

COMPARISON: IMPROVING HOW THE LEGACIES OF STATE-
SPONSORED SEGREGATION IN THE UNITED STATES AND SOUTH
AFRICA AFFECT EQUITY AND INCLUSION IN AMERICAN AND
SOUTH AFRICAN HIGHER EDUCATION SYSTEMS

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INTRODUCTION

From time immemorial, our world has exhibited a pattern: people of all races, ethnicities, religions, and backgrounds, have designated themselves the proverbial “in-group” as a means to claim superiority over others.¹ Those who identify as being within an “in-group” attribute positive characteristics to the group, and attribute negative qualities to the “out-group.”² Racial tensions and their societal manifestations in the United States and around the world illustrate a broader human problem.³ Examining the historical and current racial postures in the United States and South Africa reveals education’s crucial role in characterizing status in both nations. These histories reveal how educational systems are used as control mechanisms to perpetuate racial and economic stratification. However, education—particularly higher education—can be utilized to neutralize, rather than exacerbate, racial and economic divides.

The phenomenon of people being categorized along white, Black, or yellow lines is a social construct.⁴ As a consequence, “Black” is

1. *The Making of a Black President*, COLORLINES, (Dec. 12, 2016, 12:43 PM), <https://www.colorlines.com/articles/watch-ta-nehisi-coates-talks-president-obama-about-social-political-construction-race>.

2. Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 68 (2006).

3. *The Making of a Black President*, *supra* note 1.

4. Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CALIF. L. REV. 887, 913 (1996).

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understood differently in South Africa than in the United States.⁵ For instance, someone considered Black in America could be regarded as colored in South Africa.⁶ In South Africa, a Black person is someone generally accepted as a member of “any aboriginal race or tribe of Africa.”⁷ The term “colored” refers to South African people of mixed race, and a “white” South African is someone who, based on appearance, is obviously white and “generally not accepted as a colored person.”⁸ Colored people and people of Indian descent were also identified as second-class citizens in South Africa. Consequently, both groups were also victims of harsh discriminatory laws.⁹ Each racial group entailed immensely distinct legal entitlements and social statuses.¹⁰ However, generally any “African ancestry made one’s racial classification [B]lack.”¹¹

Juxtaposing these racial histories requires mindfulness of the substantial differences in each country. For example, apartheid was a nationally imposed system, while Jim Crow applied regionally in the South.¹² Also, *de jure* segregation in the United States lasted from the early 1600s until the mid-1960s.¹³ Alternatively, in South Africa,

5. Michael F. Higginbotham, *Affirmative Action in the United States and South Africa: Lessons from the Other Side*, 13 TEMP. INT’L & COMP. L.J. 187, 188 n.5 (1999).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Indian South Africans*, S. AFR. HIST., <http://www.sahistory.org.za/article/indian-south-africans> (last visited Nov. 14, 2018).

10. Higginbotham, *supra* note 5, at 188 n.5.

11. *Id.*; see Shari Dworkin & Kari Lerum, *Race, Sexuality, and the “One Drop Rule”*: *More Thoughts about Interracial Couples and Marriage*, SOCIETY PAGES (Oct. 18, 2009), <https://thesocietypages.org/sexuality/2009/10/18/race-sexuality-and-the-one-drop-rule-more-thoughts-about-interracial-couples-and-marriage/> (describing the United States’ “one drop rule” which is how courts and law books historically declared whether a mixed race person with “one black ancestor” or “one drop of black blood” should be categorized or treated as black; this rule reveals the “arbitrary nature of racial classifications.”).

12. Daniel Baker, *What are the differences and the similarities between Jim Crow laws and the Apartheid?*, QUORA (Feb. 2, 2016), <https://www.quora.com/What-are-the-differences-and-the-similarities-between-Jim-Crow-laws-and-the-Apartheid.>

13. *Civil Rights Act of 1964*, HISTORY.COM (Jan. 4, 2010), <https://www.history.com/topics/black-history/civil-rights-act> (explaining that *de jure* segregation is “a state of affairs that is in accordance with law (i.e. that is officially

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apartheid existed from 1948 until 1994.¹⁴ Remembering these temporal distinctions are useful in appreciating the extent of progress and the need for improvement in each nation.

Moreover, in South Africa, white people, who have historically comprised a “distinct numerical minority” of the population, implemented domineering tactics over Black South Africans.¹⁵ Alternatively, in the United States, white Americans have historically constituted a “numerical majority,” and have enslaved and oppressed the Black American minority.¹⁶ Typically, societal outcomes depend on who holds political and economic power.¹⁷ Thus, the differentiations between these social structures contextualize the understanding of potential solutions. Remembering these temporal distinctions are useful in appreciating the extent of progress and the need for improvement in each nation.

Considering the distinct cultures, religions, governments, demographics, and economics of each country, it is unrealistic to assume a successful prescription for the United States would automatically produce the same result in South Africa, or vice versa. However, the similar histories and comparable present-day situations in both countries offer a unique lens to examine how each country can redress legacies of state-sponsored segregation within higher education.

This note provides a comparative review of the historical inequalities stemming from the legacies of state-sponsored segregation in education. *Part I* studies the role of affirmative action in addressing the historical inequities in higher education. *Part II* describes how social attitudes toward affirmative action influence legislation. The note concludes by recommending a synergy of historical consciousness, social responsibility, and calculated preemptive legal measures to address and improve the state of Black Americans and Black South

sanctioned)” and that de facto segregation means “a state of affairs that is true in fact, but that is not officially sanctioned.”); cf. Peter H. Wood, *The Birth of Race-Based Slavery*, SLATE, (May 19, 2015), http://www.slate.com/articles/life/the_history_of_american_slavery/2015/05/why_america_adopted_race_based_slavery.html.

14. U.S. Department of State, *The End of Apartheid*, <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm> (last visited Nov. 14, 2018).

15. Higginbotham, *supra* note 5, at 190.

16. *Id.* at 189.

17. *Id.* at 189-90.

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Africans in higher education. This recommendation is specifically tailored to address higher education in light of the nuances and comparative systems arising from state-sponsored segregation and its legacy in the United States and South Africa. Nevertheless, if specific and relevant characteristics are accounted for, this recommendation could be applied as a broad framework to bring forth racial parity within higher education systems around the world.

I. THE HISTORICAL INEQUITIES STEMMING FROM STATE-SPONSORED SEGREGATION IN EDUCATION

Comparing the United States and South Africa reveals both countries' oppressive practices have created long-term structural disadvantages for their Black populations.¹⁸ These historical inequalities are reflected in each country's respective Black populations' limited participation and success in higher education.¹⁹ Increasing access to and achievement in higher education for Black populations remains a critical component for both countries to attain more equitable societies.

A. *Reviewing the Historical Factors Leading to the Contemporary Statuses of Black Americans in Higher Education*

During slavery in the United States, from the early 1600s until 1865, slaves were institutionalized as a racial caste associated with African ancestry.²⁰ The ability to read and write meant intellectual freedom, a dangerous notion for the master-slave dynamic.²¹ Accordingly, protecting the institution of slavery required laws both forbidding slaves from learning and criminalizing those who taught

18. The term Black here refers to people who would be classified Black or colored in South Africa and people with African ancestry in the United States.

19. Higher Education, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/higher%20education> (last visited Nov. 14, 2018) (referring to the level of education occurring after secondary education, involving undergraduate and graduate level schooling).

20. See generally Nadra K. Nittle, *Understanding Jim Crow Laws*, THOUGHTCO. (Nov. 1, 2018), <https://www.thoughtco.com/what-is-the-definition-of-jim-crow-laws-2834618>.

21. *Id.* See John Simkin, *Education of Slaves*, SPARTACUS EDUCATIONAL (Sept. 1997), <http://spartacus-educational.com/USASeducation.htm>.

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slaves to read or write.²² Forced illiteracy of Black Americans perpetuated their status as inferior and subservient to white Americans.²³ The consequence? A prevailing narrative: education for Black people was unnecessary and detrimental.²⁴ Depriving Blacks access to education inhibited their ability to function and flourish in mainstream society.

After the Civil War in 1865, the Thirteenth Amendment abolished slavery in the United States.²⁵ One year later, the Civil Rights Act of 1866 defined citizenship and affirmed equal protection under the law for all citizens.²⁶ Then, in 1868, the Fourteenth Amendment was ratified and promised “equal protection of the laws.”²⁷ It gave authority to apply the Fifth Amendment to states precluding the government from depriving any person from “life, liberty or property, without due process of law.”²⁸

Despite the United States’ efforts to provide Black Americans with equal rights through acts and amendments, Black Americans’ social status was still perceived as inferior. The stigma of Black inferiority lingered, and Black Americans were still largely viewed as undeserving of the same societal privileges, like education, as white people.²⁹ Consequently, in the late nineteenth century, white-dominated state legislatures enacted Jim Crow laws.³⁰

22. *Id.*

23. *Id.*

24. *Id.*

25. U.S. CONST. amend. XIII, § 1.

26. *The Civil Rights Bill of 1866*, HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited Nov. 20, 2018).

27. U.S. CONST. art. 14, § 1.

28. Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. INT’L L. REV. 333, 341 (1997).

29. *Beginnings of Black Education*, VA. MUSEUM OF HIST. & CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/beginnings-black> (last visited Nov. 14, 2018).

30. Nittle, *supra* note 20.

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Jim Crow laws imposed government sanctioned racial segregation throughout the South and parts of the United States.³¹ Jim Crow relegated former slaves “little or no resources to begin with . . . into [] the worst educational systems.”³² In 1896, the United States Supreme Court (“Court”) upheld the constitutionality of racial segregation laws through the concept of “equal but separate.”³³ The Court opined, “Legislation is powerless to . . . abolish distinctions based upon physical differences If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”³⁴ This decision further legitimized and facilitated government-sanctioned racial segregation in public facilities.³⁵

After the Civil War, access to and participation in higher education became the first and most important item “on the [B]lack national agenda for freedom and independence.”³⁶ Nevertheless, the conditions of the Black schools during Jim Crow were dismal.³⁷ These schools were virtually at the mercy of white-controlled state governments for funding, which provided significantly less financial support to Black schools than white schools.³⁸ For example, during Jim Crow, Alabama allocated thirty-seven dollars per white student but only seven dollars per Black student.³⁹ Inevitably, Black schools lacked adequate books, were overcrowded and poorly maintained, with faulty physical structures and underequipped teachers.⁴⁰

31. *Id.*

32. Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J. L. & SOC. CHALLENGES 1, 18 (2005).

33. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

34. *Id.* at 552.

35. Harry Groves, *Separate but Equal – The Doctrine of Plessy v. Ferguson*, 12 PHYLON (1940-1956) 66 (1951).

36. Andre M. Perry, *If black lives matter, so do historically black colleges and universities*, BROOKINGS: METROPOLITAN POL’Y PROGRAM: THE AVENUE, (Feb. 15, 2018), <https://www.brookings.edu/blog/the-avenue/2018/02/15/if-black-lives-matter-so-do-historically-black-colleges-and-universities/>.

37. *Beginnings of Black Education*, *supra* note 29.

38. *Id.*

39. Peter Irons, *Jim Crow’s Schools*, AM. EDUCATOR (2002), <https://www.aft.org/periodical/american-educator/summer-2004/jim-crows-schools>.

