Howard University

From the SelectedWorks of Robert T. Palmer, PhD

Spring April 18, 2016

Examining the Paradox between Dismantling De Jure Segregation and Affirmative Action: Implications from Contemporary Higher Education Case Law

Robert T. Palmer, PhD, *Howard University*
Tiffany Boykin-Fountaine, PhD, *Anne Arundel Community College*

Available at: https://works.bepress.com/robert_palmer/82/

The Journal of Negro Education, 85 (2), 114-128

Examining the Paradox between Dismantling De Jure *Segregation and Affirmative Action: Implications from Contemporary Higher Education Case Law*

Tiffany Fountaine Boykin **Anne Arundel Community College**
Robert T. Palmer **Howard University**

The racial diversification of America's higher education system has been at the forefront of legal argument for the last seventy-five years. Ground-breaking decisions birthed the inclusion of affirmative action policies in higher education after the enactment of the Civil Rights Act of 1964. In recent years, both the utility and constitutionality of race-based admission practices have been challenged, and in some cases, have threatened to destroy contemporary notions of diversity, fostered through affirmative action policies. As affirmative action policies continue to be attacked and ultimately prohibited in some states, many colleges are halting the use of race-sensitive admission practices. As such, the purpose of this research is to discuss a policy contradiction by which public postsecondary educational institutions are aiming to foster the racial diversity of their campuses. To help those institutions where the use of affirmative action is permissible, but leaders are fearful of doing so because of litigation concerns, this article provides several recommendations for institutions to promote racial diversity on their campus.

***Keywords**: affirmative action, diversity, HBCUs*

The racial diversification of America's higher education system has been at the forefront of legal argument for the last seventy-five years. There have been landmark Supreme Court decisions (e.g., *Gaines v. Canada*, 1938; *McLaurin v. Oklahoma State Regents*, 1950; *Sweatt v. Painter*, 1950) that would commence the argument and ultimately help to dismantle America's long-standing "separate but equal" doctrine, a legal doctrine in the United States constitutional law that justified systems of segregation (*Plessy v. Ferguson*, 1896). Those decisions would eventually give rise to more ground-breaking decisions that would birth the inclusion of affirmative action policies in higher education after the enactment of the *Civil Rights Act of 1964* and later challenge the utility and constitutionality of those very same policies (e.g., *Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003; *Regents of the University of California v. Bakke*, 1978). While many court challenges have occurred and, as a result, many laws have been implemented to facilitate the racial diversification of U.S. public colleges and universities, perhaps none has been more influential and controversial than the action brought about in *Fisher v. University of Texas* (2013), which threatened to destroy, any and all, contemporary notions of diversity, fostered through affirmative action policies, in today's higher education landscape.

Although many states have used affirmative action to diversify their college and university campuses, as these policies continue to be attacked and ultimately prohibited in some cases, many colleges are halting the use of race-sensitive admission practices. As such, the purpose of this research is to discuss a policy contradiction by which public postsecondary educational institutions are aiming to foster the racial diversity of their campuses. Nevertheless, their primary initiative (i.e., affirmative action) for achieving this goal has been consistently attacked legally and faces an uncertain future, causing many colleges to abandon the use of affirmative action because out of fear of litigation. Increasing the racial diversification of higher education is particularly important for colleges in states that have desegregation agreements with the Office of Civil Rights (OCR). To help those colleges and universities in states where the use of

affirmative action is permissible, but that are fearful of doing so because of litigation concerns, this article provides several recommendations that they may find helpful as they continue to seek ways to promote racial diversity on their campus. Before the recommendations, however, to provide context, the article will review several critical bodies of literature.

First, this study will provide a historical overview of landmark decisions, pre- and post-Civil Rights Act of 1964, which have helped to shape contemporary notions of diversity in higher education. Finally, this article will summarize affirmative action policies and relevant case law. This summary will include a discussion on the racial diversification of higher education in states that have a desegregation agreement with OCR for operating policies traceable to *de jure* segregation, or those intentional actions by the state to enforce racial segregation (*United States v. Fordice*, 1992).

Much like higher education research, the United States Supreme Court has made it clear that a diverse student body is critical to the educational objectives of colleges and universities across the nation (*Grutter v. Bollinger*, 2003). Colleges and universities must ensure that their students are prepared to engage, work and live in a global society, which requires understanding and accountability for what may be new or unfamiliar. Affirmative action programs are crucial to achieving that goal. In fact, such programs have resulted in doubling, or even tripling the number of minority applications to colleges or universities (National Conference of State Legislatures, NCSL, 2014). It is the authors position that diversity in higher education not only provides an educational gain for racially and ethnic minority students, but for all students, both personally and intellectually. While there has been some higher education research supportive of affirmative action (Allen, Bonous-Hammarth, & Teranishi, 2001; Allen et al., 2000; Bowen & Bok, 1998; Long, 2003), far less literature approaches support for these concepts through a legal lens in this decade, particularly since the most recent challenges to such needed policies. This study stands as an opportunity to usefully and purposefully summarize affirmative action ideology, law, and public policies in higher education.

HISTORICAL OVERVIEW OF LANDMARK DECISIONS

While affirmative action in higher education continues to be challenged vigorously, it is important to explore the initial legal context and case law, some of which such controversial polices were designed to address. Ironically, America's "separate but equal" concept actually deprived Black citizens of the equality that the legal doctrine had originally implied. The concept was vague and that which was considered to be equal by one race was not considered equal by others. In addition, there was legal disenfranchisement as Blacks did not have full political participation and, therefore, could not run for offices through which school systems were controlled or by which funds were allocated (Bullock, 1967). Despite this, the "separate but equal" doctrine was quickly extended and made applicable to many areas of public life such as restaurants, theaters, restrooms, and public schools and federal jurisdiction included higher education institutions.

