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Article

THE RELEVANCE OF BLACK LAW SCHOOLS

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**I. Introduction**

In his 2007 autobiography, *My Grandfather's Son*, United States Supreme Court Justice Clarence Thomas says affirmative action did more to hinder rather than help his career.<sup>1</sup> Deeming his Yale law degree essentially worthless, Thomas believed his admission to Yale under affirmative action significantly diminished its value.<sup>2</sup> Despite Thomas's pessimistic perspective, Bowen and Bok argued that affirmative action was instrumental in changing the racial make-up of many elite institutions.<sup>3</sup> Further, the Supreme Court's ruling in *Grutter v. Bollinger* illustrated that enhancing diversity adds social value.<sup>4</sup> It noted that diversity is a "compelling interest" that provides for ethno-competent interactions needed to sustain the U.S. as a leader in a diverse global market.<sup>5</sup> In addition, affirmative action policies curb the effect of structural racism, which has prevented the integration of students of color into many predominantly white institutions.<sup>6</sup> Affirmative action serves as a counterbalance to institutional policies, practices, structures, and more, which are racist in nature. However, an increasing number of states—Arizona, Colorado, \*146 Missouri, Nebraska and Oklahoma (Nebraska being the latest)—have already or are beginning to navigate the anti-affirmative action waters charted by California's Proposition 209.<sup>7</sup>

States that are moving to abandon the traditional use of affirmative action are making it more difficult for colleges and universities seeking to enroll diverse student populations. U.S. Census Bureau data predicts massive increases in the nation's minority populations, especially in states like California, Texas, and Florida.<sup>8</sup>

To help increase enrollment of underrepresented groups, institutions have routinely turned to affirmative action policies that provide varying levels of preferential treatment to underrepresented groups.<sup>9</sup> In particular, preferences in employment and college admissions are given to underrepresented individuals over white males, when candidates are similarly qualified.<sup>10</sup> These actions are designed to overcome the remnants of past discrimination, which prevented equitable access to public and private institutions for women and minorities.<sup>11</sup> Many institutions still operate under the auspices of affirmative action, but a growing number are prevented by ballot initiatives<sup>12</sup> from using race-based policies to grow and sustain their minority undergraduate enrollments.

As troubling as the inequities in representation are in higher education at the baccalaureate level, inequities in graduate and professional programs are even more concerning. For example, law schools have notoriously been among the most difficult professional programs to diversify.<sup>13</sup> The American Bar Association (hereinafter ABA) has acknowledged that the percentage

of minorities enrolled in law schools dropped by about twenty percent \*147 in the middle of this decade.<sup>14</sup> The “Miles to Go” study, conducted by the ABA’s Commission on Racial and Ethnic Diversity, found that African Americans are more disproportionately underrepresented in the legal profession than in any other similarly prominent occupation.<sup>15</sup>

This article examines the relevance and significance of Historically Black College and University (HBCU) law schools in the nation. Research shows that access to law school for most African Americans is made possible through Black colleges of law specifically: Howard University, North Carolina Central University, Florida A&M University, Texas Southern University, the University of District of Columbia, and Southern University Law Center.<sup>16</sup> Section II of this article catalogues the emergence of historical black law schools and their importance. Section III explores whether HBCUs have helped to increase minority enrollment. Finally, this article concludes with a discussion about the relevance of this article in assisting others.

## II. The History of Black Law Schools

### A. The Emergence of the Nation’s First Black Law Schools

The first school of law was established in Virginia at the College of William and Mary in 1779.<sup>17</sup> It was known as the Marshall-Wythe School of Law.<sup>18</sup> In January of 1869, Professor John Mercer Langston started the first black law school, Howard University Law Department.<sup>19</sup> The school was established to prepare \*148 black lawyers who were committed to helping black Americans protect their civil rights.<sup>20</sup> The North Carolina Central University (NCCU) School of Law was the second law school founded for blacks, established in 1940 as the North Carolina College for Negroes Law School, during a time of legal segregation in the United States.<sup>21</sup> The North Carolina General Assembly founded the law school to provide legal education opportunities for blacks with the goal of avoiding problems experienced in other states where blacks sued to gain entry to public, all-white law schools.<sup>22</sup>

America’s HBCUs, in their very young history, have educated large numbers of minority graduate and professional degree holders. Largely, this is a result of policies, which prevented or created barriers for African Americans and other minority applicants to attend most predominately white institutions.<sup>23</sup> Graduate and professional schools emerged during the 1940s in the wake of several court cases brought by African Americans who were denied entry into graduate school at all-white public universities in their states.<sup>24</sup> As a result of the lawsuits, legislators in these states opted to start publicly supporting HBCUs rather than integrating the all-white schools.<sup>25</sup> This led to the birth of a number of black law schools, such as Texas Southern University’s Thurgood \*149 Marshall School of Law and Florida Agricultural and Mechanical University College of Law.<sup>26</sup>

