NLWJC - Kagan

DPC - Box 039 - Folder 004

Race-Minority Enrollment [2]

Race-minority enrollment

ONE AMERICA IN THE 21ST CENTURY
The President's Initiative on Race

The New Executive Office Building
Washington, D.C. 20503
202/395-1010

11/15/97
please copy for Maria and Elena. see P.S. I don't think we can do it but wanted your thoughts
Sylvia

November 10, 1997

Sylvia –
Let's see how
our own meetings
go first.
Elena

President Bill Clinton
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the Advisory Board, let me once again express our appreciation for the time that you and Vice President Gore spent with us on September 30. Our work continues apace, and I want to bring a few matters to your attention.

Enclosed is a tentative list of subjects for several of our monthly meetings. It reflects several priorities identified by Board members, as well as suggestions from Judy Winston and Chris Edley. I expect several changes based on further reactions from Board members and White House staff, and in light of our evolving sense of priorities. Nevertheless, I thought it best to invite preliminary reactions from you, so that I can ensure that we cover any subjects of particular interest to you. These topics for our public meetings will drive a substantial portion of the staff's efforts.

We plan to meet in Washington, D.C. on November 19. At this meeting we are inclined to focus on two substantive subjects: evidence concerning the extent of present discrimination, and diversity in higher education. I expect that expert presentations and the background work by our staff will permit the Board to consider recommendations at that time. On discrimination, for example, we have preliminarily discussed the desirability of a concerted federal effort to create a periodic "report card" providing authoritative data on discrimination, using the best available social science methodologies. Chris Edley has given much thought to this issue for some time, and is working with Judy to identify appropriate agency and outside expertise. Regarding higher education, I'm sure you share my admiration for the principles adopted by the presidents of the nation's leading research institutions--the AAU-- in their statement last spring in support of diversity. The Advisory Board may choose to endorse that statement and to recommend that Administration officials work with university leaders in public education efforts to explain and defend policies of racial inclusion, including Bakke-style affirmative action. Much turns, for example, on public misunderstanding of notions of merit, and on the widespread failure to

appreciate that assembling students and scholars who reflect the rich diversity of America enhances both the intellectual and social missions of these institutions.

We would hope that the Board meetings will continue to follow the model of study, dialogue and action established in September. The Board itself will focus on the study and dialogue portions in anticipation of having you or your staff announce a significant policy initiative in support of the goals of the Race Initiative, e.g., the enhancement of civil rights enforcement efforts by the Department of Housing and Urban Development announced on September 30.

We will consult with education leaders and others to formulate specific recommendations for the Administration and for educators, but I want to urge that you personally meet during November with a carefully chosen group of university presidents to discuss the need for their concerted efforts to defend and enhance diversity, not only on their campuses but in broader public debate. (One recalls President Kennedy's great vision in summoning leaders of the legal profession to urge that they organize their profession to battle for civil rights. That meeting led to the creation of the Lawyers Committee for Civil Rights Under Law.) The Advisory Board will focus on this subject in November because we feel an urgent need to act during the admissions season, especially in light of developments in Texas, California, Michigan, Georgia and elsewhere. I hope you agree that time is of the essence.

Sincerely yours,

John Hope Franklin

Enclosure

cc: Vice President Gore
Members of the Advisory Board

Race-minority enrollment

Julie + Bill —

Could you work with Dawn Chirwa to make sure this is working?

Thanks.

Elena

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INTRODUCTION

This Handout is designed to help postsecondary institutions that have affirmative action programs which consider race or national origin in admissions and financial aid decisions assess whether their programs are consistent with Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. Institutions interested in establishing affirmative action programs are also encouraged to consider this Handout. As used in this Handout, the term "affirmative action" means the use or consideration of race or national origin as a factor in admission or financial aid programs. Recruitment and outreach programs designed to increase the number of minorities in the applicant pool raise distinct questions and are not included in this Assessment Handout. Note also that the Hopwood v. State of Texas decision, which applies in the states of Texas, Mississippi and Louisiana, while permitting an institution to consider race or national origin to remedy the effects of its past discrimination, prohibits the use of race or national origin in admissions to achieve the goal of a diverse student body or to remedy discrimination by other components of the State's educational institutions. Thus, the discussion of diversity issues in this Handout would not apply in those states.

The Self Assessment Handout includes Standards, Checkpoints, and Additional Legal Considerations. The Standards are based on federal statutes, case law, and policy. (See the list of legal and policy resources included with this Handout.) The Checkpoints are meant to help institutions identify information relevant to the applicable legal standards. The Additional Legal Consideration sections offer additional principles and background for practitioners and campus policy makers. This catalogue of questions is a basic approach to fundamental issues regarding the use of affirmative action in admissions and financial aid. Please note that each Checkpoint in a category will not necessarily be relevant to every institution. In many cases, additional questions may need to be answered that will be specific to an institution's affirmative action plan.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly impact the standards governing the use of affirmative action in educational institutions. Institutions working with this Handout are encouraged to contact The Office of Civil Rights ("OCR") at the Department of Education for help. The last page of the Handout lists OCR offices and staff available to assist you.

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I. General Standards

Classifications based on race or national origin for the purpose of affirmative action are permitted under Title VI to the same extent as under the Constitution. Under Title VI and the Constitution, decisions with race or national origin as a factor are "suspect" and are subject to strict scrutiny. To satisfy strict scrutiny a school's use of race or national origin must be based on a compelling governmental interest and must be narrowly tailored to meet that interest. (Narrow tailoring is discussed later in the Handout.)

The Supreme Court has held that remedying the effects of discrimination can be a compelling governmental interest that might justify the consideration of race or national origin. In the Bakke decision, Justice Powell's controlling opinion found achieving the educational benefits of campus diversity to be a compelling interest.

II. Student Admissions

A. Baseline Considerations

Legal issues may arise when a college or university considers race, color or national origin in decisions involving educational programs, such as financial aid or admissions. A thorough understanding of the admissions criteria and process is essential. The questions below cover baseline information for assessing college and university admissions.

Checkpoints

Overview: If the institution has decided to consider race and ethnic origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured?

1. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

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B. Is Affirmative Action Supported by Compelling Interests?

Standards

As discussed above, under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark opinion in Bakke. They may also do so to remedy the continued effects of discrimination by the institution itself or within the state or local educational system as a whole. As noted, however, in Texas, Mississippi and Louisiana, the Hopwood decision limits the justification for affirmative action to remedying the school's own discrimination.

Checkpoint

2. If the institution's student admissions process includes consideration of applicants' race or national origin, what is the educational and legal justification (e.g., to remedy the effects of discrimination or to obtain the educational benefits of a diverse student body)?

Additional Legal Considerations

Caveat: In Bakke, Justice Powell rejected the following interests as insufficient on their face to justify the consideration of race by the UC—Davis medical school: reducing the deficit of disfavored minorities in medical schools and the medical profession, and countering the effects of societal discrimination. Justice Powell also rejected UC-Davis' argument that its affirmative action policy was necessary to increase the number of doctors who practice in medically underserved communities.

1. Remedial Purposes

Standards

The Title VI regulations require a recipient of federal funds

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that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of the past discrimination. A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.[7] In justifying remedial affirmative action based on the current effects of past discrimination, schools should be prepared to articulate how current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the school shares responsibility.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?

4. Separate from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served

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by the institution.

Additional Legal Considerations

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The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

Caveat: Evidence of societal discrimination or other factors that are beyond the school's control that may deter participation of minority students would not likely be accepted by courts as a

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basis for remedial affirmative action.

Note: Although it rejected diversity as a basis for affirmative action, the Hopwood decision (covering Texas, Louisiana, and Mississippi) permits the use of race or national origin to remedy the effects of discrimination by that school.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?

7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

A college's written mission is a statement of core educational values that are protected by academic freedom principles. Properly devised diversity principles that clearly serve an institution's mission can be the basis for affirmative action in admissions decisions as recognized in the Bakke decision.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. In addition to identifying the educational benefits of diversity, a school should be prepared to explain why the educational advantages claimed for its diversity programs cannot be achieved without the

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use of race or national origin (see following section on Narrow Tailoring).

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

Additional Legal Considerations

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

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Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: If the institution supports its affirmative action program on remedial purposes or the attainment of diversity, is the use of race or national origin in admissions narrowly tailored to achieve its purposes?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

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11. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

Standards

Each college or university has the academic discretion to define those characteristics and qualifications that will produce the educational benefits of diversity. Under Title VI, OCR will defer to a school's reasonable choices in defining diversity. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoint

12. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals?

Standards

The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified

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based on changing circumstances, OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program?

Standards

The use of the classification should be flexible. For example, the Supreme Court in United States v. Paradise found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may also be evidence of flexibility.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

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Narrow Tailoring (Continued)

Checkpoint

14. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration?

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III. Financial Aid

Standards

The relevant standards are stated in the Department's published guidance on the use of race or national origin in the provision of financial aid, 59 Federal Register 8756 (1994) (copy included with this Handout). Note that the standards for admissions and financial aid are generally the same.

In the Podberesky v. Kirwin decision[1], the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

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38 F.3d 147 (4th Cir. 1994), cert. den., 115 S. Ct. 2001 (1995).

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The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints

A. General

Overview: Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

1. From what sources does the institution obtain its financial aid funds? Are the sources public or private? Inside sources or outside sources? Federal, state or local? What percentage of aid is received from each source?

2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?[2] If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

Note: The following sections refer to the principles from the Department's policy that are used most often by institutions.

B. Principle 1: Financial Aid for Disadvantaged Students

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny.

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[2] "Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarship policy.

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If yes, the program is subject to strict scrutiny and does not fit within this principle.

C. **Principle 3: Financial Aid to Remedy Past Discrimination**

4. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

D. **Principle 4: Financial Aid to Create Diversity**

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?

6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

E. **Narrow Tailoring of Remedial or Diversity Programs**

These questions apply to all programs that fall under Principles 3 or 4, remedial or diversity programs.

7. Can the institution show that the use of race or national origin is necessary to achieve its stated purpose? If race is used as an eligibility criterion in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by using race as a plus factor? If race is considered as one factor in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by also using race-neutral means? If so, what race-neutral efforts were made and what were the results of those efforts? If race-neutral means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

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8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?

9. What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

10. Does the institution have statistics or other evidence to show the level of participation of minorities before and after programs to achieve diversity or to remedy discrimination were established? If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually?

F. **Principle 5: Private Gifts Restricted by Race or National Origin**

11. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy guidance?

12. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

Race - minority enrollment

Sylvia M. Mathews
11/15/97 01:52:21 PM

Record Type: Record

To: Judith A. Winston/PIR/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Possible Action Item for November 19 Meeting of the President's Advisory Board on Race

DPC and Counsel have you reviewed? Judy can we get some paper on it? If it is real and substantive and consistent with our other AA efforts it sounds like a good idea. If it checks out, perhaps Riley or someone from Education should go to MD. DPC and Counsel will you please check out. Thanks.
Judith A. Winston

Judith A. Winston 11/13/97 08:32:58 PM

Record Type: Record

To: Sylvia M. Mathews/WHO/EOP, Elena Kagan/OPD/EOP
cc: See the distribution list at the bottom of this message
Subject: Possible Action Item for November 19 Meeting of the President's Advisory Board on Race

We are looking for an action item for the Nov. 19 meeting. As you know, the Departments of Education and Justice have drafted a self-assessment guide for colleges and universities that are implementing affirmative action programs in a post-Adarand world. It has been suggested to me that the guide could be released by the Administration (or Education or DOJ) in conjunction with the November 19 meeting of the Board, which will focus on the value of diversity in higher education. (This action would be similar to the policy announcements made by the Department of Housing and Urban Development in conjunction wit the Sept. 30 Advisory Board meeting.) The message would be that, consistent with the President's "mend it, don't end it" position, coleges and universities may use affirmative aciton but only where such programs are fully consistent with existing constitutional and statutory requirements.

What do you think? Should I seek any other views on this suggestion?

Message Copied To:

Peter Rundlet/WHO/EOP
Robert Wexler/PIR/EOP
Lin Liu/PIR/EOP
Beverly J. Barnes/WHO/EOP
Cheryl D. Mills/WHO/EOP
Dawn M. Chirwa/WHO/EOP

Bad - minority enrollment

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INTRODUCTION

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The Title VI regulations require a recipient of federal funds

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that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of the past discrimination. A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

In addition, colleges are permitted to take remedial action without having to wait for a formal finding by a court, administrative agency, or legislative body. Even absent such formal findings, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination. In justifying remedial affirmative action based on the current effects of past discrimination, schools should be prepared to articulate how current conditions that limit educational opportunities by race or national origin are related to past discrimination for which the school shares responsibility.

Checkpoints

3. Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination?

4. Separate from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

5. Is there under-representation at the school of qualified students from particular races or national origins? Identify the racial and ethnic composition (%African-American, Hispanic, Asian-American, American Indian, white) of the following groups: a) the institution's student body; b) the institution's qualified applicants; and, c) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served

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by the institution.

Additional Legal Considerations

Caveat: In Bakke, Justice Powell rejected the following interests as insufficient on their face to justify the consideration of race by the UC-Davis medical school: reducing the deficit of disfavored minorities in medical schools and the medical profession, and countering the effects of societal discrimination. Justice Powell also rejected UC-Davis' argument that its affirmative action policy was necessary to increase the number of doctors who practice in medically underserved communities.

The Supreme Court has described the "strong basis in evidence" standard as approaching the evidence needed to show a prima facie case of discrimination under the constitution or civil rights statutes. In order to satisfy the "strong basis in evidence" standard, a college may, if applicable, rely on evidence of past discrimination such as documentation of specific instances of intentional discrimination for which the institution is responsible. Evidence of a significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of applicants also supports an inference of discrimination. In addition to the qualified applicant pool, the racial/ethnic composition of the pool of college-bound high school graduates who would be qualified for admission to the institution may also be used to determine whether admission practices have resulted in a significant under-representation of qualified students from particular races or national origins. Colleges should assess the composition of the pool of qualified potential applicants based on the number of students by race and national origin in the areas from which applications may be drawn who may meet the school's admissions standards. Such an approach is analogous to employment discrimination cases where courts have accepted statistical evidence to infer patterns or practices of intentional discrimination against minority job applicants. Colleges can strengthen the predicate for remedial affirmative action by supplementing statistical evidence that qualified students are substantially under-represented in the student body with instances of discrimination on the basis of race or national origin against individuals.

Caveat: Evidence of societal discrimination or other factors that are beyond the school's control that may deter participation of minority students would not likely be accepted by courts as a

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basis for remedial affirmative action.

Note: Although it rejected diversity as a basis for affirmative action, the Hopwood decision (covering Texas, Louisiana, and Mississippi) permits the use of race or national origin to remedy the effects of discrimination by that school.

2. Diversity Purposes

Standards

Achievement of core educational objectives stated in an institution's mission may constitute a compelling educational interest that justifies the consideration of race or national origin in a narrowly tailored manner.

To qualify as a legal justification for the use of race or national origin, diversity programs must have sound educational objectives. An institution must be able to support its claim that diversity serves educational objectives by demonstrating the educational benefits that diversity produces on campus and/or within the institution's programs.

Checkpoint

6. What are the institution's mission statements and how do they relate to its diversity objectives?

7. What are the educational benefits of diversity at your institution? What is the empirical basis for the educational benefits the institution identifies?

Additional Legal Considerations

A college's written mission is a statement of core educational values that are protected by academic freedom principles. Properly devised diversity principles that clearly serve an institution's mission can be the basis for affirmative action in admissions decisions as recognized in the Bakke decision.

To articulate the educational benefits of diversity, studies or other expert-based information can be helpful. In addition to identifying the educational benefits of diversity, a school should be prepared to explain why the educational advantages claimed for its diversity programs cannot be achieved without the

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use of race or national origin (see following section on Narrow Tailoring).

Standards

A college may pursue its diversity interest consistent with the strict scrutiny test by using race or national origin as one of several factors considered in the admissions process.

For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's diversity program must include diversity characteristics in addition to race or national origin. Such characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others. The relative weight granted to each factor in making admissions decisions is properly determined by the college or university: race or national origin may be accorded greater weight than other factors, for example, in a multi-factored diversity program, when diversity objectives related to race or national origin remain unfulfilled while race neutral components of diversity have been achieved.

Checkpoints

8. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? Does diversity include factors other than race and ethnicity? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

Additional Legal Considerations

Colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. Bakke, 438 U.S. at 312-313. Under the Bakke decision, which governs our interpretation of Title VI, achieving the educational benefits of campus diversity is a compelling interest for purposes of the strict scrutiny test. Since Bakke, the Supreme Court has decided a number of affirmative action cases, none of which has invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting can be a compelling interest.

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Note that according to the Hopwood decision, diversity is not lawful under the Constitution to justify the consideration of race or national origin. Hopwood applies in Mississippi, Louisiana, and Texas and is not legally binding in any other state. Note also that Hopwood upheld the consideration of race or national origin by an institution where necessary to remedy discrimination by that school.

C. Is the use of race in remedial or diversity programs narrowly tailored?

Overview: If the institution supports its affirmative action program on remedial purposes or the attainment of diversity, is the use of race or national origin in admissions narrowly tailored to achieve its purposes?

Standards

The Department of Education will consider factors established by case law in assessing whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution. An overriding question is whether the school's use of race is focused as narrowly as possible on the achievement of the school's compelling interest, e.g., remedial or diversity objectives.

First, it is necessary to determine the efficacy of alternative approaches. It is important that consideration has been given to the use of race-neutral alternative approaches (e.g., the use of admissions criteria that do not include race or national origin, or recruitment programs). Race or national origin may be considered in admissions decisions only if a college determines that alternative approaches to the use of race have not been or will not be effective.

Checkpoints

9. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

10. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to enhance diversity without the plus-factor credit?

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11. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

Standards

Each college or university has the academic discretion to define those characteristics and qualifications that will produce the educational benefits of diversity. Under Title VI, OCR will defer to a school's reasonable choices in defining diversity. A program that includes a broad, multi-factored definition of diversity, designed to produce articulated educational benefits may measure whether multi-factored diversity has been achieved in determining whether programs are narrowly tailored. Lawful diversity admissions programs, however, should not set aside positions based on race or national origin. Unless essential to remedying discrimination and its effects, such set-asides or quotas are inconsistent with the legal requirement of Bakke that all applicants be able to compete for all vacancies and have their individual merits considered. Rather, race may be used as one factor among many.

Checkpoint

12. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals?

Standards

The duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. Thus, for example, the use of race or national origin as among multiple factors considered in admissions should continue only while necessary to overcome the effects of past discrimination and achieve a diverse student body. Institutions should periodically assess whether the use of race or national origin to achieve diversity continues to be necessary or whether the admissions system should be modified

based on changing circumstances, OCR considers annual reviews the best practice to support this aspect of Title VI's narrow tailoring requirements.

Checkpoint

13. Is the affirmative action program (based on diversity or remedying the effects of discrimination) periodically reviewed and modified? If so, does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program?

Standards

The use of the classification should be flexible. For example, the Supreme Court in United States v. Paradise found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may also be evidence of flexibility.

The burden on those who are not conferred the benefit of the affirmative action program (generally, non-minority students) must be considered. Lawful diversity programs do not include separate tracks, separate decision-making procedures, or different admissions formulas based on the race or national origin of applicants. It is important that institutions exercise care to avoid separate procedures that are based on race or national origin as such procedures may prevent competition among applicants of all races and national origins. A use of race or national origin may impose such a severe burden on particular individuals that it is too intrusive to be considered narrowly tailored. See Wygant v. Jackson Board of Education, (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals).

Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

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Narrow Tailoring (Continued)

Checkpoint

14. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration?

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III. Financial Aid

Standards

The relevant standards are stated in the Department's published guidance on the use of race or national origin in the provision of financial aid, 59 Federal Register 8756 (1994) (copy included with this Handout). Note that the standards for admissions and financial aid are generally the same.

In the Podberesky v. Kirwin decision[1], the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, ruled that the challenged race-targeted scholarships at the University of Maryland did not meet the Supreme Court's strict scrutiny standard. The court did not rule that all race-targeted scholarships are impermissible. Rather, it held that colleges may establish race targeted scholarships to remedy the present effects of prior discrimination, so long as such measures are narrowly tailored to achieve that objective. The court found, however, that the University had not demonstrated the need for remedial action, and that even if such need existed, the University's scholarship program was not narrowly tailored to cure the present effects of the University's previous discrimination. The Podberesky decision, which rests on the nature and weight of the University's factual evidence and the extent to which it met the "narrow tailoring" standard, does not require the Department to modify its policy guidance on remedial race-targeted scholarships. The evidentiary standards set out in the Podberesky decision should be used in applying the Department's guidance in the states of the Fourth Circuit -- Maryland, Virginia, West Virginia, North Carolina and South Carolina.

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38 F.3d 147 (4th Cir. 1994), cert. den., 115 S. Ct. 2001 (1995).

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The following questions are keyed to the financial aid guidance, which should be considered carefully in assessing financial aid programs:

Checkpoints

A. **General**

Overview: Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

1. From what sources does the institution obtain its financial aid funds? Are the sources public or private? Inside sources or outside sources? Federal, state or local? What percentage of aid is received from each source?

2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?[2] If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

Note: The following sections refer to the principles from the Department's policy that are used most often by institutions.

B. **Principle 1: Financial Aid for Disadvantaged Students**

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny.

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[2] "Race-based scholarships" or "race-targeted aid" mean, for the purposes of this memorandum, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarship policy.

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If yes, the program is subject to strict scrutiny and does not fit within this principle.

C. **Principle 3: Financial Aid to Remedy Past Discrimination**

4. What are the racial or national origin groups eligible for race-based aid? What is the nature of the past discrimination against that group? Are there court, legislative, or administrative findings of past discrimination at that institution? If so, are there continuing effects of past discrimination at the institution? If there have not been formal findings of past discrimination, is there a strong basis in evidence to believe that there are current effects of discrimination?

D. **Principle 4: Financial Aid to Create Diversity**

5. Is affirmative action in financial aid used for purposes of diversity? What is the institution's definition of diversity? Has the institution identified the benefits of diversity?

6. Is special consideration for minority status used as one factor among many factors for scholarship awards in some cases? If many factors are considered, what are the other factors? How are the factors weighted and considered, and why?

E. **Narrow Tailoring of Remedial or Diversity Programs**

These questions apply to all programs that fall under Principles 3 or 4, remedial or diversity programs.

7. Can the institution show that the use of race or national origin is necessary to achieve its stated purpose? If race is used as an eligibility criterion in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by using race as a plus factor? If race is considered as one factor in awarding scholarships, has the institution made efforts to remedy discrimination or enhance diversity by also using race-neutral means? If so, what race-neutral efforts were made and what were the results of those efforts? If race-neutral means have not been tried, does the institution reasonably believe that race-neutral efforts would be insufficient to meet its diversity goals without race-based scholarships?

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8. Is the use of race-based scholarships in the financial aid process periodically reviewed and modified? What standards are used in the review? When was the last such review?

9. What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

10. Does the institution have statistics or other evidence to show the level of participation of minorities before and after programs to achieve diversity or to remedy discrimination were established? If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually?

F. **Principle 5: Private Gifts Restricted by Race or National Origin**

11. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy guidance?

12. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

Race-minority enrollment

November 3, 1997

NOTE TO ELENA--

As I mentioned in our phone conversation earlier this evening, FYI here are some materials on affirmative action/diversity that I received last month from Marty Michaelson with Hogan & Hartson, who represents a number of higher ed institutions and associations. Included is an amicus brief from the Piscataway case, which advocates and lays out a summary of research to date on the educational benefits of diversity -- an area which Michaelson feels greatly needs to be fleshed out. In addition, there is a book chapter by Stephan and Abigail Thernstrom which criticizes affirmative action, in part based on their analysis of SAT and college dropout data. I am trying to put aside some time to read through and disgest this stuff, but I thought you might be interested in taking a look at some of it yourself. I am also forwarding much of this to folks with the Race Initiative.

-- Bill

WILL DIVERSITY BE BURIED IN PISCATAWAY?

The Supreme Court could determine whether a school board's decision to lay off a white teacher will profoundly change affirmative action in higher education.

• BY MARTIN MICHAELSON •

A NEW JERSEY school board's 1989 decision to lay off a white high school teacher may dramatically change the racial and ethnic composition of colleges and universities—or it may not. The outcome depends on what the Supreme Court says this term in *Board of Education of the Township of Piscataway v. Sharon Taxman*, and on higher education leaders' ingenuity in dealing with the consequences.

Declining enrollment at Piscataway High School resulted in elimination of one teaching position in the business department. The two most junior teachers—one white, the other black—had equal qualifications and seniority. Mindful that all other teachers in the department were white, and desiring to preserve racial diversity, the board laid off the white teacher, Sharon Taxman.

She sued, claiming that her right under Title VII of the 1964 Civil Rights Act to be free from race discrimination was violated, and she won in federal district court and the Third Circuit Court of Appeals. In June, the Supreme Court agreed to hear the case, over the objection of the U.S. solicitor general, who argued that it is a poor vehicle by which to test basic affirmative-action principles.

Not since 1978, when the high court addressed *Regents of the University of California v. Bakke*, has there been so much cause for concern about legal authority for initiatives that promote student and faculty diversity. In *Bakke*, the court struck down a set-aside program for admission of minority medical students, issuing six opinions in the case. The most often cited opinion, Justice Powell's, stated that steps to advance a student body's diversity could be lawful if race was no more than a "plus" factor. Since *Bakke*, most colleges and universities have pursued affirmative action to enhance student and faculty diversity, and the racial and ethnic composition of student bodies has diversified substantially.

Piscataway, which involves faculty employment in a high school setting, directly presents three questions: Does Title VII permit employers to take race into account other than to remedy past discrimination? If so, is it lawful to use race-based measures to foster diversity in a high school faculty? Are white employees' rights always violated when minority status is advantaged in layoff decisions?

Some observers predict the Supreme Court will broadly condemn efforts to promote racial and ethnic diversity and repudiate Justice Powell's view. The court could announce principles that apply not only to employment but also to Title VI and Title IX (federal statutes that specifically forbid discrimination in college and university programs), as well as the equal protection clause of the Fourteenth Amendment. Even if the decision does not resolve all these issues, the justices' opinions are likely to affect future cases that involve the legality of efforts to achieve diversity in higher education.

Recent reports of the lamentable experience at the universities of Texas and California in attracting black students after affirmative action was forbidden there by the *Hopwood* decision and Proposition 209 give presidents and trustees ample reason to worry. Yet the Supreme Court is renowned for saying less than it can and for doing the unexpected. We may not know the full implications of the *Piscataway* decision until long after it is rendered.

In light of the current uncertainty, some university attorneys asked to advise on the legal merits of diversity-promoting initiatives are preaching caution. Yet absent legal prohibition, few institutions appear to be abandoning their efforts.

Increasingly, educators are asking: Are prevailing definitions of applicants' merit suitable today? Is the extent of reliance on standardized test scores warranted? What would be the consequences of a return to the racial and ethnic divisions of America's yesterday? If consideration of race and ethnicity were forbidden in admissions, financial aid, and faculty recruitment, could diversity be maintained?

"Race," said the political scientist Andrew Hacker, "is a tense terrain where we often try to hide crucial truths from ourselves." Higher education's search for those truths may receive intense attention when the *Piscataway* ruling is announced.

Martin Michaelson, a partner at Hogan & Hartson in Washington, D.C., represents AGB and other associations as amici in the Piscataway case.

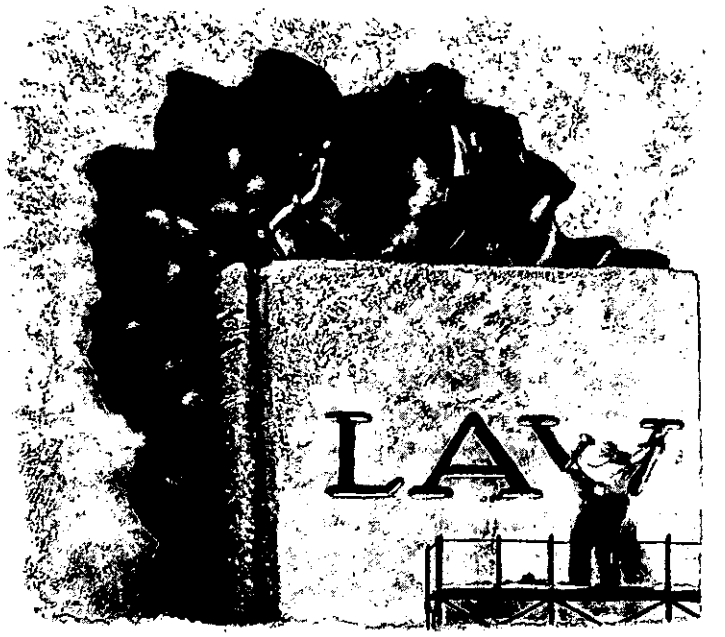
Number 7, Summer 1996

AGB

Priorities

A membership service of the Association of Governing Boards to help trustees and chief executives identify and address strategic policy issues.

Affirmative Action: Few Easy Answers



BY MARTIN MICHAELSON

PRESERVING THE educational objectives that underlie affirmative action and managing the legal risks connected to it present exceptionally tough challenges for colleges and universities today. The law is unsettled and evolving, and much public discourse on the subject has entailed more rhetoric than fact. Court decisions—from the Supreme Court's 1978 ruling in *Bakke* to federal appeals court rulings in *Podberesky* in 1994 (involving minority-targeted student aid) and *Hopwood* in 1996 (involving affirmative action in law school admissions)—have heightened uncertainty and in some respects sown confusion. The 1995 Supreme Court *Adarand* decision seems to have set the stage for a more skeptical appraisal by judges of affirmative-action measures. This issue of *Priorities* discusses these and other developments.

Will the Supreme Court allow colleges to use diversity as a rationale for affirmative action?

Many Americans have come to believe that affirmative action is either to be permitted or forbidden in its entirety. Yet notwithstanding the rhetoric and judicial vicissitudes, that is unlikely to be the case. Affirmative-action programs and judicial review of them have addressed a broad continuum of activities, from modest outreach to rigid quotas. The ten most recent Supreme Court decisions on affirmative action—only one of which, *Bakke*, arose in the higher education field—have been characterized as split 6-4 in favor of the various inclusionary

Martin Michaelson is an attorney in the firm Hogan & Hartson LLP in Washington, D.C. This issue of *Priorities* is an overview, for college and university trustees, presidents, and senior administrators, of the legal context in which institutions consider affirmative action in student admissions, financial aid, and other targeted programs particular to higher education.

Although legal issues are described here, the paper is not a substitute for seeking legal advice. Consultation with the institution's counsel is especially timely now, in light of pending litigation and the prospect of lawsuits that involve affirmative action, as well as legislative initiatives and the contentious environment on this topic.

