Volume 13 | Issue 1

Winter 2009

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Recommended Citation

L. D. Weeden, *Historically Black Colleges Advance Reverse Academic Diversity*, 13 N.Y. City L. Rev. 1 (2009).

Available at: 10.31641/clr130101

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Acknowledgements

Special thanks to Associate Professor, Asmara Tekle Johnson, my colleague at Thurgood Marshall for her insightful comments on an earlier draft of this article. I would like to thank my Research Assistant, Lauren Beamon, J.D. Candidate 2010, Thurgood Marshall School of Law, for her helpful comments on an earlier draft of this article. I am grateful to my wife and my children for their moral support while I worked on this article. In addition, I am grateful to Professor Kevin Brown Indiana University School of Law-Bloomington for his helpful comments regarding this article as a work in progress presentation at the Nineteenth Annual Midwestern People of Color (MWPOC) Legal Scholarship Conference sponsored by the University of Iowa College of Law on May 8, 2009. On March 28, 2009, at the 2009 Southeast/Southwest People of Color Legal Scholarship Conference (SE/SWPOC) hosted by the Phoenix School of Law, Phoenix, Arizona, I discussed an earlier version of this article as a member of the panel on Historically Black Law Schools and the Dialogue on Race.

HISTORICALLY BLACK COLLEGES ADVANCE REVERSE ACADEMIC DIVERSITY

*L. Darnell Weeden**

INTRODUCTION

One commentator correctly recognizes that a new, transformative racial diversity role at historically black colleges and universities (“HBCUs”)¹ may be the key to their own survival.² More than

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¹ The Higher Education Act of 1965 defines an HBCU as:

any historically black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.

20 U.S.C. § 1061(2) (2006). HBCUs also serve an important role of awarding more than 19% of bachelor’s degrees earned by African Americans; graduating 40% or more of all African Americans who receive degrees in physics, chemistry, astronomy, environmental sciences, mathematics and biology; and producing nearly 50% of the African American public school teaching force. Many HBCUs specialize in teaching students from disadvantaged backgrounds. U.S. DEP’T OF EDUC., STRENGTHENING OUR NATION’S HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (2009), <http://www.ed.gov/about/inits/list/whhbcu/strengthening-hbcus.pdf>. See generally Alfreda A. Sellers Diamond, *Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black College or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1878–92 (2004).

² Dr. Julius Chambers, the Chancellor of North Carolina Central University, stated this conclusion in an interview:

[T]he integration of HBCUs is not only a question of fairness, but also a critical survival tactic. HBCUs [must] prepare for a more diverse student body because it’s in their long-term best interest . . . [More] of the best Black students are attending White colleges. Any Black public col-

seventeen years ago, the Supreme Court in *United States v. Fordice*³ held that HBCUs must also recruit non-black students in order to dismantle de jure segregation; HBCUs today should embark on a concerted effort to implement admissions policies to become “reverse diversity” institutions, where non-black students are encouraged to enroll. In the process, these non-traditional policies will advance a new framework for diversity that challenges the flawed “traditional diversity” paradigm that most predominantly white institutions (“PWIs”) have followed since the Supreme Court decided *Grutter v. Bollinger*.⁴ After *Fordice*, HBCUs are in a position to promote “reverse racial integration” or “reverse racial diversity” by encouraging non-black students, regardless of national origin, to attend an HBCU. The long-term survival of HBCUs in the twenty-first century depends on new admissions policies and dedicated federal funding that explicitly supports a multilateral diversity paradigm. True academic diversity should be driven by new admissions policies that explicitly account for a student’s social and economic status and intellectual experience. Practicing proper diversity requires the ability to distinguish between life-exposure diversity and a race-based policy that promotes racial integration as an implied remedial measure. I am a strong promoter of racial integration at all colleges and universities regardless of their prior history, but have opposed integration that accounts for race in ways that do not conceive of white students and students of other races as benefiting from diversity.⁵

lege that wants to keep its doors open will have to be both good enough and welcoming enough to attract all types of students. We can keep our great tradition and position of being a haven for students who need nurturing, but we had better realize that more and more of those students won’t be Black, and that we will have to reach out to everybody.

Sean B. Seymore, *I’m Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 287, 309 n.126 (2006) (citing Paul Ruffins, *In a Society that is Increasingly Diverse, What’s an HBCU to Do?* BLACK ISSUES IN HIGHER EDUC., Jan. 7, 1999, at 22).

³ *United States v. Fordice*, 505 U.S. 717 (1992). The ambiguous standard from *Fordice* and plausible conflicting explanations of the Court’s dicta regarding the future of HBCUs created quite a controversy regarding the fate of HBCUs. One interpretation of *Fordice*’s confusing standard supports the sustained survival of public HBCUs while another interpretation suggests that the *Fordice* standard commands abolishing HBCUs. See discussion *infra* Part II.

⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵ See L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-economic Status Discrimination*, 19 ST. JOHN’S J. LEGAL COMMENT. 297 (2005) (arguing that the educational achievement gap between a competitive middle class education and the inferior education that others receive is due to socioeconomic factors rather than continuing patterns of racial segregation).

The American public must endorse effective economic policies on a “race-neutral” basis in order to achieve the twin goals of racial integration and true academic diversity. By the term race-neutral, I mean an approach that does not consider race as a factor. I reject the inference stated in *Grutter* that a race-blind admission system would have a dramatic negative effect on true diversity because colleges may consider socioeconomic status and life experience factors in the admission process in order to achieve a diverse student body.⁶ Implementing race-conscious admission policies in the name of academic diversity and academic freedom places a blemish on the array of experiences existing at either HBCUs or PWIs. Because institutions of higher education continue to serve as a means to recognition and achievement in America, I respectfully reject the suggestion that HBCUs do not play a vital role in providing either racial diversity or life exposure diversity for all students, regardless of race. The assertion that “[t]he maintenance of HBCUs frustrates any sincere efforts to diversify predominately white institutions”⁷ is not well-founded because it inherently assumes the majority of black students attending HBCUs would automatically attend PWIs, but for HBCUs.

By initially increasing educational opportunities for blacks, particularly in the South, HBCUs won respect as significant institutions for improving the general quality of the lives of African Americans.⁸ In 1992, Justice Thomas declared support for the continued existence of HBCUs because they play a considerable role in the education of African Americans.⁹ Although Justice Thomas is often

⁶ *Grutter*, 539 U.S. at 320. The Supreme Court described the testimony provided to the District Court by Dr. Stephen Raudenbush, the University of Michigan Law School’s expert. Dr. Raudenbush focused on

the predicted effect of eliminating race as a factor in the Law School’s admission process. In Dr. Raudenbush’s view, a race-blind admissions system would have a ‘very dramatic,’ negative effect on underrepresented minority admissions. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

Id. (citation omitted).

⁷ Seymore, *supra* note 2, at 292.

⁸ Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481, 481 (1996) (citing *Fordice*, 505 U.S. at 748 (Thomas, J., concurring)) (quoting CARNEGIE COMMISSION ON HIGHER EDUCATION, FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR NEGROES 11 (1971)).

⁹ See *Fordice*, 505 U.S. at 745–49 (Thomas, J., concurring) (citing JEAN L. PREER,

regarded as a black person insensitive to the concerns of the African American community, he is a strong and vocal supporter of HBCUs. In *Fordice*, Justice Thomas agrees with the claim that HBCUs represent a symbol of great achievement in black culture.¹⁰ However, a state cannot preserve the unique diversity of the African American experience or traditional diversity by denying admission at either an HBCU or PWI to a student primarily because of race.¹¹ A state may manage a variety of colleges, including both HBCUs and PWIs, to ensure accessible academic diversity to all on a race-neutral basis, while accommodating well-known traditions and curriculums that disproportionately attract one race or another.¹² In defense of HBCUs, Justice Thomas argues that program repetition,¹³ designed to encourage race-neutral educational diversity at either a PWI or an HBCU, is not remotely analogous to program repetition intended to separate races for the purpose of promoting racial segregation.¹⁴ Although Justice Thomas concurs with the view that a state is not constitutionally obligated to maintain its HBCUs, he emphatically declares that the Court's *Fordice* opinion allows the state of Mississippi or any other state to preserve and support HBCUs.¹⁵ According to Justice Thomas, it would be ironic and peculiar if the HBCUs that nourished and fed blacks during racial segregation were destroyed by judicial attempts to fight the vestiges of the "separate but equal" doctrine.¹⁶

Part I of the article contends that HBCUs are transforming into "Reverse Diversity Colleges and Universities" ("RDCUs") under the rationale of *Grutter*. Part II asserts that *Fordice* does not require closure of racially identifiable RDCUs and supports the conclusion that racial integration is justified because all students benefit from integration. Additionally, Part II articulates the theory that the federal government's promotion of HBCUs with additional funding is contrary to its diversity initiatives at PWIs lacks

LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION 2 (1982)).

¹⁰ *Id.* at 748.

¹¹ *Id.*

¹² *Id.* at 748-49.

