

# **The Desegregation of Higher Education, Race Conscious Admissions Policies and the Federal Constitution: Before Brown vs. Board and Beyond**

by

Taj'ullah Sky Lark  
Ph.D. Candidate, Educational Management  
Hampton University, Hampton, Virginia

## **Abstract**

It has been more than 50 years since *Brown vs. Board* and almost equally as long since the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 substantiated the necessity of the continuance of Affirmative Action Policies to enforce Race Conscious Undergraduate Admissions for minorities at colleges & universities was put into law, and African Americans in particular and other historically underrepresented groups are still struggling in numbers at public institutions. This article will review a series of historical and current events that will highlight strides in college admissions policies, where we are today, and the current legal debates that challenge the future of race based admission policies.

## **Introduction**

When most pinpoint the time in history when the desegregation of school was fought, they reference the U.S. Supreme Court's landmark 1954 ruling *Brown v. Board of Education*. However, Higher Education would begin its legal fight for desegregation before *Brown vs. Board*, with four years of litigated cases previous to this landmark case with the Supreme Court rejecting the "separate but equal" doctrine in a higher education. The strides taken in the four years preceding *Brown vs. Board*, including Swanson's case against the University of Virginia would set the legal framework and shape Thurgood Marshall's legal strategy that would put an end to Jim Crow in education (Lavergne, 2010).

The rejection of Gregory H. Swanson's application for admittance into the University of Virginia's Law School was a defining moment in higher education which opened doors not only to its law school, but other doors to other graduate schools within the Commonwealth and nationally by forcing the courts to examine and define the meaning of their own laws. The university's strong resistance to desegregation created an opportunity for it to be challenged and ordered to change. Although begrudgingly by force and viewed by some as token desegregation, an increased number of Blacks began to apply to the University of Virginia and schools across the nation (Beeler, 1950).

Swanson's subsequent admission to the University would open the threshold of numerous landmark cases of access denied because of race from Blacks and Whites well into the 21<sup>st</sup> century. Claims of reverse discrimination would arise when a White college applicant named Allan Bakke was rejected twice by the University of California in 1978 (Ball, 2000). In 2000, the University of Michigan undergraduate affirmative action policies would be challenged in *Gratz v. Bollinger* with a federal judge ruling that the use of race as a factor in admission was constitutional. The 2003 case of *Grutter v. Bollinger* the University of Michigan's Law school's affirmative action policy was challenged with the judge ruling that the policies were unconstitutional only to be upheld in the U.S. Supreme Court with the U.S. Supreme Court emphatically affirmed the value of diversity, and argued that the state has a compelling interest to promote diversity on college campuses (Sullivan, 2006).

While many milestones would result from Swanson's challenge to UVA, the University of Virginia would continue to struggle with racism and diversity issues within its student body, faculty, and administration to date. Race has always been and will continue to be an obstacle in Higher Education (Altbach & Lomotey, 1991). However, it was due to Gregory Swanson's courage to challenge the admissions policies of the University of Virginia that led its desegregation and the subsequent desegregation of Higher Education.

Before the historic 1954 landmark Supreme Court Decision *Brown v. the Board of Education* that struck down the policy of "separate but equal" and set the legal precedent that racial discrimination in public education violates the United States Constitution, there was *Swanson v. Rector of Visitors of the University of Virginia* (1950). Swanson's landmark win and admission to the University of Virginia would open the threshold of numerous landmark cases of access denied because of race from Blacks and Whites well into the 21<sup>st</sup> century.

The Department of Health Education and Welfare issued guidelines to higher education facilities for the implementation of the Executive Order 11246. The intent of this and other legislation was to increase the representation of women and minorities in educational institutions. Affirmative Action was established in the U.S. to address generations of persistent inequalities, discrimination, and marginalization of African Americans during the 1960's.

In 1961 President John F. Kennedy Executive order 10925 mandated Affirmative Action for the equal opportunity employment and fair treatment of employee regardless of race color, or national origin. This mandate would eventually be extended to regulate the equal opportunity for education.