PRIORITIES IS FUNDED BY A GRANT FROM THE ROBERT W. WOODRUFF FOUNDATION

The Supreme Court's refusal to hear Hopwood *underscores the need for discerning judgment by trustees, presidents, administrators, and lawyers.*

approaches those cases involved. With the exception of the opinion of two Fifth Circuit Court of Appeals judges in the *Hopwood* decision—who held minority status was no more rational a consideration than blood type in assessing an applicant's suitability for admission—no court to date in any case involving higher education has announced so stark a prohibition. Even *Hopwood* may not entirely extinguish some forms of affirmative action, such as those related to outreach efforts or court-ordered desegregation, in the three states the Fifth Circuit covers—Texas, Louisiana, and Mississippi. The Supreme Court has declined to review *Hopwood,* thus ensuring that definitive judicial policy awaits future cases.

Conceivably in the next year or two the Supreme Court will fully specify the law on point and provide a universally applicable rule. Most observers think that improbable, however. Because the divided court's composition and attitude in the years ahead cannot be reliably predicted, the future is likely to carry some degree of uncertainty. Discerning judgment by trustees, presidents, administrators, and lawyers will be essential as the law and public policy unfold.

AGB Priorities

Number 7 Summer 1996

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Illustrations by Paul Vismara

The Historical Background

Affirmative action as American legal policy is at once an old and a young idea. Its first roots date to the Civil War era, but its trunk became visible a century later, and its branches are likely to reach beyond the coming presidential election. Within weeks after the Fourteenth Amendment was enacted in 1866, Congress passed the Freedman's Bureau Act to establish programs for former slaves. Throughout the balance of the 19th century, however, both during and after Reconstruction, federal government actions to encourage racial pluralism were inconsistent, characterized by rancorous controversy, and no less confusing than the diffuse public argument that preceded adoption of the Fourteenth Amendment itself.

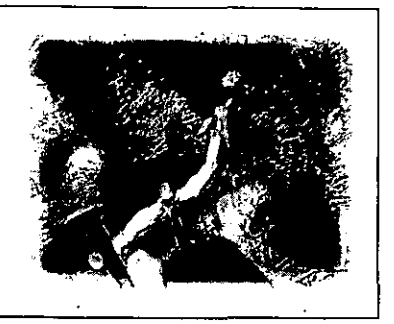
For example, the Supreme Court struck down the Civil Rights Act of 1875, reasoning that the time had come to cease giving special benefits because of any individual's race. In 1896, the court in *Plessy v. Ferguson* held that the amendment's Equal Protection Clause did not entitle blacks to sit in the same railway car as whites; the Constitution and sound policy, the court said, required only separate-but-equal public accommodation. Only one justice dissented from the decision. The separation the court endorsed was consistent with 19th century racial mores of many whites. Yet not every proposal of separation was favored only by white persons. For example, as Professor Henry Louis Gates of Harvard recently pointed out, the *Plessy* decision closely followed a widely reported speech to the same general effect by Booker T. Washington.

Plessy remained the law for 58 years, through and beyond World War II, until the Supreme Court threw it out in 1954. *Brown v. Board of Education* and related decisions held the societal need for racial integration of public schools to be compelling and said it must be met "with all deliberate speed." In the decades after *Brown*, the concept of affirmative action emerged in earnest and was applied to racial, ethnic, and other minority groups—as well as to women—in such areas as education, employment, federally funded construction, and government activities.

The development of affirmative action came in a patchwork. President Kennedy in 1961 issued Executive Order 10,925 to prohibit race, religion, color, and national-origin discrimination in

10 Questions

for Boards and Presidents to Consider In Reviewing Affirmative-Action Policies and Practices



1. Does the institution's commitment to achieving a diverse student body and faculty remain valid as a matter of educational policy?
2. Has the institution met its goals with respect to student and faculty diversity?
3. Do the legal risks entailed by recent court decisions outweigh the educational benefits of affirmative action?
4. Which of the institution's programs that promote student and faculty diversity involve low risk, and which involve high risk?
5. Is the institution well positioned to assess its efforts to advance diversity? Is the president in close consultation on the subject with counsel, responsible senior staff, and deans?
6. To what extent and how should the institution publicly explain its purposes regarding promotion of student and faculty diversity?
7. How can the institution best explain and defend its position without appearing to be politically partisan?
8. What are the views of other leaders in the higher education community on this subject? Has consensus emerged?
9. How should the institution answer those who contend that its affirmative-action initiatives are unfair to white students and faculty and others?
10. In what ways, if any, do the needs of our college or university differ from those of institutions with which we often compare ourselves or wish to compare ourselves?

federal employment. The order required the government to take "affirmative steps to realize more fully the national policy of nondiscrimination," and established a Federal Commission on Equal Employment Opportunity, superseding largely toothless equal-opportunity bodies created by presidents Roosevelt and Truman. Two years later, President Kennedy expanded "affirmative action" requirements to reach federally assisted construction projects.

In 1965, President Johnson—unquestionably the most active chief executive for civil rights since Lincoln—promulgated Executive Order 11,246, creating the Office of Federal Contract Compliance (now OFCCP) to ensure nondiscrimination by various means, including

Affirmative Action

A Chronology:

The following timeline depicts certain major judicial, executive, legislative, and other landmarks relevant to affirmative action.

1866
After ambiguous public debate, the Fourteenth Amendment to the U.S. Constitution is enacted. It includes a requirement that in all states there shall be "equal protection of the laws." The same year, Congress passes the Freedman's Bureau Act to establish programs for former slaves.

1896
In *Plessy v. Ferguson*, the Supreme Court declares the Fourteenth Amendment requires only separate but equal public accommodation.

1954
In *Brown v. Board of Education*, the Supreme Court overturns *Plessy v. Ferguson*, holding the societal need for racial integration of public schools to be compelling.

1961
President Kennedy issues Executive Order 10,925 prohibiting race, religion, color, and national-origin discrimination in federal employment. The order requires the government to take "affirmative steps to realize more fully the national policy of nondiscrimination," and establishes the Equal Employment Opportunity Commission.

1964
Congress passes the Civil Rights Act. The government proceeds to hold that Title VI, which forbids discrimination in education programs, authorizes voluntary affirmative action by public and private schools, colleges, and universities to overcome conditions limiting participation by persons of a particular race, color, or national origin. Title VII prohibits employment discrimination.

1965
President Johnson issues Executive Order 11,246, creating the Office of Federal Contract Compliance to ensure nondiscrimination in federal contracting by various means, including affirmative action.

1972
Congress passes the Education Amendments of 1972. Title IX prohibits gender discrimination in education programs, with several exceptions, including contact sports and certain single-gender colleges.

1978
In *Regents of the University of California v. Bakke*, the Supreme Court strikes down an admissions program that set aside a specific number of places for "disadvantaged" minority students in a medical school. The decision allows colleges and universities to consider race as a "plus" factor in admissions for the purpose of fostering educational benefits that flow from a diverse student body.

1979
In *United Steelworkers v. Weber*, the Supreme Court sustains private, voluntary preferences for minority workers in a traditionally segregated job category.

1983
In *Guardians Association v. Civil Service Commission of New York*, the Supreme Court holds that the legal standards imposed by Title VI of the Civil Rights Act of 1964 are coextensive with those under the Fourteenth Amendment.

affirmative action. The government launched plans in and after 1967 to increase minority employment in federally funded projects, including the Philadelphia Plan, which mandated hiring minority workers in construction jobs there, a source of controversy during the Nixon administration.

Meanwhile, federal education regulations and advisories published to implement the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964, which covers all education institutions that receive federal aid, authorized voluntary affirmative action by private as well as public schools, colleges, and universities, to overcome conditions "limiting participation by persons of a particular race, color, or national

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1986
In *Wygant v. Jackson Board of Education*, the Supreme Court disapproves the objective of providing minority faculty role models for public school students to justify race-based layoffs. However, the court upholds the objective of overcoming ongoing effects of identified past discrimination and confirms that a school need not be subject to a finding of past discrimination or admit that it discriminated in the past to adopt a voluntary affirmative-action plan.

1987
In *United States v. Paradise*, the Supreme Court identifies five factors to be considered in evaluating whether an affirmative-action plan is narrowly tailored.

1987
In *Johnson v. Transportation Agency, Santa Clara County*, the Supreme Court approves a public employer's affirmative-action plan. It says there was a "manifest imbalance" with regard to women in skilled craft jobs; the plan eschewed "rigid numerical standards"; the rights of nonminorities were not trammeled; the plan was temporary; and it was intended to attain, not maintain, a balanced work force.

1989
In *City of Richmond v. J.A. Croson Co.*, the Supreme Court applies the "strict-scrutiny test" to invalidate a local government's minority contracting set-aside program, declaring the set-aside unrelated to any proven harm to minorities.

1990
In *Metro Broadcasting, Inc. v. FCC* , the Supreme Court approves by a 5-4 vote race-conscious Federal Communications Commission policies concerning the sale of broadcast properties to enhance "broadcast diversity."

1991
In *Davis v. Halpern*, a federal district court reaffirms *Bakke* but says the City University of New York failed to articulate its reason for promoting diversity clearly enough to justify its affirmative-action admissions policy.

1992
In *United States v. Fordice*, the Supreme Court approves judicially mandated race-conscious measures to remedy state-sponsored segregation in higher education.

1994
The Fourth Circuit Court of Appeals, in *Podberesky v. Kirwan*, strikes down a minority scholarship program at the University of Maryland, holding the program is an impermissible means of voluntarily remedying ongoing effects of past discrimination.

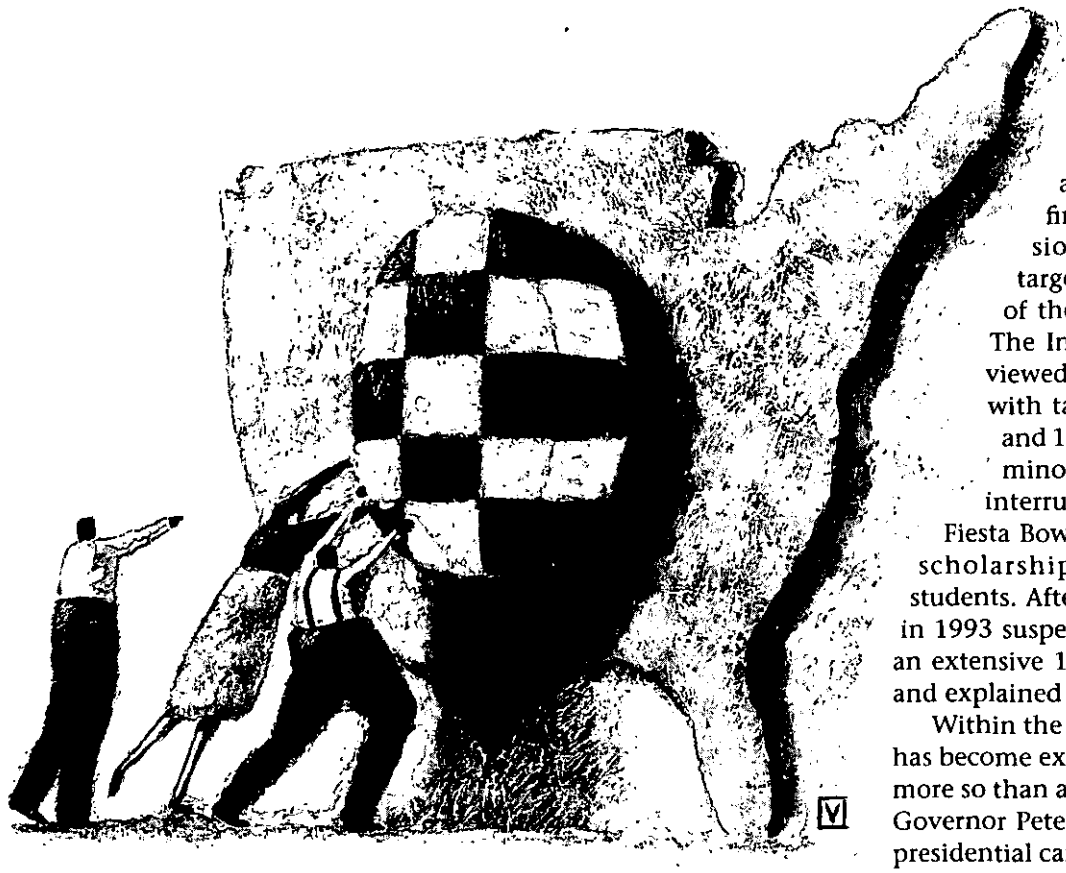
1995
In *Adarand v. Peña*, the Supreme Court reverses *Metro Broadcasting*, holding that affirmative-action programs of the federal government are subject to "strict scrutiny."

1995
University of California Regents vote to end most affirmative-action efforts.

1995
The Clinton administration undertakes a review of federal affirmative-action programs in light of *Adarand*. Legislation to bar affirmative action is offered in some state legislatures and in Congress.

1996
In *Hopwood v. Texas*, the Fifth Circuit Court of Appeals strikes down University of Texas Law School admissions processes that target certain percentages of Mexican-American and black students. Two of the three judges denounce the objective of fostering a diverse student body by recourse to racial classification. The university unsuccessfully seeks Supreme Court review, and the law remains unsettled nationally.

1996
In November, Californians will vote on a statewide initiative that would ban affirmative action.



Clearly a "hot button" of the American psyche has been pushed. Yet the Supreme Court has issued no definitive constitutional interpretation.

origin." Higher education institutions, spurred by the civil-rights and women's movements, undertook efforts to diversify their student bodies and faculties. Those efforts, which continue today, generally have been supported by administrations of both political parties.

Throughout the 1970s and 1980s, the Department of Education's Office of Civil Rights and its predecessor agency authorized affirmative-action initiatives of colleges and universities aimed at promoting diversity, notably but not exclusively involving efforts in the area of student aid. During that period, as now, the department held that under Title VI colleges could take race into account to a greater degree in awarding financial aid than in their admissions decisions if the minority-targeted aid represented a small part of the institution's overall aid funds. The Internal Revenue Service likewise viewed such aid programs as consistent with tax-exempt status. Between 1990 and 1992, that long-standing policy on minority aid in higher education was interrupted by the politically charged Fiesta Bowl controversy, which involved a scholarship plan for certain minority students. After public outcry, the department in 1993 suspended its changed policy, and in an extensive 1994 Policy Guidance reaffirmed and explained its original position.

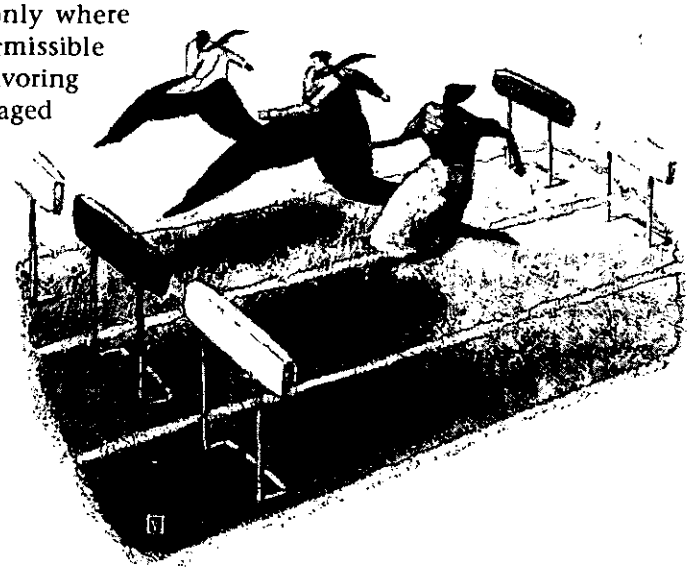
Within the past two years affirmative action has become exceedingly controversial, perhaps more so than at any time since Reconstruction. Governor Pete Wilson of California staked his presidential candidacy in part on opposition to it. University of California regents, including a number of Wilson appointees, voted to end most such efforts at the university. A highly publicized statewide initiative against affirmative action awaits California voters' will in November. In Congress, former senator and presumed Republican presidential nominee Bob Dole and others have sponsored legislation to curtail federal affirmative-action programs. President Clinton issued a report on the subject in July 1995, vowed to "mend, not end" federal support of affirmative action, and undertook a review of federal programs that is now underway. In the states, many legislators, most of them opposed to affirmative action, have offered bills on the topic. In 1996, as in 1995, the week has been rare in which articles on affirmative action did not appear in leading newspapers and magazines, while numerous books on the topic have been published and affirmative action is debated on television and radio.

Clearly a "hot button" of the American psyche has been pushed. Yet the Supreme Court has issued no definitive constitutional interpretation and appears to be as divided as politicians and the public on which specific steps to foster a pluralistic nation are right and which are wrong.

A Summary of Higher Education Affirmative-Action Law

The judiciary has had considerable difficulty with affirmative action. Over the past two decades, the Supreme Court and other federal courts have struggled repeatedly and on the whole unsuccessfully to articulate clear (or, in the case of the Supreme Court, unanimously announced) legal principles that govern decisions to take into account race, gender, and other characteristics. Few of the rulings have immediately addressed higher education programs. Thus, colleges and universities often have had to assess their legal duties in the affirmative-action area by referring to decisions in other, materially different contexts.

If a general principle can be gleaned from most of the affirmative-action law to date, it is this: Public and private colleges and universities may utilize preferences only where a court or other enforcement body orders them to do so or, in the case of preferences they adopt voluntarily, only where there is a permissible rationale for favoring the disadvantaged



group, and the program is demonstrably narrowly tailored to meet the lawful purpose to be served. Private institutions are governed by Titles VI (related to discrimination in education programs) and VII (related to employment discrimination) of the Civil Rights Act of 1964; by laws related to age, disability, and veterans discrimination; and by Title IX of the Education Amendments of 1972, which forbids gender discrimination in education programs (with certain exceptions, including independent single-gender colleges). Public colleges and universities also are constrained by the Fourteenth Amendment Equal Protection Clause. Both private and public institutions, in defending affirmative-action programs, must show a "strong basis in evidence" that a preference is warranted.

On the whole, federal courts to date have upheld these justifications for race-based preferences:

- curing present effects of identified past discrimination at the institution;
- addressing manifest imbalance in the representation of racial groups within specific job categories; and
- fostering diversity in student admissions.

However, the following proffered justifications have not survived scrutiny under the Constitution or the Civil Rights Act of 1964:

- remedying societal discrimination;
- maintaining racial balance;
- increasing the number of minorities in a profession;
- increasing the number of professionals practicing in underserved areas; and
- providing faculty role models for public school students.

Courts have looked more favorably on programs that

- are designed to *remedy* racial imbalances and not to *maintain* racial balance;
- do not significantly trammel rights of nonminorities;
- use flexible goals, not rigid quotas;
- are not arbitrarily structured;
- are not perpetual; and
- seek to achieve the lawful purpose after race-neutral alternatives have been explored and found unworkable or inadequate.

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What the Numbers Say

One-Third of a Nation, a 1988 report by the Commission on Minority Participation in Education and American Life, co-chaired by former presidents Ford and Carter and sponsored by the American Council on Education, concluded that failure by colleges and universities to admit and graduate minority students in large numbers would have highly adverse consequences for the future of the United States as a healthy economy and global leader. The report demonstrated that many economic and educational trends were unfavorable to minorities and that notwithstanding progress much remained to be done.

The data that follow, drawn from the 1995 *Statistical Abstract of the United States* and the 1996 ACE report, *Minorities in Higher Education*, depict trends in population, educational achievement, enrollment, income, and faculty composition. Far from exhaustive, they illustrate the demographic context in which college and university trustees and presidents are considering institutional policy.

For ease of review, percentages are rounded to the nearest 1 percent and absolute numbers to the nearest hundred. Hispanic Americans are of many races, and therefore some of the combined percentages exceed 100. Figures not available are indicated by a dash.

Population Trends

WHAT IS—AND WHAT WILL BE—THE PERCENTAGE RACIAL DISTRIBUTION OF THE U.S. POPULATION?

	White	Black	Other Race	Hispanic
1850	84	16	—	—
1900	88	12	1	—
1950	89	10	1	—
1995	83	13	5	10
2025	77	14	9	17
2050	73	16	11	23

Educational Achievement

WHAT PERCENTAGE OF AMERICANS OLDER THAN AGE 25 HAVE COMPLETED FOUR YEARS OF HIGH SCHOOL OR MORE?

	All races		White		Black		Hispanic	
	F	M	F	M	F	M	F	M
1960	43	40	48	42	22	18	—	—
1970	53	52	55	54	33	30	34	38
1994	81	81	82	82	74	72	53	53

WHAT PERCENTAGE OF AMERICANS OLDER THAN AGE 25 HAVE COMPLETED FOUR YEARS OF COLLEGE OR MORE?

	All races		White		Black		Hispanic	
	F	M	F	M	F	M	F	M
1960	6	10	6	10	3	3	—	—
1970	8	14	8	14	5	4	4	8
1994	20	25	20	26	13	13	9	10

TO WHOM ARE DOCTORAL DEGREES AWARDED?

	Total		All U.S. Citizens		White		Black		Hispanic	
	F	M	F	M	F	M	F	M	F	M
1984	10,700	20,700	9,300	14,700	8,200	13,200	500	400	200	300
1994	15,800	25,200	12,400	14,700	10,800	13,000	700	400	400	400

Enrollment

WHO GOES TO COLLEGE?

(higher education enrollment, in thousands of students)

	All Institutions		Four-Year Institutions		Two-Year Institutions	
	1982	1993	1982	1993	1982	1993
White	12,388	14,306	6,306	6,643	3,692	3,961
Black	1,101	1,410	612	811	489	599
Hispanic	519	989	229	432	291	557
Asian American	351	724	193	429	158	289
American Indian	88	122	39	59	49	63

Income

HOW MUCH INCOME CAN A DEGREE HOLDER EXPECT TO EARN?

(mean monthly income in 1993, by highest degree earned, persons 18 and older)

	Total Persons	No High School Degree	High School Degree Only	Some College	Vocational Degree	Associate's Degree	Bachelor's Degree	Master's Degree	Professional Degree	Doctorate
All Persons	$1,700	$900	$1,400	$1,600	$1,700	$2,000	$2,600	$3,400	$5,400	$4,300
Male	2,200	1,200	1,800	2,000	2,300	2,600	3,400	4,300	6,300	4,400
Female	1,200	600	1,000	1,100	1,400	1,500	1,800	2,500	3,500	4,000
White	1,800	1,000	1,400	1,600	1,800	2,000	2,700	3,500	5,600	4,400
Black	1,200	700	1,100	1,200	1,400	1,700	2,300	2,800	3,400	3,800
Hispanic	1,100	800	1,100	1,200	1,300	2,000	2,200	2,600	2,300	2,700

Faculty Composition

WHAT IS THE RACIAL COMPOSITION OF FULL-TIME FACULTY?

	White	Black	Hispanic	Asian American	American Indian
1983	440,500	19,600	7,500	16,900	1,300
1993	468,800	25,700	12,100	25,300	2,000

The *Bakke* Case

In *Regents of the University of California v. Bakke* (1978), a closely divided Supreme Court, with no majority opinion and six opinions in all, struck down a medical school admissions program that set aside a specific number of places for "disadvantaged" minority students. Yet the court upheld under the Fourteenth Amendment and Title VI consideration of race as a "plus" factor in admissions for the purpose of fostering educational benefits that flow from student body diversity. As Justice Powell stated, "[N]o... facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."

Justice Powell cited academic freedom as a sound basis for university officials to decide to seek a diverse student body, but he rejected several other asserted grounds for considering race in admissions—among them reducing underrepresentation of minorities in medical schools and the medical profession, remedying societal discrimination, and increasing the number of doctors practicing in underserved areas. Twelve years later, in *Metro Broadcasting, Inc. v. FCC* (1990), a bare majority of five justices relied on *Bakke* in approving race-conscious Federal Communications Commission policies concerning sale of broadcast properties to enhance "broadcast diversity." As in *Bakke*, the court favored a plan designed to advance diverse viewpoints on grounds that the plan would benefit persons other than the immediate recipients of race-based preferences.

Undoubtedly one of the most consequential rulings in higher education law, *Bakke* has spawned a surprisingly sparse jurisprudence for colleges and universities. In the 18 years since *Bakke*, only two significant federal court decisions before *Hopwood* probed the diversity rationale. In *Davis v. Halpern* (1991), a district court reaffirmed *Bakke*, but held that the City University of New York failed to articulate clearly enough its reason for promoting diversity and therefore could not justify its affirmative-action admissions policy. However, in *United States v. Board of Education of the Township of Piscataway* (1993), now under appeal, a district court rejected faculty diversity as a basis for taking race into account in deciding which of two equally qualified public school teachers would be discharged.

Many believe a Supreme Court decision in *Hopwood v. Texas* would have dramatically affected affirmative action in higher education. In March 1996, the Fifth Circuit Court of Appeals struck down University of Texas Law School admissions processes that targeted certain percentages of Mexican-American and black students. The court denounced the objective of fostering a diverse student body by recourse to racial classification. Reversing the trial court, which had endorsed

Minority-Targeted Student Aid

Although *Bakke* and *Hopwood*—the most prominent judicial decisions to date on higher education affirmative action—involved admissions programs, several important developments have addressed the legality of scholarships targeted to minority students. Many observers contend there are material differences from a legal viewpoint between admissions and student aid. (For example, at most institutions minority-targeted aid is a tiny part of overall aid and does not entail the degree of foreclosure of white candidates that some believe characterizes admissions programs.) Yet the two areas are legally related. A holding, as in *Hopwood*, that all consideration of race in admissions is irrational and constitutionally forbidden would appear pertinent to financial aid.

Recent empirical studies of minority scholarship programs show that such plans are widespread, limited in size and scope, and highly varied in the criteria they apply and the goals they serve. For example, a 1994 General Accounting Office analysis, based on a random sample of 300 four-year undergraduate and graduate institutions, found that 64 percent of undergraduate and 72 percent of professional schools surveyed awarded some such aid. A 1991 American Council on Education report related similar results. However, generally only 1 percent to 3 percent of aid programs were found to be available exclusively to members of a particular minority

in principle the diversity standard, the opinion of two judges stated that race is as irrational a factor in gauging an applicant's suitability as blood type or physical size. Although that opinion rejected Justice Powell's analysis in *Bakke*, the third judge, concurring in the decision, stated that repudiation of *Bakke* was unwise and needless in the circumstances of the admissions program at issue. Under legal doctrine, the Supreme Court's refusal to review *Hopwood* does not carry the weight of judicial precedent. It does, however, defer clarification of legal policy.

group; usually, minority status was one factor to be taken into account.

Until several years ago, only one reported court decision, a 1976 ruling that rejected a law school aid program at Georgetown University, addressed the legality of minority-targeted student aid. In 1994, the Fourth Circuit Court of Appeals in *Podberesky v. Kirwan* struck down a scholarship program for a small number of very able black undergraduates at the University of Maryland, holding the program an impermissible means of voluntarily remedying what the university identified as ongoing effects of its past discrimination.

Podberesky, a Hispanic-American student, sued after failing to obtain a scholarship notwithstanding grades and test scores higher than those of some black students awarded one. The trial court upheld the program. In 1992, the Fourth Circuit reversed that decision, finding insufficient proof of present effects of past discrimination, and sent the case back for further review. The university then conducted an extensive administrative fact-gathering exercise. It held public hearings, received factual submissions, commissioned studies, and issued a lengthy report that identified lingering effects of the past discrimination. The trial court approved the report's major conclusions and sustained the program. On the second appeal, the Court of Appeals again rejected the program.

The Fourth Circuit's conclusion that the university's findings could not "establish the necessity for relief" appears to conflict with the U.S. Department of Education's "Policy Guidance," which endorses action by a university "without a formal finding of discrimination by a court or by an administrative or legislative body," if there is "a strong basis in evidence for concluding [that such] action [was] necessary to remedy the effects of its past discrimination." The guidance also states that universities "should have substantial discretion" to weigh race and other factors in pursuing student diversity, if minority-targeted aid is narrowly tailored.

Podberesky, like *Adarand*, leaves many questions unanswered. The appeals court failed to address the trial court's finding that because the scholarships were awarded only after admissions decisions, and amounted to only 1 percent of the institution's student aid, the program minimally affected ineligible students. The appeals court also did not address findings regarding the inefficacy of race-neutral and other alternatives. Nor did it address promotion of diversity, the purpose underlying most universities' minority-targeted aid. Nor does *Podberesky* treat *Bakke* or the Department of Education endorsement of the diversity objective. Further, *Podberesky* directly pertains only to race-exclusive programs, not programs that by taking account of race to a lesser degree have a more attenuated effect on nonminority students. Nonetheless, it is the leading and only appeals court decision on this subject to date.

The Concept of Strict Scrutiny

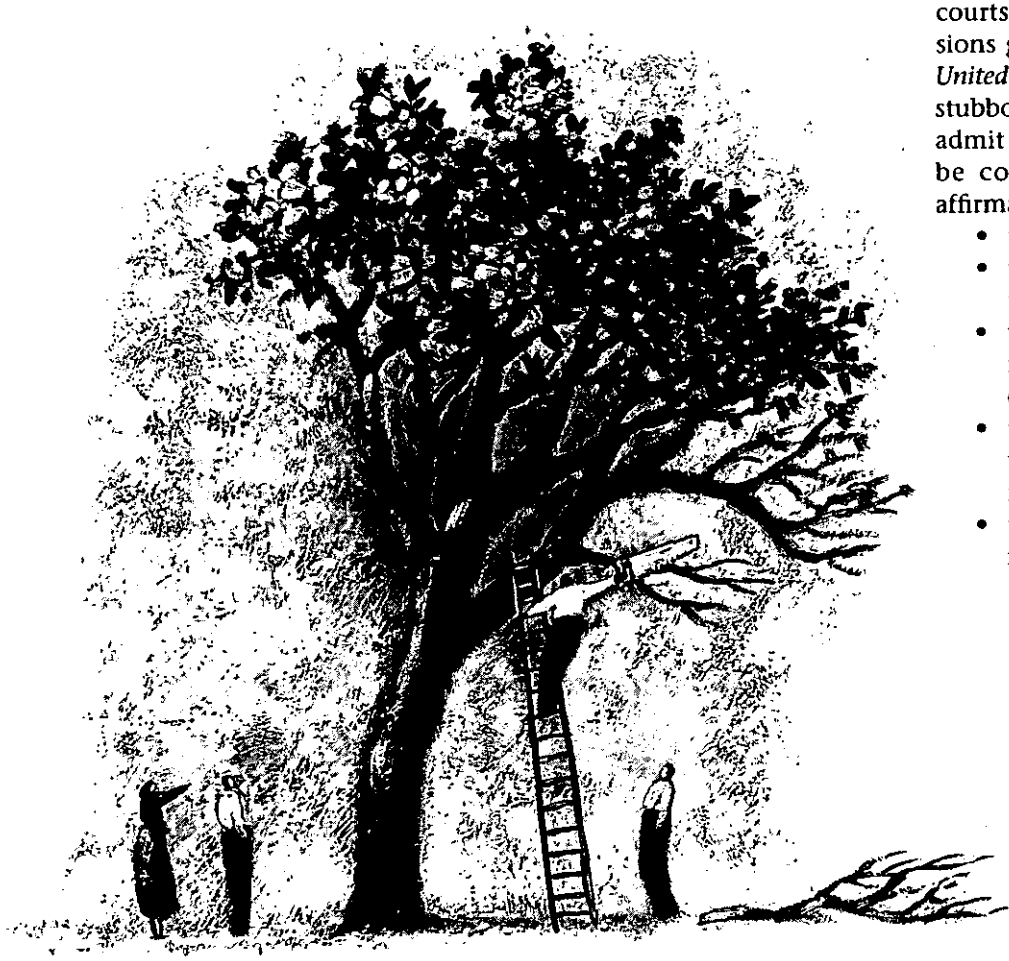
In two decisions, one of them education related, the Supreme Court sought in the 1980s to define the "strict scrutiny" to which the Constitution subjects voluntary race-conscious decision making by state and local public entities: To satisfy the Fourteenth Amendment, such actions must be "narrowly tailored" to serve a "compelling governmental interest." The cases are *Wygant v. Jackson Board of Education* (1986) and *City of Richmond v. J.A. Croson Co.* (1989).

