

MINORITY ACCESS TO HIGHER EDUCATION IN THE POST-BAKKE ERA

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Almost six years have passed since the Supreme Court's decision in the *Regents of the University of California v. Allan Bakke*.¹ The flood of legal commentaries, analyses, media reports and studies of that decision and its effects has been second only to that preceding its announcement.² Yet one is hard-pressed to arrive at any confident conclusions about the impact of that ruling upon minority admission to higher education.

Since the facts and the contours of the Supreme Court decision in *Bakke* are generally familiar, let me briefly highlight just a few points with respect to the case. Allan Bakke, a white medical school applicant, was denied admission to the University of California at Davis Medical School. He sued in state court, asserting that his rejection had been caused by the existence of a minority admissions program at Davis that set aside a fixed number of places in the entering class for which only minorities could compete. A lower court held that the Davis admissions program was unconstitutional but declined to order Allan Bakke's admission. The California Supreme Court sustained the former holding but reversed the latter. It held that the Davis program was indeed unconstitutional and Allan Bakke must be admitted.³

The United States Supreme Court accepted the case for review upon petition of the Regents. By different 5-4 alignments, it held, first, that to the extent that the California Supreme Court's ruling

1. 438 U.S. 265 (1978).

2. Justice Powell's opinion in *Bakke* makes reference to a representative sample of the scores of scholarly articles on the subject of affirmative action in higher education, *Id.* at 288 n.25. After that opinion, scholars have continued to find the topic challenging from both constitutional law and public policy perspectives. See, for examples of writing shortly after *Bakke*: *A Symposium: Regents of the University of California v. Bakke*, 67 CALIF. L. REV. 1 (1979); Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979); Lesnick, *What Does Bakke Require of Law Schools*, 128 U. PA. L. REV. 141 (1979); Stone, *Equal Protection in Special Admissions Programs: Forward From Bakke*, 6 HASTINGS CONST. L.Q. 719 (1979); and Note, *The Supreme Court, 1977 Term, Constitutional Law*, 92 HARV. L. REV. 57, 131 (1978).

3. *Bakke v. Regents of Univ. of California*, 18 Cal. 3d 34, 553 P.2d 1152 (1976).

forbade any use of race in the admissions process, it must be reversed, and secondly, that the lower court's decision to order Bakke's admission must be affirmed. The plurality for the first holding was comprised of the so-called "Brennan Group" (Justices Brennan, White, Marshall, Blackmun) and Justice Powell. The so-called "Stevens Group" (Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger) and, once again, Justice Powell, provided the votes for the second holding. The "Brennan Group" thought that the Davis program was constitutional in its entirety: race could be used as an admission criterion and setting aside a fixed number of seats for minority candidates was also appropriate under the circumstances.⁴ The "Stevens Group" believed that the Davis program violated Title VI of the Civil Rights Act of 1964, which forbids discrimination based upon race in programs receiving federal funds, both in its use of race as a criterion and in the setting aside of a fixed number of seats for minority candidates. It declined to address the plan's constitutionality.⁵

Though Justice Powell's vote was critical to both 5-4 rulings, no other Justice joined in his opinion.⁶ Hence, there was no opinion of the Court, strictly speaking. Justice Powell's opinion, given its pivotal role, has been the subject of much attention. He reached the conclusion that race may, under certain circumstances, be a criterion in the admissions process by recognizing as part of the principle of academic freedom, guaranteed by the First Amendment, the right of a university to seek racial diversity among its student body.⁷ He found, however, that the Davis practice of setting aside a fixed number of places for which only minority applicants could compete was an impermissible use of race.⁸ According to Justice Powell, this practice denied Allan Bakke his right under the Constitution and Title VI to be treated as an individual and not absolutely barred from consideration for admission because of his race or ethnic origin.⁹ The lesson many "Court-watchers" derived from Justice Powell's opinion was that race can be used as a "plus," along with other factors, in the admissions process, but that no fixed number or percentage of seats in an entering class can be set aside exclusively for minorities. At some point in the admissions process, minority and non-minority

4. 438 U.S. at 324, 368-69, 378-79.

5. *Id.* at 408, 421.

6. *Id.* at 269-324.

7. *Id.* at 311-15.

8. *Id.* at 315-20.

9. *Id.* at 319-20.

candidates must be evaluated competitively with one another prior to any final decisions as to the make-up of an entering class.¹⁰

What the *Bakke* decision has meant for affirmative action in admission to higher education has been the subject of much dispute. Some have suggested that it has had relatively little impact: schools that were committed to increasing opportunities for minorities prior to *Bakke* have maintained that commitment afterwards. Their plans have simply been somewhat altered in response to the concern of Justice Powell that fixed quotas and procedures that did not allow minority and non-minority candidates to be evaluated together were unconstitutional and illegal. Others argue that the *Bakke* decision relaxed the pressure that many institutions felt to seek out aggressively and admit, in more than token numbers, minority candidates for undergraduate, graduate and professional programs. It is also asserted that *Bakke*, because it spoke so equivocally to the question of affirmative action, caused many eligible minority candidates to abandon plans to seek admission to major, predominantly white institutions.¹¹

Of course, the "real" impact of *Bakke* upon higher education admissions may be, to quote Justice Stewart out of context, "unknown and perhaps unknowable. . . ."¹² About the only thing one can be certain of is that the headlines in June, 1978 that read "Bakke Wins" were clearly right. Allan Bakke was admitted to the Davis Medical School, graduated in 1982 and went on to the Mayo Clinic in Rochester, Minnesota to pursue further training.¹³ But, as to the decision's general impact, there are some more than impressionistic bits of evidence to support quite conflicting conclusions.

On the side of those who claim that the decision changed little about the way institutions make admissions decisions, one has to acknowledge that several major educational and professional organizations have continued to argue for vigorous recruitment and training of minorities post-*Bakke*. In August 1980, the American Bar Association amended its *Standards for Approval of Law Schools* to

10. See, e.g., Lesnick, *supra* note 2, at 157-58.

11. These positions have been canvassed in a number of recent newspaper articles. See, e.g., Cummings, *Bakke, Graduating as Debate Over Case Goes On*, N.Y. Times, June 4, 1982 at 14, col. 2; and Farrell, *Five Years Later, Allan Bakke is a Doctor, but Effects of His Suit Are Still Debated*, The Chronicle of Higher Education, June 22, 1983 at 11, col. 1. For an interesting look at the efforts of one law school, Rutgers-Newark, to respond after *Bakke* see, *Minority Student Program Documents*, 31 RUTGERS L. REV. 865 (1979).

12. *Milliken v. Bradley*, 418 U.S. 717, 756 (1974) (Stewart, J. concurring).