40. *Id.*

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Furthermore, the curricula for Black schools were limited because white school leaders recognized the dangers of exposing Black children to notions like freedom and equality.⁴¹ The sharecropper dynamic between Blacks and whites contributed to many Black children being divested of attending school altogether.⁴² Many stopped attending after the fourth grade to assist their families on the farms.⁴³ Other factors, like fewer operational days and limited funding in Black schools, exacerbated the education disparity between Blacks and whites during that time.⁴⁴ The outcome of these legal and systemic educational frameworks prolonged the second-class citizen status of Black Americans.

In the late nineteenth century, some universities like Stanford and Harvard began accepting exceptional Black students.⁴⁵ For instance, the first Black male admitted to Stanford attended a white grammar school and his family knew “the eponymous Stanfords from a previous line of work.”⁴⁶ Ultimately, the abolitionist family “prodded its university’s president to accept” the Black student.⁴⁷ In 1847, when Harvard admitted its first Black student, “students, faculty, and pro-slavery

41. Russell Brooker, *The Education of Black Children in the Jim Crow South*, AM.’S BLACK HOLOCAUST MUSEUM, <https://abhmuseum.org/education-for-blacks-in-the-jim-crow-south/> (last visited Nov. 14, 2018).

42. *Id.* See *Sharecropping*, HISTORY (2010) <https://www.history.com/topics/black-history/sharecropping> (“Despite giving African Americans the rights of citizens, the federal government . . . took little concrete action to help freed black [slaves] blacks in the quest town their own land.”). By the early 1870s, the system known as sharecropping dominated agriculture across the cotton-planting South. Under this system, black families rented small plots of land, or shares, to work, in exchange, black sharecroppers gave a portion of their crop to the landowner at the end of the year. This system made it difficult for freed blacks to acquire meaningful autonomy and provided white landowners with power over freed blacks).

43. Brooker, *supra* note 41.

44. *Id.*

45. Faiz Siddiqui, *The First Black Students Admitted to 15 Prestigious U.S. Universities, and their stories*, COMPLEX, (Feb. 16, 2013), <http://www.complex.com/pop-culture/2013/02/the-first-black-students-admitted-to-15-prestigious-us-universities-and-their-stories/ernest-houston-johnson>.

46. *Id.*

47. *Id.*

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Southerners . . . rioted upon hearing the news.”⁴⁸ It would be another twenty-three years until Harvard admitted another Black student.⁴⁹

The first Black students accepted to universities were exceptions to social and academic norms. Indeed, the majority of these Black students lacked the resources and skills to reach the high academic standards required to enter these institutions.⁵⁰ They experienced “giant mobs, picket lines, nuisance fires, and militant rioters.”⁵¹ Social rejection of Blacks involving themselves in higher education fueled the unequal education paradigm.

In addition to the social ramifications, experts recognized that segregation in the South, operating under Jim Crow laws, produced lasting psychological impacts on Black Americans.⁵² For example, Kenneth Clark’s Doll Test revealed how children ages three to seven years old reconciled their self-identities with race.⁵³ In short, the study examined three hundred fifty-three children by presenting them with both a black and white doll.⁵⁴ The researchers asked each child to identify the doll’s race and with which doll they preferred to play.⁵⁵ The majority of Black students preferred the white doll with yellow hair “assigning positive traits to it.”⁵⁶ Meanwhile, “most discarded the brown doll with black hair, assigning it negative traits.”⁵⁷ The researchers concluded that by the age of three, Black children had already “formed a racial identity” and “attached negative traits to their own identity.”⁵⁸ The researchers claimed these results provided “solid

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Leila McNeill, *How a Psychologist’s Work on Race Identity Helped Overturn School Segregation in 1950s America*, SMITHSONIAN (Oct. 26, 2017), <https://www.smithsonianmag.com/science-nature/psychologist-work-racial-identity-helped-overturn-school-segregation-180966934/>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

proof that enforced segregation stamped African American children with a badge of inferiority.”⁵⁹

The study’s findings contributed to the Court’s determination in the *Brown. v. Board of Education* decision.⁶⁰ In 1954, the Court declared state laws facilitating separate public schools for Black and white students unconstitutional.⁶¹ This resulted in “massive resistance” across the South.⁶² Many white schools were unwilling to incorporate Black students.⁶³ Because the power to effectuate school desegregation was bestowed upon white schools, white reactions toward school desegregation exacerbated notions of inequity.

Further, Justice Warren, writing for the majority, focused on the need for integrated schools. The focus was to ensure Black students could attend white schools and receive equal education by attending white schools. This implied Black students would only receive equal education if they attended white schools.⁶⁴ Rather than focusing on integrating and improving Black schools, the narrative centered on Black students benefiting from white students.⁶⁵ This type of white-centric reasoning placed the interests of the victims—the Black students—as secondary.

After the *Brown* decision, many schools resisted the transition to desegregation. Absent explicit legal validation to segregate schools, lingering notions of superiority, economic advantages for whites, and resentment from both Black and white Americans, schools still

59. *Kenneth and Mamie Clark Doll*, NAT’L PARK SERV., <https://www.nps.gov/brvb/learn/historyculture/clarkdoll.htm> (last visited Nov. 14, 2018).

60. Mamie Katherine Phipps Clark, ENCYCLOPEDIA OF ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2938> (last visited Nov. 14, 2018); *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

61. *Brown*, 347 U.S. at 483.

62. Ronald Brownstein, *How Brown v. Board of Education Changed – and Didn’t Change – American Education*, ATLANTIC, (Apr. 25, 2014), <https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/>.

63. *Id.*

64. Derrick Bell, *Serving Two Masters: School Litigation: A Behind-the-Scenes View*, in CRITICAL RACE THEORY: AN INTRODUCTION 303-305 (Richard Delgado & Jean Stefancic, eds., 2001).

65. *Id.* at 305.

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remained segregated.⁶⁶ This social pushback to integrate schools has contributed to polarized schools today.⁶⁷ These incongruities remain particularly severe in schools with the “highest concentrations of minority and poor students.”⁶⁸

Accumulations of these legal, social, financial, and psychological complications contribute to the continued plight of higher education for Black Americans. These inequities have been “constant during and since slavery ipso facto establishes a connection to slavery.”⁶⁹

*B. Reviewing the Historical Factors Leading to the Contemporary
Statuses of Black South Africans in Higher Education*

Europeans infiltrated South Africa, stripping the indigenous people of their land and their “entire way of life.”⁷⁰ Over time, the native people lost all freedom and became controlled by European colonizers.⁷¹ After a series of wars between the colonizers and the native people, white people began forming their own nation in South Africa. They established institutions and laws to safeguard their interests.⁷² In 1948, the National Party gained power, thereby strengthening the racial segregation that began during the colonial period.⁷³

66. Brownstein, *supra* note 62.

67. Lauren Camera, *More Than 60 Years After Brown v. Board of Education, School Segregation Still Exists*, USNEWS (May 17, 2016 1:47 PM), <https://www.usnews.com/news/articles/2016-05-17/after-brown-v-board-of-education-school-segregation-still-exists>.

68. *Id.*

69. Brooks, *supra* note 32, at 22.

70. Angela Goebel, *Inequalities in the Educational Systems in South Africa*, 22 ILL. WESLEYAN UNIV. 1, 1 (1992); *How did colonization happen in South Africa?*, QUORA (Aug. 20, 2018), <https://www.quora.com/How-did-colonization-happen-in-South-Africa> (explaining that oppression in South Africa began in 1652 until 1806 with the Dutch East India Company and in 1806, the British colonized South Africa until 1910).

71. Goebel, *supra* note 70.

72. *Id.*

73. *Id.* at 7.

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From 1948 until 1991, apartheid legally formalized racial discrimination and segregation in South Africa.⁷⁴ Analogous to the disenfranchisement of Blacks in America through Jim Crow laws, Apartheid functioned on white supremacy and repressed Black and colored South Africans.⁷⁵ Jim Crow Laws in America subjected Black people to inferior public services, desolate living communities, subservient jobs, and suboptimal access to education.⁷⁶

While Blacks in the United States had restricted curricula, the South African government devised a completely separate set of educational material for Black students.⁷⁷ In 1953, the South African government introduced the Bantu Education Act.⁷⁸ This act effectively extended apartheid to Black schools by conditioning the school's funding on implementing "racially discriminatory curricul[a]."⁷⁹ Bantu schools for Black South Africans focused specifically on "law and order."⁸⁰ This distinct curriculum ensured Blacks were confined to be "the hewers of wood and drawers of water," or rather, to work only low-level jobs.⁸¹

The Bantu system affected South African students' abilities to attend higher education. It established Black South Africans as the underclass by restricting their societal roles to those that served white South Africans⁸² by intentionally stifling the academic potential of

74. Greg Myre, *South Africa ends racial classifications*, SOUTHEAST MISSOURIAN (June 18, 1991), <https://news.google.com/newspapers?nid=1893&dat=19910618&id=3sQfAAAAIABJ&sjid=ltgEAAAAIABJ&pg=5582,6356040&hl=en>.

75. The Stream Team, *Rules of the Apartheid*, AL JAZEERA AM. (Dec. 6, 2017, 7:14 PM), <http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2013/12/6/rules-of-the-apartheid.html>.

76. *Breakdown: Apartheid vs. Jim Crow*, BET (Jan. 6, 2012), <https://www.bet.com/news/global/2012/01/06/breakdown-apartheid-vs-jim-crow.html>.

77. *Id.*; *Bantu Education*, SOUTH AFRICA OVERCOMING APARTHEID BUILDING DEMOCRACY, <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-2> (last visited Nov. 14, 2018).

78. *Bantu Education*, *supra* note 77.

79. *Id.*

80. Goebel, *supra* note 70, at 1.

81. *Bantu Education*, *supra* note 77.

82. Moufid Jaber, *What was the level of education the blacks in South Africa were allowed to achieve under apartheid?*, QUORA (Sep. 15, 2014),

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Black and colored South Africans. Similar to the undersupplied primary and secondary schools Black Americans attended during Jim Crow, Bantu schools suffered from government neglect and enormous funding disparities.⁸³ To put this in context, in 1982, the South African government spent an average of R1, 211 educating each white child compared to R146 for each Black child.⁸⁴ These conditions resulted in overcrowded classrooms, inadequate instruction, dilapidated facilities, and a shortage of textbooks.⁸⁵ Today, this volatile educational foundation continues to have far reaching consequences for Black South Africans. This is particularly true, in terms of attaining higher education and securing leadership and influential employment opportunities.⁸⁶

The Extension of University Act of 1959 prohibited non-whites to register at white universities.⁸⁷ This act was “the keystone” of efforts from the South African government to devise a “self-enclosed system of ‘Bantu Education’ that would fit the vision of a racially compartmentalized society.”⁸⁸ The act established separate “tribal

<https://www.quora.com/What-was-the-level-of-education-the-blacks-in-South-Africa-were-allowed-to-achieve-under-apartheid>.

83. *Bantu Education*, *supra* note 77.

84. Alistair Boddy-Evans, *School enrollment in Apartheid South Africa*, THOUGHTCO (Mar. 8, 2017), <https://www.thoughtco.com/school-enrollment-in-apartheid-south-africa-43437>. See generally US DEP'T OF TREASURY, *Treasury Reporting Rates of Exchange as of March 31, 1982* 1, 5 (1982) https://www.gpo.gov/fdsys/pkg/GOVPUB-T63_1007ed1d5321219f14ba8158feaf193ef3/pdf/GOVPUB-T63_100-7ed1d5321219f14ba8158feaf193ef3.pdf (explaining that in 1982 the South African Rand's currency exchange rate was R82=.9799 dollars).

