

Does *Bakke* Matter?

Affirmative Action and Minority Enrollments in Medical and Law Schools

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Since 1978, the Bakke decision has been the guiding legal principle underlying affirmative action in higher education. Recent attacks on Bakke have caused considerable anxiety among supporters of affirmative action and some celebration among opponents. This Article assesses the impact of Bakke on black and Hispanic enrollment in law and medical schools, using three major sources of evidence. The Article concludes that while the decision was significant because it legitimated and institutionalized the practice of affirmative action in higher education, it produced almost no change in pre-Bakke levels of minority applications and enrollment or admissions decisions made about minorities. Thus, Bakke's effect on boosting or curtailing minority enrollment was far less than either supporters or opponents predicted.

I. INTRODUCTION

When we began this project in the mid-1980s, affirmative action and the compromises articulated in the *Regents of the University of California v. Bakke*¹ decision seemed to be a settled and accepted part of public policy. To be sure, much of the white public had never accepted some of the more far-

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¹ 438 U.S. 265 (1978).

reaching affirmative action practices, but even so, there was some support for giving African Americans extra opportunities in education and employment. The Reagan Administration opposed affirmative action, but the administration's attempts to dismantle programs were largely frustrated by Congress and the courts. In that setting, our objective was to determine how much of an impact on medical and law school enrollments the landmark, but confusing, *Bakke* case actually had.

As we complete this project in 1998, the political climate for affirmative action has altered dramatically. The United States Supreme Court has shifted ground with a stream of cases narrowing the scope of affirmative action practices.² In *Hopwood v. Texas*,³ the United States Court of Appeals for the Fifth Circuit rejected the University of Texas Law School's justifications for racial preferences—which were to achieve a diverse student body, combat a hostile environment at the school, alleviate a poor reputation in the minority community, and eliminate present effects of past discrimination by actors other than the law school itself—and barred the use of race in admissions decisions. Additionally, many members of the Republican congressional majority stridently oppose affirmative action. In California, voters approved a state constitutional amendment to prohibit race, sex, color, ethnicity, and national origin as considerations in “discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting.”⁴ The Regents of the University of California, the original defendants in the *Bakke* case,⁵ have barred racial preference schemes in admission to the University,⁶ and many other institutions are reviewing their practices in light of the changed legal and political climate.

Public commentary points out the dire consequences of *Hopwood* and the California decisions for minority enrollments.⁷ Analysts often point out that these decisions are rolling back the *Bakke* decision.⁸ In that context, it is especially important to discover the actual consequences of the *Bakke* decision.

² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 900 (1995); *Martin v. Wilks*, 490 U.S. 755 (1989); *Richmond v. Croson*, 488 U.S. 469 (1989); *Grove City College v. Bell*, 465 U.S. 555 (1984); see also *Miller v. Johnson*, 515 U.S. 200 (1995).

³ 78 F.3d 932, 962 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

⁴ Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, § 6 (Magazine), at 39, 66.

⁵ See 438 U.S. at 266.

⁶ See Lemann, *supra* note 4, at 36, 66.

⁷ See SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOL 147–57 (1998).

⁸ See *id.*

The purpose of our study was to answer the question—Did *Bakke* matter? In Part II of this Article, we explicate the *Bakke* decision. In Part III, we examine three major sources of evidence—aggregate enrollment trends, effects of the decision on individual institutions, and views of admissions officials—in order to ascertain the impact of the decision on minority enrollment in law and medical schools. In Part IV, we attempt to answer the question—Does *Bakke* matter today? In Part V, we conclude that affirmative action alone can make only a small difference in improving equality in educational and employment opportunities. Nonetheless, until we, as a society, can muster the national will to adopt more effective public policies for combating racism, rolling back affirmative action will only constitute a step backwards in our nation's fight for racial equality.

II. THE *BAKKE* DECISION

In 1978, the Supreme Court issued its famous, or infamous, decision in *Bakke*.⁹ The ruling invalidated the admission plan of the medical school at the University of California-Davis (hereinafter "UC-Davis"), which reserved 16 of 100 places in each year's entering class for racial minorities.¹⁰ The divided Court held that the school could not reserve a certain number of places for minorities, but it could use race as a positive factor in admissions.¹¹

Despite its current status as a bedrock of affirmative action practices in education, the decision devastated many civil rights activists of the time.¹² Despite the initial attention lavished on this single case, there has been scarcely any systematic focus on its impact.¹³

Bakke was an unusually high profile case. Observers followed as it climbed step by step through the California courts. When the U.S. Supreme Court

⁹ 438 U.S. 265 (1978).

¹⁰ *See id.* at 275.

¹¹ *See id.* at 305-14, 319-20.

¹² Jesse Jackson, for example, exhorted his supporters to "rebel." *See Conflicting Reactions to the Bakke Decision*, THE CHRON. OF HIGHER EDUC., July 3, 1978, at A12 [hereinafter *Reactions*].

¹³ *See, e.g.*, Steven Shea & Mindy Thompson Fullilove, *Entry of Black and Other Minority Students Into U.S. Medical Schools*, 313 NEW ENG. J. MED. 933 (1985) (analyzing African American professional school trends without focusing on *Bakke*); JAMES E. BLACKWELL, *ADVOCACY AND STRATEGIC INTERVENTION: THE HIGHER EDUCATION PROGRAM OF THE SOUTHERN EDUCATION FOUNDATION: A TWELVE YEAR REPORT* (1987) (analyzing African American medical school enrollment trends, implying that *Bakke* had an effect). *But see* TIMOTHY J. O'NEIL, *BAKKE AND THE POLITICS OF EQUALITY* (1985); RON SIMMONS, *AFFIRMATIVE ACTION: CONFLICT AND CHANGE IN HIGHER EDUCATION AFTER BAKKE* (1982).

agreed to hear the case, more than one hundred organizations filed a record number of amicus curiae briefs.¹⁴ Magazines featured cover stories on the case,¹⁵ and commentators anticipated the result.¹⁶ Commentators called *Bakke* the most important civil rights case since *Brown v. Board of Education*.¹⁷ *Bakke* would determine not only the validity of one school's admissions plan, but the composition of many schools' classes for many subsequent years. Moreover, *Bakke* was expected to determine the legality of affirmative action and the speed of further civil rights progress in American society.

Even years after the decision, *Bakke* seemed important. In 1987, when Justice Louis Powell, who authored the main opinion, retired, he was asked which of his opinions was the most important.¹⁸ "*Bakke*," he replied without hesitation.¹⁹ Today, nearly two decades after the case was decided, its issues and holdings have become a centerpiece of a renewed public debate over affirmative action.

The case began when Allan Bakke, a white engineer who decided to become a doctor, applied for admission to eleven medical schools.²⁰ Although Bakke had good test scores, he was older than the schools preferred, and he was rejected by all of them.²¹ The following year, Bakke applied to UC-Davis and was again rejected.²² In both years that Bakke applied to UC-Davis, the school admitted through the special admissions program some minority applicants whose test scores and grades were lower than Bakke's.²³ In addition, UC-Davis admitted some white applicants whose test scores and grades were lower than

¹⁴ See *Bakke*, 438 U.S. at 268-70; see also O'NEIL, *supra* note 13, at 3-6 (listing organizations that submitted amicus curiae briefs and briefly discussing the strife the organizations experienced as a result of taking a position on affirmative action and quotas).

¹⁵ See, e.g., Cheryl Fields, *In Bakke's Victory, No Death Knell for Affirmative Action*, THE CHRON. OF HIGHER EDUC., July 3, 1978, at A1.

¹⁶ See Frederick R. Lynch, *Affirmative Action, the Media and the Public*, 28 AM. BEHAV. SCI. 807, 811 (1985).

¹⁷ 347 U.S. 483 (1954) (holding that segregating school children based on race violates the Equal Protection Clause of the Fourteenth Amendment).

¹⁸ See BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 1 (1988).

¹⁹ See *id.*

²⁰ See ALLAN P. SINDLER, *BAKKE, DEFUNIS, AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY* 66-69 (1978).

²¹ See *id.*

²² See *id.* at 73-77 (describing the administrative decisions leading to Bakke's second rejection from the University of California-Davis medical school).

²³ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277-78 (1978) (providing tables comparing Bakke's scores and grades to those of average and special admittees).

Bakke's through the school's regular admissions procedures.²⁴

When the medical school at UC-Davis opened its doors in 1968, it had no African-American or Hispanic students.²⁵ The next year it had just two blacks and one Hispanic student.²⁶ In 1970, the UC-Davis faculty, like many schools' faculties, voted to establish a special admissions program for "economically or educationally disadvantaged" students because of the small number of minority applicants.²⁷ When the school doubled its entering class to 100 in 1971, it reserved 16 of these places for students selected through the special admissions program.²⁸ Although the program was open to "disadvantaged" students of all races, it was established primarily for blacks and Hispanics.²⁹ Few Native Americans applied.³⁰ Numerous Asians applied but most were evaluated through the regular admissions procedures.³¹ Many whites applied to the medical school, but none were accepted through the special admissions program.³² The Dean of Admissions later acknowledged that the program was not tailored to take into account lower class whites or middle class minorities.³³

Bakke sued because he had been passed over in favor of minorities with lower scores. He claimed reverse discrimination and asserted the Equal Protection Clause.³⁴ Although the school passed over Bakke in favor of some whites with lower scores, Bakke had no constitutional or statutory grounds for challenging these admissions.

In June 1978, the Supreme Court announced the *Bakke* decision. Justice Powell did not exaggerate when he said, "[w]e speak today with a notable lack of unanimity."³⁵ There was no majority opinion. In six separate opinions the Justices split on the two key issues: whether quotas are unconstitutional and whether using race as a positive factor is unconstitutional.³⁶ One bloc of four

²⁴ See JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 20 (1979).

²⁵ See O'NEIL, *supra* note 13, at 26.

²⁶ See *id.*

²⁷ See DREYFUSS & LAWRENCE, *supra* note 24, at 19; see also SCHWARTZ, *supra* note 18, at 4.

²⁸ See *Bakke*, 480 U.S. at 275; see also DREYFUSS & LAWRENCE, *supra* note 24, at 19.

²⁹ See *Bakke*, 480 U.S. at 275.

