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Diverging Interests: Balancing Racial Diversity and Race-Sensitive Policies Across State Higher Education Systems

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Abstract

The United States has sought to racially diversify its public colleges since 1964. Laws have been implemented and court challenges have occurred to facilitate the racial diversification of public universities. Racially diversifying higher education is particularly important for states that have a desegregation agreement with Office for Civil Rights for operating policies traceable to de jure segregation. Although many states have used affirmative action to diversify their colleges, as these policies continue to be attacked and prohibited, colleges are abandoning race-sensitive policies to foster diversity. This article explains these diverging issues and offers recommendations for universities that are legally able to use affirmative action to diversify their campuses but are apprehensive about doing so because of litigation concerns.

Keywords

diversity, affirmative action, students, desegregation

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Recently, the Supreme Court announced that it would hear the case of Abigail Fisher, a student who was denied admittance into the University of Texas. Fisher asserts that her rejection was a result of race-based policies that allowed less qualified racially underrepresented students to be admitted instead of her. It is widely held that the Court's agreement to hear this case may signal the end of affirmative action policies in higher education (Barnes, 2012; Lewin, 2012). Given the changing demographics and political orientations of court appointees in recent years, this assertion seems credible. However, this case cannot be viewed in isolation but rather in context of years of litigation, interpretation, and research. Although many states have used affirmative action to diversify their colleges, as these policies continue to be attacked and prohibited, colleges are abandoning race-sensitive policies to foster diversity. The demise of affirmative action is particularly problematic for states being monitored by the Office for Civil Rights (OCR) for operating policies traceable to de jure segregation in higher education. This article discusses this policy contradiction in that states being monitored by the OCR are expected to increase the racial diversity on their public campuses but their primary means for doing so—affirmative action—is being increasingly eradicated. Specifically, this article explains this diverging issue and offers recommendations for universities that are legally able to use affirmative action to diversify their campuses but are apprehensive about doing so because of litigation concerns. The authors believe that the critical summation of litigation presented in this article is essential for scholars and policymakers alike, given the impending ruling in the Fisher case.

Background

Since 1964, with the promulgation of the *Civil Rights Act*, the United States has focused on diversifying its public 4-year colleges and universities (Brown, 1999, 2001, 2002; Stefkovich & Leas, 1994). Specifically, Title VI of the *Civil Rights Act* was meant to increase racial diversity across historically Black colleges and universities (HBCUs) and predominantly White institutions (PWIs) by denying federal funding to institutions that practiced discriminatory policies in their admissions of students, recruitment and hiring of faculty, and administrators (Brown, 2001). Despite the lofty values of parity embodied within the *Act*, the intent of this initiative did not lead to the racial diversification of colleges. Primarily, this is because the U.S. Department of Health, Education, and Welfare (HEW)—now the U.S. Department of Education—did not enforce institutional compliance with Title VI, which prompted a lawsuit known as *Adams v. Richardson* (1972; Perna et al., 2006). This case was brought forward by the National Association

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for the Advancement of Colored People (NAACP) Legal Defense Fund, who asserted that the Nixon administration, under Elliot L. Richardson (then Secretary of HEW), failed to enforce Title VI, which prevented all forms of discrimination in institutions receiving federal funds (Egerton, 1974). According to Brown (1999), the NAACP argued that 10 states, which eventually included 19 southern states, maintained segregated and discriminatory higher education systems but still received federal funding. The plaintiffs argued that federal funds should be eliminated for all recipients out of compliance with Title VI.

In July 1977, the federal court mandated that HEW devise guidelines for states that operated dual systems of higher education to use when developing desegregation plans for compliance with Title VI. The court also stipulated that states must attain racial diversity for faculty and students at PWIs and HBCUs (Roebuck & Murty, 1993). While research indicates that *Adams v. Richardson* (1972) had some impact on aiding the dismantling of America's dual system of higher education (Fleming, 1984; Nettles, 1988; Wilson, 1994), the court eventually invalidated *Adams* in its decision in the *Women's Equality Action League v. Cavazos* (1990) in which it ruled that plaintiffs lacked a private rights of action against a federal agency (Brown, 1999).