85. *Bantu Education*, *supra* note 77 (explaining that South African currency consists of banknotes and coins and is denoted by the Rand (R) and Cents (C)).

86. *White People in South Africa Still Hold the Lion's Share of Capital*, CONVERSATION (Apr. 24, 2017, 12:00 PM), <https://theconversation.com/white-people-in-south-africa-still-hold-the-lions-share-of-all-forms-of-capital-75510> (explaining that White people are “more likely to attain higher positions in the labour market and, on average, earn higher wages.”).

87. *Bantu Education and the Racist Compartmentalizing of Education*, SOUTH AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/bantu-education-and-racist-compartmentalizing-education> (last visited Nov. 14, 2018).

88. Joseph Lelyveld, *Apartheid creates riddles in Black Education*, N.Y. TIMES (Dec. 26, 1982), <http://www.nytimes.com/1982/12/26/world/apartheid-creates-riddles-in-black-education.html?pagewanted=all>.

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colleges” for Black, colored, and Indian university students.⁸⁹ Notably, the South African government established these racially segregated universities.⁹⁰

In 1991, after significant domestic and international opposition, the South African government abolished apartheid.⁹¹ South Africa attempted to eradicate all remnants of apartheid by rewriting its entire constitution.⁹²

Analogous to the psychological effects of Black Americans from slavery and Jim Crow, Black South Africans suffer similar traumas.⁹³ Even post-apartheid, lingering notions of superiority for white South Africans and insecurities for Black South Africans remain pervasive.⁹⁴ Similar to the United States, deeply entrenched differential allocation of resources and socio-political privileges has fostered the build-up of economic, social, and mental disadvantages for Black South Africans.⁹⁵ Despite efforts to rectify the atrocious realities of apartheid through legal reform, South Africa still struggles to combat the racist ideas and structures rooted in the institution of apartheid.⁹⁶

89. *Bantu Education and the Racist Compartmentalizing of Education*, *supra* note 87; *see generally* Perry, *supra* note 36.

90. *Bantu Education and the Racist Compartmentalizing of Education*, *supra* note 87.

91. Myre, *supra* note 74.

92. Langston, *supra* note 28, at 364.

93. Bridget Murray, *Psychology tackles apartheid's aftermath*, 33 AMERICAN PSYCHOLOGICAL ASSOC., no. 1, Jan. 2002, <http://www.apa.org/monitor/jan02/apartheid.aspx>.

94. *Id.*

95. Yvonne Nono K. Mohutsioa-Makhudu, *The Psychological Effects of Apartheid on the Mental Health of Black South African Women Domestic Workers*, 17 J. MULTICULTURAL COUNSELING AND DEVELOPMENT 134, 134 (1989), https://www.researchgate.net/publication/234681141_The_Psychological_Effects_of_Apartheid_on_the_Mental_Health_of_Black_South_African_Women_Domestic.

96. *Id.* at 141.

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II. THE INTRODUCTION OF AFFIRMATIVE ACTION POLICIES IN CONTEMPORARY HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA

A. *The Dawn of Affirmative Action in the United States*

Slavery, Jim Crow, underfunded historically Black colleges and universities, and the enduring psychological harm on Black psyches, compounded by other demeaning societal attitudes, left gaping disparities between Blacks and whites in education. President Lyndon B. Johnson recognized the disproportionate racial situation and analogized the state of Black people to a physical footrace.⁹⁷ He lamented that the “high hurdles of racism” made it impossible for Black Americans to effectively prepare future generations.⁹⁸ He explained when Black Americans “passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina than they would have in a non-racist society.”⁹⁹

Affirmative action is currently understood as a legal response “intended to end and correct the effects of a specific form of discrimination.”¹⁰⁰ Through a series of Executive Orders, laws, policies, and administrative practices, the United States government sought to redress the disadvantages associated with past and present discrimination.¹⁰¹ President Kennedy first implemented affirmative action as a means to present equal opportunities in the work force for all United States citizens.¹⁰² Eventually, affirmative action was implemented in public institutions, such as universities, to improve diversity and bring forth parity.¹⁰³

97. Langston, *supra* note 28, 348-49.

98. *Id.*

99. *Id.*

100. Walter Feinberg, *Affirmative Action*, in THE OXFORD HANDBOOK OF PROF. ETHICS 272 (Hugh LaFollette ed., 2003), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199284238.001.0001/oxfordhb-9780199284238-e-12>.

101. *Id.* at 275.

102. David Hamilton Golland, *CONSTRUCTING AFFIRMATIVE ACTION: THE STRUGGLE FOR EQUAL EMP. OPPORTUNITY*, 3 (Univ. Press of Ky., 2011).

103. Elizabeth S. Anderson et al., *Race, Gender, and Affirmative Action*, U. MICH., <http://www-personal.umich.edu/~eandersn/biblio.htm> (last updated May 16, 2013).

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However, affirmative action policies in higher education admissions face controversy and constant challenges at the federal level.¹⁰⁴ One of the reasons for social and political pushback against affirmative action is the Fourteenth Amendment's Equal Protection Clause.¹⁰⁵ The clause "prohibits government entities[,] including public universities[,] from discriminating on the basis of race" unless the discrimination is "narrowly tailored to serve a compelling government interest."¹⁰⁶ Additionally, Title VI of the 1964 Civil Rights Act, which applies to public and private institutions, sets forth a similar standard for racial discrimination.¹⁰⁷ For programs or activities receiving federal financial assistance, this Act prohibits "discrimination on the basis of race, color, and national origin"¹⁰⁸

However, at the state level, several states, such as California, Washington, Nebraska, Arizona, Oklahoma, and Michigan, have outright banned affirmative action policies in admissions processes.¹⁰⁹ As a result, college enrollment among Black students significantly decreased after California universities introduced affirmative action bans.¹¹⁰ For instance, after Proposition 209 banned race-conscious admissions in California, "underrepresented minority admissions dropped by [fifty-three] percent" at the University of California Los Angeles.¹¹¹

At the federal level, the government developed tactics to desegregate schools. For example, in the 1971, the Court determined

104. Mark C. Long, *Is there a "Workable" Race-Neutral Alternative to Affirmative action in College Admissions?*, J. POL. ANALYSIS AND MGMT. 34, 162 (2014), <http://onlinelibrary.wiley.com/doi/10.1002/pam.21800/full>.

105. *Gratz & Grutter: Frequently Asked Questions*, CTR. FOR INDIVIDUAL RTS., <https://www.cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/gratz-grutter-frequently-asked-questions/> (last visited Nov. 14, 2018).

106. *Id.*

107. *Id.*

108. U.S. DEP'T OF JUSTICE, TITLE VI OF THE C. R. ACT OF 1964, 42 U.S.C. § 2000D (2016), <https://www.justice.gov/crt/fcs/TitleVI-Overview>.

109. Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/>.

110. Erica Perez, *Enrollments Down in UC Schools Despite Diversity Efforts*, HUFFINGTON POST (Apr. 25, 2012), https://www.huffingtonpost.com/2012/02/24/proposition-209_n_1300122.html.

111. *Id.*

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busing students between schools was a “remedial technique” for achieving school desegregation.¹¹² The Court reasoned that government officials needed to foster integration through affirmative measures to achieve racial neutrality in schools.¹¹³ Thus, school districts used busing to transport Black students to suburban schools and white suburban students to urban schools.¹¹⁴ Nevertheless, “[m]any white parents were outraged by the plan, and the school district [where the case was decided] declared that it was too burdensome to implement.”¹¹⁵

Widespread social rejection of integrated schools triggered legal responses attempting to balance compelling government interests with individualized concerns. After *Brown*, several Supreme Court decisions have significantly muddled the original intent to provide accessible and equal educational opportunities.¹¹⁶ One such instance is the 1974 *Milliken v. Bradley* case, where the Supreme Court limited the previous decision in *Swann* regarding cross-district busing.¹¹⁷ The Court held students could only be bused across district lines after a showing of de jure segregation across multiple school districts.¹¹⁸

In 1978, the Court acknowledged schools are permitted to consider race during their admission processes.¹¹⁹ The Court struck down the medical school’s admission policy, partly because it allocated a specific number of seats for minorities.¹²⁰ This decision effectively deemed racial quotas unconstitutional.¹²¹ However, the decision was a split

112. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30.

113. *Id.* at 28.

114. *Id.* at 10.

115. The Learning Network, *April 20, 1971 Supreme Court Rules That Busing Can Be Used to Integrate Schools*, N.Y. TIMES (Apr. 20, 2018, 4:07 AM), <https://learning.blogs.nytimes.com/2012/04/20/april-20-1971-supreme-court-rules-that--can-be-used-to-integrate-schools/>.

116. *Milliken v. Bradley*, 433 U.S. 267, 279-80 (1977).

117. *Id.*

118. *Id.* at 269.

119. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978).

120. *Bakke*, 438 U.S. at 375 (JJ., Brennan, White, Marshall, and Blackmun, dissenting).

121. *Id.* at 320.

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decision, leaving much uncertainty for the future of admission quotas.¹²²

In 2003, the Court further obscured the legality of affirmative action in *Gratz v. Bollinger* and *Grutter v. Bollinger*. In *Grutter*, the Court held that admission policies automatically giving preference on the basis of race and without additional individualized consideration “run[] afoul of the [Equal Protection Clause].”¹²³ The Court ultimately upheld the affirmative action policies because the university did not employ a quota system.¹²⁴ Instead, the university used a “narrowly-tailored” method for accomplishing its purpose.¹²⁵

In *Gratz*, the Court held considering race as one element of a holistic admissions policy does not violate the Fourteenth Amendment.¹²⁶ Together these decisions placed limits on how and when racial preferences could be incorporated into an admissions process.¹²⁷ These decisions also created uncertainty about which admission policies served a compelling government interest.¹²⁸

In 2007, the Court further narrowed affirmative action.¹²⁹ In response to student assignment plans, parents brought suit against the school district, claiming the district violated the Equal Protection Clause.¹³⁰ The Court considered the issue of whether public school districts can achieve racial integration by assigning students to particular schools solely on the basis of race.¹³¹ Distinguished from *Grutter*, the Court struck down the district’s affirmative action policy because its desegregation techniques were not sufficiently narrowly tailored.¹³²

122. See *Bakke*, 438 U.S. 265.

123. *Grutter v. Bollinger*, 539 U.S. 306, 375 (2003).

124. *Id.* at 306.

125. *Id.*

126. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

127. *Gratz v. Bollinger; Grutter v. Bollinger*, CTR. FOR INDIVIDUAL RTS., <https://www.cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/> (last visited Nov. 14, 2018) [hereinafter CTR. FOR INDIVIDUAL RTS.].

128. *Id.*

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

130. *Id.*

131. *Id.* at 710-11.

132. *Id.* at 715.

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The issue appeared before the Court again in 2016. In *Fisher v. University of Texas at Austin*, the Court clarified that “obtaining the educational benefits that flow from student body diversity” was a compelling state interest.¹³³ However, the Court determined the school must demonstrate how it previously made “serious, good faith consideration of workable, race-neutral alternatives” to achieve the sought-after racial diversity.¹³⁴ Essentially, if universities consider race as a soft variable among many other variables in the admission process, then the policy has a better chance of surviving strict scrutiny.¹³⁵

In 2015, Asian-American students accused Harvard University of discriminating against them in admissions and lodged a complaint with the U.S. Department of Justice.¹³⁶ The students alleged the university gave preferential treatment to other racial minorities.¹³⁷ While the students may have had valid claims, studies expose how Asian Americans “fare well beyond their numbers in admission to top colleges” as compared to their proportion of the general population.¹³⁸ The data also exposes how, “without affirmative action the acceptance rate for” Black students would “likely fall by nearly two-thirds.”¹³⁹ However, commentators expect that the Supreme Court will hear this case.¹⁴⁰

Many of these decisions were plurality decisions, which illustrate the recurring difficulties inherent in striking a balance between affirmative action and the Constitution. Furthermore, by narrowing the scope of affirmative action, the Court left many schools confused in

133. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016).