³⁰ See DREYFUSS & LAWRENCE, *supra* note 24, at 19.

³¹ See *id.* at 19.

³² See SCHWARTZ, *supra* note 18, at 4.

³³ See DREYFUSS & LAWRENCE, *supra* note 24, at 42.

³⁴ See SCHWARTZ, *supra* note 18, at 16.

³⁵ *Id.* at 143.

³⁶ See *Bakke*, 480 U.S. at 269, 324, 379, 387, 402, 408.

Justices—Chief Justice Burger and Justices Rehnquist, Stevens, and Stewart—apparently concluded that both the quota and any use of race as a positive factor were invalid.³⁷ Another bloc of four—Justices Blackmun, Brennan, Marshall, and White—concluded that both quotas and using race as a positive factor were valid.³⁸ Powell was the swing Justice, maintaining that the quota was unconstitutional but the use of race as a positive factor was not.³⁹ Thus, Powell provided the fifth vote for one issue from each bloc, and his opinion became the controlling opinion.

Justice Powell, using “strict scrutiny,” considered whether the program served a compelling governmental interest.⁴⁰ He rejected all of the university’s justifications except for its need to establish a diverse student body.⁴¹ However, Justice Powell stated that it was not necessary to set aside a certain number of seats to accomplish this goal.⁴² Thus, he proclaimed that the program violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁴³ Justice Powell concluded that schools could use race to obtain a more diverse student body and approvingly cited the Harvard Plan. He added an explanation of this plan to the appendix.⁴⁴

However, Powell’s opinion does not clearly distinguish what schools can and cannot do. They cannot use an obvious quota or set-aside. They should not use separate procedures to evaluate applications from different racial groups. But can they use a flexible “goal” rather than a fixed quota? Powell called this a “semantic distinction” that was “beside the point,”⁴⁵ but Harvard implied that it set a goal.⁴⁶ If schools do not use a flexible “goal,” but weight some races differently and enroll about the same number of minorities every year, is this different significantly from using what is forbidden?

Brennan maintained that there was “no constitutional distinction” between

³⁷ See *id.* at 420–21. Stevens, arguing for this bloc, chided the other five Justices for addressing the issue of race as a positive factor in admissions. He considered these statements dicta. Yet, Stevens seems to address this issue implicitly. Moreover, it is hard to conceive that Stevens and his bloc could reach any conclusion other than that race could not be used at all, given their interpretation of the Civil Rights Act of 1964.

³⁸ See *id.* at 378.

³⁹ See *id.* at 320.

⁴⁰ See *id.* at 305.

⁴¹ See *id.* at 307–15.

⁴² See *id.* at 316–17.

⁴³ See *id.* at 270–71.

⁴⁴ See *id.* at 316–18, 321–24.

⁴⁵ *Id.* 288–89.

⁴⁶ See *id.* at 323–24.

the two approaches.⁴⁷ The only difference is that the Harvard Plan “proceeds in a manner that is not immediately apparent to the public,” whereas the UC–Davis program is more open.⁴⁸ Blackmun echoed these views, stating the line was “thin and indistinct.”⁴⁹ Powell replied that the crucial difference was the “facial intent to discriminate.”⁵⁰ Yet, Powell acknowledged that a plan that used race as a selection criterion could be “simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program.”⁵¹ Further, in a passage directed toward school officials, Powell assured that “a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed. . . .”⁵² While the distinction exists in theory, it might not appear in practice.

The *Bakke* decision was covered extensively by the media, both national and specialized.⁵³ Commentators, reflecting the split ruling, were divided about the likely effect.⁵⁴ One study of editorial reaction by nineteen daily newspapers found an emphasis upon the balanced outcome of the decision.⁵⁵ Surprisingly, there was relatively little criticism. Perhaps the compromise in the result, or possibly the ambiguity of the ruling, neutralized potential opponents in the press.

Yet, activists feared the worst. Civil rights activists, perhaps taking their cue from Justice Marshall’s pessimistic opinion, foresaw negative

⁴⁷ See *id.* at 378.

⁴⁸ *Id.* at 379.

⁴⁹ *Id.* at 406.

⁵⁰ *Id.* at 318.

⁵¹ *Id.*

⁵² *Id.* at 318–19.

⁵³ For example, the weekly newspaper devoted to higher education, THE CHRONICLE OF HIGHER EDUCATION, began its coverage of *Bakke* in September 1976 with a story on the California Supreme Court’s opinion. See Beverly T. Watkins, *Minority Admissions Plan Held Unconstitutional in California*, THE CHRON. OF HIGHER EDUC., Sept. 27, 1976, at A3. THE CHRONICLE then featured the United States Supreme Court ruling on page one in its first issue after the decision. See Fields, *supra* note 15, at A1. Titling its coverage, *In Bakke’s Victory No Death Knell for Affirmative Action*, THE CHRONICLE printed complete texts of the Powell, Brennan, and Stevens opinions in that issue, see *supra* at A3–12, and the remainder of the opinions in the next issue. See *3 Separate Opinions in the Bakke Case*, THE CHRON. OF HIGHER EDUC., July 10, 1978, at A11–13. Additionally, both issues also featured extensive commentary and reactions from both legal analysts and advocacy groups.

⁵⁴ See DREYFUSS & LAWRENCE, *supra* note 24, at 225–27.

⁵⁵ See William Haltom, *Before and After Bakke: Editorialists and Judicial Mediation* (undated) (unpublished manuscript, on file with author).

consequences. The NAACP called the ruling "a major disappointment."⁵⁶ The *Amsterdam News* headlined the story, "Bakke: We Lose!"⁵⁷ Jesse Jackson, comparing the decision with the withdrawal of federal troops from the South after Reconstruction, proclaimed, "[b]lack people will again be unprotected . . . we must not greet this decision with a conspiracy of silence . . . we must rebel."⁵⁸ The spokesperson for the Mexican American Legal Defense and Education Fund noted that while *Bakke* won a symbolic victory, most affirmative action programs would be lawful under the standards of the case.⁵⁹ However, the Congressional Black Caucus emphasized that the Court upheld the use of race, and it urged that this point be publicized to shore up support for affirmative action policies.⁶⁰

Some opponents of affirmative action applauded the ruling. Some conservative activists, however, predicted that Powell's opinion would drive quota programs "underground;"⁶¹ while universities would purport to adopt the Harvard Plan, they would continue to use *de facto* quota programs. Thus, Powell's opinion would "produce much the same result" as before but with "an encouragement of duplicity."⁶²

The Court did not decide any other cases involving school admissions through 1987, but it did sanction affirmative action.⁶³ It upheld race-conscious remedies, including quotas if evidence of past discrimination existed.⁶⁴ It invalidated affirmative action only when whites with more seniority were laid

⁵⁶ NAACP Statement on Implications of the Bakke Decision, 86 THE CRISIS 41, 42 (1979).

⁵⁷ *The Age of Less*, NEWSWEEK, July 10, 1978, at 19-26.

⁵⁸ *Reactions*, *supra* note 12, at 12.

⁵⁹ *See id.* at 12.

⁶⁰ *See* SINDLER, *supra* note 20, at 317.

⁶¹ *See* Nathan Glazer, *Why Bakke Won't End Reverse Discrimination: 2*, 66 COMMENTARY, Sept. 1978, at 36, 39.

⁶² William J. Bennett & Terry Eastland, *Why Bakke Won't End Reverse Discrimination: 1*, 66 COMMENTARY, Sept. 1978, at 29, 32.

⁶³ *See* Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987); United States v. Paradise, 480 U.S. 149, 185-86 (1987); International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986); Sheetmetal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 487 (1986); Fullilove v. Klutznick, 448 U.S. 448, 491-92 (1980); United Steelworkers v. Weber, 443 U.S. 193, 209 (1979). *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-84 (1986) (disallowing layoffs of senior non-minorities before minorities); Firefighters Local Union v. Stotts, 467 U.S. 561, 578-83 (1984) (holding that "make-whole" relief is only available to those who have actually suffered illegal discrimination).

⁶⁴ *See* Paradise, 480 U.S. at 153, 166, 185-86; International Ass'n of Firefighters, 478 U.S. at 515-17; Sheetmetal Workers', 478 U.S. at 445-51; Fullilove, 448 U.S. at 490-92; Weber, 443 U.S. at 209.

off instead of minorities with less seniority.⁶⁵ If these rulings had any effect on the impact of *Bakke*, they should have reinforced the use of race as a positive factor in the decade after the decision.

III. THE STUDY

Although *Bakke* affected many types of schools, our research assesses *Bakke*'s impact on applications and admissions to medical and law schools.⁶⁶ We chose to examine medical and law schools for several reasons. First, we chose to examine medical schools because *Bakke* occurred in this context. Second, we chose to examine law schools because the Supreme Court sidestepped a previous case involving law school admissions,⁶⁷ and law school faculty are aware of and sensitive to legal decisions. Third, medical and law schools had more special programs to recruit and retain minorities than other professional schools,⁶⁸ and admission to these schools had become highly competitive by the time of the *Bakke* decision. For all of these reasons, *Bakke*'s impact, if any, should be apparent in an examination of these schools.

This study examines both the ultimate targets of the ruling, the students, and those who were responsible for implementing the ruling—the admissions officials.⁶⁹ We use three sources of information. First, national application and enrollment trends over a twenty-year period before and after *Bakke* allow us to examine macro-level year-to-year changes in students' decisions to apply and in enrollments. Second, cross-sectional information on individual schools before and after *Bakke* highlights micro-level changes in enrollments across schools. Third, 1989 survey responses from admissions officers in medical and law schools reveal their perceptions of *Bakke*'s impact and of their admissions policies. In each of the sections below, we will describe in more detail the data used.

⁶⁵ See *Wygant*, 476 U.S. at 270, 282–84; *Stotts*, 467 U.S. at 567, 572–76, 583.

⁶⁶ It is important to note that our data sources are more complete for medical schools than law schools. Accurate time series data on minority applications and acceptances to law schools in pre-*Bakke* years are unavailable.

⁶⁷ See *DeFunis v. Odegaard*, 416 U.S. 312, 314–15 (1974).