In 1992, 28 years later, the U.S. Supreme Court issued its most recent decision on collegiate desegregation in *United States v. Fordice* (Brown, 2001; Gasman et al., 2007). This case stemmed from Mississippi's efforts to continue de jure segregation in its public university system by maintaining universities segregated along racial lines (Stefkovich & Leas, 1994).The case began in 1975, when James Ayers, along with other plaintiffs, filed a lawsuit against Kirk Fordice, the former Governor of Mississippi, for racial discrimination in the state university system. During the time that Ayers filed the litigation, there were five almost entirely White universities and three HBCUs operating within the same geographic region, facilitating a race-based tracking system (Sum, Light, & King, 2004). Furthermore, there were vast differences in the mission statements, admission stanards, and state financial allocation between the state's PWIs and HBCUs (Brown, 2001; Gasman et al., 2007).

The Supreme Court identified four policies traceable to the vestiges of de jure segregation (Brown, 2001). The first of these dealt with the use of the American College Testing program (ACT), which seemed to have discriminatory intent because admission to any Mississippi State University was based on those scores (Gasman et al., 2007). Given that Black students did not perform well on this measure, and the minimum score needed for acceptance was higher at PWIs compared with HBCUs, many Blacks were excluded from attending the PWIs (Stefkovich & Leas, 1994).

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The second policy weighed by the Supreme Court was Mississippi's classification scheme for institutional mission (Stefkovich & Leas, 1994). Three of the PWIs were designated as "flagship" universities, offering more advanced programming and enhanced curricular offerings, and benefiting from greater funding levels (Brown, 1999; Stefkovich & Leas, 1994). HBCUs, however, had unique missions and limited state funding. The third policy the Court questioned was the unnecessary duplication of programs at PWIs and HBCUs (Palmer & Griffin, 2010). The Court emphasized that such duplication was linked to de jure segregation, as it perpetuated the abolished separate but equal system. The fourth policy considered by the Court was the need to maintain all of the state institutions in Mississippi (Palmer, Davis, & Gasman, 2011). Of concern was the necessity in doing so due to minimal fiscal resources and the close geographic proximity of the institutions (Brown, 1999). The Supreme Court returned *Fordice* to a federal district court in Mississippi and charged the court with developing a new desegregation plan (Brown, 1999, 2001, 2002; Gasman et al., 2007).

The Court mandated that Mississippi fund new academic programs and construction, and start an endowment for the state's HBCUs (Gasman et al., 2007). Mississippi agreed to provide 503 million dollars over a 17-year period to its HBCUs; most of the money would have to be used to enhance programs and facilities at these institutions (Gasman et al., 2007). Mississippi also required the HBCUs to recruit and retain at least 10% of non-Black students for 3 consecutive years (Palmer et al., 2011). Until such time, the HBCUs would not be allowed to control their share of financial resources earmarked for the recruitment of non-Black students (Brown, 2002; Gasman et al., 2007). The OCR within the U.S. Department of Education has applied the *Fordice* ruling to states whose collegiate desegregation plan had expired or continue to be monitored for compliance with laws that preclude discriminatory policies in public higher education (Maryland Higher Education Commission [MHEC], n.d.).

Much like its predecessors (e.g., Title IV of *Civil Rights Act of 1964* and *Adams v. Richardson of 1972*), *Fordice* was thought to lead to the racial diversification of students, faculty, and administrations in America's higher education. However, 20 years after the U.S. Supreme Court's decision in *Fordice*, many 4-year higher education institutions remain segregated across racial lines (*Journal of Blacks in Higher Education* [JBHE, 2011]; Minor, 2008; Perna et al., 2006). Perhaps contributing to the lack of progress in diversifying higher education is the reluctance of some postsecondary educational institutions to use race-sensitive policies to increase the number of underrepresented populations across institutional types (HBCUs and PWIs). Indeed, Orfield (2007) noted that despite the Supreme Court's most recent

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ruling in *Grutter v. Bollinger* (2003), which indicated that using race to attain a diverse student body was permissible, colleges were advised to avoid affirmative action policies. Specifically, he indicated,

> Across the country conservative legal action groups wrote letters to leaders of higher education institutions threatening to sue them unless they stopped affirmative action measures. Federal civil rights officials strongly suggested that colleges were obliged to try non-racial strategies and claimed that such strategies were workable. In other words, the opponents of affirmative action attempted to interpret the law as if they had won the case. (Orfield, 2007, p. xi)

Though affirmative action was promulgated for the purpose of promoting racial and gender diversity in America's postsecondary education institutions, colleges are moving away from these policies out of fear of litigation (Orfield, 2007; Palmer, 2010; Zamani-Gallaher, Green, Brown, & Stovall, 2009), and gradually some states are prohibiting affirmative action (Glater, 2006; Jaschik, 2011; Schmidt, 2006; Zamani-Gallaher et al., 2009).