The *Pearson v. Murray* (1936) case was one of the first of many legal challenges to higher education's prevailing use of the "separate but equal" doctrine. The case centered on Donald G. Murray, a Black graduate of Amherst College, who desired admission to the University of Maryland law school. Murray was originally denied admission but the University Regents opted to pay his tuition to any out-of-state institution in which he could gain admittance; the state's only historically Black institution did not have a law school. Murray rejected the offer and filed suit citing denial of equal protection under the Fourteenth Amendment. The Court of Appeals of Maryland later ruled in his favor and required the University of Maryland Law School grant Murray admission (*Pearson. v. Murray*, 1936).

Similarly, in *Gaines v. Canada* (1938), Lloyd Gaines applied for admission to the University of Missouri Law School, an all-White institution. As in *Murray*, the institution offered to pay for tuition at an out-of-state institution or to establish a comparable law school at Lincoln University,

an all-Black institution. Gaines refused both offers and filed suit against the university. The court ruled that the act of establishing an additional law school solely for the benefit of Gaines as well as requiring he seek legal training outside of the border of his state violated the equal protection clause (*Gaines v. Canada*, 1938). However, the ruling spoke to Gaines' individual rights only and his victory of gaining admission to the law school. Consequently, the ruling did not extend to all Blacks at all universities throughout the nation.

Using the "separate but equal" doctrine, the state of Texas established the Texas State University for Negroes (now Texas Southern University), in 1946 (Green, 2004). This separate university offered postsecondary programs in law, pharmacy, dentistry, journalism, education, literature, arts, sciences, medicine, and other professions. The actions of one student, Herman Sweatt, challenged that legislation however. In that same year, 1946, Sweatt was denied admission to the University of Texas Law School because he was Black (*Sweatt v. Painter*, 1950). Initially, the Texas Supreme Court found that admitting him into the separate university, Texas State University for Negroes, was appropriate and substantially equal to the education he would receive at the University of Texas. However, the U.S. Supreme Court later found in Sweatt's favor based on the equal protection clause of the Fourteenth Amendment and required that Sweatt be admitted to the University of Texas majority law school (*Sweatt v. Painter,* 1950).

Additionally, in *McLaurin v. Oklahoma State Regents* (1950), McLaurin applied to a doctoral program in education at the University of Oklahoma. He was denied admission because state law ruled it a misdemeanor to maintain or operate, teach, or attend school at which both Blacks and White were enrolled (*McLaurin v. Oklahoma State Regents*, 1950). As in *Sweatt*, McLaurin argued those actions were unconstitutional based on his rights guaranteed by the equal protection clause in the Fourteenth Amendment. Although McLaurin won at the district court level, he and other Blacks would only be admitted in certain situations where institutions offered courses that were unavailable at separate institutions for Blacks (*McLaurin v. Oklahoma State Regents*, 1950). The U.S. Supreme Court subsequently heard the case and concluded that:

> . . . the conditions under which [McLaurin] is required to receive his education deprive him of his personal and present right to the equal protection of the laws. . . . We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. [McLaurin], having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. (*McLaurin v. Oklahoma State Regents*, 1950, p. 854)

AFFIRMATIVE ACTION IN HIGHER EDUCATION: AN OVERVIEW

The aforementioned cases paved the way for the dismantling of the "separate but equal" doctrine via the Civil Rights Movement. After the promulgation of the Civil Rights Act of 1964, the United States began focusing on diversifying its workforce and education systems, including postsecondary education (Brown, 2001, 2002; Stefkovich & Leas (1994). In 1965 and 1967, respectively, the onset of affirmative action policies was created by President Lyndon B. Johnson through Executive Orders 11246 and 11375 (Mayer & Price, 2002; Pojman, 1992). Initially, these policies were designed to promote racial minorities' access and women's equity in programs using federal funds (Brown, 1999). Essentially, affirmative action provides special consideration for employment, education, and contracting decisions to underrepresented racial minorities and women. In higher education, affirmative action policies have been implemented to increase access and participation of racial minorities and women (Kaplin & Lee, 2007). Since its implementation, the constitutionality of affirmative action in postsecondary education has been consistently challenged in courts.

In 1971, *DeFunis v. Odegaard* (1974) marked one of the earliest actions challenging affirmative action in higher education. Marco DeFunis Jr., a White Jewish student of Spanish-Portuguese descent, filed suit against the University of Washington Law School. DeFunis claimed that he was not admitted to the law school, but less qualified minority applicants were admitted because of the law school's affirmative action policy (*DeFunis v. Odegaard*, 1974).

The case eventually was argued before the Supreme Court, but was declared moot because by the time the U.S. Supreme Court heard the case, DeFunis was in his last year of law school. Consequently, *DeFunis* failed to do much in affecting affirmative action policies nationwide.

A little more than seven years later, however, another case would eventually set forth an affirmative action precedent that would have major implications for higher education institutions nationally. In 1978, the issue of affirmative action yet again resurfaced in *Regents of the University of California v. Bakke*. Bakke alleged that the University of California at Davis (UCD) Medical School's practice of a dual admission, quota-based program prevented him from being admitted to the school. Bakke, a White male, had been rejected twice by UCD's medical school, despite having a high qualification score. In each instance, according to Bakke's claims, students in the racial minority group were admitted with lower overall scores than he'd had.