Colleges and Universities would develop their own Affirmative Action Admission policy that would take into serious consider a variety of variables other than standardized test scores when assessing minority applicant's in particular historically underrepresented minorities which would include race, gender, ethnicity, native language, social class, geographical origin. Special attention would be given to historically underrepresented minorities. In addition, minorities can be awarded scholarships on the basis of the said criteria.

The passing of the 1964 Civil Rights Act prohibited colleges and universities from discriminating based upon age, sex, race, or religion with the laws that govern the Act having the power of enforcement to ensure desegregation. The Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 substantiated the necessity of the continuance of Affirmative Action Policies to enforce Race Conscious Undergraduate Admissions for minorities at colleges & universities allowing institutions of higher education to tailor their undergraduate admission policies utilizing race as an important criteria.

It has been fifty – seven years since *Brown v Board*. However, the struggle for equal opportunity for academic success is still alive and well in America today. What are the causes? Holding on to “tradition”, dual systems of higher education, discriminatory admissions policies, financial barriers, racism, open interpretation of the law? Some many argue that desegregation has had more negative effects in desegregation and closing the achievement gap than anything. Should we return to *Plessy v. Ferguson* (1896), "separate but equal" public facilities law?

The initial claim of “reverse discrimination” would arise when a White college applicant named Allan Bakke was rejected twice by the University of California in 1978 (Ball, 2000). On June 28, 1978, the U.S. Supreme Court would strike down a UC Davis Medical School policy that reserved a fixed number of spots for minority applicants, but ruled that race can be considered in college admissions to improve racial diversity, as long as quotas were not utilized. The Court ordered the university to admit Allan P. Bakke, a 38-year-old white applicant, whose application was denied despite having higher admission test scores than many of the minority students admitted to the program. The case was the first in a series of successful challenges to affirmative action programs over the next two decades. The ruling set up a paradox for University of California schools, which are under a state mandate to match the racial composition of their student bodies to that of the state's high school graduates.

In 2000, the University of Michigan undergraduate Affirmative Action policies would be challenged in *Gratz v. Bollinger* with a federal judge ruling that the use of race as a factor in admission was constitutional. In the 2003 case of *Grutter v. Bollinger* the University of Michigan's Law school's affirmative action policy was challenged with the judge ruling that the policies were unconstitutional only to be upheld in the U.S. Supreme Court with the U.S. Supreme Court emphatically affirmed the value of diversity, and argued that the state has a compelling interest to promote diversity on college campuses (Sullivan, 2006).

The use of "race" as a measure but not a dispositive feature of admissions within the constitutional bounds delineated by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) would ensure equal opportunity and diversify college student body. Universities making the effort to diversify their student body are supported by the Departments of Education and Justice. In *Grutter v. Bollinger* 2003, the U.S. Supreme Court emphatically affirmed the value of diversity, and argued that the state has a compelling interest to promote diversity on college campuses (Sullivan, 2006).

Other significant Historical Legal Cases to shape equal access to education include the *Regents of the University of California v. Bakke*, June 28, 1978. This would be the first case to successfully challenge Affirmative Action programs at a university, the U.S. Supreme Court strikes down a UC Davis Medical School Affirmative Action Race Based Admissions Policy that reserves a fixed quota of minority applicants, but does rule that race can be considered in college admissions to improve racial diversity. The case of *Hopwood v. Texas*, March 19, 1996, judges for the Fifth Circuit Court of Appeals would condemn the use of racial classifications to diversify student body. On November 5, 1996, California voters would pass the *California* Civil Rights Initiative/*Proposition 209*, banning affirmative action in government employment ending all race-based admissions practices at University of California schools.

Attorney Curt Levey who represented the plaintiffs of *Hopwood v. State of Texas*, *Gratz v. Bollinger* and *Grutter v. Bollinger*, argues that while the Supreme Court make it clear that the use of race as a preference can be utilized to remedy past discrimination, the rational does not provide limits on scope or duration, and insist that there will always be numerical minorities (Levey, 2003). Levey also points the finger at HSCU's accusing them of depriving African American student of the benefits of diversity (2003). Are Historically Black Colleges and Universities just as guilty as Predominately White Institutions of maintaining segregated schools systems? Does the 21<sup>st</sup> century move to desegregate institutions of higher education mean the end of single sex, and Historically Black Colleges and Universities as we know them? Should consideration be given to HBCU's? Will HBCU's become a mere footnote in American History?