⁶⁸ See FRANK J. ATELSEK & IRENE L. GROMBERG, AMERICAN COUNCIL ON EDUCATION, SPECIAL PROGRAMS FOR FEMALE AND MINORITY GRADUATE STUDENTS, NO. 41, 6–8 (1978).

⁶⁹ For a more comprehensive overview of the study, see WELCH & GRUHL, *supra* note 7, at 109.

IV. DID *BAKKE* MATTER?A. *Aggregate Enrollment Trends*

Perhaps the most direct way to examine the impact of *Bakke* is to look at nationwide trends in African-American and Hispanic enrollment.⁷⁰ We have collected data on several key trends, including minority applications, admission, and enrollment, beginning as early as 1951 for some variables, and as late as 1973 for others. These data can show us how, if at all, both students and admissions committees changed their behavior over time in response to *Bakke* or to other factors.

We begin by examining the aggregate trends in black and Hispanic first-year medical school enrollment. As Figure 1 shows, African-American enrollment jumped from about 200 in 1965 to almost 1200 in 1975. African-American enrollments were very stagnant through the next decade, increasing only gradually. In the late 1980s, enrollment again began to increase significantly and accelerated in the 1990s to a peak of more than 1500. The trends were generally similar for Hispanics, except for the 1975 to 1985 period, which showed a slow upward growth with a plateau in the late 1980s.

The *Bakke* decision had little effect on either of these time series. The steep upward climb in enrollment had reached a plateau before *Bakke* and would not resume until more than a decade after the decision.

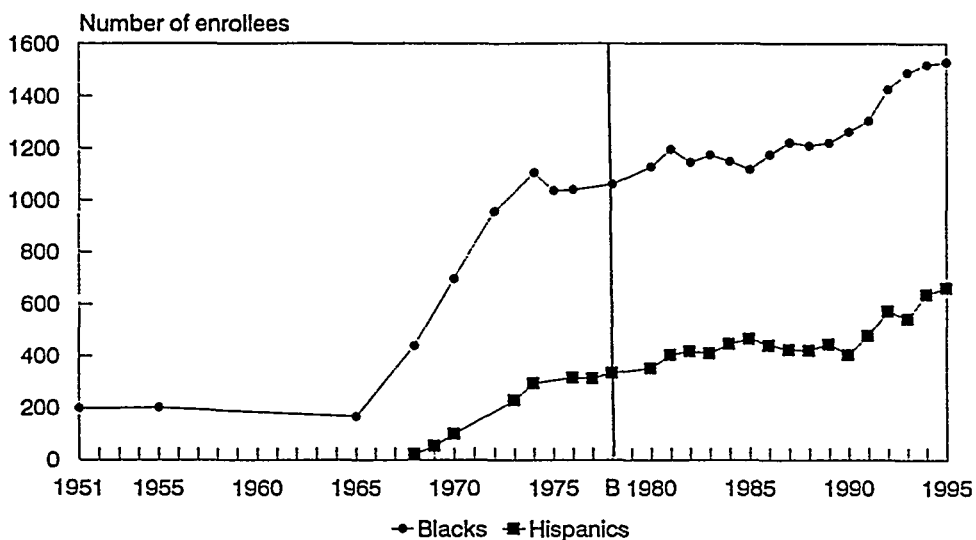
Although the longitudinal patterns are somewhat different, the same conclusion can be reached about black and Latino first-year enrollment in law schools. For African-American enrollment, the year of the *Bakke* decision was only one point in a period of relative stagnation from about 1975 to 1986. This was followed by a rather sharp increase beginning in 1987. Hispanic enrollment rose slowly but fairly consistently over the entire period for which we have data—1969 to 1995. Only in 1975, 1983, and 1995 did enrollment decrease from the year before. Again, *Bakke* seems irrelevant to interpreting these time series data.

We also have data on medical school applications beginning in 1973. Applications by both African-American and Latino students were fairly stagnant from 1973 through 1983. The two patterns then diverged—African-American applications actually declined until they began to increase steeply in the late 1980s. This continued until 1994 when applications began to decline. Applications from Hispanic students stayed very constant until 1990, when they began a slow but perceptible increase through 1996. Again, however, the *Bakke*

⁷⁰ Data sources include AAMC (selected years), the Lawyer's Almanac (selected years), and personal communications from Rick Morgan of the American Bar Association. These data are based on individuals' self reports of race and ethnicity.

decision appeared to have no impact on these trends for either African Americans or Hispanics.

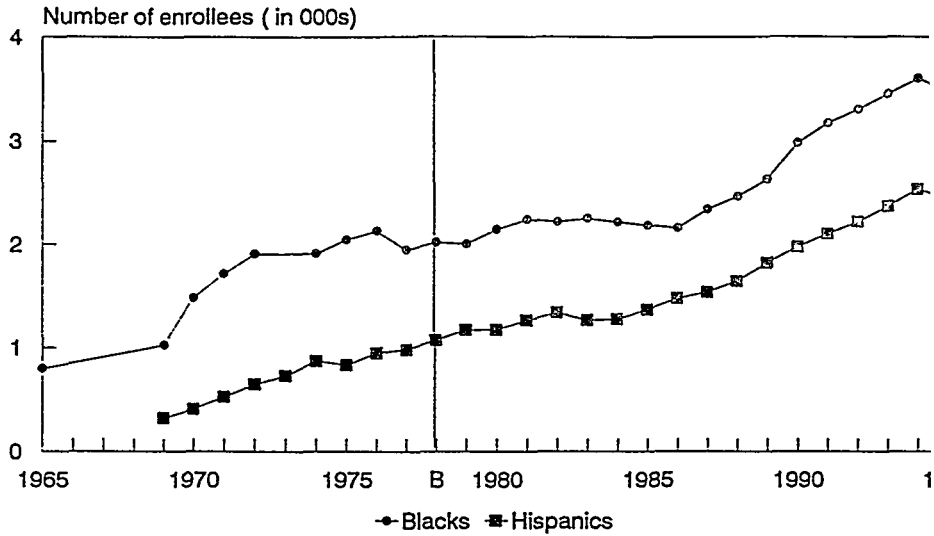
Figure 1: Black and Hispanic First Year Medical School Enrollment



Source: Shea and Fullilove (1985)

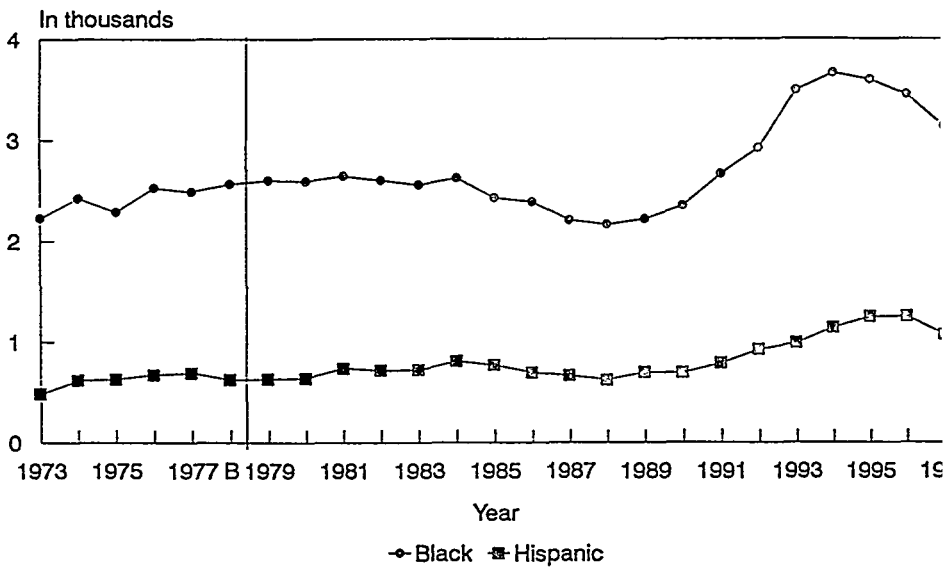
Admission Requirements, selected years. B=date of *Bakke* decision

Figure 2: Black and Hispanic First Year Law School Enrollment



Source: Shea and Fullilove (1985)
 Lawyers Almanac (1986); American Bar Association Survey. B=date of *Bakke* decision

Figure 3: Black and Hispanic Applications to Medical School



Data from AAMC, 1973-1997

In order to calculate the impact of *Bakke* more precisely than could be done from a visual inspection of the graphs, we utilized the following: annual data on several application, admission, and enrollment variables; a model that included a short term effect and long term effect and several control variables; and time series methodology. Our time series analyses began either in 1968 or as soon thereafter as data were available and ended in 1987. This period allowed us to focus more precisely on *Bakke* than would a longer time period. The longer the time period examined, the more difficult it is to separate *Bakke*'s effects from others, because "the repercussions of all government actions ramify indefinitely and interrelate with other phenomena, both public and private, many of which simply cannot be quantified and indeed often cannot even be identified."⁷¹

Control variables included a dummy variable for the Reagan Administration years and a measure of federal financial aid available in that year. For the dependent variables of applications and acceptance ratios, we also controlled the aggregate number of applications from all students that year.

We reported each of these trends in more detail elsewhere,⁷² but Table 1 summarizes these findings. In general, they reinforce our conclusions that *Bakke* had little specific impact on trends in minority applications, admissions, and first-year enrollment. Though the fit of the models range from good to excellent, only two of the *Bakke* coefficients are significant.

In examining the longer time series that extends through 1997, it seems clear that the growth in minority applications and enrollments occurred at two points. First, there was a sharp increase after the passage of the Civil Rights Act of 1964, as legal barriers fell and professional schools became aware of the need to recruit minority, particularly African-American, students to their institutions. In addition, competition for admission to professional schools was growing tremendously at this time.⁷³ Second, there was a significant increase in the late 1980s and early 1990s. This increase may best be attributed to the growing middle class in the African-American community and the large increase in the number of college educated minorities.⁷⁴ These developments

⁷¹ Jesse Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 7 (1983).

⁷² See John Gruhl & Susan Welch, *The Impact of the Bakke Decision on Minority Enrollments in Medical and Law Schools*, 71 SOC. SCI. Q. 458-71 (1990).

⁷³ See WELCH & GRUHL, *supra* note 7, at 52-53.