13. Farrell, *supra* note 11.

require ABA accredited law schools to "demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified numbers of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms."¹⁴ In January, 1982 the Law School Admissions Council (LSAC) earmarked \$1.2 million to finance a recruitment drive to increase the pool of minority students applying to law schools.¹⁵ In September 1982, the Association of American Medical Colleges (AAMC), which with the American Medical Association accredits medical schools in the United States, reaffirmed its strong 1970 statement in support of affirmative action, expressing a "continued commitment to undertake, maintain and reinforce activities to increase the numbers of proportions of underrepresented minority group students in their classrooms."¹⁶ And only recently, Boston University and the four black colleges that make up the Atlanta University Center in Georgia entered into a cooperative program to increase the percentage of black students enrolled in Boston University's medical school from the current 12.8 percent to 15 percent. Under the program, black students will be recruited in their sophomore year in college, given instruction during three successive summers at the Boston campus to strengthen their preparation for medical study, and will be accepted into medical school without being required to take the Medical College Admission Test.¹⁷

There is also evidence that institutions have continued their affirmative action or special admissions programs post-*Bakke*. Judge Henry Ramsey, formerly a professor at the University of California at Berkeley Law School, in 1980 published the results of a study on affirmative action in law school admissions conducted under the auspices of the ABA.¹⁸ He concluded, based upon responses from 100

14. Standard 212, *Standards for Approval of Law Schools*.

15. *The Challenge of Minority Enrollment: Seeking Diversity in the Legal Profession*, Law School Admissions Council (2d Printing, 1983) describes this program in some detail. The LSAC is a membership organization of all nationally accredited law schools in the United States which arranges for a variety of centralized services, such as the Law School Admission Test (LSAT), to assist the individual schools in the admission process.

16. *Statement on Status of Minority Students in Medical Education*, (September 9, 1982) transmitted to affected medical school deans by AAMC Memorandum #82-52 (September 24, 1982). See also, MEDICAL SCHOOL ADMISSIONS REQUIREMENTS, 1984-85, UNITED STATES AND CANADA 46-47 (1984).

17. Sullivan, *Plan Is Set to Increase Black Medical Students*, N.Y. Times, Jan. 18, 1984 at A.18, col. 3.

18. Ramsey, *Affirmative Action in American Bar Association Approved Law Schools*:

law schools, selected as a representative sample of the then-168 ABA accredited American law schools, that "a great majority of ABA approved schools . . . have read the *Bakke* opinions as permitting the continuation of affirmative action admissions . . . and academic support programs which are designed primarily to admit and retain members of racial and ethnic minority groups in law school."¹⁹ In fact, 68 out of the 100 schools surveyed, or 72 percent, responded that they had "a formal special or affirmative action admissions program for minority and/or economically disadvantaged students."²⁰

Moreover, to the extent that institutions have been sued for alleged "reverse discrimination," they have defended against such suits vigorously and successfully. Of the five reported challenges to affirmative action or minority admission programs, none involve an undergraduate institution. One was against a state medical school (University of Washington)²¹ and four attacked practices at state law schools (The Universities of Colorado,²² Minnesota,²³ California at Davis²⁴ and Rutgers-Newark²⁵). No private universities have been sued. Though one can only speculate as to why the suits break down into these categories, let me offer some thoughts.

First, as to undergraduate institutions, it has been common knowledge, and commonly accepted, that colleges and universities employ a variety of criteria that go beyond so-called "objective" indicators of academic ability to fill their entering classes, such as athletic prowess, artistic ability and the need for geographic diversity, to name only a few.²⁶ The Harvard College Admissions program to which Justice Powell refers in his *Bakke* opinion is just one example of this practice.²⁷ Given the range of permissible non-academic factors in this process, it is likely that unsuccessful candidates for ad-

1979-80, 30 J. LEGAL ED. 377 (1980).

19. *Id.* at 411-12.

20. *Id.* at 384.

21. *McDonald v. Hogness*, 92 Wash. 431, 598 P.2d 707 (1979), *cert. denied sub. nom.*, *McDonald v. Gerberding*, 445 U.S. 962 (1980).

22. *DiLeo v. Board of Regents of the University of Colorado*, 196 Colo. 216, 590 P.2d 486 (Colo. 1978), *cert. denied*, 441 U.S. 927 (1979).

23. *McAdams v. Regents of the University of Minnesota* 508 F. Supp. 354 (D. Minn. 1981).

24. *DeRonde v. Regents of the University of California*, 28 Cal. 3d 875, 625 P.2d 220, *cert. denied*, 454 U.S. 832 (1981).

25. *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893 (3d Cir. 1981) *aff'g*, 487 F. Supp. 1291 (D.N.J. 1980).

26. *See, Selective Admissions in Higher Education*, (A Report of the Carnegie Council on Policy Studies on Higher Education, 1977), 75-85.

27. *Bakke*, 438 U.S. at 315-19, 321 app.

mission to college have recognized the difficulty of demonstrating that considerations of race or ethnic origin, as opposed to some other factor, prevented their being accepted.

Second, it is my sense, with respect to medical schools that pre-*Bakke* most of these institutions operated a "one-track" admissions program in which all applicants were subjected to basically the same criteria, a first stage involving review of Medical College Admission Test (MCAT) scores and grade point average (GPA) and a second stage involving more subjective, but structured, inquiries. In the second stage, race, ethnic origin and cultural deprivation were viewed as appropriate considerations.²⁸ I believe it was the practice before *Bakke* and continues to be the case that medical schools place great importance upon conducting personal interviews of all serious candidates. This approach allows, one would think, for a quite individualized evaluation of a candidate's non-academic strengths and weaknesses.²⁹ Davis Medical School's use of a "two-track" system appears to have been contrary to general practice. Having been subjected to this individualized consideration, post-*Bakke* rejected medical school applicants may well be less inclined to feel that they were precluded from competing for certain places in the entering class on the basis of race. Nevertheless, *McDonald v. Hogness*,³⁰ the medical school challenge, reflects a still-prevalent attitude toward professional school admission that differs markedly from that generally held toward the undergraduate process: namely, that subjective considerations are largely inappropriate in determining who should be allowed to attend medical or law school.³¹ To my knowledge such institutions have never, except in a few isolated instances, made admissions decisions "solely by the numbers." But many people unfamiliar with the process continue to believe to the contrary.

Third, law schools, in contrast to undergraduate and medical institutions, are vulnerable in several respects. Unlike medical schools and the medical profession generally where "having a bed-

28. *Selective Admissions*, *supra* note 26, at 107-15. See also, *Brief of the Association of American Medical Colleges, Amicus Curiae*, at 4-7.

29. The Association of American Medical Colleges has attempted, given the importance of the interview, to improve the skills of those involved in the medical admissions process to identify promising candidates. See Sedlacek and Prieto, *An Evaluation of the Simulated Minority Admissions Exercise*, 57 J. MEDICAL ED. 119 (February, 1982).

30. 92 Wash. 431, 598 P.2d 707 (1979).