In *Wygant*, the court disapproved, as a justification for race-based layoffs, the objective of providing minority faculty role models for public school students in order to remedy societal discrimination. However, the court upheld the objective of overcoming ongoing effects of identified past discrimination and confirmed that a school need not be subject to a finding of past discrimination or admit that it discriminated in the past to adopt a voluntary affirmative-action plan. Concurring, Justice O'Connor observed that "the state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."

In *Croson*, the court applied the same strict-scrutiny test to invalidate a local government's minority contracting set-aside program, finding no "strong basis in evidence" that could justify remedial action. The court declared the set-aside unrelated to any proven harm to minorities and criticized the city's failure to consider race-neutral alternatives.

Where race discrimination has been pervasive or obstinate, the Supreme Court has endorsed far-reaching and even numerically rigid affirmative-action measures. In *United States v. Fordice* (1992) the court extended to the higher education field its approval of judicially mandated race-conscious measures to remedy state-sponsored segregation. In that context, other courts, too, have approved race-based admissions goals and race-exclusive scholarships. In *United States v. Paradise* (1987), which involved stubborn refusal by a state police department to admit blacks, the court identified five factors to be considered in evaluating whether an affirmative-action plan is narrowly tailored:

- the efficacy of race-neutral alternatives;
- the projected duration of the plan, including provisions for periodic review;
- the relation between numerical goals and representation of minorities in the relevant population;
- the flexibility of the plan, including provision for waivers if numerical goals cannot be met; and
- the nature and extent of the burden on innocent third parties.



The Supreme Court, closely divided for many years on affirmative action, is more hostile than ever to racial classifications.

In *Bakke*, and later in both *Guardians Association v. Civil Service Commission of New York* (1983), which involved a challenge to a public employer's "last-hired, first-fired" layoff plan, and *Fordice*, which involved a previously segregated state higher education system, the Supreme Court held that Title VI prohibits the same racial classifications and affords the same protections as the Fourteenth Amendment. This strongly suggests that, in the context of a challenge to an affirmative-action plan, Title VI will be construed to place the same limits on a private institution that receives federal funds that the Fourteenth Amendment places on state institutions.

Two other key Supreme Court decisions since *Bakke* have upheld employment-related affirmative-action plans. *United Steelworkers v. Weber* (1979) sustained private, voluntary preferences for minority workers in a traditionally segregated job category. The court reasoned that interests of nonminorities were not unnecessarily trammeled, the program was temporary, and it was "not intended to maintain a racial balance, but simply to eliminate a manifest imbalance." In the other case, *Johnson v. Transportation Agency, Santa Clara County* (1987), the court approved a public employer's affirmative-action plan where there was a "manifest imbalance" with regard to women in skilled craft jobs, the plan was flexible and eschewed "rigid numerical standards," rights of nonminorities were not trammeled, the plan was temporary, and it was intended to attain, not maintain, a balanced work force.

The *Adarand* Case

The 1995 decision in *Adarand v. Peña*, like *Bakke* the product of a splintered Supreme Court with six different opinions, at once represents a significant break with precedent and a continuation of the court's recent pronouncements on affirmative action. In *Adarand*, a majority of the court took a dim view of race-conscious laws administered by the U.S. Department of Transportation, under which bonuses were paid to prime contractors on federal highway projects if the contractor awarded subcontracts to firms controlled by "socially and economically disadvantaged" persons. The programs presumed that women, blacks, Hispanics, Asian-Americans, and native Americans are disadvantaged. Reversing *Metro Broadcasting*, the court held that affirmative-action programs of the federal government are subject to strict scrutiny and sent the case back for further lower court review.

With the possible exception of Louisiana, Mississippi, and Texas (the three states covered by the Fifth Circuit, which decided *Hopwood*), the *Bakke* principle remains the nation's law even after *Adarand*, but what weight the Supreme Court now will give *Bakke* is difficult to predict. The court's slender majority in *Adarand* treated *Bakke* gingerly, as if loath to reject or to embrace it. Justice O'Connor's lead opinion gave short shrift to Justice Powell's often-cited opinion in *Bakke*. She emphasized not Justice Powell's point that race is a valid consideration in admissions but his remark that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

That remark now reflects the prevailing view. The Supreme Court, closely divided for many years on affirmative action, is more hostile than ever to racial classifications, as several decisions

handed down recently reflect. These include *Missouri v. Jenkins* (1995), involving desegregation, and *United States v. Hays* (1995) as well as several 1996 decisions involving voting rights. In these cases, the court rejected rationales offered by proponents of race-conscious plans devised to improve public elementary and secondary education, and in the voting rights cases it refused to uphold realignment of congressional districts so that the minority populations' electoral strength would not be diluted. In light of the court's current edgy skepticism about government intervention in matters of race, *Adarand* cannot be viewed as an anomaly.

Still, it is unclear whether recent Supreme Court utterances in affirmative-action cases reflect more mood than new doctrine or the reverse. Although many observers believe the

Gender Equity Under Title IX

An overview of federal higher education affirmative-action policy certainly should contain information about the principal statute that addresses women's affirmative-action rights. Congress enacted Title IX of the Education Amendments of 1972 to protect individuals at education institutions from sex-based discrimination and, by conditioning eligibility for federal funding on compliance, to ensure that federal resources do not support sex discrimination. Title IX, although generally modeled on the Title VI prohibitions of race, national-origin, religious, and color discrimination, nonetheless differs from Title VI in various ways. Mindful that some gender integration in higher education, such as in contact sports, was neither practiced nor wanted, Congress limited Title IX's scope. For example, the law permits private women's colleges to exist, an outcome not precluded by the 1996 Supreme Court decision in *United States v. Virginia*, which held unconstitutional males-only admissions at Virginia Military Institute, a public college. Regulations and agency interpretations under Title IX authorize—indeed, in some situations appear to compel—affirmative action.

Notwithstanding disputes under it in the sports area, Title IX and evolving attitudes toward women's roles have had a very salutary effect. At the time of its passage, many institutions only recently had begun to admit women. Today, women receive more than half the bachelor's degrees awarded nationally and graduate in large numbers with majors and degrees in fields historically dominated by men. Also, progress in advancing women's sports participation continues. According to a recent study, about 36 percent of high school varsity athletes are girls—the same percentage nationally of women undergraduates who participate in intercollegiate varsity sports.

Intercollegiate sports issues related to women's participation have generated a series of court decisions under Title IX in recent years. Several of these cases, notably those construing a 1979 interpretative announcement enforced by the Education Department's Office of Civil Rights, have reached appeals courts. Under the 1979 interpretation, colleges and universities are deemed to have discriminated against women in their sports programs unless they have complied with at least one element of a three-part test:

1. Participation opportunities for male and female students are provided in numbers substantially proportionate to their enrollments.

2. If members of one sex are underrepresented among intercollegiate athletes, the institution can show a history and continuing practice of program expansion that demonstrably responds to the interests and abilities of members of that sex. *Or*

3. The program "fully and effectively" accommodates interests and abilities of that sex.

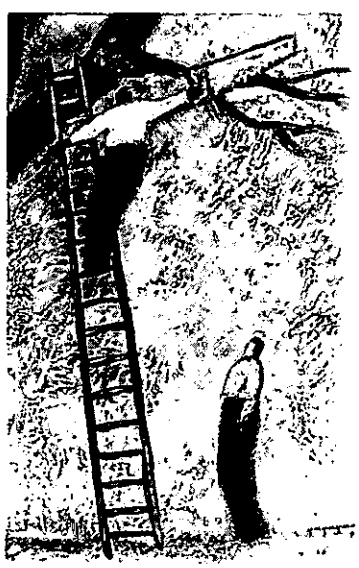
The three-part test, which has been unsuccessfully challenged by Brown, Colorado State, and other universities, has proved far from easy for some institutions to pass.

The incentive to comply with Title IX is by no means lessened by the Supreme Court's 1992 ruling in *Franklin v. Gwinnett County Public Schools* that failure to do so can give rise to a claim against the institution for money damages.

decision represents a major change, *Adarand* leaves unresolved the extent to which the court now will prohibit affirmative action. The court indicated that properly constructed affirmative-action programs can withstand strict scrutiny, but it appears to suggest that the factual predicates for them must be very powerful. In her opinion, Justice O'Connor sought to "dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'" Nonetheless, the court's tenuous majority appears highly skeptical.

Adarand and the Supreme Court's denial of review in *Hopwood* leave open many questions critical to institutions that are considering whether to maintain, reduce, or expand affirmative-action efforts. Prominent among these is whether and the extent to which the diversity rationale remains constitutionally valid in the context of higher education, and if so, how strict scrutiny is to be applied to programs founded on it. ✧

The thoughtful suggestions of Elizabeth Heffernan, Steven Routh, and other colleagues are gratefully acknowledged. —M.M.



Some Additional Readings

The literature on affirmative action is extensive. Some further readings are identified below.

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In Defense of Affirmative Action (1996).

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Reflections of an Affirmative Action Baby (1991).

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"Goodbye to Affirmative Action?" *The New York Review of Books,* July 11, 1996, at 21.

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"Taking Affirmative Action Apart," *The New York Times Magazine,* June 11, 1995, at 36.

Glenn C. Loury
One by One from the Inside Out (1995).

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This Issue

Merit, Diversity, and the Law

BY DANIEL J. LEVIN

AGB commissioned this analysis and history of affirmative action in higher education in response to the intense pressures on colleges and universities to reassess their policies and practices. Possibly no unresolved question of constitutional interpretation has so significantly affected institutional policy as whether Fourteenth Amendment anti-discrimination principles and other civil-rights laws permit, limit, or bar voluntary steps to diversify the racial, ethnic, and gender composition of student bodies.

No single approach to this subject has been embraced by all higher education institutions, nor by all of their trustees. Sound judgment on exactly how to proceed entails careful assessment of educational considerations and of legal risk. Most colleges and universities are committed to doing what the law allows to preserve their right to determine who shall be taught and who shall teach—a right many believe is predicated on First Amendment academic freedom as well as advancement of higher education's core mission.

This topic will not go away. If the Supreme Court in the next year or two resolves key legal matters related to affirmative action, colleges and universities still will be left with knotty questions of how to reconcile inclusion with equity and how to advance their educational purposes in this area of volatile public opinion. However higher education proceeds, the debate about pluralism will not soon end.

The consequences for the higher education community of failing to maintain pluralism lawfully would be momentous. Demographic trends and the nation's needs in a fiercely competitive global economy argue for opening higher education's doors to all sectors of society. At the same time, a perceived unresponsiveness to "merit" as the salient consideration for admission would likely erode the public confidence on which higher education depends.

Governing boards plainly need to assess what their policies should be, and many colleges and universities have renewed this self-examination process. A principled view is unlikely to be an inflexible one, and even if such self-examination serves no larger purpose than to rebut claims that the institution is a mere weathervane that changes direction with every wind, the efforts are valuable. We hope this paper will contribute to every trustee's understanding of how and why affirmative-action programs evolved and to a reasoned review of the issues apart from political partisanship or ideology.

This particular issue of *Priorities* may be one readers will wish to keep on hand for reference in the months ahead.

—Daniel J. Levin is editor of Priorities.

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RACE IN MODERN AMERICA

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CHAPTER FOURTEEN

The Higher Learning

IN 1995, STANFORD University's new president, Gerhard Casper, announced a number of measures to raise academic standards, including a reinstatement of the grades of D and F and an end to the privilege of dropping courses on the eve of the final exam without paying an academic penalty. But President Casper's effort to control grade inflation and to encourage students in other ways to take seriously the courses in which they were enrolled was apparently viewed by many black students as a direct attack on them. Or at least so the *Journal of Blacks in Higher Education* reported.[1]

It was, alas, a believable report. Stanford had for some time been a sea of racial troubles. The school had certainly tried to make blacks feel welcome. Indeed, it had gone to extraordinary lengths to do so. But the effort itself became part of a cluster of problems, of which the protest directed at President Casper was but one sign. The university not only instituted an aggressive affirmative action admissions policy; it trained students in racial sensitivity, created dorms with an ethnic "theme," and drastically altered the curriculum to meet minority demands. The result was more minorities on campus; a curriculum that included courses on such subjects as black hair; frustrated, bewildered white students; and blacks who felt more alienated, more culturally black, and perhaps more hostile to whites than when they arrived.

The university had wanted to make minority students feel at home. But with the dramatic increase in minority numbers and with the creation of ethnic theme houses, the level of minority student discomfort actually rose. With more minority students in this environment came more interracial tension—especially tension between whites and blacks. When blacks first demanded their own dorms, they hoped to live entirely separate from white Stanford. The college insisted, however, on a quota of 50 percent white. As it turned out, it wasn't quite the "comfortable" arrangement that the university wanted.

A widely reported incident in September 1988 made that abundantly clear.

In the wake of an argument over black lineage, two intoxicated white students defaced a Beethoven poster in such a way as to make the composer look black. The action took place in Ujamaa, the African-American residential house, and subsequently provoked a number of racially ugly meetings and a flyer on which the word "niggers" was scrawled by unknown actors. The scrawl was unfairly attributed to the students who had altered the Beethoven drawing, and thus they quickly became victims themselves—blamed for acts they didn't commit. Antiwhite leaflets began to appear, most of them urging an all-black dorm, and pins were jammed into the photographed faces of white students on a picture board.

How could the situation have become so ugly so quickly? Stanford had almost no students who did not think of themselves as liberals. Only 15 percent of seniors surveyed identified themselves as even somewhat conservative. These were students, then, painfully self-conscious about having enlighted racial attitudes. But the Stanford campus—like so many others—was a racial tinder box, ready to explode. In the 1960s few had doubted that more interracial contact would bring understanding and friendship: a family of man. Less than three decades later, things looked a lot more complicated.

As a series of interviews conducted in 1988 and 1989 by John H. Bunzel, a political scientist at the Hoover Institution, made clear, by then blacks and whites were not even talking the same language.[2] Most important, they couldn't agree on the meaning of racism. White students talked of prejudice, stereotyping, and overtly racist acts, and believed evidence of such personal hostility was exceedingly hard to find. Black students, on the other hand, viewed racism as something akin to a pervasive vapor—invisible but lethal. Only 30 percent of blacks in a student survey reported direct experience with prejudice, and the majority of those described that experience as "subtle" and "hard to explain." Nevertheless, "covert," "elusive" discrimination deeply affected their daily life, they said. Racism, as they described it, was institutional or structural. The greater "power" (undefined) of whites had racist consequences: too many white tenured faculty and too few black students had been receiving academic honors, for instance.

Almost half the blacks Bunzel interviewed said their views on racism had hardened while they were students at the university. Not suprisingly, whites (as one of the seniors interviewed put it) found it "hard to know how to react to charges of racism when there [were] no specific incidents or examples." In fact, their experience at Stanford made white students more skeptical of black charges of racism and less likely to reach out. It was not rhetoric alone that alienated white students. Whites were bewildered and angered by black separatism. In the interviews black students were quick to say they kept largely to themselves, celebrating their distinctiveness. Blacks were expected, they reported, to talk black, dress black, think black, and certainly date black. In so doing, they did create safe psychological havens, but whites experienced

such separatism as hostile. What had they done to provoke or deserve the enmity? they asked.

Relations between the races had thus become, in Bunzel's words, "reserved, and circumspect, restrained by apathy, fears, and a certain amount of peer pressure." In a senior survey 70 percent of the students agreed that racial tension had increased in the years they had been on campus. And thus, thirty-two years after the first lunch counter sit-ins, privileged blacks on the most enlightened of college campuses were insisting on eating apart. At Stanford and other institutions of higher education, the integrationist dream of Martin Luther King, Jr., had been shattered.

What a mess. How did it come about? Does a greater black presence on campus inevitably mean greater racial tension? Of course not. Not if black students arrive as equals and are treated as such. At Stanford neither was true. As of 1994, black undergraduates were entering Stanford with an average combined SAT score of 1,164—a very good score by national standards, putting them in the top sixth of all test-takers in the country. But their white classmates had been admitted with a 1,335 average, placing them in the top 3 percent of all students nationally.[3] As Shelby Steele has argued, black students pay a heavy price for their letters of acceptance on the basis of lower academic standards. To begin with, the affirmative action programs call attention to racial differences—they heighten racial consciousness. And then, too, they reinforce that myth of black inferiority upon which we touched in the last chapter. Almost all students start competitive colleges like Stanford feeling insecure, but for African-American students "the anxiety is not only personal but racial."[4] Hence the reaction when President Casper raised academic expectations—the sense of insecurity instantly revealed.

High anxiety—the deep-seated fear that black inferiority may not be, after all, a myth—is just one source of what Steele has called a campus "politics of difference," in which groups assert rights and vie for power based on their racial identity. The charge of (invisible) white racism becomes the solution to the pain of self-doubt, and that charge not only transfers the problem to others but legitimizes a politics of 1960s-style racial protest. Add to the mix the ideology of black power (which sanctions demands made on the basis of color) and college administrators who make a virtue of appeasement and reward those demands, and the result is precisely that resegregation of campus life so clearly and appallingly on display at Stanford—but certainly not confined to that school.

Without an admissions system involving racial preferences, the picture would be quite different.

The Surge in College Enrollments

In 1960, the year that black students at North Carolina Agricultural and Technical College sat down at the Woolworth's lunch counter in Greensboro and insisted upon their right to be served a cup of coffee, fewer than 150,000 African Americans were enrolled in colleges or universities in the United States, just 4 percent of the total student body (Table 1). There are almost ten times that many black college students today.

Blacks were even less visible on the typical campus, and even further behind in the educational competition, than the 4 percent figure would suggest. Most of the black student population—two-thirds of it, in fact—was concentrated in segregated southern colleges like North Carolina A&T. The education these schools offered, with few exceptions, was distinctly inferior to that provided in the typical predominantly white institution of the day. In their penetrating 1968 survey of American higher education, *The Academic*

Table 1
Black Enrollments in College, 1960–1994

		Percent of Enrollments	
	Number (in thousands)	*Total*	*In other than black colleges*
1960	146	4.1	1.8
1970	522	7.0	4.2
1980	1,007	9.9	8.2
1994	1,317	10.7	9.0

Sources: Enrollment data for 1960 from Sar A. Levitan, William B. Johnston, and Robert Taggart, *Still a Dream: The Changing Status of Blacks Since 1960* (Cambridge: Harvard University Press, 1975), 84; 1970–1980 figures from U.S. Bureau of the Census, Current Population Reports, P-20-479, *School Enrollment-Social and Economic Characteristics of Students: October 1993* (Washington, D.C.: U.S. Government Printing Office, 1994), tables A-1, A-5, and A-6; 1994 data from American Council on Education, *Minorities in Higher Education, 1995–96: Fourteenth Annual Status Report* (Washington, D.C.: 1996), tables 1 and 5. Figures on the proportion of black students on campuses other than those of the historically black colleges include graduate students, since they are not separated out in the data on attendance at historically black colleges. Estimated from data in Frank Bowles and Frank A. DeCosta, *Between Two Worlds: A Profile of Negro Higher Education* (New York: McGraw-Hill, 1971), 199; Sar A. Levitan, William B. Johnston, and Robert Taggart, *Still a Dream: The Changing Status of Blacks Since 1960* (Cambridge: Harvard University Press, 1975), 84, 102; National Center for Education Statistics, *Historically Black Colleges and Universities, 1976–1990*, NCES 92-640 (Washington, D.C.: U.S. Government Printing Office, 1992), table 5; National Center for Education Statistics, *Digest of Educational Statistics, 1995* (Washington, D.C.: U.S. Government Printing Office, 1995), 208, 225. Nineteen ninety-four figures are for the 1993–1994 academic year.

Revolution, Christopher Jencks and David Riesman concluded that the approximately one hundred historically black colleges ranked "near the end of the academic procession in terms of student aptitudes, faculty competence, and intellectual ferment." The typical freshman at such schools, judging from average SAT scores, was "semiliterate" and performed at about the ninth-grade level.[5] Well into the 1960s such Jim Crow colleges were the only option available in most southern states to black students who wanted a higher education, unless they had the money to go to school in the North and the confidence that they could survive the competition despite having attended segregated elementary and secondary schools. Significant numbers of African Americans from the North attended one of the historically black colleges as well.

In 1960 only about 50,000 black students attended predominantly white colleges and universities in the North, accounting for less than 2 percent of enrollments. The more prestigious, selective, and expensive the school, the smaller the proportion of African-American students there. Very few were to be found in Ivy League schools or similar institutions with intensely competitive admissions. They were less often enrolled in the flagship campuses of the state university system, more often found in the state colleges than the state university campuses, and still more often in community colleges and junior colleges.[6]

As the civil rights movement reached a climax and the issue of race moved to center stage in the 1960s, black college enrollments took off like a rocket. The economy was booming, higher education was expanding to accommodate the children of the Baby Boom, the incomes of black families were rising, and it was widely believed that increased education was the route to racial equality. In addition, institutions of higher learning actively sought to increase their black enrollments. The number of blacks in college more than tripled over the decade, and then doubled in the 1970s. College attendance rates for all groups were rising, but they were rising far more rapidly for blacks than for others; the black share of total enrollments jumped from 4 percent to almost 10 percent between 1960 and 1980. What is more, the share of the African-American college population attending the historically black colleges plunged, dropping from two-thirds in 1960 to about half in 1968, and just 17 percent by 1980, where it remains today.[7] The proportion of African-American students enrolled in predominantly white schools quadrupled between 1960 and 1980, rising from 1.8 percent to 7.7 percent. These are striking gains to have been achieved in a relatively brief span of years.

Since 1980 blacks have made further impressive gains in higher education. The number attending college has risen by another 30 percent, lifting the black share of the total by almost a full percentage point.[8] The most illuminating figures to consider in assessing the changing landscape are presented in Table 2. Here we see rates both of college attendance and of college comple-

Table 2
College Attendance and Completion Rates for Persons 25–29 Years of Age, by Race, 1965–1995

	Black	White	B/W ratio	Black	White	B/W ratio
	Percent who had attended college			*Percent who had completed 4 or more years*		
1965	15.2	26.2	58	6.8	13.0	52
1970	17.2	32.8	52	7.3	17.3	42
1975	27.6	42.8	64	10.7	22.8	47
1980	32.8	46.2	71	11.7	23.7	49
1985	34.4	44.5	77	11.5	23.2	50
1990	36.0	45.3	79	13.4	24.2	55
1995	44.9	55.4	81	15.3	26.0	59

Source: U.S. Department of Education, *Youth Indicators 1996: Trends in the Well-Being of American Youth*, NCES 96-027 (Washington, D.C.: U.S. Government Printing Office, 1996), 70.

tion for young people (aged 25 to 29) at six different points over the past three decades.

As the table makes evident, in each successive cohort between 1965 and 1995, the fraction of blacks who have been to college has risen. Advances were more rapid at some times than at others, but the gains of the first half of the 1970s were nearly matched by those in the first half of the 1990s. Over these three decades, the African-American rate of college attendance has jumped 195 percent, while the rate for whites has risen only 114 percent. Three decades ago blacks were only about half as likely as whites to attend college; in 1995 it was just over 80 percent of the white rate.

The Lag in Graduation Rates

That's the good news. The racial gap in rates of college attendance has declined very sharply over the past three decades. The bad news is that the striking increase in the number of African Americans enrolled in higher education has not produced an equally noteworthy gain in the number who who have completed college and obtained their degrees.[9] The problem of black youths dropping out of high school has been pretty much solved; high school graduation has become virtually universal in the United States, and the racial difference has disappeared. The real dropout problem for African Americans is at the college level. Although almost half (45 percent) of African Americans in the twenty-five-to-twenty-nine age bracket today have been

enrolled in college, barely one out of seven holds a bachelor's degree. The drop-off here—45 percent at the starting gate but only 15 percent reaching the finishing line—is disturbing. In 1965, blacks were only about half as likely as whites to go to college, and those who did go were only about half as likely to graduate. In 1995, African Americans were only about 20 percent less likely to attend college, but those who did go were still not much more than half as likely to graduate.

Of course not everyone who enters college needs to stick it out for four years to derive some benefit. But when greatly disproportionate numbers of one group fall by the wayside long before commencement, we need to ask why. Finishing college is important. In 1995 men who had some college but not a degree had median incomes that were just one-fifth higher than those who were only high school graduates; for women the advantage was 29 percent. Males with a bachelor's degree, though, had incomes 82 percent above those of high school graduates and 55 percent above those who had attended college but dropped out. A college diploma paid off even more for women; the incomes of graduates were 220 percent of those with only a high school education, and 170 percent of those with some college but no degree.[10] Furthermore, a college diploma is a necessary passport for entry into graduate school, with its promise of even greater returns.[11]

After reviewing the graduation rates of black students at some three hundred major colleges and universities, the *Journal of Blacks in Higher Education* declared in 1994 that the black college dropout rate was nothing short of "disastrous." Among the full-time students who enrolled in degree programs as freshmen between 1984 and 1987, 57 percent of whites earned a degree within six years, and 43 percent dropped out.[12] Only 34 percent of African Americans, by contrast, completed a degree; 66 percent dropped out. The black dropout rate exceeded the white rate by more than 50 percent. More recent evidence, for freshmen who began college in the 1989–1990 academic year, shows only a slight improvement. The black six-year graduation rate had risen to 40 percent as compared with 59 percent for whites.[13] That left the black dropout rate at 60 percent, almost 50 percent higher than the 41 percent dropout rate for whites.

Why have large numbers of black students been able to make it *to* college but not to make it *through* college? It is natural to look for an economic explanation. Black students are less likely to come from affluent households than are their white classmates, and thus they receive less financial help from home. Indeed, their families may turn to them for aid in hard times, forcing some to abandon school and take a job. But while economic status does have a lot to do with who goes to college and who completes college, it doesn't help much with the problem at hand. A high proportion of these students come from the greatly expanded black middle class. In addition, over the last three decades financial aid programs have greatly expanded. The Economic Opportunity Act of 1964 channeled federal funds to needy college students

through the work-study program. The Higher Education Acts of 1965 and 1972 vastly increased the federal commitment to aiding college students and institutions by providing both direct grants and federally guaranteed student loans. By 1995 the federal government was spending over $18 billion a year to subsidize college students, and most states were also devoting sizable sums to grants and loans for students in higher education, on top of the subsidy involved in operating state university systems.[14] Coming from homes with lower average incomes, black students were more often the recipients of such aid. According to the most recent figures available, 54 percent of black undergraduates were receiving some form of financial aid, as compared with 39 percent of whites. Almost four out of ten African Americans had federal grants to defray college costs, double the proportion among whites.[15]

In the coming pages we offer an alternative explanation for the low graduation rates for black college students. Affirmative action admissions policies, we will suggest, did work to increase enrollments, but if the larger aim was to increase the number of African Americans who would succcessfully complete college, preferential policies had disappointing, even counterproductive, results.

Double Standards in Admissions

It is not surprising that few black students were enrolled in the most selective institutions of higher education in the early 1960s. Most of them did not have families who could afford to pay the bill, and, as a consequence of the inferior schooling they had received, very few had the academic preparation to qualify for admission. James Coleman's monumental 1966 survey demonstrated that even in the North, black twelfth-graders were more than three years behind their white peers in reading comprehension, on the average, and about five years behind in math. Southern blacks (from Jim Crow schools) lagged even further behind.[16] The first NAEP tests a few years later disclosed similarly glaring racial gaps.

The small numbers of black students to be found on white campuses, especially elite white campuses, suddenly became an issue when the civil rights revolution erupted in the national consciousness. The civil rights cause had broader and deeper support in higher education than in any other American institution, and the question of what those who lived in the ivory tower could do for the cause of racial justice seemed increasingly urgent. Enrolling many more African-American students was the obvious step. A college education would open doors to large numbers of young people whose prospects had been blighted by racism. It would mean better-educated leaders in the black community in the next generation, and would prepare white students for life in a society that would be more diverse culturally.

In time, institutions of higher education would search for both more black

students and more black faculty and administrators. But the two stories are quite separate. The commitment to hiring more blacks to fill teaching and other positions was due in great part to federal pressure. In the early 1970s, grants to twenty leading universities that amounted to more than $28 million were held up because these schools had not filed with the federal government satisfactory plans to obtain more African-American employees, as they were obligated to do under an executive order.[17] The obligatory affirmative action plans had met with resistance; academic departments generally believed in appointing scholars and teachers on the basis of their academic merit—conventionally defined. The large-scale affirmative action programs governing student admissions and financial aid, however, were freely adopted as the right thing to do.

"Affirmative action" in the selection of students initially meant greater outreach, making a bigger effort to seek out talent in places that the recruiters had never visited before. For example, admissions officers from elite schools began to visit predominantly black inner-city high schools and to solicit applications from the top students there. This was commendable, but the unfortunate fact was that, given the poor education most black students had received, the most imaginative and intensive searches turned up very few diamonds in the rough. It soon became apparent that the most highly selective and competitive schools could not enroll a significant concentration of African-American students without admitting most of them under a different and lower academic standard.

Race thus became a qualification for admission, and a very important one. Letters of acceptance and scholarship offers went to students whose applications would have been turned down in a flash had their skins been white. There was a certain irony here. Until the mid-1960s, liberals had demanded that colleges remove questions about race on their application forms, and cease to require photographs of applicants. To eliminate racial discrimination, they believed, the admissions process should be made strictly color-blind. Massachusetts actually passed a law forbidding race questions on college applications in 1949.[18] When the focus of liberal concern shifted from preventing discrimination to overcoming the effects of past discrimination, and the idea of color-blind solutions was abandoned in favor of preferential treatment for the victims of historic discrimination, the law was ignored.

