



Photo credit: AP Photo

This December 1938 photo shows Lloyd Gaines, a young African-American, who applied to the University of Missouri's law school and was denied admission. He carried his case to the Supreme Court, and in its decision the High Court ruled that Gaines was to be admitted into the MU institution.

Brown's Legacy Then and Now

*Race and Law School
Admissions Debates
Continue after Nearly
70 Years*

by Lauren Collins

Next month marks the 50th anniversary of the landmark desegregation case, *Brown v. Board of Education*. Although this case represents a major victory in the battle for civil rights, the struggle against racism in education began some 20 years prior to *Brown*.

During the 1930s and 1940s, at least seven African-American law school candidates aggressively challenged the unequal treatment of minority applicants in state courts, some eventually reaching the U.S. Supreme Court. Early successes in these cases lead to the more sweeping *Brown* decision, which then contributed to further law school admission policy reform. Discussion about the role of race in higher education admission policies persists today, with cases challenging affirmative action and racial quotas continuing the nearly 70-year debate.

Law School Pre-*Brown*

Long before *Brown*, a number of minorities sought court intervention to challenge law school admission practices. In what became Justice Thurgood Marshall's first major civil rights victory, the NAACP Legal Defense Fund tested a strategy to open the doors of mainstream law schools to African-Americans in a state court case brought against the University of Maryland Law School. In *Murray v. Maryland* (169 Md. 478, 182 A. 590 (1936)), the Maryland Court of Appeals upheld a writ of mandamus issued by a lower court compelling the University of Maryland to admit Donald Murray, a qualified law school applicant who was denied admission

solely on the basis of his race. The court found that no other law school of equal measure existed in Maryland for blacks to attend and determined that it could not mandate the creation of a new school. Thus, the court found that Murray's admission into the University of Maryland law school was properly mandated.

In 1935, Lloyd Gaines, an African-American, was refused admission to the School of Law at the State University of Missouri. When Gaines applied for admission, Missouri, which did not have a law school that admitted African-Americans, had a policy of providing tuition and fees for attendance at out-of-state schools to qualified African-American applicants. The Supreme Court found that this practice violated the *Plessy v. Ferguson* (163 U.S. 537 (1896)) standard of "separate but equal." Gaines was entitled to attend law school in Missouri; forcing him to leave the state to pursue a law degree violated his rights under the Equal Protection Clause of the U.S. Constitution. Incidentally, Gaines never enrolled in the law school at Missouri; after the favorable decision, he disappeared and was never heard from again.

As a result of the decision in *Missouri ex rel. Gaines v. Canada* (305 U.S. 337(1938)), the Lincoln University School of Law was created. Lincoln admitted 34 black students per year for four years until it closed due to lack of students during World War II. Before the advent of war, schools like Lincoln graduated thousands of minority students.

Many of the schools created to provide separate facilities were not nearly as successful as Lincoln. Ten years after *Gaines*, Ada Lois Sipuel, also represented by Thurgood Marshall, was granted a seat at the Langston University School of Law, a new Oklahoma school created under the *Gaines* standard solely for Sipuel. However, in *Sipuel v. Oklahoma State Regents* (322 U.S. 631 (1948)), the equality requirement of the "separate but equal" standard was found lacking. In 1949, after remand by the Supreme Court and further litigation, Sipuel became the first African-American woman to attend and graduate from a white majority law school in the South.

Two years after the *Sipuel* decision, the Supreme Court determined that the treatment received by Sipuel should be the law of the land. In *Sweatt v. Painter* (339 U.S. 629 (1950)), a Texas case, it was found that the provision of equal educational opportunities was not likely to result from attendance at law schools created solely in

response to admission denials to minority applicants in mainstream schools.

The law school created in Texas as a consequence of the *Sweatt* controversy, the Texas Southern University Thurgood Marshall School of Law, had an inadequate faculty, insufficient library volumes, and no other students. (Today, however, it is a reputable school with a 35 percent increase in applications, according to its latest annual report.) Thus, the Supreme Court found admission into the newly developed school did not adequately protect Sweatt's constitutional rights.

At the same time the *Sweatt* and *Sipuel* controversies were brewing, similar lawsuits were filed in North Carolina (*Fisher v. Hurst*, 333 U.S. 147 (1948)), Tennessee (*Gary v. University of Tennessee*, 97 F. Supp. 463 (D. Tenn. 1951)), and Florida (*Hawkins v. Board of Control of Florida et al.*, 350 U.S. 413 (1956)). Nowhere is the effect of *Brown* on law school admissions cases more evident than in the Florida case.