¹³ *Id.* at 738 (quoting *Ayers v. Allain*, 674 F. Supp. 1523, 1540 (N.D. Miss. 1987) (explaining that program repetition refers "to those instances where two or more institutions offer the same nonessential or noncore program. Under this definition, all duplication at the bachelor's level of nonbasic liberal arts and sciences course work and all duplication at the master's level and above are considered to be unnecessary.")).

¹⁴ *Id.* at 749.

¹⁵ *Id.*

¹⁶ *Id.*

congruence unless one supports the conclusion that academic diversity under the *Grutter* rationale is a one-way street that starts and ends on PWI campuses. Part III of the article argues that President Barack Obama should establish unequivocal White House support for HBCUs as RDCUs as a viable alternative to a constitutionally permissible but problematic race-conscious diversity program.

I. HBCUs AS REVERSE DIVERSITY COLLEGES & UNIVERSITIES ("RDCUs") UNDER THE RATIONALE OF *GRUTTER*

In *Grutter v. Bollinger*, the Supreme Court approved the University of Michigan Law School's race-conscious admission program because a law school has a compelling state interest in realizing a racially diverse student body since educational benefits are associated with such diversity.¹⁷ The Supreme Court held, under the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment,¹⁸ that it is permissible for a law school to use race as a factor in making admissions decisions.¹⁹

Under a more expansive view of the diversity rationale articulated in *Grutter*, it is necessary and proper for the federal government to support HBCUs in order to promote "reverse racial diversity." Reverse racial diversity occurs when whites are encouraged to attend an HBCU because it will help them become

¹⁷ The Supreme Court stated:

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

¹⁸ U.S. CONST. amend. XIV, § 1.

¹⁹ The Supreme Court stated:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." Instead, a university may consider race or ethnicity only as a "plus" in a particular applicant's file, without "insulating the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

Grutter, 539 U.S. at 334 (citations omitted).

better leaders in a multicultural society due to their intentional learning experience as a reverse racial minority. The opportunity to live and study as a reverse racial minority on an HBCU campus exposes white students to nontraditional learning experiences that will broaden their cultural and intellectual exposure. The federal government advances both traditional diversity and reverse racial diversity by providing financial support to HBCUs.²⁰ This funding clearly rejects Ward Connerly's belief that HBCUs are inherently not diverse.²¹

A recent study conducted by *U.S. News and World Report*, which calculated the diversity of students on a law school campus, does not support Connerly's argument that HBCUs are inherently not diverse.²² In fact, in the 2008 *U.S. News & World Report: America's Best Graduate Schools* edition, two historically black law schools were ranked at the top of the "Most Diverse Law Schools" list.²³ The most diverse law school in the country is Thurgood Marshall Law School at Texas Southern University, an HBCU. The second most diverse law school is Florida A&M University, another HBCU.²⁴ Furthermore, according to *U.S. News and World Report*, four of the top seven most diverse law schools in the United States are at HBCUs.²⁵ African American students make up only forty-seven percent of the population at both Texas Southern University and Florida A&M University's law school.²⁶ Law school diversity identifies institutions where students have the greatest opportunity to meet classmates from different racial or ethnic groups.²⁷ *U.S. News* has designed a diversity index centered on the entire percentage of minority students excluding international students in the blend of racial and ethnic clusters on campus.²⁸ The diversity index is calculated by utilizing demographic data showing each law school's stu-

²⁰ *Contra* Seymore, *supra* note 2, at 292 (quoting Ward Connerly, *At Issue: Are Racially Identifiable Colleges and Universities Good for the Country?*, 13 CQ RESEARCHER 1061, 1061 (2003)).

²¹ *Id.* at 291-92 (citing Ward Connerly, *At Issue: Are Racially Identifiable Colleges and Universities Good for the Country?*, 13 CQ RESEARCHER 1061, 1061 (2003)).

²² U.S. News & World Report, *Schools of Law: The Most Diverse Schools*, AMERICA'S BEST GRADUATE SCHOOLS, 2008, at 51.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Robert Morse & Sam Flanigan, *How We Calculate the Rankings*, U.S. NEWS & WORLD REP., Mar. 26, 2008, available at <http://www.usnews.com/articles/education/best-graduate-schools/2008/03/26/how-we-do-the-numbers.html>.

²⁸ *Id.*

dent body for the 2007–2008 academic years.²⁹ Those students that form the basis of the *U.S. News* law school diversity calculations are African Americans, Asian Americans, Hispanics, American Indians and non-Hispanic Whites.³⁰

I believe Americans continue to support HBCUs with federal tax dollars every year because they understand intuitively that HBCUs promote both the intellectual and professional growth of blacks, while allowing whites and other minorities, who are not African Americans, to experience a culturally diverse academic and social lifestyle at an HBCU as a reverse racial or ethnic minority. The diversity rationale of *Grutter* taken literally at a PWI is a one-way street for the benefit of whites, according to Professor Kenneth B. Nunn.³¹ Nunn's characterization of *Grutter* creates a reasonable inference that he does not view the *Grutter* rationale as significantly expanding access to educational opportunities for blacks and other minorities at PWIs. If *Grutter* is considered a one-way street for the benefit of whites, it is not likely to be treated as a decision to help establish social and economic empowerment for racial minorities at PWIs. Nunn contends that the diversity rationale articulated in *Grutter* stigmatizes people of color because the diversity regime promoted by the Supreme Court permits African Americans to be used at PWIs to benefit white students' educational experiences.³² As a collection of individuals, people of color do not have an equal diversity status before the Supreme Court under *Grutter*.³³ However, "the group interests of the white majority are recognized, as they are expressed through institutions that the white majority controls. Thus, although the Supreme Court has demonstrated why diversity might be good for white people, it fails to speak to why diversity might be good for people of color."³⁴ Failure to support HBCUs furthers an agenda that promotes separate but unequal diversity and leads to an unequal application of the Equal Protection Clause.

On the other hand, encouraging white students to attend HBCUs sends the message that white America endorses the concept of "reverse diversity." Reverse diversity expands on the *Grutter*

²⁹ *Id.*

³⁰ *Id.* The *U.S. News & World Report* law school diversity rankings include only law schools accredited by the American Bar Association.

³¹ See Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 725–27 (2008).

³² *Id.* at 723–24.

³³ *Id.* at 724.

³⁴ *Id.*

diversity concept by recognizing not only the intellectual and cultural benefits associated with the existence of black students on PWI campuses, but also recognizing the cross-racial benefit that a black student gains from the attendance of a white student at an HBCU. The maintenance of an HBCU does not frustrate any sincere efforts to diversify PWIs as suggested by Professor Seymore.³⁵

II. *FORDICE* DOES NOT REQUIRE CLOSURE OF RACIALLY IDENTIFIABLE RDCUS

If HBCUs and PWIs choose to implement admission policies that give great weight to factors other than race, such as social and economic status and life experience, it will not pose a challenge to either traditional or reverse diversity. Justice White's majority opinion in *Fordice* is misconstrued by Seymore's conclusion that the opinion renders racially identifiable HCBUs as suspected of being in violation of the Equal Protection Clause of the Constitution.³⁶ It appears that Seymore has rejected the Supreme Court's explicit statement in *Fordice* "[t]hat an institution is predominantly white or black does not in itself make out a constitutional violation."³⁷ It is an unsupported and flawed equal protection theory that PWIs with race-neutral policies may be presumed as constitutional while HBCUs with identical race-neutral policies border on unconstitutionality. This flawed analysis demonstrates a refusal to accept the Court's clearly articulated position in *Fordice* that the racial identity of an HBCU or a PWI does not create a presumption of a constitutional violation for either a PWI or an HBCU.³⁸

While *Fordice* has been viewed as hostile to the very continuation of HBCUs, pushed to its logical extreme, the Supreme Court's rationale in *Fordice* could require that all universities born in de jure era states, PWIs and HBCUs, be subject to closure because of their continuing racial identity.³⁹ As a matter of pragmatic reality, neither an HBCU nor a PWI is subject to closure merely because its student body is racially identifiable. One constitutional theory under which public HBCUs in former de jure states may be maintained after *Fordice* is the rationale utilized by the Supreme Court in its ground-breaking *Brown v. Board of Education* opinion.⁴⁰ Professor

³⁵ Seymore, *supra* note 2, at 292.

³⁶ *Id.* at 293.

³⁷ *Id.* (quoting *United States v. Fordice*, 505 U.S. 717, 743 (1992)).

³⁸ *United States v. Fordice*, 505 U.S. 717, 743 (1992).

³⁹ See Dannye Holley & L. Darnell Weeden, *United States v. Fordice: The Mississippi Aftermath*, 31 NEW ENG. L. REV. 769 (1997).

