academies. The Tenth Circuit disagreed with the preschools, finding the comparison to be a “purely legal one.”¹⁰⁹

Likewise, in a subsequent case involving a child custody matter, the Supreme Court observed that “the Constitution cannot control such prejudice . . . neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹¹⁰ To be sure, the constitutional guarantee of religious freedom is not an entitlement to “general immunity from secular laws.”¹¹¹ As underscored in *Employment Division v. Smith*, anything to the contrary would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”¹¹² In a country characterized by extensive religious diversity, the wide range of beliefs among the population makes it unavoidable that certain secular laws may conflict with or offend some individuals’ religious convictions concerning race, sexual orientation, or faith. Hopefully the Court will eventually find that a state has discretion to condition the receipt of public funds to ensure the money is used in a manner consistent with state policies. State power could be diminished if a private religious school that receives taxpayer money is allowed to engage in discriminatory practices that conflict with state law.

While residents in any state have the right to freely exercise their religion, there is also a strong governmental interest for states to provide education in a non-discriminatory way. In providing education, it includes oversight about how to subsidize schools that use public money for sectarian purposes. Of course, in doing so, a state may not apply non-discrimination conditions unevenly, allowing exceptions for secular but not religious reasons.¹¹³ Also, even if rational basis is not ultimately applied, the Court should find that the public’s interest in not funding discrimination is a compelling state interest. Finally, the state would be abandoning its most basic obligation to treat all its citizens equally if they were required to fund programs that treat some of its members “as social outcasts or as inferior in dignity and worth.”¹¹⁴

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109. *St. Mary Cath. Par. in Littleton*, 154 F.4th at 766 (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976) within the context of the preschools’ free association argument).

110. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (finding that the Equal Protection Clause forbids a child custody decision that is based on racial prejudice and social bias). Justice Kennedy also recognized a constitutional right to equal dignity in a case involving marriage equality *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

111. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020); see also *Prince v. Massachusetts*, 321 U.S. 128, 166 (1944) (ruling that the freedom to exercise religion is not absolute).

112. *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145 (1878)).

113. See *Fulton*, 593 U.S. at 522.

Teaching All the Babies: Reflections on Power, Politeness, and the Promise of Good Trouble

DR. DAVID J. JOHNS

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Teaching All the Babies: Reflections on Power, Politeness, and the Promise of Good Trouble

DR. DAVID J. JOHNS[‡]

There's a particular kind of electricity that fills a room when young people gather to imagine freedom. I felt it the moment I walked into Howard University School of Law ("HUSL") for the 22nd Annual Wiley A. Branton Symposium. The theme, "Good Trouble: Unleashing Power, Policy, and the Voice of the People," wasn't just printed on programs¹ and projected on screens. It was alive in the bodies of students who leaned forward in their seats, who locked eyes with panelists when brutal truths were spoken, who nodded with recognition when we dared to name what too many institutions still refuse to acknowledge: the law, as constructed, was never designed for all of us to thrive.

I've spent my career teaching babies—from kindergartners tracing their ABCs to college students grappling with the architecture of oppression, from young activists finding their voices to seasoned advocates remembering why they started this work in the first place. On my podcast, *Teach the Babies*, I explore what it means to honor ancestral wisdom while preparing for revolutionary times.² But that November day at Howard, I found myself in the rare position of being a student again, learning from the brilliance, hunger, and clarity of vision that law students brought to conversations about power.

The Weight of the Room

When Professor Lia Epperson moderated our panel, "Seizing the Reins of Power: From Classroom to Courtroom," I sat alongside accomplished legal scholars and practitioners who have dedicated their careers to justice: Dean Cedric M. Powell of Howard University School of Law, Professor Fred Smith from Stanford Law School, and Professor Brenda Gibson from Wake Forest University School of Law. The conversation³ was designed

[‡]CEO & Executive Director, National Black Justice Collective.

1. Howard Law Journal, 22nd Annual Wiley A. Branton Symposium Program, 69 HOW. L.J. 498 (2026).

2. See generally TEACH THE BABIES W/ DR. DAVID J. JOHNS (Apple Podcasts) (examining the

to explore how power is constructed through education and law, how it's distributed, maintained, and potentially reimagined. These are not small questions. They are the questions that determine who gets to breathe freely, who gets to exist without constant surveillance, and who gets to dream without the weight of systems crushing those dreams before they become palpable.

But as the conversation unfolded, I felt a familiar tension building in my chest—the same tension I've felt in classrooms when I've watched brilliant minds self-censor, when I've witnessed the careful choreography of respectability politics override the urgency of truth-telling. Don't misunderstand me: my fellow panelists were exceptional, thoughtful, and accomplished. And there was something in the air, something I've encountered in countless professional spaces where those of us who have “made it” into institutions are expected to speak about transformation while being careful not to threaten the very structures that granted us conditional access.

I was honored to be enrolled in the process of helping kindergartners and third grade students make sense of who they are in this world they didn't ask to be born into. They taught me more about resilience than any graduate seminar ever could. I've taught college students who were simultaneously brilliant and exhausted, navigating systems that demanded their excellence while withholding the resources necessary to fully manifest it. And what I learned from all those babies—what they taught me—is that politeness in the face of injustice is not neutrality. It is complicity.

The Question I Had to Ask

At one point during the panel, I couldn't hold it anymore. I turned to one of my fellow panelists and asked a question that I knew might disrupt the carefully maintained equilibrium of academic discourse: *Can you truly trust that the institution of the law will show up for us?* For those of us whose experiences have been illuminated by critical race theory and intersectionality theory? And if we can't—if history and present reality have taught us that the law often arrives too late, if at all—then what novel strategies can we employ to defend and expand democracy?

My question hung in the air for a moment. I watched my colleague's face, watched the room, watched the students. And in that watching, I saw what I needed to see: recognition. The students knew what I was asking. They'd been asking it themselves, in late-night study sessions and coffee shop conversations, in the moments when doctrine collided with lived experience, when they were told to “think like a lawyer.” Still, they couldn't shake the feeling that thinking like a lawyer sometimes meant thinking like someone who doesn't look like us, doesn't live like us, doesn't risk what we risk.

The law, after all, is a tool. And like any tool, its utility depends on who wields it and toward what ends. We've seen the law used to uphold slavery and to end it, to enforce segregation and to dismantle it, to criminalize existence and to protect it. The question isn't whether the law can be a tool for liberation—we know it can. The question is whether we're willing to acknowledge that the institution of law, as currently structured, is more

This is not cynicism. This is clarity. And clarity, I've learned from every classroom I've ever stood in, is the first requirement of effective resistance.