31. McDonald, the rejected applicant, argued unsuccessfully that the University of Washington Medical School admission procedures were arbitrary and capricious in that they went beyond objective criteria to include such subjective considerations as "motivation, maturity and demonstrated humanitarian qualities." *Id.* at 717.

side manner" and being adept clinically have for some time been regarded as important qualities to identify and develop in potential physicians, legal education and the bar have only recently and, sometimes reluctantly, acknowledged the relevance of such subjective factors.³² Most law schools, irrespective of affirmative action considerations, dispensed with conducting personal interviews of candidates years ago.³³ And, prior to *Bakke*, many law school affirmative action programs employed a "two-track" approach.³⁴ Ironically, the Davis Medical School program was probably more representative of law school practices, though perhaps not its seat set-aside feature, than those of other medical schools. The lack of the highly personalized medical school approach and the pre-*Bakke* history of two-track affirmative action programs may account for the greater number of challenges to law school admissions practices. The fact that no private universities have been sued, at least insofar as published reports are concerned, may reflect a reluctance of potential plaintiffs to rely upon Title VI alone, unsupported by a constitutional cause of action,³⁵ as a basis for suit, given the conflicting views of that statute's impact upon affirmative action plans expressed in the *Bakke* opinions.³⁶

Whatever the explanation for these suits, let me repeat that educational institutions have successfully defended against them, and the Supreme Court has thus far declined to review these decisions.³⁷ Four basic features of these successful defenses should be noted. First, unlike the Regents of the University of California who con-

32. I have in mind particularly the relatively new emphasis in law schools upon clinical legal education. See generally, *Clinical Legal Education* (Report of the Association of American Law Schools - American Bar Association Committee on Guidelines for Clinical Legal Education, 1980).

33. Last year's official guide to American Bar Association - approved law schools published by the Law School Admission Council and the Association of American Law Schools does not even mention the personal interview and its description of the admissions process. *Pre-Law Handbook 1983-84* at 18-23 (1983).

34. Cummings, *supra* note 11.

35. Such a case would lack the key element, "state action," necessary to make out a Fourteenth Amendment claim. *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163 (1972).

36. The Brennan Group joined by Justice Powell concluded that Title VI proscribed only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment. *Bakke*, 438 U.S. at 287, 328. The Stevens Group, however, declined to reach the question of whether the Constitution outlawed the Davis Medical School program; it clearly violated Title VI, in their estimation. *Id.* at 417-18. There was, moreover, some uncertainty on the question of whether a private right of action existed under Title VI, one not presented by constitutional claims. See 42 U.S.C. § 1983 and 28 U.S.C. § 1343. One Justice concluded that no such right existed. *Bakke*, 438 U.S. at 379-87 (White, J.).

37. See cases cited *supra* notes 21-25.

ceded in *Bakke* that they could not prove that the plaintiff would not have been admitted absent the existence of the minority admissions program,³⁸ defendants in post-*Bakke* litigation have been successful in doing just that.³⁹ Interestingly, these "lack of standing" defenses rely, in large part, upon precedents in pre-*Bakke* "reverse discrimination" cases.⁴⁰ Second, for the most part, defendants have been able to show that special programs designed to increase minority enrollments are not closed to non-minority candidates, as in *Bakke*, or that race and ethnic origin are factors utilized along with other considerations in evaluating all candidates for admission.⁴¹ Third, the courts have not attempted to second-guess the weight institutions decide to give the factor of race in the admissions process as against objective

38. *Bakke*, 438 U.S. at 320.

39. *McAdams*, 508 F. Supp. at 899-902; *DeRonde*, 28 Cal. 3d 875, 625 P.2d 220; *DiLeo*, 590 P.2d at 489; *McDonald*, 92 Wash. 431, 598 P.2d at 711; did not address the issue directly, even though the trial court had found that the plaintiff "would have been rejected for admission even if the University had not employed an admissions procedure which gave consideration to 'ethnic minority status.'" 28 Cal. 3d at 881. Each of these decisions reflects, moreover, an attempt in addressing the standing issue, to strike balance between two competing considerations. On the one hand, courts do not want to foreclose entirely the possibility of a rejected applicant's challenging an allegedly discriminatory minority admissions process by imposing a heavy burden upon the challenger to establish that "but for" the program he or she would have been admitted. This is a responsibility Justice Powell's opinion in *Bakke* held was improperly placed on the challenger. 438 U.S. at 280. On the other hand, they do not appear willing to impose such a light burden in this regard as to give every rejected non-minority candidate a chance to mount a challenge to such programs on the merits. Judge Sloviter in *Doherty* resolves this tension as follows:

. . . [A]lthough an applicant may not be able to show s/he would have been admitted in the absence of the challenged discriminatory program, s/he will nonetheless have standing if there was a chance of successful admission had s/he not been prohibited from competing for all the seats. On the other hand, if, using the University's criteria, the applicant still would not have had a realistic chance of successful admission, there could be no injury from an inability to compete for all the available seats. Were [the plaintiff's reading of *Bakke* correct], any applicant, no matter how far-fetched his or her chances of admission, would be permitted to challenge the admissions procedure.

651 F.2d at 902.

40. *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir.) (per curiam), cert. denied, 434 U.S. 987 (1977); *Henson v. University of Arkansas*, 519 F.2d 576 (8th Cir. 1975) (per curiam).

41. *Doherty*, 651 F.2d at 898-99 (citing findings of trial court); *DeRonde*, 28 Cal. 3d at 885, 625 P.2d 220; and *McDonald*, 92 Wash. 431, 598 P.2d at 712, 713, 714. In *Doherty*, interestingly, the courts raised no questions about Rutgers' giving final decision-making power to a separate minority admissions program committee. 487 F. Supp. at 1293. *DiLeo* and *McAdams* appear to be the only exceptions. Each law school program at issue set aside a predetermined number of spaces for applicants accepted under its special admissions program. *McAdams*, 508 F. Supp. at 358, *DiLeo*, 196 Colo. 216, 590 P.2d at 486-87.

criteria, or for that matter other subjective criteria.⁴² Last, representatives of minority group organizations have been allowed to play an active role on the side of the defendant institutions in arguing for the legality of the admissions process under attack.⁴³ Several commentators criticized the handling of the defense in the *Bakke* case by the Regents and urged that minority group organizations play a more important role in the defense of future "reverse discrimination" cases.⁴⁴ In all likelihood, however, these cases do not tell the whole story. One cannot tell, for example, the extent to which schools have abandoned their separate admissions programs altogether post-*Bakke* or declined to establish such programs for the first time. Nor does one know how many schools were unable or unwilling to establish a challenger's lack of standing, deciding instead to admit the initially-rejected applicant. It is also difficult to assess the impact upon the challenged programs during the pendency of such litigation, for instance whether efforts to recruit minorities were suspended or retarded during this period.

Now for the bad news. Allan Bakke has become a doctor, but many minority men and women have not; nor have they become lawyers or graduate students in the arts and sciences or even undergraduates since the *Bakke* case was decided. Let us look at Davis Medical School itself. Between 1971, the year it instituted a special admissions program, and 1974, the year Bakke sued, Davis admitted 21 black students, 30 Mexican-Americans and 12 Asian-Americans,

42. The *DeRonde* court addressed the point as follows:

We have a traditional and instinctive reluctance to intrude unnecessarily into the administrative affairs of the University of California and do so only under clear constitutional and statutory mandate. A university requires a measure of "elbow room" within its functions. In its wisdom the appropriate administration-faculty-student admissions committee in full cooperation with the regents has proceeded upon a path which it believes will best achieve fairness and balance in the admission to the University's professional schools. It has done so for legally acceptable, educational purposes.