Subsequently, Bakke sued alleging his constitutional right to equal protection under the law was in fact violated. Bakke prevailed and eventually gained admission to the medical school; the Supreme Court, Mr. Justice Powell, held that:

> . . . although the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, [the University's] special admissions program, which forecloses consideration to persons like [Bakke], is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. (*Regents of the University of California v. Bakke*, 1978, pp. 2747-2764)

Notwithstanding, consideration of an applicant's race was not effectively ruled out; the Court also held that some consideration of race in affirmative action is permissible when it stated:

> 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 qualifications of each applicant, and to place them on the same footing for consideration. (*Regents of the University of California v. Bakke*, 1978, p. 2762)

Bakke established a baseline for other colleges and universities to tailor their affirmative action policies. That is, the Court explicitly expressed that racial quotas and evaluating racially underrepresented applicants separately from nonracially underrepresented groups were impermissible. However, the Court did note that race could in fact be used as one of the selection factors that foster racial and ethnic diversity in postsecondary educational settings (*Regents of the University of California v. Bakke*, 1978). Subsequently, colleges and universities that adopted and aligned their affirmative action policies with the *Bakke* decision prevailed in court when legally challenged. For example, in several cases over the next decade, courts readily accepted universities' emphasis on fostering a diverse student community as a constitutionally sufficient justification for using race-based admission policies (*Davis v. Halpern*, 1991; *DeRonde v. Regents of the University of California*, 1981; *McDonald v. Hogness*, 1979).

Specifically, in *McDonald v. Hogness* (1979), the University of Washington–School of Medicine denied admission to Frederick N. McDonald, a White male applicant. As a result, McDonald brought legal action claiming that he was denied admission because of his race. McDonald asserted that the university admitted all unqualified racially underrepresented applicants while the White applicants had to fight for the remaining available slots (*McDonald v. Hogness*, 1979). In the year that McDonald applied, there were seven racially underrepresented applicants who were ranked higher than McDonald, but were not admitted into the medical school. The school's application process included an interview with applicants and an evaluation based on an applicant's demonstrated humanitarian qualities, academic performance, motivation, medical aptitude, and maturity. Those demographic characteristics of selected applicants were only taken into consideration as they related to the aforementioned factors. Although McDonald, by most standards, would have been considered an exceptional

candidate for admission, based on the school's overall holistic approach for evaluating and admitting students, he was considered an average applicant. The court held that the school's use of race as a factor for admission was allowed per *Bakke* and 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). Another important aspect that the court ruled was that higher education institutions are to have broad discretion in admission decisions and "the fact that some qualified applicants are rejected and nonmathematical factors are weighed differently by different interview committee members does not show arbitrary or capricious conduct" (*McDonald v. Hogness*, 1979, p. 717).

Similarly in *DeRonde v. Regents of the University of California* (1981), Glen DeRonde, a White male, was unsuccessful in gaining admission to the University of California, Davis (UCD) School of Law. The law school considered applicants' ethnicity in its admission selection process. DeRonde sued the University, alleging that considering an applicant's race or ethnicity was biased and unconstitutional. The Supreme Court of California applied the principles in *Bakke* to determine the university's race-based admission policy violated DeRonde's constitutional rights. Essentially, 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. In the end, the Court concluded that the University's selection process was not unconstitutional and was in accordance with the principles set forth in *Bakke*. Each application was individually evaluated; ethnic origin was merely one of several competing factors in making admission decisions and an applicant's ethnicity did not unfairly preclude other applicants from gaining admission to the University (*DeRonde v. Regents of the University of California*, 1981).

In another analogous case, David Davis, a White male, applied to and was denied admission by the City University of New York (CUNY) Law School at Queens College eight times (*Davis v. Halpern*, 1991). Davis, the plaintiff, contended that in each denial, the law school admitted less qualified racially underrepresented women instead of him; he brought a sex discrimination suit against the school alleging that their affirmative action admission policy was prohibited by the Fourteenth Amendment. That policy included a committee that evaluated applicants' academic ability, analytical and problem-solving skills, research, embodying qualities of an exceptional lawyer, and the diversity within the class. The law school applied for and was granted summary judgment, in part. The court concluded that Davis had failed to establish the sex discrimination claim and therefore could not proceed to trial. The court reasoned that for the claim to warrant proceeding to trial, Davis needed to prove not only disparity, but also causation. Although Davis had succeeded in showing that there was a statistical disparate impact between admitted women and men, he had failed to show that the disparity was caused by some unconstitutional admission practices on the part of CUNY. The court offered that:

> 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, p. 979)

CUNY's rationale for using an affirmative action policy was an insufficient basis for the court to summarily dismiss Davis' Fourteenth Amendment. One of the expressed goals of the policy was to increase diversity in the legal profession. The court held that if the policy was designed to remedy societal discrimination in the legal profession, then that was an issue that could go to trial because it may be unconstitutional. 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," and not by society in general (*Davis v. Halpern*, 1991, p. 980). The court also cautioned that the policy is constitutionally flawed if its goal was to produce lawyers who were committed to serving racially underrepresented groups because racially underrepresented applicants are not the only individuals genuinely interested in the plight of underrepresented groups (*Davis v.*

Halpern, 1991). Since Davis' Fourteenth Amendment claim presented a genuine fact that warranted consideration at trial, the court denied the university's motion for summary judgment with respect to that claim (*Davis v. Halpern*, 1991).

A subsequent major legal case to impact affirmative action was *Hopwood v. Texas* (1996). In that case, four White students applied for and were denied admission to the University of Texas Law School in 1992. They subsequently filed suit alleging that they were not admitted because the school used race-based admission criteria for certain applicants. Plaintiffs asserted that the law school's admission policy was discriminatory 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 it was permissible for the University of Texas Law School to show preference to any group or groups under the Fourteenth Amendment. The court declared that it was not permissible. The court concluded that:

> 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, p. 934)

This decision by 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).

> We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection. Justice Powell's view in *Bakke* is not binding precedent on this issue. (*Hopwood v. Texas,* 1996, p. 944)

Given that the court concluded that increasing diversity was not a justifiable goal for implementing a race-sensitive admission policy, the *Hopwood* ruling served as a direct challenge to affirmative action admissions policies, especially in consideration of the Supreme Court's ruling in *Bakke,* which suggested a different viewpoint (*Hopwood v. Texas,* 1996).