The Politics of Politeness and the Price of Restraint

Let me be explicit about what I mean by "the politics of politeness." I'm talking about the unspoken rules that govern how marginalized people are expected to advocate for their own humanity. We're taught to be reasonable, to consider all sides, to acknowledge complexity, to temper our demands with an awareness of what's "realistic" or "feasible" or "politically possible." We're taught that anger is unproductive, that directness is unprofessional, that naming white supremacy, heteropatriarchy, and capitalism as organizing logics of oppression is too radical, too divisive, too risky.

But here's what I know from my time as the first Executive Director of the White House Initiative on Educational Excellence for African Americans under President Obama: politeness doesn't protect us. Respectability doesn't save us. Playing by rules that were written to ensure our failure doesn't lead to our success. It leads to exhaustion, to the erosion of democracy, to the insidious internalization of the very logics we claim to resist.

The lawyers on my panel were brilliant. They've dedicated their lives to justice. And I sensed in some of their responses a restraint that has been honed by years of navigating predominantly white institutions, by the subtle and not-so-subtle messages that to be taken seriously, we must moderate our critiques, that to be effective, we must work within the system rather than fundamentally challenging it.

And I understand that impulse. I've felt it myself. There's a strategic calculus to institutional work, a recognition that sometimes you have to speak the language of power to disrupt it (the master's tools), that sometimes access requires compromise. There's a difference between tactical restraint and internalizing the belief that your whole, unfiltered truth is somehow too much, too aggressive, too threatening to be voiced in professional spaces.

What the Students Taught Me

While the panel discussion unfolded, I was watching the students. Not in a distant, observational way, but with the attentiveness of a forever teacher who knows that the most critical learning often happens in the spaces between words, in the body language of people processing new information, in the quick glances exchanged when something true and uncomfortable is finally named.

I saw students nod when I challenged whether the institution of law would show up for us. I saw them lean back and cross their arms when responses felt too measured, too careful. I saw them light up when we talked about novel strategies, about the need to challenge precedent, about acknowledging that those who hoard power will rewrite rules to maintain that hoarding and that our job is to disrupt those rewrites with equal creativity and strategic boldness.

After the panel, the questions students asked were incisive, urgent,

good trouble looks like in courtrooms and policy rooms and community organizing spaces. They were asking, in essence, the same question I'd posed to my fellow panelist: *How do we use the tools of the law to dismantle legal structures that were built to exclude us?*

And that's when I knew: these students don't need us to model politeness. They need us to model courage. They don't need us to demonstrate how to navigate oppressive systems with grace. They need us to show them how to imagine and build liberatory alternatives.

In the weeks following the symposium, I had the privilege of speaking with Juliette Stanley, the Editor-in-Chief of the *Howard Law Journal*, on my podcast, *Teach the Babies*.⁴ Juliette is a former chemistry teacher who walked away from the classroom not because she stopped loving her students, but because she realized that the problem wasn't in her building—it was in the law. She recognized that systemic change requires engaging systems at their roots, and for her, that meant law school.

Our conversation was remarkable for many reasons, but what struck me most was how naturally Juliette talked about teaching. Even as she leads one of the nation's most prestigious law journals, even as she prepares to enter the legal profession, she understands that her work is still teaching. Every brief she writes, every case she analyzes, every conversation she facilitates about civil and human rights—it's all in service of teaching future generations how to recognize injustice and refuse to accept it as inevitable.

Juliette told me about a former student who called her just to say he was finally at peace.⁵ That moment, that recognition that teaching is a relationship, that impact is measured in transformed lives, not just test scores or case wins, is what connects those of us who have been called to classrooms, whether those classrooms have chalkboards or courtrooms or podcast studios.

We bonded over this shared understanding: that we're both classroom teachers who have applied the lessons learned in that space to other sectors, all to change systems that weren't designed for us to thrive. And we're committed to ensuring that we do thrive, that we teach all the babies how to thrive, that we refuse the false choice between institutional access and revolutionary vision.

What "Teach All the Babies" Means in Legal Spaces

When I say, "teach all the babies," I'm not being cute or diminutive. I'm being deadly serious. I'm talking about a pedagogical and political commitment to ensuring that everyone, regardless of age, irrespective of whether they hold a J.D. or a high school diploma, has access to the knowledge, skills, and frameworks necessary to recognize and resist oppression.

In the context of legal education and practice, teaching all the babies means several things:

First, it means demystifying the law. Too often, legal knowledge is hoarded, gatekept, and presented as the exclusive domain of those who can afford elite education and navigate the credentialing systems that reproduce class and racial hierarchies. But the law shapes everyone's life. Everyone deserves to understand it, to interrogate it, to imagine how it could be different.

Second, it means centering those whom legal systems have most harmed in conversations about and efforts to facilitate legal reform. This isn't charity or inclusion for inclusion's sake. This is a strategic necessity. Those who experience the sharp edge of the law most acutely often have the most precise analysis of how it functions and the most creative visions for how it could be transformed. If your legal education doesn't regularly put you in conversation with currently and formerly incarcerated people, with undocumented immigrants, with sex workers, with disabled people, with Black trans people, with deaf and hard of hearing people, with people with intellectual and developmental disabilities, with everyone the law has been used to criminalize and control—then your legal education is incomplete.

Third, teaching all the babies means acknowledging that the classroom is everywhere. Juliette learned this when a student's question about insufficient chairs led her to realize that education policy, not just pedagogical practice, was the site of intervention. I learned it in my work at the White House, where every policy conversation was an opportunity to teach policymakers about the lived realities of African American students. I learn it every day at the National Black Justice Collective,⁶ where our work to end racism, homophobia, and lesbian, gay, bisexual, transgender, queer/questioning+ and same-gender loving ("LGBTQ+/SGL") bias, stigma, and discrimination requires constantly teaching—teaching media how to cover our communities, teaching legislators how their policies impact us, teaching each other how to show up in solidarity across difference.

Fourth, and perhaps most importantly, teaching all the babies means refusing to accept the limitations that institutions place on our imagination. Law schools teach case law and statutory interpretation. They teach legal writing and oral argument. But do they teach how to organize communities to create the political conditions that make justice possible? Do they teach how to use media to shift narratives? Do they teach how to build coalitions across movements? Do they teach that sometimes the most legally sound strategy is less effective than the most politically bold one?

I want everyone who has the privilege of studying and practicing law to recognize that privilege for what it is: a responsibility to teach. To teach those who will never set foot in a law school but whose lives are shaped by legal decisions every single day. To teach each other, across ideological and methodological divides, how to build the world we claim to want. To teach the next generation not just how to think like lawyers, but how to think like freedom fighters who happen to use legal tools in service of liberation.

The John Lewis Legacy: Necessary Trouble in Dangerous Times

The symposium's theme invoked Congressman (and my birthday twin) John Robert Lewis's call to "get in good trouble, necessary trouble[.]"⁷ It's a call that resonates deeply in this moment, when American democracy is under assault from multiple directions, when the legal and political gains of previous generations are being systematically dismantled, when those of us committed to justice must decide whether we will defend old ground or dare to imagine new territory.