⁷⁴ For example, before 1975, only about 13% of all African-American families earned more than \$50,000 (1994) dollars. This estimate rose to about 17% by 1985. By 1994, it had risen to over 21%. Among Hispanics, the comparable figures for 1975 and 1994 are 13% and 19%. During this same time, the numbers of individuals attending college rose from 1.1 million to 1.8 million among African Americans and from 0.4 million to 1.2 million among Hispanics.

led to an increase in the number of families who were able to send their children to professional schools. In addition, an economic boom in the early to mid-1990s reduced unemployment and induced some income growth, making it possible for more students to attend college. This growth in minority enrollment began nearly a decade after *Bakke* and is highly unlikely to have been affected by it.

Table 1: Blacks, Hispanics, and *Bakke*

A. Blacks Only

	Pre- <i>Bakke</i> Trend	Post- <i>Bakke</i> Trend	Short Term Change	Fit of Model* (R ²)
# of applicants to medical school	83	145	-37	.95
% of medical school class	-.17	-.11	-.05	.63
% of law school class	-.01	.08	-.15	.65
% of African Americans accepted, medical school	-1.46*	1.33	1.73	.88
Acceptance ratio, medical school	-.06*	.02	.02	.99

B. Hispanics Only

	Pre- <i>Bakke</i> Trend	Post- <i>Bakke</i> Trend	Short Term Change	Fit of Model* (R ²)
# of applicants to medical school	52*	-54	26	.97
% of medical school class	.25*	.06	.01	.98
% of law school class	.15*	.11	-.08	.93
% of Hispanics accepted, medical school	1.70*	1.51	7.36*	.86
Acceptance ratio, medical school	-.01	.00	.10*	.91

* The coefficients reflect the effect of these variables controlling for other variables in the model, including a dummy variable for the Reagan Administration years, a measure of federal financial aid available, and, for the applicant and acceptance measure, an indicator of the number of applications from all students.

B. *The Effect on Individual Institutions*

Another way to explore the impact of *Bakke* is to look at individual institutions before and after the decisions. Aggregated national data could

conceivably obscure important gains in individual institutions. If *Bakke* changed patterns and intensities of minority recruiting, we might expect that effect to be apparent in the distribution of minority gains and losses among different types of schools. For example, we might expect the effect to be less apparent in states with small minority populations. We might also expect a bigger gain in northern schools, rather than southern schools, where resistance to civil rights was more intense.⁷⁵ For this analysis, we used the total minority enrollment in the school, rather than just first-year enrollment.⁷⁶

The overall growth in minority enrollments in the typical medical or law school between 1978—the time of *Bakke*—and 1987 was extremely small. Medical schools, for which we have data on blacks and Hispanics, increased their overall enrollment by thirty-five students during this decade, and about one-third of this small growth was in minority students. However, African-American enrollment grew by only .19%, and, on average, Hispanic enrollment grew by .75%. Law schools, in which our data are for “minorities”—a combination of African Americans and Hispanics—actually decreased in overall enrollment during this decade, but the minority proportion of their enrollment increased 2.63%.

Table 2 illustrates that, institution by institution, minority enrollment in 1987 is highly related to minority enrollment a decade earlier. This is most true for African-American students attending medical schools, where earlier enrollment explains over 93% of the variation in 1987 enrollment (shown in the table as R^2). This conclusion is almost as true for African Americans attending law schools, where the variation explained is 89%, and somewhat less true for Hispanics in medical school where the explained variation is only 57%. A high proportion of variation means that those schools with high minority enrollments in 1987 also had high enrollments in 1977, and the same is true for those schools with medium and low enrollments.

If *Bakke* had an effect on professional schools' treatment of minority applicants, one would expect this effect to vary greatly among institutions, with some moving ahead dramatically and others lagging behind. If so, we should not have expected to find an extremely strong relationship between minority enrollments before and after *Bakke*. However, the strong relationship found between previous and current minority enrollments suggests that the decision reinforced existing patterns of minority recruiting. Whatever factors promoted

⁷⁵ See James H. Kuklinski et al., *Racial Attitudes and the "New South,"* 59 J. OF POL. 323–49 (1997).

⁷⁶ First-year minority enrollment was not available for law schools. Law school data for 1977 were not available, so we used 1979 data. Unfortunately, this captures the first-year post-*Bakke* class, so the data are partially contaminated. However, two-thirds of the law students would have been accepted before *Bakke*.

minority enrollment in 1977, also did so in 1987. The possible exception is Hispanic medical school enrollment, in which the variation between the 1987 enrollment and the 1977 enrollment, while substantial, is considerably less than in the other two cases. However, as we will see in the next table, there are other factors in addition to *Bakke* that help explain changing Hispanic enrollments.

Table 2: The Impact of Earlier Minority Enrollment on 1987 Minority Enrollment⁷⁷

	Medical Schools Blacks	Medical Schools Hispanics	Law Schools Minorities
% of group enrolled before <i>Bakke</i>	.93	.76	.84
(t)	(39.08)	(12.13)	(36.49)
Constant	.62	1.12	4.04
R ²	.93	.57	.89

In Table 3 we examine the impact of 1977 enrollment on 1987 enrollment, while taking into account several other possible predictors of minority enrollment.⁷⁸ The table indicates that none of these other factors affected black enrollment in medical schools. Although the 1977 enrollment remains an extremely strong predictor of 1987 enrollment, neither the type of school or the proportion of blacks in the state population, enrollment, or changing enrollment are related to African-American enrollments in 1987.⁷⁹ Indeed, adding these factors to the equation only increases the explained variation in enrollment by a nonsignificant 1%, from 93% to 94%.

Hispanic enrollment continues to be strongly predicted by previous Hispanic enrollment (as we saw in Table 2, it explains 57% of the variation),

⁷⁷ The dependent variable is the percent of African Americans, Hispanics, and minorities enrolled in 1987. The coefficients shown are unstandardized regression coefficients (b values). An example of the interpretation is as follows: for every percent of African-American enrollment before *Bakke*, in 1987 there was .93% African-American enrollment plus a constant of .62%. Thus, a medical school with a 10% African-American enrollment in 1977 can be predicted to have a 9.92% enrollment in 1987 (10 x .93 + .62). A law school with a 10% minority enrollment in 1977 can be predicted to have a 12.44% enrollment in 1987 (10 x .84 + 4.04). N=112 for medical schools and 164 for law schools.

⁷⁸ Multicollinearity between region and the proportion of African Americans impels us to delete region from the equations.

⁷⁹ Note that this does not mean that the state's African-American population percent is not related to 1987 enrollments. The two are related at $r=.38$. But, its effect is indirect, through the 1977 enrollment proportions.

but the proportion of Hispanic population in the state also is an important predictor of that enrollment. Hispanic medical enrollment grew by a larger proportion than did African-American enrollment, and it is clear that much of this growth took place in states with larger Hispanic populations. These states, such as Florida, Texas, and California, are also the site of much of the increase in the Hispanic population. The impact of a state's Hispanic population is largely responsible for the increase in the R^2 from .57—with only the 1977 enrollment figures as a predictor—to .70 in this equation.

Table 3: Impact of Previous Minority Enrollment and Other Factors on 1987 Proportions of Minority Enrollment⁸⁰

	Medical Schools		Law Schools
	Blacks	Hispanics	Minorities
% of group enrolled before <i>Bakke</i>	.92 (35.45)	.35 (4.22)	.82 (33.83)
% blacks in state's population	.03	-.01	.04
% Hispanic in state's population	-.00 (-.01)	.22 (5.90)	.15 (3.24)
Number of students enrolled	.14 (1.17)	.12 (1.46)	.06 (.57)
Change in number enrolled	-.32 (-1.49)	-.11 (-.69)	-.35 (-1.98)
Major state university	.19 (.35)	.01 (1.45)	-.47 (-.64)
Other state university	.92 (1.29)	.00 (.06)	-.69 (-.82)
Constant	-.61 (-.74)	1.12 (-.33)	2.42 (2.88)
R^2	.94	.70	.91

Minority enrollment in law schools is somewhat affected by the black and Hispanic proportions in a state. However, together the additional predictors increase the R^2 only from .89 (with only previous enrollment as a predictor) to .91. Still, beyond their effects on 1979 minority enrollment, the proportions of

⁸⁰ N=112 for medical schools; 163 for law schools. Significant coefficients are in bold face.

Hispanics in a state are significantly related to 1987 enrollment as well. Contrary to expectations, minority enrollment in 1987 is higher in those law schools that have decreased their overall enrollment, with all other things being equal. As with minority enrollments in medical school, there are no effects of overall enrollment and type of university.

In both medical and law schools, African-American and Hispanic enrollment a decade after *Bakke* was very much related to enrollment before *Bakke*. Though some professional schools moved ahead faster than others in this decade, on the whole, schools that had larger proportions of minorities before the decision had them a decade later. But not all variation in 1987 minority enrollments was explained; we have seen that the Hispanic population of the state affected changes in Hispanic enrollment and, in law schools, overall minority enrollment.

C. *The Views of Admissions Officials*

Viewpoints of admissions officials, who screen applications and make decisions about whom to admit, provide a third kind of evidence about the impact of *Bakke*. Through reports in the popular and specialized media, and through the activities and publications of the Association of American Colleges of Medicine and the American Association of Law Schools, it is clear that professors, deans, and admissions officers at both medical and law schools had ample information about the *Bakke* decision at the time it was handed down and immediately afterward.⁸¹ "Given that attention in professional as well as popular media, it is not surprising that eleven years after the decision, fully 97% of the medical admissions officers and 99% of their law school counterparts had heard of the decision."⁸²

Most of these officials perceived that *Bakke* has had minimal impact on admissions policies. For example, officials were asked whether the decision changed their admissions policies at the time *Bakke* was decided and whether it affected their policies at the time of the survey, which was conducted nearly a decade later.⁸³ Almost no one reported that the decision changed their policies significantly at the time of the decision. However, 11% of the medical school officials and 17% of the law school officials in the survey reported that it changed their policies "somewhat."⁸⁴ As indicated in Figure 4, over three-

⁸¹ See WELCH & GRUHL, *supra* note 7.