### B. Using the Court System to Gain Access to Legal Programs

In 1946, the Texas State Senate established Texas State University for Negroes (now called Texas Southern University) that offered programs of higher education in law, pharmacy, dentistry, journalism, education, literature, arts, sciences, medicine, and other professions.<sup>27</sup> This legislation reinforced a constitutionally mandated separate but equal doctrine.<sup>28</sup> The Texas Legislature was forced to act after Mr. Heman M. Sweatt, a black male, was refused admission into the University of Texas School of Law.<sup>29</sup> Sweatt sued to gain entry into the state’s majority white law school but was denied.<sup>30</sup> The Texas Supreme Court held that admission into an all black law school, which was opened in 1947 by the Texas State University for Negroes (Texas Southern University), was appropriate and largely equal to the education he would receive at the University of Texas.<sup>31</sup> Sweatt appealed this decision to the U.S. Supreme Court and was granted a writ of certiorari.<sup>32</sup> The Court ultimately ruled in his favor based on the U.S. Constitution’s Equal Protection Clause stating: “[w]hether the University of Texas was compared with the original or new law school for Negroes, the Court could not find substantial equality in the educational opportunities

offered to White and Negro law students by the state.”<sup>33</sup> Furthermore, petitioner had a constitutional right to a legal education equivalent to that offered to students of other races, and it was not available in a separate law school.<sup>34</sup> The Court ordered the State of Texas to grant the \*150 appellant admittance to the University of Texas School of Law, striking down the state's separate but equal laws.<sup>35</sup>

A few years later, a similar case was filed in the state of Florida. “In April 1949, Virgil Darnell Hawkins, a black school teacher from Daytona Beach, Florida, applied for admission to the whites-only University of Florida [UF] College of Law in Gainesville.”<sup>36</sup> The UF College of Law was founded in 1909 as the only publicly supported law school in Florida.<sup>37</sup> In an effort to maintain segregated schools, Florida officials refused to grant Hawkins access to the UF College of Law.<sup>38</sup> Undeterred, Hawkins filed a mandamus action<sup>39</sup> against the UF governing body to the Supreme Court of Florida claiming his civil rights were being violated.<sup>40</sup> Hawkins's lawsuit charged that, because UF's College of Law was the only tax-supported institution of its type in the state, “the denial of his application on the basis of race violated his civil rights under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.”<sup>41</sup> Four other black students joined Hawkins in the suit; all of them were seeking admission into UF, albeit different programs (i.e. law, pharmacy, agriculture, and engineering programs).<sup>42</sup>

In Florida ex rel. Hawkins v. Board of Control, the plaintiff, Mr. Hawkins, argued that the Board of Control of Florida, in denying him the right to attend Florida's law school because of his race, committed an arbitrary and illegal violation of his constitutional right to equal protection under the law.<sup>43</sup> The Court held that a Negro is entitled to prompt admission to a graduate professional school of a state, under the rules and regulations applicable to other qualified candidates.<sup>44</sup> In an effort to maintain segregation \*151 at the UF College of Law, the Board of Control established graduate level schools of law, mechanical engineering, agriculture, and pharmacy at Florida Agricultural and Mechanical College for Negroes, later renamed Florida Agricultural and Mechanical University (FAMU), on December 21, 1949.<sup>45</sup> Though Hawkins could not attend UF Law School, it was integrated in 1958.<sup>46</sup>

The U.S. Supreme Court held that its previous rulings applied only to graduate study and had ordered the admission of Negroes to graduate study without race-based discrimination.<sup>47</sup> However, the Court, in a turnabout, stated that its second decision had absolutely no application to a Negro applying to a state law school.<sup>48</sup> The Court subsequently remanded the case to the State of Florida indicating that Hawkins was entitled to prompt admission under the rules and regulations applicable to other qualified candidates.<sup>49</sup> Consequently, the State of Florida did not view the Supreme Court Ruling as an immutable directive or mandate based on the aforementioned language. Because under the separate and equal doctrine, the Florida Supreme Court decided that a College of Law at a black institution was sufficient for meeting the requirements of Mr. Hawkins.<sup>50</sup> Although a black institution was certainly not equal in anyone's eyes, the Florida Supreme Court was keenly aware that the situation was acutely volatile; disapproving alumni and other supporters of the University of Florida College of Law could easily withdraw their financial contributions as well as their sons and daughters. One must remember that segregation was still firmly entrenched in the minds and hearts of many white southerners during this period in time.