Congressman Lewis understood something crucial: respectability has never protected Black people. Legality has never protected Black people. The law itself has never been our salvation. It has been a terrain of struggle. On this site, we fight for recognition of our humanity against a legal tradition that long defined us as property, that continues to criminalize our existence, and that deploys the language of rights and due process to maintain structural inequality.

Good trouble, in Lewis's framework, wasn't about being polite or patient. It was about strategic disruption, about making injustice visible and untenable, about creating crises that forced institutions to respond. The students who sat-in at lunch counters weren't engaging in dialogue with segregationists. They were refusing the terms of engagement that segregation offered. They were saying, through their bodies and their persistence, that the law as written was illegitimate, and that their defiance was, in fact, the highest form of legal and moral reasoning.

This is what I wanted to surface during our panel at Howard: that we need more practitioners who understand the law as a site of struggle, not just as a set of rules to be mastered and applied. We need lawyers who can code-switch—who can write brilliant briefs and file persuasive motions, argue compellingly before judges, and communicate clearly to the community—but who never forget that the law, as currently constructed, is often the problem, not the solution.

We need legal education that teaches students to challenge precedent, not just cite it. That teaches them to recognize when the rules are being rewritten to facilitate power hoarding, and to develop strategies to disrupt those rewrites. That teaches them that sometimes the most important legal work happens outside courtrooms, in community spaces where people are building the political power necessary to make legal victories meaningful and sustainable.

The Stakes: Democracy, Education, and Everything

Someone asked me recently what's at stake in this moment. I said: everything. And I meant it.

We're living through a time when the fundamental premises of multiracial democracy are actively contested, when public education is under systematic attack from those who recognize that an educated populace is a threat to authoritarianism. When the legal frameworks that

made even limited progress possible—from *Brown v. Board of Education*⁸ to *Obergefell v. Hodges*⁹—are being actively undermined by a Supreme Court that has abandoned any pretense of impartiality.

For Black people, for women, for LGBTQ+/SGL people, for people with disabilities, for everyone who exists at the intersections of marginalized identities, the stakes are not abstract. They are embodied. They show up in school board meetings where books about our lives are banned, in legislative sessions where our rights are stripped away, in courtrooms where our humanity is debated, in police encounters where our survival is uncertain, in emergency rooms where our pain is dismissed, in voting booths that are increasingly hard to access, in inaccessible buildings and transportation systems, in guardianship proceedings that strip autonomy, in nursing facilities and institutions where disabled people are warehoused and abused.

And yet—and this is crucial—despair is not an option. As my mother, Edith Johns, told me when we recorded a conversation for my podcast: “I finally am at peace. I don’t fight as much as I used to. I’m healthier than I have been in years, and I never knew what peace was until about a year ago.”¹⁰ My mother found peace not by giving up the fight, but by understanding that resistance must be sustainable, that we must find ways to engage in necessary trouble without destroying ourselves in the process.

This is part of what I wanted to convey to the students at Howard: that the work of justice is a marathon, not a sprint (shout out to the great educator Nipsey Hussle). We need strategies that allow us to show up consistently, powerfully, and creatively. That good trouble requires discernment—knowing when to push and when to rest, when to engage institutions and when to build alternatives to them, when to use the tools of the law and when to recognize that legal strategies alone will never be sufficient.

What Leadership Looks Like: Learning from Juliette

When I observed Juliette Stanley leading at the symposium, I saw something that gave me tremendous hope. I saw a young Black woman who had been a teacher, who understood that teaching is fundamentally about seeing people’s potential and creating conditions for that potential to flourish, bringing that same ethos to legal work.

During our podcast conversation, Juliette talked about the dangerous reality of how prior convictions silence Black voices in courtrooms, about the importance of grace—especially grace for yourself—as a tool for anyone fighting for justice. She talked about missing the classroom, about the specific joy of watching students have breakthrough moments, about the impossibility of leaving teaching behind once it’s become part of your identity.

And I realized: this is what we need more of in legal education and practice. We need people who understand that law is pedagogy, that every interaction with the legal system is teaching something—about power,

8. 347 U.S. 483 (1954).

about worth, about who matters and who doesn't. We need lawyers who are teachers, who bring that sensibility to their work, who refuse to accept that professional excellence requires abandoning care, compassion, and the belief that everyone deserves to understand the systems that shape their lives.

Juliette embodies this. She left the classroom because she recognized that the problems her students faced—insufficient resources, criminalization, the school-to-prison pipeline, the school-to-sex trafficking pipeline—weren't problems she could solve with better lesson plans. They were legal problems, policy problems, problems that required engaging the law itself. But she didn't leave teaching. She expanded her classroom.

This is what I mean when I say we must teach all the babies. It's not a retreat from specialized knowledge or professional expertise. It's a commitment to ensuring that such knowledge and expertise are always in service of collective liberation, always accountable to those most impacted by injustice, always humble enough to recognize that the people closest to the problem are closest to the solution.

Radical Approaches: Imagining Beyond Reform

So, what are the "more radical, less restrained approaches" I referenced during the panel?¹¹ What does it actually mean to challenge precedent, to rewrite rules, to disrupt power hoarding?

It means recognizing that the law is not neutral or objective, that it has always been a tool of power, and that transformative justice requires more than skillful manipulation of existing legal frameworks. It means being willing to say that some legal structures cannot be reformed—they must be abolished and replaced.

It means drawing inspiration from movements that understood the limitations of legal strategy. The Civil Rights Movement, for all its legal victories, was most effective when it combined litigation with direct action, with economic pressure, with massive organizing that created political crises requiring response. *Brown v. Board*¹² was significant, but it was the Montgomery Bus Boycott, the sit-ins, the Freedom Rides, the March on Washington, and the Selma to Montgomery marches that created the conditions for meaningful legal change.

It means recognizing that procedural justice—making sure everyone has access to courts, ensuring due process—is not the same as substantive justice. A legal system can operate perfectly according to its own rules while still producing profoundly unjust outcomes. This is why intersectionality theory and critical race theory are so vital: they give us frameworks for understanding how formally neutral rules produce racially and otherwise stratified results.

It means being willing to use the law strategically while maintaining a healthy skepticism about it. File the lawsuit *and* organize the protest. Win the case *and* build the political movement that ensures the win is enforced. Cite precedent *and* be prepared to argue for overturning it. Work within institutions *and* create alternatives to them.

Most importantly, it means centering those who have been most marginalized in defining what justice looks like. Not as objects of pity or charity, but as subjects with agency, with analysis, with vision. This is why the National Black Justice Collective's work is explicitly intersectional—we recognize that Black LGBTQ+/SGL people and Black people with disabilities, particularly Black trans women and Black people with disabilities, face compounded vulnerabilities that require compound responses. We can't address racism without addressing homophobia, transphobia/transmisogynoir,¹³ and ableism. We can't address LGBTQ+ oppression without addressing racism and economic injustice. We can't address disability justice without addressing how race, sexuality, and gender identity shape access to care, autonomy, and dignity.