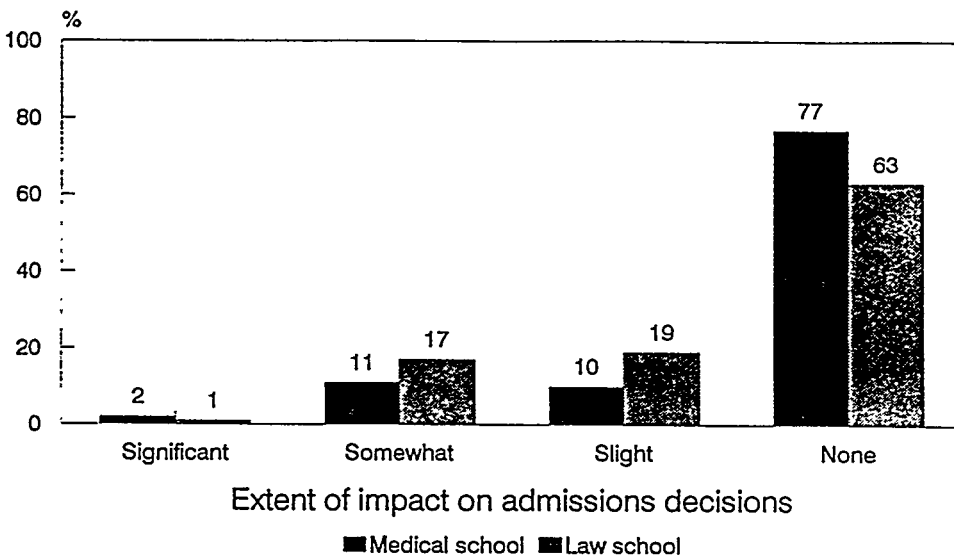
⁸² *Id.* at 67-68. What is surprising about the aftermath of *Bakke* is that there were a handful of admissions officials who had not heard of the decision.

⁸³ See *id.* at 74.

⁸⁴ Examples given by respondents of such small changes include one who noted that they are more conscious of what they are doing in minority recruitment and another who said

quarters of the surveyed medical school officials and 63% of the law school officials claim that it affected policies "not at all." One school official said, "[w]e have always upheld affirmative action."⁸⁵ Another respondent reported that its affirmative action policy remained essentially unchanged since 1968.⁸⁶ Thus, only a small minority of schools reported that *Bakke* changed rather than reaffirmed their admissions policies.

Figure 4: Admission Officials' Perceptions of *Bakke's* Impact



Source: Survey Questionnaires
Law=84; med=63

Similar to the minority of respondents who asserted that *Bakke* changed their policies when the decision was handed down, another minority of respondents reported that the decision had an impact on their decisions in 1989 when we conducted the survey. One fear of those who opposed the decision was that public attention and professional school actions would focus on the portion

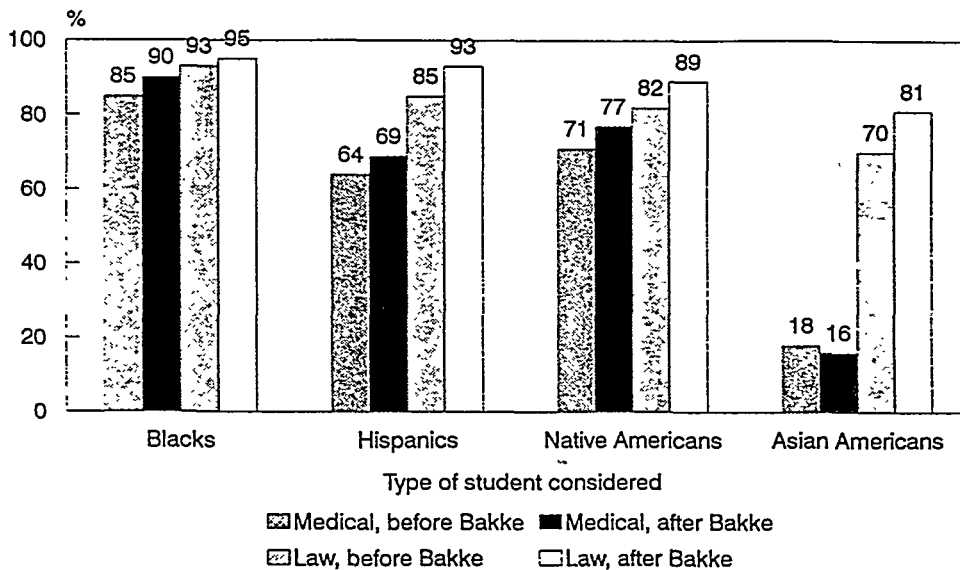
their policies are slightly more flexible. One medical official said they ceased using "two lists," one for majority and one for minority applicants. One official said race became less of a factor, and two officials said that it became more of one.

⁸⁵ See WELCH & GRUHL, *supra* note 7, at 74. This respondent clearly had a restrictive definition of "always."

⁸⁶ See *id.*

of the Court's decision outlawing quotas, rather than the portion of the Court's decision affirming the use of race as a positive factor.⁸⁷ "If this emphasis were to occur, these detractors believed, eventually efforts to recruit minorities would cease and opportunities for minorities would diminish."⁸⁸ Despite the fears of some officials, the majority of medical and law school officials did not believe that opportunities for minorities were diminished as a result of *Bakke*. In fact, of those who believed that *Bakke* has had a continuing impact, more believed it has worked to increase the admissions of minority students than to limit admissions. Indeed, among law school respondents, twice as many believed the decision has opened the doors wider than believed it has closed them tighter. Among medical respondents, only slightly more respondents believed that *Bakke* improved access for minorities than believed it limited access. Most admissions officials believed that *Bakke* legitimized existing practices rather than changed them, and where it did change practices, most officials believed *Bakke* improved them.

Figure 5: Consider Race a Positive Factor in Admissions Before and After *Bakke*



Source: Survey Questionnaires

Law=n=67 before, 87 after; med=n=61 before, 68 after

There is still more evidence that the impact of *Bakke* was to legitimize policies rather than change them. Respondents were asked whether they took

⁸⁷ See *id.*

⁸⁸ *Id.*

race into account before *Bakke* and whether they take race into account, as a positive factor, in making decisions today. Most schools took race into account in a positive way before the decision, and a few more schools did afterwards. The safest conclusion to reach is that the decision apparently did not deter schools from considering race as a positive factor, and may even have encouraged a handful. Being black, Hispanic, or a Native American earns students positive credit in the admissions process at most law and medical schools. As indicated in Figure 5, by 1989, over 95% of law and 90% of medical schools gave extra consideration to African Americans. Moreover, 93% of law schools and 69% of medical schools did the same for Hispanics.⁸⁹

D. *Some Conclusions*

Many commentators, referring to the "chilling effect of *Bakke*," predicted that the ruling, by invalidating quotas, would result in fewer applications by minority students, less pressure on schools to admit them, and, consequently, smaller minority enrollments.⁹⁰ Over time, supporters of affirmative action came to view *Bakke* as an essential stimulus to minority enrollment. Based on this systematic study of *Bakke*'s impact, we conclude that its effect on boosting or curtailing minority enrollment was far less than either supporters or opponents predicted. Nonetheless, the decision was significant because it legitimated and institutionalized the practice of affirmative action in admissions decisions. *Bakke* outlawed racial quotas, but the decision also validated affirmative action practices that give some positive weight to the race or ethnicity of candidates.⁹¹ Therefore, although *Bakke* is increasingly under challenge, it continues to be the Supreme Court decision underpinning affirmative action in higher education admissions.

We are confident in our conclusions, but we realize there are limits to this study. As with any examination of the impact of a Supreme Court case, it is difficult to separate the effect of the Court's ruling from the effects of other factors occurring at the time. Minimizing the period of the series analysis reduces, but does not eliminate, the number of other factors conceivably

⁸⁹ These proportions are very similar to those reported for African Americans in a 1974 survey of medical schools, but lower for Native Americans, Asian-Americans, and Hispanics. See Wellington & Montero, *Equal Educational Opportunity Programs in American Medical Schools*, 53 J. OF MED. EDUC., 633-39 (1978). African Americans were the most likely to receive preferential treatment, followed by Native Americans, Hispanics, and Asians. Differences could be in recall of our respondents and different samples, as well as changing practices.

⁹⁰ See WELCH & GRUHL, *supra* note 7, at 30.

⁹¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272, 317 (1979).

affecting minority enrollment. Moreover, predicting individual behavior from aggregate characteristics is always risky. We have examined decisions made by a few thousand students and a few hundred schools in our aggregate analysis, but we have tried to predict their behavior with variables affecting millions.

Ideally, we would have conducted a before and after study of both individuals and institutions. It would have been useful to examine students' reasons for applying or not applying to professional schools to see if their reasons differed before and after *Bakke*, and indeed to determine if students were even aware of *Bakke* and its predicted impact. Moreover, such a before and after design could have been profitably used to study the admissions process. However, even at the time we conducted our survey, much time had passed since the decision. Therefore, we have no "before" information from individuals and admissions committees except for responses based on memory. Thus, we assembled the best evidence we could after the decision and relied on a multiplicity of sources.⁹²

Given this evidence, our conclusions are reasonably straightforward. Admissions officials said in response to our questionnaire that the impact on their decisions was "none" or "slight." Hardly any respondents said the impact was "significant." Our analyses of aggregate applications, acceptances, and enrollments confirm these officials' impressions. In particular, the impact of *Bakke* on the number of minority applicants or enrollees was minimal. The schools with the most minorities the year before *Bakke* were the ones with the most minorities a decade later, and those schools with the least number of minorities before the decision were the ones with the least minorities after the decision. Patterns of institutional behavior tend to persist, and professional school enrollment before and after *Bakke* is certainly an example of that persistence.

Our conclusions reinforce the findings of some previous studies on the impact of Supreme Court decisions.⁹³ Such studies confirm the impression that the impact of Supreme Court decisions is often different than what would be expected from reading the decision or even from reading media reports about its presumed consequences. Cases considered significant at the time the decisions

⁹² See WELCH & GRUHL, *supra* note 7, at 179-80.