⁴⁰ Adams, *supra* note 8, at 489 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

Frank Adams contends, under a *Brown* analysis, that public HBCUs may be preserved because HBCUs possess the intangible qualities needed to make a quality education available to any learner who is trying to find intellectual, cultural, and social diversity in an academic environment.⁴¹ An HBCU's community reputation, dedicated faculty, experienced administrators, as well as high-ranking alumni meet the standard that the Supreme Court says points toward greatness in a college or university.⁴² A voluntary, private de facto separation of the races by individual actors free of state action, at either a PWI or an HBCU, does not subject an HBCU or a PWI to closure because of their continuing highly visible non-diverse racial identity. The destruction of HBCUs in the name of promoting racial diversity would generate the public impression that HBCUs are inferior to PWIs by promoting a stigma of racial inferiority in access to public education, which the *Brown* Court concluded was an unconstitutional violation of equality.⁴³

Under the reverse diversity concept in the de facto era, neither racially identifiable HBCUs nor PWIs are inherently in violation of the Equal Protection Clause. The *Fordice* opinion is best understood as promoting reverse diversity by essentially mandating that HBCUs recruit and enroll white students. In 1992, the Supreme Court in *Fordice* ordered Mississippi to change its race-neutral method in higher education to satisfy its duty to desegregate.⁴⁴ The *Fordice* opinion recognized that unequal resource allocation places Mississippi's three HBCUs at a disadvantage.⁴⁵ However, the Supreme Court in *Fordice* ruled that remedial measures for further funding be restricted to initiatives that encourage reverse racial diversity.⁴⁶ As a result, a subsequent \$500 million settlement agreed to by the State of Mississippi, in an attempt to satisfy the *Fordice* requirement to desegregate and create reverse diversity, is to some extent subject to Mississippi's three HBCUs' capacity to recruit, enroll, and retain whites and other non-black students as reverse di-

⁴¹ *Id.* at 495.

⁴² *Id.* (citing *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)).

⁴³ *Id.* at 497 (citing L. Darnell Weeden, *Statutory and Equal Protection Remedies to Save Historically Black Colleges from the Effects of Invidious Desegregation*, 18 T. MARSHALL L. REV. 41, 46 (1992)).

⁴⁴ Paul E. Sum, Steven Andrew Light & Ronald F. King, *Race, Reform, and Desegregation in Mississippi Higher Education: Historically Black Institutions After United States v. Fordice*, 29 LAW & SOC. INQUIRY 403, 404 (2004).

⁴⁵ *Id.*

⁴⁶ *Id.*

versity students.⁴⁷

The conclusion that there is an intrinsic inconsistency between the federal government's difficult tasks of strengthening HBCUs while sponsoring traditional diversity at PWIs⁴⁸ is rejected because the federal government should have twin goals of advancing diversity at both HBCUs and PWIs. HBCUs were historically placed within a dual system of separate and unequal higher education because of the money provided to higher education under the federally funded Morrill Acts⁴⁹ as well as several United States Supreme Court cases.⁵⁰ The historical racial discrimination in federal funding and treatment has caused several HBCUs to continue to suffer from the "separate but equal" doctrine. The federal government takes the moral high ground when it provides funding to make HBCUs stronger and more attractive to all students including non-minorities in the name of both academic equity and academic diversity.⁵¹ The White House initiatives⁵² and the "HBCU Aid Act"⁵³ serve the purpose of helping to make HBCUs stronger

⁴⁷ *Id.*

⁴⁸ Seymore, *supra* note 2, at 303. Prof. Seymore argues that the federal government's support of HBCUs and the government's criticism of the lack of diversity at other public colleges and universities are competing initiatives that confuse both state governments and the colleges and universities themselves.

⁴⁹ The Morrill Acts provided eligible states with federal land that the individual states could use for or put the proceeds of the sale toward establishing and funding educational institutions with the purpose of, "without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life." 7 U.S.C. § 304 (2006). *See* First Morrill Act of 1862, Act of July 2, 1862, ch. 130, § 1, 12 Stat. 503, 7 U.S.C. §§ 301–308 (2006); Second Morrill Act of 1890, Act of August 30, 1890, ch. 841, 26 Stat. 417, 7 U.S.C. §§ 321–329 (2006).

⁵⁰ Seymore, *supra* note 2, at 297–98 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Berea College v. Kentucky*, 211 U.S. 45 (1908)).

⁵¹ *Contra id.*

⁵² The White House Initiative on Historically Black Colleges and Universities seeks to strengthen the capacity of HBCUs to provide excellence in education. *See* Exec. Order No. 12232, 45 Fed. Reg. 53437 (Aug. 8, 1980); Exec. Order No. 12320, 46 Fed. Reg. 46107 (Sep. 15, 1981); Exec. Order No. 12677, 54 Fed. Reg. 18869 (Apr. 28, 1989); Exec. Order No. 12876, 58 Fed. Reg. 58735 (Nov. 1, 1993); Exec. Order No. 13256, 67 Fed. Reg. 6823 (Feb. 12, 2002).

⁵³ The Strengthening Historically Black Colleges and Universities Act was passed as Title III, Part B in the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. §§ 1060–1063(c) (2006)). The Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008), was enacted on August 14, 2008 and reauthorized and extended the Higher Education Act of 1965. This program provides financial assistance to HBCUs to establish or strengthen their physical plants, financial management, academic resources, and endowment-building capacity.

RDCUs.

The contention that *Fordice* requires ending federal support of HBCUs is unequivocally rejected as inconsistent with the concept of reverse diversity.⁵⁴ A theory that the federal government's promotion of HBCUs with additional funding is contrary to its diversity initiatives at PWIs lacks congruence unless one supports the conclusion that academic diversity, as articulated in *Grutter*, is a one-way street that starts and ends on PWI campuses. An inclusive and realistic view of *Grutter's* academic diversity rationale must include a seat for HBCUs at the diversity table. I believe the theory that HBCUs receive federal support because of white guilt and America's involvement with de facto segregation rather than an affirmation of reverse diversity must be rebuffed.⁵⁵ The argument that the federal government should invest in minority education at the K-12 level in order to bridge the racial divide is supported.⁵⁶ The federal government at the college level should aggressively continue to financially support HBCUs to make them strong institutions in advancing the concept of reverse diversity.⁵⁷ In 1987, more than fifteen years before the *Grutter* opinion, I took the position that law schools within HBCUs should view the affirmative action concept as presenting a challenging opportunity for legal educators at HBCUs to provide quality legal education to a multiethnic and diverse student body, while at the same time establishing creative and innovative roles for legal education.⁵⁸

I agree with the contention that the benefits of academic racial diversity as articulated by the Supreme Court in *Grutter* are greatly exaggerated.⁵⁹ The Supreme Court believes academic racial

⁵⁴ *Contra* Seymore, *supra* note 2, at 303.

⁵⁵ *Contra id.* at 312-18; cf. Kevin Brown & Vinay Sitapati, *Lessons Learned From Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACKLETTER L.J. 3, 7-8 (2008) (contending that justifications for HBCUs are not due to a sense of guilt about the past oppressive treatment of one's group but rather for purposes of eliminating racial stereotypes, improving national security, and improving cross-racial understanding).

⁵⁶ See Leland Ware, *The Most Visible Vestige: Black Colleges after Fordice*, 35 B.C. L. REV. 633 (1994).

⁵⁷ See L. Darnell Weeden, *Black Law Schools and the Affirmative Action Rationale*, 12 T. MARSHALL L. REV. 395 (1987).

⁵⁸ *Id.*

⁵⁹ William B. Turner, "A Bulwark Against Anarchy": *Affirmative Action, Emory Law School, and Southern Self-Help*, 5 HASTINGS RACE & POVERTY L. J. 195, 248 (2008) (citing Brian N. Lizotte, Note: *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006); see L. Darnell Weeden, *After Grutter v. Bollinger, Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 B.Y.U. J. PUB. L. 161 (2004); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003). See also

diversity qualifies as a compelling government interest at PWIs.⁶⁰ The Supreme Court felt compelled to grant deference to the University of Michigan Law School's educational determination that academic racial diversity, as a goal, is indispensable to its educational mission.⁶¹ Several amici briefs filed with the Supreme Court corroborated the educational advantages inherent to the University of Michigan's determination.⁶² The compelling interest in academic diversity declared by the Law School accepts a complex educational judgment that rests, for the most part, within the bounds of the University's proficiency.⁶³ I simply argue that the problematic concept of academic racial diversity, adopted under the *Grutter* rationale, is also applicable at HBCUs for the benefit of their respective student bodies. In order to avoid sending the message that the use of academic racial diversity is separate but equal, the *Grutter* rationale must be applicable at HBCUs. In *United States v. Virginia* the United States Supreme Court appropriately rejected the State of Virginia's attempt to exploit the academic racial diversity rationale to support gender-based discrimination in higher education at some of its state supported colleges.⁶⁴ However, it

Sharon Elizabeth Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U.J. GENDER & L. 43 (1997) (exploring state's use of diversity as rationale for sex segregation in *United States v. Virginia*, 518 U.S. 515 (1996)). But see Matthew S. Lerner, Comment: *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement*, 47 BUFF. L. REV. 1081 (1999) (arguing that diversity is as valuable among teachers and administrators as among students). *Id.* at 248 n.262.