The good news is we can do it all. #BlackExcellence.

The Promise: What Howard Students Are Teaching Us

As I left the symposium that day, I carried with me a renewed sense of hope. Not the naive hope that things will inevitably get better, but the grounded, hard-won hope that comes from witnessing a new generation refuse to accept the limitations of the past.

The Howard Law students I encountered weren't asking for permission to imagine differently. They were demanding the tools to build differently. They weren't satisfied with incremental progress. They were insisting on transformation. They weren't content to become lawyers who happen to be Black, queer, women, disabled, working-class. They were determined to become Black lawyers, queer lawyers, women lawyers, disabled lawyers, working-class lawyers who bring their full identities and the insights those identities provide to the practice of law.

This is what gives me hope: that there's a generation standing on business that has been politicized by crisis, that has watched democracy buckle under the weight of white mediocrity and authoritarianism, that has seen how supposedly neutral institutions consistently fail to protect the most vulnerable, and that has decided not to accept those failures as inevitable.

These students are teaching us what we need to know: that respectability politics won't save us, that playing by rules designed for our exclusion won't lead to our inclusion, that good trouble isn't just a historical strategy but a contemporary necessity.

They're reminding us that teaching isn't just what happens in classrooms. It's what happens every time we choose courage over comfort, truth over politeness, liberation over access, collective freedom over individual advancement. It's what happens when we refuse to let institutions define the boundaries of what's possible.

A Call to Action: Teaching as Resistance

I want to end with a call to action, specifically for everyone who has the privilege of studying and practicing law: use your time, talent, and treasures to teach all the babies.

This means:

Demystify your knowledge.

Write op-eds, host community education sessions, and create accessible resources that help people understand their rights and the legal systems that shape their lives. Don't hoard knowledge behind professional jargon and expensive consultations.

Center the marginalized.

In your practice, in your scholarship, in your teaching, in your advocacy—center those who legal systems have most harmed. Not as case studies or examples, but as collaborators and leaders. Learn from them. Let them set the agenda.

Challenge harmful precedent.

Don't just cite cases; interrogate them. When you see a precedent that upholds oppression, name it as such. Argue for its reversal. Be willing to lose cases in service of building a record that future advocates can use.

Build movements, not just legal arguments.

Recognize that legal victories are often the result of political organizing, not just skilled lawyering. Invest time in building coalitions, in supporting community organizers, in creating the political conditions that make legal change possible and sustainable.

Teach each other.

Share strategies, failures, and insights. Create spaces for difficult conversations about how to balance institutional work with revolutionary vision, how to sustain yourself in work that is often traumatizing, and how to maintain hope without slipping into naivety.

Be willing to fail.

The most important legal work is often the riskiest, the least certain, the most likely to result in immediate losses. File the cases that push the boundaries. Make the arguments that seem impossible. Create the precedent for future generations, even if you don't win today.

Remember who you serve.

Not the institution, not your own career advancement, not even the law itself as an abstract concept. You serve the people who need justice, who deserve liberation, who are waiting for those of us with access to institutional power to use that power in service of collective freedom.

Conclusion: The Classroom is Everywhere

When I walked out of HUSL that day, I carried with me the energy of students who reminded me why I do this work. I carried the weight of knowing that we're living through a moment when democracy itself is

precarious, when the legal frameworks that made even limited progress possible are under attack, when those of us committed to justice must choose between defending old ground and imagining new territory.

But I also carried the certainty that we're not alone in this work. That there's a generation coming up that refuses to accept oppression as inevitable. That there are students, teachers, lawyers, organizers, dreamers, and fighters who are getting into good, necessary trouble every single day.

The classroom is everywhere. The courtroom is a classroom. The policy room is a classroom. The protest is a classroom. The podcast is a classroom. Every interaction we have is an opportunity to teach and to learn, to model what courage looks like, to imagine what freedom could be.

At the NBJC, we work to end racism, homophobia, and LGBTQ+/SGL bias and stigma. This work requires teaching constantly—teaching media, teaching legislators, teaching communities, teaching each other. It requires recognizing that liberation is not a destination but a practice, not something we achieve once but something we must enact every single day.

The 22nd Annual Wiley A. Branton Symposium reminded me of this.¹⁴ It reminded me that good trouble isn't just a slogan; it's a methodology. It reminded me that the politics of politeness is a trap, that institutional access without revolutionary vision is compliance, that teaching all the babies is the most radical act we can commit.

To the students I met that day at Howard: thank you for your questions, your energy, your refusal to accept easy answers. Thank you for reminding me why I became a teacher in the first place, why I continue to teach even in spaces that don't call themselves classrooms. Thank you for the hope you carry, not the naive hope of the privileged but the grounded hope of those who know struggle intimately and choose resistance anyway.

To my fellow panelists—Dean Cedric M. Powell, Professor Fred Smith, Professor Brenda Gibson, and our moderator Professor Lia Epperson: thank you for your brilliance, your dedication, and your commitment to justice. Especially in moments of disagreement or tension, even when I pushed against the constraints of professional discourse, I recognized that we're all engaged in the same struggle, just with different strategies and from various positions.

To everyone reading this: remember that the law is a tool, nothing more and nothing less. Tools can be used to build or to destroy, to liberate, or to oppress. The question is not whether we engage the law, but how we engage it, toward what ends, in service of whom.

And remember this above all: teach the babies. All of them. Everywhere. Always. Because the future we're fighting for depends on what we're teaching today.

Our democracy is fragile. Our legal systems are designed to reproduce inequality. The moment we're living through is perilous. But we are not powerless. We have knowledge, we have each other, we have the ancestors whose shoulders we stand on and the young people whose futures we fight for.

Let's get into some good trouble. Let's challenge precedent. Let's refuse to be restrained by the politics of politeness. Let's teach all the babies how to imagine and build the world they deserve.

This is what Wiley A. Branton understood when he fought to desegregate Little Rock Central High School. This is what John Lewis understood when he walked across the Edmund Pettus Bridge. This is what every freedom fighter who came before us understood: that justice delayed is justice denied, that waiting for permission is a form of surrender, that good trouble is not just necessary—it's the only path forward.

May we have the courage to walk that path. May we have the wisdom to teach each other along the way. May we have the audacity to believe that another world is possible, and the commitment to build it, one classroom, one courtroom, one policy room, one moment of necessary trouble at a time.

Thank you, Howard University School of Law, for reminding me why this work matters. Thank you for creating space for difficult conversations. Thank you for embodying the legacy of Wiley A. Branton, of John Lewis, of every educator and advocate who understood that teaching is the most revolutionary act, and that all the babies—every single one of us—deserve to be taught how to be free.