28 Cal. 3d at 891, 625 P.2d at 230.

43. In *DeRonde*, for example, lawyers from the NAACP Legal Defense Fund, the American Civil Liberties Union, the Mexican American Legal Defense Fund and the Asian American Legal Defense Fund, though denied intervention, appeared as *amici* at both trial and appellate levels defending the law school's admissions process. *Id.* at 878-79. And in *Doherty*, a number of public interest law firms and minority and women student organizations were granted leave to intervene in the trial court, participating actively there and on appeal in defense of the Rutgers program. 651 F.2d at 895, 896.

44. Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 4-7 (1979); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979); and Smith, *Reflections on a Landmark*, 21 HOW. L.J. 72, 77-79 (1978).

a total of 63 under the auspices of that program. One black, six Mexican-Americans and 37 Asian-Americans, for a total of 44 minority students, were admitted through the regular process.⁴⁵

After the decision against it in 1978, the Medical School, according to one of its administrative officials, "reorganized its entire admissions system to ensure scrupulous adherence to the legal mandate delivered by the Court." "This did not exclude consideration of race or cultural disadvantage," she asserted, "but it did make active recruitment of excellent minority students more difficult simply because the system became less personalized and more time-consuming than it had been."⁴⁶ The results of this reorganizing have been as follows: including Mr. Bakke's class, 111 minority-group students, mostly Asian-Americans, have entered the Davis Medical School as of June, 1983. Of this group only nine have been black and, in one year, there were no blacks in the entering class,⁴⁷ though this was apparently caused by the fact that all five blacks offered places in the 1980 entering class declined the invitation to matriculate.⁴⁸

The Davis experience might be written off as largely the result of that school's possibly dubious appeal for some minority candidates after *Bakke* was decided were it not characteristic of a more general decline in minority medical school enrollments. The AAMC reported in September, 1982 that "despite major efforts which successfully increased black first-year enrollment to a peak of 7.5 percent in 1974-75, the proportion of total enrollment for the underrepresented minorities - blacks, American Indians, Mexican Americans and mainland Puerto Ricans - has formed a plateau at about 8 percent." With regard to black medical school enrollment, there has been a decrease in its percentage of total enrollment from a high of 6.3 in 1974-75 to 5.8 in 1983-84. Even more revealing are the figures for black first-year enrollments. Blacks were 7.5 percent of total first-year enrollments for 1974-75; in 1983-84 the percentage was 6.8. In both total enrollments and first-year enrollments, the figures for the other minority groups reflect either decreases or very modest increases.⁴⁹ In any event, the number of black physicians in the United States has risen from 2.1 percent in 1950 to only 2.6 percent in 1980.⁵⁰

45. *Bakke*, 438 U.S. at 275-76.

46. Fitzgerald, *Three Years After Bakke: A Reaffirmation*, 305 N.E. J. MEDICINE, 886 (1981).

47. Farrell, *supra* note 11.

48. Fitzgerald, *supra* note 46.

49. AAMC Memorandum #82-52 (September 24, 1982).

50. Sullivan, *supra* note 17. The picture in other allied fields is much the same: dentists

The situation in legal education is no better. The Law School Admission Council found in 1981 "that the number of minorities in law school has plateaued."⁵¹ According to the LSAC, "the rapid increase in minority enrollment which resulted in tripling minority law students [sic] between 1970 and 1975 has ended and there has been relatively little growth over the last five years."⁵² Black law school enrollment, for example, experienced a dramatic increase between 1969-70 and 1976-77 from 3.1 percent to 4.7 percent.⁵³ In 1981-82, however, the proportion dropped to 4 percent. Figures for 1982-83 appear to show an increase back to the 1976-77 percentage of 4.7 percent. In contrast, the enrollments of Hispanic Americans, Native Americans and Asian Americans appear to be increasing slightly.⁵⁴ The picture for blacks, particularly in graduate and undergraduate education, reflects the same decrease in both the number and percentage of total enrollment between 1976 and the present, leveling off at 5 percent in graduate schools and 9 percent in baccalaureate programs.⁵⁵

It may well be that these decreases in minority enrollment are explained by cutbacks in financial support for affirmative action programs post-*Bakke*. Racial and ethnic minorities (particularly blacks, Hispanics and Native Americans) have traditionally occupied the lowest rungs of America's socio-economic ladder. This reality has contributed, working in tandem with various forms of discriminatory treatment, to the underrepresentation of these groups in majority-white undergraduate, graduate and professional schools, both public and private. Affirmative action programs of majority-white institutions, in many instances, pre-*Bakke* had financial components explicitly designed to insure that minority students admitted for study could actually afford to accept the offers.⁵⁶ It is not clear after *Bakke*, however, to what extent any special assistance is being provided to minority students to ensure their attendance. In fact, a decision prior to *Bakke* placed in substantial doubt the legality of such

- 2.9% black; pharmacists - 2.3% black; and, veterinarians - 1.6% black. Farrell, *supra* note 11.

51. *The Challenge of Minority Enrollment*, *supra* note 15, at 4.

52. *Id.*

53. Cummings, *supra*, note 11.

54. *Press Release*, Section of Legal Education and Admissions to the Bar, American Bar Association, February 1, 1984.

55. Farrell, *supra* note 11.

56. W. MCCORMACK, *THE BAKKE DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS 54-57*. (American Council on Education/Association of American Law Schools 1978).

programs and may have produced some restructuring of financial aid arrangements for minority students.⁵⁷

On the other hand, putting the impact of *Bakke* aside, the overall financial picture with respect to minority access to higher education has changed drastically since 1978. First, the economic plight of racial and ethnic minorities has worsened in many respects. In 1982, 35.6 percent of black families and 29.9 percent of Hispanic families had incomes below the poverty level. For whites, the figure was 9.1 percent. Thirty-seven point seven percent of all black families and 35.2 percent of all Puerto Rican families were headed by single women. Seventy to eighty percent of female-headed non-white families live in poverty.⁵⁸

Second, the cost of higher education has gone up significantly while financial assistance for minority students, particularly from the federal government, has gone down or not kept pace with the inflationary trend. For example, the Pell Grant Program, designed to provide federal financial assistance to undergraduate students from low-income families, allowed a maximum of \$1,800 to the neediest students in fiscal year 1979 but fell to \$1,670 in FY 1981. During the intervening three-year period, college costs had risen more than 30 percent.⁵⁹ In 1978-79 (the last year for which data were collected), 56.7 percent of Pell recipients were minority students.⁶⁰ The National Commission on Student Financial Assistance has attributed a marked decline in enrollment of low-income students directly to the failure of aid to keep up with rising costs. More specifically, the National Institute of Independent Colleges and Universities has reported that from FY 1979 to FY 1981 enrollment of students with family incomes up to \$24,000 declined 39 percent.⁶¹

The AAMC has acknowledged the significant impact of increased costs upon minority enrollments in its institutions.⁶² The

57. *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976). See also, O'Neill, *Bakke in Balance: Some Preliminary Thoughts*, 67 CALIF. L. REV. 143, 65-66 (1979).