⁶⁰ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (explaining that the law school possesses a compelling interest in a diverse student body because, in the Supreme Court's view, reaching a diverse student body is at the heart of the law school's proper institutional mission).

⁶¹ *Id.*

⁶² *Id.* at 330–32 (“[t]he Law School’s claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”) Over fifty amici curiae submitted briefs in support of the University of Michigan from a wide range of organizations including the American Bar Association, retired military generals, U.S. Senators and Congresspersons, as well as General Motors and other professional organizations.

⁶³ *Id.* at 328–29 (stating that “[t]oday, we hold that the Law School has a compelling interest in attaining a diverse student body. The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.”).

⁶⁴ *United States v. Virginia*, 518 U.S. 515 (1996). The United States sued the State of Virginia and the Virginia Military Institute (VMI), Virginia’s only single-sex public college, alleging that VMI’s male-exclusive admission policy violated the Equal Protec-

appears that the Supreme Court believes that educational benefits of a racially engineered student body in the name of academic racial diversity is permissible under the strict scrutiny standard,⁶⁵ while a gender engineered student body in the name of educational equity is not permissible under a less than strict scrutiny standard. I am not advocating support for the Supreme Court's racial engineering approach to approve race-based diversity thinly disguised as academic diversity implicitly adopted in *Grutter*. The concept of "belief life experience," defined as the life exposure of an individual student, would enhance the opportunity for a cross-racial understanding of social and economic status for the historical majority student body. This is a true race-neutral basis for achieving academic diversity at either a PWI or an HBCU. Since the Supreme Court's flawed *Grutter* rationale allows race to be considered as a factor when making academic diversity decisions, it only stands to reason that when implementing reverse academic diversity, it is equally constitutionally permissible to use race as a factor to promote nontraditional diversity at an HBCU.

One commentator, Brian Lizotte, contends that the Supreme Court proclamation in *Grutter*, that racial diversity generates important educational advantages that justify racial favoritism in public university admissions, is not supported by social science.⁶⁶ If truth be told, social science does not have the ability to prove that race-based student body diversity creates specific educational benefits.⁶⁷ Lizotte claims that since the *Grutter* diversity rationale is not capable of proof by social science, racial diversity cannot be established as a compelling governmental interest.⁶⁸ Although I think *Grutter*'s race-based diversity rationale is flawed, I believe that true race-neu-

tion Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court held, under a heightened standard of review, that Virginia's exclusion of women from VMI's educational opportunities and civilian leadership development denied women the equal protection of the laws guaranteed by the Fourteenth Amendment. *Id.* at 534-46.

⁶⁵ Turner, *supra* note 59, at 248.

⁶⁶ Brian N. Lizotte, Note: *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 667-68 (2006).

⁶⁷ *Id.*

⁶⁸ *Id.* Lizotte challenges the social science research upon which the *Grutter* Court relied on when holding that a diverse student body produces educational benefits. By criticizing the *Grutter* theory and methodology, Lizotte explains how the research fails to prove educational benefits; and by reflecting on the logic underlying social science by and large, he illustrates how the causal relationship is, technically, not verifiable. He contends social science is capable of only speaking to what might be true. Ultimately, a diversity interest is an unstable basis for affirmative action policy—definitely not compelling. *Id.* at 629.

tral academic diversity that is based on life experience is a constitutionally permissible approach for a public university under the rational basis standard applied to social or economic governmental action.⁶⁹

Courts frequently doubt the usefulness of social science research that concerns the injuries caused by racial isolation and the advantages of racial diversity in a public education.⁷⁰ A jurist's view of the law and her personal experiences with education "may become the prism through which she refracts the social science evidence about the effects of school racial compositions that come before her."⁷¹ A reverse racial diversity role for HBCUs under the rationale of *Grutter* will reduce the racial isolation of whites, blacks and other students of color who choose to attend an HBCU. *Fordice* is a racial diversity opinion because it requires Mississippi's public HBCUs to achieve reverse racial diversity by reducing racial isolation of black students on their campuses.⁷²

In *Fordice*, the Supreme Court held that Mississippi was obligated to change its "race-neutral" method in higher education in order to fulfill its duty to reduce racial isolation at its HBCUs.⁷³ Although *Fordice* recognized that Mississippi's unequal resource allocation adversely impacted its three HBCUs, the Court required that remedial additional funding at HBCUs be limited to conduct that immediately advances reverse racial diversity.⁷⁴ As a result, the \$500 million settlement agreed to by Mississippi under *Fordice* and the ensuing lower federal court decisions was contingent on an HBCU's capacity to recruit, enroll, and maintain "other-race" students.⁷⁵ *Fordice* was a breakthrough decision requiring reverse di-

⁶⁹ *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

⁷⁰ Roslyn Arlin Mickelson, *Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, 1176 (2008).

⁷¹ *Id.* at 1177.

⁷² See Sum, *supra* note 44, at 404.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* *Ayers v. Allain* is the trial court version of the Supreme Court's *Fordice* decision. In *Ayers v. Allain* the primary defendants were the Governor of the State of Mississippi, the Board of Trustees of State Institutions of Higher Learning, as well as the individual members sued in their personal and official capacities, all the institutions identified as the historically white institutions and their principal administrative officers, the State Department of Education, and the State Superintendent of Education. 674 F. Supp. 1523, 1535 (N.D. Miss. 1987). The defendants have for many years made clear their wish to attract and recruit minority race students at every institution, in particular the historically white institutions. Each institution employs various techniques in bringing about this objective. For example, universities use other-race recruiters with the specific objective to recruit other-race students. *Id.* at 1557-58. In the context of the district court opinion in *Ayers v. Allain* an other-race student may be

versity in higher education at HBCUs.⁷⁶ Under the rationale of *Fordice*, and subsequently in *Grutter*, the Supreme Court assumed that either traditional or reverse racial diversity provided an educational advantage to the predominant group on a college campus because it reduces de facto racial isolation. In *Grutter*, the Supreme Court relied on research studies and amicus curiae briefs in support of their conclusion that a racially diverse student body provides an educational advantage by improving academic learning while encouraging an environment of cross-racial understanding.⁷⁷

Regardless of the debatable benefits of court mandated racial diversity, Mississippi's three HBCUs are in a no-win situation because of *Fordice*.⁷⁸ Although Mississippi's HBCUs' apparent contemporary deficiencies are the creation of past state authorized racial discrimination, Mississippi's public HBCUs can now remedy the situation only if they accept a reverse academic racial diversity remedy in which successful implementation is outside their power.⁷⁹ A *Fordice* reverse racial diversity remedy is outside the power of HBCUs in Mississippi if perceptions of race among eligible white students are a controlling factor in making a decision about choice of college.⁸⁰ HBCUs have to find a way to reconcile the inherent tension between *Fordice*'s court-ordered reverse racial diversity at HBCUs and the traditional way whites think of race in Mississippi.⁸¹ Some commentators theorize that race is a key factor in college choice for qualified white students in Mississippi.⁸² If this is true, the *Fordice* pronouncements will have token practical impact in accomplishing either traditional or reverse institutional racial diversity within the Mississippi university system.⁸³ In *Fordice*, Justice Thomas described institutional diversity as a "diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or

defined as either a student or potential student whose presence at either a PWI or an HBCU renders him or her a racial minority when compared to the majority members of the student body.

⁷⁶ See Sum, *supra* note 44, at 404.

⁷⁷ *Grutter*, 539 U.S. at 330.

⁷⁸ Sum, *supra* note 44, at 433.

⁷⁹ *Id.* A reverse racial diversity remedy is outside of an HBCUs power only if racial attitudes continue to restrict which Mississippians' voluntary enrollment decisions. See *id.*

⁸⁰ *Id.* at 412.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

another.”⁸⁴

In an attempt to become more attractive to other-race students, HBCUs may find it very useful to appeal to those students under a theory of racial integration rather than racial desegregation. According to one commentator, Justice Kennedy’s concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*⁸⁵ offers separate rationales for the integration and desegregation of public education.⁸⁶ Justice Kennedy’s justification for integration is grounded in the belief that all school students benefit from integration.⁸⁷ This justification differs considerably from the rationale for desegregation that is construed as only benefiting black students.⁸⁸ Justice Kennedy’s down-to-earth justification for integration in public education stresses the importance of racial diversity/integration as benefiting our society as a whole.⁸⁹ This rationale will help HBCUs recruit white students under the *Fordice* requirement and to expand reverse diversity by demonstrating to white students and their parents that they will receive a competitive education at an HBCU while simultaneously advancing the goal of increasing cross-racial understanding through academic di-

⁸⁴ *Fordice*, 505 U.S. at 749 (Thomas, J., concurring).