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Wiley A. Branton Family Reflection

BEVERLY BRANTON LAMBERSON, WYLENE BRANTON WOOD &
DEBRA E. BRANTON

Dean Wiley A. Branton's Daughters

The Sidley and Austin Wiley A. Branton Luncheon and later the *Howard Law Journal's* Wiley A. Branton Symposium has meant a great deal to the Branton family as well as to Wiley A. Branton's friends and associates. The annual gathering is not only an opportunity to celebrate Branton and his contributions, but it also showcases the person he was as a model and inspiration for others, especially for students.

The Symposium is a time to recall difficult history with which students may not be familiar, to recognize the progress we have made as a nation and to challenge the plethora of inequities that still plague our nation and our world. In addition, the Symposium exposes students to esteemed experts in various fields of law, housing, healthcare, prison reform, education and other disciplines where laws, policies or practices need to be or have been challenged in pursuit of justice and equity.

We always knew his work was very important but had no idea of our father's impact until his untimely passing in 1988. He was always "Daddy." We were in awe of how many people from so many different walks of life he helped in big and small ways; how he showed up; how loved he was and is—we still hear new stories about how he helped people or made a difference in their lives.

For us, his children, he was "the best Daddy in the whole wide world." He would stretch out his arms and, one by one, we would run

into his embrace when he said, “You are the best baby in the whole wide world!” Each of the six of us felt closest to him.

And our mother, Lucille, was his partner in all things, his anchor and best friend, the person he trusted and loved most in the world. After they married, she was, according to him, the best secretary he ever had. Her office management helped him concentrate on his cases. She supported and sustained him in calling for justice.

At the time of his passing at age sixty-five, Branton was a partner at Sidley and Austin. Robert McLean, then managing partner of the D.C. office of Sidley and Austin, who had clerked for Justice Thurgood Marshall, felt very strongly the firm should do something in Branton’s honor—they considered Branton to be Sidley’s ‘moral compass.’ Sidley decided to host an annual luncheon to celebrate and carry on his legacy. Over the years, it was held at hotels in Washington, D.C., including the Sheraton Carlton, the St. Regis Hotel, and the Capitol Hilton. The guest list of about 150 for the event was comprised of a remarkable assembly of friends, neighbors, and legal associates. The family was thrilled to have such an overwhelming show of support for our patriarch.

After the first luncheon in 1991, and subsequently over the years, our mother, Lucille, was surprised and honored that the law firm continued to host the luncheon again and again, year after year. Luncheon speakers, carefully selected under the guidance of Sidley partner Michael Nemeroff, included the Honorable Thurgood Marshall, Vernon Jordan, Jack Greenberg, the Honorable Julian Bond, Elanie Jones, Roger Wilkins, Jane E. Smith, the Honorable Rodney Slater, and the Honorable Kurt Schmoke among many other distinguished orators. The firm presented both a monetary and beautiful award to the first-year Howard Law student with the highest grade point average. Mrs. Cecelia Marshall, Thurgood’s wife and longtime friend of the Branton family, became the most special guest each year and hosted an elegant dinner for the family following each event.

Kurt Schmoke joined the luncheon when he became Dean of Howard School of Law. Afterwards, he expressed his appreciation for the recognition of Dean Branton but felt there was more Sidley could do in Branton's honor that would directly impact a larger group of law students. After several subsequent meetings and discussions, the idea of a symposium planned by the *Howard Law Journal* students was set in motion.

Author of *There When We Needed Him*,¹ a biography of Wiley Branton, Judith Kilpatrick, was invited to bring remarks at the very first Branton Symposium in 2004. In *The Unfinished Work of the Civil Rights Act of 1964: Shaping an Agenda for the Next 40 Years*,² she felt it imperative to talk about Branton, his upbringing, homelife, character, influences, and impact, more than to simply give his bio. It then became tradition that each year the family selects someone to make remarks on behalf of the family. Over the years, such remarks have been made by four of Branton's six children—some multiple times—grandchildren, in-laws and close family friends like the Honorable Paul R. Webber III, the Honorable Andy J. Young, Linda Earley Chastang, and others who personally knew and/or were impacted by Branton. Though he was a judge in Arkansas, Branton's youngest son, the late Honorable Wiley A. Branton, Jr., tried to arrange his schedule so he could often attend and speak.

The symposium through its timely and consequential topics discussed by legal scholars, activists, litigators, teachers, law students, and others informs attendees and interprets data, policies and actions relating to the pursuit of justice—racial, climate, health, employment, gender, immigration and more. In fact, it is impossible to come away from a Branton Symposium without being impressed by the expertise and passion of the presenters, including students, enlightened by their

1. See generally JUDITH KILPATRICK, *THERE WHEN WE NEEDED HIM* (2007) (describing the life and legacy of Wiley A. Branton).

2. Symposium, *The Unfinished Work of the Civil Rights Act of 1964: Shaping an Agenda for the Next 40 Years*, X HOW. L.J. (2004).

comments, and motivated by their words and their work to make a difference. Providing all this in the name of Wiley A. Branton continues and expands his legacy. It is a great gift to Branton—and to the pursuit of justice.

The Branton family looks forward to the annual symposium, planning ahead to get the date on their calendars. The Symposium has evolved over the years so that family members can always attend in person or remotely now that it's livestreamed. Our family absolutely loves interacting with the law students and witnessing their commitment to having a successful and relevant symposium. Each year the event is outstanding yet somehow it gets better every time without diminishing the excellence of the prior ones.

The family is pleased to see how the students have creatively incorporated more information about Branton throughout the program's day. From including music from years when Branton was Dean, to using quotes from his speeches, to showing video clips of him in action, attendees have become more familiar with the person they are honoring.

Over the years, there have been poignant remarks at the symposium, most made by those who knew Branton personally. From the descriptions of his personality and character traits, one becomes aware that Dean Branton was truly his authentic self—in all circumstances, with people from varying walks of life. Words—sometimes seemingly contradictory ones yet true—used to describe him include gentle, kind, compassionate, empathetic, bold, generous, loyal, dedicated, focused orator, humorous, humble, fierce, powerful, fearless, strong, warm, witty, thoughtful, gentlemanly, passionate, genuine, community advocate, diplomatic, even quiet.

His Impact Continues

In the early 1990's (after Branton had passed), his daughter, Beverly Branton, was planning events at the Washington Hilton for the Congressional Black Caucus Legislative Weekend. Noticing Beverly's last name, the head caterer asked if she was related to Wiley Branton. With "Yes" being the answer, the woman went on to share that

“Branton is the best emcee in the city; when he’s speaking, the hotel staff tries to work their way into the ballroom to hear him.”