134. *Id.* at 2218.

135. *Id.* at 2221. In the opinions of these cases, the Court cautioned that, even when such policies benefit members of minority races, they are subject to strict scrutiny, and when a fundamental constitutional right is infringed, courts apply strict scrutiny to ensure the policy is: (1) justified by a compelling government interest; (2) narrowly tailored to achieve the goal or interest; and (3) the law must be the least restrictive means for achieving that interest.

136. Scott Jaschik, *The Numbers and the Arguments on Asian Admissions*, INSIDE HIGHER ED (Aug. 7, 2017), <https://www.insidehighered.com/admissions/article/2017/08/07/look-data-and-arguments-about-asian-americans-and-admissions-elite>.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

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how to achieve the task of providing equal opportunity without engaging in a mechanical racial balancing.¹⁴¹

By legally “eliminat[ing] strategies[,] such as cross-district busing, dismantl[ing] local court supervision of desegregation plans, and limit[ing] use of race-based admissions to ensure diversity” in schools, the judiciary significantly diluted the strength of previous policies designed to achieve integrated schools.¹⁴² Given the level of social resistance and tensions between affirmative action and the Constitution, de facto segregation continues to affect many schools, and to some extent determines the fate of many Black American students.¹⁴³

B. The Dawn of Affirmative Action in South Africa

During apartheid, the South African government prioritized higher education for white students while other racial groups were marginalized.¹⁴⁴ Currently, the South African Constitution enshrines socioeconomic parity and explicitly defines education as a constitutional right.¹⁴⁵ Alternatively, the authors of the United States Constitution did not include the right to education in the country’s founding documents. Instead, education has always been the state’s responsibility.¹⁴⁶ Further, the South African Constitution states the government will work toward healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.¹⁴⁷ The United States and South Africa have similar intents for introducing affirmative action policies. However,

141. CTR. FOR INDIVIDUAL RTS., *supra* note 127.

142. Beverly Daniel Tatum, *Segregation worse in schools 60 years after Brown v. Bd. of Educ.*, SEATTLE TIMES (Sept. 14, 2017, 2:54 PM), <https://www.seattletimes.com/opinion/segregation-worse-in-schools-60-years-after-brown-v-board-of-education/>.

143. *Id.*

144. 2013 *Higher Education Data: Participation*, COUNCIL ON HIGHER EDUC. S. AFR. (Jan. 22, 2016), http://www.che.ac.za/focus_areas/higher_education_data/2013/participation#race.

145. Eric Berger, *The Right to Education Under the South African Constitution*, 103 COLUM. L. REV. 614, 614 (2003).

146. Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

147. Berger, *supra* note 145, at 627.

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unlike in the United States, South Africa's redress methods for equality are intended to realize constitutional objectives.¹⁴⁸

In post-apartheid South Africa, affirmative action is presented as a means to correct historical injustices so "everyone can compete, based upon equal access to education[.]"¹⁴⁹ South Africans refer to this ideological, political, and social shift as "transformation," meaning to transform their society to be more inclusive.¹⁵⁰ Furthermore, the government claims to have given consistently increased priority to developing and improving the educational system.¹⁵¹

Distinguished from the United States, South Africa's constitution specifically calls for affirmative action. Missing a footnote here. Thus, South Africa's transformation efforts introduced the concept of Black Economic Empowerment ("BEE") and later Broad-Based Economic Empowerment ("BBEE").¹⁵² BBEE expanded the initiatives to encompass coloreds, Indians, and Chinese South Africans.¹⁵³ South Africa implemented specific initiatives with the explicit purpose to empower Black and colored South Africans. The South African government refers to BEE as "positive discrimination."¹⁵⁴ Where the United States is limited by the 14th Amendment and Title VI legislation, South Africa's constitution requires it to prioritize measures in order to counteract apartheid's divisive effects.¹⁵⁵ It can be inferred

148. *Id.* at 651 n.195.

149. Harold D. Herman, *Affirmative action in education and Black Economic Empowerment in the Workplace in South Africa since 1994: Policies, Strengths and Limitations, Current Bus. and Econ. Driven and Education: Perspectives from Around the World*, 15 CURRENT BUS. & ECON. DISCOURSE AND EDUC. 31, 32 (2017), <https://files.eric.ed.gov/fulltext/ED574231.pdf>.

150. *Analytic Quality Glossary: Transformation*, QUALITY RES. INT'L, <http://www.qualityresearchinternational.com/glossary/transformation.htm> (last visited Nov. 14, 2018).

151. *Shaping Change- Strategies of Development and Transformation*, BERTELSMANN STIFTUNG, <http://bti2003.bertelsmann-transformation-index.de/60.0.html?&L=1> (last visited Nov. 15, 2018).

152. Herman, *supra* note 149, at 33.

153. Nicole Crampton, *How Do I Become B-BBEE Compliant?*, ENTREPRENEUR MAG. (May 1, 2018), <https://www.entrepreneurmag.co.za/ask-entrepreneur/doing-business-in-sa-ask-entrepreneur/how-do-i-become-bee-compliant/>.

154. *Id.*

155. Langston, *supra* note 28, at 262-63.

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that by promoting economic achievement for Black South Africans, access to higher education is an underlying factor of the BEE mission. For Black South Africans to partake in a greater share of the economy, and facilitate the transition to BEE, they must first acquire the necessary skills and education required to function in those capacities.

Compliance with BEE principles is governed by codes delineating procedures for how BEE should be implemented.¹⁵⁶ BEE was first introduced in the 1990s; however, it was not until the beginning of 2007, when the government gazette updated the Codes of Good Practice.¹⁵⁷ These improved Codes strengthened BEE as a “legal reality.”¹⁵⁸ The Codes differ depending on the size of the organization; however, any state organization, public entity, or private enterprise undertaking business with a public entity must abide by the BEE Codes.¹⁵⁹ The Codes specify numerical benchmarks for the required amount of diversity companies must possess. Furthermore, companies that adhere to these Codes avail themselves the benefits to bid for government tenders; have access to tax incentives and financial grants; and are generally favored as clients by other business. Additionally, compliance with the Codes eliminates the need to disclose any unmet requirements when competing for a contract, and it facilitates positive “participation in the formal South African economy.”¹⁶⁰

One of the initial BEE pieces of legislation was the Higher Education Act of 1997. This act addressed the need to create “a single coordinated higher education system” to more effectively address the needs of South Africa’s post-Apartheid, multicultural society.¹⁶¹ The act sought to remedy past discrimination, ensure equal access, and contribute “to the advancement of all forms of knowledge and scholarship.”¹⁶² The act also declared that for universities to function

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Saleem Badat, *The challenges of transformation in higher education and training institutions in South Africa*, DEV. BANK OF S. AFR. 1, 5, (2010) <https://www.dbsa.org/EN/AboutUs/Publications/Documents/The%20challenges%20of%20transformation%20in%20higher%20education%20and%20training%20institutions%20in%20South%20Africa%20by%20Saleem%20Badat.pdf>.

162. *Id.*

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most effectively, it was preferable for them to be autonomous from the state.¹⁶³ Therefore, unlike the public universities in the United States, all universities in South Africa are autonomous and report to their own councils rather than the government.¹⁶⁴ This is noteworthy because it reduces South African schools' dependence on government funding and provides more leeway to implement creative improvement measures.

The Education White Paper 3 is part of a series of initiatives to facilitate the transition from apartheid.¹⁶⁵ The document identified several social purposes of higher education.¹⁶⁶ Some of the purposes include: addressing the development needs of society; improving access for "black, women, disabled and mature students;" and facilitating "fair chances of success to all while eradicating all forms of unfair discrimination and advancing redress for past inequalities."¹⁶⁷

Contrary to the reform tactics in the United States, transformation in South Africa and its incorporation of purposeful stratagem offers a more direct avenue for achieving equality. Nonetheless, South Africa's transformation efforts have not been entirely successful. Aside from the tremendous task to reverse decades of profoundly rife inequality, these efforts have triggered feelings of resentment and unworthiness.¹⁶⁸ Indeed, providing Black South Africans with social, economic, political, and academic privileges once enjoyed solely by white South Africans will inevitably require redefining social categories.¹⁶⁹ This adjustment incites a new set of social reactions and attitudes. Regarding some Black South Africans, it also incites feelings of false entitlement and guilt.¹⁷⁰

163. *Id.*

164. *Id.* at 4.

165. *Id.* at 5.

166. *Id.*

167. *Id.* at 6.

168. Kenichi Serino, *How Apartheid Haunts a New Generation of South Africans*, ATLANTIC (Sept. 21, 2016), <https://www.theatlantic.com/international/archive/2016/09/south-africa-apartheid-mandela-born-free-university/500747/>.

169. See generally Gary Baines, *The Rainbow Nation? Identity and nation building in post-apartheid South-Africa*, 7 RHODES U. 1, 2 (1998).

170. Serino, *supra* note 168.

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III. THE EFFICACY OF AFFIRMATIVE ACTION IN UNITED STATES AND SOUTH AFRICA

Under resourced Jim Crow and Bantu primary and secondary schools were never completely rehabilitated. Currently, both the United States and South Africa struggle to erase the residual effects of state-sponsored segregation in education. As such, both countries currently experience similar predicaments linked to race and education, which continue to fuel disparate scholastic opportunities.¹⁷¹ For example, The New York Times claimed while Black American students have benefited from affirmative action policies, “persistent underrepresentation often stems from equity issues that begin earlier.”¹⁷²

A. *The Efficacy of Affirmative Action in the United States*

In 1965, Executive Order 11246 compelled universities to adopt recruitment policies tailored by affirmative action ideals.¹⁷³ The concept of de facto racially segregated schools is relevant in evaluating the efficacy of affirmative action. Between 1970 and 1990, steady progress occurred toward desegregating schools at all levels.¹⁷⁴ However, beginning in the 1990s, that progress diminished.¹⁷⁵ Similar to the make-up of Black schools during the Jim Crow era, nationwide, roughly one-third of Black and Latino students attend schools that have a majority of minority students.¹⁷⁶ These majority-minority schools have a much higher incidence of students in poverty than majority white schools.¹⁷⁷

171. Jeremy Askenas, et al., *Even with Affirmative Action, Blacks and Hispanics are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html?mtref=www.google.com>.