CONTEMPORARY CHALLENGES TO AFFIRMATIVE ACTION POLICIES

Hopwood would prove to be just the tip of the iceberg for contemporary challenges to affirmative action policies in higher education. In 1996, California voters passed Proposition 209, a ballot initiative that prohibited affirmative action in public all entities (Pusser, 2001). Specifically, Proposition 209 mandated that race could not be used as factor for consideration in public education (Alvarez & Bedolla, 2004). This included admission, employment, and programming. The states of Washington, Michigan, Nebraska, Florida, and Arizona have also barred the use of race-sensitive policies (Jaschik, 2011). Moves to end affirmative action are growing across the nation as similar efforts have also existed or are currently underway in the states of Colorado, Missouri, and Oklahoma. Although Michigan's ban on affirmative action was 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).

While many states abolished affirmative action altogether, in 2003 the Supreme Court reaffirmed higher education institutions' power to include race as a consideration to achieve a diverse student body, so long as the consideration is narrowly tailored and does not function as a quota system. The Court's reaffirmation was specifically demonstrated in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003). The plaintiffs in each of those cases alleged the University of Michigan afforded discriminatory advantages to Blacks and other minorities over Whites within the university's admission practices. To this end, plaintiffs claimed that University

of Michigan's affirmative action policy violated the equal protection clause, Title VI of the Civil Rights Act, and Section 1981.

In *Gratz*, the U.S. Supreme Court nullified the undergraduate affirmative action plan, holding that the point system in place was too narrowly designed; the system awarded racially underrepresented applicants 20 extra points out of 100 points for admission. In contrast, in *Grutter*, the Court upheld the law school's admission plan as applicants were given individualized consideration where race served as one among many selection factors designed to create a diverse student body (Green, 2004). Specifically, the majority opinion reaffirmed the rationale set forth in *Bakke* that using affirmative action to diversify a student body is permissible, but using quotas as well as reviewing racially underrepresented applicants separately from the majority is impermissible (*Grutter v. Bollinger*, 2003).

In spite of the Supreme Court's reaffirmation of colleges' and universities' privileges to adopt race-sensitive practices to attain a diverse student body, the Court signaled 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. (*Grutter v. Bollinger*, 2003, p. 2346)

Grutter would serve as a prophetic cautionary tale. By 2012, the Supreme Court was faced with yet another challenge to affirmative action in *Fisher v. University of Texas* (2013). In 2008, Abigail Fisher, one of 29,501 applicants to the University of Texas, Austin, was denied admission. Four years prior, the university had enacted a policy, in an effort to obtain a critical mass of minority students, which included race as an evaluative measure on each applicant's Personal Achievement Index (PAI) score. The PAI score measured a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that offer insight into a student's background (i.e., growing up in a single-parent home, speaking English as a second language, significant family responsibilities assumed by the student, and socioeconomic status). Fisher contended that her rejection was a result of the university's flawed and unconstitutional race-based policy that allowed less-qualified racially underrepresented students to be admitted rather than her. The policy was based on a 2004 self-study, conducted by the university. The study concluded that the university lacked a "critical mass of minority students and that to remedy this problem, it was necessary to give explicit consideration of race in the undergraduate admission program. A firm policy was instituted in the fall of 2004 to implement race as an explicit component in evaluating undergraduate admission applications. Fisher ultimately alleged that the university's race-sensitive admission policy violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The district court granted summary judgment to the university, *Fisher v. University of Texas* (2008), and the United States Court of Appeals for the Fifth Circuit affirmed (*Fisher v. University of Texas*, 2011). Fisher petitioned for *writ of certiorari* and the United States Supreme Court granted (*Fisher v. University of Texas*, 2013). The Supreme Court vacated and remanded the fifth circuit's opinion, holding that the court of appeals failed to apply the correct standard of strict scrutiny, therefore its decision in affirming the district court's grant of summary judgment to the University of Texas was incorrect.

Although the *Fisher* decision did not effectively put an end to affirmative action in higher education, it certainly suggested that the Court had become uneasy about its institutional legitimacy and, therefore, is now cautious of issuing sweeping decisions that depart drastically from precedent. The Court's ruling in *Fisher* did not technically affirm *Grutter*, but thankfully for affirmative action proponents, it did not disturb it either. The opinion, overall, endorses the concept, necessity, benefits, and power of higher education institutions to promote and strive to achieve diversity. The Court reasoned that, as set forth in *Grutter* "a university's 'educational

judgment that such diversity is essential to its educational mission is one to which we defer.'" (*Fisher v. University of Texas*, 2013, citing *Grutter v. Bollinger,* 539 U. S. 306, at 328.). The Court went on to point out that:

> *Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, 'based on its experience and expertise,' that a diverse student body would serve its educational goals (*Fisher v. University of Texas*, 2013, Grutter v. Bollinger, 539 U. S. 306, at 330).

While the Court did not depart from the benefits of diversity in higher education, as articulated in *Grutter,* the *Fisher* Court does seem to question whether or not diversity is a compelling state interest. The Court referenced *Grutter* stating that, "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity'" (*Fisher v. University of Texas*, 2013, *Grutter v. Bollinger,* 539 U. S. 306, at 330).

AFFIRMATIVE ACTION IN HIGHER EDUCATION CLINGS TO LIFE . . . WHAT NOW?

The *Fisher* decision explicates that for now, affirmative action measures to ensure diversity on higher education campuses are alive and well. But it would be premature to think that is the end of the story. Notwithstanding the Supreme Court's ruling in *Grutter* and subsequently *Fisher*, attacks on affirmative action policies will likely continue. Therefore, it is important to examine the broader implications to diversity and the higher education landscape if affirmative action were prohibited.