Similarly, a few years ago, Branton’s youngest daughter, Debra Branton, arrived at the airport in Seattle to rent a car that had been reserved. Unfortunately, there were no rental cars available. Debbie explained to the manager that she needed the car to get home after a long flight. The manager arranged a car through another rental agency. On seeing her name on her driver’s license, the manager asked if by chance she was related to Dean Branton of Howard Law. With confirmation that yes, she was his daughter, the manager explained that while he was unable to finish law school and had not actually attended while Branton was Dean, he had spoken with Branton who encouraged him; he said that conversation had a big impact on him. He was also excited to call his family to say that he had met Dean Branton’s daughter.

Branton’s granddaughter Erica Michelle Lamberson, daughter of Beverly Branton Lamberson, at the 2015 Howard University School of Law Branton Symposium, expressed what he means to her:

Today’s occasion conjures up the principle of *Sankofa* in my mind. *Sankofa* is a concept from the Akan people of Ghana, which teaches us to reach back to our roots before we are able to move forward. The word’s literal translation is “go back and get it.” Like the vast majority of you in this room, I have never actually met Wiley A. Branton. He passed 5 years before I was born. And so, this concept of *Sankofa* resonates for me personally, because it tells me that it is okay for me to reach back into my ancestry, fortifying the connection I have to my grandfather, even though I was not able to share space and time with him. Through conversation with family, online research, and events such as this I am able to practice *Sankofa*. This symposium has helped to strengthen his legacy as a constant force in

my life, and the lives of so many others. As I reflect on my journey, I realize that I have been constantly guided by his values and vision, whether I was conscious of it at the time or not. So today I would like to share some of the values that my family has helped me to fetch from my grandfather, so that I may carry forward in his tradition. I invite you to join me in honoring him by remembering and practicing his values which are essential in tackling today's injustices.

My grandfather came from a family of highly educated blacks—which was incredibly rare for their generation. He committed himself to his education and developed a brilliant intelligence. He passed this on to each of his six children, who each completed college degrees. My mother passed this value of higher education on to me. Because of this emphasis and support system, I was able to complete my college degree. I recently graduated as the salutatorian of the Spelman College Class of 2015 as a member of Phi Beta Kappa. I hope that he is proud of this accomplishment, but I hope that he is even more proud that I studied Comparative Women's Studies, with a committed concentration in Film and Social Justice, and minors in Computer Science, Mathematics, and Studio Art. Though my complex path does not directly follow his, I attribute my dedication to social justice to his influence.

My grandfather did not limit his education to the classroom. He understood the value of *Sankofa* and sought out knowledge from his elders. He gained his drive for progress from strong maternal figures who encouraged him to reject the status quo. His siblings used to make fun of him for hanging so closely around older people; but he loved to soak up their wisdom. He completed the full circle of *Sankofa* by passing on this knowledge to others. He would often sneak in deeper

meaning into casual conversation. He had a talent for meeting people where they were in order to get his messages across. He was able to relate with ease both to the most highly educated, well-versed individuals and to those with no formal education. He exuded such a warm personable energy, full of life and humor, even when dealing with the most serious of subjects. He directly engaged with everyone he interacted with, and he always made time to speak to people no matter how busy he was. Whenever he could, he used his talents and resources to help anyone in need. We must learn from my grandfather to not only seek knowledge from others, but also, we must make a conscious effort to pass it on.

The value of our education increases tenfold with each person we share it with. I especially encourage those of you pursuing law degrees to share the knowledge you acquire with others, which can be so powerful in the face of injustice. It is imperative that we connect with those around us, both those with privilege and those who are most oppressed and encourage others to join us in our quest for justice.

The quality that I most admire about my grandfather is his daring courage and bravery. Being a Black civil rights attorney in the south was a very difficult undertaking. The overwhelmingly racist institutions and individuals of this nation were not small enemies to make. But he did not let fear stop him from action. He made up his mind to do something about injustice, and he did not stray from this commitment. Even when the Ku Klux Klan came to his home to burn a cross on his yard while his young children were inside, he did not back down. He continued to fight the good fight. Yet he did not let the hatred of others harden him or weigh him down. It takes constant effort to achieve this

balance of consciousness and optimism, but it is necessary. That kind of unwavering perseverance in the face of oppression and hope for progress that my grandfather exemplified is what it will take for us to continue on this path of fighting injustice. We must be honest about the depth of the issues we face, yet continue to steadfastly believe that together, we have the ability and the resources to change them. We must fiercely believe that the future has the potential to be better than the present if we are to make it so.³

Linda Earley Chastang, who met Dean Branton as a then recent Howard University School of Law (1977) graduate and who became a close family friend, spoke about Dean Branton at the 2024 Wiley A. Branton/*Howard Law Journal* Symposium:

He was a storyteller, the best storyteller ever—bar none! You’ve probably heard or read that about him.

But, as much as Mr. Branton was a great storyteller, he was a terrific listener.

Listening is important. Listening is a skill. It is an art. It is a gift. All really good lawyers must be really good listeners. (Being a good storyteller is not enough.)

But, let me just tell you what John Lewis once told me about Wiley Branton. He said:

Wiley Branton was there for all of us. He stood up for those of us who were left out and left behind. He

3. Erica Michelle Lamberson, Address at the Twelfth Annual Wiley A. Branton/*Howard Law Journal* Symposium: Reforming the Criminal Injustice System (2015).

traveled the length and breadth of the South, listening to and getting to know us, to understand the challenges we faced, and crafting strategies to overcome those challenges. Wiley defended countless individuals who dared to stand up and fight because they had Wiley Branton as their “shepherd and defender.”

I know I was supposed to come here to talk about the Wiley Branton I knew. However, what I know is that he would think I were irresponsible if I did not take this opportunity to teach a lesson, to share a message he would want to share.

The message, the lesson is . . . Listen, listen, listen!

If you listen to people—and people feel listened to—they will want to be on your team, they will follow your lead, you will have inspired their confidence in you, you will know what the challenges are, and you will know how those challenges can best be addressed . . . and you too can make a difference, you too can be a shepherd and defender, you too can improve the lives of others, and you too can change the world—just as Mr. Branton did.⁴

Grandson Kahil Branton, son of Richard H. Branton, Wiley Branton’s oldest child, explained during the 2025 Branton Symposium the impact his grandfather continues to have:

4. Linda Earley Chastang, Address at the Twenty-Second Annual Wiley A. Branton/Howard Law Journal Symposium: The 21st Century Social Engineer: Crafting the Future of the 14th Amendment (Oct. 23, 2024).

Grandfather passed when I was fifteen.

To be honest, my memories of him, outside of family photos and shared stories have mostly reduced to core feelings . . . of warmth, a charismatic smile that attracted people, an engaging guffaw that disarmed them, family gatherings listening from the children's table of stories, jokes and more stories. Most of all, in his and my grandmother Lucille's world, I always felt special, supported, celebrated and loved.