Fred Abernathy, who finished high school in the spring of 1995, was a beneficiary of that shift, and his is a familiar story. Abernathy got 19 on the ACT—a score that put him in the bottom half of all test-takers. Nevertheless, he was flooded with college invitations, including one from the College of Engineering at the University of Illinois, where he chose to go. The school is highly selective; most white students were scoring in the 98th or 99th percentile. They came, in other words, well prepared to meet tough academic standards, and that meant that close to 90 percent were graduating. The black

record, on the other hand, was quite different: almost half the black students were leaving.[19]

To give someone a coveted place in the freshman class at a competitive university is not like handing the recipient a winning ticket in the state lottery. The curriculum at elite institutions assumes that students arrive with highly developed academic skills—that they are capable of reading and assimilating a great many pages of complicated material each week, writing essays that are coherent and grammatical, and grasping problems expressed in mathematical language. President Johnson's rationale for affirmative action in his 1965 Howard University speech, let us recall, was that it was unfair to take someone who has long been "hobbled by chains" and put him at the starting line in a race and say "you are free to compete with all the others."[20] And yet affirmative action in admission to elite colleges amounted to precisely that. It put ill-prepared African-American students at the starting line and told them that they were free to compete with students who entered with calculus, several Advanced Placement credits and combined College Board scores often above 1400.

With the aid of wishful thinking about the irrelevance of scores on standardized tests, well-meaning educators glossed over the difficulty. A classic example was a 1967 report of a committee of the Southern Regional Education Board. The committee asserted that "there is considerable evidence that the scores do not accurately reflect the potential of disadvantaged youths for college training," but did not specify what "evidence" it had in mind.[21] It warned that recruiting "exceptionally talented Negro students" who met regular admissions standards was not nearly enough. Institutions also had an "obligation to participate in the education of students whose disadvantage ha[d] been more severe." Although the committee referred to "exceptionally talented" students, it was unwilling to speak of any as less talented or not very talented at all. The least adept were merely those whose "disadvantage" had been "more severe," which seemed to suggest that the more dismal a student's academic record was, the more the student deserved admission to college. All colleges and universities therefore had a moral duty to "adopt 'high risk' quotas which commit them to admitting disadvantaged students" who were "not ready for college work and [to] place them in compensatory or remedial programs."

However benevolent the motives of such progressive thinkers, their muddled thinking has had unfortunate consequences, as we saw with the University of Illinois example. The risk in taking in a "high risk" student like Fred Abernathy is that of academic failure. When it does not work out, the loser is not the institution but the individual student, who suffers a crushing, humiliating personal defeat that may have lasting results. That should be of special concern when the student (who might be fine at a less competitive school) has already been scarred by encounters with racial prejudice. The proponents

of affirmative action at elite schools gave little thought to the problem of those who might fall by the wayside. But, if their high-risk students did not make it, the schools had little to lose and much to gain—namely, applause for their benevolence. No one could say that they hadn't made special efforts to do their bit for the cause of racial justice.

The real difficulties involved in dealing with students who did not meet traditional standards was evaded with rhetoric about the "remedial" and "compensatory" efforts that institutions would supposedly make to close the gap. But remediation was easy to talk about and hard to accomplish. Twelve years of dismal education take a heavy toll. Schools did not know how to take a group of eighteen-year-olds whose reading, writing, math, and science skills were four or five grade levels below those of their average student and bring them up to par in a semester or two—or even a year or two. Such remediation was certainly not a job that the typical professor at an elite school had any talent for. The more distinguished the university, the less adept its faculty was likely to be at this task. Thomas Sowell, the most penetrating critic of affirmative action in higher education, has noted the illogic of the core idea of putting black students into fast-paced colleges for which they were so ill prepared that they required special slower-paced courses.[22]

Filled with idealistic zeal and convinced that academic deficiencies that had developed over twelve years of schooling could be quickly overcome by instructors whose hearts were in the right place, the nation's colleges and universities rushed to adopt preferential admissions policies. Such measures were assumed to be temporary, a way of giving a jump start to the process of social change. No one anticipated that these efforts would harden into a regime of racial preferences that would last into the twenty-first century. But three decades later that seems to be what has happened. A 1993 survey of fifty-nine randomly selected colleges and universities found that every one of them claimed to have taken specific steps aimed at increasing minority enrollment. That could mean only a general interest in aggressive recruiting, but in fact, three out of four of these schools either aimed for a student body with a racial mix matching that of the population of the state or had other specific numerical goals for minority enrollment.[23]

The pervasiveness of the affirmative action mentality was strikingly illustrated in a 1995 announcement by administrators at the University of New Hampshire, located in a conservative and practically all-white state with a minority population of only 2.6 percent (0.6 percent black). University officials complained that minorities were "only" 3.2 percent of its student body and "only" 5.8 percent of its faculty, and that something had to be done about this disturbing imbalance, even though minorities were overrepresented at the university in both categories relative to their numbers in the state.[24] The university committed itself to the goal of making both the student body and the faculty 7.5 percent minority by 2005. The plan provoked no criticism.

Even in New Hampshire the idea that society had a special duty to be sure that racial minorities were well represented—indeed overrepresented—in higher education was apparently so widely accepted that the proposal attracted no critical notice.

To grasp why affirmative action, originally a temporary expedient, is so firmly entrenched some three decades later, we need to look closely at evidence about the academic performance of African-American youths since the 1960s. The information from the National Assessment of Educational Progress (NAEP) analyzed in the previous chapter provided a useful starting point, but here we look more closely at the segment of the population that might be college material. The best data come from the most widely used instrument employed by admissions officers in selective colleges and universities—the SATs.

The Racial Gap in SAT Scores

Each year the College Entrance Examination Board administers tests to approximately 1 million high school students who aspire to admission to one of the nation's more selective colleges or universities.[25] Unlike the NAEP tests, SATs are not administered to a random sample of the entire student population. Although some school systems require it, in most cases students elect to take it. Changes over time in the SAT scores of particular racial groups thus may not be evidence of changes in the academic skills of the group as a whole; the membership of the group taking the test differs from year to year.[26] Nevertheless, the SAT is a vital gatekeeper that strongly influences who is admitted to which college.

How well have black students performed on the SATs? Racial breakdowns of SAT scores are only available since 1976. In the two decades that have elapsed since then, the performance of African-American college-bound seniors has risen substantially, reflecting the progress also evident from the NAEP tests. The mean verbal scores of black youths rose 24 points between the mid-1970s and 1995, while white scores actually dropped a little—by 3 points (Table 3).[27] The racial gap thus narrowed by 27 points, a drop of about a quarter, a shift of the same magnitude as that displayed in the NEAP reading results. Progress in closing the racial gap, though, came to a halt in 1991. Since then white scores have actually risen a little more than those of blacks. The verbal SATs show only a tiny hint of the sharp regression evident in the NAEP results, but it is troubling that virtually all of the progress came in the late 1970s and early 1980s, and that something has gone awry since then.

The mathematics results look quite similar. Black scores rose by 34 points, while those of whites increased just 5 points. The gap shrank by 29 points, again about a quarter, and again a drop of approximately the magnitude as

Table 3
Mean College Board Scores of College-Bound Seniors by Race, 1976–1995

	VERBAL			MATHEMATICAL			
	Black	*White*	*Gap*	*Black*	*White*	*Gap*	*Total gap*
1976	332	451	119	354	493	139	258
1981	332	442	110	362	483	121	231
1984	342	445	103	373	487	114	217
1987	351	447	96	377	489	112	208
1991	351	441	90	385	489	104	194
1995	356	448	92	388	498	110	202

Source: National Center for Education Statistics, *The Condition of Education, 1996* (Washington, D.C.: U.S. Department of Education, 1996), 240.

that found in the NAEP results. But the SAT math scores show more than a hint of the regression revealed by the NAEP tests. The racial gap has widened by 6 points since 1991, not a huge reversal but not a trivial one either.

These figures are averages. A somewhat different—and distinctly less encouraging—picture is revealed when we look at how many blacks have SAT scores that would make them strong prospects for admission into the nation's top colleges and universities if they were judged exactly as any other applicant, on a color-blind basis. Consider the universities that *U.S. News & World Report* rates as the nation's top twenty-five, where the average combined SAT score for entering freshmen is approximately 1300.[28] To be in the running for admission at such a school, the ordinary white applicant needs to score a mininum of 600 on the verbal portion of the test (7 percent of all test-takers in 1981 and 8 percent in 1995) and at least 650 on the mathematics section (8 percent of the total examined in 1981 and 7 percent in 1995).

How many black students have SAT scores that would qualify them for admission to top colleges and universities when judged by the same standards as white applicants? In 1981 fewer than 1,000 (1.2 percent) of the more than 70,000 black students taking the SATs scored as high as 600 on the verbals. (See Table 4.) Almost 58,000 whites, 8 percent of the total, had verbal scores that high; they outnumbered blacks in the verbal elite by a ratio of 61 to 1. Asian Americans also ranked well ahead of African Americans; the proportion scoring 600 or more was six times the black rate.

If we look at the very top scorers—those with 700 or more on their verbals—the disparity is even sharper. Only 70 African Americans in the entire country were on the top rung of the verbal ladder, and well over 8,000 whites. There were 118 whites for every black among the highest scorers, and even the tiny Asian-American group had more than five times as many students with verbal scores of 700 or better.

Table 4
Number and Percent of Black, White, and Asian Students with High SAT Scores, 1981 and 1995

	1981			1995		
	Black	*White*	*Asian*	*Black*	*White*	*Asian*
Verbal						
700–800	70	8,239	366	184	8,978	1,476
650–699	221	16,216	655	465	19,272	2,513
600–649	596	33,231	1,119	1,115	36,700	4,201
Total >600	950	57,685	2,140	1,764	64,950	8,190
Percent >600	1.2	8.0	7.2	1.7	9.6	10.0
Mathematics						
750–800	24	5,077	633	107	9,519	3,827
700–749	132	16,257	1,514	509	29,774	7,758
650–699	393	35,353	2,488	1,437	51,306	9,454
Total >650	549	56,687	4,635	2,053	90,599	21,039
Percent >650	0.7	7.9	15.6	2.0	13.4	25.8
Number examined	75,434	719,383	29,753	103,872	674,343	81,514

Sources: College Entrance Examination Board, *Profiles, College-Bound Seniors, 1981* (New York: College Board, 1982), 41, 60, 79; College Entrance Examination Board, *1995 National Ethnic/Sex Data* (New York: College Board, 1995), unpaginated.

Racial differences on the 1981 math test were even larger than on the verbal test. Only 549 blacks out of the 75,000 taking the test had scores of 650 or higher, 0.7 percent of the total. Whites outnumbered them by 103 to 1. Indeed, more than eight times as many Asians as blacks did that well, though there were many more black test-takers. In the very top group, with scores of 750 and up, the white to black ratio was 212 to 1. It is especially striking that the 30,000 Asian test-takers produced 26 times as many 700-plus scorers as the 75,000 blacks.

In 1995 the number of blacks taking the SAT was up by more than a third, and the number scoring in the upper reaches had expanded by considerably more than that. The proportion with verbals of 600 or more rose from 1.2 percent to 1.7 percent, and the fraction with math scores of 650 and up went from 0.7 percent to 2.0 percent. The racial gap, though, remained huge. In the 700 and up bracket of the verbals, the ratio of whites to blacks was 49 to 1; in the 750-plus category in math it was 89 to 1.

The contrast with the Asians is also marked. Just 3.5 percent of the population in 1995, Asians were 13 percent of all students scoring 700 or more on the verbals and a stunning 27 percent of those with 750 and up in math. If we look at a still more rarefied level of achievement—at the 734 superstar students named Advanced Placement Scholars by the College Board in 1995

because they had high grades on eight different AP tests—the picture is still more dramatic. An amazing 29.7 percent of all the winners were Asians, and 53.1 percent were non-Hispanic whites. Just 2 out of the 734—less than 0.3 percent—were African-American.[29]

The spectacular academic achievements of the Asian students—records that have made these students impossible for colleges to turn down—account for the surge in their enrollments in elite colleges and universities over the past decade and a half. Less than 4 percent of the population, they account for 24 percent of undergraduate enrollment at Stanford and Columbia, 19 percent at Harvard, 17 percent at Cornell, and 16 percent at Yale.[30] The striking differences between Asian and black students clarify the difficulties involved in engineering racial balance in highly competitive institutions. The number of Asian students at places like Harvard has soared, but not because of admissions policies designed to recruit more of them for "diversity" purposes. By now, indeed, Asian Americans are so overrepresented at many elite schools that their presence actually reduces diversity, if it is defined as some approximation of proportional representation for all groups.[31]

Defenders of affirmative action often claim that race is used only as a tie-breaker when two candidates have otherwise identical qualifications. Instead of tossing a coin, admissions officers give the nod to the student from a disadvantaged and underrepresented racial minority—a category that does not include Asians. Few Americans today would complain much if that's how the process worked. Even those who believe that race-conscious policies are profoundly pernicious in principle might condone putting a thumb on an otherwise evenly balanced scale as a temporary expedient.

These metaphors—breaking a tie, tipping the scales a bit—are appealing but irrelevant to the actual issues in higher education today, as the data above should have made clear. If race were being used only to break ties between equally qualified students, unfortunately we would expect the leading schools to have student bodies in which the percentage of blacks was very small. In fact, the California Institute of Technology, which had a 1.1 percent black enrollment in 1994, seems to be the only example of a nationally known institution in which racial identity merits (at most) a thumb on the scale. Cal Tech is known to be—or at least thought to be—a school that students with less than 750 on the math SATs needn't bother applying to. Since only 0.8 percent of the nation's students who score that high in math are black, Cal Tech might have needed to give some preference to black applicants to get even as many as 1.1 percent. If so, the preference given is modest.

MIT, which also expects entering students to have advanced mathematics skills, takes in more than four times as many black students as it would if it only picked top scorers on the math SATs, and three times the number who would qualify on the basis of both verbal and math scores. Bowdoin College, located in Maine, which has barely 5,000 black residents, has a student body

Table 5
Black Percentage of the Student Body at Selected High-Ranking Colleges and Universities, 1994

University of Virginia	8.9	Brown University	5.6
University of North Carolina	8.9	Princeton University	5.4
Wesleyan University	8.3	Swarthmore College	5.4
Amherst College	8.1	Stanford University	5.3
University of Michigan	7.9	UC-Berkeley	5.3
Duke University	7.5	Dartmouth College	5.1
Wellesley College	7.1	Rice University	4.2
Harvard University	6.9	University of Chicago	3.7
Yale University	6.9	Cornell University	3.7
Columbia University	6.6	MIT	3.6
Williams College	6.6	Bowdoin College	2.1
Johns Hopkins University	6.3	Cal Tech	1.1

Sources: "Long-Term Black Student Enrollment Trends at the Nation's Highest-Ranked Colleges and Universities," *Journal of Blacks in Higher Education* 12 (Summer 1996), 10–14, and "The Status of Black Faculty at the Flagship State Universities" in the same issue, 14–16.

that is 2.1 percent black, and nearby Bates and Colby achieve something similar (with 2.6 and 1.8 percent respectively).

The editor of the *Journal of Blacks in Higher Education* has made a similar calculation of the distribution of SAT scores by race, using 1994 data, and applying it to the twenty-five highest-ranked national universities. African-American students held 3,000 of the 48,000 places in the freshmen classes at those institutions, or 6.3 percent. If test scores alone had been used in making admissions decisions, he estimates, only about one-quarter as many blacks—720—would have been accepted, reducing their share of the class from 6.3 to 1.5 percent.[32] The author takes this as a powerful demonstration of the need for affirmative action; we see it as evidence that our universities have gone too far in bending their admissions standards in pursuit of greater racial balance.

More Bad News

The gulf in test scores is immense. But should we care about mere tests? Many educators profess to believe that performance on such standardized examinations as the SATs is irrelevant. In 1996, for example, the president of Amherst College charged that it was "simple-minded, incorrect, and even

racist" to believe "the ridiculous notion that 'qualifications' and test scores are synonymous." (His denunciation of tests was so unqualified that it was difficult to understand why Amherst College continued to require applicants to take the SATs at all.) The president of Williams College also dismissed the salience of SAT scores, claiming that "the best measures" of "academic potential" are "rank in class and the degree to which applicants have taken the strongest academic program offered at their schools." On those counts—supposedly much more predictive of college performance than the SATs—he went on to claim, "Williams students of color closely resemble the student body as a whole."[33]

It may be true of Williams, but it cannot be true of our most selective institutions of higher education in general. When they heap scorn on "mere tests," defenders of affirmative action pick an easy target, and deflect attention away from a wealth of evidence demonstrating that the racial gap in other measures of academic achievement and preparation is just as large as the gap in SAT scores.

Information about the class rank, grade averages, and courses taken by the 1 million–plus students who took the SATs in 1995 is summarized in Table 6. If rank in class is what should matter to admissions officers, twice as many white as black students ranked in the top tenth of their class. Furthermore, only 8 percent of African Americans but 21 percent of whites had grade averages of 93 or better. Whites were far ahead of African Americans in the average number of courses taken in core academic subjects, and in the proportion taking honors-level courses. In almost every case, Asian students were well ahead of both whites and blacks. When it came to taking honors courses in math and science, indeed, they were as far ahead of whites as whites were ahead of blacks. If one ignored SAT scores altogether and admitted students

Table 6
Academic Preparation and Achievement of College-Bound Black, White, and Asian Seniors, 1995

	BLACK	WHITE	ASIAN
Percent in top tenth of their class	12	23	28
Percent with A average (93 or higher)	8	21	27
No. of year-long courses in 6 academic subjects	27	44	44
Honors course taken in			
English	27	39	40
social science	19	29	35
natural science	18	29	38
mathematics	18	29	42

Source: College Entrance Examination Board, *1995 National Ethnic/Sex Data*, unpaginated.

on the basis of measures like these, the results would not differ significantly from the pattern produced by using SAT scores alone. As the editor of the *Journal of Blacks in Higher Education* points out, "Data from The College Board clearly demonstrate a direct and strong correlation between grade point average and SAT scores."[34]

These criteria all relate to academic performance. A college may wish to reward students who have been outstanding in music, drama, athletics, or some other extracurricular activity. Would taking extra-academic excellence into account greatly change the racial and ethnic profile? A study by the National Center for Education Statistics assessed qualifications for admissions to top-ranked schools more broadly, considering not only SAT scores, GPAs, and academic coursework but also extracurricular participation and recommendations by teachers. Assessing 1992 data in terms of these five criteria, the NCES estimated that just 0.4 percent of African-American seniors met the standards for admission at the top schools, as compared with 6.5 percent of non-Hispanic whites and 8.8 percent of Asians. If elite colleges and universities had abided by this formula in making all their admissions decisions, white students would have outnumbered blacks by a ratio of 65 to 1, an even bigger gap than using test scores alone would have produced.[35]

Taking these other factors into account did somewhat reduce the edge that Asians have over whites, probably because the typical Asian student devotes less time to extracurricular activities. But broadening the criteria in this fashion does nothing whatever to reduce the gap between blacks and whites. It is possible that the president of Williams College is correct in his claim that black freshmen there are just as likely as their white and Asian classmates to have ranked at the top of their class, and to have taken the most rigorous and demanding academic classes available to them. But if so, Williams must have had exceptionally good luck in its recruitment efforts, because African Americans lag badly in these respects, too. So far, at least, critics of tests have been unable to demonstrate that any other measure of academic preparation and achievement yields a significantly different result.

Not Race but Social Class?

However we measure the academic preparation and achievements of students at the age at which they are applying to college, we find large and disheartening racial differences. Such disparities in academic performance were only to be expected three decades ago, when the dual school system was still largely intact in the South and the black middle class was much less developed than it is today. It is surprising and disturbing that they still loom so large today. The reasons are undoubtedly complex and not entirely known but here we look just at one possibility: the impact of the remaining social-class differences

between African Americans and whites. Children from low-income families, we know, do less well on tests and in school in general than those from middle-class homes. The children of highly educated parents do better than those from families with less education.

A crude but illuminating test of the hypothesis that social-class differences are the main cause of the racial gap in SAT scores may be obtained from data available from the College Board (Table 7). The results are very disturbing. In 1981 black students coming from families in the top income bracket—those earning $50,000 or more—had a mean verbal score of 414 and a mathematics score of 433. That was 47 and 76 points below what white students from the same income bracket scored in the verbals and in math respectively. The scores were approximately those of white students from families in the *lowest* income category—under $6,000 a year. The poorest whites were only 10 points behind affluent black children on the verbal test and actually a shade ahead of them in mathematics.

Low-income Asians performed much less well than well-to-do blacks on the verbal SATs, which doubtless had much to do with the fact that many were recent immigrants with a limited command of English. In math, though, the poorest Asians outscored the most prosperous blacks by more than 50 points. Poverty doubtless depressed overall black scores, but white and Asian children from families that also lived in poverty were not nearly as handicapped by it.

The other social-class variable that should have an impact on the educational performance of children is the education of their parents. Black children perform much less well than whites on the SATs partly because black parents have less education, on the average. But that explanation doesn't take us very far. In 1981 white students whose parents had only a grade school education had higher scores than blacks whose parents had acquired a graduate degree, and Asian children of similarly uneducated parents lagged on the verbals, as seen previously, but they performed nearly 100 points better in math than black youths from the highest parental education bracket.

Fourteen years later, in 1995, the patterns looked about the same. Black students from families in the top income bracket—now $70,000 and up—were a shade behind whites in the lowest income bracket on the verbal test, and significantly behind them in math. They were well ahead of the poorest Asian children in the verbals, but also well behind them in math. The only hint of progress was that blacks from families in the top educational category did better than in 1981, while whites in the lowest one—this time those without a high school diploma—did a little worse. But African-American children from families in which at least one parent had a graduate degree still were not performing as well as white youths whose parents had no education beyond high school, and in math they fell behind the offspring of Asian high school dropouts. In short, the rising educational level of the black population and the continued expansion of the black middle class since the 1960s has not yielded the expected gains in educational achievement by the younger

Table 7
SAT Scores by Family Income, Parental Education, and Race, 1981–1995

	VERBAL	MATHEMATICAL
1981 median scores		
Family income		
Blacks, $50,000 or more	414	432
Whites, under $6,000	411	436
Asians, under $6,000	299	485
Parental education		
Blacks, graduate degree	388	406
Whites, grade school only	395	429
Asians, grade school only	333	501
1995 mean scores		
Family income		
Blacks, $70,000 or more	407	442
Whites, under $10,000	409	460
Asians, under $10,000	343	482
Parental education		
Blacks, graduate degree	406	438
Whites, no high school diploma	374	418
Asians, no high school diploma	338	478
Whites, high school graduates	414	459
Asians, high school graduates	382	502

Sources: College Entrance Examination Board, *Profiles, College-Bound Seniors, 1981*, 36–37, 54–55, 73–74; *1995 National Ethnic/Sex Data*, unpaginated. It is unfortunate that the College Board tabulated medians for the 1981 data and means in 1995. For data of this kind, however, the difference between the two summary statistics is not significant. The 1981 data on parental education gives separate figures for the education of mothers and of fathers; scores for the two have been averaged here. The 1995 parental education figures are for the highest level of education attained by either parent.

generation, the kind of payoff that Asian students are receiving today. Why that should be so undoubtedly has much to do with the weakness of the elementary and secondary education that many are receiving—a topic we addressed in the previous chapter and one to which we will return.

PREFERENTIAL ADMISSIONS AND DROPPING OUT

We have seen that since the 1960s black enrollments in college have increased much more dramatically than the rate of black graduation. The college drop-

out rate for black students is at least 50 percent higher than it is for whites. We suggested earlier that misguided affirmative action policies may have done a lot to create the problem. Here we examine that argument more fully. The point is simple. When students are given a preference in admissions because of their race or some other extraneous characteristic, it means that they are jumping into a competition for which their academic achievements do not qualify them, and many find it hard to keep up.

Affirmative action policies in higher education rest upon the optimistic assumption that a student's past record has little predictive value. Exposure to the college environment, it is assumed, will have a transforming effect upon minority students and stimulate them to perform at a much higher level than before. "We are interested in applicants' academic potential rather than past performance," the president of Williams declares.[36] Just how Williams admissions officers discern the "potential" of applicants except by considering their past performance is unclear. Whatever divining rod they use, it is one that somehow detects more untapped potential in minority students than in others.

Until recently it has been impossible to obtain evidence about the magnitude of the preferences involved in affirmative action admissions or about the performance of students who have been its beneficiaries.[37] And the picture is still incomplete, but we do have bits and scraps of important information. We now know, for instance, that at the University of California at Berkeley, the evidence of "past performance" that the president of Williams thought of doubtful value proved to be highly predictive of academic success in college. In July 1995 the regents of the UC system voted to abolish racial and ethnic preferences in admissions and to admit students on a color-blind basis in the future.[38] The controversy that led to that decision forced the release of illuminating data. Table 8 shows the connection between the SAT scores of freshmen who entered Berkeley in 1988 and their graduation rate. Only 58 percent of students who entered the school with a combined score in the 700s made it through to a degree; among those who scored in the 800s, 62 percent finished. Students with scores in the 1200s, by contrast, had an 86 percent graduation rate, and those in the 1300s an 88 percent rate. (The pattern reverses somewhat for those scoring in the 1400s and 1500s, but the change may not be statistically significant because of the relatively small numbers at that level. It is also possible that some of these seeming dropouts merely transferred from Berkeley to other elite schools—for instance, Cal Tech, Stanford, or Harvard).

Such figures are not available broken down by race, regrettably, but we have enough additional information to draw some conclusions. First, black freshmen in that class had combined SATs that averaged under 1,000, fully 304 points below the white average and 326 points below the Asian average. They also had high school grade averages of only B+, while their white and Asian classmates had GPAs close to straight-A.[39] The black students with the

Table 8
Proportion of 1988 Freshmen Who Had Graduated by 1994, by SAT Scores, University of California at Berkeley

700–799	58
800–899	62
900–999	72
1000–1099	78
1100–1199	83
1200–1299	86
1300–1399	88
1400–1499	84
1500–1599	79

Source: "Affirmative Action Under Attack on Campus Where It Worked," *New York Times*, 4 June 1995, A22.

strongest credentials—with verbal and math scores in the top quartile for African-American freshmen—ranked in the bottom quarter of all students at the school.[40] Second, we know that the black graduation rate was only 59 percent, as compared with the white rate of 84 percent and the Asian rate of 88 percent. It is very difficult to believe that there is no connection between these two sets of facts. The very high black dropout rate would seem logically the result of the inadequate academic skills with which African-American students arrived as a result of preferential admissions. They were put in this predicament by the unfortunate combination of poor preparation and preferential admissions.

The 41 percent dropout rate for African Americans entering Berkeley in 1988 was not exceptionally high by national standards. As we saw earlier, about six out of ten blacks who begin college fail to complete it, an attrition rate about 50 percent higher than that of whites. The picture looks somewhat different, however, if we focus on the very top colleges and universities, most of which have much lower dropout rates than Berkeley. Since some observers have interpreted the record of such schools as proof that affirmative action is a great success, a closer look at these elite schools should be useful (Table 9). At Harvard, all but 5 percent of entering African Americans graduate within six years, not dramatically different from the 3 percent figure for whites. Those figures are important because Harvard's admissions policies are often cited as the model. In the landmark 1978 case *Regents of the University of California v. Bakke*, for instance, Justice Lewis Powell made much of the fact that racial considerations entered into Harvard's admissions decisions as one of many factors. We will return to the *Bakke* case later. For now, we note that Table 9 suggests that Harvard is a very dubious model, since it attracts much

better prepared black applicants than any other school, and obtains a substantial black enrollment—close to 7 percent—with nothing more than a light thumb on the scale. With a 1,305 mean SAT score for African Americans entering the freshman class in 1992, it is the only school in the country where the racial gap in SAT scores is not in the triple digits.

In any event, Harvard is a very special case. The mean SAT score of its African-American students was 133 points higher than that of black students admitted to Princeton, the closest contender. Their score was actually higher

Table 9

SAT Scores of Black Freshmen, 1992, the Racial Gap in Scores, and Dropout Rates in Selected Elite Universities

	SAT RACIAL GAP	MEAN BLACK SAT	BLACK	WHITE
			Percent dropping out	
Harvard	−95	1,305	5	3
Princeton	−150	1,172	9	5
Brown	−150	1,160	13	6
Pennsylvania	−150	1,135	28	10
Cornell	−162	1,118	23	8
Stanford	−171	1,164	17	6
Northwestern	−180	1,075	21	10
Columbia	−182	1,128	25	12
Duke	−184	1,126	16	5
Dartmouth	−218	1,112	16	4
Virginia	−241	979	16	7
Rice	−271	1,093	26	11
UC-Berkeley	−288	947	42	16

Sources: SAT scores of students starting college in the 1992–1993 academic year from Theodore Cross, "What if There Was No Affirmative Action in College Admissions? A Further Refinement of Our Earlier Calculations," *Journal of Blacks in Higher Education*, 5 (Autumn 1994), 55. The dropout rate is the proportion of the students entering those schools in the four classes from 1986–1987 to 1989–1990 who failed to graduate within six years of entry, as given in National Collegiate Athletic Association, *1996 NCAA Division I Graduation-Rates Report* (Overland Park, Kans.: 1996). The dropout rates are not for the same entering classes; such figures for students starting college in 1992 obviously will not be available until 1998. The data available are for earlier entrants, so the gap in scores documented here cannot have directly caused these dropout patterns. The fragmentary data available, though, suggests that the average scores of students at a particular school and the proportion dropping out do not fluctuate much from year to year. At UC-Berkeley, about which the evidence is richest, the SAT gap and the gap in dropout rates changed very little between 1984 and 1994; see "Affirmative Action Under Attack," *New York Times*, 4 June 1995, A22.

than the average score *for whites* at such distinguished schools as the University of Chicago, Cornell, and Penn. It was 50 points above the score of whites at Northwestern, 70 points above those at Berkeley, and 80 points above those at Virginia. What is more, a score of 1,305 was so close to the top of the scale that it is questionable whether the 95 points separating the average black freshman from the average white freshman at Harvard was even statistically meaningful, since the SAT was not designed to make fine distinctions among students at the very top of the distribution.

In none of the elite schools in Table 9 is dropping out a huge problem. The vast majority of all students graduate. It is extremely difficult to get accepted in the first place, but also hard to flunk out. On the other hand, none of them can boast no racial gap in graduation rates. At all but Harvard and Princeton, which top the list, African-American students are at least twice as likely to fall by the wayside and fail to take a degree. These are very able students, and it is dismaying that a fifth to a quarter or more of them are dropping out in many cases. It is difficult to doubt that there is a connection between the academic double standards in the admissions procedures of these schools and the differences in academic outcomes.

The Economic Costs of Dropping Out

Elite schools are by definition atypical. At less selective institutions the overall dropout rate is higher and the black-white gap is correspondingly larger (Table 10). Economists Linda Datcher Loury and David Garman analyzed a representative national sample of young males from the time of their high school graduation in 1972 down to 1986, when they were in their early thirties, and found that graduating from selective colleges—with selectivity defined by average SAT scores—paid off in the labor market. Giving African Americans a better chance at the best-paid jobs might seem a good reason for affirmative action. Loury and Garman discovered, however, that many of the blacks who attended the more selective schools never graduated to reap the rewards; indeed, their chances of graduation were powerfully affected by how their SAT scores compared with the average at the schools they attended. The greater the gap, the lower their chances of making it through.