The Department of Education confirmed its commitment to preserve public HBCUs with its statement to the Supreme Court in regards to the case of *Fordice* stating that due to of past discriminatory barriers experienced by African Americans in obtaining an education; concessions may be required to overcome the lingering effects of such discrimination (Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (Dep't Educ. 1994). United States Supreme Court Justice Thomas would further argue in support of the existence of HBCUs by stating that they are "educationally justifiable", "distinctive histories and traditions", "a symbol of the highest attainments of black culture", "open to all", hence constitutionally acceptable (United States v. Fordice).

Sixty plus years since *Swanson v. Rector of Visitors of the Univ. of Va.*, and the rancorous debate on race based admissions policies remains a hot topic with Higher Education still struggling with equal access to education, diversifying its student body, admission policies, Affirmative Action, and the federal constitution.

## **Review of the Literature**

The purpose of this document is not a treatise on national College and University admissions criterion, but an analysis of the literature on the debate, and why the issue of race and admissions are still an issue in Higher Education. There is plethora of Empirical data that supports not only the continued necessity but the individual, institutional, societal and global benefits of race conscious admissions policies. Research studies held by Bowen & Bok (1998); Zweigenhaft & Domhoff (1991); Bernal (2002); Chung & Espenshade, (2004); Gurin et al (2004); Milem & Hakuta (2000); Terezini et al (2001); and Orfield, G. (2001) are just a few of many studies by proponents of race conscious admissions who's research supports the success, benefits, and the continued necessity of race conscious admissions.

The benefits of Affirmative Action Race Conscious Admissions Policies for all students, including faculty and administrators are numerous. Race conscious admissions diversifies the student body which facilitates opportunities to eliminate stereo types; develop empathy; develop critical thinking skills; stimulate complex thinking; to democratically deal with conflict; consideration of multiple perspectives; acknowledgment for appreciation of common values; develops the ability to democratically deal with conflict; and prepares students for meaningful participation in a pluralistic society. The use of Affirmative Action Race Conscious Admissions Policies has been instrumental in successfully admitting numerous women, minorities, and African Americans in particularly, into predominately White colleges and universities across the nation.

While few scholars would argue the wealth of benefits associated with racially diverse student body or negates how far higher education has come in the area of diversity and equality. However, much controversy, heated debates, and various lawsuits continue to challenge the use of Race-Based Admissions Policies.

More specifically, the state of Arizona now has followed suit of California, Florida, Michigan, Nebraska, Texas, and Washington, in becoming the 17<sup>th</sup> state in the United States to place a ban on Affirmative Action Admissions Policies in public colleges and universities, without legally substantiating the constitutionality of these bans.

In Cabera & Burkim's (2001) overview of college admissions criteria in the United States, they pinpoint the time frame of 1600 and 1800 as a time period of more subjective and "institution – specific" driven admissions procedures with the Presidents of institutions utilizing a personal interview as the test of eligibility. This responsibility would subsequently be shifted to faculty members during the end of the 1800's with college admissions becoming inconsistent from one institution to the next. As a result, a system of various standards emerged for students that led to the creation of the establishment of the College Entrance Examination Board and the use of a standardized test (SAT) for college entrance.

Overtime, however, the SAT would be characterized as discriminatory by the U.S. Department's Office of Civil Rights in its impact on minority college applicants, particularly African American and Latinos (Cabera & Burkim, 2001). As a result, many leading educators began to call for a more holistic approach to predicate academic success and equity as well as the development of a new paradigm for college entrance (Adelman, 1999 b; Olivia, 1997; Grose & Selingo, 2001).