Currently, the debate around affirmative action has implications in and of itself. All of this litigation is prompting some 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 lawsuits (Orfield, 2007). Opponents have 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 (Zamani-Gallaher et al., 2009). Although not instigated by the CIR, *Podberesky v. Kirwan* (1992) is a clear example. That case weighed in more than ten years before *Grutter* and *Fisher* and demonstrated how challenges to affirmative action policies could radically hinder or even cease the racial diversification of higher education.

In *Podberesky*, the University of Maryland at College Park's (UMCP) use of race-sensitive policies was challenged. Given that the State of Maryland has an agreement with the OCR to end its dual system of higher education (Maryland Higher Education Commission, n.d.), the UMCP offered the Benjamin Banneker Scholarship—a merit-based award—to attract academically talented Black students. The Banneker program is rooted in a protracted controversy between the Office of Civil Rights of the Department of Health, Education and Welfare and the State of Maryland concerning desegregation of Maryland's system of higher education. In 1969, OCR first informed the state that its system of higher education was in violation of Title VI of the Civil Rights Act of 1964 (See *Adams v. Richardson*, 1973). Over the next six years, Maryland officials submitted three separate plans in an attempt to comply with Title VI, but all were unacceptable. The OCR deemed that the State of Maryland's state-operated institutions of higher education are not operating in compliance with Title VI of the Civil Rights Act of 1964 and was preparing to commence formal enforcement proceedings. After some negotiating, the State of Maryland voluntarily submitted a compliance plan. The Banneker program was established in 1979 as part of the state's effort to achieve Title VI compliance. The plan emphasized the need to increase "other race grants," a generic name for scholarships, such

as the Banneker program, aimed at increasing the representation of historically underrepresented racial groups at public higher education institutions in Maryland.

Podberesky, the plaintiff, filed suit against the UMCP claiming that the scholarship discriminated against other races because it was only offered to Blacks. The United States District Court for the District of Maryland disagreed and granted summary judgment to Kirwan, but the United States Court of Appeals for the Fourth Circuit held that university scholarship program that was only open to Black students did violate Title VI. The court reasoned that:

> . . . in order to justify a race-based remedy in a case where identifiable discrimination occurred a number of years in the past, a finding of such past discrimination is not sufficient. There must be some present effect of this past discrimination that the program is designed to redress. (*Podberesky v. Kirwan,* 1992, p. 56)

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 the university (Jaschik, 1995).

Another implication for the possible cessation of affirmative action in higher education is the negative impact such an end would have on states, such as Maryland, that have desegregation agreements with OCR. The complete dismantling of affirmative action is especially problematic for states being monitored by the OCR for operating policies traceable to *de jure* segregation in higher education. There is an inherent policy contradiction in that states being monitored by the OCR are required to increase the racial diversity on their public campuses but their primary tool for doing so—affirmative action—is being increasingly challenged and removed from the higher education admission schema.

THE PARADOX BETWEEN DISMANTLING *DE JURE* SEGREGATION AND AFFIRMATIVE ACTION

Title VI of the Civil Rights Act was designed to increase racial diversity campuses at historically Black colleges and universities (HBCUs) and predominantly White institutions (PWIs) by withholding federal funding to institutions that practiced discriminatory policies in their admission of students, recruitment and hiring of faculty, and administrators (Brown, 2001). Even though the Act promoted these desirable and necessary values, the intent of this initiative did not lead to the racial diversification of America's higher education system. 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. The Department's inaction prompted yet another lawsuit, *Adams v. Richardson* (1973) that would have major implications, even if indirect, for affirmative action policy in higher education.

Adams, the plaintiff, asserted that the federal government failed to enforce Title VI. Adams argued that ten states maintained segregated and discriminatory higher education systems but still received federal funding (*Adams v. Richardson*, 1973). The plaintiff contended that federal funds should be eliminated for all recipients out of compliance with Title VI. The District Court held that the HEW's performance fell below that required of them under Title VI, and ordered them to:

> (1) institute compliance procedures against ten state-operated systems of higher education, (2) commence enforcement proceedings against seventy-four secondary and primary school districts found either to have reneged on previously approved desegregation plans or to be otherwise out of compliance with Title VI, (3) commence enforcement proceedings against forty-two districts previously deemed by HEW to be in presumptive violation of the Supreme Court's ruling in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), (4) demand of eighty-five other secondary and primary districts an explanation of racial disproportion in apparent violation of *Swann*, (5) implement an enforcement program to secure Title VI compliance with respect to vocational and special schools, (6) monitor all school districts under court desegregation orders to the extent that HEW resources permit, and (7) make periodic reports to appellees on their activities in each of the above areas. *Adams v. Richardson*, 1973, p. 269.

Research indicates that *Adams* had some impact on aiding the dismantling of America's dual system of higher education (Fleming, 1984; Nettles, 1988). But, some 20 years later the vestiges of *de jure* education were shown to be alive and well. In 1992, the U.S. Supreme Court issued its most recent decision on collegiate desegregation in *United States v. Fordice*. This case stemmed from Mississippi's efforts to continue *de jure* segregation in its public university system by maintaining universities segregated along racial lines. In 1975, James Ayers, along with other plaintiffs, filed an action against Kirk Fordice, the former Governor of Mississippi, for racial discrimination in the state's university system. At that time, there were five nearly entirely White universities and three HBCUs operating within the same geographic region, facilitating a race-based tracking system (Sum, Light, & King, 2004). Moreover, there were distinct differences in the mission statements, admission standards, and state financial allocation between the White and Black schools in the state (Gasman et al, 2007).