Some white students, it is often said, are also admitted preferentially—although on the basis of such nonacademic factors as being the child of an alumnus or having special athletic or musical talents. But these considerations are given much less weight than race in the admissions decisions of most schools, with the result that whites typically attend schools in which their academic credentials are about the same as those of their classmates.[41] Thus, the average white student in the Loury and Garman study had an SAT score of 1,011, and had gone to a college at which the median score was almost

Table 10
How Graduation Rates of Black Students Vary with Their SAT Scores and the Median SAT Score at Their College, 1972 High School Graduates

	COLLEGES WITH MEDIAN SATs OF	
Percent graduating of students with SATs of	*900*	*1,000*
700 or less	38	26
701–850	56	39
851–1,000	77	51
over 1,000	77	51

Source: Linda Datcher Loury and David Garman, "College Selectivity and Earnings," *Journal of Labor Economics* 13, no. 2 (1995), 304. The failure of the pattern evident in the three lower SAT groups to show up for those with scores over 1,000 may reflect the fact that the number of blacks in this category was very small.

precisely that—1,019. Whites were well matched to the colleges they attended, and could survive academically simply by doing the same amount of schoolwork as their fellow students.

But those African Americans in the study who had been to college had experienced a less comfortable and more threatening environment. The typical black student in the sample had a combined SAT of 768—unexceptional at many institutions of higher learning. But African Americans with scores in this range did not attend schools in which the average SAT was in the high 700s. The blacks in the study had instead been enrolled in colleges in which the average student scored 936, making the typical African-American freshman 168 SAT points behind the typical white freshman. And equally far behind, of course, in all the other academic measures correlated with SAT scores—in grade point averages, number of years of coursework in academic subjects, and number of honors courses taken. Naturally they faced an uphill struggle getting through.

Did they not benefit from attending "better" schools than they would have enrolled in without affirmative action, however? Proponents of preferential policies assume that it is an unmixed blessing to give minority students access to the most prestigious and demanding colleges. If it forces the beneficiaries of preferences to stretch themselves more than their white peers who enter with stronger credentials, fine. In some cases the pressure is undoubtedly beneficial, but many students break under the strain.

The Berkeley story contained in Table 8, in other words, applies to black students nationally. When a student and a college are mismatched, the lower the SAT score, the less likely that student is to graduate, the Loury and Garman evidence showed. Blacks with SATs in the 701-to-850 range, for

example, had a 56 percent chance of graduating from a college where the median score was 900. If they were given a bigger affirmative action boost and admitted to a school where the median SAT score was 1,000 and the racial gap was 100 points larger, their chances of making it through to a degree dropped sharply, to just 39 percent. Likewise, African-American students with scores from 851 to 1,000 had a three-to-one chance of graduating from a school in which their scores were average or even a little above average. On the other hand, the odds of their succeeding fell to 50-50 if they were generally below the college SAT average. The point, of course, squares with common sense.

The Loury and Garman study also looked at what happens to students after college, answering those who argue for giving black students a crack at places like Berkeley even if their chances of graduating are not good. Failure carries a painful price. In 1986, fourteen years after leaving high school, black college dropouts were earning one-quarter less than their counterparts who went to less selective schools in the first place but managed to graduate. When colleges attempt to display their social commitment by admitting "high-risk" students from minority groups, in other words, it is the students who suffer when the risks don't pan out. The schools may feel better, having demonstrated their racial virtue, but many of the beneficiaries end up worse off.

The Ole Miss Model

The black-white gap in graduation rates is trivial at Harvard and a few other elite institutions like it. It is surprising and intriguing, though, that the gap is still smaller at another university of an entirely different sort. Difficult though it is to believe, the university that comes closest to racial equality in graduation rates is none other than the University of Mississippi, the "Ole Miss" that was the object of such a bitter, ugly fight over integration in the early years of the Kennedy administration. Of the freshmen entering the school from 1984 through 1987, 49 percent of the whites graduated; for black students it was a nearly identical 48 percent.[42]

What is more, a similar pattern prevailed at other southern schools that are not generally seen as bastions of racial liberalism. At the University of Alabama, 55 percent of whites and 49 percent of blacks graduated. At the University of South Carolina it was 62 and 56 percent, and at the University of Georgia, 60 and 48 percent. These Deep South institutions, among the very last in the nation to accept black students, had smaller racial gaps in graduation rates than most of the elite, mainly private, schools listed in Table 9.

What explains this rather startling pattern? It is not that these schools have become more committed to giving special assistance to black students than northern colleges with a strong liberal tradition. Not at all. The answer given by the *Journal of Blacks in Higher Education* is that Ole Miss and its sister

schools in neighboring Deep South states require students of both races to achieve a minimum SAT score that is set high enough to bar students likely to experience severe academic difficulties. Although these southern institutions claim to have affirmative action programs, they nevertheless impose admissions requirements that screen out the high-risk students who would be accepted at comparable schools that employ a double standard in evaluating black applicants.

The *Journal*, a fervent advocate of affirmative action, expressed unhappiness that "only the most highly qualified black students" in these states "are admitted to the predominantly white institutions." It complained that African Americans were severely underrepresented at Ole Miss, making up 9.4 of the student body but 35.6 percent of the population of the state.[43] If the racial disparity in SAT scores and grades that is the main source of that underrepresentation is attributable to deficiencies in the state's public schools, something should obviously be done to address the problem at that level. Racial double standards in college admissions allow elementary and secondary schools to continue to serve students poorly, offering a quick fix that in fact is no remedy.

LEGAL CHALLENGES TO PREFERENTIAL ADMISSIONS

Giving spaces in competitive educational programs to minority students with academic records notably weaker than those of whites who were turned away has inevitably provoked controversy. The practice has been hard to square with the moral code of the civil rights movement—that of judging people on the basis of their individual merits rather than group characteristics. And thus it has been hard to square with the crowning achievement of that movement: the Civil Rights Act of 1964, which barred discrimination on the basis of race, religion, or national origin. In addition, racial preferences seemed to violate the equal-protection promise of the Fourteenth Amendment.

As a legal matter, the issue first surfaced in suits challenging preferential admissions policies not in colleges but in professional schools at state universities. They were the most logical points of attack because their announced admissions policies gave more weight to strictly academic qualifications than did most selective colleges, which generally looked at such extracurricular activities as drama clubs and the like. Professional schools thus found it harder than colleges to claim that race was just one of a great many nonacademic factors they took into account in making admissions decisions. They also had specialized tests like the Law School Aptitude Test (LSAT), the Medical College Aptitude Test (MCAT), and the Graduate Records Examination (GRE), which predicted performance in graduate programs more reliably than the SATs predicted college grades. Not all professional schools, however, were equally vulnerable to suits challenging their affirmative action programs.

The Fourteenth Amendment, the obvious starting point for plaintiffs, could only be used against state institutions, since it did not bar discriminatory action in the private sector.

The first case challenging such racial preferences in higher education was heard by the Supreme Court in 1974. Marco DeFunis had sued the University of Washington Law School for having turned him down while accepting thirty-six minority students, all but one of whom had lower college grades and poorer scores on the LSATs than he did.[44] But he had been admitted when he won the first round in the battle, and by the time his case wended its way through Washington state courts and arrived at the Supreme Court, he was beginning his final term at the law school. The High Court thus declared the matter moot. Four years later, however, a white plaintiff was back before the Supreme Court, asking much the same set of questions: Was it legitimate to attempt to promote the advance of members of a racial group that had long suffered from prejudice by making special allowances for their prior racial disadvantage? Was it morally offensive to dispense benefits on the basis of group membership only when majorities employed racial categories to harm minority interests, as had been the case for much of our history? The Fourteenth Amendment had been passed to guarantee African Americans the basic citizenship rights they had long been denied. Did the Constitution nevertheless set limits on what could be done to overcome the effects of centuries of discrimination against black people?

The plaintiff in 1978 was Allan Bakke, who had graduated from the University of Minnesota in 1962, and stayed on briefly for graduate work. He had gone on to serve in the Marine Corps in Vietnam, work as a research engineer in California, and earn a master's degree in mechanical engineering from Stanford. By the time he applied to the medical school at the University of California at Davis in 1973, he was in his early thirties, and his age was a serious handicap. (Professional schools in the days before the Age Discrimination Act of 1975 seldom trained students who had been out of college for more than a few years.) On the other hand, Bakke's credentials were excellent. His grade record was stronger than that of most regular admittees, and his MCAT scores were much better. He was in the 97th percentile in the science section of the test and just a shade below that on the verbal and quantitative sections. But he was rejected for the 1973–1974 entering class, and rejected again the next year.[45]

Although his age may have been Bakke's biggest handicap, the school's two-track admissions procedure, prompting his legal complaint, also limited his chances. Sixteen of the hundred places in the first-year class at the Davis medical school were set aside for (in theory) "economically and/or educationally disadvantaged" applicants. In fact, since no white ever got one of the sixteen places, it was really a special minority admissions program. Not only were the slots reserved for blacks, Hispanics, and an occasional American

Indian (no Asians), they were filled by an entirely separate committee that accepted and rejected candidates without comparing them to students in the regular applicant pool.

The academic records of the minority admittees were dismal compared to that of Allan Bakke. In 1974 they had C+ grade averages as undergraduates, compared with Bakke's A−; their MCAT scores put them at the top of the bottom third of all test-takers, while Bakke was well up in the top 10 percent. In terms of traditional academic qualifications, there was no comparison. The MCAT averages for the minority students fell below the 50th percentile in every category and averaged around the 33rd, while the lowest percentile average for the regular admittees in any MCAT was the 67th. A school that had refused admittance to a black student with Bakke's record while admitting whites who were as academically weak as those of the minorities accepted for special admissions would surely have been successfully sued for racial discrimination.

Allan Bakke's case was first heard in a state court, which ruled that the special admissions program was indeed an unconstitutional racial quota, and that the admissions preferences given to minority applicants violated Bakke's right to the equal protection of the laws.[46] The university took its argument to the California Supreme Court. Although that court had a strongly liberal reputation, it upheld Bakke by a 6-to-1 vote and declared the racial set-aside a clear violation of the Fourteenth Amendment.[47] UC-Davis appealed once again and the case—by then a cause célèbre—went to the U.S. Supreme Court. A record fifty-seven "friend of the court" (amicus curiae) briefs were filed in the case. About three-quarters of them, from leading universities, civil rights groups, and minority organizations, sided with the University of California. Seven Jewish organizations, a smattering of other ethnic, conservative, and business groups backed Bakke.[48]

The Supreme Court's decision in *Regents of the University of California v. Bakke* was a personal victory for Allan Bakke—he got to go to medical school—but not for the color-blind principle at the heart of his case. Racial preferences were left standing, thanks to Justice Powell, who, although largely writing on his own, essentially gave the Court's opinion. Shuttling between two camps in a 4–1–4 decision, Powell voted with one group of four to strike down Davis's quotas, but used the votes of four liberals to allow the school to consider race as one factor in admissions. Although there was no single majority opinion, he thus cast a decisive fifth vote for the liberals on one issue, and a decisive fifth for the conservatives on another.

The *Bakke* decision is perhaps best known for Justice Harry Blackmun's famous dictum that "in order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection clause perpetuate racial supremacy."[49] It was not clear why racial quotas and racial supremacy were the only two alternatives. But the vaguely Orwell-

ian notion that it was necessary to treat some persons "differently" in order to treat them "equally" had already, by 1978, become civil rights orthodoxy.

Justice Blackmun was the phrase-maker, but Justice William Brennan's was the most important voice supporting the university. His opinion dismissed the classic liberal insistence that "[o]ur Constitution is color-blind" as an interpretation that had "never been adopted by this Court as the proper meaning of the Equal Protection Clause."[50] That was true enough, but it did not answer the question of whether it wasn't time for the Court to say precisely that. Brennan's view, however, was clearly that Justice John Marshall Harlan (dissenting in *Plessy* in 1896) had been wrong and remained wrong. Racial discrimination that stigmatized a group was wrong, but not that which was "benign." "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." Those "disadvantages cast on minorities by past racial prejudice," Brennan argued, were behind "the failure of minorities to qualify for admission at Davis under regular procedures." But for "pervasive discrimination," Bakke (it is reasonable to conclude) "would have failed to qualify for admission even in the absence of Davis's special admissions program."[51]

It was an imaginative rewriting of history, and it was rejected by Powell. All previous racial preferences had been remedies, Powell emphasized, usually for the constitutional violation of school segregation or the statutory violation of employment discrimination. "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." So far, so good, but Powell's next step was to open the back door to quotas. It was legitimate, he said, for a school to make admissions decisions aimed at producing a "diverse student body"; race could thus be taken into account. Invoking both academic freedom and the First Amendment as protecting a university's interest in selecting "those students who will contribute the most to the 'robust exchange of ideas,' " he accepted with a wink the notion that UC-Davis thought of this concern when it created its quotas. The whole argument, of course, rested on the very stereotyping that the Fourteenth Amendment was supposed to bar—the notion that racial differences were a proxy for differences in "points of view, backgrounds, and experiences."[52]

Powell's "diversity" edifice had all sorts of cracks in its foundation. With the exception of "geographical origin," all the characteristics that he mentioned (musical or athletic talent, for instance) were individual; to list racial identity as a desirable characteristic is to engage in racial stereotyping on the basis of group membership. Most important, however, was his embrace of one sort of "diversity" program—that which Harvard College had adopted—while

rejecting that in place at UC-Davis, when in fact it was a distinction with no important difference.

Harvard College, Powell said, had no numerical quotas for "the number of blacks, or of musicians, football players, physicists or Californians to be admitted in any given year," but nonetheless allowed such factors to be a "plus" when an applicant was compared with others.[53] Race had to be "simply one element—to be weighed fairly against other elements—in the selection process." Harvard College, he thought, used it that way; the medical school at the University of California at Davis did not. There was much wrong with Powell's use of the Harvard model. The college wasn't a professional school, and thus did look for nonacademic talents. Moreover, it drew an incredibly talented pool of applicants (as we noted before). And what did it mean in practice to say that race could be a "plus" but not a decisive factor? When did the "plus" become decisive? Justice Powell wanted race to be "weighed fairly," but provided no illumination as to just how much weight could "fairly" be given to it. Enough to make up for having a GPA or a MCAT score just a bit below that of the typical white student accepted? Or enough to compensate for grades or scores in the bottom 30 percent when the average student enrolled at the school was in the 90th percentile? And if it was only the former, then not only UC-Davis but almost every other institution of higher education with an affirmative action program violated both the Constitution and Title VI of the 1964 Civil Rights Act, which barred discrimination in institutions receiving federal funds. (All medical schools are recipients of federal grants.)

Institutions of higher education, with the arguable exception of Harvard College, all violated the *Bakke* standard because, given the academic performance of most applicants, race could not be simply a "plus" factor. Indeed, though Justice Powell probably did not know it, in the mid-1970s the Harvard Medical School was reserving 20 percent of the places in each entering class for minorities, a larger proportion than at Davis.[54] And it was Justice Brennan who made clear just how useless Powell's distinction between good and bad discrimination was. Any admissions program, he said, that "accords special consideration to disadvantaged racial minorities" must determine how much preference to give them. But any amount of preference will to some extent exclude whites, so as a constitutional matter "there [was] no difference" between Davis's and Harvard's approaches. The amount of preference, or weight, or "plus," a minority applicant receives could only depend on how many minorities the school wished to admit:

> There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants . . . with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

Harvard itself, in a part of the plan that Powell relegated to an appendix, as much as admitted this.[55] Harvard's approach merely allowed it to be less frank than Davis, Brennan explained. While this may have had public relations advantages, it had no constitutional relevance.

Justice Powell conceded that programs like those at Harvard might be viewed as "simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program." He insisted, however, that a "facial intent to discriminate" could be seen in the Davis plan but not in the Harvard program. As long as a school professed to "employ a facially nondiscriminatory admissions policy," he said, no court would assume that it would "operate it as a cover for the functional equivalent of a quota system."[56] Professed intent was thus the key.

Justice Thurgood Marshall, the Court's only black member, viewed the Davis program as an effort to "remedy the effects of . . . centuries of unequal treatment," although Davis had crafted a preference program with no authority or effort to identify victims of discrimination and without identifying either itself or anyone else as guilty of discrimination. Both he and Brennan defended quotas as reparations—compensating applicants who (in Brennan's words) were "fully qualified to study medicine."[57] Marshall's bitter opinion conjured up the specter of another great reversal in the nation's treatment of African Americans, a rhetorical strategy that, in subsequent years, has been employed increasingly by civil rights advocates. With the retreat from Reconstruction at the close of the nineteenth century, Marshall wrote, the Supreme Court had "destroyed the movement toward complete equality" by sanctioning segregation under the separate-but-equal doctrine. Now the Court was "again stepping in, this time to stop programs of the type used by the University of California."[58]

The final opinion was that of Justice John Paul Stevens. Title VI was the issue, he said. The university received federal funds; it excluded Bakke because of his race; therefore, by "the plain language of the statute," it violated the law and, as the California Supreme Court ordered, must admit him. Only if the facially color-blind statute "misstate[d] the actual intent of the Congress that enacted the statute" could the Court justify another conclusion. It didn't. The Civil Rights Act protected individuals, of whatever race, and protected them all equally. Neither the statute nor the legislative history left any room for allowing discrimination that lacked "racial stigma." "As succinctly phrased during the Senate debate, under Title VI it [was] not 'permissible to say "yes" to one person; but to say "no" to another person, only because of the color of his skin.' "[59] That settled the matter for Justices Stewart, Rehnquist, and Burger, as well as Stevens. They needed one more vote, however, to make theirs the majority opinion. And had they had it the subsequent history of affirmative action in higher-education admissions policies—and indeed perhaps of preferential policies altogether—would have been entirely different.

As it was, Justice Marshall's lurid estimate of the impact of the *Bakke*

decision on the admissions policies of the nation's colleges and universities proved to be far off the mark. *Bakke*—thanks to Powell—did little to curb affirmative action. The decision gave Allan Bakke his chance to become an M.D., but other disappointed applicants who felt that they had been denied educational opportunities because of their race had little to cheer about. Schools were to look at individuals, judging them on a "case-by-case basis," and not as members of groups, Powell had said.[60] It was an exercise in pure wishful thinking. In the immediate wake of the Court's decision, another branch of the UC system—Boalt Hall, the law school at Berkeley—adopted an affirmative action admissions procedure in which applicants who were members of one racial group were judged only against other members of that group; blacks competed only against blacks, in other words. In addition, the school maintained racially separate waiting lists, such that students received notices that ran something like "You are number 10 on the black waiting list."[61]

Fourteen years later the (Republican-controlled) U.S. Department of Justice finally said, no, Boalt Hall could not maintain almost precisely the same sort of program that the Court had struck down in 1978. "After *Bakke*, Berkeley decided it was safest to use subtlety and deception to accomplish the important goal of a racially diverse student body," Ruben Navarrette, Jr., the editor of *Hispanic Student USA*, wrote in the *Los Angeles Times*. "For 14 years," he went on, "Berkeley and its UC sisters . . . pretended not to violate *Bakke*. . . . Did Boalt violate *Bakke*? Of course." As a high school senior seven years earlier, Navarrette had obtained a copy of what he called "the University of California's not-so-subtle five-year affirmative-action plan." Had it set a "goal" or a "quota" for each minority group? "Same difference," he answers. "I was accepted to Berkeley under a quota that the Supreme Court had ruled illegal; I was accepted to Harvard under a goal that had the court's blessing."[62]

Berkeley agreed to go to a single admissions committee and had already (in 1989) given up on its ethnically sorted waiting lists—although from the beginning of the process to the end, applicants were still racially identified. As the executive director of the Association of American Law Schools stated, these were certainly "minor adjustments." And while the president of a similar organization (the Association of Colleges and Universities) said he had "no reason to think [Boalt Hall's] practices were unique or even unusual," no other school—at least publicly—took any significant steps to mend its affirmative action ways.[63]

Thus, eighteen years after *Bakke* the Fifth Circuit Court of Appeals took a hard look at admissions procedures at the University of Texas Law School and found a system that could not, by any stretch of the imagination, meet the already pathetically weak legal standards set out in the High Court's landmark 1978 decision. Justice Powell had written an opinion that required a small shift in rhetoric (race as a "plus" factor, "diversity" as the goal), but which, by and large, schools simply ignored.

HOPWOOD

If judicial decisions contained subtitles, the majority opinion in *Hopwood v. Texas* might have read, "the road to hell, paved with the best intentions." The University of Texas (UT) Law School had ("with the best of intentions," Judge Jerry E. Smith acknowledged) adopted a policy of preferential admissions that confirmed the worst fears of those opposed to quotas. Blacks and Hispanics were admitted by a segregated evaluation process (conducted by a minority committee of three whose word was final) and were held to much lower academic standards than whites and Asians. For the latter two groups, the school was extremely difficult to enter; the median LSAT score of whites in the 1992 class was in the 91st percentile. But the story was quite different for African Americans (not blacks from abroad) and Hispanics (citizens or aliens) —the preferred "minorities." The black median score that year was in the 78th percentile. The grade point averages of the two groups were similarly different. Cheryl Hopwood, white but disadvantaged by any normal measure, along with three other students filed a Fourteenth Amendment suit after they had applied unsuccessfully for admission to the 1992 entering class. According to the plaintiffs, six-to-seven hundred higher-scoring white Texas residents had been passed over before the first blacks were denied admission.[64]

As Judge Smith, writing the court's opinion put it, "race was always an overt part of the review of any applicant's file."[65] The school said it lowered standards to meet a goal of 10 percent Mexican Americans and 5 percent blacks —a target set to overcome the effects of past discrimination and to ensure "diversity." One is tempted to ask, how did UT think it could get away with such obviously vulnerable arguments for admissions procedures that were so wrong from so many angles?

What exactly, for instance, were the lingering effects of past state-sponsored discrimination that the program addressed? Most of the black students at the law school came from out of state; were those who grew up in New York victims of Texas policies such that a Texas state institution was obligated to provide a remedy? And if not, surely it was insufficient to point in the vague direction of harms from "societal discrimination"—a bottomless pit that could be used to justify any and all racial preferences. The "diversity" rationale had been used by Justice Powell—and only Powell—in *Bakke*, and it had cropped up in one other, overruled decision. What did "diversity" mean? The concept was simply "too amorphous" and "too insubstantial" (as Justice Sandra Day O'Connor had once noted) to justify sorting out citizens on the basis of race —which was highly suspect under the best of circumstances.

The whole admissions process, in fact, reeked of discrimination—precisely the discrimination that the Constitution forbids. The point of the Fourteenth Amendment had been to end all racially motivated state action; the UT law school was a state institution that was using race to decide who was entitled

to a seat in its classrooms. Segregated admissions policies; segregated waiting lists; blatant racial double standards: the whole system was uncomfortably close to a Jim Crow nightmare, ostensibly for benign ends. As a professional school, the admissions office did not look at nonacademic talent. But it did look at race, which was certainly not a "plus" factor; for most black and Hispanic students it was decisive. The Fifth Circuit said simply, call it quits: "The law school may not use race as a factor in deciding which applicants to admit."[66] *Bakke*-like facts had produced a very un-*Bakke*-like holding—eighteen years later. The Supreme Court did not take the case, but had it done so, would it have signed on to Judge Smith's sweeping rejection of race-based state action? The question, of course, cannot be answered, but, as the next chapter will make clear, in 1996 there was certainly less sympathy on the High Court for race-driven policy than there had been in the 1970s, when Justice Powell danced—or stumbled—around the issue.

CAN WE DO WITHOUT?

The reaction to the *Hopwood* decision on the part of higher-education spokesmen was borderline hysteria. Justice Marshall in 1978 had warned that the extremely mild—indeed, utterly innocuous—curbs upon racial preferences contained in the *Bakke* decision might have led America to "come full circle"—that the nation seemed once again back at the end to Reconstruction.[67] Eighteen years later, when *Bakke* was in effect relitigated, the same cry of impending disaster went up. If the Supreme Court did not overturn the decision, the law school would become a "passive participant in a system of racial exclusion," the U.S. Department of Justice said.[68] Not just that law school, the Justice Department—and others—clearly believed. University of Miami law professor Donald Jones envisioned "lily-white universities across the United States." University of Texas president Robert M. Berdahl predicted that the decision, if upheld, would lead to "the virtual resegregation of higher education."[69]

Given the credentials of the minority applicant pool to the UT law school, there is no doubt that even reducing race to the "plus" factor that *Bakke* allowed (but the Fifth Circuit did not) would greatly diminish the black and Hispanic presence at that particular law school—one would hope, only in the short run. Unless, that is, the school came up with some sort of subterfuge—a different means to the same end. By one calculation, if Texas had based its 1992 admissions on a strictly color-blind standard, the entering class of five hundred students would have included, at most, nine who were black, all of whom would have been courted by the most prestigious law schools in the country.[70] But would the total number of black students at law and other professional schools and attending college be similarly reduced? Yes and no.

The black students enrolled at the UT law school would have all gone to other schools; they all had the academic credentials to get into a less competitive institution—fair and square, without playing the race card. But there are no professional schools that are not selective, and those black students with the weakest grades and scores in the nation would probably be left having to choose another profession. On the other hand, the undergraduate picture would be very different. Some of the black students now at Michigan would instead find themselves at Western Michigan or Wayne State. But would any now enrolled have been left out altogether? A large majority of the more than three thousand colleges and universities in the United States essentially have open admissions. Sign up and you can go. And if you do well, even at virtually unknown places, the doors to jobs and further education will have been opened. Ward Connerly, a highly successful black businessman who was appointed to the University of California Board of Regents in 1993, started out at a community college. "That's not depriving kids of education," he has rightly said.[71]

True Equality

"The contest between white suburban students and minority inner-city youths is inherently unfair," the chancellor of the University of California at Berkeley, Chang-Lin Tien, said in the summer of 1995.[72] It was not a very persuasive argument for the racial double standards he was defending. If inner-city youngsters are educationally deprived, surely the real solution—indeed the only effective and just solution—has to be one that attacks the problem of K–12 education directly. But in any case, most of the beneficiaries were not the inner-city youths upon whom Tien chose to focus; 30 percent of the black students in the 1994-1995 freshmen class came from families with annual incomes over $70,000. In fact, the Berkeley admissions office, studying the question, found that preferences reserved only for students from low-income families would have reduced the black enrollment by two-thirds.[73] Relatively privileged students—by the measure of economic well-being—had acquired privileges on the basis of the color of their skin.

Affirmative action is class-blind. Students who fall into the category of protected minority will benefit whatever the occupation and income of their parents. As the *Boston Globe* has put it, "officials at even the most selective schools recruit minority scholars with the zeal of a Big 10 football coach." The overwhelming majority of four-year institutions buy expensive lists of minority students and their scores from the Educational Testing Service. Admissions counselors and a network of thousands of alumni comb the country, visiting schools and the special preparatory programs that Phillips Academy in Andover and other private high schools run. Some universities, like Tufts, start the

recruitment process in the elementary school years; others, like Boston College, have been known to bring minority students, all expenses paid, for a visit, complete with a chauffeured tour of the area.[74] And if that student can already afford the air fare and more? That's not relevant. Until 1996, when the policy was changed, the African-American student whom the Harvard Graduate School wanted automatically qualified for a Minority Prize Fellowship—even if that student was the son or daughter of a black millionaire.[75]

It's not a process likely to encourage its beneficiaries to work hard in high school. The message is clear: color is the equivalent of good grades. If you don't have the latter, the former will often do. When the University of California regents decided in July 1995 to abolish racial and ethnic preferences in admissions, the executive director of a YWCA college-awareness program told students that the UC vote meant that their "application would be sent in with everybody else's—people who are on college tracks and are prepared." One of the minority students at the session, Jesley Zambrano, reacted at first with anger: "The schools are mostly run by white people. If they don't help us get in, how are we going to get in?" she asked. But then she answered the question herself: "I guess I have to work harder," she said.[76]

That was exactly the point Martin Luther King had made in a speech Shelby Steele heard as a young student in Chicago. "When you are behind in a footrace," King had said, "the only way to get ahead is to run faster than the man in front of you. So when your white roommate says he's tired and goes to sleep, you stay up and burn the midnight oil."[77] As Steele went on to say, "academic parity with all other groups should be the overriding mission of black students. . . . Blacks can only *know* they are as good as others when they are, in fact, as good. . . . Nothing under the sun will substitute for this."[78] And nothing under the sun except hard work will bring about that parity, as King had said. Challenge the students academically rather than capitulate to their demands for dorms with an ethnic theme, Steele has urged universities. And dismantle the machinery of separation, break the link between difference and power. For as long as black students see themselves as *black* students—a group apart, defined by race—they are likely to choose power over parity.

Part of the secret is doubtless that students at Catholic schools are self-selected. But Paul T. Hill, Gail E. Foster, and Tamar Gendler, *High Schools with Character* (Santa Monica, Calif.: Rand Corporation, 1990), demonstrates that minority children from extremely disadvantaged backgrounds who were selected more or less at random to have their way paid to Catholic schools performed far better than their peers who remained in the public schools. Since it was not a strictly randomized selection procedure, the problem of selectivity cannot be dismissed altogether, but it is very hard to believe that it was the only factor at work.

183. A good brief review of the literature on minority achievement in the Catholic schools is provided in Sol Stern, "Why Catholic Schools Work," *City Journal*, Summer 1996, 14–26. Course-taking is obviously not the only secret to their success, as Stern argues.
184. Ford, *Reversing Underachievement*, 3, 22.