In essence, there is a policy contradiction. While states, particularly those monitored by OCR for discriminatory policies, are expected to increase racial diversity at all levels of their public postsecondary education institutions, some colleges and universities are backing away from affirmative action (Glater, 2006; Jaschik, 2008; Orfield, 2007; Schmidt, 1999, 2006; U.S. News, 2012; Zamani-Gallaher et al., 2009)—one of their primary linchpins to facilitate campus racial diversity. This paradox might account for some of the stagnation in respect to the racial diversity of America's colleges and universities. The subsequent section of this article will provide an overview of affirmative action and delineate its legal challenges.

Overview of Affirmative Action in Higher Education

President Lyndon B. Johnson's Executive Orders 11246 and 11375 created affirmative action (Mayer & Price, 2002; Pojman, 1992) to promote underrepresented racial minorities' access and women's equity in programs using federal funds (Brown, 1999; Froomkin, 1998). More specifically, affirmative action gives special consideration for employment, education, and contracting decisions to underrepresented racial minorities and women (Froomkin, 1998). Educational institutions have generally used affirmative action policies to increase access among racial minorities and women in higher education (Kaplin & Lee, 2007). Since its implementation, the constitutionality of this policy has been challenged vigorously in postsecondary education.

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One of the first cases challenging affirmative action in higher education was *DeFunis v. Odegaard* (1974). In 1971, Marco DeFunis Jr., a White Jewish student of Spanish-Portuguese descent, brought suit against University of Washington, claiming that because of the University of Washington Law School's affirmative action policy, he was not admitted but less qualified minorities were admitted. The case went to the Supreme Court where it was declared moot because DeFunis had been admitted to the law school per a decision by the state trial court, and by the time the U.S. Supreme Court heard the case, DeFunis was in his final quarter of law school. Consequently, not much resulted from *DeFunis v. Odegaard* that affected affirmative action on a national scale. The University of Washington Law School's affirmative action policy was upheld, and other colleges and universities continued to use affirmative action to promote equal access to higher education for underrepresented minorities and women.

In 1978, 5 years after *DeFunis*, the U.S. Supreme Court was forced to deal with the issue of affirmative action again in *University of California Regents v. Bakke* (1978). Bakke's suit claimed that the University of California at Davis (UCD) Medical School's practice of a dual admissions program—one for regular admits and another for racially underrepresented students, coupled with UCD's operation of a quota system in which they reserved 16 seats out of a 100 for racially underrepresented students—prevented him from being admitted to the school. Bakke, who was a White male, had twice been turned away from UCD's medical school despite having a high qualification score. In each case, according to the suit, students in the "disadvantaged" group were admitted with lower overall scores than Bakke. To this end, Bakke sued, claiming a violation of his constitutional right to equal protection under the law. He prevailed and was eventually granted admission to the school. Moreover, the Court ruled in a 5-to-4 vote that, first, "racial preferences that partake of quotas—rigid numerical or percentage goals defined specifically by race—are impermissible. Second, separate systems for reviewing [racially underrepresented] applications—with procedures and criteria different from those for [non-racially underrepresented] applications—are impermissible" (Kaplin & Lee, 2007, p. 342). Nevertheless, in a different 5-to-4 vote, the Court also ruled that some consideration of race in affirmative action is permissible. Justice Powell, who was the only Justice in the majority of both votes, indicated,

> Race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it [may] not insulate the individual from comparison with all other candidates for the available seats . . . In short, an admission program operated in this way is flexible to consider all pertinent elements of diversity in light of the particular

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> qualifications of each applicant, and to place them on the same footing for consideration. (p. 343)

Bakke provided context for other colleges and universities to tailor their affirmative action policies. For example, Justice Powell made it clear that racial quotas and reviewing racially underrepresented applicants separately from nonracially underrepresented groups were impermissible. However, race could be used as one of the selection factors that foster racial and ethnic diversity in higher education. Indeed, colleges and universities that adopted Justice Powell's race-conscious policy prevailed in court when challenged legally. For example, in three cases, *McDonald v. Hogness* (1979), *DeRonde v. Regents of the University of California* (1981), and *Davis v. Halpern* (1991), the courts accepted the universities' emphasis on fostering a diverse student body as a constitutionally sufficient justification for using race-sensitive policies (Kaplin & Lee, 2007).