172. *Id.*

173. 41 C.F.R. § 60-2 (1964-1965); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

174. Tatum, *supra* note 142.

175. *Id.*

176. *Id.*

177. *Id.*

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A report from the Center for American Progress identified that the racial gap in wealth is widening.¹⁷⁸ In 2016, the median wealth of Black households was \$13,460, while the median wealth for similar white households was \$142,180.¹⁷⁹ The report explained “[c]omponents of family wealth, such as stocks, bonds, money in the bank, and real estate, produce interest, dividends, or rental income which are commonly used to offset or pay college costs.”¹⁸⁰ President Johnson’s quote about “the high hurdles” of historical racism further contextualizes the other report findings. The report discovered that the median wealth of Black households led by a college graduate was \$57,250.¹⁸¹ This accounts for a “median wealth of only seventy percent of” what white households have when “led by a person without a college degree.”¹⁸²

This provides insight into a household’s ability to provide a college degree for their children. A 2016 study by the National Assessment of Educational Progress identified a consistent pattern of significant academic improvement for “states that sen[t] additional money to their lowest-income school districts.”¹⁸³ This study demonstrates and provides support for the assumption that, generally, whether in schools or in a household, the more money available to students, the better the outcome for the student as an adult.¹⁸⁴

Furthermore, students are predominantly assigned to public schools based on where they live. Neighborhoods are, by and large, racially segregated as a result of economics.¹⁸⁵ Discrepancies in schools occur

178. Angela Hanks et al., *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.

179. *New Report Examines the Persisting Racial Wealth Gap Among U.S. Households*, J. BLACKS IN HIGHER EDUC., (Mar. 5, 2018), <https://www.jbhe.com/2018/03/new-report-examines-the-persisting-racial-wealth-gap-among-u-s-households/>.

180. *Id.*

181. *Id.*

182. *Id.*

183. Kevin Carey & Elizabeth Harris, *Study Examines the Power of Money in Schools*, TAMPA BAY TIMES, (Dec. 13, 2016), <http://www.tampabay.com/news/education/study-examines-the-power-of-money-in-schools/2306081>.

184. *Id.*

185. See generally Semuels, *supra* note 146.

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because public school districts across the nation are controlled by local cities and are funded, in part, by local property taxes.¹⁸⁶ Logically, high-poverty areas with lower home values collect fewer taxes to funnel into local schools. The result is the students who generally need the most support in school end up with the least support.

Generally, majority-minority schools are the least likely to have college preparation curricula, higher-level science and math courses, or guidance counselors.¹⁸⁷ Indeed, “separate remains unequal,” for schools with concentrated poverty and racial segregation suggest a higher probability for having “less experienced teachers, high levels of teacher turnover, inadequate facilities[,] and fewer classroom resources.”¹⁸⁸ Thus, students from these schools are unable to compete on college entrance exams with students from schools with far better resources.¹⁸⁹

For example, students who take advanced placement (A.P.) courses and pass the exams earn course credit for college.¹⁹⁰ The A.P. exam administrator reports a wide disparity in success levels between white and Black American students on A.P. examinations.¹⁹¹ Generally, white and Asian American students enter university with college credits and are far more prepared than their Black student counterparts.¹⁹² With major impediments at every stage of a Black student’s scholastic journey, it is not surprising reaching college and succeeding once there can be a struggle for many Black Americans. These foundational shortcomings, coupled with economic struggles to remain in school, contribute to the present-day gap between Black and white college

186. *Id.*

187. *Nikole Hannah-Jones on DOJ’s Attack on Affirmative Action & How School Segregation Never Ended*, DEMOCRACY NOW (Aug. 3, 2017), https://www.democracynow.org/2017/8/3/nikole_hannah_jones_on_dojs_attack [hereinafter *Nikole Hannah-Jones*].

188. Tatum, *supra* note 145.

189. *Nikole Hannah-Jones, supra* note 192.

190. *AP Program*, COLLEGEBOARD AP, <https://ap.collegeboard.org/> (last visited Nov. 22, 2018).

191. *The Racial Gap in Advanced Placement Test Scores*, J. BLACKS IN HIGHER EDUC. (Feb. 5, 2018), <https://www.jbhe.com/2018/02/the-racial-gap-in-advancement-placement-test-scores-2/>.

192. *The Nationwide Racial Gap in College Graduation Rates*, J. BLACKS IN HIGHER EDUC. (Jan. 22, 2018), <https://www.jbhe.com/2018/01/the-nationwide-racial-gap-in-college-graduation-rates-3/>.

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students and graduates. This is evident when comparing college graduation rates of Black Americans with those of other racial or ethnic groups.¹⁹³ According to data from the National Collegiate Athletic Association, only forty-six percent of Black students who “entered bachelor’s degree programs at four-year institutions . . . earned their degree within six years.”¹⁹⁴ Furthermore, the Black student college graduation rate was twenty-three percent “lower than the rate for whites and [thirty-one] percentage points below the rate for Asian Americans.”¹⁹⁵ Hispanic students also had a fourteen percent higher graduation rate than Black students.¹⁹⁶ Among Black college students, the data also revealed a nine percent gap in favor of Black women.¹⁹⁷

Moreover, according to the United States Census Bureau, in 2017 Blacks had attained the following education levels: 4,301,000 with Bachelor’s degrees; 1,872,000 with Master’s degrees; 194,000 with Professional degrees; and 297,000 with Doctoral degrees.¹⁹⁸ In contrast, whites had attained the following education levels: 39,672,000 with Bachelor’s degrees; 16,169,000 with Master’s degrees; 2,655,000 with Professional degrees; and 3,109,000 with Doctoral degrees.¹⁹⁹ Of people 25 years and over in the U.S. population, twenty-four percent of Blacks had received higher education degrees, while nearly thirty-five percent of whites had received higher education degrees.²⁰⁰

An analysis by the New York Times determined that black representation at elite institutions has actually declined in the past 35 years.²⁰¹ The senior vice president at the American Council on Education claimed that Black Americans have enjoyed improvements by being admitted to less selective colleges.²⁰² However, he asserts this

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES 2017 (2017), <https://www.census.gov/data/tables/2017/demo/education-attainment/cps-detailed-tables.html> [hereinafter EDUCATIONAL ATTAINMENT].

199. *Id.*

200. *Id.*

201. Askenas, *supra* note 171.

202. *Id.*

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is not the case at the highly selective institutions.²⁰³ Although Black Americans are defying many obstacles by entering college, they still struggle to break into the most coveted and traditionally white-dominated academic arena, like Ivy League institutions.

Asian Americans account for about five percent of the nation's population, yet account for twenty-two percent of admitted students at Harvard.²⁰⁴ Comparatively, Black Americans comprise slightly over twelve percent of the nation's population, and they account for roughly twelve percent of Harvard's admitted students.²⁰⁵ Hence, proportional to the American population, Asian American students, at Harvard, are far more represented than Black Americans. Experts also suggest that, if Harvard were forbidden from using race as a factor in admissions, the Asian American admission rates would increase, while the admission rates of other students would decrease.²⁰⁶ In fact, a 2005 study, appearing in *Social Science Quarterly*, found absent affirmative action, the acceptance rate for Black American candidates at elite colleges would likely fall by nearly two-thirds.²⁰⁷

These statistics bespeak the social, economic, psychological, and political generational disenfranchisement of Black Americans, and it has resulted in acute imbalances and pervasive barriers between Black Americans and white Americans. Not surprisingly, education functions as a cyclic complication; that is, limited access low-quality schooling can operate as a self-fulfilling prophecy, restricting future generations' prospects for advancement. Notably, even Black households led by a college graduate trail their white counterparts in terms of economic progress.²⁰⁸ Despite progress, future generations of Black students still face higher academic hurdles to compete with their white peers.

203. *Id.*

204. Jaschik, *supra* note 136.

205. *Id.*

206. *Id.*

207. *Id.*

208. *New Report Examines the Persisting Racial Wealth Gap Among U.S. Households*, *supra* note 184.

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B. The Efficacy of Affirmative Action in South Africa

Notable increases in Black student participation in public higher education have occurred post-apartheid.²⁰⁹ Still, when considering that “the majority of working class [B]lack students come from [a background of] poorly-resourced schools,” it is not surprising these students are often ill-equipped to surpass the minimum university grade.²¹⁰ Statistics South Africa asserted, “Children with the required support, which includes better-educated parents, would pass these examinations and tests . . . [and] would be better off compared to children with less educated parents.”²¹¹

The country’s efforts to produce qualified Black professionals is complicated by social class. Similar to the role economics played in segregating schools in the United States, South Africa “remain[s] crippled by failing public high schools in impoverished rural areas and black townships”²¹² Hence, both in the United States and South Africa, predominantly Black neighborhoods still suffer from a disproportionate allocation of resources, likely stemming from each country’s historically state-sponsored segregation. As in the United States, limited access to, and quality of, education at the primary and secondary levels are reflected as similar shortcomings at the university level.

Given South Africa’s explicit affirmative action policy, universities have more incentive to accept Black South Africans. For example, the University of Cape Town (“UCT”) “has an openly stated policy of admitting Blacks, [even with] substantially lower test scores than whites.”²¹³ Nevertheless, whites still outnumber Black South Africans

209. 2013 *Higher Education Data: Participation*, *supra* note 147.

210. Slonae Hunter, *It Was Easier For Black South African Students to Graduate During Apartheid*, 2 OCEANS VIBE (Oct. 26, 2017), <http://www.2oceansvibe.com/2017/10/26/it-was-easier-for-black-south-african-students-to-graduate-during-apartheid/>.

211. *Overturing Verwoerd’s Legacy: Is This Generation Better-Educated than Their Parents?*, STAT. S. AFR. (Feb. 7, 2017), <http://www.statssa.gov.za/?p=9530>.

212. Celia W. Dugger, *Campus that Apartheid Ruled Faces a Policy Rift*, N.Y. TIMES (Nov. 22, 2010), http://www.nytimes.com/2010/11/23/world/africa/23safrica.html?_r=2&nl=todaysheadlines&emc=a22.

213. *Id.*

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nearly two to one.²¹⁴ This is particularly striking when white South Africans account for only nine percent of the population.²¹⁵

Additionally, UCT offers compensatory instructional programs designed to aid disadvantaged students.²¹⁶ Even with reinforcement, roughly half of Black South African students graduate in five years.²¹⁷ Comparatively, within that same time frame, four out of five white students completed their educations.²¹⁸ Referencing the Black student population, the vice chancellor of the university lamented, “[W]e’re getting the best [of the Black South African students] here and the best [are] struggling.”²¹⁹

The 2011 census established that Black South Africans still comprise the majority of the South African populace at 79.2 percent.²²⁰ Additionally, colored South Africans are 8.9 percent of the population and white South Africans are 8.9 percent of the population.²²¹ However, according to Statistics South Africa, as of November 2017, 9.1 percent of Black South Africans attained post-secondary education.²²² Comparatively, 38.3 percent of white South Africans acquired post-secondary education.²²³ Thus, despite Black South African students possessing a higher level of education than previous generations, presently and relative to the nation’s population, Black South Africans still trail their white counterparts.²²⁴ Therefore, despite BEE efforts, the

214. *Id.*

215. *Census in Brief*, STAT. S. AFR. (2011) http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf.

216. Dugger, *supra* note 212.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Census in brief*, *supra* note 215.

221. *Id.*

222. EDUCATIONAL ATTAINMENT, *supra* note 198.

223. *Id.*

224. Lynsey Chutel, *For black South African students, the odds of graduating were better during apartheid*, QUARTZ AFR. (Oct. 25, 2017), <https://qz.com/1111666/feesmustfall-black-south-african-students-had-a-better-chance-at-graduating-during-apartheid/>.