Virgil Hawkins' Story

In 1949, Virgil Hawkins and four others submitted applications to attend the University of Florida's law school but were denied. Though his co-applicants either chose to seek legal education outside the state or not at all, Hawkins decided to fight, using the precedent set by *Gaines*. In blatant disregard of the *Gaines* decision, the Florida courts denied Hawkins admission into the University of Florida in *State ex rel. Hawkins v. Board of Control of Florida et al.* (47 So. 2d 608, 1950 Fla). The court said Hawkins could either attend law school

outside the state at the state's expense or he could attend a law school created solely for his attendance at Florida A&M University, a predominantly black college.

Hawkins' claim eventually reached the U.S. Supreme Court, where a decision in the case was put on hold to allow for the more pressing decision in *Brown*, which the court anticipated would provide some

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—Charles Daye, the first African-American tenure-track professor at the University of North Carolina



direction in the *Hawkins* case. One week after the *Brown* decision, the court directed that the Florida courts review *Hawkins* in light of the *Brown* decision.

The Florida courts, however, used the opinion in the implementation phase of

Brown, referred to as *Brown II* (349 U.S. 295 (1955)), to prevent Hawkins' enrollment at the University of Florida. The Florida Supreme Court circumvented the U.S. Supreme Court's clear implication that Hawkins should be admitted under the *Brown* standard by arguing that implementation under *Brown II* could not be successful until there had been a change in the racial climate in Florida.

In 1956 the U.S. Supreme Court expressly directed that Hawkins, as a qualified applicant, was entitled to be admitted to the University of Florida. The court, relying on the decisions in *Sweatt* and *Sipuel*, wrote:

As this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates (*Florida ex rel. Hawkins v. Board of Control of Florida et al.*, 350 U.S. 413).

In response, the university changed the admissions standards at the law school so that Hawkins, on his original application, was no longer qualified for admission. Hawkins ended his battle upon the agreement that other minorities with the newly determined qualifications would be granted admission into the law school. The University of

Further Reading

For additional historical information and discussion of the cases examined in this article, consult the following titles.

Agnihotri, Bishma, Kumar, *Negro Legal Education and "Black" Law Schools*, 17 Loy. L. Rev. 245 (1970-1971).

Daye, Charles Edward, *African American and Other Minority Students and Alumni, in Sesquicentennial History of the University of North Carolina School of Law*, 73 N.C. Law Review 675 (1995).

Dubin, Lawrence, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 Fla. L. Rev. 913 (1999).

Hawkins, B. Denise, *Cross-Examining Law Schools: Battle Over New Florida Law*

School Underscores Lack of Black and Hispanic Students, Black Issues in Higher Education, v. 10 (June 3, 1993) p. 10-15.

Kidder, William C., *Law and Education: Affirmative Action Under Attack: The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 Harv. BlackLetter J. 1 (2003).

Paulson, Darryl and Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 Fla. St. U. L. Rev. 59 (1984).

Rabby, Glenda Alice, *The Pain and the Promise: The Struggle for Civil Rights in Tallahassee, Florida*, University of Georgia Press (1999).

Smith, J. Clay, Jr., *Emancipation: The Making of the Black Lawyer 1844-1944*, University of Pennsylvania Press (Philadelphia) (1993).

Welch, Susan and John Gruhl, *Does Bakke Matter? Affirmative Action in Minority Enrollments in Medical and Law Schools*, 59 Ohio St. L. J. 697 (1998).

Williams, Juan, *Thurgood Marshall: American Revolutionary*, Random House Publishing (1998).

Florida College of Law graduated its first African-American student, George Allen, in 1962.

The Practical Effects of *Brown*

It took many years for southern African-Americans to feel the full effect of *Brown*. In 1972, Charles Edward Daye became the first African-American tenure-track professor at the University of North Carolina (UNC). Daye recalls that the impact of the *Brown* decision, made when he was just 10 years old, was not immediately apparent. In fact, 12 years later, he graduated from what was still an “all-black county school,” he said, in Durham, North Carolina.

The *Brown II* mandate, that integration happen with “all deliberate speed,” seemed to creep along in Durham, leading Daye and his contemporaries to wonder whether their lives had been impacted by *Brown* at all. Nevertheless, Daye later realized that he is indeed a direct beneficiary of *Brown*. In fact, Daye was inspired to become a lawyer during a speech about the implementation of *Brown* given by North Carolina attorney and civil rights leader Floyd McKissick.

Daye also credits *Brown* for his acceptance at UNC, though almost 20 years after the decision. “I don’t think it was [merely] fortuitous that the law school at UNC was ready for me in 1972,” Daye said. “These were people who had read, studied, and understood *Brown*,” and in that climate of awareness, Daye made a professional home that he still enjoys today.