Specifically, in *McDonald v. Hogness* (1979), Frederick N. McDonald was denied admission to the University of Washington–School of Medicine. As a result, he sued on the basis that he was denied admission because of his race (*McDonald v. Hogness*, 1979). McDonald claimed that the school admitted all unqualified racially underrepresented applicants while the White applicants had to fight for the remaining available slots. The year McDonald applied, there were seven racially underrepresented applicants who were ranked higher than McDonald but were not admitted into the program. In conjunction with an interview, an evaluation of applicants was conducted on the basis of demonstrated humanitarian qualities, academic performance, motivation, medical aptitude, and maturity (*McDonald v. Hogness*, 1979). The demographic characteristics of selected applicants were only taken into consideration as they related to the aforementioned factors. While McDonald, by most standards, would have been considered an exceptional candidate for admission, based on the school's selection process and overall holistic approach, he was considered an average applicant. The Court found that the school's use of race as a factor for admission was allowed per *Bakke.* The use of race in the school's admission policies and procedures did not violate the equal protection clause of the Fourteenth Amendment because race was a supplementary factor and not the deciding factor (*McDonald v. Hogness*, 1979). The Court found that the school did not employ a separate selection process for racially underrepresented applicants (which would be a violation) but race was a beneficial factor in a variety of other considerations. The Court also ruled that universities have broad discretion in admission decisions and "the fact that some qualified applicants are

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rejected and nonmathematical factors are weighed differently by different interview committee members does not show arbitrary or capricious conduct" (*McDonald v. Hogness*, 1979).

In *DeRonde v. Regents of the University of California* (1981), the plaintiff Glen DeRonde, a White male, applied for admission into the 1st-year class at the UCD School of Law and was unsuccessful in gaining admission. The UCD School of Law took into account an applicant's ethnicity in its admission selection process. DeRonde sued the institution, stating that considering an applicant's race or ethnicity was biased and unconstitutional. Academic criteria were used to predict performance at the freshman level. To complement the predicted 1st-year average, the University also considered several additional background elements, including racial and ethnic status contributing to diversity. The Supreme Court of California applied the principles in *Bakke* to determine this case. The University used academic and qualitative criteria in its selection process. The majority opinion stated that the selection process in this case was not unconstitutional and was in accordance with the principles set out in *Bakke.* Each application was individually evaluated and ethnic origin was only one of several competing factors in making admission decisions. Ethnicity did not unfairly preclude others from gaining admission to the University (*DeRonde v. Regents of the University of California*, 1981).

In Davis v. Halpern (1991), David Davis, a White male, applied to and was rejected by CUNY Law School at Queens College 8 times. Davis alleged that the institution admitted less qualified racially underrepresented women over him each time. The CUNY Law School's application process had a committee that evaluated an applicant's academic ability, analytical and problem-solving skills, research, embodying qualities of an exceptional lawyer, and the diversity within the class. The law school also had an affirmative action policy that sought to diversify not only the student body but also the legal profession in the state of New York and the United States of America as a whole. The law school applied for summary judgment with respect to Davis's claims that the school's admission policies used racial and ethnic status in a way that is prohibited by the Fourteenth Amendment and was discriminatory on gender grounds (*Davis v. Halpern*, 1991). The Court decided that Davis had failed to establish the sex discrimination claim should the case proceed to trial. The Court reasoned that for the claim to merit going to trial, the plaintiff needed to prove not only disparity but also causation. Davis had succeeded in showing that there was a statistical disparity between admitted females and males but failed to show that the disparity was caused by some improper practices on the part of CUNY. The Court stated,

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> Women applicants to CUNY may, on the average, have better academic qualifications than the male applicants. They may have a greater affinity for CUNY Law School's unique curricular approach. They may display greater enthusiasm for the type of public service careers for which CUNY endeavors to prepare its students. Any number of legitimate reasons may account for the disparity. (*Davis v. Halpern*, 1991)

As a result, the Court did not just assume discriminatory practice by CUNY. Consequently, the plaintiff's sex discrimination claim was dismissed.