In the State of Oklahoma, and at roughly the same time, a case with much of the same argument was being heard. In 1950, G. W. McLaurin, a black citizen of Oklahoma with a Master's degree, \*152 was denied entry into the University of Oklahoma for doctoral study in education.<sup>51</sup> McLaurin sued the state claiming his constitutional right of equal protection under the law was violated because of his race.<sup>52</sup> The University's refusal to admit him was based on the current law in Oklahoma, which prohibited blacks and whites from attending the same schools.<sup>53</sup> McLaurin won a partial victory when a district court ruled that he must be admitted, although he would be required to sit, study, and eat separately from white students.<sup>54</sup> McLaurin pursued the case all the way to the U.S. Supreme Court, which ordered an end to his separate treatment. The Court found the following:

We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, 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. The judgment is reversed.<sup>55</sup>

Blacks have fought long and hard to gain access to a quality legal education. Almost two and one - half centuries have passed since the first black law school opened its doors, and it is important to analyze whether HBCUs are still relevant today.

### III. Discussion & Purpose of the Study

#### A. Enrollment Data for Minority Students

Minority enrollment in graduate and professional programs has increased. Data shows that “minority enrollment in graduate programs increased 254 percent (from 134,000 to 475,000) [by 2004], while white enrollment increased 27 percent (from 1.1 to \*153 1.4 million).”<sup>56</sup> Hispanics and Asian/Pacific Islanders are represented more than any other groups.<sup>57</sup> Ethnic minorities<sup>58</sup> accounted for about 20 percent of graduate enrollment in 2004, up from almost 10 percent previously.<sup>59</sup> In professional programs, the National Center for Education Statistics (NCES) study expressed that “[m]inority enrollment in first-professional programs grew 319 percent (from 21,000 to 88,000), compared with an 8 percent growth in White enrollment...”<sup>60</sup>

Minority representation in law schools still lags behind that of whites.<sup>61</sup> Despite efforts over the past forty years with affirmative action,<sup>62</sup> race conscious admissions<sup>63</sup> and other programs intended to increase diversity in the nation's law schools, minority enrollment in majority institutions remain low when compared to whites.<sup>64</sup>

#### B. Enrollment Data for White Students

The various court cases leading to desegregation in higher education had no apparent negative effect on the number of whites enrolling in graduate and professional schools. The number of students in graduate schools and professional programs went up during the period. Data provided by NCES noted that “[b]etween 1976 and 2004, enrollment in graduate programs increased 62 percent (from 1.3 to 2.2 million), while enrollment in \*154 first - professional programs increased 37 percent (from 244,000 to 335,000).”<sup>65</sup> NCES (2006) reported that graduate and professional programs are expected to maintain their growth over the next decade.<sup>66</sup> With the expectations of graduate enrollment increasing in the future, the NCES (2006) report found that enrollment will reach 2.6 million, and professional enrollment will reach 437,000 by 2015.<sup>67</sup>

#### C. Enrollment Data Based on Gender

Data compiled by the NCES (2006) study postulated that prior to 2004, there was a larger percentage of men than women attending both graduate and professional programs; however, in 2004, “female enrollment in graduate programs increased 106 percent to 1.3 million, while male enrollment increased 23 percent to 879,000.”<sup>68</sup> As a result of the increase in female enrollment, females made up 59 percent of graduate programs in 2004. In professional programs, female enrollment increased over 200 percent to 166,000 by 2004, but male enrollment decreased by 11 percent to 168,000.<sup>69</sup> Females made up 50 percent of professional enrollment in 2004, and minorities were also better represented in graduate and professional programs.<sup>70</sup>

#### D. Factors Contributing to Low Minority Enrollment

Data suggests that the early gains of affirmative action have been lost by a lack of widespread adherence to this policy or as a result of other policies, which diminish the chances of minorities gaining admission to law school. According to the ABA the number of applicants to law schools, public and private, between 1995 and 2005 rose dramatically for all students regardless of race, peaking in 2004.<sup>71</sup> The large increase in applications, however, \*155 did not translate into a similar rise in the number of admits for all races.

The data from the ABA shows an increase in law school applications around the nation of nearly 25,000 between the base year of 1995 and the peak year of 2004.<sup>72</sup> However, white applicants were responsible for much of the increase with over 12,000 more applications during 2004, followed by Asians, Hispanics, and African American applicants, respectively.<sup>73</sup> While the number of minority law school applicants admitted rose by about 5,000, Asians, whites, and Hispanics accounted for nearly all of the 5,000 new slots for law schools.<sup>74</sup> The number of African American students admitted into law schools remained static over the ten-year period.