⁸⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

⁸⁶ Kevin Brown, *Reflections On Justice Kennedy’s Opinion In Parents Involved: Why Fifty Years Of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 740 (2008). In discussing the implications of Justice Kennedy’s controlling opinion in *Parents Involved*, Professor Brown contends that the opinion will likely come to define the terms upon which public school districts may pursue school integration. Brown argues that Justice Kennedy offers a different rationale for the integration of public schools than he does for desegregation. The rationale for integration is rooted in the belief that all school children will benefit from integration. This differs abruptly from the rationale for desegregation, which viewed desegregation as only benefiting black students. As a consequence, according to Brown, every student—including white students—will profit from integration. *Id.*

⁸⁷ *Id.* (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

⁸⁸ *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467, 485–86 (1992) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)). In *Freeman v. Pitts*, the Court said that it is the duty and responsibility of a school district that was previously segregated by law to take all steps needed in order to do away with the vestiges of the unconstitutional de jure system. This is necessary in order to make sure that the fundamental wrong of the de jure system, the injuries and stigma impose upon the race disfavored by the infringement no longer exists. This was the underlying principle and the intent of *Brown I* and *Brown II*. In *Brown I* the Supreme Court stated: “To separate [black students] 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.” 347 U.S. 483, 494 (1954); see *Brown II*, 349 U.S. 294 (1955).

⁸⁹ *Id.*

versity. Under the desegregation rationale articulated by Chief Justice Warren in *Brown I*, it was believed that blacks were culturally deprived because of racial isolation and that school desegregation was exclusively for their benefit.⁹⁰ Under this theory it was generally taken for granted that white students did not gain any advantage from the attendance of black students at predominantly white schools.⁹¹ Justice Kennedy in *Parents Involved in Community Schools*⁹² asserts racial diversity/integration in public schools enlightens all students regardless of race because these students benefit from the interactive hands-on experience of seeing that America's freedom is protected by people of distinctive races, creeds, and cultures.⁹³ One commentator says Justice Kennedy has adopted a positive utilitarian justification for racial integration of public schools, colleges, and universities that is likely to unite students from different racial and ethnic backgrounds around the theme of benefiting society by protecting freedom.⁹⁴ Under the theory that racial diversity/integration in higher education is a benefit to all students who believe in a multi-racial effort to protect American freedom, HBCUs offer students of other races a unique cultural experience in an intellectually challenging and nourishing environment.

Professor Alex M. Johnson maintains that *Fordice* failed to create a situation in higher education that truly values the diversity/integration concept.⁹⁵ The *Fordice* decision undermines the educational diversity of cultural tolerance by not requiring equal funding in order to help African Americans at Mississippi's three HBCUs climb beyond their subordinated social status entering the contest for educational excellence with whites on equal terms while voluntarily attending an HBCU.⁹⁶ *Fordice* should have granted either equal or enhanced funding to HBCUs so that they can implement curricula in physical structures that whites or other-race students may find appealing to interact with the unique cultural and academic experience provided at an HBCU. Professor Johnson supports a practice of non-coercive diversity/integration that permits African Americans to liberally decide how to approach mainstream society and culture with the choice to attend either an HBCU or a

⁹⁰ *Id.* at 742 (citing *Brown I*, 347 U.S. at 494–95).

⁹¹ *Id.*

⁹² *Parents Involved in Cmty. Sch.*, 551 U.S. 701 (2007).

⁹³ *Brown*, *supra* note 86, at 743.

⁹⁴ *Id.*

⁹⁵ Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1467 (1993).

⁹⁶ *Id.* at 1468.

PWI.⁹⁷ Johnson defends HBCUs because these schools pass on and safeguard African American culture, a culture that must be appreciated in order for integration/racial diversity to be achieved.⁹⁸ Under the reverse racial diversity theory, whites and other-race students may be given a choice to experience African American culture at either an HBCU or a PWI. A reading of *Fordice* that requires the closure of HBCUs will deny whites and other-race students the opportunity to embrace reverse racial or cultural diversity in an authentic predominantly African American setting.

According to Johnson, the *Fordice* line of attack on racial segregation is inconsistent because the Court failed to adopt the view that true equality and racial diversity or cultural diversity can be achieved by maintaining both HBCUs and PWIs based on students' voluntary freedom of choice.⁹⁹ I support HBCUs because they allow for traditionally disadvantaged African American students to join and properly negotiate the advantage of mainstream American society. By providing a non-threatening environment for African Americans to learn about white cultural norms and how to properly handle an integrated mainstream American society as educated professionals, HBCUs serve as virtual safe teaching houses for many economically disadvantaged African Americans.

Using the *Fordice* rationale to close HBCUs unnecessarily forces African American students to make college their point of integration into mainstream white culture regardless of their personal preferences.¹⁰⁰ One of the advantages of a reverse diversity student attending an HBCU is the opportunity to see first-hand American mainstream values as well as traditional academic subject matters being taught to predominantly black students by a critical mass of well prepared African American professors. White students electing to attend an HBCU will be exposed to a critical mass of bright and intelligent black student peers as well as black faculty members, thereby increasing whites exposure to blacks in higher education. A reverse minority diversity student attending an HBCU will increase the type of cross-racial understanding approved by the Supreme Court in *Grutter*. A white student's opportunity to experience intellectual enhancement as a reverse diversity student at an HBCU with a critical mass of black intellectuals will be prematurely lost if the *Fordice* and *Grutter* cases are improperly construed as re-

⁹⁷ *Id.* at 1432-55.

⁹⁸ *Id.* at 1432.

⁹⁹ *Id.* at 1468.

¹⁰⁰ *Id.* at 1446.

quiring the closure of HBCUs in the name of racial diversity/integration.

Professor Alfreda A. Sellers Diamond declares that if racial diversity in the student body is an important goal for HBCUs, maybe HBCUs will come to think of *Fordice* as the inspiration for initiating a different and more progressive perception of HBCUs.¹⁰¹ Alcorn State University, a Mississippi HBCU, has displayed how it met the mandatory academic racial diversity requirement of *Fordice* as well as how to achieve the voluntary racial diversity goals that are constitutionally permissible under *Grutter*.¹⁰²

HBCUs also may become attractive to all students regardless of race and advance socioeconomic integration by promoting class diversity in their admissions policies—a form of diversity subject to rational basis review by the courts.¹⁰³ A significant advantage of advancing this type of integration at both HBCUs and PWIs is that socioeconomic status is not a proxy for race, and will be subject to

¹⁰¹ Alfreda A. Sellers Diamond, *Black, White, Brown, Green, and Fordice: The Flavor of Higher Education in Louisiana and Mississippi*, 5 HASTINGS RACE & POVERTY L. J. 57, 126 (2008).

¹⁰² *Id.* at 127. Alcorn State University is the only historically black university in Mississippi that effectively met the three-year, ten-percent other-race student enrollment target and was entitled to receive its pro rata share of the principal established under the public endowment pursuant to a settlement agreement. Alcorn was able to achieve this objective because of its aggressive marketing and recruitment policies. *Id.*

¹⁰³ In *Adarand Constructors, Inc. v. Peña*, the Supreme Court considered a non-race-based preference for socially or economically “disadvantaged” applicants for government contracts as not provoking a significant issue regarding constitutional authority under the rational basis standard. 515 U.S. 200, 211–12 (1995); *see also*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *see Eboni S. Nelson, The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841, 843 n.22 (2008); *e.g.*, Richard Fallon, *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1931 (1996) (“Affirmative action [based on economic disadvantage] would not trigger strict judicial scrutiny, and it would almost surely survive rational basis review in nearly any imaginable context.”); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1064 (1996) (“[C]lass-based preferences provide a constitutional way to achieve greater racial and ethnic diversity, because they do not use a suspect category for decision making. Racial preferences are subject to strict scrutiny under the Fourteenth Amendment, but class preferences are not.”); Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 327 (2006) (concluding that socioeconomic integration efforts are not subject to the potentially “fatal standard of strict scrutiny because they neither employ racial classifications nor seek to achieve racial diversity benefits”); L. Darnell Weeden, *Creating Race-Neutral Diversity in Federal Procurement in a Post-Adarand World*, 23 WHITTIER L. REV. 951, 967–68 (2002) (“A truly race-neutral affirmative action plan will not implicate the *Adarand* strict scrutiny test, because such plans are designed to create social and economic class-based diversity for disadvantaged persons . . . regardless of race, and thus are subject to the rational basis test.”).

rational basis review¹⁰⁴ rather than strict scrutiny review required under the race-conscious higher education diversity rationale articulated in *Grutter*.¹⁰⁵ Under the rational basis standard, governmental policy advancing socioeconomic diversity at either an HBCU or a PWI would be presumed valid under relevant Supreme Court precedent.¹⁰⁶ In an effort to prioritize socioeconomic integration, HBCUs can achieve their transformative role of encouraging white and non-traditional minority students to enroll by providing them with more choices in higher education.

Alcorn State University effectively achieved the three-year realization of their 10% other-race student enrollment goal due to its hard-hitting efforts in marketing and recruitment of non-black students.¹⁰⁷ Alcorn State University did not target other-race students who were predisposed to rejecting enrollment at an HBCU.¹⁰⁸ Targeted other-race students accepting enrollment at Alcorn State University include Mississippi residents as well as residents from Australia, Canada, and Russia.¹⁰⁹ Alcorn State University should be applauded for promoting true international diversity among its students. The diversity approaches taken by Alcorn State University will not only help to promote cross-racial understanding; they will also promote understanding among international students in the global economy.