The Court declined to summarily dismiss the Fourteenth Amendment claim based on CUNY's articulated reasons for using an affirmative action policy. One of the stated goals of the policy was to increase diversity in the legal profession. The Court ruled that this was an issue that could go to trial because it may be unconstitutional if the policy was meant to remedy societal discrimination in the legal profession. In order for the policy to stand, it had "to be limited to the goal of remedying specific prior discriminatory practices by the law school," not society at large (*Davis v. Halpern*, 1991). The Court cautioned that the policy would also be unconstitutional if its aim was to produce lawyers who were committed to serving underrepresented groups because racially underrepresented applicants are not the only ones genuinely interested in the plight of underrepresented groups. Based on the fact that the Fourteenth Amendment claim presented a genuine fact that merits consideration at trial, the Court denied the defendants motion for summary judgment with respect to that claim.

Hopwood v. Texas was the subsequent major legal case to impact affirmative action, although not on a national scale. In that case, four White citizens applied for admission to the University of Texas School of Law in 1992 and were denied. Their suit claims they were not admitted because the school used special race-sensitive criteria for certain applicants. The policy in question was discriminatory, they claimed, because it gave Black and Mexican Americans preference for admittance, which inflicted harm to Whites and others. The Fifth U.S. Circuit Court of Appeals was asked to decide whether the Fourteenth Amendment permitted the University of Texas Law School to show preference to any group or groups. The Court declared,

> We hold that it does not. The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body. (*Hopwood v. Texas*, 1996)

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Furthermore, the Fifth U.S. Circuit Court of Appeals essentially overturned *Bakke* by ruling that race could not be taken into account in admissions decisions (Lowe, 1999). According to Lowe (1999), given that the Court asserted that increasing diversity was not a justifiable aim for implementing a race-sensitive policy for admissions, this ruling serves as a direct challenge to the selective admissions policies, especially in consideration of the Supreme Court's ruling in Bakke, which suggested a different viewpoint.

In addition to the Court's decision in *Hopwood*, in 1996, California voters passed Proposition 209, a ballot initiative spearheaded by Ward Connerly, which prohibited affirmative action in public entities (Pusser, 2001). Specifically, Proposition 209 amended California's constitutions, mandating that race could not be used as a consideration (e.g., admission, employment, and programming) in public education (Alvarez & Bedolla, 2004; Zoltan, Gerber, & Louch, 2002). Washington, Michigan, Nebraska, Florida, and Arizona have also prohibited the use of race-conscious policies (Jaschik, 2011). Furthermore, similar efforts have also existed or are currently underway in Colorado, Missouri, and Oklahoma. Although Michigan's ban on affirmative action was recently invalidated by the Sixth U.S. Circuit Court of Appeals, state officials have contested the Court's decision, which reinstated the ban in Michigan for now (Jaschik, 2011). Interestingly, California, Florida, and Texas have implemented percentage plans to supplant the efficacy of race-sensitive policies.

According to research, percentage plans are an unpretentious solution to a multifaceted problem (Horn & Flores, 2003). By design, percentage plans provide admission to state universities for a specified percentage for the highest ranking student from every high school across the state (Horn & Flores, 2003). Due to long-standing achievement gaps in educational performance, there is often little diversity in these allotted percentages. The overall high school completion rates in California, Florida, and Texas have fallen on the lower end of the spectrum in the last two decades in comparison with other states. This coupled with the large gaps between the percentages of Blacks and Hispanics in comparison with Whites and Asians meeting the basic requirements to gain access to state university systems greatly reduces the pool of students of color that benefit from the percentage plans (Horn & Flores, 2003). Furthermore, in states that have percentage plans, the most selective institutions are the least affected by the plan. Given these perspectives, the evidence about the efficacy of these percentage plans is mixed. For example, while research has shown that percentage plans have not been nearly as effective in promoting access to higher education for underrepresented racial minorities (Cortes, 2010; Garces, 2012; Horn & Flores, 2003;

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Tienda, Niu, & Cortes, 2006), Lloyd, Leicht, and Sullivan (2008) indicated that knowledge of Texas's percentage plan helped increase the desire to attend college for all students in general and racially underrepresented students specifically. In contrast, Garces (2012) explained that reallowing the consideration of race in admissions to some public higher education institutions in Texas was critical to increasing the enrollment of racial minorities in graduate and professional schools by 3.4% in 2006. This suggests that Texas's percentage plan, implemented before Grutter, was not pragmatic in facilitating access to higher education for racially underrepresented students. Interestingly, research indicates that percentage plans alone are ineffective in increasing diversity, as institutions still have to use recruitment, outreach, support, and financial aid programs that take race into account, at least to some degree, in order to increase the institution's likelihood of enrolling racially underrepresented students (Horn & Flores, 2003; Tienda et al., 2006).