58. *Minorities in Higher Education* 1-2 (American Council on Education, Second Annual Status Report, 1983).

59. Saunders, *Reshaping Federal Aid to Higher Education*, in *THE CRISIS IN HIGHER EDUCATION* 122 (Froomkin ed. 1983).

60. United States Commission on Civil Rights, *Statement on the Fiscal Year 1984 Education Budget* 86 (Clearinghouse Publication 79, July 1983).

61. Saunders, *supra* note 59, at 127.

62. The AAMC's September, 1982 Statement, see *supra* note 16, observed as follows on this point:

. . . [T]he strength of the nation's commitment to equal opportunity appears to

Law School Admission Council's 1981 survey reflected that 86 out of 126 (or 68%) responding law schools stated that their inability to provide sufficient financial aid contributed importantly to the loss of minority applicants who had been accepted.⁶³ As a general matter, the historically black colleges and universities have been severely affected by the cutbacks in outside funding, thereby reducing both the number of students attending colleges and the pool of graduates eligible to pursue advanced degrees elsewhere.⁶⁴ In this latter respect, it is important to realize that the historically black institutions had been, until relatively recently, the principal providers of higher education opportunities for blacks⁶⁵ and still serve as important "feeder schools" for predominantly-white graduate and professional schools seeking to increase their minority enrollments.⁶⁶

be waning and other recent developments (financial aid cut backs, class size reductions, static minority applicant pool, rising tuition, etc.) appear to threaten this progress.

63. *The Challenge of Minority Enrollment*, *supra* note 15 Appendix A. More specifically, in response to the question "To what extent do the following factors contribute to the loss of minority applicants that you would accept?", "inability to provide sufficient financial aid" was viewed as "very important" by sixty-one responding schools and "important" by twenty-five others. The Reagan Administration proposed in its Fiscal Year 1985 budget to discontinue all funding for the Council on Legal Education Opportunity (CLEO), program one that has since 1968 provided an opportunity for over 3,000 mostly minority students to attend law school. U.S. Civil Rights Commission Report, *supra* note 60, at 117-19.

64. Farrell, *5 Black Colleges in Cancelled Study Say Cuts in U.S. Aid Hurt Their Students*, *The Chronicle of Higher Education*, February 1, 1984, p. 1, col. 3.

65. As of the late 1960's, Howard University College of Medicine in Washington, D.C. and Meharry Medical College in Nashville, Tennessee had trained approximately 90 percent of all black physicians educated in the United States. MORAIS, *THE HISTORY OF THE NEGRO IN MEDICINE* 137 (1967). More generally, one commentator recently described the contribution of traditionally black colleges and universities as follows:

As recently as 1976, a significant share of the higher education degrees awarded to blacks at the baccalaureate, masters, doctoral and first professional levels were from black institutions of higher education. While historically black colleges represented a relatively small sector of the national higher education system, in 1975-76 they conferred 37.9 percent of all bachelor's degrees awarded to blacks, 22.3 percent of the master's degrees, 4.1 percent of the doctorates, and 20.2 percent of the first professional degrees.

Baxter, *The Affirmative Duty to Desegregate Institutions of Higher Education - Defining the Role of the Traditionally Black College*, 11 J. L. & EDUC. 1, 28 (1982).

66. Until the early 1970's, traditionally black colleges were the primary source of black medical school applicants and matriculants. For example, in 1970-71, 52 percent of all black medical school matriculants came from such institutions. *Report of the Association of American Medical Colleges Task Force on Minority Students Opportunities in Medicine* 28-29 (Table 3) (June 1978). Five of the top seven "feeder" undergraduate institutions for law schools in 1981 were black institutions: Howard University, Morehouse College (Atlanta), Hampton Institute (Virginia), Morgan State (Baltimore); and Fisk (Nashville). *The Challenge of Minority Enrollment*, *supra* note 15, Appendix I.

All this leads me to conclude that we may not be able to single out the *Bakke* decision as a major cause for the troubling enrollment picture for minorities in higher education. But whatever the cause or causes, we know what the effects look like and have a responsibility for seeking solutions. What I have said already should make it unnecessary to belabor the point here that more money is an indispensable ingredient in any serious program to reverse the downward trends of recent years in minority participation.

I want to turn, at this point, to a less concrete, perhaps, but in my estimation equally important question. Namely, I wonder whether an adequate legal framework exists in America within which intelligent and just solutions to the problem of gross minority underrepresentation in higher education and the professions can be developed. What do I mean by this? Put simply, discrimination in higher education against minorities is the only civil rights area to my knowledge that has been left relatively untouched by federal court decisions or by actions of the Congress and President since *Brown v. Board of Education*⁶⁷ was decided. Consequently, for almost thirty years, our society has not had the benefit of insights that court records and legislative hearings might have provided into the nature and scope of racial discrimination in higher education. Nor have we had an opportunity to go through a process of trial and error during this post-*Brown* period to arrive at approaches that offered meaningful chances of success in eradicating the effects of historic segregation and exclusion practiced against racial minorities in higher education.

Clearly, the Supreme Court, the Congress and the President do not have a monopoly with respect to how public debate over social issues is framed and what solutions are adopted in our society. Nevertheless, they have been major forces in shaping public opinion and developing remedies for racial discrimination in a number of areas since *Brown*. Take the matter the *Brown* decision addressed directly, racial segregation in public primary and secondary education. Since *Brown*, the Supreme Court decisions have taught us, among other things, that the mere cessation of segregative practices which alters the status quo little, if at all, does not meet constitutional requirements;⁶⁸ that pupil assignments, school facility placement and size and grade structure decisions can be utilized by school officials to keep students separated by race almost as effectively as was the case

67. 347 U.S. 483 (1954).

68. *Green v. County School Board*, 391 U.S. 430 (1968).

under statutorily-imposed segregation;⁶⁹ that intentional segregation in public schools was a practice not limited to the South but had Northern and Western parallels as well;⁷⁰ and that not only blacks, but also Hispanics were the victims of such practices.⁷¹ We learned that remedies that cause some interim disruptions of the educational process may be necessary to achieve meaningful desegregation in the long run.⁷² Voluntary efforts to remedy public school segregation, whatever the cause, do not violate the Constitution, we were told by the Court in *Swann*.⁷³ We learned about segregated private schools and their impact upon public education.⁷⁴

President Eisenhower's calling out the troops to ensure that nine black children attended Little Rock High School in 1957 underscored the depth of resistance in some communities to *Brown's* mandate and affirmed the national government's commitment to seeing that federal law was obeyed.⁷⁵ The enactment by Congress of the two provisions of the 1964 Civil Rights Act (Titles IV and VI)⁷⁶ bearing on discrimination in education and many subsequent laws designed to assist in the desegregation process has also forced the Nation to confront discrimination in this area and consider which responses should be adopted.