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journey from their first year to graduation still presents the most challenges for Black students.²²⁵

“While the ‘big five’ historically white universities have opened their [admissions] to non-white students, historically [B]lack universities . . . still languish at the bottom of the pile in terms of the volume and quality of their academic work.”²²⁶ “Most white students attend the previously advantaged universities,” including the UCT or Witwatersrand (“WITS”).²²⁷ This is analogous to the reputable Ivy League institutions and their student body consisting mostly of white and Asian Americans. Meanwhile, there is a significantly higher concentration of Black and colored South African students attending previously disadvantaged universities.²²⁸ The “big five” universities, which enjoy an established reputation as prestigious, obtain the majority of research funding from statutory bodies, and charge substantially higher tuition fees.²²⁹ Relatively, the ethnically differentiated universities, designated during apartheid, are still considered “bottom tier.”²³⁰ These tribal colleges have restricted research activity and provide students a slim chance to enter even the lower levels of global rankings of esteemed universities.²³¹ These financial disparities maintain and fuel the “class structure of apartheid society.”²³² The vice chancellor of WITS claimed in a lecture the “government has lacked the will or the imagination despite all of its

225. *Id.*

226. David Jobbins, *Universities struggle to shed apartheid topography*, U. WORLD NEWS (Oct. 28, 2012), <http://www.universityworldnews.com/article.php?story=20121023192747849>.

227. Rajendra Chetty & Christopher B. Knaus, *Why South Africa’s Universities Are in the Grip of a Class Struggle*, CONVERSATION (Jan. 12, 2016, 11:35 PM), <https://theconversation.com/why-south-africas-universities-are-in-the-grip-of-a-class-struggle-50915>.

228. *Id.*

229. *Id.*

230. Jobbins, *supra* note 226.

231. *Id.*

232. Chetty & Knaus, *supra* note 227; *see* Serino, *supra* note 168 (“Today, South Africa remains one of the most unequal countries in the world, a place where poverty breaks down largely along racial lines. A black person is four times more likely to be unemployed than a white person, and the average income for a white family is six times greater than for a black family. White people dominate senior management positions at businesses across the country.”).

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political rhetoric to develop these historically black universities.”²³³ He further claimed, as a result, these universities will be “mired in a sub optimal education trajectory.”²³⁴ Hence, despite efforts to include Black South Africans, meaningful rehabilitation is not occurring at the rate needed for significant improvement.

IV. SOCIAL ATTITUDES TOWARD EFFORTS TO EFFECTUATE RACIAL
EQUITY IN HIGHER EDUCATION IN THE UNITED STATES
AND SOUTH AFRICA

Social attitudes and legislation are intimately connected and often influence each other.²³⁵ Sometimes lawmakers attempt to reflect social norms and sentiments through legislation.²³⁶ For instance, in the United States, social attitudes about the legality of same-sex marriage, the use of recreational marijuana, and equal rights during the Civil Rights movement, have all catalyzed adjustments to legal frameworks.²³⁷ Analogously, in South Africa, domestic and international social resistance and pressure played major roles in the overhaul of apartheid.

Alternatively, laws can also dictate attitudes about social behavior.²³⁸ For example, the United States introduced laws mandating designated facilities for breastfeeding mothers; and the effect of this law

233. *Whiteness of South African universities questioned*, BUS. TECH. (Oct. 1, 2015), <https://businessstech.co.za/news/general/100000/whiteness-of-south-african-universities-questioned/>.

234. *Id.*

235. Clifton B. Parker, *Laws may be ineffective if they don't reflect social norms*, *Stanford scholar says*, STAN. NEWS (Nov. 24, 2014), <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html>.

236. Mo Convery et al., *Legislation and Societal Attitudes: A Love-Hate Relationship*, SERENDIP STUDIO, http://serendip.brynmawr.edu/sci_cult/courses/knowbody/f04/web2/cpomer.html (last visited Nov. 14, 2018).

237. Parker, *supra* note 235.

238. Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECON. AND THE L., 241-267, 241 (Eyal Zamir & Doron Teichman eds., 2014), <https://www.law.northwestern.edu/faculty/fulltime/nadler/Bilz-Nadler-LawMoralAttitudesPageProofs.pdf>.

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was to normalize breastfeeding.²³⁹ Thus, laws can set values, which in turn can alter social behavior.

A. *Social Attitudes Toward Efforts to Effectuate Racial Equity in Higher Education in the United States*

The litany of Supreme Court cases, complaints about unfair preferences, and varying ideas about affirmative action illustrate the difficulty in reaching effective solutions. For instance, in 2003, the Court noted that using race as a factor in a holistic approach would likely no longer be necessary “within twenty-five years.”²⁴⁰ Comparatively, in 2007, Justice Roberts opined, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁴¹

As part of the current Executive Administration’s efforts to effectuate change in education, the Civil Rights Division of the Justice Department plans to investigate and “potentially take legal action against universities over affirmative action admissions policies.”²⁴² Attorney General Jeff Sessions claims affirmative action policies “[have] delayed the kind of movement to racial harmony we ought to be going forward with today.”²⁴³ In fact, the President of the Conservative Center for Equal Opportunity told the *New York Times*, “[N]ot only are whites discriminated against now, but frequently Asian-Americans are as well.”²⁴⁴ In general, Americans against affirmative action policies claim that one set of injustices, such as state-sponsored segregation, does not excuse another – affirmative action.²⁴⁵

239. *Id.* at 242.

240. *Gutter v. Bollinger*, 539 U.S. at 322-23.

241. *Affirmative Action: Unequal Protection*, ECONOMIST (Apr. 27, 2013), <https://www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences-around-world-we-look-americas>.

242. Katie Reilly, *The Trump Administration is Set to Probe College Affirmative Action for Discriminating Against White Students*, TIME (Aug. 3, 2017, 10:25 AM), <http://time.com/4883793/justice-department-college-admissions-affirmative-action/>.

243. Mike Levine, *What Jeff Sessions Has Said About Race and Civil Rights*, ABC NEWS (Nov. 18, 2016, 7:02 PM), <http://abcnews.go.com/Politics/jeff-sessions-race-civil-rights/story?id=43633501>.

244. Reilly, *supra* note 242.

245. *Affirmative Action: Unequal Protection*, *supra* note 241.

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A 2016 Gallup poll revealed seven in ten Americans believe merit should be the only basis for college admissions.²⁴⁶ In fact, sixty-five percent of Americans polled disagreed with the Court's decision to allow race as a factor in college admissions.²⁴⁷ Other social attitudes toward affirmative action suggest a color blind or race-neutral approach would address issues of equality and representation in higher education more fairly.²⁴⁸ Proponents of this view recommend considering economic status as a factor to avoid giving an unfair advantage to middle-class Black American students.²⁴⁹ Supporters of this approach assert this type of evaluation would benefit low-income students of all races.²⁵⁰ Also, policies similar to those adopted by public universities in Texas have been viewed as better alternatives to affirmative action policies.²⁵¹ There, colleges automatically admit students graduating in the top ten percent of their high school classes.²⁵² Many opponents of affirmative action view this policy as fairer.²⁵³

Moreover, many white and sometimes Asian American students feel disadvantaged by affirmative action.²⁵⁴ For instance, in 2012, an

246. Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP (July 8, 2016), <http://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx>.

247. *Id.*

248. Valerie Strauss, *Actually, we still need affirmative action for African Americans in college admissions. Here's why.*, WASH. POST (Aug. 2, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/02/actually-we-still-need-affirmative-action-for-african-americans-in-college-admissions-heres-why/?utm_term=.3c8fc98b6b.

249. Eugene Robinson, *A Question of Race vs. Class*, WASH. POST (May 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051401233.html> (“[T]here are a lot of African American kids who are still struggling, that even those who are in the middle class may be first-generation as opposed to fifth- or sixth-generation college attendees.”). Thus, even when Black students are coming from the middle class, there are historical structural impediments they must overcome, and in light of these historical factors, their white counterparts, even if they are poor, do not confront those same issues.

250. *Id.*

251. *Affirmative Action: Unequal Protection*, *supra* note 241.

252. *Id.*

253. *Id.*

254. Jessica Schladebeck, *'Affirmative Action Bake Sale' Charges University of New Mexico Students Based on Race*, N.Y. DAILY NEWS (Sept. 23, 2018, 11:15

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American conservative non-profit group, Turning Point USA, emerged with the mission to educate students about true market values.²⁵⁵ In 2017, at the University of New Mexico, members of this organization held an “‘Affirmative Action Bake Sale,’ with prices for products varying based on the customer’s race.”²⁵⁶

The group’s motives were to incite debate about how different people received different opportunities that do not result in equal opportunity.²⁵⁷ These social views toward affirmative action dictate how often the Court examines this topic. They also reflect society’s willingness to support affirmative action legislation. They provide insight into how laws should approach the topic to maximize public support and thus, the execution of and compliance with such measures.

B. Social Attitudes Toward Efforts to Effectuate Racial Equity in Higher Education in South Africa

Today, some Black South African students experience an “unspoken” racial hierarchy.²⁵⁸ In an article published by *The Atlantic*, a student recounted his experience as a Black university student.²⁵⁹ He explained that gaining admission to formerly all-white universities is considered the “golden key.”²⁶⁰ However, this accomplishment is met with the expectation that one should “shut up and not [] do anything about [changing admission policies] because you’ve been given a gift—the gift of education.”²⁶¹

White South Africans, particularly poor ones, who once enjoyed elevated social, economic, and academic privileges, were forced to adjust to the new implications of Blacks being treated equally under the law. This meant many white South Africans had to reconcile with policies prioritizing Black South Africans and the process through which the government chose for realizing equality. Critical Race

AM), <http://www.nydailynews.com/news/national/affirmative-action-bake-sale-charges-students-based-race-article-1.3515715>.

255. *Id.*

256. *Id.*

257. *Id.*

258. Serino, *supra* note 168.

259. *Id.*

260. *Id.*

261. *Id.*

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Theorist, Derrick Bell, explains how poor and powerless white people are “sustained in their sense of racial superiority.”²⁶² That is, their “property right” in their “whiteness” renders them more willing to accept less in terms of social, economic, and political privileges.²⁶³

Historically, courts and society in both countries have upheld the “property right” in “whiteness.”²⁶⁴ Derrick Bell claims this preservation of “whiteness” is driven by the fear that “[B]lack gains threaten the notion that white people are ‘entitled to priority and preference.’”²⁶⁵ This fear created the subclass that Black Americans and Black South Africans are attempting to transcend beyond the marginalized positions in which society has placed them.²⁶⁶ Challenging this idea has a domino effect on other widespread narratives. For instance, eliminating Blacks as an underclass implies Blacks can be perceived on the same level as whites. Traditional definitions of what is considered excellent and what constitutes privilege are disrupted. Thus, as Black students enter into spaces traditionally occupied by white students, a new status quo emerges.

Similar to white and Asian Americans feeling disadvantaged by affirmative action legislation, “more and more white South Africans” claim they have faced difficulties securing a job and as a result are living in poverty.²⁶⁷ The South African Institute for Race Relations (“SAIFRR”) reported white poverty levels have increased.²⁶⁸ Nevertheless, white poverty levels, still “pale in comparison to black poverty levels.”²⁶⁹ Despite data revealing white people are not being significantly adversely affected by affirmative action, white South

262. Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2612&context=vlr>.

263. *Id.*

264. *Id.*

265. *Id.* at 776.

266. *Id.*

267. Martin Cuddihy, *White South Africans complain affirmative action policy is causing them to face discrimination*, ABC NEWS (Aug. 1, 2016, 1:50 PM), <http://www.abc.net.au/news/2016-08-01/white-south-africans-complain-of-a-reverse-apartheid/7676764>.