Although many states abolished affirmative action in 2003, the Supreme Court reaffirmed educational institutions' ability to use race to attain a diverse student body as long as it is narrowly tailored and does not function as a quota system. More specifically, in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), the plaintiffs claimed the University of Michigan extended unfair advantages to Blacks and other minorities over Whites with regard to its admission practices. To this end, they alleged that University of Michigan's affirmative action policy violated the equal protection clause, Title VI of the *Civil Right Act*, and Section 1981. In *Gratz v. Bollinger*, the U.S. Supreme Court invalidated the undergraduate affirmative action plan by a 6-to-3 vote, noting that the point system in place (which awarded racially underrepresented applicants 20 extra points out of 100 points for admission) was too narrowly designed. In contrast, in *Grutter v. Bollinger*, the Court upheld the law school's admission plan by 5-to-4 vote, as applicants were given individualized consideration where race served as one among many selection factors designed to create a diverse student body (Green, 2004). In particular, Justice O'Connor, who authored the opinion for the majority, reaffirmed Justice Powell's rationale in *Bakke* that using affirmative action to diversify a student body is permissible and using quotas as well as reviewing racially underrepresented applicants separately from the majority is impermissible.

In this case, specifically, there were two factors that helped in the court ruling in favor of the institution with regard to their race-sensitive admissions process: "holistic review" and attaining a critical mass of racially underrepresented students (Kaplin & Lee, 2007). The process was flexible enough in that it allowed for many different factors to be considered including race. Applicants were admitted after undergoing a comprehensive individualized regime. Through additional application materials such as letters of recommendations,

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personal statements, and essays, applicants had the opportunity to showcase their own diversity. So, while race was a part of this overall consideration, it was not the deciding factor in selecting an applicant. In fact, the law school often rejected racially underrepresented students with higher grade point averages and test scores than White applicants based on this criterion.

Despite the Supreme Court reaffirmation of educational institutions' use of race to attain a diverse student body, the Court cautioned that race-sensitive policies would eventually face demise:

> We are mindful, however, that a core purpose of the Fourteenth Amendment was to do away with all government imposed discrimination based on race . . . Accordingly, race conscious admission policies must be limited in time. This requirement reflects that racial classification, however, compelling their goals, are potentially so dangerous that they may be employed no more than the interests demands . . . We see no reason to exempt race conscious admissions programs from the requirement that all government use of race must have a logical end point. (539 U.S. 342)

As noted earlier, the Supreme Court signaled that affirmative action policies may be nearing an end (JBHE, 2012). The Court recently agreed to hear a case involving the University of Texas regarding a race-conscious admissions policy in place at the institution. In this case, Abigail Fisher, a White female, asserts that she was denied admission into the university due to her race; she proffers that her academic qualifications were higher than that of admitted Black and Latino students (Lewin, 2012). Interestingly, Texas asserts that the race-conscious policy employed mirrors that of the University of Michigan Law School policy upheld in 2003 in *Grutter v. Bollinger* (Barnes, 2012).

Indeed, notwithstanding the Supreme Court's ruling in *Grutter v. Bollinger* (2003), attacks on affirmative action policies are prompting colleges and universities to abandon race-sensitive programs, such as scholarships, academic enrichment programs, and fellowships because they believe that such policies will make them a target for litigation (Glater, 2006; Jaschik, 2008; Orfield, 2007; Schmidt, 1999, 2006; U.S. News, 2012; Zamani-Gallaher et al., 2009). Indeed, Zamani-Gallaher et al. (2009) indicated that the Center for Individual Rights (CIR) and other conservative legal foundations will continue to target summer enrichment programs, scholarships, and pipeline programs focused on racial and ethnic minorities in higher education. Although not spearheaded by the CIR, *Podberesky v. Kirwan* (1994) indicated how challenges to affirmative action policies could stymie the racial diversification of higher education. In *Podberesky v. Kirwan*, University of Maryland at College Park's

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(UMCP) use of race-sensitive policies was challenged. Given that Maryland has an agreement with the OCR to dismantle its dual system of higher education (MHEC, n.d.), the UMCP offered the Benjamin Banneker Scholarship—a merit-based award—to attract academically talented Black students. Podberesky sued the university on the basis that the scholarship discriminated against other races because it was only offered to Blacks. The federal court agreed, prohibiting the UMCP from using race-exclusive scholarships. As a result of the court's decision, the then president of UMCP, William E. Kirwan feared that this would hinder the racial diversification of his university (Jaschik, 1995).