These developments since *Brown* in the school desegregation area make the policies of the current national administration untenable, as a matter both of law and experience. I believe that the same argument has force with regard to employment and voting discrimination.⁷⁷ But I will not pursue those issues here. I want to make a different point: even if one is against busing as a desegregation remedy or thinks racial quotas in employment violate Title VII of the

69. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

70. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

71. *Id.*

72. *Swann*, 402 U.S. at 28.

73. *Id.* at 16.

74. *Norwood v. Harrison*, 413 U.S. 455 (1973).

75. *Cooper v. Aaron*, 358 U.S. 1 (1958).

76. 42 U.S.C. § 2000C-6a (1976) authorizes the United States Attorney General to sue to desegregate public schools and colleges. Title VI's 42 U.S.C. 2000d through 2000d-4 (1976) prohibits discrimination in programs or activities receiving federal financial assistance and authorizes administrative or legal sanctions against noncomplying recipients. This provision was a particularly potent tool during the Johnson Administration in achieving desegregation of Southern schools. See Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 756-58 (1974) for a discussion of that period.

77. See Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

1964 Civil Rights Act⁷⁸ (which prohibits discrimination in employment), or questions the propriety of facilitating attacks upon at-large electoral schemes as part of an effort to increase minority political participation, your arguments and those who oppose you are unavoidably structured by events in federal courts, the Executive Branch and the Congress over the past thirty years. They provide the language with which the public debate is waged.

Where is the language for discussing discrimination in higher education? I would suggest that it is a language of relatively few words, quite rudimentary words at that. Prior to *Brown*, as the *Supreme Court Law Reports* and excellent works of history like Richard Kluger's *Simple Justice* attest, the legal attack upon the "separate-but-equal" doctrine was directed initially at opening up opportunities for blacks in all-white colleges and professional schools.⁷⁹ It was a successful suit against the University of Texas Law School at Austin in 1950, *Sweatt v. Painter*,⁸⁰ that caused NAACP legal strategists to believe that the frontal assault upon segregation in public elementary and secondary schools mounted in *Brown* could succeed. In *Sweatt*, the Supreme Court acknowledged for the first time that racial segregation in education, even if administered in scrupulous regard for *tangible* equality, might nevertheless be unconstitutional.⁸¹

Between *Brown* and *Bakke*, however, the Supreme Court decided on the merits only one case involving questions of racial discrimination in higher education. In *Florida ex rel. Hawkins v. Board of Control*⁸² in 1956, the Court summarily rejected arguments that the "all deliberate speed" formula of *Brown* applied to desegregation of higher education as well.⁸³ The next higher education discrimination case to be accepted by the Court for review on the merits came 18 years later in *De Funis v. Odegaard*,⁸⁴ a suit challenging the University of Washington Law School's minority admissions program brought by a rejected white applicant. The case

78. 42 U.S.C. § 2000e-2000e-17 (1976).

79. R. KLUGER, *SIMPLE JUSTICE* 265-84 (1976). See also J. GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 49-89 (1977) and G.R. McNEIL, *GROUNDWORK, CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 137-51, 200 (1983).

80. 339 U.S. 629 (1950) *reh'g denied*, 340 U.S. 846 (1950).

81. *Id.* at 633-35.

82. 350 U.S. 413 (1956).

83. *Id.* at 414.

84. 416 U.S. 312 (1974).

was ultimately dismissed as moot.⁸⁵ *Bakke* came along four years later.

Imagine yourself a Martian who returned in 1978 to obtain up-to-date information on how the Supreme Court had dealt with the problem of racial discrimination against blacks in higher education since your last visit to the United States in 1950. What would your likely reaction to the *Bakke* case have been? Would you not have been inclined to conclude that in twenty-eight years America had solved the problem of discrimination against blacks; indeed, that blacks and other minorities had gained the ascendancy in determining admissions policies for medical schools; and that the Supreme Court was struggling to prevent powerless whites like Allan Bakke from being mistreated because of the color of their skins? Supreme Court Justices are not Martians; I mean to suggest nothing to the contrary. But there has been a highly formalized character to racial discrimination litigation over the years that has required minority plaintiffs to prove several times over the facts of segregation and exclusion that the Justices certainly knew as men (and woman) if not as jurists. Once precedent was established, however, the burden of proving the reality of discrimination was likely to be lightened, though not in all cases. This has certainly been true with respect to school desegregation litigation at the primary-secondary school level. For example, the 1971 *Swann v. Charlotte-Mecklenburg Board of Education*⁸⁶ decision approving busing as a remedy, was preceded by a host of other Supreme Court and lower federal court decisions that painted a picture of widespread resistance to desegregation, failed remedies and changed demographics that made that decision a plausible and perhaps unavoidable response.⁸⁷

To contend that *Bakke* followed naturally and easily from *Sweatt v. Painter* is, to my way of thinking, perverse. I would contend, rather, that *Bakke* was decided in a legal time-warp in which all evidence of the lingering and pervasive effects of discrimination against minorities in higher education, despite the noble efforts of scores of *amici*,⁸⁸ was technically not before the Justices. And no

85. *Id.* at 319-20.

86. 402 U.S. 1.

87. *Id.* at 11-14.

88. Over fifty *amicus* briefs (representing the views of hundreds of individuals and organizations) were filed. *Bakke*, 438 U.S. at 268-70. Many of these briefs devoted substantial argument to describing the history of discrimination against blacks and other minorities in education at all levels, including medical training. See generally UNITED STATES SUPREME COURT RECORDS AND BRIEFS: LANDMARK CASES, REGENTS OF THE UNIVERSITY OF CALIFOR-

precedent bearing directly on this history, other than *Sweatt*, existed to which the Court could look to determine, in a judicially cognizable way, what had happened to blacks in higher education during the intervening years. Where were the cases on Northern and Western discrimination in higher education? What about the treatment of Hispanics, Asian-Americans and Native-Americans in colleges and universities? What, if any, connection was there between the instituting of standardized testing in higher education and the desire to continue the exclusion of minorities?

Nor could the Court look to the Congress for any helpful guidance in this regard. Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to challenge segregation in public higher education has been rarely invoked and certainly not to address issues beyond the "separate-but-equal" degree of difficulty. And Title VI was not thought relevant to problems of higher education desegregation until the early 1970's, a point I mean to expand upon shortly. These statutes were, in truth, enacted and implemented principally with primary-secondary public school desegregation in mind. The Supreme Court's attempt to decide the *Bakke* case in a just way was, therefore, analogous to its trying to decide the *Weber*⁸⁹ case, which approved the use of racial criteria in private employment affirmative action plans, without having had the benefit of the Executive Order Program⁹⁰ experience, the original enactment and reenactment by Congress of Title VII⁹¹ and fourteen years of legal precedents under that statute for the Court to draw upon.⁹²

While the Supreme Court remained silent for the twenty-one years between *Hawkins* and its agreeing to hear *Bakke*, lower federal courts were not very active either. There were, of course, decisions enjoining state officials, like Governors George Wallace of Alabama⁹³ and Ross Barnett of Mississippi,⁹⁴ from barring blacks from

NIA V. ALLAN BAKKE, COMPLETE CASE RECORD (3 vols. 1978). Much of this effort was occasioned by the fact that the *Bakke* case had been tried and decided in the California courts on an almost bare factual record. See *Brief of the United States, Amicus Curiae* at 67-74, and Smith, *supra* note 44.

89. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

90. Executive Order No. 11246, 3 C.F.R. 339 (1965), reprinted in 42 U.S.C. 2000e at 1236 (1976).

91. See *supra* note 78.

92. See, e.g., *Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transp. Co., Inc.* 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.* 401 U.S. 424 (1971);

93. 8 Race Rel. L. Rep. 453 (1963).

94. J. MEREDITH, *THREE YEARS IN MISSISSIPPI* (1966).

enrolling in their public universities. But the first federal court effort to address the *systemic* nature of higher education racial segregation in the South did not occur until thirteen years after *Brown*. In that case, *Lee v. Macon County Board of Education*,⁹⁵ Judge Frank Johnson ordered the Alabama Board of Education to dismantle its dual system of administration for the state colleges under its direction and control. Parenthetically, not much has changed in this regard during the past seventeen years, as can be seen from the fact that the Reagan Administration felt it necessary to sue the State of Alabama in July of last year, alleging the state's failure to take adequate steps to desegregate its higher education system.⁹⁶

The Alabama experience is understandable, however. The lower court decisions after *Lee* have not shown any aggressiveness in helping to dismantle dual systems of higher education, in stark contrast to their approach in the primary-secondary desegregation cases. In general, the remaining handful of cases have adopted approaches to desegregation that were rejected for primary-secondary systems by Supreme Court in 1968. In that year, the Court held in the *Green*⁹⁷ case that "freedom of choice" desegregation plans were constitutionally unacceptable unless they did the job of eradicating the vestiges of the state-imposed dual system "root and branch."⁹⁸ Essential to the Court's determination was its recognition, as a matter of both law and fact, that the victims of segregation, blacks, could not be asked to bear the burden of correcting the injustice against them. That duty must rest squarely upon the school board's shoulders. Yet decisions in the higher education area have generally adopted basically a "freedom-of-choice" model, whether or not it "promised realistically to work and promised realistically to work now."⁹⁹ As in Alabama, the model has not proven very successful.¹⁰⁰

95. 267 F. Supp. 458 (M.D. Ala. 1967), *aff' sub nom*, *Wallace v. United States*, 389 U.S. 215 (1967).

96. See Farrell, *U.S. Suit Seeks Desegregation of Ala. Colleges*, THE CHRONICLE OF HIGHER EDUCATION, July 20, 1983, at 1, col: 5.

97. *Green v. County School Bd.*, 391 U.S. 430 (1968).

98. *Id.* at 438.

99. *Id.* at 439.

100. See, e.g., *Richardson v. Blanton*, 597 F.2d 1078 (6th Cir. 1979); *Hunnicut v. Burge*, 356 F. Supp. 1227 (M.D. Ga. 1973); *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971); *Alabama State Teachers Association v. Alabama Pub. School and College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968); *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968). The only significant exception to this trend, perhaps, is *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977) *aff'd sub non*. *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.) *cert. denied* 442 U.S. 937 (1979), which ordered the merger of two universities in Nashville, one historically black, one historically white under the direction of

Administrative efforts at the federal level have also been, in my estimation, "too little and too late" in defining the nature of higher education discrimination and developing meaningful remedies. In 1969, fifteen years after *Brown* and five years after the Civil Rights Act was passed, the Department of Health, Education and Welfare (HEW) determined that ten states (Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania and Virginia) were still operating dual systems of higher education in violation of Title VI. Four years later, however, HEW was found by a federal appeals court, in *Adams v. Richardson*,¹⁰¹ to have failed to carry out its responsibility to ensure that the ten cited states acted promptly to comply with Title VI. HEW was enjoined by that decision to achieve compliance pursuant to a set timetable. Over a decade and eight additional states later (Alabama, Delaware, Kentucky, Missouri, Ohio, South Carolina, Texas and West Virginia were subsequently cited) the *Adams* case continues to be the subject of complex administrative proceedings and litigation over whether the requirements of Title VI have been met.¹⁰²

This is not to say that the *Adams* litigation and administrative enforcement of Title VI have not made a difference in opening up opportunities for minority students in higher education. They have, although I think not nearly enough. For example, Judge Ramsey's 1980 study concluded that "Southern law schools [were] very much out of step with the affirmative action efforts of ABA approved law schools in every other region of the country."¹⁰³ However one comes out on this question, there are several points more relevant to my thesis that ought to be made about this process. First, "freedom-of-choice" continues to be the guiding principal of higher education desegregation. Second, the administrative determinations, agreements between HEW (now the Department of Education) and the affected states and consent decrees growing out of the *Adams* process have left the public record relatively bare as to the nature and scope of racial discrimination in higher education beyond establishing the fact that racially-dual admissions and hiring were once statutorily mandated or official state policy.¹⁰⁴ Consequently, the widely-ac-

the former institution's administration. For a comprehensive discussion of these cases see *Baxter*, *supra* note 65, at 6-18.

101. 480 F.2d 1159 (D.C. Cir. 1973).

102. See Stuart, *New Trend in College Desegregation Emerges*, N.Y. Times, September 3, 1981, at 1.

103. Ramsey, *supra* note 18, at 412.

104. This is true in the sense that courts and federal administrative agencies have not

cepted view that "freedom-of-choice" is the correct framework for achieving desegregation has not been subjected to the rigorous testing out that occurred in the primary-secondary school process. I am not suggesting that it is wrong but rather that the record to support that conclusion is not compelling. Remedies proposed for desegregation within the "freedom-of-choice" framework similarly lack the type of factual underpinnings that would establish their responsiveness to the nature of discrimination in higher education and likelihood of success.¹⁰⁶ Finally, what all the foregoing observations point to is the fact, reaffirmed very recently by a June, 1983 decision of the Court of Appeals for the District of Columbia affirming a consent decree between the current administration and the State of North Carolina, that *Adams* provides no authorization to the federal judiciary to make substantive judgments as to the current nature of racial discrimination in higher education in the affected states and what remedies are likely to be most successful. What this decision, *Adams v. Bell*,¹⁰⁶ seems to say is that administrators at the Department of Education have broad discretion in deciding how and at what pace they will seek an end to dual systems of higher education, so long as they do not abdicate entirely their duty to enforce Title VI.¹⁰⁷ The Supreme Court recently refused to review this decision.¹⁰⁸

Even if I am right that American society lacks an adequate legal or factual language with which to debate intelligently the question of affirmative action in higher education, is the solution to this

ordered the mandatory assignment of students to particular schools except for *Geier v. Blanton*, 427 F. Supp 644 (M.D. Tenn. 1977). They have used instead, a series of inducements of one form or another to attract "other-race" students to traditionally black or white institutions. See e.g., *United States v. State of Louisiana*, 527 F. Supp. 509, 514-15 (E.D. La. 1981). *Louisiana Panel Accepts Plan for Desegregation*, N.Y. Times, September 9, 1981 at p. 14, col. 6. See also, Revised Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (1978). It should be acknowledged that some observers have questioned whether the *Adams* litigation was in the best interest of traditionally black institutions and their students. See Bell, *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949 (1979).