Much older and at least a little wiser now, I marvel at the dueling worlds they operated in—one of pure love starkly contrasting the broader world where Wiley was fighting for equality, justice and the ideals espoused in the constitution—the promise of what this nation will one day become—all the while enduring discrimination, terrorism, and potential bodily harm or death.

This was the world a mere sixty-ish years ago which feels like the blink of an eye to me at the age of fifty-three.

When I was in elementary school, my father, Ricky, took me to the Adam's Park Pond where he picked up a pebble explaining:

The pebble represents each of us;
before the pebble hits the water represents
before birth;
once the pebble is submerged represents after
death;
then he dropped the pebble in the pond.
The ever so brief period when the pebble is in
contact with the surface of the pond represents
our lifespan;

There are many beliefs regarding before birth and after death and at some point, I would find my beliefs;

but the point of the story was to notice the ripples that remained on the surface of life;

it is nearly impossible to live without some ripple.

This had a profound impact on me—our choices and behavior in life determine the nature and magnitude of the ripples and thus the impacts on others long after we are gone.

When Wiley passed, my perspective broadened from simply seeing my loving grandfather. While attending his funerals in Pine Bluff and here at the National Cathedral, where dignitaries received no special seating under Wiley's personal direction conveyed by Lucille.

I could finally see his impact in the eulogy by Vernon Jordon, attendance by Thurgood Marshall, Colin Powell, President Johnson's children, Jessie Jackson, Bill and Hillary Clinton, and thousands of people of all stripes.

I've since come to see his impact in my siblings, cousins, aunts and uncles' lives. I can now see my ability to attend schools from Pre-K through college that put in effort, however slow, to be more diverse, equitable and inclusive. I can see his impact in a current exhibit at the Supreme Court,⁵ and I can see his impact in these symposiums.

5. *Integration Must Proceed Forthwith*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/visiting/IntegrationMustProceedForthwith.aspx> [<https://perma.cc/4JXG-T7PU>].

I have come to see the multitude of ripples that are his true legacy.

With much of the progress made over the last sixty years under siege, I am heartened that all of you, as lawyers, judges, educators, students are making your own ripples (of impact), building on the ripples of our collective ancestors (those who came before us), creating waves of impact that will continue to leverage good trouble, bending the arc of the moral universe toward justice.

And in moments like this, I experience the presence and warmth of my grandfather, Wiley Branton, via his ripples through time.⁶

For most of his adult life, Branton almost always wore a suit, mostly a white shirt, and a tie, even on Saturdays. After he passed, his daughter Wylene Branton Wood, gathered his many beautiful ties and had small, quilted hangings made for each of her siblings. She wrote this poem to accompany the wall hangings and shared it during her remarks when she spoke at the Branton Symposium.

6. Kahil Branton, Remarks at the Twenty-Second Annual Wiley A. Branton/*Howard Law Journal* Symposium: Good Trouble: Unleashing Power, Policy, and the Voice of the People in Education (Oct. 23, 2025).

Daddy's Ties

In Memory of Wiley Austin Branton, Sr.

By Wylene Branton Wood

For my siblings with love

Daddy's Ties were a custom of his dress
style
life.

They signified his ethics but could not define him.

For, Daddy was much more than his Ties.

Yet, when I consider Daddy,

I remember Daddy's Ties.

The paisleys, plaids and stripes of his collection
spanned the years and venues of his life.

Daddy's Ties gave silent testimony to the man.

They bore witness to his intent and practice.

They heralded his presence, set the tone of his action.

Looped precisely round his collar,
gathered gently and secured,

Daddy's Ties were symbols of his way:
Kin and community kept centered in his focus
and made the agenda for his days.

Daddy's Ties hung before him,
elegant sentinels of time,
emblems of his ethic and ego.

They swung gently from his neck
when he visited past clients in nursing homes,
paid on their accounts,
and passed the time of day.

"Just checking on you. Anything you need?"
and when he pop-called on friends and distant
relations.

"Just thinking 'bout you and wanting to say 'hello.'"

They fell with quiet grace as he ushered in church
those

Sundays,
valued clergy, and reached out in Christian charity,
his inclination since childhood days with Honnah.

Daddy's Ties were flat and smooth
when he went to court.
They shared his nerve and daring,
shoulder to shoulder with Thurgood, Harold, and Bill.⁷
He followed the cause wherever it led.
The threats didn't halt him, nor the cross on the lawn.
But when his friends went down, he wept - - for
Sylvanus,
Medger, and Martin.⁸
He wept - and swept his tie out of the way.

He removed his Tie when Toni⁹ died,
and we worried for him.
Gone was the flair and devil-may-care,
Gone was the bright in his eye,
Gone was the bubbling joy the fancy Ties belied.

7. These names refer to the Honorable Thurgood Marshall, the Honorable Harold Flowers, and the Honorable William (Bill) Coleman.

8. These names refer to Sylvanus Olympio, Medgar Evers, and Martin Luther King, Jr.

9. Toni Branton Moore (1948-1986); Branton's oldest daughter.

But Daddy's Ties could tell the tales
of 98 Taxi,
of Howard Law,
of confidences kept,
of high-placed folks and ordinary ones—
All naming him "best friend."
Of lobbying for change and chance for others,
of nurturing students to success.

Daddy's Ties would know whose speeches held sway,
whose fierce orations made justice real,
whose role play sprung good men from jail.
They could sing the list he made of righteous folks,
those who made a difference.
He'd wear his Tie and call their names—
the uncelebrated heroes he never forgot.

I remember Daddy's Ties.
They fluttered at the top of the stairs
as he retrieved the kisses he had the grandkids
blow into the basement.
"I'll need them someday," he'd say,
"when I'm feeling weak, and those kisses will make
me well."

Daddy, in his Ties didn't coddle,
but he urged, advised and sympathized.
Exacting effort and ambition,
he'd lend assistance as he offered correction.

The Ties shook with his laughter
as he told now famous stories—
outrageous and true—
of cunning and courage
against bigotry and hate.
Daddy's Ties knew danger and fear
when he rode out on gut and conviction.

They were pressed down under his suit coat as he
argued for the Nine¹⁰
and challenged Faubus for the right.
They reflected the light of the law and his passion
as he carried the message from Atlanta
and gave voting power to thousands,
changing the way of politics
and raising the dignity of his people.

10. "Nine" refers to the 'Little Rock Nine' and "Faubus" to then Arkansas Governor Orval Faubus.

He'd straighten his Tie and gather himself
as he daily visited his dying friend
or stopped by jails across the South
and even in Africa,
sometimes to hone the strategy for defense--
often just to see some folks he'd known along the
way--
folks now fallen on hard times.