Data provided by the ABA illustrates that the number of blacks<sup>75</sup> in the law profession is not proportional to their representation in wider society. The impact of this uneven representation is manifested in a lack of trust of the nation's judicial system among minorities. Partly, this is a result of there being so few lawyers with the same racial/ethnic background as minorities.<sup>76</sup> Kim Keenan, past president of the National Bar Association (NBA), indicated that individuals of color will be incapable of finding attorneys of color as a result of the underrepresentation of African Americans in the legal profession.<sup>77</sup>

The underrepresentation of African Americans in law school and in the legal profession should not be interpreted as an indication that African Americans are unable to succeed in law school. Randall suggested that underrepresentation is primarily a by-product of discrimination, as opposed to a lack of ability.<sup>78</sup> Randall noted that law schools are discriminating improperly with the use of the Law School Admissions Test (LSAT) because institutions are using the exam as a cut-off tool in determining whom \*156 to admit.<sup>79</sup> The Law School Admissions Council (LSAC) indicated that this is an improper procedure. LSAC notes that the probability of scores on the LSAT being accurate (representing the true ability of the examinee) is 65 percent. Thus, the LSAT may be viewed as an ineffective tool in determining law school admission, especially as a stand-alone predictor of success. Despite this fact, 90 percent of the nation's law schools base their admissions decisions on a combination of undergraduate grade point average and the applicant's LSAT score.<sup>80</sup> The continued misuse of the LSAT has a disproportionately negative impact on minorities, specifically black applicants.

#### IV. Conclusion

The data and court cases presented herein can serve as an intricate component of the landscape of the legal profession. We believe that the information must be presented to inform stakeholders about the importance of professional programs (such as J.D. programs) at HBCUs. This manuscript is a benefit to others (researchers, lawyers, administrators of law schools and personnel within the academy) who are interested in the subject of diversity in higher education. It may serve to encourage researchers to look further into the impact that HBCUs have had, and continue to have, on diversifying graduate and professional fields, such as medicine, engineering, etc. Hence, as policymakers become more aware of the significance of black law schools, hopefully they will work to channel funding toward them.

#### Footnotes

- 1 See Clarence Thomas, *My Grandfather's Son: A memoir* (2007).
- 2 See generally *id.* (In his memoir, Clarence Thomas informed readers that his law degree from Yale was watered down as a result of affirmative action).

- 3 William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998).
- 4 [Grutter v. Bollinger](#), 539 U.S. 306 (2003) (holding that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body).
- 5 *Id.* at 328-30.
- 6 *Id.*
- 7 Michael J. Kaufman, [From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives](#), 13 MICH. J. RACE & L. 461, 544-45 (2008).
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 *Id.*
- 12 See e.g., California's Proposition 209, Michigan's Proposal 2 and Washington State's Initiative 200.
- 13 *Id.*
- 14 ABA Comm. on Racial and Ethnic Diversity, *Miles to go 2000 report: Minorities fare worse in law than in other profession*, [http:// www.abanow.org/2000/07/aba-presidentwilliam-paul-warns-that-diversity-effort-must-be-sustained-cites-miles-to-go-2000-report/](http://www.abanow.org/2000/07/aba-presidentwilliam-paul-warns-that-diversity-effort-must-be-sustained-cites-miles-to-go-2000-report/) (last visited July 2012).
- 15 *Id.*
- 16 Gary S. Rosin, *Endangered: Historically Black Law Schools?*, 2 (2011), available at [http://apps.americanbar.org/legaled/committees/Standards%20Review%20Review%20ocuments/20110525\\_comment\\_outcome\\_measures\\_gary\\_rosin\\_revised.pdf](http://apps.americanbar.org/legaled/committees/Standards%20Review%20Review%20ocuments/20110525_comment_outcome_measures_gary_rosin_revised.pdf).
- 17 College of William & Mary, *History of America's First Law School*, <http://law.wm.edu/about/ourhistory/index.php> (Last visited October 27, 2012).
- 18 *Id.*
- 19 Howard University, *History of Howard University School of Law*, <http://www.law.howard.edu/19> (Last visited March 20, 2007).
- 20 *Id.*
- 21 North Carolina Central University, *History of North Carolina Central University School of Law*, <http://law.nccu.edu/about/history/> (Last visited October 27, 2012).
- 22 See [Florida ex rel. Hawkins v. Board of Control](#), 350 U.S. 413 (1956)(denying certiorari holding “that the law student, an African American, was entitled to prompt admission under the rules and regulations applicable to other qualified candidates for admission to a graduate professional school”); see also [Sweatt v. Painter](#), 339 U.S. 629 (1950)(holding that the equal protection clause required that petitioner, who had been denied because of race, be admitted to the University of Texas Law School.).
- 23 See H. Patrick Swygert, President Emeritus, Howard University, *The accomplishments and challenges of historically Black colleges and universities*, Address at 2nd Annual African American Leadership Summit (April 28, 2004).
- 24 Michael Gannon, *The New History of Florida* (Univ. of Florida Press 1996); Larry O. Rivers, *Florida A&M University College of Law (1949-2000)*, (Florida A&M University Press 2000).
- 25 See [Sweatt](#), 339 U.S. at 633-635.