105. See J. PREER, *LAWYERS V. EDUCATORS, BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* 189-222 (1982).

106. 711 F.2d 161 (D.C. Cir. 1983).

107. Judge Wright, one of the dissenters in the 5-4 decision in *Adams*, concluded as follows about the North Carolina plan approved by the U.S. Department of Education:

First, in approving North Carolina's plan the Department abandoned its own desegregation criteria, implementation of which was judicially mandated. Second, the Department approved a plan with the same basic infirmities as the 1974 plan, which had already been judicially determined to be inadequate under the law.

Id. at 204. His description of the plan's specifics can be found at 204-09.

108. *Id.*, cert denied, 104 S.Ct. 1272 (1984).

dilemma more litigation? I have expressed elsewhere my doubts about the ability of further litigation in the 1980's to eradicate the lingering effects of systemic discrimination and exclusion.¹⁰⁹ I see it, rather, as a necessary response to inaction by institutions, other than the courts, in addressing forthrightly the unfinished job of according previously excluded racial and ethnic minorities first-class citizenship in education, jobs, housing and voting. If resistance to meaningful change continues to characterize efforts to open up higher education to racial minorities, however, litigation may be the only alternative.¹¹⁰

Things need not be resolved by litigation, however. Racial and ethnic minorities need not be penalized, as in *Bakke*, because the long and pervasive history of their exclusion from institutions of higher education, both public and private, has not been spread upon the judicial or legislative record. Colleges, universities and professional schools should not be chilled in their efforts to develop effective programs, albeit imperfect and rough in many cases, designed to offset the consequences of this unfortunate history, including numerical goals and timetables, Justice Powell's opinion notwithstanding. Of course, I am supportive of administrative and legislative efforts to document the extent to which discriminatory practices have restricted minority access to higher education, for example, how California's official educational practices may have limited the pool of minority students eligible to attend Davis Medical School under its pre-affirmative action admissions program. The failure of the Regents to make such a record was fatal to its defense of the set-aside program, in my estimation. Such information can only help as institutions go about developing programs that are appropriately tailored to their specific circumstances. I see no reason, however, why such records need comply with evidentiary standards that must be met in the courts to obtain a remedy for racial discrimination.¹¹¹

Any serious commitment in America to increasing minority access to higher education cannot begin and end, however, with strengthening affirmative action plans at the universities and

109. Days, *Creating a New Civil Rights Consensus*, 112 DAEDALUS 197, 209-13 (1983).

110. See in this connection, *Ayers v. Winter* (N.D. Miss., September 20, 1983) *petition for cert. filed*, 52 U.S.L.W. 3853 (U.S. May 22, 1984) (No. 83-1479). There, black plaintiffs are challenging the constitutional adequacy of a desegregation plan for black and white public junior colleges in Mississippi.

111. See *Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1978) (discussing Congress' power to legislate to remedy discrimination in the absence of a judicial or administrative record.)

professional schools. After all, the push in the development of affirmative action plans in higher education during the late 1960's and early 70's was an acknowledgment that the society had failed to address seriously more profound barriers to minority access and retention. It was admittedly only a band-aid for a very large and serious wound. Little healing has taken place since then.

Here are some examples. The proportion of black and Hispanic high school graduates who go on to higher education declined between 1975 and 1980. Over half of Hispanic and Native American students and over 40 percent of black and Asian students were enrolled in two-year colleges. In 1979, 4.4 percent of faculty were black and 1.4 percent were Hispanic in institutions of higher education. Whites are relatively concentrated in both public and private universities at the top of the institutional hierarchy. In fact, whites are twice as likely as either blacks or Hispanics to be enrolled in a public university (as opposed to a two-year institution) and about 50 percent more likely to be enrolled in a private university. Whites are also more than twice as likely to enroll in some type of private institution. The practical significance of these figures is that four-year colleges, universities and especially private institutions have more resources for almost all of the important areas of educational expenditures than two-year and public colleges in which minorities are concentrated.¹¹² The figures on minority participation in governance, as members of Boards of Regents or administrative heads of institutions, are not encouraging, either, except with respect to historically black or other racially-identifiable institutions.¹¹³

The long-term answers to minority access to higher education lie, rather, in addressing the foregoing problems by increasing the degree to which students from these groups go to college, reducing the concentration of minorities in two-year institutions and insuring their ability to transfer to four-year colleges and universities,¹¹⁴ and providing necessary academic and financial support to raise retention

112. *Minorities in Higher Education* 9-11. (American Council on Education 1983).

113. Stuart, *supra* note 102. See generally, A. ASTIN, *MINORITIES IN HIGHER EDUCATION* (1982); and Olivas, *Federal Education Policy: The Case of Hispanics*, 4 *EDUCATIONAL EVALUATION AND POLICY ANALYSIS*, 301-310 (1982).

114. Recently, two public interest groups in California, the Mexican-American Legal Defense Fund and Public Advocates, filed an administrative complaint with higher education authorities alleging that, contrary to state law, minorities in two-year institutions were not being given a meaningful opportunity to transfer to four-year colleges and universities. *Mexican-American Legal Defense and Educ. Fund v. Board of Governors of the California Community Colleges*, (September 13, 1983).

rates, thereby making it more realistic for minority graduates of colleges and universities to plan on post-graduate and professional training. The representation of minorities in teaching and governance at traditionally white institutions must also be increased significantly.¹¹⁵

These are not new approaches, I realize. They were described in greater detail by the 1978 HEW *Guidelines*¹¹⁶ in *Adams*. I would suggest that these considerations ought to inform the efforts of not only public institutions affected by *Adams* but also public institutions in the non-*Adams* states, as well as of private colleges and universities. That for me is the message of the new Boston University Medical School program I mentioned earlier:¹¹⁷ a private university has assumed the responsibility for reaching down into the undergraduate years to *make certain* that it has a sufficient pool of qualified black applicants to accept for medical training.

In sum, I think we can make of *Bakke* what we want. It can remain an excuse for doing little or nothing to increase minority access to higher education or the occasion for addressing the problems that, unless dealt with promptly and forcefully, will leave us in the next century with two educational systems: to paraphrase the Kerner Commission Report, "one minority, one white."¹¹⁸

115. For example, for the 1981-82 academic year there were 224 full-time black law teachers in ABA-approved law schools. This number constituted only 4 percent of more than 5,000 teachers and administrators in legal education nationwide. G. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 237 (1984).

116. Revised Criteria, *supra* note 104.

117. Sullivan, *supra* note 17. Moreover, New York City and State officials have set in motion plans to establish a new medical school that would concentrate on graduating black and Hispanic physicians. The state's medical schools as of the 1983-84 academic year had a minority enrollment of 6.4 percent, 3 percent below the national average. New York State's minority population is 19.7 percent. Sullivan, *A Medical School for Minorities is Tentatively Planned for Queens*, N.Y. Times, April 18, 1984 at 1, col. 6

118. *Report of the National Advisory Commission on Civil Disorders* 1 (1968).