Daddy's Ties harbor the secrets of his heart.
They scented the peril but felt the pride,
the joy in his home and his one true love.
They watched him forgive and show compassion
and bear no reproach 'gainst threats and betrayals,
'gainst the slide of time and circumstance
that gave others the credit.
They knew his grace.

Daddy's Ties string together his timeless values
and pursuits.
They whisper the voice of action and change,
and echo love and work and service.
They honor spirit and man.

They rested at his bosom, close to his heart,
where still he speaks to me.
Daddy's Ties bind me to fact and legend,
to culture and truth.
They take me home
and bring me back to my cell/soul source.
They coax my recollection and suspend me in time.

Daddy's Ties loop around my childhood
and knot me in his legacy
--his love.
They jostle my awareness and inspire my view.
They carry me to yesterday yet fashion my tomorrow.
They anchor me in history and heritage.

Daddy's Ties hug me still,
and hold me in remembering . . .
I remember Daddy's Ties.
I remember.¹¹

11. Wylene Branton Wood, *Daddy's Ties, In Memory of Wiley Austin Branton, Sr.*, (unpublished manuscript) (on file with author).

And words from Wiley A. Branton himself—by way of his Letter to the Editor, *Pine Bluff Commercial*, *Good Memories Dissolve Bitterness*, circa Fall, 1980:

I wish to thank the *Pine Bluff Commercial* and Margie Snider of your Little Rock Bureau for the very generous space and comments that were devoted to some of my activities in your September . . . edition. Judging from the telephone calls I received from friends in Pine Bluff who had seen the article, it appears that they were also appreciative for what you had to say about me and my work.

There is one slight error contained in the article where it gives me credit for re-locating the law school to our present campus. The School of Law moved to our present site some three or four years before I became Dean. While I have been responsible for bringing some physical improvements, I had nothing to do with the acquisition of this very beautiful campus which formerly was occupied by Dunbarton College, a Catholic school for women.

The opinion that I expressed that I thought persons coming on my lawn in 1958 to burn crosses would have been shot did not necessarily mean that they would have been shot by me. I had members of my family, neighbors, and volunteers who kept my home under guard for three or four years. They were determined to do all that they could to see to it that no harm came to me, my wife, or our six children, and the likelihood of a trespasser getting shot during that period was extremely high. However, my protectors were cautioned to shoot only if necessary to prevent possible harm to my family or to themselves. Except for a few individual police officers, I had no reason to have any evidence that local police would offer any diminution of my respect for human life and the length that one

should go to avoid inflicting personal injury or death on another.

The threats made on my life created such a strain on my wife in September of 1957 as to cause her to go into premature labor with our last child. The biggest cross that was ever burned on our lawn was placed there on her first night home from the hospital. Our baby, Debbie, remained in the old Davis Hospital for several weeks. While Debbie is now grown and out of college, she still has some physical problems that relate to her premature birth. While I can never forget what happened in those days, I am more than willing to forgive those who were responsible for the threats and the cross burnings. I have many memories of white people who were kind and friendly to me and my family, and those memories blot out any bitterness that I might otherwise have had.¹²

At home, he was “Daddy”—happy to play hide and go seek; One, Two, Three, Four, Redlight, bicycle riding with neighborhood kids up to the Branton’s 98 Taxi—us so excited that he had a key to the soda machine which he would open up to let everyone pull out their favorite soda pop. He would load our mother and all six of us in the car for outings to visit people, drive into the country to get produce as payment for his legal services from some of his client’s farms or just meandering to see the sites and enjoy the change in weather. To the outside world, as Congressman John Lewis said, he was “always there when we needed him”—seeker and defender of justice.¹³

12. Wiley A. Branton, *Good Memories Dissolve Bitterness*, THE PINE BLUFF COM. (1980).

13. John Lewis, *Wiley Branton Was There For Us*, LEGAL TIMES (Jan. 12, 1989).

As Willam Raspberry wrote in his column on December 23, 1988, entitled “A Few Thousand Close Friends”:

He was everybody’s favorite master of ceremonies, always ready with a funny story—usually with himself as the butt. Thousands of people who thought they knew him well learned, in the week following his death from a heart attack, things about Branton that they had never known: his weekly visits, with his wife Lucille, to nursing homes to call on former clients, or their widows; his subscriptions to Arkansas papers that allowed him to keep up with accomplishments of his “home boys” and their children and to send them congratulatory notes; his never assuaged grief over the death, in 1986, of daughter, Toni.

But Branton’s special gift was his friendship. People who never heard him argue a case or teach a class or resolve a dispute counted him a special friend. He had a way of bringing you inside, making you feel that he took genuine pleasure in having you around.

The people who never knew need to be reminded of the gargantuan contributions, too seldom noted, to the course of the civil rights movement and of American jurisprudence. But it is for Wiley Branton’s kindness, his good fellowship and his incredible warmth that I will remember him—I and a few thousand other “close personal friends.”¹⁴

14. Willam Raspberry, *A Few Thousand Close Friends*, THE WASH. POST (Dec. 22, 1988).

The Branton family is eternally grateful to Sidley and Howard University School of Law, especially the students, for keeping Wiley A. Branton's legacy alive. Carter G. Phillips, managing partner of Sidley and Austin's D.C. office from 1994–2012 and as cited "one of the most experienced Supreme Court and appellate lawyers in the country[.]" takes a personal interest in ensuring Sidley's support of the Symposium each year.¹⁵ For this we are also grateful. But more importantly, we appreciate the providing of opportunities for students and others to learn how to show up. Branton was only thirty-two when in 1956 he, as chief counsel, along with Thurgood Marshall and other NAACP attorneys filed *Aaron v. Cooper* in the District Court of the United States for the Eastern District of Arkansas.¹⁶ This began what ended up being the landmark decision in *Cooper v. Aaron* by the rare agreement of all nine Supreme Court justices in 1958.¹⁷ It upheld both *Brown v. Board of Education* and *Brown II* that separate but equal is unconstitutional and also the 'rule of law' mandates that no entity, including states, is above the law.¹⁸ How can young lawyers make a difference in a similar way in the spirit of Wiley A. Branton? Where are today's Wiley A. Brantons—we need you more than ever.

15. Carter G. Phillips, SIDLEY, <https://www.sidley.com/en/people/p/phillips-carter-g> [<https://perma.cc/3ATL-FDG9>] (last visited April 3, 2026).

16. *See generally* *Aaron v. Cooper*, 143 F. Supp. 855 (Aug. 27, 1956, E.D. Ark.) (arguing that negro students had a constitutional right to not be excluded on account of race).

17. *See generally* *Cooper v. Aaron*, 458 U.S. 1 (1985) (holding that Arkansas officials were bound by federal court orders mandating desegregation).

18. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that separating children based on race is unconstitutional); *see also* *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (*Brown II*) (stating that schools should desegregate with "all deliberate speed.").