Opponents of race conscious admissions policies such as Rothman et al (2002), claim that higher racial diversity on campuses is correlated with higher reports of racial discrimination, lower perceived work ethic among the students, and less satisfaction with the educational experience among students. Other opponents of Affirmative Action Admissions policies make similar claims such as Affirmative Action reinforces stereotypes; lowers self-esteem of minorities; lowers the academic achievement bar; allows unprepared applicants to be accepted in highly demanding educational institutions; creates an academic mismatch; comes at a high financial cost to institutions; and causes reverse discrimination with Affirmative Action requiring the very discrimination it seeks to eliminate (D'Souza, 1998; Levey, 2003; Steele, 1990, 1998; Sowell, 1990; Thernstrom & Thernstrom, 1997, 1999, 2003; Ward, 2007; Williams, 2008).

Shelby Steele specializes in race relations, multiculturalism, and affirmative action. He is a member of the National Association of Scholars, the National Board of the American Academy for Liberal Education, the University Accreditation Association, and the National Board at the Manhattan Institute's Center for the New American Community. Steele (1998) argues that affirmative action policies that are race based only perpetuate already existing stereotypes of African Americans being intellectually inferior to Whites. Steele sees Affirmative Action as stagnating and undermining the potential of minority students.

Dr. Walter E. Williams is a Distinguished African American Professor of Economics faculty member of George Mason University in Fairfax, Virginia since 1980. He serves on the Boards of Directors for Grove City College, the Reason Foundation, and the Hoover Institution, and the Advisory Boards for the Cato Institute, the Landmark Legal Foundation, the Institute of Economic Affairs, and the Heritage Foundation. Williams (2008) believes that many minorities admitted in to tier one university via race based affirmative action policies cannot make the grade once admitted because of the lack of merit. Williams believe that curriculum become watered down to accommodate minority students are under prepared for college level learning.

Williams (2008) argument raises other questions as to the practices of universities in admitting minority athletes under race based admissions policies. Does this sub culture of minority students contribute academically and intellectually while in college or later within society as much as other minorities applying with similar GPA's that are not athletes? Do colleges and universities value minority athletes more for the potential notoriety and potential financial gains they bring to the university than non-athletic minority applicants while under the guise of utilizing race based Affirmative Action policies to diversify its student body for the betterment of student development? If so, how does this prevent or contribute to discriminatory admissions practices?

Abigail Thernstrom is a senior fellow at the Manhattan Institute in New York, a member of the Massachusetts state Board of Education, the Vice Chair of the U.S. Commission on Civil Rights, and a Board of Advisors member of the U.S. Election Assistance Commission. Stephan Thernstrom is the Winthrop Professor of History at Harvard University, where he teaches American social history. Thernstrom & Thernstrom (1999) maintains that Affirmative Action has a double standards and race should not be a factor in admissions policies because it is a judgment based on race which is discriminatory. It is not only those in academia who oppose Affirmative Action Policies. The only African American Justice to the United States Supreme Court, Clarence Thomas (2007) believes it creates "a cult of victimization" and implies blacks require "special treatment in order to succeed". Thernstrom & Thernstrom strongly believe that Affirmative Action Race Conscious Admissions Policies, stigmatize minority students, limit admissions for more qualified White students, show preference, facilitates reverse racism, and simply serves as a pernicious palliative to avoid the "real" issues of under prepared minority college applicants.

However, the charge of reverse discrimination ignores history. Many predominately White institutions claim their admission policies are race-neutral when in fact they are upholding traditions that extend back beyond the end of slavery in the U.S. and is the reasons why they remain predominately White in their student body, faculty and administration.

While it may be argued that racial diversity alone is not necessarily the only criterion for facilitating a broad mix of cultural experiences and varying perspectives that create diversity, empirical research has shown that race neutral admission does not racially diversify student bodies as effectively as race based admissions policies. Race based admission policies have shown far ranging significant benefits for all students and the diversifying of the university as a whole. More importantly, race based admissions policies is essential for preparing student in developing empathy, critical thinking, conscious learners with transferable knowledge that is critical for participating in a pluralistic society within a global community.