Although Alcorn State University has experienced a degree of

¹⁰⁴ Nelson, *supra* note 103, at 843. Under rational basis review the well-known rule is that legislation is presumed to be legal and will be upheld if the classification drawn by the law is rationally related to a legitimate state interest. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174–75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). When social or economic legislation is the subject of a constitutional challenge, the Equal Protection Clause allocates wide latitude to the states, *United States Railroad Retirement Board v. Fritz*, 449 U.S. at 174; *New Orleans v. Dukes*, 427 U.S. at 303.

¹⁰⁵ In *Grutter v. Bollinger*, the Supreme Court approved the University of Michigan Law School's race-conscious admission program because a law school has a compelling state interest in realizing a racially diverse student body since educational benefits are associated with such diversity. 539 U.S. at 334. The Supreme Court held, under the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment, that it is permissible for a law school to use race as a factor in making admissions decisions. *Id.*

¹⁰⁶ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (upholding a Massachusetts law requiring state police officers to retire at age fifty even though the state did not engage in individualized testing to determine an officer's ability to continue to perform the job).

¹⁰⁷ *Sellers Diamond*, *supra* note 101, at 127.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

success in recruiting whites and other racial minorities who are non-black, Professor Kevin Brown is correct in his assertion that the eventual effect of *Fordice* on public HBCUs remains unknown.¹¹⁰ Professor Brown contends that the *Fordice* decision clearly supports the specific constitutional conclusion that states are not constitutionally required to strengthen and upgrade public HBCUs as a method of expanding the educational opportunities of blacks.¹¹¹ While it is true that *Fordice* does not require a state to enhance its funding of an HBCU to promote racial diversity, it is equally clear that *Fordice* does not prohibit a state or the federal government from providing funds to strengthen HBCUs as reverse racially diverse academic enclaves born under freedom of choice.¹¹² One commentator correctly observes that it is hard to predict the definitive judicial impact of *Fordice* due to the opinion's confusing standards and the dicta concerning Mississippi's HBCUs.¹¹³ In *Fordice*, the Court's dicta implied that by continuing a racially identifiable university, a state might be violating the Constitution.¹¹⁴ In addition, the Court's dicta suggested that closing or merging HBCUs might cure the discriminatory results of the present system.¹¹⁵ The ambiguous standard of *Fordice* and plausible conflicting explanations of the Court's dicta regarding the future HBCUs created mixed messages regarding the fate of HBCUs.¹¹⁶ One interpretation of *Fordice*'s confusing standards supports the sustained survival of public HBCUs while another interpretation suggests that the *Fordice* standard commands abolishing HBCUs.¹¹⁷

¹¹⁰ Brown, *supra* note 55, at 36.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ John A. Moore, *Are State-Supported Historically Black Colleges and Universities Justifiable After Fordice? A Higher Education Dilemma*, 27 FLA. ST. U. L. REV. 547, 556 (2000).

¹¹⁴ *Id.* The Court in *Fordice* stated: "Because the former *de jure* segregated system of public universities in Mississippi impeded the free choice of prospective students, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free. The full range of policies and practices must be examined with this duty in mind. That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies." 505 U.S. 717, 742-43 (1992).

¹¹⁵ Moore, *supra* note 113, at 556; see *Fordice*, 505 U.S. at 742.

¹¹⁶ Moore, *supra* note 113, at 556. What the *Fordice* standard actually means is simply not clear. It is clear that *Fordice* established an ambiguous standard as it connects to the future role of HBCUs. Subsequent *Fordice* interpretations demonstrate that there is a clear dichotomy as to how the *Fordice* standard applies to HBCUs. One interpretation supports the continued existence of public HBCUs while a different interpretation advises that the *Fordice* standard would require eliminating HBCUs. *Id.*

¹¹⁷ *Id.*

An important interpretation of *Fordice*, supporting the retention of public HBCUs, came from the United States Department of Education ("DOE").¹¹⁸ In 1994, the DOE announced its interpretation of *Fordice* and the implication for public HBCUs.¹¹⁹ The DOE interpreted the *Fordice* standard as consistent with a state's commitment to support and protect public HBCUs.¹²⁰ The DOE "revised criteria" acknowledged that in order to meet the *Fordice* standard, a state system of higher education might find it necessary to strengthen and improve HBCUs to correct the consequences of prior discrimination.¹²¹ In 1994, the DOE said it would strictly scrutinize state plans to close or merge HBCUs as well as any other conduct that diminishes the unique roles of HBCUs.¹²² The DOE's interpretation of *Fordice* is an example of how interpretations by a federal administrative agency within the executive branch can impact the future existence of public HBCUs.¹²³ It is necessary and proper for President Barack Obama's administration to instruct the DOE to develop regulations and provide financial support to ensure the continuing existence of HBCUs as transformative institutions of both racial and intellectual diversity in a changing global market place.¹²⁴ HBCUs need strong support from the DOE in order to effectively enforce the congressional goal of strengthening HBCUs as instruments of expanding cross-racial understanding in America and around the world.

III. PRESIDENT BARACK OBAMA SHOULD EMPHASIZE WHITE HOUSE SUPPORT FOR HBCUs AS RDCUs AS A VIABLE ALTERNATIVE TO CONSTITUTIONALLY PERMISSIBLE RACE CONSCIOUS DIVERSITY PRACTICES

I would like to make it crystal clear that I am not recommending that President Obama or anyone else support HBCUs as state-funded black enclaves with race-conscious admission policies. Although the *Grutter* opinion allows for race-conscious admission policies at a PWI, and presumably at an HBCU, life exposure or academic diversity based on intellectual energy should be achieved

¹¹⁸ *Id.*

¹¹⁹ Moore, *supra* note 113, at 556–57 (citing Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (Dep't Educ. Jan. 31, 1994)).

¹²⁰ *Id.* at 557.

¹²¹ Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (Dep't Educ. Jan. 31, 1994).

¹²² *Id.*

¹²³ Moore, *supra* note 113, at 556–57.

¹²⁴ *Id.*

on a race-neutral basis.¹²⁵ Similar to other specialized higher education institutions, such as religious colleges and women's colleges, HBCUs provide a diversity of choice for those seeking educational environments that are consistent with their personal values and experiences on a race-neutral basis.¹²⁶ As long as HBCUs are open to all applicants regardless of race, they improve both equality and diversity while increasing opportunities for blacks without restricting the preferences of others.¹²⁷ However, African American culture is not an indispensable component of the formal curriculum at HBCUs as suggested by Professor Leland Ware.¹²⁸ The incredible day-to-day mission of a typical HBCU involves teaching a large number of at-risk college students from disadvantaged educational backgrounds how to negotiate the standard college curriculum successfully. While teaching traditional academic subject matter, most professors at an HBCU regardless of their race understand that they must model mainstream cultural norms for their students' future success as educators and professionals. Unlike Ware, I believe essential elements of the African American culture can be maintained and honored at both PWIs and HBCUs.¹²⁹ It is not fair to engage in reverse racial stereotyping by suggesting that all PWIs' black students are marginalized because at every level PWIs close their eyes to the involvement of African Americans in art, literature and science.¹³⁰

Ware concludes, at a very superficial level, that the arguments supporting the continuance of HBCUs resemble those articulated

¹²⁵ See *Grutter*, 539 U.S. at 328.

¹²⁶ Moore, *supra* note 113, at 567.

¹²⁷ *Id.* (citing SERBRENIA J. SIMS, *DIVERSIFYING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A NEW HIGHER EDUCATION PARADIGM* 12 (1994)).

¹²⁸ Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. REV. 633, 675 (1994). Professor Ware states:

Perhaps most importantly, African-American culture and accomplishment are essential ingredients in the curriculum at black colleges. These attributes cannot be replicated at white universities where black students are marginalized and the program of study ignores the contributions of African-Americans to art, literature and the sciences. The paradox of the arguments made in favor of black colleges is that they seem in some ways to be the same as claims that were made by defenders of segregation when *Brown* was argued. They could be construed as accepting the *Plessy* rationale that separate but equal schools for black students would be preferable, or at least as good as receiving an education in an integrated environment.

Id. at 675-76.