In *Fordice*, the Court articulated and identified four policies traceable to the vestiges of *de jure* segregation. The first of these concerned the use of the American College Testing program (ACT), which seemed to have a discriminatory intent; the use of the test was originally enacted in 1963 by three of the White universities to discriminate against Black students, who, at the time, had an average ACT score well below the required minimum. The second policy was centered on Mississippi's classification scheme for institutional mission—three of the PWIs were designated as "flagship" universities, offering more advanced programming and enhanced curricular offerings, and benefiting from greater funding levels. HBCUs, however, did not enjoy the same funding benefits. The third policy questioned was the unnecessary duplication of programs at PWIs and HBCUs. The Court pointed out that such duplication was a nexus for *de jure* segregation, as it all but preserved the abolished "separate but equal" system. The fourth policy was the need to maintain all of the state institutions in which The Court questioned the necessity of doing, especially with minimal fiscal resources and the close geographic proximity of the institutions. The Supreme Court eventually remanded the case to a federal district court in Mississippi and ordered the lower court to develop a new desegregation plan (*United States v. Fordice*, 1992).

Another lawsuit centered on dual higher education systems is currently underway in the State of Maryland. The leaders of the public HBCUs in Maryland, and others, have claimed that the State of 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 (*Coalition for Equity and Excellence in Higher Education v. Maryland Higher Education Commission*, 2011). It does not stop there; Maryland is one of several states whose public system of higher education remains segregated along racial lines (Minor, 2008). Specifically, in a report, which examined the enrollment patterns, state funding, and distribution of advanced degree programs for HBCUs in five southern states, it was revealed that while those states' PWIs enrolled a relatively small number of Blacks, HBCUs are doing the majority of the work in terms of educating Blacks (Minor, 2008). Furthermore, "analyses show that Blacks are at or above equity in enrollment at the HBCUs at each of the 19 [southern] states" (Perna et al., 2006, p. 223). There appears to be an acute disconnect between legal initiatives introduced to facilitate the racial diversification of the nation's colleges and universities and the current state of affirmative action. On the one hand, states, especially those being monitored for desegregation compliance by the OCR, must attain a racial diversity on their public campus. But, on the other hand, fear of litigation from implementing affirmative action policies have stymied some postsecondary education institutions from capitalizing on race-sensitive programs to help increase racial diversity (Orfield, 2007).

The OCR within the U.S. Department of Education has applied the *Fordice* ruling to states whose collegiate desegregation plan have expired or continue to be monitored for compliance with laws that prohibit discriminatory policies in public higher education (MHEC, n.d.). However, many higher education institutions remain segregated across racial lines (Minor, 2008). The lack of progress in diversifying higher education could in fact be the hesitance of

some colleges and universities to implement the use race-sensitive policies to increase the number of underrepresented racial populations. With the continued legal challenges and outcomes, as set forth in *Grutter*, and now more recently, *Fisher*, colleges and universities may be persuaded to avoid affirmative action policies altogether. Essentially, there is a policy contradiction. While states, particularly those monitored by OCR for compliance with desegregation plans, are expected to increase racial diversity at all levels of their public postsecondary education institutions, some colleges and universities are simply backing away from affirmative action—one of their primary cornerstones to effectuate campus racial diversity (Jaschik, 2008). This inconsistency might account for current and an increase in future facilitation of racial diversity initiatives on America's higher education campuses.

ALTERNATIVES FOR RACE-SENSITIVE POLICIES

Courts that invalidated affirmative action plans have suggested that states implement other race-neutral policies to achieve racial parity and diversity on higher education campuses. In accordance, states such as California, Florida, and Texas have implemented percentage plans to replace the effectiveness of race-sensitive policies. However, according to research, percentage plans are a too simple solution to a multifaceted, complex problem (Horn & Flores, 2003). 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). But, due in part to recurring achievement gaps in students' educational performance, there is often very little diversity in these fixed percentages. For example, 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 to their White and Asian counterparts, meeting the basic requirements to gain access to state university systems greatly reduces the pool of minority students that benefit from the percentage plans (Horn & Flores, 2003). Furthermore, the most selective institutions are the least affected by percentage plans (Horn & Flores, 2003).

Given these perspectives, it is not surprising that views on the efficacy of percentage plans, based on the evidence thus far, are mixed. That is, some research has indicated that percentage plans have not been nearly as effective in promoting access to higher education for underrepresented racial minorities (Cortes, 2010). But, other states, such as Texas, have seen where knowledge of a percentage plan helped increase the desire to attend college for all students in general and racially underrepresented students specifically (Lloyd, Leicht, & Sullivan, 2008). In fact, reintroducing the consideration of race in admissions to some public higher education institutions in Texas has been seen as critical to increasing the enrollment of racial minorities in graduate and professional schools (Garces, 2012). Notwithstanding, research indicates in general, percentage plans alone are ineffective in improving diversity on higher education campuses; institutions must also use recruitment, outreach, support, and financial aid programs that take race into account, at least to some degree (Tienda, Niu, & Cortes, 2006).

RECOMMENDATIONS FOR MOVING FORWARD

Considering the Supreme Court's rulings on race-based affirmative action policies in higher education, and the legal initiatives to diversify public colleges and universities across, it seems practical that educational institutions in states where it is permissible to engage in affirmative action should implement such policies to increase the number of underrepresented racial populations on their campuses. It was widely held that the Supreme Court's decision in *Fisher* would possibly signal the end of affirmative action policies in higher education (Barnes, 2012; Lewin, 2012). But, that was not the case and so, for now, affirmative action lives on. In the interim, 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, higher education institutions should apply non-affirmative action strategies that intentionally attract a diverse group of students. For example, institutions can make a diverse

student body a priority through the institutions' strategic plan (Kaplin & Lee, 2007). Setting recruitment and retention goals that demonstrate an institutional commitment to diversity has the possibility to effectuate a trickle-down effect and university-wide buy-in as most offices take direction from the institution's mission and strategic plan. This also ensures that diversity is not the burden of one or two areas in the institution, such as an admission office, but rather everyone's responsibility. If alternative options such as this are not successful, then the institution certainly has a case for implementing affirmative action. Colleges and universities might consider recruiting in non-traditional areas that have large numbers of the policy's targeted population(s), such as rural areas. Oftentimes, college recruiters do not visit or bypass schools in rural areas and many students face limited options in attending college or not attending college at all (Rendón & Hope, 1996).