CHAPTER 14: THE HIGHER LEARNING

1. Laird Townsend, "Is Diversity Taking a Back Seat at Stanford?" *Journal of Blacks in Higher Education* 6 (Winter 1994–1995), 110. The Stanford decision was also discussed in Elwood Watson, "In Higher Education, Grade Inflation Has Not Helped Blacks," *Michigan Chronicle*, 27 June 1995, 6-A.
2. John H. Bunzel, *Race Relations on Campus: Stanford Students Speak Out* (Stanford, Calif.: Stanford Alumni Association, 1992).
3. SAT data for 1994 as given in Theodore Cross, "What If There Was No Affirmative Action in College Admissions? A Further Refinement of Our Earlier Calculations," *Journal of Blacks in Higher Education* 5 (Autumn 1994), 55.
4. Shelby Steele, *The Content of Our Character: A New Vision of Race in America* (New York: St. Martin's, 1990), 134. The two paragraphs that essentially summarize Steele are all based on chap. 7; without, we hope, putting words in his mouth, we have slightly reworded much of his discussion in order to make it fit better with our Stanford story.
5. Christopher Jencks and David Riesman, *The Academic Revolution* (Garden City, N.Y: Doubleday, 1968), 428–433. For telling evidence about the quality of students in the southern black colleges in the mid-1960s, see James S. Coleman, *Equality of Educational Opportunity*, U.S. Department of Health, Education, and Welfare, Office of Education (Washington, D.C.: U.S. Government Printing Office, 1966), 345. In tests of verbal competence, nonverbal reasoning, mathematics, and science, no more than 5 to 15 percent of seniors in these schools had scores that were above the mean score for whites. Furthermore, on each of the tests black freshmen in southern colleges were at least a few points closer to the white mean than they were four years later, which suggests that these schools provided a learning environment inferior to that in the institutions attended by the typical white student.
6. Coleman, *Equality of Educational Opportunity*, 443.
7. Sar A. Levitan, William B. Johnston, and Robert Taggart, *Still a Dream: The Changing Status of Blacks Since 1960* (Cambridge: Harvard University Press, 1975), 84, 102; National Center for Education Statistics, *Historically Black Colleges and Universities, 1976–1990*, NCES 92–640 (Washington, D.C.: U.S. Government Printing Office, 1992), table 5.
8. It may not seem very surprising that the trends of the previous two decades have continued, but the point needs to be underscored because a myth that the rate of

black college attendance has declined gained considerable currency. That myth is based on the relatively brief downturn in just one of several possible measures of college attendance; in fact, the decline bottomed out in 1983 and black college attendance rates have been rising more or less steadily ever since. The primary source of the belief that black college attendance rates were declining is Gerald David Jaynes and Robin M. Williams, Jr. eds., *A Common Destiny: Blacks and American Society*, National Research Council, (Washington, D.C.: National Academy Press, 1989), 338–345. The discussion there relied entirely upon changes in the rates at which black high school graduates entered college directly, in the fall following graduation. This ignored all who took out time for work or military service before going back to school, a distorting influence unless it could be shown that the proportion of students who went to college later was the same for all racial groups. Further, the denominator in the rate was the number of high school graduates, not the entire age group, and this complicates intergroup comparisons. The proportion of blacks who were graduating from high school in these years was growing more rapidly than the proportion of whites graduating, arguably because "social promotions" were becoming more common. That many more black youths were acquiring high school diplomas meant that more of them were technically "eligible" to go to college. But that did not necessarily mean a corresponding increase in the number who were good college material, which the measure assumes. The rate of college attendance for the entire age group, not high school graduates alone, is in our view a better measure. See table 2 for these figures, which do not show any significant reversal of black prospects in the early 1980s. For a much more comprehensive discussion of these issues, which does not endorse the simple and alarmist conclusion that opportunities for blacks were plunging, see Daniel Koretz, *Trends in the Postsecondary Enrollment of Minorities* (Santa Monica, Calif.: Rand Corporation, 1990). Thomas J. Kane, *Black Educational Progress Since 1970: Policy Lessons*, Malcolm Wiener Center for Social Policy, Working Paper Series #H-90-8 (Cambridge: John F. Kennedy School of Government, Harvard University, 1990), 3–4, noted that the decline in black college entry in the early 1980s had been exaggerated, and argued correctly that the main problem for African Americans is not entry into college but persistence in college and completion of degree requirements. For more details, see Kane's *College Entry by Blacks Since 1970: The Role of Tuition, Financial Aid, Local Economic Conditions, and Family Background*, Malcolm Wiener Center for Social Policy Working Papers: Dissertation Series #D-91-3 (Cambridge: John F. Kennedy School of Government, Harvard University, 1991). Robert M. Hauser, "The Decline in College Entry Among African-Americans: Findings in Search of Explanations," in Paul M. Sniderman, Philip E. Tetlock, and Edward G. Carmines, eds., *Prejudice, Politics, and the American Dilemma* (Stanford, Calif.: Stanford University Press, 1993), 271–312, offers a more detailed and nuanced version of the analysis in *A Common Destiny*.

The argument that the rate of black college attendance has declined is still being advanced. See, e.g., a 1994 volume by economist Martin Carnoy; *Faded Dreams: The Politics and Economics of Race in America* (New York: Cambridge University Press), 149, which speaks in the present tense of "falling college enrollment levels" for blacks and other minorities. The author's discussion of "declining minority college enrollment" rests upon the authority of *A Common Destiny*, whose conclusions on this point were glaringly out of date by the time Carnoy's manuscript went to press. In an essay, "Why Aren't More African Americans Going to College?" *Journal of Blacks in Higher Education* 6 (Winter 1994–1995), 56, Carnoy claims that "the

proportion of young blacks enrolled in college fell in the late 1970s, as it did for whites. But white enrollment rates recovered in the 1980s and black rates did not." This claim is quite mistaken. College attendance numbers bounce around too much from year to year for short-term changes to be very meaningful. But in 1983 only 38.2 percent of recent black high school graduates went directly on to college, as compared with 55 percent of whites, for a black/white ratio of 69. Over the most recent three years for which data are available—1992–1994—the average figure for African Americans has been 51.5 percent, notably higher than in the early 1980s. The white average has been higher, too—63.9 percent—but that gives a black/white ratio of 81. Even by this imperfect measure, the negative trend of the late 1970s and early 1980s has been reversed; National Center for Education Statistics, *The Condition of Education, 1996* (Washington, D.C.: U.S. Department of Education, 1996), 52.

9. Strictly speaking, the evidence, except that for 1995, has to do with completion of four or more years of college, not with the attainment of a degree, but the two are so closely related that it seems justifiable to speak as if completing four years was the same as graduating with a bachelor's degree. Until 1992 the Census and Current Population Survey questions about educational attainment were in terms of years of schooling completed. In 1992 the question was changed to one about degrees obtained. For a discussion of the relatively minor difference this made, see U.S. Bureau of the Census, Current Population Reports, P-20-476, *Educational Attainment in the United States: March 1993 and 1992* (Washington, D.C.: U.S. Government Printing Office, 1994), xii–xv.
10. U.S. Bureau of the Census, Current Population Reports, P-60–193, *Money Income in the United States: 1995* (Washington, D.C.: U.S. Government Printing Office, 1996), table 7.
11. Kane, *Black Educational Progress Since 1970*, 6.
12. The data are for the 301 NCAA Division I institutions, as given in "Graduation Rates of African-American College Students," *Journal of Blacks in Higher Education* 5 (Autumn 1994), 44–46. Some of those who had not taken their degree within six years may have still been enrolled and plugging away at it, but it cannot have been very many. The NCAA's assumption that a six-year span is long enough to measure completion and dropout rates seems sound.
13. National Collegiate Athletic Association, *1996 NCAA Division I Graduation-Rates Report* (Overland Park, Kans., 1996), 622.
14. John S. Brubacher and Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities, 1636–1976* (New York: Harper & Row, 1976), 236; National Center for Education Statistics, *Digest of Educational Statistics: 1995* (Washington, D.C.: U.S. Government Printing Office, 1995), 368, 381, 387.
15. *Digest of Educational Statistics: 1995*, 321.
16. Coleman, *Equality of Educational Opportunity*, 274–275.
17. Richard A. Lester, *Antibias Regulation of Universities: Faculty Problems and Their Solutions*, Report for the Carnegie Commission on Higher Education (New York: McGraw-Hill, 1974), 3–4; John E. Fleming, Gerald R. Gill, and David H. Swinton, *The Case for Affirmative Action for Blacks in Higher Education* (Washington, D.C.: Howard University Press, 1978), 118–119. The obligation was as a result of their status as a federal contractor, making them subject to executive order 11246; see chap. 15.
18. This statute made it an "unfair educational practice" for any educational institution to make "any written or oral inquiry concerning the race, religion, color, or national

origins of a person seeking admission"; *Massachusetts General Laws Annotated*, vol. 22A (St. Paul, Minn.: West Publishing Co., 1996), 440.

19. Brian McGrory, "Affirmative Action: An American Dilemma," pt. 3, *Boston Globe*, 23 May 1995, 1.
20. Lyndon B. Johnson, Speech at Howard University, 4 June 1965, in Lee Rainwater and William Yancey, *The Moynihan Report and the Politics of Controversy* (Cambridge: MIT Press, 1967), 126.
21. Commission on Higher Educational Opportunity in the South, *The Negro and Higher Education in the South* (Atlanta: Southern Regional Education Board, 1967), 25–26.
22. Thomas Sowell, "The Plight of Black Students," a searching 1974 essay reprinted in *Education: Assumptions vs. History: Collected Papers* (Stanford, Calif.: Hoover Institution Press, 1986), 136. The flood of criticism of affirmative action in higher education that has appeared since the publication of this paper and Sowell's 1972 volume, *Black Education: Myths and Tragedies* (New York, David McKay), offers nothing more than minor variations on what Sowell perceived when preferential policies were still taking shape.
23. Grant Mindle, Kenyon D. Bunch, and Carolyn Nickolas, "Diversity on Campus: A Reassessment of Current Strategies," *Policy Studies Review* 12, (Spring-Summer 1993), 25–46.
24. "Pursuing Diversity," *Boston Globe*, 1 February 1995, 1, 4. The *Globe* story, a typical puff piece supporting the university's plan, failed to include the population figures we provide, though one would think them highly relevant to the issue at hand. They are taken from U.S. Bureau of the Census, 1990 Census of Population, *General Population Characteristics: United States*, 1990-CP-1-1 (Washington, D.C.: U.S. Government Printing Office, 1992), table 253.
25. David W. Murray, "Racial and Sexual Politics in Testing," *Academic Questions* 9 (Summer 1996), 10–17. In 1995 the College Board began to "recenter" the scores on its verbal and mathematics tests, which meant adding 76 points to the average verbal score and making other adjustments. Although the Board offered various technical reasons for the change, Murray argues that resulting compression of the scale will obscure distinctions in performance that are currently visible, and that this may have been the primary motivation. For outstanding students, as Diane Ravitch has put it, the change is like moving the fences in the baseball park 76 feet closer to home plate. There will be many more home-run hitters, and the great long-ball hitters will be indistinguishable from mediocre ones who presently hit a lot of long fly balls that are easy outs. For students who are below average, the lower your score the more you benefit from the recentering. Those with an old-scale score of 380 in math get 430 on the new scale, a nice 50-point gain; see Murray, "Racial and Sexual Politics," 14–16. All the scores we make use of in the present chapter are of the older, pre-recentered, type. Similar analysis of long-term trends in SAT scores will be impossible unless the Board continues to release detailed breakdowns using the old scale.
26. Some 34 percent of high school graduates took the SATs in 1972; in 1995 it was 42 percent; National Center for Education Statistics, *The Condition of Education, 1996*, 239. If the rising participation rate meant that more students who were average or below average were taking the SATs, as seems likely, it becomes difficult to interpret changes in mean scores over the period.
27. The 1995 SAT scores are somewhat inflated. The test was made easier in three ways: (a) students were given an extra half hour in which to do it; (b) they were allowed to

use a calculator; (c) the vocabulary test supplied contextual information that had not been given in previous SATs.

28. Theodore Cross, the editor of the *Journal of Blacks in Higher Education*, reports that a telephone survey by his staff found that the mean combined SAT score of freshmen in these twenty-five schools was 1,291; "What if There Was No Affirmative Action in College Admissions? A Refinement of Our Earlier Calculations," *Journal of Blacks in Higher Education* 5 (Autumn 1994), 53.
29. "College-Bound Black Students are Slowly Advancing in Advanced Placement Tests," *Journal of Blacks in Higher Education*, 11 (Spring 1996), 6–9.
30. Calculated from the relevant pages of *1996 NCAA Report*.
31. This should be self-evident, but it may not be these days. If the Asian-American share of enrollments at an institution is six times their share of the population at large, as it is today at Columbia and Stanford, for example, other groups must inevitably have considerably less than their share, because admissions is a zero-sum game. Diversity and meritocracy, in this instance and many others, are conflicting goals.
32. Theodore Cross, "Why the *Hopwood* Ruling Would Remove Most African Americans From the Nation's Most Selective Universities," *Journal of Blacks in Higher Education* 11 (Spring 1996), 66–70. Cross calculated racial distributions for those scoring 650 or better on either the verbal or math tests. He also made some allowance for economic disadvantage and for "strong personal qualities," but is unclear about precisely how this was done. The calculation seems essentially of the same kind as that provided in table 4.
33. "College Presidents Reply to *The Wall Street Journal*," *Journal of Blacks in Higher Education* 11 (Spring 1996), 12.
34. Cross, "What If There Was No Affirmative Action?," 53n. And there is a wealth of evidence that SATs are accurate predictors of black college performance. See, for example, Robert Klitgard, *Choosing Elites* (New York: Basic Books, 1985), 160–165, 187–188. "One might wish that standardized tests underestimated the later performance of blacks," Klitgard concludes, but at elite institutions black students "typically do worse" than "whites do with the same test scores, perhaps one to two thirds of a standard deviation worse." Klitgard estimates that to make the prediction of black college grades precisely correct it is necessary to *subtract 240 points* on the combined SAT. Among black and white students with the same high school grades, blacks will perform as well in college as whites with an SAT score that is 240 points lower. No college in the country demands higher test scores of black applicants; most accept black applicants with scores as much as 240 points *below* those of whites and Asian Americans. SAT scores are better predictors of college performance than high school grades for black students but not for whites or Asians; Stanley Sue and Jennifer Abe, *Predictors of Academic Achievement Among Asian Students and White Students* (New York: College Entrance Examination Board, 1988), 1. For data indicating that standardized tests predict the performance of African-American students enrolled in historically black colleges even more accurately than they do in the case of black students in predominantly white institutions, see Jaqueline Fleming, "Standardized Test Scores and the Black College Environment," in Kofi Lomotey, ed., *Going to School: The African-American Experience* (Albany: State University of New York Press, 1990), 143–152. It is particulary striking that these supposedly biased instruments, allegedly devised by whites to keep blacks down, work so well for African-American students at predominantly black institutions. It is also striking that an experimental program designed to improve the performance of minority freshmen at

the University of Michigan was deemed successful because the first-semester grades of blacks "did not fall behind those earned by white students with similar standardized test scores," as had usually been the case in the past. That black students needed a special program to perform as well as whites with comparable SAT scores plainly indicates that such tests are not biased against blacks, as is commonly charged. They are rather biased in favor of blacks, in the sense that they lead us to expect them to peform better in college than in fact they do without programs like that at Michigan; Denise K. Magner, "Professor Takes Aim at Blacks' Racial Vulnerability," *Chronicle of Higher Education*, 1 April 1992, A5.

35. National Center for Education Statistics, "Making the Cut: Who Meets Highly Selective College Entrance Criteria?" *Statistics in Brief*, NCES 95–732 (Washington, D.C.: U.S. Government Printing Office, 1995), table 1.
36. "College Presidents Reply to *Wall Street Journal*," 12.
37. Thus, there was a national stir in 1991, when Timothy McGuire, a law student employed part-time in the admissions office at the Georgetown University Law School, used his inside knowledge to write an article charging that African-American students at his school had notably weaker academic qualifications than their white classmates. It created national news. Defenders of the policy claimed that McGuire was disseminating "incomplete and distorted information" that would "renew the long-standing and intellectually dishonest myth" that black students were "less qualified than their white counterparts to compete in school . . ."; "Degrees of Success," *Washington Post*, 8 May 1991, A31. None of those who complained of McGuire's allegedly "incomplete and distorted" information offered any data to contradict his double-standards point, however. Of course the policy could have been defended in a variety of ways, but the first step should have been a candid acknowledgment that McGuire had his facts right.
38. Bob Zelnick, *Backfire: A Reporter's Look at Affirmative Action* (Chicago: Henry Regnery, 1996), chap. 9.
39. These data are for 1989 rather than 1988 freshmen, but that seems close enough; "Affirmative Action Under Attack on Campus Where It Worked," *New York Times*, 4 June 1995, A22.
40. Robert Lerner and Althea K. Nigai, *Racial Preferences in Undergraduate Enrollment at the University of California, Berkeley, 1993–1995: A Preliminary Report* (Washington, D.C.: Center for Equal Opportunity, 1996), charts 4 and 5.
41. Thus, at the University of Virginia in 1994, the average alumni child who was admitted had a combined SAT score that was just 25 points below that of nonalumni children; blacks had scores that were 196 points below those of whites. Alumni preference was stronger at William and Mary, a private school with a presumably greater need to encourage alumni loyalty to enhance fund-raising. But even at William and Mary alumni status counted for only 58 points, while the premium given to black applicants amounted to 197 points. At Virginia, being an African American helped your chances of admission eight times as much as having a parent who had attended the school; at William and Mary it increased them more than three times as much; Philip Walzer, "Diversity's Cost on Campus," *Hampton Roads Ledger-Star*, 6 June 1995, A1, A6. At Harvard, the sons and daughters of alumni who are admitted have average scores just 35 points below those of nonalumni children, so alumni preference is about a third of the magnitude of the affirmative action preference for blacks; Zelnick, *Backfire*, 142. Klitgard reports that in the early 1980s being from a disadvantaged minority group increased the chances of admission, holding other

variables constant, by 53 percent at Williams, 51 percent at Bucknell, and 46 percent at Colgate. No other factor came close to race in importance, except having an alumni parent at Bucknell, which improved admission chances by 47 percent; Klitgard, *Choosing Elites*, 46.

42. These and other figures cited in the paragraph are from "Black Graduation Rates at Second-Tier Public Universities, *Journal of Blacks in Higher Education*, 5 (Autumn 1994), 45. The pages of the journal are a treasure trove for anyone seeking information and a wide range of opinions on this topic.
43. Ibid.; "The Status of Black Faculty at the Flagship State Universities," *Journal of Blacks in Higher Education*, 12 (Summer 1996), 15.
44. J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954–1978* (New York: Oxford University Press, 1979), 256–258.
45. Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* (New York: Longman, 1978), 63–67.
46. Ibid., 214–215.
47. Ibid., 222–235.
48. Ibid., 241–245.
49. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 407 (1978).
50. 438 U.S. at 355.
51. 438 U.S. at 325, 365.
52. 438 U.S. at 307, 313, 323.
53. 438 U.S. at 316–317.
54. Guidelines given to interviewers for the Harvard Medical School stated that "the minimum goal should be representation of minority groups in the student body at least equal to the proportion of those minority groups in the population of the U.S.A. at large"; quoted in Klitgard, *Choosing Elites*, 40. In 1969 the Harvard Business School voted to admit all minority applicants whose records indicated that they had no more than one chance in four of flunking out. After a few years this practice was abandoned and replaced with a goal of 10–12 percent minority representation, partly out of a fear that the business world would come to think that Harvard Business School awarded two kinds of degrees—white degrees and black degrees; Klitgard, *Choosing Elites*, 43–44. Bernard D. Davis, "Academic Standards in Medical Schools," *New England Journal of Medicine* 294 (13 May 1976), 1118–1119, points to the negative consequences of lowered standards at the Harvard Medical School.
55. 438 U.S. at 378, 323–324.
56. 438 U.S. at 318.
57. 438 U.S. at 375.
58. 438 U.S. at 402.
59. 438 U.S. at 412–414, 418.
60. 438 U.S. at 319, n. 53.
61. The phrasing of a typical notice was given to the *Los Angeles Times* by Professor Stephen R. Barnett, who had been on the Boalt Hall faculty since the early 1970s. Jean Merl and William Trombley, "UC Law School Violates Civil Rights, U.S. Says," *Los Angeles Times*, 29 September 1992, A1.
62. Ruben Navarrette, Jr., "Berkeley's Awkward Two-Step to Ensure a Racially Diverse Campus," *Los Angeles Times*, 11 October 1992, 8.
63. The quotations are from William Trombley, "Colleges Fear Affirmative Action Setback," *Los Angeles Times*, 30 September 1992, A3.
64. *Hopwood v. Texas*, 78 F. 3d 932, 932–937 (1996).

65. *Hopwood v. Texas*, 78 F. 3d at 937.
66. *Hopwood v. Texas*, 78 F. 3d at 962.
67. 438 U.S. at 402.
68. U.S. Department of Justice, Brief Supporting Petition for a Writ of Certiorari in *Hopwood v. Texas*.
69. Scott Jaschik and Douglas Lederman, "Appeals Court Bars Racial Preference in College Admissions," *Chronicle of Higher Education*, 29 March 1996, A27.
70. Jeffrey Rosen, "Is Affirmative Action Doomed?" *New Republic*, 17 October 1994, 25.
71. Marc Fisher, "Equal and Opposite Reaction," *Washington Post*, 29 October 1996, E1.
72. Chang-Lin Tien, "Perspective on Affirmative Action," *Los Angeles Times*, 18 July 1995, B9.
73. Robert Bruce Slater, "Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans, *Journal of Blacks in Higher Education* 8 (Summer 1995), 59.
74. Brian McGrory, "Affirmative Action: An American Dilemma," pt. 3, *Boston Globe*, 23 May 1995, 1. The director of student search services for the Educational Testing Service told the *Globe* that more than 1,280 of the country's 1,600 public and private four-year colleges and universities request minority-specific lists.
75. Elena Newman, "Harvard's Sins of Admission," 9 October 1995.
76. Suzanne Espinosa Solis, "Teens' Strong Views on UC Regents' Vote," *San Francisco Chronicle*, 26 July 1995, A1. Jesley Zambrano was a Latino student, but her point obviously applies to any minority student currently protected by affirmative action admissions.
77. Steele, *Content of Our Character* 138.
78. Ibid., 147.

Chapter 15: Jobs and Contracts

1. Louis Freedberg, "The Enforcer," *San Francisco Chronicle*, 4 June 1995, 1. The Office of Federal Contract Compliance Programs (OFCCP) has the power to conduct a "compliance review"—an investigation into a corporation's hiring record—which can be either a random audit or the consequence of a complaint. The settlements in the Marriott Hotel and UC–San Diego cases were the result of just such compliance reviews. In congressional testimony in 1995, OFCCP director Shirley Wilcher stated that the agency was then finding violations in 73 percent of the more than 4,000 compliance reviews it conducted each year; James Bovard, "Here Comes the Goon Squad," *American Spectator*, July 1996, 36. Our research assistant, Kevin Marshall, prepared a first draft of portions of this chapter.
2. Christopher Edley, Jr., and George Stephanopoulos, "Affirmative Action Review: Report to the President," 19 July 1995, 67, n. 85.
3. "Minority Enterprise: Fat White Wallets," *Economist*, 27 November 1993, 29.
4. Quoted in Justice William Rehnquist's dissent in *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979) at 242, n. 20.
5. Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick, N.J.: Rutgers University Press, 1971), 53.
6. Ibid., 58.
7. Alfred W. Blumrosen, "Strangers in Paradise: *Griggs v. Duke Power Co.* and the

HOGAN & HARTSON L.L.P.

M E M O R A N D U M

September 29, 1997

From: Martin Michaelson

Re: Emerging trends in higher education

For a series of upcoming talks on the weighty subject of the future of higher education, I assembled some data that may interest you. The attachment depicts various demographic trends that have a range of implications, not least for legal risk management. Possible effects on university legal work will be summarized in a future memorandum.

If the demographers are to be credited, it appears that American higher education will be bigger, more located in the south and west, more public, more attended by full-time students, more undergraduate in focus, more female across the board, more perplexed about how to enroll black and hispanic-Americans in sufficient numbers, more necessary for economic security, more strapped for resources to support both teaching and research, and more challenged to stay ahead of the rest of the world. A basic question is whether the massive investment will be made that will be required to enroll the extraordinarily large number of college-age low income citizens. Another unknown is whether institutional resistance to distance-learning and to higher student-teacher ratios will abate sufficiently to permit enrollments to grow without corresponding growth of fixed costs. Increased tension between on the one hand Americans' high educational aspirations and, on the other, resources inadequate to meet them is likely to generate plenty of tough new work for administrators, faculty, those who shape public policy, and university lawyers.

Attachment

EMERGING TRENDS IN HIGHER EDUCATION
INPUTS, OUTPUTS, VALUES

"U.S. higher education will be shaped more deeply by societal forces beyond its control than by any reforms of its own making. Restructuring will take place; institutions will become more efficient; students will continue to delight and dismay their elders; faculty members and administrators will face closer scrutiny and more regulation; and, colleges and universities may not be more pleasant places to work and conduct research than they have been in the past. Within higher education, reformers will continue to seek changes that adapt their institutions to the fluctuating social, political, and economic climate. Yet, while reformers will accomplish some significant changes, developments in the larger society will -- as they have in the past -- have a profound influence."

-- Malcolm G. Scully (Managing Editor, The Chronicle of Higher Education), "Postsecondary Education and Society: The Broader Context," in Timothy R. Sanford, ed., Preparing for the Information Needs of the Twenty-First Century, No. 85 New Directions for Institutional Research (Spring 1995)

THE NATION'S POPULATION

BY 2010, THERE WILL BE 5 MILLION MORE 18-24 YEAR OLDS

Resident Population Projections, by Age and Sex: 1996 to 2050

(In thousands, except as indicated. As of July. See headnote, table 3.)

YEAR	Total	Under 5 years	5 to 13 years	14 to 17 years	18 to 24 years	25 to 34 years	35 to 44 years	45 to 54 years	55 to 64 years	65 to 74 years	75 to 84 years	85 years and over
TOTAL												
Lowest series:												
1996	264.869	19.282	34.781	15.150	24.573	40.325	43.283	32.320	21.341	18.663	11.419	3.731
1997	266.733	18.945	35.138	15.420	24.584	39.500	43.858	33.542	21.772	18.465	11.680	3.831
1998	268.396	18.626	35.487	15.428	24.972	38.530	44.257	34.432	22.585	18.286	11.851	3.943
1999	269.861	18.295	35.658	15.547	25.423	37.518	44.450	35.580	23.260	18.068	12.019	4.044
2000	271.237	17.943	35.790	15.602	25.876	36.740	44.364	36.840	23.798	17.974	12.162	4.148
2005	276.990	16.896	34.366	16.667	27.491	35.095	41.365	40.992	29.145	17.943	12.465	4.566
2010	281.468	16.563	31.950	16.319	29.050	36.393	37.049	42.589	34.393	20.245	11.912	5.005
2020	288.807	17.168	30.998	14.331	26.671	40.067	36.640	35.487	39.642	29.219	13.598	4.987
2030	291.070	16.450	31.454	14.631	25.111	36.312	40.222	35.075	32.948	33.483	19.610	5.776
2040	287.685	16.200	30.164	14.405	25.849	35.018	36.489	38.475	32.631	27.827	22.376	8.250
2050	282.524	16.330	30.124	13.925	24.810	35.604	35.185	34.868	35.747	27.700	18.588	9.642
Middle series:												
1996	265.253	19.403	34.809	15.167	24.646	40.274	43.311	32.341	21.360	18.685	11.440	3.747
1997	267.645	19.229	35.206	15.463	24.690	39.624	43.930	33.591	21.816	18.511	11.723	3.862
1998	270.002	19.117	35.609	15.503	25.160	38.757	44.389	34.520	22.662	18.365	11.925	3.996
1999	272.330	19.041	35.846	15.661	25.710	37.676	44.661	35.717	23.378	18.186	12.129	4.124
2000	274.634	18.987	36.043	15.752	26.258	37.233	44.659	37.030	23.962	18.136	12.315	4.259
2005	285.981	19.127	35.850	16.986	28.268	36.806	42.165	41.507	29.606	18.369	12.898	4.899
2010	297.716	20.012	35.605	16.894	30.138	38.282	38.521	43.564	35.283	21.057	12.680	5.671
2020	322.742	21.979	38.660	16.965	29.919	42.934	39.612	37.740	41.714	31.365	15.375	6.466
2030	346.899	23.066	41.589	18.788	31.826	42.744	44.263	38.897	36.348	37.406	23.517	8.455
2040	369.980	24.980	43.993	19.844	34.570	45.932	44.159	43.530	37.739	33.013	28.668	13.552
2050	393.931	27.106	47.804	21.207	36.333	49.365	47.393	43.494	42.368	34.731	25.905	18.223
Highest series:												
1996	265.646	19.510	34.838	15.186	24.660	40.429	43.349	32.362	21.376	18.704	11.465	3.766
1997	268.577	19.483	35.277	15.507	24.798	39.761	44.024	33.644	21.853	18.552	11.775	3.902
1998	271.647	19.563	35.735	15.581	25.352	39.004	44.561	34.615	22.728	18.434	12.011	4.063
1999	274.865	19.726	36.039	15.780	26.004	38.264	44.932	35.868	23.482	18.290	12.257	4.225
2000	278.129	19.955	36.300	15.909	26.651	37.766	45.038	37.241	24.105	18.276	12.490	4.399
2005	295.318	21.350	37.266	17.318	29.064	37.599	43.197	42.119	29.997	18.723	13.367	5.317
2010	314.571	23.649	39.195	17.467	31.248	40.275	40.302	44.738	36.018	21.696	13.465	6.518
2020	357.702	27.273	46.855	19.641	33.084	45.836	42.878	40.263	43.473	32.937	17.007	8.456
2030	405.089	30.818	52.876	23.276	38.886	49.091	48.519	42.895	39.398	40.270	26.861	12.198
2040	458.444	35.901	60.446	26.000	44.069	57.362	51.925	48.560	42.258	37.096	33.907	20.920
2050	518.903	41.213	70.000	30.005	49.683	64.279	60.324	51.967	47.950	40.319	32.070	31.093
MALE (middle series)												
1996	129.522	9.927	17.823	7.790	12.516	20.165	21.490	15.798	10.162	8.323	4.478	1.049
1997	130.712	9.839	18.024	7.941	12.550	19.774	21.808	16.409	10.390	8.266	4.621	1.089
1998	131.883	9.780	18.232	7.961	12.787	19.325	22.044	16.860	10.805	8.224	4.730	1.134
1999	133.039	9.740	18.355	8.042	13.063	18.869	22.184	17.446	11.150	8.171	4.839	1.179
2000	134.181	9.712	18.454	8.090	13.338	18.535	22.181	18.092	11.433	8.180	4.937	1.228
2005	139.785	9.786	18.353	8.724	14.359	18.014	20.891	20.304	14.166	8.408	5.306	1.473
2010	145.584	10.243	18.232	8.679	15.313	18.990	18.993	21.325	16.922	9.752	5.363	1.771
2020	158.021	11.259	19.813	8.718	15.201	21.319	19.466	18.347	20.120	14.791	6.845	2.141
2030	169.950	11.813	21.311	9.653	16.171	21.214	21.775	18.854	17.441	17.878	10.819	3.021
2040	181.261	12.788	22.534	10.192	17.563	22.808	21.723	21.139	18.093	15.796	13.522	5.103
2050	193.234	13.877	24.488	10.893	18.462	24.533	23.352	21.150	20.403	16.699	12.342	7.036
FEMALE (middle series)												
1996	135.731	9.476	16.986	7.377	12.100	20.209	21.820	16.543	11.198	10.362	6.962	2.697
1997	136.933	9.389	17.182	7.522	12.139	19.850	22.122	17.182	11.426	10.246	7.102	2.773
1998	138.119	9.336	17.377	7.542	12.373	19.432	22.345	17.659	11.857	10.141	7.194	2.862
1999	139.291	9.302	17.492	7.619	12.647	19.007	22.476	18.271	12.228	10.015	7.290	2.945
2000	140.453	9.274	17.589	7.662	12.920	18.699	22.478	18.938	12.529	9.956	7.377	3.031
2005	146.196	9.341	17.498	8.262	13.909	18.291	21.273	21.203	15.440	9.961	7.592	3.426
2010	152.132	9.768	17.373	8.215	14.824	19.301	19.527	22.240	18.362	11.305	7.317	3.899
2020	164.721	10.719	18.847	8.247	14.717	21.615	20.146	19.393	21.594	16.594	8.530	4.319
2030	176.949	11.253	20.278	9.135	15.655	21.529	22.488	20.044	18.907	19.529	12.699	5.433
2040	188.719	12.192	21.459	9.652	17.006	23.125	22.436	22.391	19.646	17.216	15.146	8.449
2050	200.696	13.229	23.316	10.314	17.871	24.832	24.041	22.344	21.965	18.032	13.563	11.188
PERCENT DISTRIBUTION (middle series)												
2000	100.0	6.9	13.1	5.7	9.6	13.6	16.3	13.5	8.7	6.6	4.5	1.6
2005	100.0	6.7	12.5	5.9	9.9	12.7	14.7	14.5	10.4	6.4	4.5	1.7
2010	100.0	6.7	12.0	5.7	10.3	12.9	12.9	14.6	11.9	7.1	4.3	1.9
2020	100.0	6.8	12.0	5.3	9.1	13.3	12.3	11.7	12.9	9.7	4.8	2.0
2050	100.0	6.9	12.1	5.4	9.2	12.5	12.0	11.0	10.8	8.8	6.6	4.6

Source: U.S. Bureau of the Census, *Current Population Reports*, P25-1130.