268. *Id.*

269. *Id.*

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Africans believe “a reverse apartheid” is occurring.²⁷⁰ The chief executive of SAIFRR advised South Africans to view things in “perspective” of the apartheid limitations on Black South Africans.²⁷¹

In 2010, university students at UCT, a university referred to as being a former “citadel” of “white privilege,” debated the boundaries of affirmative action.²⁷² A UCT professor claimed affirmative action “betrays the ideals of nonracialism that so many fought and died for.”²⁷³ The professor asserted, the university must “resist pressure from the government to use racial benchmarks in determining how well the is performing.”²⁷⁴ Alternatively, the vice chancellor contended, “preferences based on apartheid’s racial classifications provide a means to help those harmed by that system to gain critical educational opportunities.”²⁷⁵

In response to this sentiment, UCT developed nonracial benchmarks to measure disadvantage.²⁷⁶ For instance, the university will now consider whether the applicants’ parents attended a university or the quality of the high schools of the applicants. Nevertheless, the vice chancellor contends race should still be considered during admissions.²⁷⁷ Otherwise, he claimed many Blacks would be excluded from such universities, thereby reinforcing negative stereotypes of Black failure.²⁷⁸ Similar to the United States, the issues of affirmative access and bridging the opportunity gap is intricately intertwined with wealth, or lack thereof.

In 2015, Black, colored, and poor South African students disrupted the status quo by challenging high fees, structural inequalities, and colonial symbols.²⁷⁹ In late 2014, post-graduate students at the WITS drafted a “Transformation Memo,” calling for a “decoloni[z]ation of the curriculum, an increase in the number of Black academic staff, and

270. *Id.*

271. *Id.*

272. Dugger, *supra* note 212.

273. *Id.*

274. *Id.*

275. *Id.*

276. Chetty & Knaus, *supra* note 227.

277. Dugger, *supra* note 212.

278. *Id.*

279. *Id.*

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a shift towards embracing the political, philosophical, and historical intellectual traditions of Africa . . . in order to build a truly post-colonial African university.”²⁸⁰ Meanwhile, at UCT, a student threw a bucket of feces at the Cecil John Rhodes Statue on campus.²⁸¹ These events catalyzed a series of protests on the UCT campus, and after a month of “performance art, graffiti, posters and demonstrations,” the statue was removed.²⁸²

The #feesmustfall and the #rhodesmustfall movements exposed stale notions of superiority from apartheid.²⁸³ These massive protests triggered victory for the students by forcing former President Jacob Zuma to withdraw plans for an 11.5 percent tuition increase in 2016.²⁸⁴ What began as protests over university fee increases culminated in nationwide momentum provoking considerations for a renewed perspective on the current racial state of South African universities. “Universities responded by committing to more student support, transformation of the curriculum, and a number of institution-specific demands. . . .”²⁸⁵

280. Camalita Naicker, *From Marikana to #Feesmustfall: The Praxis of Popular Pops. in S. Afr.*, 1 SAGE J. 53, 54 (2016), <http://journals.sagepub.com/doi/full/10.1177/2455747116640434>.

281. *Id.*; see also Stephen Castle, *Oxford University Will Keep Statute of Cecil Rhodes*, N.Y. TIMES (Jan. 29, 2016), <https://www.nytimes.com/2016/01/30/world/europe/oxford-university-oriel-college-cecil-rhodes-statue.html?mtrref=en.wikipedia.org&gwh=F91AC24C2A3422953D71E4C22F262569&gwt=pay>. (explaining that Cecil John Rhodes was a South African politician who served as Prime Minister of the Cape Colony from 1890 to 1896; he was an ardent believer in British imperialism; and he is regarded as the person who began racial segregation in southern Africa).

282. Naicker, *supra* note 280, at 54.

283. *Id.*

284. *Id.* at 53-54.

285. Janet Cherry, *The successes and failures of South Africa’s student movement*, WAGING NONVIOLENCE (June 29, 2017), <https://wagingnonviolence.org/feature/south-africa-fees-must-fall/>.

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V. RECOMMENDATIONS FOR IMPROVING THE STATE OF BLACK AMERICANS AND SOUTH AFRICANS IN HIGHER EDUCATION

A. *Historical Consciousness*

The lingering effects of state-sponsored segregation in both countries are crucial components of the contextual framework within which these issues should be addressed. Opponents of affirmative action in both countries often deemphasize how Black people in both nations were historically and systematically disenfranchised from education.

Indeed, the historically disproportionate allocation of resources; the blatantly unequal educational foundations; and the entitlement and stigma stemming from racially disparate treatment have produced and continue to contribute to racial gaps in education at every level. These imbalances accumulate and erupt in college where marginalized students are ripe to suffer its consequences. Therefore, it is inaccurate to assert students, who are academically dissimilarly situated, ought to be regarded similarly during college admission processes.²⁸⁶

Challenging the stock story and presenting the experiences of the disempowered through stories of the lived experiences of Black American and South African students is crucial.²⁸⁷ Resituating the narrative will expose “deficit-informed” stories of racial privilege and further the discourse for reform.²⁸⁸ Majoritarian stories often explain education inequity through a “cultural deficit model.”²⁸⁹ In turn, these narratives influence how teachers interact with Black students.²⁹⁰ Presenting the experiential knowledge of Black students is “legitimate, appropriate, and critical to understanding, analyzing, and teaching racial subordination.”²⁹¹ Incorporating historical and present-day Black

286. Jesus Martinez, *Affirmative Action: The Band-Aid for K-12 Education*, SSRN 1, 9 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960780.

287. Daniel G. Solórzano, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 *QUALITATIVE INQUIRY* 23, 24 (2002), <http://www.sjsu.edu/people/marcos.pizarro/courses/8085/s1/SY.pdf>.

288. *Id.* at 26.

289. *Id.* at 30.

290. *Id.* at 26.

291. *Id.*

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perspectives and experiences is the first step in reshaping the relationship between race and education in both countries.

B. Social Responsibility for Attaining Equity in Higher Education in the United States and South Africa

The United States and South Africa share similar backstories regarding their initial motives to implement affirmative action policies. After Dr. King was assassinated in 1968, there were “riots in sixty American cities simultaneously.”²⁹² The complete state of unrest precipitated societal leaders in government, business, and academia, to realize Black people could no longer be socially marginalized. Additionally, pressure, from abroad following the end of World War II, compelled the United States to address segregation and inequality.²⁹³

Similarly, the 1980s marked an era with the biggest, longest and most violent black uprisings in South African history.²⁹⁴ Riots and violence were ubiquitous throughout the country.²⁹⁵ Similar to the Black American retaliation, Black South Africans vigorously combatted political and economic deprivation and other apartheid laws.²⁹⁶ By 1985, violence was “at an all time high,” and the government declared a state of emergency.²⁹⁷ Taken in tandem with rising social and economic pressures from other countries, and increased media coverage of the hostilities, the government was forced to react.²⁹⁸ In the same way, increased attention to state-sponsored segregation in the United States was implemented to quell social unrest;

292. *The forgotten history of affirmative action*, CNN <https://www.cnn.com/videos/us/2018/01/04/affirmative-action-in-the-beginning-ts-orig.cnn> (last visited Nov. 14, 2018) [hereinafter CNN].

293. Mary Dudziak, *Desegregation as a Cold War imperative*, 41 STAN. L. REV. 61, 71 (1988).

294. CNN, *supra* note 292.

295. *Id.*

296. *The Factors that led to the Downfall of Apartheid in South Africa*, MARKED BY TEACHERS <http://www.markedbyteachers.com/as-and-a-level/history/the-factors-that-led-to-the-downfall-of-apartheid-in-south-africa.html> (last visited Nov. 22, 2018).

297. *Id.*

298. *Id.*

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the end of apartheid was, in part, a solution to restore the country's order.²⁹⁹

Thus, serious efforts in both nations toward affirmative action only became paramount when white people feared for their social stability and global images.³⁰⁰ Including Blacks into workplaces and educational institutions was not an entirely conscious effort to elevate the status of Blacks. Critical Race Theorists, Dr. Derrick Bell, labeled this sort of reaction, "interest convergence."³⁰¹ In other words, when the interests of white people and racial justice converge, white people will support racial justice to further their agendas.

With greater clarity of each country's objectives, reintroducing affirmative action policies as measures intended to actually advance the status of Black people is paramount. Of course, affirmative action does not relieve Black people from their duty to take proactive measures toward their futures. Nevertheless, modifying social perceptions of affirmative action is useful. This process should begin by simply replacing current terms. Continuing to refer to programs seeking to level the higher education playing field as "affirmative action" programs is detrimental. Alternatively, these programs would be better suited as being coined equity and inclusion programs. "Affirmative action" places stigmas on those benefiting from affirmative action policies. By addressing existing and new programs in terms of the goals the programs seek to achieve—equity and inclusion—such programs would be more accepted.

First, in both countries, social backlash against affirmative action presumes a stance of "white innocence" and avoids confronting the obvious argument that "white people [in both countries] have been advantaged by this oppression" of Black people.³⁰² The working

299. See *The collapse of apartheid in South Africa- coming together of internal and external pressures*, SA HISTORY, <http://www.sahistory.org.za/article/collapse-apartheid-grade-12> (last visited Nov. 14, 2018).

300. CNN, *supra* note 292.

301. Warren Blumenfeld, "Interest Convergence" and the Republican Party, HUFFINGTON POST (Nov. 13, 2012, 3:29 PM), https://www.huffingtonpost.com/warren-j-blumenfeld/interest-convergence-and-_b_2119973.html.

302. Thomas Ross, *Innocence and Affirmative Action*, 43. VAND. L. REV. 297, 301 (1990), in *CRITICAL RACE THEORY: AN INTRODUCTION* 784-786 (Richard Delgado & Jean Stefancic eds., 2001).

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assumption of attitudes against affirmative action is one where innocence necessitates not having received any advantages at the expense of others.³⁰³ Accordingly, it is impossible for white Americans and white South Africans to be innocent.³⁰⁴ Recognizing the historical factors that have afforded privileges to white people, at the expense of Blacks, resituates the issue by emphasizing relevant reasons for why affirmative action is necessary.

The second component of shifting rhetoric around affirmative action policies requires questioning Black people as actual victims. As demonstrated through each country's history, pervasive and ongoing discrimination make Black people victims of historical and lingering inequities. By understanding these historical components, it becomes clear how Black people have been, and to some extent, still are victims. Therefore, affirmative action aids in neutralizing historical legacies responsible for assigning Black people second-class citizenship.

Highlighting contradictions from opponents of affirmative action dismantles their contentions of fairness. In the United States, legacy admissions allot extra points to children of alumni.³⁰⁵ At prestigious American universities, the same ones where Black Americans are underrepresented, legacy admissions account for nearly thirty percent of admitted students.³⁰⁶ These programs disproportionately benefit middle-class white and Asian students.³⁰⁷ The programs promote students who have been afforded generations of privilege because of state-sponsored segregation. Black and poor students are precluded from receiving this type of preferential consideration. If the issue with affirmative action is fairness, then it would be reasonable to equally condemn programs providing unfair admission advantages to wealthy students.³⁰⁸

In South Africa, complaints that affirmative action is causing white South Africans to become poorer is subject to logical scrutiny. These

303. *Id.* at 301.

304. *Id.* at 312.

305. Richard D. Kahlenberg, *A New Call to End Legacy Admissions*, ATLANTIC (Feb. 14, 2018), <https://www.theatlantic.com/education/archive/2018/02/when-affirmative-action-benefits-the-wealthy/553313/>.

306. *Id.*

307. *Id.*

308. *Id.*; Nikole Hannah-Jones, *supra* note 187.

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contentions are exaggerated and factually inaccurate. Thus, South Africans can realistically confront affirmative actions.