Like Daye, Professor Mildred W. Robinson of the University of Virginia School of Law never experienced a desegregated education as a child growing up in South Carolina. However, she is keenly aware of *Brown*’s centrality in her life. “Simply put, *Brown* set in motion the events that have permitted me to enjoy personal and professional experiences and opportunities that would otherwise have certainly been unavailable because of segregation,” she said.

The Legacy of *Brown* in Law School Education

As descendants of *Brown*, affirmative action and racial quota cases have replaced

desegregation lawsuits in recent years. Affirmative action in higher education was addressed in a 1977 case, *University of California Regents v. Bakke* (438 U.S. 265 (1978)), brought by a rejected white applicant to the medical school at the University of California at Davis. Bakke argued that the school’s practice of setting aside 16 of 100 slots for minority students was unconstitutional. In six opinions, the U.S. Supreme Court clearly decided that racial quotas, such as that used at Davis,



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were unconstitutional. But the court not so clearly determined that race could be a factor considered in graduate school admissions. The decision left little direction for the creation of diversity-promoting policies that would not violate the Constitution.

Though the percentage of minority applicants who were admitted to law schools across the nation began to increase after the *Bakke* decision, peaking in the mid-1980s, those numbers leveled off between 1992 and 2000. In 2000 underrepresented minorities made up less than 2 percent of law school admissions, according to statistics compiled by William C. Kidder in the *Harvard BlackLetter Journal*.

In 2003, the U.S. Supreme Court determined that the University of Michigan School of Law could continue to consider race as a factor in its individual evaluation of law school applicants. The case, *Grutter v. Bollinger*, was likely granted certiorari for two reasons. First, federal appellate courts sitting in two states,

Washington and Texas, had issued diametrically opposed opinions on the issue raised in *Grutter*.

In *Hopwood v. Texas* (78 F.3d 932 (CA5 1996)), the Fifth Circuit Court of Appeals determined that diversity was not a compelling governmental interest. The Ninth Circuit Court of Appeals in *Smith v. University of Washington Law School* (233 F.3d 1188 (CA9 2000)), however, determined that it was.

Second, university admissions officers had repeatedly, since *Bakke*, complained that the standards set out in that case were too ambiguous to apply. Legal scholars continue to question whether the court provided any guidance on the issue of university admissions at all in *Bakke*.

In *Grutter*, Justice Sandra Day O’Connor determined that exposure to a diverse student body benefited not only minority law students, but all law students. O’Connor recognized education, under the decision in *Brown*, as the “cornerstone of good citizenship.” And as the “training ground for a large number of our Nation’s leaders,” law schools must embrace diversity if they are to reflect society, she wrote.

The Michigan law school admissions policy was created after the *Bakke* decision to help enroll a “critical mass of underrepresented minority students,” according to *Grutter* testimony. By considering the whole applicant as an individual—not to the exclusion of his or her race—the Michigan plan sought to make allowances for factors that minority students continue to face, such as attendance at inferior high schools and other deficient educational opportunities. The law school, which had long been a proponent of legal education for minorities, enrolling up to 10 times the national average of students from underrepresented minority groups, was permitted to continue its plan to successfully provide minority students with a highly distinguished legal education.

When it passed legislation to permit the establishment of two new law schools in 2002, Florida demonstrated that it was no longer the same state that had fought to deny Virgil Hawkins a legal education. Despite resistance from the Florida Bar and an initial rejection by the State Board of Regents, Florida International University opened the doors of its law school in 2003. Also, Florida A&M University, the law school created for Virgil Hawkins, was reopened more than 50 years after it abruptly closed in favor of

creating a new Florida State University law school.

Though both Florida schools admit applicants regardless of race, it was well understood that providing legal education to African-Americans and Latin Americans, both underrepresented groups in the Florida Bar, is the primary goal. Between 1981 and 1991, only 4 percent of the graduates of Florida's public law schools were Hispanic and 4 percent were African-American, according to the Florida Senate Committee on Education.

Professor Taunya Banks now teaches at the University of Maryland where the law school admissions cases began. Banks recalls the excitement expressed by her aunt when she accepted a position in 1989. "I remember when we couldn't go there, and now you teach there," Banks quoted her aunt. The comment emphasized for Banks the immense amount of progress that was made during her parents' and her own lifetimes.

Though not a product of the *Brown* generation, I too am reminded every

day of the case's effects. My educational and professional careers have been and continue to be full of possibilities that would never have presented themselves without the battles won by Donald Murray, Lloyd Gaines, Ada Lois Sipuel, Virgil Hawkins, the primary and secondary school litigants from *Brown*, and all those who followed the paths paved by those brave people.

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