Second, institutions should employ conscious efforts to engage with current racially underrepresented students and alumni to help identify and recruit racially underrepresented prospective applicants. Higher education administrators must embrace that each student who comes to their institution likely has a network of other students who may be of similar racial backgrounds and may be qualified for admission. Furthermore, students who have demonstrated success in college, as evidenced by their continued matriculation, have a significant understanding of the skills and competencies needed for achievement in college. Therefore, 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.

In addition, colleges and universities can be proactive by arranging a meeting between the university's general counsel and the general counsel for the state's higher education coordinating board or system. Such a joint meeting may be helpful and facilitate much needed dialogue for decision making; this encourages a balanced discourse for a university's general counsel to articulate the legal implications for affirmative action plans and the higher education coordinating board's legal counsel to articulate the conditions and factors necessary to warrant the constitutional permissibility of affirmative action. In general, colleges and universities must 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 might also consider investing in admissions software, such as Questbridge (www.questbridge.org), and third party programs, such as the Posse Foundation (www.possefoundation.org), to help diversify their campuses. These kinds of software and programs take into account myriad factors, including an applicant's academic performance, geographic background, socioeconomic status, gender, race, and other pre-enrollment characteristics. With these tools, postsecondary education institutions are able to racially diversify their campuses without necessarily using affirmative action. Auburn University is one of several universities that has publicly admitted to using this type of software on a trial basis and since the trial run resulted in a slightly more diverse class, Auburn has since decided to use the software permanently instead of its traditional admissions committee (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 admissions criteria. Institutions could develop 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.

Finally, colleges and universities should consider establishing transfer programs with community colleges. This can assist in creating a pool of diverse and qualified applicants. Existing data suggest that community colleges disproportionately serve racially underrepresented students (Beginning Postsecondary Students, 2009). This positions the

community college as a prime pipeline for recruiting racially underrepresented groups into postsecondary settings.

CONCLUSION AND FINAL THOUGHTS

This article has presented a policy disaccord in that colleges are attempting to foster racial diversity of their public postsecondary educational systems. Nevertheless, one of their primary means for doing so is increasing being phased out and faces an uncertain future. This is particularly problematic for colleges in states with desegregation agreements with OCR. Given the controversy surrounding race-sensitive policies, many higher educational institutions have already or may abandon the use of affirmative action policies out of fear of litigation. As a caveat, the aforementioned recommendations are based on the historical context and progression of court rulings and interpretation of affirmative action. Therefore, future legal actions to affirmative action could modify existing affirmative action policies or serve to end affirmative action as a whole. 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.

REFERENCES

Adams v. Richardson, 480 F.2d 1159, 156 U.S. App. D.C. 267 (1973).

Allen, W. R., Bonous-Hammarth, M., & Teranishi, R. (2001). Stony the road we trod. . . . The Black struggle for higher education in California. (Unpublished research report).

Allen, W., Teranishi, R., Dinwiddie, G. & Gonzalez, G. (2000). Knocking at freedom's door: Race, equity and affirmative action in U.S. higher education. *The Journal of Negro Education*, *69*, 3-11.

Alvarez, R. M., & Bedolla, L. G. (2004). The revolution against affirmative action in California: Racism, economics, and Proposition 209. *State Politics & Policy Quarterly, 4,* 1-17.

Barnes, R. (2012, February 21). Supreme Court agrees to reconsider use of race in college admission decisions. *The Washington Post*. Retrieved from http:// www.washingtonpost.com/supreme-court-agrees-to-reconsider-use-of-race-incollege-admission-decisions/2010/07/28/gIQA2viJRR_story_1.html

Beginning Postsecondary Students. (2009). *First institution sector (level and control) 2003-04 by race/ethnicity: Beginning Postsecondary Students Longitudinal Study*. Washington, DC: National Center for Education Statistics.

Bowen, W. G & Bok, D. (1998). *The shape of the river: Long-term consequences of considering race in college and university admissions*. Princeton, NJ: Princeton University Press.

Brown, C. M. (1999). Ebony men in the ivory tower: A policy perspective. In Polite, V. C., & Davis, J. E. (Eds.), *African American males in school and society: Practices and policies for effective education* (pp. 122-133). New York: Teacher College Press.

Brown, C. M. (2001). Collegiate desegregation and the public Black college: A new policy mandate. *Journal of Higher Education, 72*, 46-62.

Brown, C. M. (2002). Hoodwinked and bamboozled: Black colleges, desegregation and selling out. *Black Issues in Higher Education, 19* (9*)*, 131.

Bullock, H. A. (1967). *A history of Negro education in the South, 1619 to the present.* Cambridge: Harvard University Press.

Civil Rights Act of 1964. Pub. L. 88-352, 78 Stat. 241 (1964).

Coalition for Equity and Excellence in Higher Education v. Maryland Higher Education Commission, Civil Action No. CCB–06–2773, 2011 WL 2217481 (2011).

Cortes, K. E. (2010). Do bans on affirmative action hurt minority students? Evidence from the Texas top 10% plan. *Economics of Education Review, 29,* 1110-1124.

Davis v. Halpern, 768 F. Supp. 968, 69 Ed. Law Rep. 373 (1991).

DeFunis v. Odegaard, 416 U.S. 312, 94 S. Ct. 1704 (1974).