Furthermore, profits, from slavery and notoriety stemming from apartheid, benefited universities in both countries. In the United States, slavery and its related industries contributed to funding several prestigious institutions. For example, Harvard, Columbia, Princeton, and Yale reaped benefits from slavery, even to the extent that enslaved people built their campuses.³⁰⁹ Comparatively, in South Africa, formerly all-white institutions were well-resourced from the government and from alumni. Given Black South Africans were historically unable to attend those schools or work decent jobs, it is logical that parents of Black students were not able to contribute to the formerly Black universities in the same way. At minimum, universities could contribute to the process by expanding measures of excellence and shifting destructive narratives about Black students.

Also, both nations should expand their notions of what is considered meritoriously excellent. Currently, the definition of merit presumes every student comes from an even playing field; thus, the best students work the hardest to achieve the highest test scores and grades.³¹⁰ However, both countries' racially segregated histories effect how Black students are still generally not receiving the same education, as white students.³¹¹ A new approach to determine aptitude is appropriate because test scores and grades are also not necessarily indicative of intelligence or potential.³¹² Mari Matsuda from Georgetown Law asserts, the only way to "surviving the assault on affirmative action" is to require universities to measure students more holistically.³¹³ She claims, diversity will be realized and the entire process will be fairer to all students, specifically those who are "shut out by the present system."³¹⁴

For instance, many Black students in the United States and South Africa often overcome, generational and economic barriers, inadequate

309. Stephen Smoth & Kate Ellis, *Shackled Legacy*, APM REPS. (Sept. 4, 2017), <https://www.apmreports.org/story/2017/09/04/shackled-legacy>.

310. *Nikole Hannah-Jones*, *supra* note 187.

311. *Id.*

312. *Id.*

313. Mari Matsuda, *Who is Excellent?*, 1 SEATTLE J. SOC. JUST. 29, 36 (2003).

314. *Id.* at 36.

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primary and secondary schooling, feelings of inferiority and inadequacy, and a variety of other obstacles not typically part of their white counterparts' paths to college.³¹⁵ Acknowledging the skills and tenacity involved in overcoming tumult and how the traits acquired during those struggles also contribute to a flourishing society, would transform higher education to be more inclusive. Prioritizing grit over grades, resourcefulness over resources, creativity over capacity to succeed on standardized exams, could lead to profound benefits.³¹⁶ This could be achieved by taking into account how much adversity a student has overcome. Assessments similar to the Childhood Ace Quiz, which quantifies the amount of trauma in a child's life, could be useful as supplementary instruments for determining college admission.³¹⁷ Points during admissions would also be based on how much adversity a student has overcome.

While some disciplines require precise measures, expanding perceptions of merit could generate more confidence among Black students. Heightened level of appreciation for Black talent could combat the lingering psychological effects of state-sponsored segregation. By affirming that Black students are capable and smart, albeit in different ways from their white counterparts, tendencies toward self-fulfilling prophecies would shift from negative to positive. Perhaps then, Black students could even improve in other more traditional scholarly measures.

C. Calculated Preemptive and Legal Measures in South Africa and the United States

Given the nature of racial disparities in education in both countries, it is unlikely the United States or South Africa will realistically be able to phase out affirmative action policies within the near future. The first step in the United States to resolve educational disparities would be to include education as a fundamental right, like in the South African constitution. If the federal government included education as a right in the Constitution, perhaps states would be inclined to follow suit. The

315. See Strauss, *supra* note 248.

316. *Id.*

317. *Take the ACE Quiz-And Learn What it Does and Doesn't Mean*, NPR (Mar. 2, 2015), <https://www.npr.org/sections/health-shots/2015/03/02/387007941/take-the-ace-quiz-and-learn-what-it-does-and-doesnt-mean>.

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federal government could offer incentive money for states to include education. However, to avoid any Tenth Amendment issues, it would not be a requirement. In some situations, Congress is permitted to attach conditions to its spending of federal funds; therefore, absent coercive conditions, the federal government could delegate funds to state grantees.³¹⁸

Beyond recognizing equal access to education as a right, the most obvious solution to this quandary is to focus on neutralizing inequities before accumulating at the university level. If both countries refocused their efforts to ensure students were coming from similar educational starting points, measures like affirmative action would be less necessary over time. Both South Africa and the United States should develop legislative initiatives to target pre-school, primary, and secondary school systems. These initiatives would aid in offsetting South Africa's implementation of specific quotas for Black university students and the United States' balancing between constitutional rights and fulfilling a compelling government interest.

In the United States, Head Start is a federally funded non-profit administrated through the Department of Health and Human Services. The program provides early childhood education to children from low-income families. Studies show the long-term gains from this program include increased post-secondary credential attainment, and translating to a "variety of economic, and social outcomes."³¹⁹ While Head Start sometimes receives backlash from conservatives, it is generally received as a bipartisan form of improving education. South Africa could adopt a similar model to develop a system targeting their poor and Black young students. Furthermore, both the United States and South Africa could take this model, which focuses on preparing students from low-income families for the next level of schooling, to extend these techniques beyond pre-school into each level of schooling leading up to college.

Additionally, more equitable ways to fund schools would likely alleviate some of the disparities that surface once students enter college.

318. See *Tenth Amendment*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/constitution/tenth_amendment.

319. Diane Whitmore Schanzenbach & Lauren Bauer, *The long-term impact of the Head Start program*, BROOKINGS (Aug. 19, 2016), <https://www.brookings.edu/research/the-long-term-impact-of-the-head-start-program/>.

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Each country could develop a system that would facilitate social sharing programs; that is, districts with more funding could share resources with districts or townships with less funding. Schools could comply with a pooled resource system, similar to the BEE programs. This could result in the school's ability to bid for government tenders, have access to tax incentives and financial grants, and be favored as progressive schools.

Logistically, a pooled resource sharing system would be easier to implement in South Africa, since the BEE framework already exists. Moreover, the United States could use the BEE system as a model.

Although the United States is restricted in implementing explicit affirmative action measures in the same way as South Africa, the BEE model offers unique ideas that could be implemented in the United States. For instance, instead of requiring universities, or schools in general, to meet certain racial quotas, the United States could simply reward schools participating in programs to promote diversity. Promoting diversity would include focusing on a diverse student body, as well as, faculty and professors. The federal government could provide states with additional resources to use as incentives for primary and secondary schools, as well as, universities to incorporate voluntary diversity standards. Participating schools could gain recognition on a national registry as being schools of distinction, which in turn would lead to favorable social reputations. The prospect of being nationally recognized could encourage other schools to participate in the diversity program.

Furthermore, diverse representation within universities could reinforce Black students' beliefs that they can fulfill certain jobs and societal roles. Thus, increased efforts to incorporate Black people into higher education through faculty and leadership positions are also a necessary component to actualize progress. In 2016, Black professors in the United States constituted three percent of all full-time faculty at degree-granting post-secondary institutions.³²⁰ In light of the hiring explosion many American schools experienced beginning in the 1990s,

320. *Characteristics of Postsecondary Faculty*, NAT'L CTR. FOR EDUC. STATS. (May 2017), https://nces.ed.gov/programs/coe/indicator_csc.asp.

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“it’s mildly surprising that not many more minorities were included in that growth.”³²¹

Comparatively, Black professors in South African universities account for merely seventeen percent of the country’s university professors.³²² Diverse educators provide different perspectives and ultimately contribute to more well-rounded graduates, future employees, and entrepreneurs. Black students learning from professors who are racially reflective of their background will contribute to increased confidence. Black students may perceive their goals and ultimate success as more realistic if they witness and interact with successful Black role models during college.

Apart from diversity incentives, the governments of both nations could also provide tax incentives or loan forgiveness for teachers and professors.³²³ Under the new House tax plan in the United States, teachers are no longer permitted to deduct school supplies from their taxes.³²⁴ For genuine improvements in education, teachers should be supported in their reasonable endeavors to supplement their classrooms. Considering teachers in both countries are generally not paid high wages, reincorporating, or in the case of South Africa simply introducing, tax legislation to incentivize or support teachers, is another avenue to alleviate disparities.

Legal initiatives geared toward redirecting affirmative action toward early education, leading up to higher education, could eventually eliminate the need for affirmative action in higher education.

321. Matthew Lynch, *Study: Nearly 90 Percent of Full-Time Professors are White*, EDVOCATE (Feb. 21, 2018) <https://www.theedadvocate.org/study-nearly-90-percent-of-full-time-professors-are-white/>.

322. Jenni Evans, *Nzimande wants probe into shortage of black professors*, NEWS 24 (May 5, 2016), <https://www.news24.com/SouthAfrica/News/nzimande-wants-probe-into-shortage-of-black-professors-20170516>.

323. *Wondering whether you can get your federal student loans forgiven for your service as a teacher?*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/teacher> (last visited Nov. 14, 2018) (explaining that under the Teacher Loan Forgiveness Program, if teachers meet certain requirements, they may be eligible for loan forgiveness for up to \$17,500; this type of program is a useful start toward incentivizing qualified teachers to serve in low-income areas).

324. Katie Reilly, *4 Ways the Republican Tax Plan Could Affect Teachers, Students and Schools*, TIME (Dec. 4, 2017), <http://time.com/5047680/gop-tax-plan-education-impact/>.

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Nevertheless, until systems are implemented in a different way, affirmative action during admissions will remain necessary.

CONCLUSION

By promoting Black student inclusion and representation at the university level, specifically, within esteemed universities, more Black students will be equipped with the necessary skills to participate in and contribute to society. Specifically, Black students could acquire the academic and professional acumen through which they could be funneled into prominent leadership roles in both countries.

When Black and minority students attend higher education, they generally end up paying more taxes, leading healthier lives, relying less on public assistance, being more politically involved, and having lower unemployment rates.³²⁵ Furthermore, white students who may have never been exposed to other races or diversity are given the opportunity to acquire new perspectives with which to view the world, and ultimately approach and solve problems.³²⁶ Facilitating young Black professionals to assume leadership roles in spaces traditionally and predominately held by white people, specifically white males, will benefit everyone. The concept of interest convergence could serve the goals of this movement by highlighting these benefits that arise from a more inclusive higher education landscape.

For example, legal clerkships in the United States are some of the most valuable experiences within the legal profession. These opportunities provide a network and credentials that many employers value. Yet, in 2012 when Blacks accounted for 13.6 percent of the total population, they only comprised 2.4 percent of federal appeals clerks and 3.2 percent of federal district court clerks.³²⁷ Considering the role of a clerk is often to advise, and even sometimes make prescriptive rulings for judges, the dearth in representation directly shapes legal

325. Martinez, *supra* note 286.

326. *Id.*

327. Maria Chutchaiian, *Statistics Show Little Change in Law Clerk Diversity*, LAW 360 (May 3, 2012), <https://www.law360.com/articles/336973/statistics-show-little-change-in-law-clerk-diversity>; *Profile Facts for Features: Black History Month 2012*, U.S. CENSUS BUREAU (Jan. 4, 2012), https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff01.html.

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precedent and policies. Meaning, American laws are heavily influenced by one demographic of people, and are being applied to the entire nation. Not surprisingly, this has the effect of creating laws that often exclude or completely ignore entire segments of the population.

Replacing stale notions of inferiority and control with concepts of equity and progress will surely trigger positive implications for both nations. Educational parity translates into a wealth of positive societal outcomes. Qualified and educated Black members of the population will inevitably create more diverse and inclusive societies. Enabling Blacks to assume leadership positions across several societal sectors will set new precedents for future generations of Black students and young adults. Everyone will benefit, and the goals that the United States and South Africa have attempted to achieve will finally become realities.

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