Source: Statistical Abstract of the United States, 1996.

34M

39M

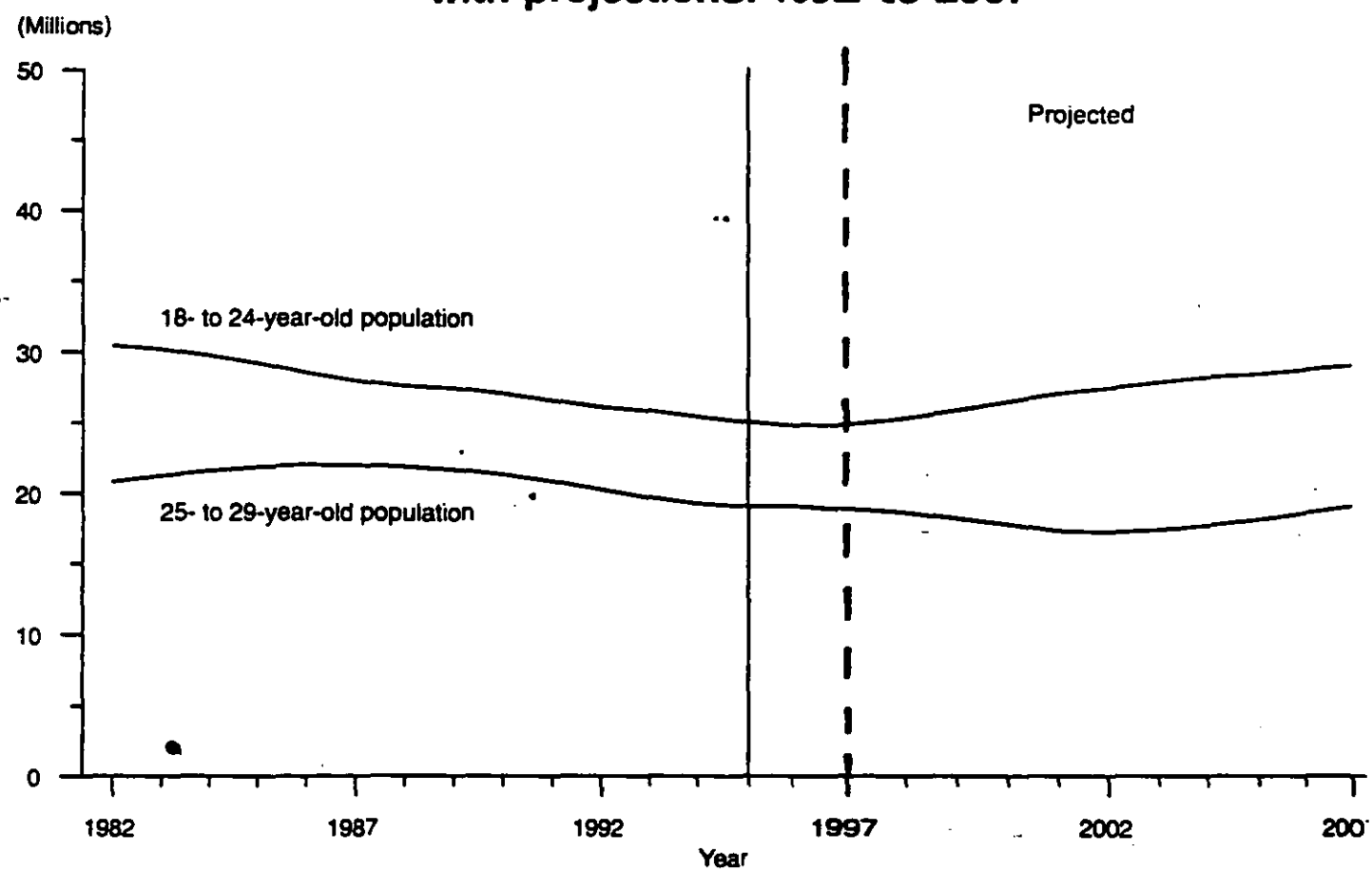
12.7

12.3

20

MORE 18-24 YEAR OLDS, FEWER 25-29 YEAR OLDS

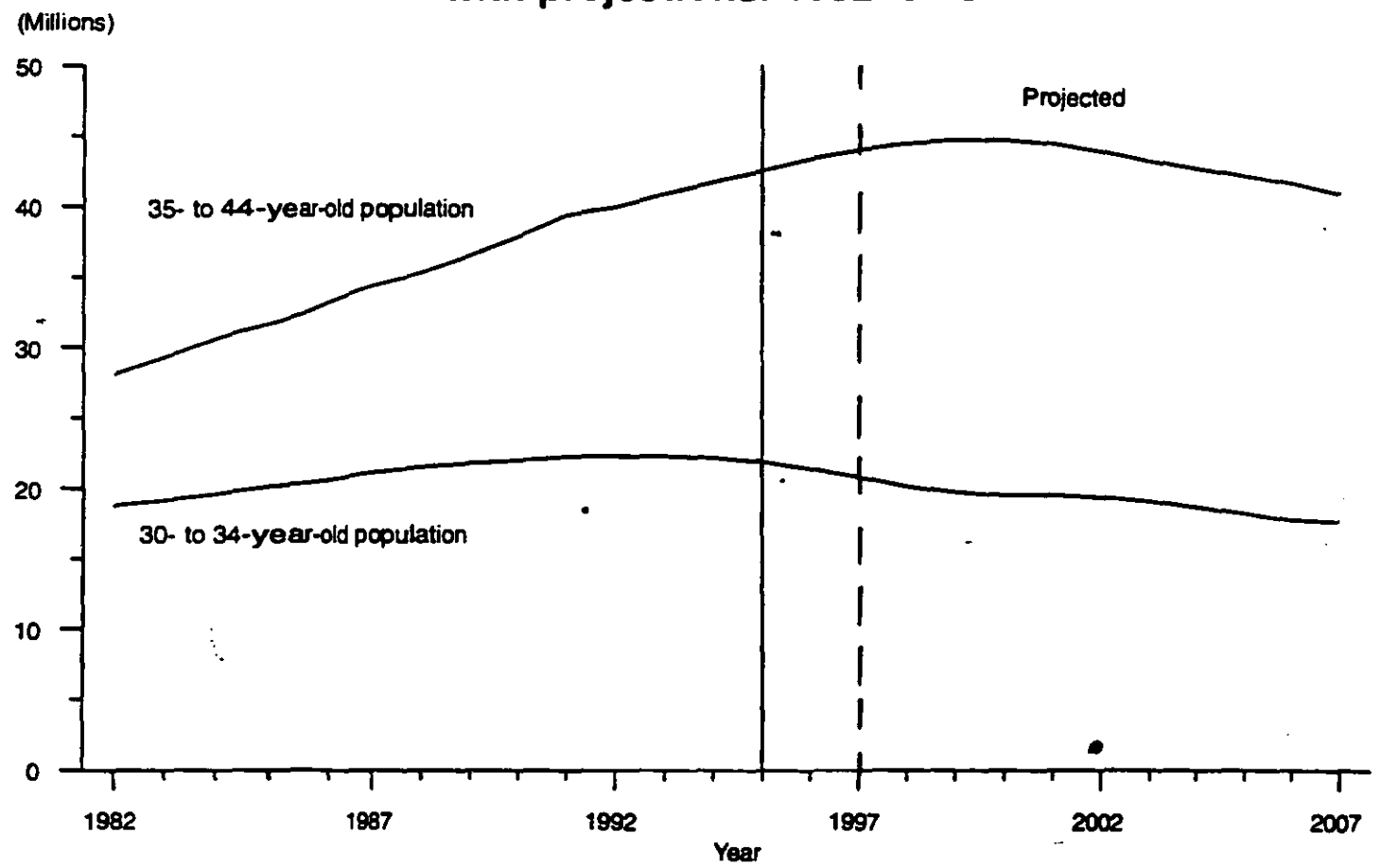
College-age populations (18-24 years and 25-29 years), with projections: 1982 to 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

FEWER 30-34 YEAR OLDS, MORE 35-44 YEAR OLDS

College-age populations (30-34 years and 35-44 years), with projections: 1982 to 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

FIVE-SIXTHS OF THE POPULATION INCREASE 2000-2010 WILL BE IN THE SOUTH AND WEST

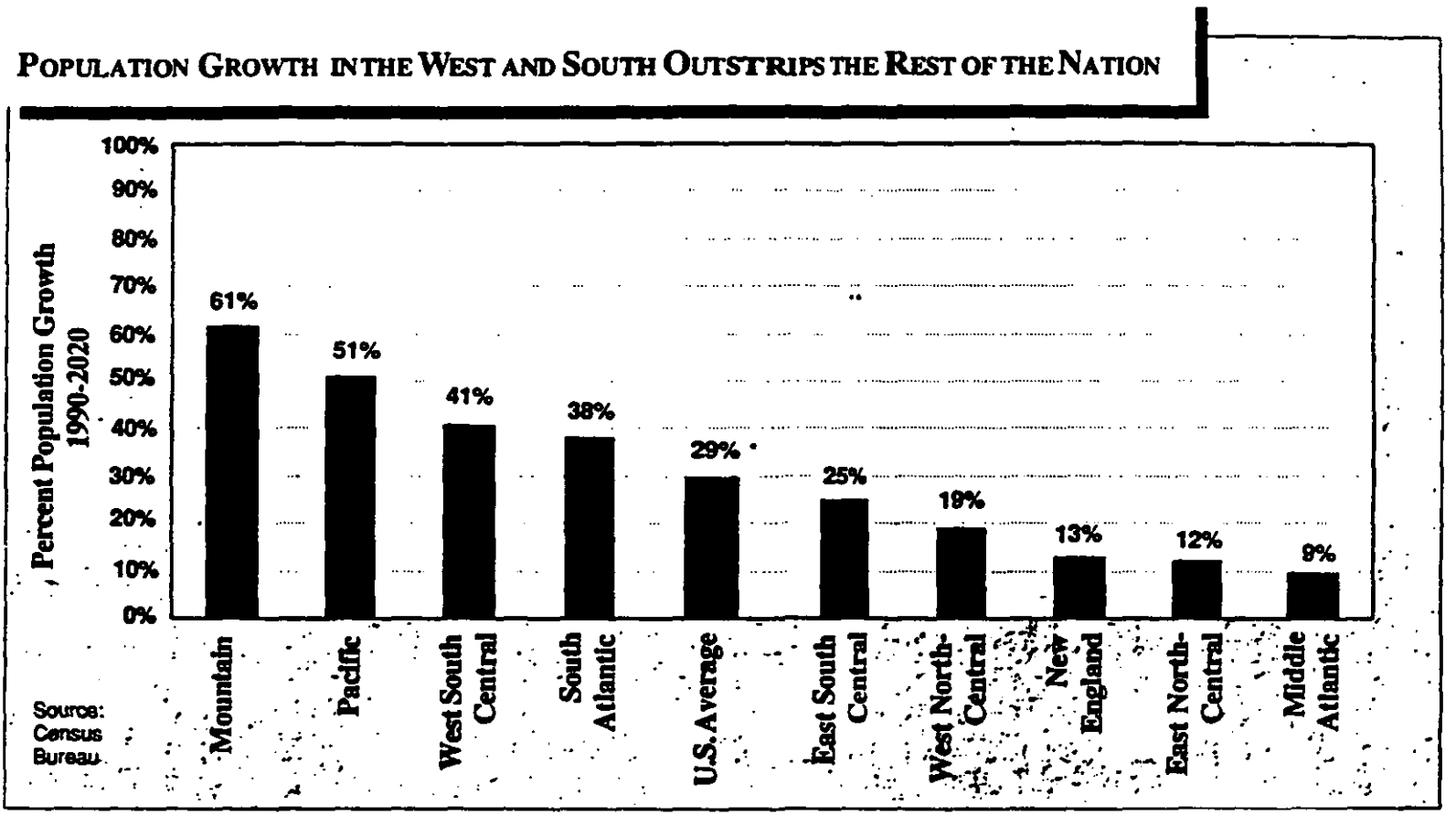
State Population Projections: 2000 to 2010

(In thousands. As of July 1. Series A, B, C, and D reflect different interstate migration assumptions. Series A is the preferred series model. For explanation of methodology, see text, section 1)

REGION, DIVISION, AND STATE	Series A			Series B			Series C			Series D		
	2000	2005	2010	2000	2005	2010	2000	2005	2010	2000	2005	2010
U.S	276.242	288.283	300.430	276.242	288.283	300.431	276.239	288.287	300.431	276.239	288.286	300.430
Northeast	51.884	52.472	53.301	53.210	54.151	55.102	52.329	53.279	54.225	54.582	56.418	58.183
N.E	13.216	13.406	13.755	14.025	14.408	14.785	13.507	13.868	14.212	13.996	14.392	14.751
ME	1.240	1.265	1.309	1.323	1.367	1.413	1.288	1.332	1.375	1.270	1.286	1.300
NH	1.165	1.215	1.280	1.274	1.355	1.429	1.204	1.281	1.350	1.163	1.186	1.207
VT	592	607	623	623	649	675	605	625	644	596	609	620
MA	5.950	5.991	6.097	6.254	6.372	6.495	6.032	6.140	6.249	6.401	6.605	6.785
RI	998	1.009	1.034	1.060	1.087	1.115	1.022	1.047	1.072	1.065	1.096	1.126
CT	3.271	3.319	3.412	3.491	3.578	3.658	3.356	3.443	3.522	3.501	3.610	3.713
M.A	38.668	39.066	39.546	39.185	39.743	40.317	38.822	39.411	40.013	40.586	42.026	43.432
NY	18.237	18.348	18.546	18.504	18.666	18.856	18.321	18.547	18.799	19.838	20.808	21.761
NJ	8.135	8.338	8.562	8.267	8.482	8.681	8.165	8.431	8.677	8.413	8.746	9.075
PA	12.296	12.380	12.438	12.414	12.595	12.780	12.336	12.433	12.537	12.335	12.472	12.596
Midwest	63.836	65.193	66.333	62.610	63.709	64.953	63.684	64.798	65.982	64.075	65.900	67.716
E.N.C	44.606	45.620	46.259	44.013	44.717	45.506	44.769	45.485	46.242	45.220	46.528	47.805
OH	11.453	11.587	11.659	11.238	11.361	11.500	11.430	11.544	11.661	11.479	11.705	11.913
IN	6.045	6.190	6.286	5.922	6.066	6.212	6.032	6.155	6.274	5.929	6.065	6.187
IL	12.168	12.417	12.652	11.974	12.180	12.424	12.153	12.378	12.621	12.533	13.035	13.541
MI	9.759	9.898	10.033	9.614	9.698	9.803	9.826	9.992	10.160	10.040	10.356	10.666
WI	5.381	5.528	5.629	5.265	5.412	5.567	5.328	5.426	5.526	5.239	5.367	5.498
W.N.C	19.030	19.573	20.074	18.597	18.992	19.447	18.895	19.303	19.740	18.855	19.372	19.911
MN	4.824	4.986	5.127	4.733	4.873	5.020	4.814	4.955	5.096	4.756	4.909	5.068
IA	2.930	2.965	2.981	2.867	2.902	2.946	2.885	2.872	2.868	2.912	2.971	3.032
MO	5.437	5.592	5.760	5.313	5.392	5.489	5.459	5.622	5.788	5.406	5.521	5.638
ND	643	657	676	633	635	642	622	621	626	663	680	698
SD	770	796	815	737	757	781	750	766	786	749	776	805
NE	1.704	1.752	1.793	1.660	1.697	1.742	1.681	1.706	1.734	1.680	1.725	1.773
KS	2.722	2.825	2.922	2.654	2.736	2.827	2.684	2.761	2.842	2.689	2.790	2.897
South	97.244	102.364	107.385	96.576	101.382	106.120	96.931	101.911	106.852	94.503	98.001	101.445
S.A	50.005	52.708	55.321	50.015	52.762	55.422	50.517	53.667	56.737	48.004	49.521	50.976
DE	759	789	815	757	795	834	770	810	850	727	743	758
MD	5.322	5.548	5.782	5.334	5.552	5.762	5.420	5.718	6.006	5.334	5.553	5.763
DC	537	547	577	545	539	545	549	564	584	640	669	697
VA	7.048	7.398	7.728	7.060	7.423	7.760	7.106	7.515	7.902	6.854	7.097	7.318
WV	1.840	1.844	1.842	1.811	1.815	1.827	1.783	1.746	1.720	1.830	1.836	1.835
NC	7.617	8.002	8.341	7.588	8.009	8.416	7.616	8.040	8.455	7.169	7.314	7.438
SC	3.932	4.122	4.311	3.924	4.107	4.287	3.976	4.178	4.378	3.808	3.908	3.998
GA	7.637	8.111	8.553	7.678	8.188	8.679	7.664	8.206	8.732	7.249	7.510	7.758
FL	15.313	16.347	17.372	15.318	16.334	17.312	15.633	16.690	18.106	14.393	14.891	15.411
E.S.C	16.762	17.383	17.941	16.357	16.868	17.412	16.633	17.183	17.697	16.252	16.522	16.962
KY	3.989	4.086	4.160	3.883	3.962	4.050	3.927	3.984	4.046	3.913	3.993	4.064
TN	5.538	5.791	6.007	5.399	5.626	5.857	5.513	5.750	5.980	5.222	5.313	5.392
AL	4.485	4.674	4.856	4.375	4.521	4.677	4.471	4.644	4.818	4.357	4.472	4.580
MS	2.750	2.832	2.918	2.700	2.759	2.828	2.722	2.785	2.853	2.760	2.844	2.926
W.S.C	30.477	32.273	34.123	30.204	31.752	33.286	29.781	31.081	32.418	30.247	31.858	33.507
AR	2.578	2.679	2.782	2.557	2.653	2.751	2.546	2.629	2.716	2.489	2.540	2.592
LA	4.478	4.627	4.808	4.424	4.509	4.604	4.343	4.398	4.471	4.592	4.769	4.947
OK	3.382	3.520	3.683	3.366	3.469	3.578	3.259	3.294	3.352	3.353	3.438	3.524
TX	20.039	21.447	22.850	19.857	21.121	22.353	19.633	20.760	21.879	19.813	21.111	22.444
West	63.278	68.254	73.411	63.846	69.041	74.256	63.315	68.299	73.372	63.079	67.967	73.086
Mountain	16.890	18.087	19.093	16.339	17.486	18.625	16.391	17.357	18.331	15.718	16.526	17.359
MT	920	962	996	894	941	993	867	880	899	859	882	906
ID	1.290	1.385	1.454	1.200	1.285	1.373	1.229	1.281	1.335	1.158	1.219	1.282
WY	522	559	596	512	541	571	483	485	491	495	514	534
CO	4.059	4.309	4.494	3.957	4.224	4.477	3.851	4.017	4.183	3.729	3.867	4.000
NM	1.823	1.956	2.082	1.780	1.894	2.005	1.776	1.892	2.009	1.737	1.836	1.939
AZ	4.437	4.763	5.074	4.320	4.604	4.891	4.404	4.772	5.136	4.201	4.417	4.645
UT	2.148	2.318	2.462	2.079	2.244	2.413	2.063	2.177	2.294	2.076	2.254	2.442
NV	1.691	1.835	1.935	1.597	1.753	1.902	1.718	1.853	1.984	1.463	1.537	1.611
Pacific	46.388	50.167	54.318	47.507	51.555	55.631	46.924	50.942	55.041	47.361	51.441	55.727
WA	6.070	6.570	7.025	6.025	6.564	7.087	6.054	6.477	6.898	5.539	5.770	6.005
OR	3.404	3.645	3.876	3.340	3.573	3.812	3.396	3.571	3.753	3.151	3.253	3.360
CA	34.888	37.771	41.085	36.062	39.138	42.255	35.490	38.749	42.075	36.689	40.288	44.076
AK	699	745	781	732	809	880	658	706	754	666	716	769
HI	1.327	1.436	1.551	1.348	1.471	1.597	1.326	1.439	1.561	1.316	1.414	1.517

Source: U.S. Bureau of the Census. *Current Population Reports*, series P25-1111.

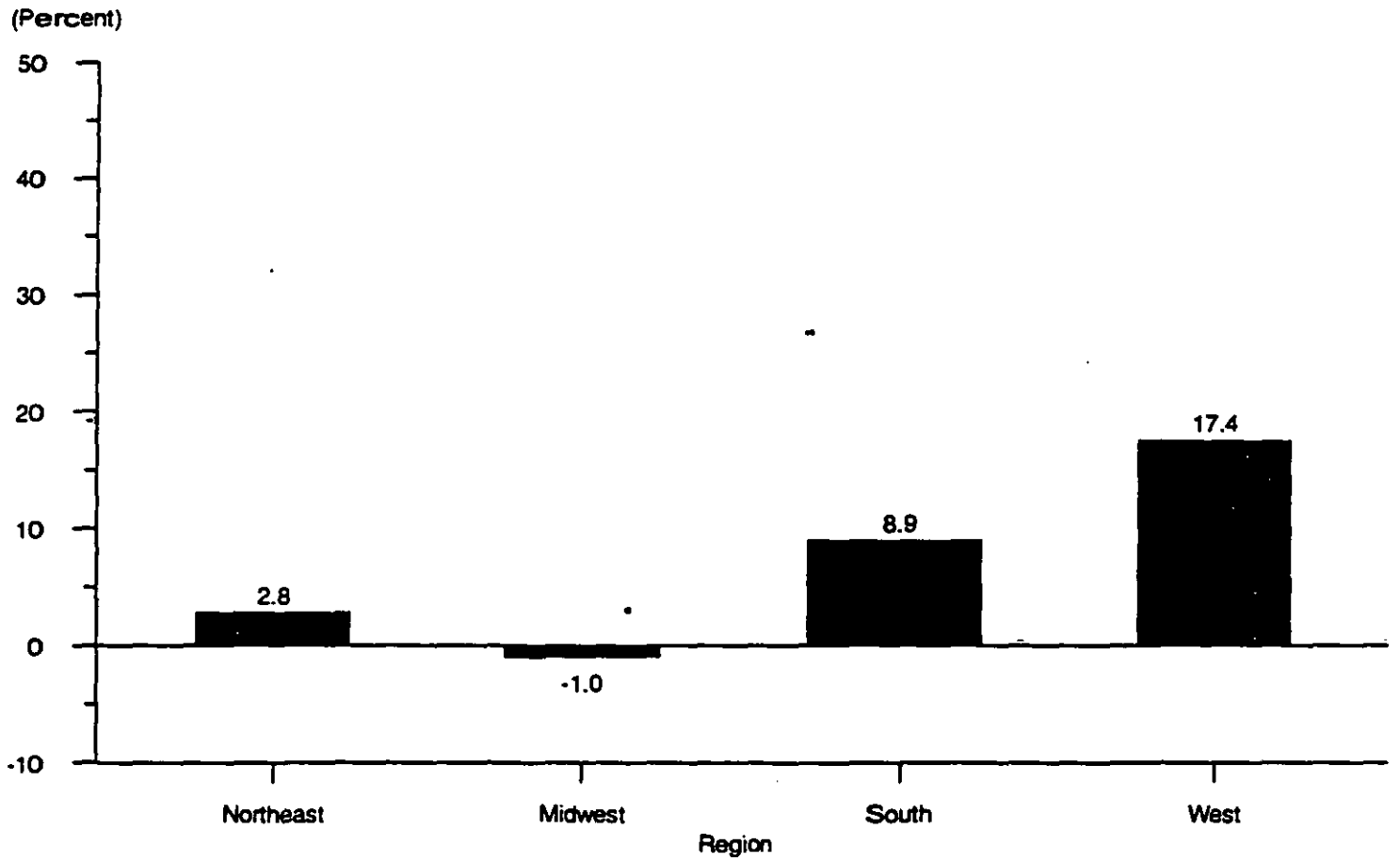
Source: Statistical Abstract of the United States, 1996.



Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

MORE THAN 90% OF INCREASED PUBLIC SCHOOL ENROLLMENT WILL BE IN THE SOUTH AND WEST

Percent change in public K-12 enrollment, by region: Fall 1995 to fall 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

COLLEGE AND UNIVERSITY ENROLLMENT

THE PERCENTAGE OF AMERICANS WITH FOUR YEARS OF COLLEGE HAS MORE THAN QUADRUPLED IN THE PAST HALF-CENTURY

Number of Years of School Completed in the United States: 25 and Over and 25-29 Cohorts[1]

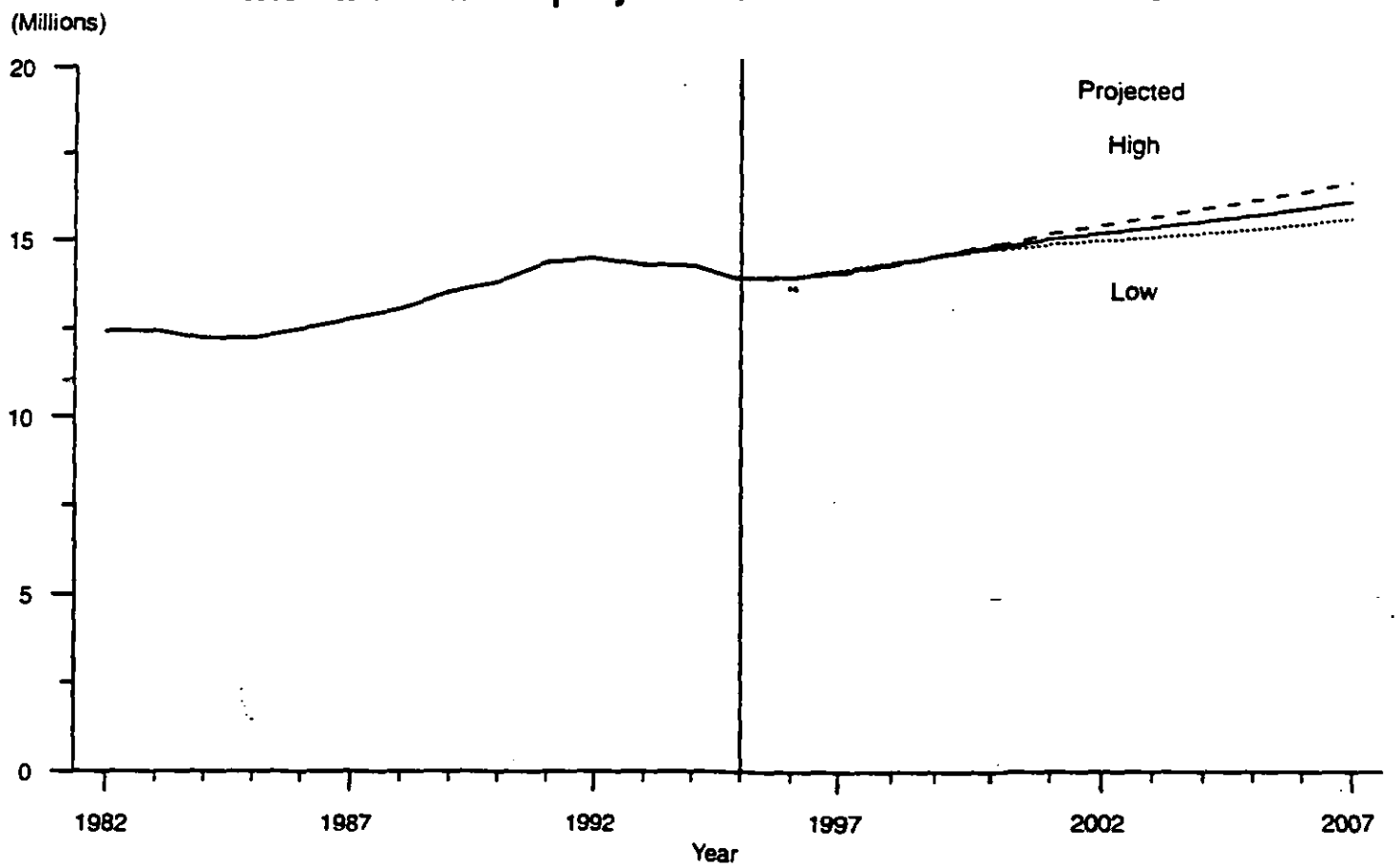
Age of Cohort	Less than 5 years	4 years of high school or more	4 years of college	Median
25 and over				
1940	13.7	24.5	4.6	8.6
1950	11.1	34.3	6.2	9.3
1960	8.3	41.1	7.7	10.5
1970	5.3	55.2	11.0	12.2
1980	3.4	68.6	17.0	12.5
1990	2.4	77.6	21.3	12.7
25-29				
1940	5.9	38.1	5.9	10.3
1950	4.6	52.8	7.7	12.1
1960	2.8	60.7	11.0	12.3
1970	1.1	75.4	16.4	12.6
1980	0.8	85.4	22.5	12.9
1990	1.2	85.7	23.2	12.9

[1]Source: Develen, Gerald (ed.). 1991. Condition of Education. Washington, D.C.: US Department of Education; Snyder, T.M. 1993. Digest of Educational Statistics. National Center of Educational Statistics. Washington, D.C.: US Department of Education.

Source: Philip D. Gardner, Collegiate Employment Research Institute, Michigan State University, "Demographic and Attitudinal Trends: The Increasing Diversity of Today's and Tomorrow's Learner" (1994).