- 26 Larry O. Rivers, *Florida A&M University College of Law (1949-2000)*, (Florida A&M University Press 2000).
- 27 S.B. 140, 82nd Leg .... Reg. Sess. (Tx. 1946).
- 28 [Sweatt](#), 339 U.S. at 633-635.
- 29 *Id.* at 634-636.
- 30 *Id.* at 631-633.
- 31 *Id.* at 635-636.
- 32 *Id.* (A writ is a formal written order issued by the court calling up the records of the lower court).
- 33 [Sweatt v. Painter](#), 339 U.S. 629, 633 (1950).
- 34 *Id.* at 635.
- 35 *Id.* at 636.
- 36 See [Florida ex rel. Hawkins v. Board of Control](#), 350 U.S. 413 (1956).
- 37 *Id.* at 414.
- 38 *Id.*
- 39 A mandamus action or writ of mandamus is traditionally used by federal courts to confine an inferior court to a lawful exercise of its jurisdiction or to compel an inferior court to exercise its authority when it had a duty to do so.
- 40 [Hawkins](#), 350 U.S. at 414.
- 41 *Id.*
- 42 See Gannon, *supra* note 24.
- 43 [Hawkins](#), 350 U.S. at 413.
- 44 *Id.* at 414.
- 45 See Rivers, *supra* note 26.
- 46 Michelle Klink, *The reestablishment of the Fla. Agric. & Mech. Univ. Coll. of Law: A policy analysis of equality of educational opportunity and legal education policy making in Fla. (2003)* (unpublished doctoral dissertation, The Fla. State Univ.)(on file at with The Fla. State Univ.).
- 47 See generally [Sweatt](#), 339 U.S. at 633-636.
- 48 See [Hawkins](#), 350 U.S. at 414.
- 49 *Id.*
- 50 See generally *id.* at 413.
- 51 [McLaurin v. Oklahoma State Regents for Higher Educ.](#), 339 U.S. 637, 638-39 (1950).
- 52 *Id.* at 638-640.
- 53 *Id.*
- 54 *Id.* at 640-642.

- 55 Id. at 642.
- 56 U.S. Department of Education, National Center for Education Statistic (NECS), The Condition of Education 2006, NCES 2006-071, 37 (U.S. Government Printing Office 2006).
- 57 Id.
- 58 This manuscript uses minorities and underrepresented groups interchangeably.
- 59 Id.
- 60 Id.
- 61 ABA Total Minority Enrollment Data 1987-2011, [http:// www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_minority.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_minority.authcheckdam.pdf).
- 62 Affirmative action is defined as governmentally required positive efforts, beyond elimination of discrimination, to seek out and employ persons of groups that have been discriminated against.
- 63 See *Gutter*, 539 US 306 (2003)(Supreme Court upheld the right of colleges to consider race in admissions decisions).
- 64 Vernellia R. Randall, The 2004 Whitest Law Schools Report, [http:// academic.udayton.edu/race/03justice/LegalEd/Whitest/index.htm](http://academic.udayton.edu/race/03justice/LegalEd/Whitest/index.htm) (Last visited January 23, 2007).
- 65 NCES, *supra* note 17, at 37.
- 66 Id.
- 67 Id.
- 68 Id.
- 69 Id.
- 70 Id.
- 71 ABA Enrollment and Degrees Awarded 1963-2011, [http:// www.americanbar.org/content/dam/aba/Administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/Administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf).
- 72 Id.
- 73 Id.
- 74 Id.
- 75 This manuscript uses African American and Black interchangeably.
- 76 See Randall, *supra* note 64.
- 77 K. Mallory, Black Presence in law schools dwindling, *The Chicago Defender*, Aug. 5, 2005.
- 78 See Randall, *supra* note 64.
- 79 Id.
- 80 See *id.*