⁹³ See generally STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* 16-22 (1970) (discussing the "impact theory," and how Supreme Court decisions impact areas such as economics, politics, and public opinion differently); CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES* 4 (1984) (examining the impact of translating judicial policies as a political process subject to a variety of pressures from a variety of political actors); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 30 (1991) (combining the "Constrained Court" and the "Dynamic Court" views to understand how the Court can bring significant reform).

are rendered do not always have an impact other than the legal and political commentary that follow in their wake. Indeed, the most fundamental finding of these studies is that rulings do not always change behavior in the expected way, to the expected extent, or at all.

To a great extent, the minimal impact Supreme Court decisions produce derives from the refusal of the parties involved and the lower courts to comply with the ruling. If they do comply, the results might be different from the ones intended, or the effect might be far less than the extent anticipated. Moreover, if there is an impact, it often varies from place to place.⁹⁴ Studies relevant to *Bakke* have concluded that decisions that are ambiguous,⁹⁵ which contradict the norms of the community or beliefs of those who are to enforce the law,⁹⁶ or which challenge the organizational status quo,⁹⁷ may be less likely to be fully implemented. For example, after the Court's decision in *Miranda v. Arizona*,⁹⁸ some police officers did not advise suspects of their rights to silence

⁹⁴ See JOHNSON & CANON, *supra* note 93, at 229–69.

⁹⁵ See DAVID W. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 164–68 (1974) (discussing why the Supreme Court's decisions limiting police investigatory powers were imprecise and had little effect); see also HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, *LAW AND SOCIAL CHANGE* 198–99 (1972) (noting that in civil rights law, an ambiguous decision will be “too indefinite to bring about meaningful change”); Bradley Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 *AM. POL. Q.* 57, 71 (1977).

⁹⁶ See KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS* 23 (1971) (noting in the Court's schoolhouse religion cases, the community as a whole preferred to continue prayer in school, but elite community leaders supported the Court); see also RICHARD M. JOHNSON, *THE DYNAMICS OF COMPLIANCE* 143 (1967) (stating the impact of Supreme Court policy depends upon whether the policy is relevant to the community and whether key actors are aware of such relationships); Robert H. Birkby, *The Supreme Court and the Bible Belt*, 10 *MIDWEST J. POL. SCI.* 304, 305–07 (1966) (contrasting the Supreme Court's prayer in public school decisions with the views of the public school boards and communities involved). See generally JOHN HERBERT LAUBACH, *SCHOOL PRAYERS* 98 (1969) (noting a consistent public opposition to the Court's disposition of church-state matters); WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS* 59 (1967) (discussing the Court's “separatist self-image”).

⁹⁷ See generally ROSENBERG, *supra* note 93, at 362 (asserting the Supreme Court's attempt to bring social change has strengthened opponents to change); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 *MICH. L. REV.* 1347, 1394 (1968) (stating *Miranda* did not ensure police would suddenly conform to the ruling).

⁹⁸ 384 U.S. 436, 467 (1966) (requiring a suspect in custody must be “adequately and effectively appraised of his rights” and guaranteed “a continuous opportunity to exercise them”).

and to an attorney before interrogating them.⁹⁹ Other officers did advise suspects, but nonetheless found them more willing to confess than to exercise their rights.¹⁰⁰ Therefore, contrary to predictions, there was only a small decline in confessions following *Miranda*.¹⁰¹

Courts must rely on others to implement their decisions.¹⁰² For *Bakke*, admissions officials and others who affect admissions decisions formed the implementing population. Despite initial fears by civil rights organizations, hindsight indicates that most of these officials were at least somewhat committed to increasing minority enrollment.¹⁰³ Because admissions officials believed they should make this effort, they established procedures to increase enrollment. However, to the extent that the Court's ruling made this goal more difficult to achieve, these officials might be less than enthusiastic to implement these procedures. Our findings that the schools with the best record of minority enrollment before *Bakke* were also the schools with the best record a decade after *Bakke* suggest the influence of the implementing population.

The Court must rely also upon others to communicate the rule to those who must implement it.¹⁰⁴ As we previously noted, law and medical school officials were very aware of the *Bakke* decision. However, the ruling itself was not clear, and ample communication of an ambiguous message still leaves an

⁹⁹ See Medalie et al., *supra* note 97, at 1394. The authors state that after the *Miranda* decision, police officers did not adopt the Court's policies. For example, half of the defendants studied were not given the silence warning, less than two-thirds reported they were denied the station-house counsel warning, and more than two-thirds reported they were not given any of the formal *Miranda* warnings. *See id.*

¹⁰⁰ *See id.* at 1395 (noting defendants were "loathe" to use attorneys, often giving statements because they did not understand how *Miranda* applied to them); *see also Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1578 (1967) (reporting that 19 out of 37 defendants in their study did not react to the *Miranda* warnings and incriminated themselves).

¹⁰¹ *But see* Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh: A Statistical Study*, 29 U. PITT. L. REV. 1, 23 (1967). The authors' study on *Miranda* reported a 20% decline in the percentage of cases in which a defendant gives a confession. *See id.*

¹⁰² *See* JOHNSON & CANON, *supra* note 93, at 77. The authors define an "implementing population" as persons who carry out and translate judicial policies into action. *See id.* In most cases, the implementing population is "a group effort by some bureaucratic organization." *Id.* at 77-78. However, members of the population tend to be diverse. *See id.* at 77.

¹⁰³ *See* WELCH & GRUHL, *supra* note 7, at 124.

¹⁰⁴ *See* JOHNSON & CANON, *supra* note 93; at 81-82 (stating that implementing agencies often interpret judicial decisions and lower courts only sometimes help elaborate on the interpretation).

ambiguous message.¹⁰⁵ These ambiguities might have been clarified by subsequent rulings, but the Justices did not take any related cases in school admissions. Thus far, the Court has left *Bakke* as its last words on the subject of affirmative action in education.

Whether a ruling has an impact also depends upon the “consumer population”—those individuals who will gain benefits or suffer losses under the ruling.¹⁰⁶ *Bakke*’s “consumer population” consisted of the actual and potential applicants to professional schools, both minorities and nonminorities. We found that the impact for these individuals was relatively small, affecting either their rate of applying to professional schools or their opportunities to be admitted.

Finally, we can examine the impact of the decision on the “secondary population,” which includes those not directly affected by the decision.¹⁰⁷ The media, of course, are a relevant part of the secondary population. The media clearly covered the *Bakke* decision, but the coverage was primarily superficial. In fact, the media provided very little information to readers about the nature of affirmative action practices beyond those at UC-Davis. Indeed, the media did not begin to describe the way affirmative action practices work at a variety of institutions until well over a decade after the *Bakke* decision. In the few years following *Bakke*, the lack of intense media interest helped defuse the issue and contributed to the legitimization of affirmative action. The lack of media concern, coupled with the lack of further judicial scrutiny in the decade after *Bakke*, also allowed some institutions to drift back into near-quota systems in their affirmative action practices.¹⁰⁸

Thus, *Bakke* appears to have solidified the existing practice of affirmative action in admissions. While formal quotas disappeared, actions to maintain and increase minority enrollments became institutionalized. Admissions officials look differently at test scores and grade point averages of minority applicants compared with white, non-Hispanic applicants, and, until the 1990s, most

¹⁰⁵ See generally John Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886, 888–89 (1981) (discussing how clear decisions, and those that are not specific, effect compliance with the Court's decision); Neil T. Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda, and the Use of Judicial Impact Analysis*, 27 W. POL. Q. 38, 58 (1974) (asserting that a vague Supreme Court decision allows a lower court to follow its own policies, but a clear decision requires lower courts to follow the decision at least to its minimum boundary).

¹⁰⁶ See JOHNSON & CANNON, *supra* note 93, at 107 (defining “consumer population” as those persons who are personally affected by the particular decision).

¹⁰⁷ See JOHNSON & CANON, *supra* note 93, at 110 (defining secondary population as those persons “not personally affected by a judicial policy”).

¹⁰⁸ See WELCH & GRUHL, *supra* note 7, at 154–55.

university officials appeared to take this practice for granted.¹⁰⁹ By legitimizing this practice, *Bakke* allowed the growth and further development of these race conscious policies.

The change is not inconsequential. Legitimizing executive and congressional policies is one of the most important functions of the courts. Many people assume that *Marbury v. Madison*,¹¹⁰ which articulated the Court's authority to exercise judicial review, was the Supreme Court's most important ruling. However, some legal scholars insist that *McCulloch v. Maryland*,¹¹¹ which upheld the government's authority to create and operate a national bank, was actually more important. Robert McCloskey wrote that *McCulloch* was "by almost any reckoning the greatest decision John Marshall ever handed down—the one most important to the future of America, most influential in the Court's own doctrinal history. . . ."¹¹² *McCulloch* was important because the Court legitimated government action.¹¹³ In his analysis of the role of the Court, Robert Dahl concluded that "the main contribution of the Court is to confer legitimacy on the fundamental policies" of the governing coalition.¹¹⁴ Otherwise, the Court would interfere with the democratic process. It is not necessary for us to go this far to agree that legitimating governmental policy is an important function for the courts and to see that legitimating affirmative action was an important result of the *Bakke* case.

V. EPILOGUE: DOES *BAKKE* MATTER TODAY?

Today the *Bakke* decision is threatened, both by court decisions and by the changing political environment. Supporters of affirmative action, who once were skeptical of the value of the decision to their cause, urge that it continue to be the controlling legal doctrine.¹¹⁵ The Supreme Court's support for affirmative action has wavered since the late 1980s,¹¹⁶ and in *Adarand Constructors, Inc. v. Peña*,¹¹⁷ the Court held that programs must demonstrate a

¹⁰⁹ See *id.* at 143.

¹¹⁰ 5 U.S. 137 (1803).

¹¹¹ 17 U.S. 316 (1819).

¹¹² ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 66 (1960).

¹¹³ See *id.* (stating that *McCulloch* put "down the classic statement of the doctrine of national authority").

¹¹⁴ ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES* 200–10 (1972).

¹¹⁵ See the *amicus curiae* briefs to *Hopwood*, for example.

¹¹⁶ See *Martin v. Wilks*, 490 U.S. 755 (1989); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹¹⁷ 515 U.S. 200 (1995).