While some White and Asian college applicants who have been rejected may feel that affirmative action policies discriminated against their admission, research conducted by Bowen & Bok (1998) and Chung & Espenshade (2005) revealed that the removal of the race based component in Affirmative Action policies would only have a very minimal affect on White's acceptance rates in elite universities. Their research concluded that the removal of race based affirmative action policies would only reduce the acceptance rate of minorities in particularly those of African American and Latino applicants (2005). In fact, search studies conducted by Hurtado & Cade, 2001; Laycock, 2001, in regards to the *Hopwood v. Texas* case, showed the impact of the dismantlement of Affirmative Action policies, and the abolition of Affirmative Action based on legislative measure, based on a study by Heller & Schwartz, 2002, and Pusser, 2001, that the number of minority applicants would decrease dramatically. In addition, research conducted by Hicklin in 2007, revealed that the elimination of Affirmative Action policies in higher educational institutions in the United States would redistribute minority students from elite universities, to less selective ones.

According to Allen, Bonous-Hammarth, & Teranishi (2006) in their book entitled "Higher Education in a Global Society Achieving Diversity, Equity and Excellence", they state the problem of diversity in the 21<sup>st</sup> century is that it is rapidly expanding but with resistance from persistent status quo. The authors further state that power inequalities by race, ethnicity, gender, sexual orientation, class, language, citizenship and region continue to stubbornly strive in society with consequences that directly affect higher education.

It is imperative that students experience a variety of perspectives not only from a diverse faculty and student body but also from multicultural curriculum in order to think critically and contribute in a positive significant way that takes in consideration other cultures as future leaders of the 21<sup>st</sup> century. As we become a global community of learning, colleges and universities should make strong efforts in developing more inclusive curriculum in all disciplines. This will not only allow for varying perspectives to play a significant role in shaping the knowledge of students the diversity, it will ensure that classrooms facilitate more progressive, higher level, learning experiences that are reflective of global communities.



## Conclusion

Race has always been and will continue to be an obstacle in Higher Education (Altbach & Lomotey, 1991). However, in our attempts to unify institutions of higher learning and eliminate segregation through equity and equality, who will be the winners and losers? How do we define “educationally justifiable”? There is a great deal of ambiguity in the case of *United States v. Fordice*. Future law suits could attempt to utilize *Fordice* to force the courts to close HBCU’s arguing their unconstitutionality due lack of racial diversity or force HBCU’s to merge with predominately White institutions resolve the issue of racial discrimination.

While there are few scholars and practitioners of education who will deny that it is imperative that students experience a variety of perspectives not only from a diverse faculty and student body but also from multicultural curriculum in order to think critically and contribute in a positive significant way that takes in consideration other cultures as future leaders of the 21<sup>st</sup> century, there is still much ambiguity in regards to racially diversifying higher education student bodies. The literature used here has raised some red flags as to the sincerity of the use of race based affirmative action admissions policies. Is the current use only based on race merely racial politics or for gains on other agenda’s? Is it possible in our growing multicultural society that the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 can no longer substantiate the necessity of the continuance of Affirmative Action Policies to enforce Race Conscious Undergraduate Admissions for minorities at colleges & universities allowing institutions of higher education to tailor their undergraduate admission policies utilizing race as an important criteria?

As we become a global community of learning, colleges and universities must make strong efforts in developing admissions policies that allow access to those traditionally and historically discriminated against for opportunities of academic success. This will not only allow for varying perspectives to play a significant role in shaping the knowledge of students the diversity, it will ensure that classrooms facilitate more progressive, higher level, learning experiences that are reflective of global communities. It is clear from the literature reviewed that the propensity of institutions to engage in affirmative action policies revolve around the dimensions of historical, demographic, political, and regulatory contexts (Grotsky & Kalogrides, 2008).

It has been sixty plus years since *Swanson v. Rector of Visitors of the University of Virginia*. However, the rancorous and intense debate on race based admissions policies will remain a serious issue within Higher Education until there is a rise in consciousness that see and understands the value of diversity in race, gender, and the importance of equality, equity, opportunity and access to resources for an educated populace and a sustainable future. Until then, Title VI of the Civil Rights Act of 1964 and Race Conscious Admissions Policies will continue to be the key that unlocks the door to higher education for minority students across this nation.

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