¹²⁹ *Contra id.*

¹³⁰ See *id.*

by defenders of segregation in *Brown*.¹³¹ Arguments made in defense of HBCUs have been wrongly interpreted as requesting separate but equal schools for black students at HBCUs.¹³² A separate but equal argument by the supporters of HBCUs would indeed be at odds with the integrationist theory of *Brown*.¹³³ The plaintiffs in *Fordice* did not seek to repeat the transgressions of racial segregation in violation of *Brown*,¹³⁴ rather they sought the preservation of black institutions on race-neutral and equal terms. The goal of *Brown* was to remove students from a separate and under-funded system of racially segregated schools at every level.¹³⁵ HBCUs that were created during the era of U.S. segregation survived while teaching and coaching thousands of black students with very inadequate resources.¹³⁶ The historic triumph and continuing achievement of HBCUs is evidence of their power to overcome giant obstacles.¹³⁷ Ware correctly maintains the abolition of de jure segregation does not indicate that HBCUs are no longer necessary.¹³⁸ HBCUs are indispensable because forced racial integration does not respect an African American student's freedom to choose between a predominantly black or white college as the best path to successfully assimilate into mainstream American society.¹³⁹ In *Fordice*, Justice Scalia stated that congressional support of HBCUs is constitutionally permissible because students may choose to attend HBCUs regardless of race, thereby not sending the message of racial inferiority prohibited by *Brown*.¹⁴⁰ If the Supreme Court's *Fordice* test is intended to eliminate HBCUs Justice Scalia would reject the test and support the position that "if no [state] authority exists to deny [the student] the right to attend the institution of his choice, he is done a severe disservice by remedies which" deny him the freedom of choice.¹⁴¹

If *Fordice* is construed as the Supreme Court's constitutionally mandated antagonism toward racially identifiable schooling at HBCUs that did not result from state action, this interpretation by

¹³¹ *Id.*

¹³² *Id.* at 675–76.

¹³³ *Id.* at 676.

¹³⁴ Ware, *supra* note 128, at 676.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Johnson, Jr., *supra* note 95, at 1418.

¹⁴⁰ *Fordice*, 505 U.S. at 760 (Scalia, J., concurring).

¹⁴¹ *Id.* (quoting Ayers v. Allain, 914 F.2d 647, 687 (5th Cir. 1990)).

commentators is assuredly not good constitutional law.¹⁴² The Constitution does not prohibit racially identifiable HBCUs since neither blacks nor whites are required to attend because of their race and either a black or a white is free to make a private choice whether to attend or not.¹⁴³ I believe that Congress continues to authorize the President to support the strengthening of HBCUs with federal tax dollars because Congress understands that closing the doors of HBCUs is not only poor social policy but also minimizes both racial and academic diversity.¹⁴⁴

Ten years after *Fordice*, President George W. Bush demonstrated a strong show of support for HBCUs.¹⁴⁵ On February 12, 2002, President Bush stated that he supported making HBCUs stronger because HBCUs are recognized (1) for cultivating latent human talent in America; (2) for expanding equal expectations in higher education; (3) for offering an attractive education; and (4) in need of assistance in order to take part in federal programs on terms and conditions similar to colleges and universities that are not HBCUs.¹⁴⁶ Executive Order No. 13,256 established a Presidential advisory committee in the Office of the Secretary of Education named the “President’s Board of Advisors on Historically Black Colleges and Universities” (the “Board”).¹⁴⁷ The Board was given the duty of planning and delivering an annual report to the President regarding the involvement of HBCUs in federal programs.¹⁴⁸ The Board is obligated to give advice to the President and to the Secretary of Education concerning the requirements of HBCUs on subjects relating to infrastructure, academic curriculums, along with faculty and institutional improvement.¹⁴⁹ Although President Bush issued a proclamation declaring September 28, 2001, as “National Historically Black Colleges and Universities Week,” some commentators doubt the sincerity of his efforts in support of HBCUs because he did not support the *Grutter* rationale for race-

¹⁴² *Id.*

¹⁴³ *Id.* at 760–61.

¹⁴⁴ See 20 U.S.C. §§ 1060–1063(c) (1992).

¹⁴⁵ See Exec. Order No. 13,256, 67 Fed. Reg. 6823 (Feb. 12, 2002); Congress enacted the Strengthening Historically Black Colleges and Universities Act, 20 U.S.C. §§ 1060–1063(c) (1992), under Title III of the Higher Education Act. Congress incorporated Title III, Part B in the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965). Title III, Part B is codified and amended by 20 U.S.C. §§ 1060–1063(c) (1992).

¹⁴⁶ Exec. Order No. 13,256, 67 Fed. Reg. 6823 (Feb. 12, 2002).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

based diversity as the only path to educational equity.¹⁵⁰ Unlike these commentators, I do not believe the Bush administration's effort to strengthen HBCUs is "hard to reconcile with its *amici* supporting the petitioners in *Grutter* and *Gratz*"¹⁵¹ because I do not limit diversity to the type of racial diversity thinly disguised as academic diversity approved by the Supreme Court in *Grutter*. President Bush's support of HBCUs is consistent with his approval of a diversity agenda in higher education because true intellectual diversity or non-racial diversity can be achieved at either a PWI or an HBCU by race-neutral means under a freedom of choice plan. However, those who share the unfounded belief that HBCUs are inherently and forever non-diverse based on an institutional racial identity regardless of cultural and intellectual diversity will object to any U.S. president's support for HBCUs, including President Obama's.

President Bush's attempts to strengthen HBCUs benefited him politically and the GOP's standing in the black community.¹⁵² Similar to his immediate predecessor in the White House, I believe President Obama will find that taking an active role in strengthening HBCUs is a political asset rather than a political liability. Unfortunately President Obama's education budget has provoked leaders of HBCUs to challenge the reduction in a federal program viewed as a financial lifeline for their schools and students.¹⁵³ The President's education budget made public on Thursday, May 7, 2009, failed to provide \$85 million dollars to HBCUs, which they have collected once a year for the past two years.¹⁵⁴ The two-year-old program provides money directly to federally recognized HBCUs.¹⁵⁵ Although other direct federal money assisting HBCUs is projected to grow from \$238 million to \$250 million, the loss that the HBCU fund will incur under President Obama is a \$73 million reduction in financial support.¹⁵⁶ Because HBCUs have suffered a

¹⁵⁰ Seymore, *supra* note 2, at 304.

¹⁵¹ *Id.* at 304–05 (citing Alfreda A. Sellers Diamond, *Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black College or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1885 n.29 (2004) (emphasis added) (citation omitted)).

¹⁵² *Id.* at 305.

¹⁵³ Justin Pope, *Black Colleges Will Fight Cut to Federal Program*, USA TODAY, May 12, 2009, available at http://www.usatoday.com/news/education/2009-05-12-black-colleges_N.htm.

¹⁵⁴ *Id.*; U.S. DEP'T OF EDUC., FISCAL YEAR 2010 BUDGET SUMMARY AND BACKGROUND INFORMATION 67 (2009), <http://www.ed.gov/about/overview/budget/budget10/summary/10summary.pdf>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

great deal under the current recession, HBCU leaders maintain that this is not the time for the Obama administration to substantially reduce funding for programs giving direct support to HBCUs since they play a significant role in educating the neediest college students in America.¹⁵⁷ Although the 105 federally recognized HBCUs amount to only 3% of U.S. colleges, they provide nearly 20% of undergraduate degrees earned by blacks, according to the United Negro College Fund (“UNCF”).¹⁵⁸ HBCUs need strong federal financial support because they are still haunted by the vestiges of the racially discriminatory separate but equal system in higher education.¹⁵⁹ “We believe it is in the best interest of our country to ensure that [HBCUs] are strong,” asserts John Donohue, UNCF’s executive vice president for development.¹⁶⁰ Donohue stated that the federal program to which the Obama Administration proposes to deny funding supported an important college readiness project at Dillard University, an HBCU in New Orleans.¹⁶¹ United States Senator Richard Burr, Republican of North Carolina, whose state is home to eleven HBCUs, appropriately expressed reservation about the Obama administration’s priorities in reducing direct funding to HBCUs while leaving untouched \$9 million in financial support for whaling history museums.¹⁶² It appears higher education officials think that Congress will not support the \$85 million reduction in funds to HBCUs.¹⁶³ Terry Hartle, senior vice president of the American Council on Education, believes the proposed \$85 million reduction in funding to HBCUs will not survive because HBCUs have strong champions in both political parties, as well as in both houses of Congress.¹⁶⁴

Some commentators contend that creative reports alleging that President Obama permitted major funding cuts for HBCUs are misplaced.¹⁶⁵ Kim Lampkins of American Urban Radio Networks argues that the theory that Obama is the man who reduced

¹⁵⁷ *Id.*

¹⁵⁸ United Negro College Fund, Our Member Colleges: About HBCUs, <http://www.uncf.org/members/aboutHBCU.asp> (last visited Dec. 2, 2009).

¹⁵⁹ Seymore, *supra* note 2, at 299.