“compelling government interest” and must be “narrowly tailored.”¹¹⁸ Similar reasoning in *Miller v. Johnson*¹¹⁹ prompted the majority of the Court to hold unlawful the practice of gerrymandering to create “minority-majority” voting districts.¹²⁰

These cases did not involve higher education, but some federal courts of appeals have tackled the use of racial classifications in that arena. The Fourth Circuit in *Podberesky v. Kirwan*¹²¹ ruled that a University of Maryland scholarship program exclusively for blacks was unconstitutional.¹²² The court, stating that a history of discrimination by itself cannot justify race conscious remedies, concluded that this program was not narrowly tailored to overcome the school’s past discrimination because it was open to African Americans from all states, including those financially well off as well as those who were needy.¹²³ The Supreme Court denied *certiorari*.

The decision in *Hopwood v. Texas*¹²⁴ directly threatens the *Bakke* precedent. In 1994, four white students sued the University of Texas Law School after being denied admission, challenging the school’s goal of filling 10% of the seats for Mexican Americans and 5% for African Americans.¹²⁵ Additionally, the plaintiffs also challenged the school’s procedures for evaluating the applications of minorities.¹²⁶ The federal district court upheld the numerical goal, noting that the percentages had varied during the past ten years,¹²⁷ but invalidated the procedures used because they entailed separate screening of minorities from whites, as Powell’s opinion in *Bakke* criticized.¹²⁸ *Hopwood* upheld the right of colleges to consider race and ethnicity, but ruled out the use of separate committees for evaluating white and minority applicants, as well as the use of different minimum test scores and grade point averages for minority applicants.¹²⁹ Reaffirming the general

¹¹⁸ *Id.* at 228–37 (discussing application of strict scrutiny).

¹¹⁹ 515 U.S. 900 (1995).

¹²⁰ *See id.* at 924–28.

¹²¹ 38 F.3d 147 (1995).

¹²² *See id.* at 161.

¹²³ *See id.* *See generally* Scott Jaschik, *Blow to Affirmative Action*, THE CHRON. OF HIGHER EDUC., June 23, 1995, at A21–22 (discussing the possible impact of the “compelling government interest” and “narrowly tailored” standards on colleges).

¹²⁴ 861 F. Supp. 551 (W.D. Tex. 1994).

¹²⁵ *See id.* at 560.

¹²⁶ *See id.*

¹²⁷ *See id.* at 574.

¹²⁸ *See id.* at 577–78.

¹²⁹ *See id.* at 579.

principles of *Bakke*, the federal district court refused to order the admission of plaintiffs.¹³⁰

On appeal, the Fifth Circuit overturned the district court and issued the most sweeping affirmative action decision yet.¹³¹ Rejecting all justifications the school put forth, the Fifth Circuit ruled that the law school could not use race or ethnicity as a factor in admissions.¹³² Apparently, the only justification for the use of race would be clear evidence of present effects of past discrimination by the law school itself, but the court couched this possibility in such restrictive language that such a finding would be nearly impossible to show to the judges' satisfaction.¹³³ Though there had clearly been *de jure* discrimination before the 1960s, as evidenced by the invalidation of a university's *de jure* discrimination in *Sweatt v. Painter*¹³⁴ in 1949 and the state public schools' *de jure* segregation in *Brown v. Board of Education*¹³⁵ in 1954, the Court asserted that there had been no discrimination since the 1960s.¹³⁶

In *Hopwood*, the Fifth Circuit took direct aim at the *Bakke* decision. Referring to Justice Powell's "lonely opinion," the court emphasized that there was no majority opinion and thus no binding precedent to justify race conscious remedies as means to achieve diversity.¹³⁷ Remarkably, they said that the use of race in admissions promotes no more diversity than would the use of applicants' blood type. To think otherwise, they argued, is to stereotype people.¹³⁸ The court essentially rejected the existence of any shared experience of persons due to their race.¹³⁹

The university appealed to the Supreme Court, but the Justices denied *certiorari*.¹⁴⁰ As is their custom, the Court issued no opinion to explain why, but two Justices did issue their own opinion.¹⁴¹ Justices Ginsburg and Souter noted that the question of the constitutionality of a public school's use of race or national origin is of great national importance. However, the Justices stated that they considered the case moot because the law school discontinued separate

¹³⁰ *See id.* at 580–82.

¹³¹ *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

¹³² *See id.* at 948.

¹³³ *See id.* at 951–52.

¹³⁴ 339 U.S. 629, 633–36 (1949).

¹³⁵ 347 U.S. 483, 495 (1954).

¹³⁶ *See Hopwood*, 78 F.3d at 953.

¹³⁷ *See id.* at 944–45.

¹³⁸ *See id.* at 945.

¹³⁹ *See id.* at 946.

¹⁴⁰ *See Texas v. Hopwood*, 518 U.S. 1033 (1996).

¹⁴¹ *See id.* at 2581–82.

admissions procedures for minority and nonminority applicants after the district court's decision.¹⁴² Because the other Justices did not join or issue opinions, it is unclear whether they agreed or simply hoped to postpone such a contentious and divisive matter.

Hopwood only applies to the states in the Fifth Circuit—Texas, Louisiana, and Mississippi. Ultimately the issue will have to be resolved by the Supreme Court. Its conservative membership and recent decisions on affirmative action and civil rights issues suggest that the Court might weaken, if not discard, Powell's opinion in *Bakke*.¹⁴³

In the wake of these decisions, the nearly unanimous verdict of the media is that these decisions have had a crushingly negative effect on attempts to diversify higher education nationally, particularly in California and the Fifth Circuit states to which *Hopwood* applies.¹⁴⁴ For example, the media reported that the fall 1997 class of minority students at the University of Texas Law School and at the University of California Law School (Boalt Hall) declined dramatically.¹⁴⁵ At Boalt Hall, for example, the number of blacks admitted fell 81% from 75 students to just 14 in 1996. The number of Hispanics admitted fell 50%, while the number of Asians increased 18%, and the number of whites increased 15%.¹⁴⁶ Texas Law School accepted just 5 African-American and 18 Mexican-American Students, compared to 65 and 70 a year ago.¹⁴⁷

In reaction to the news of falling minority applications at the University of Texas, the Texas legislature passed a law in 1997 to circumvent the *Hopwood* ruling.¹⁴⁸ The law requires Texas state universities to admit all applicants from Texas high schools who graduated in the top ten percent of their class, essentially substituting geography for race.¹⁴⁹ After these slots are filled, the universities can use other race-neutral criteria to choose the remaining

¹⁴² See *id.* at 2582.

¹⁴³ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 900 (1995); *Miller v. Johnson*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Shaw v. Reno*, 509 U.S. 630 (1983).

¹⁴⁴ See Ben Gose, *Elite Private Colleges See a Drop in Applications*, THE CHRON. OF HIGHER EDUC., Mar. 7, 1997, at A35.

¹⁴⁵ See *id.* at A35.

¹⁴⁶ See Michelle Locke, *School's Minority Admissions Drop with New Policy*, CHATTANOOGA TIMES, May 15, 1997, at A16, available in LEXIS, News Library.

¹⁴⁷ See *Ways and Means*, THE CHRON. OF HIGHER EDUC., Apr. 18, 1997, at A28 [hereinafter *Ways and Means*].

¹⁴⁸ See Patrick Healy, *Texas Lawmakers Take an Activist Role on Issues Affecting Higher Education*, THE CHRON. OF HIGHER EDUC., June 13, 1997, at B4.

¹⁴⁹ See *id.*

students.¹⁵⁰ This creative approach, one commentator observed, “takes one of this country’s worst social tragedies, its racially segregated neighborhoods, and uses it to create a college applicant pool that reflects the state’s racial, ethnic, and economic diversity.”¹⁵¹

But is the verdict of the catastrophic effect of *Hopwood* and the new California laws accurate? Is the changed legal environment affecting applications, decisions by admissions committees, or both? The evidence is somewhat more mixed than most media accounts. At some campuses of the University of California system, for example, the number of minorities in the fall 1998 class, the first class accepted under the anti-social preference policy, increased.¹⁵² However, the number of minorities in the fall 1998 class decreased at both UCLA and Berkeley, which are the most competitive campuses in the University of California system. Similarly, minority enrollments in University of California law and business schools decreased, while minority enrollments in graduate schools did not decrease.¹⁵³

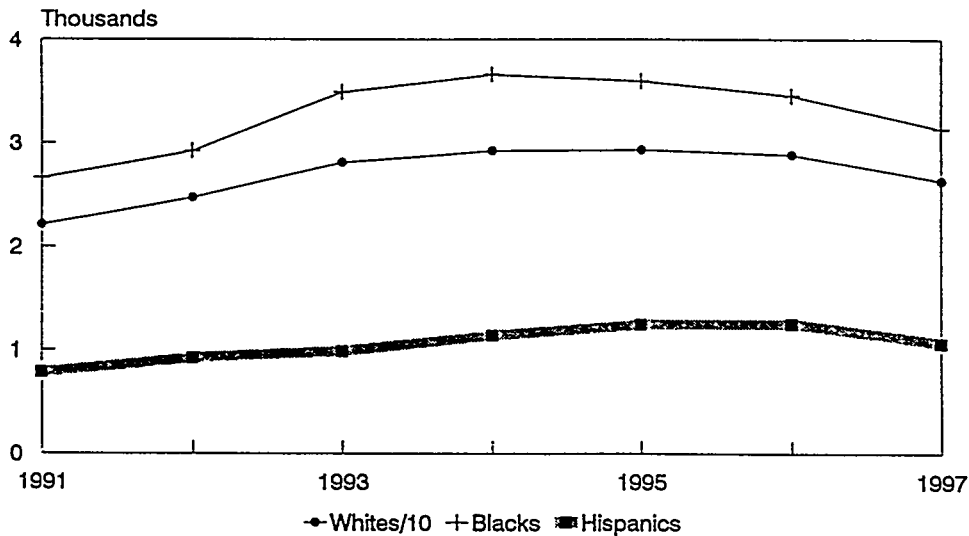
The best overall evidence we have is from national data on medical school applications and admissions, though even there we have some gaps in needed information. As previously shown in Figure 3, black and Hispanic applications to medical schools declined nationally. Figure 6 places this in perspective by showing white applications alongside blacks’ and Hispanics’, demonstrating that the number of white applicants are also declining. In fact, the decline in white applications began in 1996, one year after the beginning of the African American decline, and one year before the decline in Latino applications began. From 1996 to 1997, the number of white applicants dropped over 8%, which is comparable to the 9% decline in African-American applicants. However, the drop in Latino applicants was larger, exceeding over 14%.