DeRonde v. Regents of the University of California, 28 Cal.3d 875, 172 Cal. Rpt. 277 (1981).
Fisher v. University of Texas, 133 S. Ct. 2411 (2013).
Fleming, J. (1984). *Blacks in college: A comparative study of student success in Black and White institutions*. San Francisco, CA: Jossey-Bass.
Gaines v. Canada, 305 U.S. 337, 59 S. Ct. 232 (1938).
Garces, L. (2012). Necessary but not sufficient: The impact of *Grutter v. Bollinger* on students of color enrollment in graduate and professional schools in Texas. *Journal of Higher Education, 83*, 497-534.
Gasman, M., Baez, B., Drezner, N. D., Sedgwick, K., Tudico, C., & Schmid, J. M. (2007). Historically Black colleges and universities: Recent trends. *Academe, 93*, 69-78.
Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411 (2003).
Green, D. O. (2004). Fighting the battle for racial diversity: A case study of Michigan's institutional responses to *Gratz* and *Grutter*. *Educational Policy, 18,* 733-751.
Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325 (2003).
Hopwood v. Texas, 78 F.3d 932, 5th Cir. (1996).
Horn, C. L., & Flores, S. M. (2003). *The percentage plan in college admissions: A comparative analysis of the three states' experiences*. Cambridge, MA: The Civil Rights Project at Harvard University. Retrieved from http://civilrightsprojects.harvard.edu/research. affirmativeaction/tristate.pdf
Jaschik, S. (1995, April 28). A valuable tool or bias reverse? *The Chronicle of Higher Education*, pp. A14-16.
Jaschik, S. (2008). *Admissions by software*. Retrieved from http://www. http://www. insidehighered.com/news/2008/04/17/quest
Jaschik, S. (2011). *Throwing out a state vote*. Retrieved from http://www.insidehighered.com
Kaplin, W., & Lee, B. (2007). *The law of higher education*. San Francisco, CA: Jossey-Bass.
Lewin, T. (2012, April 2). At the University of Texas, admissions as a mystery. *The New York Times.* Retrieved from http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html?partner=rss&emc=rss
Lloyd, K. A., Leicht, K. T., & Sullivan, T. A. (2008). Minority college aspirations, expectations, and applications under the Texas Top 10% Law. *Social Forces, 86,* 1105-1137.
Long, B. T. (2003). Diversity by any other name: Are there viable alternatives to affirmative action in higher education? *Western Journal of Black Studies, 27*, 30-34.
Lowe, E. Y. (1999). *Promise and dilemma: Perspectives on racial diversity and higher education.* Princeton, NJ: Princeton University Press.
Maryland Higher Education Commission. (n.d.). *Maryland's report and the partnership agreement between the state of Maryland and the U.S. Department of Education, Office for Civil Rights*. Retrieved from http://www.mhec.state.md.us/higherEd/ocrplan/index.asp
Mayer, K. R., & Price, K. (2002). Unilateral presidential powers: Significant executive orders, 1949-99. *Presidential Studies Quarterly, 32,* 367-386.
McDonald v. Hogness, 92 Wash.2d 431, 598 P.2d 707 (1979).
McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S. Ct. 851 (1950).
Minor, J. T. (2008). *Contemporary HBCUs: Considering institutional capacity and state priorities (A research report)*. East Lansing: Department of Educational Administration, College of Education, Michigan State University.
National Conference of States Legislatures. (2014). *Affirmative action: Overview*. Retrieved at http://www.ncsl.org/research/education/affirmative-action-overview.aspx
Nettles, M. T. (1988). *I*ntroduction: Contemporary barriers to Black student equality in higher education. In Nettles, M. (Ed.), *Toward Black undergraduate student equality in American higher education* (pp. 1-15). New York: Greenwood.
Orfield, G. (2007). Foreword. In Orfield, G., Marin, P., Flores, S. M. &. Garces, L. M. (Eds.), *Charting the future of college affirmative action: Legal victories, continuing attacks, and new research* (pp. xi-xiv). Los Angeles, CA: The Civil Rights Project at UCLA.

Pearson v. Murray, 182 A. 590, 169 Md. 478, 103 A.L.R. 706 (1936).
Perna, L. W., Milem, J., Gerald, D., Baum, E., Rowan, H., & Hutchens, N. (2006). The status of equity for Black undergraduates in public higher education in the South. *Research in Higher Education, 47*, 197-228.
Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).
Podberesky v. Kirwan, 956 F.2d 52, 4th Cir. (1992).
Pojman, L. P. (1992). The moral status of affirmative action. *Public Affairs Quarterly*, *6*, 181-206.
Pusser, B. (2001). *The contemporary politics of access policy: California after Proposition 209*. In Heller, D. E. (Ed.), *The states and public higher education: Affordability, access, and accountability* (pp. 121-154). Baltimore, MD: The Johns Hopkins University Press.
Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).
Rendón, L., & Hope, R. (1996). *Educating a new majority*. San Francisco, CA: Jossey-Bass.
Stefkovich, J., & Leas, T. (1994). A legal history of desegregation in higher education. *The Journal of Negro Education, 63*, 406-420.
Sum, P. E., Light, S. A., & King, R. F. (2004). Race, reform, and desegregation in Mississippi higher education: Historically Black institutions after *United States v. Fordice*. *Law & Social Inquiry, 29*, 403-435.
Swann v. Charlotte-Mecklenburg Board of Education, 22 Ill.402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).
Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848 (1950).
Tienda, M., Niu, S., & Cortes, K. E. (2006). College selectivity and the Texas top 10% law: How constrained are the options? *Economics of Education Review, 25*, 259-272.
United States v. Fordice, 505 U.S. 717, 112 S. Ct. 2727 (1992).
Zamani-Gallaher, E. M., Green, D. O., Brown, M. C., & Stovall, D. O. (2009). *The case for affirmative action on campus: Concepts of equity, considerations for practice.* Sterling, VA: Stylus.

AUTHORS

TIFFANY FOUNTAINE BOYKIN is the Assistant Dean for Student Services at Anne Arundel Community College in Arnold, Maryland. ROBERT T. PALMER is Associate Professor, Educational and Leadership Policy Studies in the School of Education, Howard University.

All comments and queries regarding this article should be addressed to tfboykin@aacc.edu