Indeed, there is a lawsuit that the leaders of the public HBCUs in Maryland have against the state, which, among other things, asserts that Maryland has breached its agreement with the OCR to dismantle its dual system of higher education because the public universities remain segregated along racial lines (JBHE, 2011; Palmer et al., 2011). According to Minor (2008) and Perna et al. (2006), Maryland is not the only state whose public system of higher education remains segregated along racial lines. Specifically, in a report, which examined the enrollment patterns, state funding, and distribution of advanced degree programs for HBCUs in five southern states, Minor found that while those states' PWIs enrolled a paucity of Blacks, HBCUs are doing the lion's share of the work in terms of educating Blacks. Furthermore, Perna and colleagues noted that there are disparities in Black student enrollment and graduation rates between public HBCUs and PWIs in numerous southern states. Precisely, they noted, "analyses show that Blacks are at or above equity in enrollment at the HBCUs at each of the 19 [southern] states" (p. 233). Indeed, there seems to be a disaccord between legal initiatives promulgated to facilitate the racial diversification of America's public higher education systems and the current state of affirmative action. On one hand, states, particularly ones that continue to be monitored for compliance with laws that prohibit discriminatory policies in public higher education, must attain a racial diversity on their public campuses (Gasman et al., 2007; Palmer et al., 2011). On the other hand, because of fear of litigation from the affirmative action in higher education, postsecondary education institutions within states where affirmative action is legal are not capitalizing on race-sensitive programs to help increase racial diversity (Glater, 2006; Jaschik, 2008; Orfield, 2007; Schmidt, 1999, 2006; U.S. News, 2012; Zamani-Gallaher et al., 2009). Considering the Supreme Court's ruling on race-sensitive policies, and the legal initiatives to diversify public colleges and universities across institutional types, it seems sensible that educational institutions in states where it is permissible to engage in affirmative action should indeed use this policy to increase the number of underrepresented populations in postsecondary education.

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Recommendations

Colleges and universities in states where it is legally feasible to engage in race-sensitive policies, but are reluctant out of apprehension about litigation, should consider the following:

First, institutions should apply tactics to intentionally recruit a diverse group of students without affirmative action. For example, institutions can make a diverse student body a priority through the institutions' strategic plan (Kaplin & Lee, 2007). Setting recruitment and retention goals shows an institutional commitment to diversity has potential to produce a trickle-down effect as most offices take direction from the institutions mission and strategic plan. This also ensures that diversity is not the burden of one or two areas of the college or university but rather everyone's duty. If alternative options such as this strategy are not successful, then the institution has a case for using affirmative action (Kaplin & Lee, 2007). Recruit in areas that have large numbers of the populations that you are trying to attract, including rural areas. Oftentimes, college recruiters do not visit or bypass schools in rural areas or neighborhoods populated by racially underrepresented students. These schools, like any other schools, have students who are academically prepared to begin their postsecondary education but lack the information to get them started (Rendón & Hope, 1996). As a result, these students may end up attending a local community college or not attending college at all. A conscious effort by recruiters to make multiple visits to schools in rural areas and inner-city neighborhood schools in places like Detroit, Chicago, Philadelphia, and Atlanta would allow students more options to explore different avenues of higher education and increase the enrollment of racially underrepresented students at the schools dealing with diversity enrollment issues.

Second, institutions should work with current racially underrepresented students and alumni to help recruit and identify racially underrepresented prospective applicants. Each student who comes to college has a network of other students who may be of the same race and may be qualified for admission. Furthermore, students who are already successful in college (as assessed by their continuation) have an important understanding of the skills, competencies, and dispositions needed for success in college. Thus, leveraging current students and alumni knowledge of prospective racially underrepresented students, who are qualified and have the aptitude necessary for collegiate success, can serve as an effective and efficient marketing tool for colleges in diversifying their student bodies. These individuals can serve as visible symbols of success, thereby demystifying prospective students' apprehension about their ability to enroll and succeed in higher education.