¹⁵⁰ See *Ways and Means*, *supra* note 147, at A29.

¹⁵¹ Clarence Page, *Useful Ways to Diversify Colleges Sprout From Anti-Quota Crusades*, FRESNO BEE, June 5, 1997, at B7, available in LEXIS, News Library.

¹⁵² See James Ramage, *Berkeley and UCLA See Sharp Drops in Admission of Black and Hispanic Applicants*, 44 THE CHRON. OF HIGHER EDUC., Apr. 10, 1998, at A43.

¹⁵³ See Julianne Basinger, *U. of Cal. Reports on Minority Enrollment*, 42 THE CHRON. OF HIGHER EDUC., Jan. 30, 1998, at A28.

Figure 6: Applications to Medical School, by Ethnicity

AAMC. "Facts," October 1997. Data on whites are divided by 10.

Somewhat counteracting these trends, in 1997, medical school admissions officers increased the proportion of students accepted in all major groups, including African Americans and Latinos.¹⁵⁴ Thus the decline in white, African-American, and Latino students admitted is only 1%, 3%, and 9% respectively. From these early returns, it appears that Hispanics, rather than African Americans, experienced the major effects on minority admissions to medical school, and the negative effect is confined to the decisions of students to apply rather than to decisions of the admissions committees to admit.

The particular effect on Hispanics may reflect the fact that a large proportion of Latinos live in Texas and California, where *Hopwood* and the changes in the California law are most salient. In 1998, the Association of American Medical Colleges ("AAMC") reported that the number of minorities who applied to medical school in the four states most affected by the *Hopwood* decision—California, Louisiana, Mississippi, and Texas—declined by 17% (a total of 125 students), and this decline accounted for almost 40% of the total decline in minority applications.¹⁵⁵ The AAMC did not indicate how many

¹⁵⁴ See ASSOCIATION OF AMERICAN MEDICAL COLLEGES, FACTS: APPLICANTS, MATRICULANTS, GRADUATES, 1991-1997 (1998).

¹⁵⁵ See *id.*

fewer students were admitted to medical schools in these states; therefore, we do not know if admissions committees partly compensated for this large decline.

These data modify the more simplified story portrayed in the press, but leave many questions unanswered. Is the decline in applications a one-year phenomenon or will it persist? To what extent is the declining application rate among minorities attributable to either improved job opportunities available to all college graduates as a result of the very healthy economy, or to the overall declining interest in medical school as evidenced by decreasing white, black, and Latino applications? To what extent can admissions officials offset declining minority applications, and have they done so in the targeted anti-affirmative action states?

It would be extremely unusual for a set of court decisions to have a dramatic impact on the consumer population; we have just shown that such an impact did not occur after the *Bakke* decision. It is more likely that the decisions would have an impact on the university admissions officials who implement the decisions.¹⁵⁶ It appears, though, that in the wake of the *Hopwood* decision, the greater effect has been on the decisions of students to apply. However, this conclusion must await further evidence.

In addition to court decisions affecting affirmative action policy and policy decisions such as those made by the state of California and the Board of Regents of the University of California, a number of other elements lead some to conclude that the future of affirmative action is, and perhaps should be, dim. Public support is weak, with no signs of change. Most Republican national office holders and some Democrats oppose affirmative action.¹⁵⁷ Moreover, moving in parallel with this acrimonious public debate is a major change in the face of America, or more particularly, the faces of Americans.¹⁵⁸ These changes include the immigration of millions of nonwhites, the increasing intermarriage of whites and nonwhites, and, consequently, the increasing ambiguity of race and ethnicity in America.¹⁵⁹ We are not so naive to argue that

¹⁵⁶ See WELCH & GRUHL, *supra* note 7, at 136-38.

¹⁵⁷ See, e.g., *GOP Shelves Plans to Cut Back Affirmative Action Programs*, CONG. Q. ALMANAC 5-37-38 (1996).

¹⁵⁸ For a brief review of the changing face of America, see WELCH & GRUHL, *supra* note 7, at 161-63.

¹⁵⁹ See Tom Morganthau, *What Color is Black?*, NEWSWEEK, Feb. 13, 1995, at 63-64. America is becoming a multiracial society with a growing rate of intermarriage and mixed race births. Between 1970 and 1994, the number of interracial married couples more than quadrupled. See Gary Younge, *What am I?*, WASH. POST NAT'L WKLY. EDITION, July 29, 1996, at 30-31. About 25% of marriages involving minorities other than African Americans are interracial. Moreover, over one-quarter of all marriages involving a Latino (a diverse category, which is neither a race nor a specific ethnic group) is to a non-Latino. For statistics regarding interracial relationships, see Laura K. Yax, *U.S. Census Bureau the Official*

America has now become a true melting pot, but, at a time when common wisdom indicates that the melting pot is only a myth, the melting is proceeding faster than at any time in the past. As a result of the increase in intermarriage, there has been an increase in mixed-race births.¹⁶⁰ Over two million children are in interracial families.¹⁶¹ The proportion of mixed race births is much higher among groups covered by affirmative action policies.¹⁶² For example, there are now 39% more Japanese-white births than there are births to two Japanese-American parents.¹⁶³ Interracial births between American Indians and non-Indians exceed single race American-Indian births by 40%.¹⁶⁴ However, the categorization of Americans by race and ethnicity is essential to the operation of affirmative action.

On the other hand, there is evidence that there is considerable support for affirmative action in some segments of society—in the business community, especially in big corporations; among university officials; among the majority of blacks and Hispanics; and among some elected officeholders.¹⁶⁵ Moreover, racism still exists in this society. While this may seem obvious to those who are its victims, many opponents of affirmative action do deny its existence. The persistence of racism cries out for remedies for its pernicious effects—if not affirmative action, then what?

VI. CONCLUSION

We have no magic solution to this dilemma, but we will conclude by offering a few observations that might move the discussion of affirmative action

Statistics (last modified June 11, 1998) <<http://www.census.gov/Population/www/socdemo/interrace.html>> (indicating that the distinctiveness of this category is eroding further). A survey of Detroit area residents in the early 1990s found that 36% of African Americans and 12% of whites claimed a relative of another race. See Timothy Bledsoe, Michael Combs, Lee Sigelman, & Susan Welch, *Race and Place* (tentative title) (undated) (on file with author).

¹⁶⁰ See Susan Kalish, *Interracial Baby Boomlet in Progress?*, POPULATION TODAY, Dec. 1992, at 1.

¹⁶¹ See Michael Fletcher, *More Than a Black-or-White Issue*, WASH. POST NAT'L WKLY. EDITION, May 26, 1997, at 34.

¹⁶² See Kalish, *supra* note 160, at 2, 9; Juanita Lott, *Do United States Racial/Ethnic Categories Still Fit?*, POPULATION TODAY, Jan. 1996, at 6ff; PAUL SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH CENTURY AMERICA* (1989); Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 44-45; Morgenthau, *supra* note 159, at 63-68.

¹⁶³ See Kalish, *supra* note 160, at 2, fig.2.

¹⁶⁴ See *id.* at 9.

¹⁶⁵ See Alan Wolfe, *Affirmative Action, Inc.*, THE NEW YORKER, Nov. 25, 1996, at 106-115.

policy to more productive levels. First, it would be helpful to separate the concept of diversity from affirmative action policy. Affirmative action was initiated as a program to try to make up for the legacy of centuries of slavery and oppression of African Americans, yet the focus of current affirmative action policies appears to have shifted from compensating for historical wrongs to promoting diversity.¹⁶⁶ Diversity is not a value enshrined in American history or culture.¹⁶⁷ Energetic efforts to make sure every group has an opportunity to apply for admission and employment do not require special preferences for some groups. Affirmative action is neither a necessary nor sufficient condition for diversity, and the diversity that many institutions are striving for goes beyond affirmative action categories.

Current affirmative action policies are an extremely unsophisticated and blunt instrument whose diverse beneficiaries are not easily understood by the wider public. These policies benefit those who suffer from current discrimination, but they also benefit those who do not; they benefit those whose ancestors were brought forcibly to this continent and who experienced systematic slavery, segregation, and discrimination. However, they also benefit those whose ancestors or who themselves came voluntarily in recent years. A narrowly drawn affirmative action policy with specific, well defined targets might win more public support.

Moreover, affirmative action alone can make only a little difference in improving equality in educational and employment opportunity. Just as our study found negligible effects by affirmative action on enrollment, most studies of affirmative action in the workplace also found small effects. Affirmative action is neither the key public policy that many supporters seem to believe it to be, nor the stumbling block to white achievement that critics contend it to be. Its actual impact appears to be modest, and its potential effects appear to be dwarfed by economic conditions, the dramatic growth in higher education over the past four decades, the increasing ethnic pluralism of American society, and the changing attitudes and educational opportunities opened by the Civil Rights Act of 1964. It is quite likely that affirmative action is more a symbol than a major impetus to further change. As one supporter has argued, "to its critics [affirmative action] represents the decline of meritocracy, ethnic pork barrels writ large. To its proponents, it represents fairness and minority and female progress. In practice, it is neither a great angel nor a great Satan."¹⁶⁸

¹⁶⁶ See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 75-80 (1996).

¹⁶⁷ See *id.* at 28, 30; Douglas Lederman, *The Special Preferences are not Limited to Blacks*, *THE CHRON. OF HIGHER EDUC.*, Apr. 28, 1995, at A16-18; JOHN SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* (1996).

¹⁶⁸ Liz McMillan, *Berkley Professor Sees No Economic Erosion for Whites and Modest*

In conclusion, affirmative action is unlikely to ever win the kind of support—even verbal support—that civil rights legislation has won. It is unlikely ever to have the impact that civil rights legislation has had. However, without some compensating policy initiatives indicating that, as a society, we are serious about overcoming racial discrimination, rolling back affirmative action would be perceived as a huge step backward in America's commitment to racial equality. Mustering the national will to replace or augment affirmative action with more effective and acceptable public policies for combating racism remains one of this nation's biggest challenges.