¹⁶⁰ Pope, *supra* note 153.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Boyce Watkins, *Bottom Line with Dr. Boyce: Did Barack Obama REALLY Cut HBCU Funding?*, BLACKVOICES.COM, May 27, 2009, <http://www.blackvoices.com/blogs/2009/05/27/bottom-line-with-dr-boyce-did-barack-obama-really-cut-hbcu-fun/>.

money for HBCUs is misguided.¹⁶⁶ According to Lampkins, “[c]ontrary to the Internet chatter stating otherwise, the Obama Administration’s education budget does not cut funds to Historically Black Colleges and Universities.”¹⁶⁷ Ms. Lampkins contends that the Obama administration’s failure to extend the College Cost Reduction and Access Act (“CCRAA”), which provided \$170 million dollars annually for two years to help HBCUs become financially independent, is justified because the grant was supposed to end.¹⁶⁸ After reviewing a copy of the educational budget of the Obama administration, a few assert that President Obama’s budget for fiscal year 2010 indicates a \$20,830,000 enhancement in appropriation for HBCUs over the prior year.¹⁶⁹ Some believe that this budget expansion for HBCUs is misunderstood as President Obama not supporting black colleges.¹⁷⁰

The Obama administration must understand the symbolism that affirmative federal funding—or cuts in funding—from the executive presents when an HBCU is a nurturing mother figure in the black community. I believe most people familiar with the African American community know that as a matter of historical symbolism you do not give mother HBCU \$85 million every Mother’s Day for two consecutive years and then stop and tell her that she had no right to expect that money without creating unnecessary tension in the family.¹⁷¹ The message to the Obama administration is that it must avoid even giving the appearance of being disrespectful toward “Mother HBCU” by taking away money that she might not be legally entitled to without articulating a compelling moral justification.

Glen Ford of Black Agenda Radio strongly recommends that President Obama be offered a short refresher course on the history that created the conditions at HBCUs that now require direct federal aid to help correct.¹⁷² Since blacks were more or less intentionally shut out of higher education for most of their history in the United States President Obama should give HBCUs the \$85 million dollars.¹⁷³ Ford commented on the fact that those colleges at-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ Watkins, *supra* note 165.

¹⁷¹ Pope, *supra* note 153.

¹⁷² Glen Ford, *First Black President Cuts Funds for Black Higher Education*, BLACK-AGENDAREPORT.COM, May 13, 2009, <http://blackagendareport.com/?q=content/first-black-president-cuts-funds-black-higher-education>.

¹⁷³ *Id.*

tended by large numbers of Hispanic students will have their budget increased with direct federal aid from \$93 million to \$98 million.¹⁷⁴ According to Ford, Native American higher education receives the “Black treatment” because the Obama budget proposes a decrease in federal funding to their schools.¹⁷⁵ “The Obama administration’s callous disregard for Black colleges is even more curious, considering the [P]resident’s constant quest for areas of bipartisan consensus. Support for Black higher education is one of the rare issues around which southern white Republicans and members of the Congressional Black Caucus often find common ground.”¹⁷⁶

Roger Caldwell has characterized the Obama administration’s choice to reduce \$85 million from HBCUs as insensitive because it will compel HBCUs to increase tuition and expenses.¹⁷⁷ Caldwell calls for “an organized national protest and challenge from the African American leadership and community to express their displeasure and outrage with this decision. Based on the present economic conditions in the country, this \$85 million program should have been increased, instead of being cut.”¹⁷⁸ President Obama’s Assistant Secretary of Education Carmel Martin said, “[t]he administration is definitely committed to strengthening HBCUs and other colleges and universities that serve minority populations.”¹⁷⁹ Caldwell takes the position that Assistant Secretary Martin’s statement creates a misleading impression that Obama’s administration is increasing the federal dollars supporting HBCUs.¹⁸⁰ Because the Obama administration is reducing funding to HBCUs “there should be a movement to write the senators and congress people and demand a reinstatement of the \$85 million program to HBCU schools and students. If Bush could find \$85 million to help HBCUs, then I am certain that Obama can find \$85 million to continue the program,” said Caldwell.¹⁸¹

It is not a surprise that some black leaders in higher education are vigorously opposed to either reduced or unequal funding to HBCUs because they may share the perception that HBCUs are

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Roger Caldwell, *Obama Cuts Millions From HBCUs, Shameful!*, WEST ORLANDO NEWS, May 27, 2009, available at <http://westorlandonews.com/2009/05/27/obama-cuts-millions-from-hbcus-shameful>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

inherently unequal and inferior, a perception that can only be remedied by either enhanced or equal funding.¹⁸² Those who believe that equal funding and voluntary race-neutral admission policies among HBCUs and PWIs are the most effective way to achieve diversity criticize the Supreme Court's conclusion in *Fordice* that the Constitution does not compel Mississippi to remedy funding disparities between its historically black colleges and its historically white colleges.¹⁸³ Although it is conceded that the *Fordice* Court does not require either the state or federal government to correct funding disparities between HBCUs and PWIs, the wise public policy implemented in Missouri demonstrates how enhancement money to equalize HBCUs can promote reverse racial diversity.

Voluntary freedom of choice has proved itself to be an effective tool for promoting diversity and overcoming racial imbalances at historically black colleges where equal funding and enhancements have been provided. Dr. Charles J. McClain, Commissioner of the Department of Higher Education for the State of Missouri, said that the *Fordice* ruling would not have an affect on his state.¹⁸⁴ Dr. McClain said that the state's two historically black colleges "receive more general revenue than similar institutions in the State. McClain noted that Lincoln University, a historically black university, has more white students than black students who attend the institution."¹⁸⁵ Lincoln University has transformed into a nondiscriminatory reverse diversity university where white students are now in the majority through freedom of choice, enhancement money and equal funding. The equal funding and enhancement money provided to Lincoln University did not produce increased racial isolation for blacks; instead it resulted in even more reverse diversity. The funding at Lincoln preserved the traditional identity of an HBCU while promoting educational diversity for students attending Lincoln as a reverse diversity enclave of promising intellectuals. Experience teaches us that intentional state action to

¹⁸² See L. Darnell Weeden, *Statutory and Equal Protection Remedies to Save Historically Black Colleges from the Effects of Invidious Desegregation*, 18 T. MARSHALL L. REV. 41, 50 (1992).

¹⁸³ *Id.*; *Fordice*, 505 U.S. at 749 (Scalia, J. concurring) (agreeing with the majority's position that the Constitution did not require Mississippi to remedy funding disparities between its HBCUs and PWIs).

¹⁸⁴ Diana Carter, *Former Adams States Take Cautious Attitude Toward Fordice Decision*, BLACK ISSUES IN HIGHER EDUC., Oct. 22, 1992, at 18; see, e.g., *Geier v. Alexander* (*Geier II*), 801 F.2d 799 (6th Cir. 1986); *Geier v. Univ. of Tenn.* (*Geier I*), 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979).

¹⁸⁵ Carter, *supra* note 184, at 18.

enhance and equally fund historically black Lincoln University is a substantial factor in making it an appealing place to learn for all students while at the same time advancing diversity. The experience at Lincoln University demonstrates that HBCUs are not inherently non-diverse. The policy makers who want to close HBCUs because they remain predominantly black should replicate Lincoln's example rather than simply advocating for the closure of HBCUs that were never given a chance to compete on equal grounds.

CONCLUSION

Scholars and others seeking to impact education as a civil rights policy must recognize the decisive role the Executive Branch of the federal government has played in determining the scope and direction of racial integration and race-neutral diversity in higher education.¹⁸⁶ In particular, Professor Lia Epperson scrutinizes the very commanding role of the United States Department of Education's Office for Civil Rights in influencing the treatment of the Supreme Court's opinions regarding racial diversity in public education in both *Brown* and *Grutter*.¹⁸⁷ Although the Obama administration has the discretion to decide whether it will support reverse diversity or other-race integration at HBCUs, any White House failure to support HBCUs as transforming diversity institutions should be challenged by the proper exercise of congressional authority.¹⁸⁸ Notwithstanding the power of Congress in establishing educational policy on issues of diversity, Epperson appropriately suggests that the congressional role does not reduce the very strong role the Executive Branch plays in determining the course of racial diversity in public higher education at either a PWI or an HBCU.¹⁸⁹

The Obama administration should follow Congress' lead in providing additional money to support HBCUs. Congress understands it is not promoting a racially exclusive public funded higher education enclave for blacks only. When Congress supports expanding funding to maintain HBCUs, Congress knows that it is making an investment to recast HBCUs from victims of Jim Crow philosophy of separate but truly unequal to defenders of diversity

¹⁸⁶ Lia Epperson, *Undercover Power: Examining The Role Of The Executive Branch In Determining The Meaning And Scope Of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008).

¹⁸⁷ *Id.*

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

advancing socioeconomic integration. When the Obama White House takes a leading role in providing additional federal dollars to make HBCUs more attractive to all students regardless of race and in the name of socioeconomic integration it is promoting diversity subject to rational basis review by the courts. A significant advantage of advancing socioeconomic integration at both HBCUs and PWIs that is truly not a proxy for race is being subject to rational basis review. Governmental policies that fail to provide either equal or enhanced funding to HBCUs in order to transform them into nontraditional diversity schools are most unfortunate. Missouri's Lincoln University has become so attractive and strong with enhanced funding and educational goals that white students attend in great enough numbers to have transformed Lincoln from a traditional HBCU into a reverse diversity HBCU.¹⁹⁰ Although the Lincoln example may not work for every institution, I do not think a single public HBCU should be closed until a state has made every reasonable effort to replicate Lincoln's reverse diversity plan.

¹⁹⁰ Carter, *supra* note 184, at 18.