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In addition, set up a meeting between the university's general counsel and the general counsel for the state's higher education coordinating board or the boards' director of policy analysis. Such a joint meet may be helpful because while the university's general counsel may explain to the university that using affirmative action will open it up to lawsuits, the higher education coordinating board's legal counsel or policy analyst should explain that it is permissible to use affirmative action as long as the university uses it appropriately. *University of California Regents v. Bakke* (1978) and *Grutter v. Bollinger* (2003) made it clear that successful affirmative action plans must not operate as a quota and are flexible enough to consider all relevant aspects of diversity. Moreover, ensure that various departments of the universities responsible for student recruitment (e.g., admissions), scholarship allocations (e.g., financial aid) and faculty, staff, and administrative hires (e.g., human resources) do not base their affirmative action plan on a quota and make certain whether it is narrowly tailored. Furthermore, and most importantly, be certain to have full input of legal counsel when adopting, reintroducing, or modifying race-sensitive policies to facilitate the racial and ethnic diversification of their student body.

Universities should also consider investing in "Applications Quest"—a software program that Dr. Juan E. Gilbert, Associate Professor of Computer Science and Software Engineering at Auburn University, developed. This program helps diversify the campus by taking into account a host of factors, such as the applicants' academic performance, geographic background, socioeconomic status, gender, race, and other attributes. With this software, postsecondary education institutions are racially diversifying their campuses without using affirmative action. In a sense, universities are able to accomplish the same goal of campus diversity without the threat of litigation (Jaschik, 2008). According to Jaschik (2008), Auburn is one of several universities that have publicly admitted to using the software on a trial basis. Because the trial run of this software proved to be successful, resulting in a slightly more diverse class, Auburn decided to use the software permanently in lieu of its admissions committee, though the committee will still review outcomes that the software produces (Jaschik, 2008).

Many of the litigation cases claimed that the colleges and universities let minorities in with substandard admissions criteria. Therefore, a long-term solution would be to help minorities meet the same criteria. Institutions could set up programs and partnerships with middle and high schools with a high or substantial population of racially underrepresented students. Examples of these types of programs include but are not limited to mentoring programs, summer programs, early talent identification programs, campus exposure programs, SAT OR ACT prep courses, and scholarship competitions or opportunities.

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Finally, colleges and universities should consider establishing transfer programs with community colleges. This can assist in creating a pipeline of diverse and qualified applicants. Extant data indicate that the community college disproportionately serves racially underrepresented students. For example, among public institutions, 70.7% of African Americans, 70.8% of Latinos, and 61.9% of Native Americans attend community colleges as opposed to 4-year institutions or less than 2-year colleges (Beginning Postsecondary Students, 2009). This situates the community colleges as a primary door for postsecondary recruitment.

As a caveat, the aforementioned recommendations are based on the historical context and progression of court rulings and interpretation of affirmative action. Thus, the impending case with the University of Texas may modify existing affirmative action policies or serve to end affirmative action as a whole. This would largely change the current landscape of how colleges and universities negotiate diversification efforts. As such, new policies, procedures, and efforts would need to be enacted by institutions of higher education to facilitate parity among racial/ethnic groups with regard to access to college.

Conclusion

This article has discussed a policy disaccord in that states with desegregation agreements with OCR are expected to racially diversify their public postsecondary educational systems. Nevertheless, affirmative action—one of their primary means to facilitate the racial diversification of their higher education system—is increasingly being targeted through litigation and prohibited by voter referendums in various states. Given the controversy surrounding race-sensitive policies, many higher educational institutions are abandoning the use of affirmative action policies, which may be negatively impacting their ability to increase racial diversity on their campuses.

Worst yet, some predict that the current case before the Supreme Court involving Abigail Fisher and the University of Texas may signal the end of affirmative action in higher education. Indeed, if it does, colleges would need to implement new policies and programmatic initiatives to engender racial diversity. Nevertheless, with the way affirmative action is presently situated—institutions in states that have existing agreements with OCR and are able to use affirmative action but are reluctant to do so because of litigation concerns—this article has provided recommendations that administrators and college officials may find helpful in using affirmative action to diversify their campus—thereby helping their states comply with their OCR mandate to increase racial diversity in its public system of higher education.

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