POST-SECONDARY ENROLLMENT WILL STEADILY INCREASE

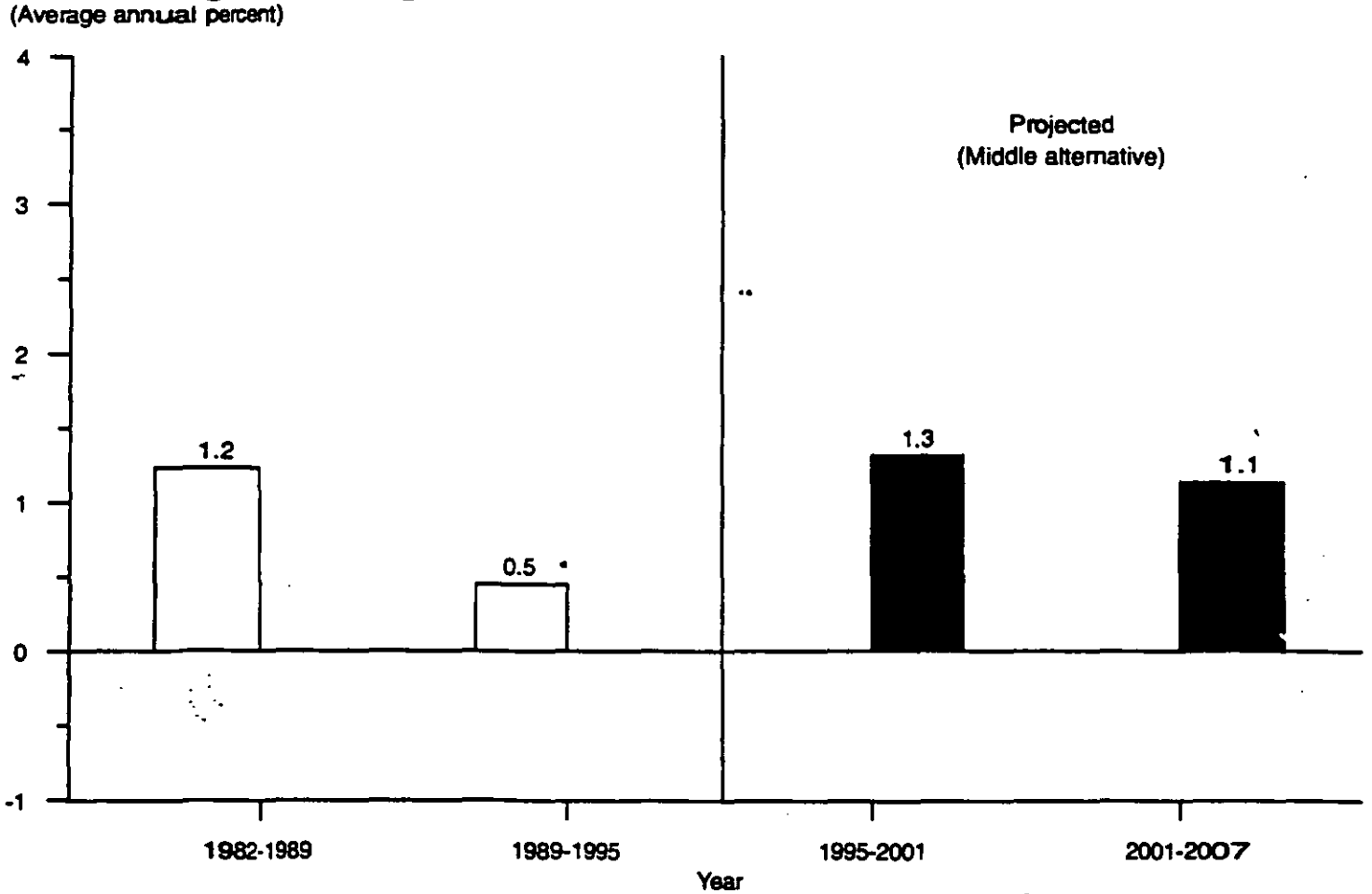
Enrollment in institutions of higher education, with alternative projections: Fall 1982 to fall 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

ENROLLMENT WILL INCREASE AS FAST AS IN THE 1980'S

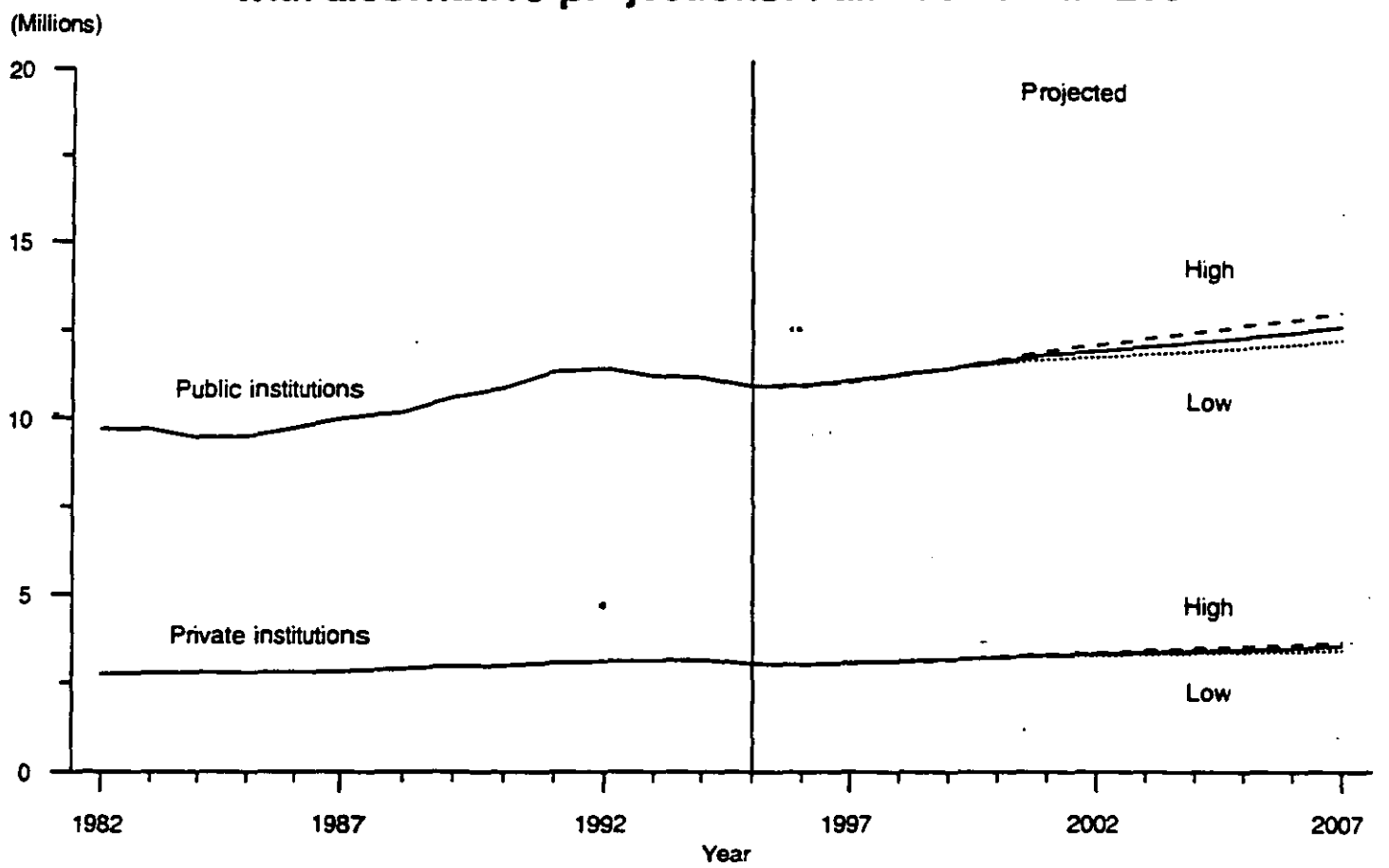
Average annual growth rates for total higher education enrollment



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

PUBLIC INSTITUTIONS WILL ABSORB MUCH OF THE INCREASED ENROLLMENT

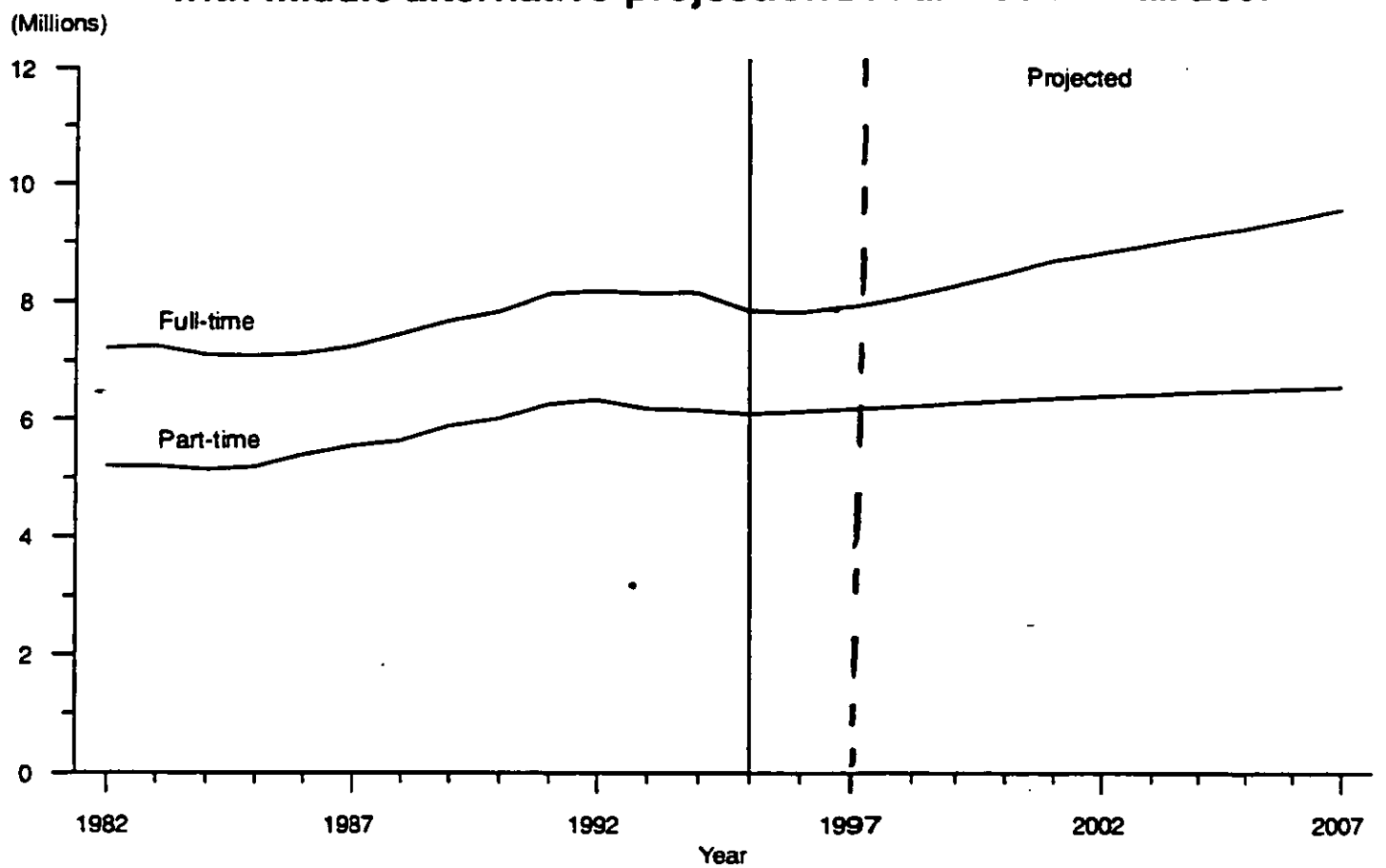
Enrollment in institutions of higher education, by control of institution with alternative projections: Fall 1982 to fall 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

THERE WILL BE RELATIVELY MORE FULL-TIME STUDENTS

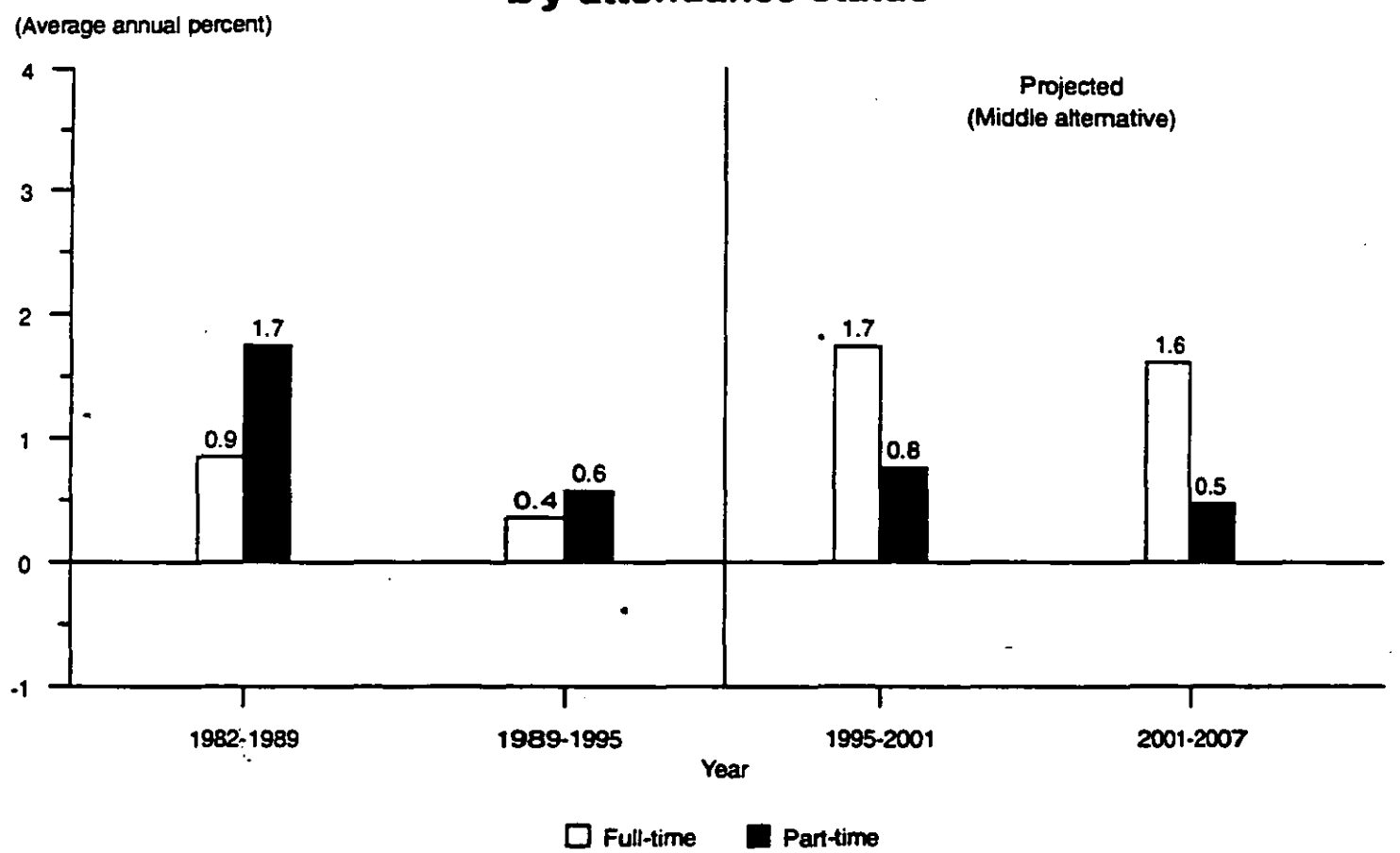
Enrollment in institutions of higher education, by attendance status, with middle alternative projections: Fall 1982 to fall 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

MOST OF THE ENROLLMENT INCREASE WILL BE FULL-TIME STUDENTS

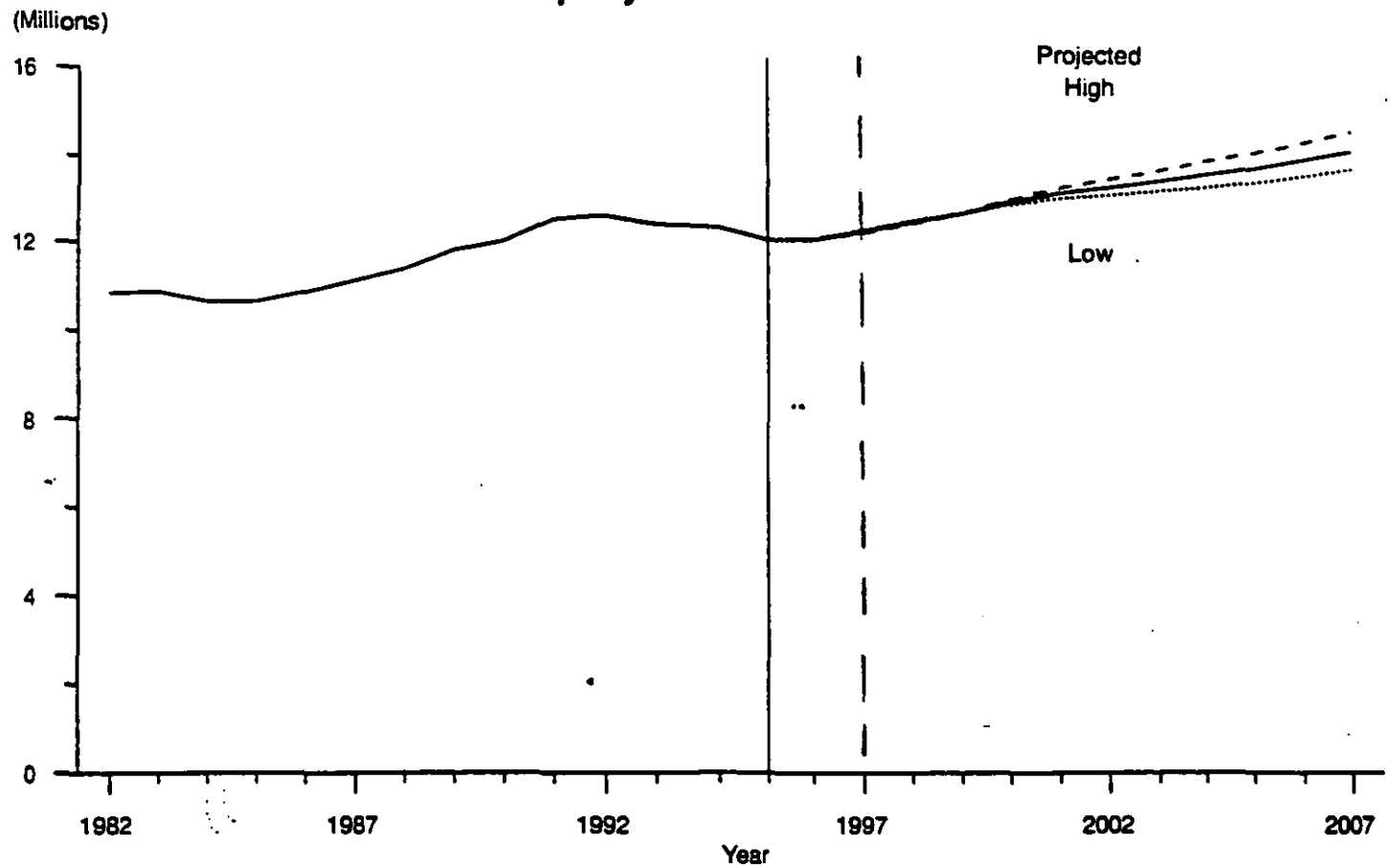
Average annual growth rates for total higher education enrollment, by attendance status



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

MOST OF THE INCREASED ENROLLMENT WILL BE UNDERGRADUATE

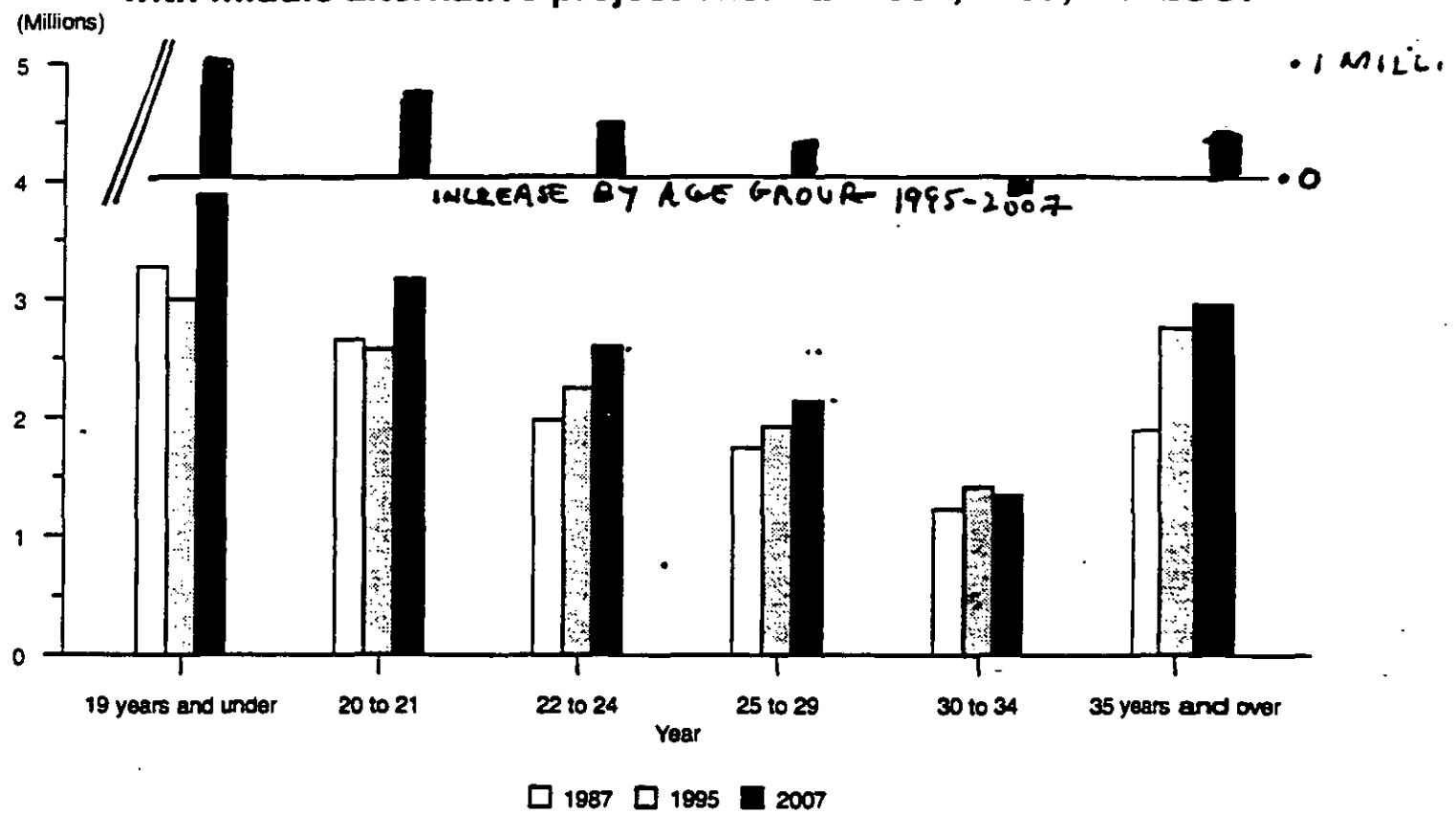
Undergraduate enrollment in institutions of higher education, with alternative projections: Fall 1982 to fall 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

STUDENTS 21 AND YOUNGER WILL ACCOUNT FOR MOST INSTITUTIONAL EXPANSION

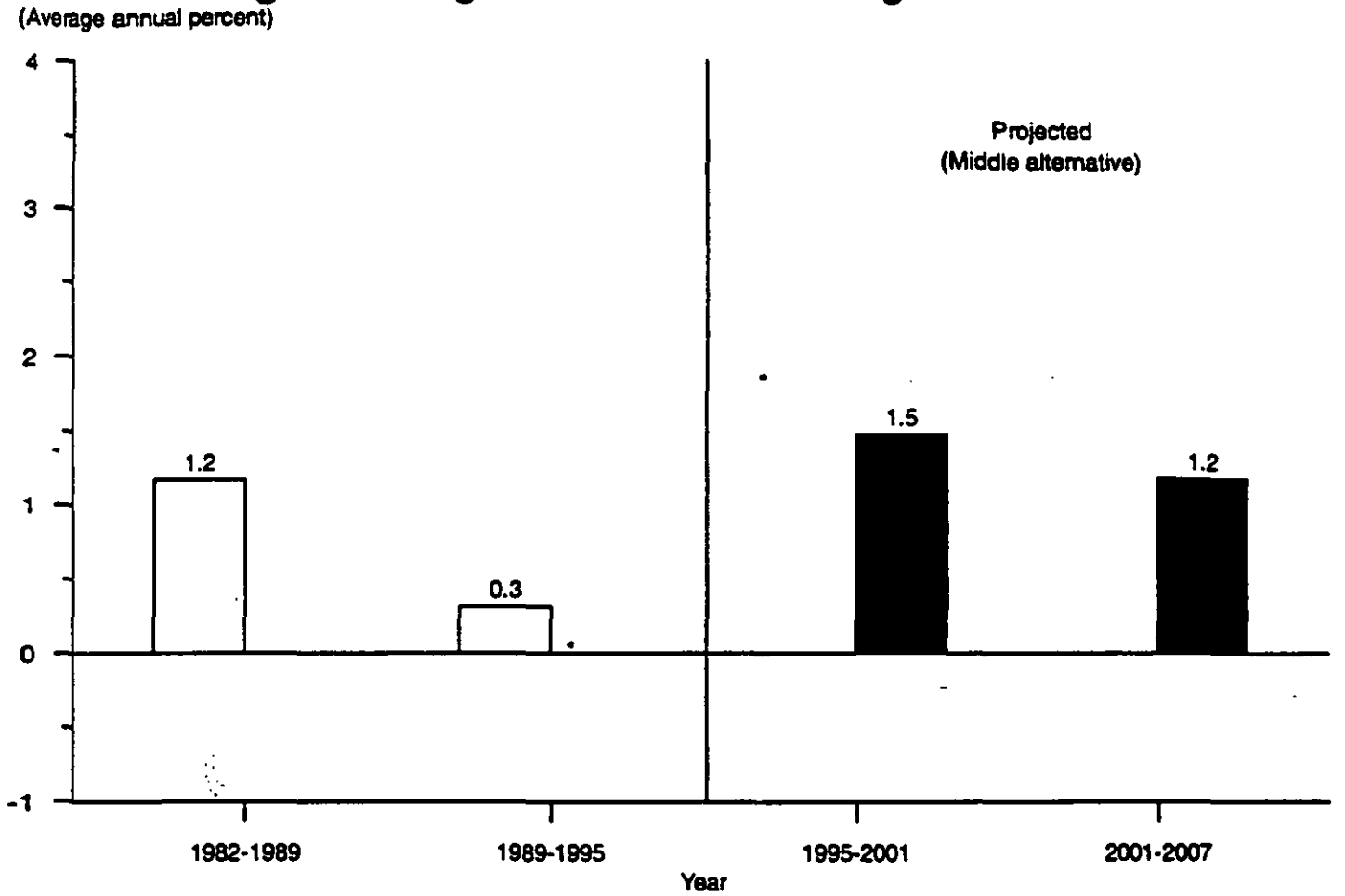
Enrollment in institutions of higher education, by age group, with middle alternative projections: Fall 1987, 1995, and 2007



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

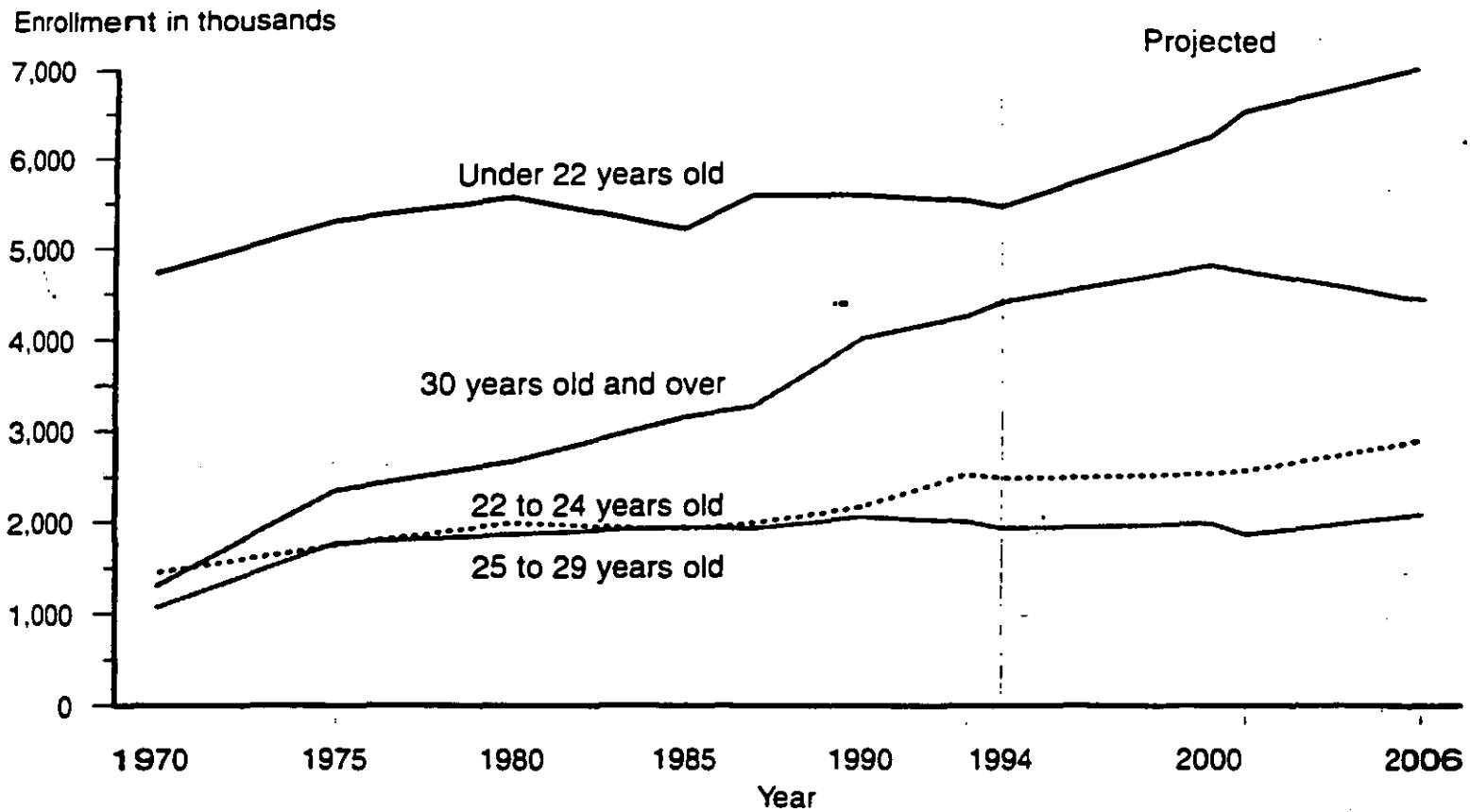
COLLEGE ATTENDANCE WILL SURGE AS IT DID IN THE 1980'S

Average annual growth rates for undergraduate enrollment



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

Enrollment in institutions of higher education, by age: Fall 1970 to fall 2006

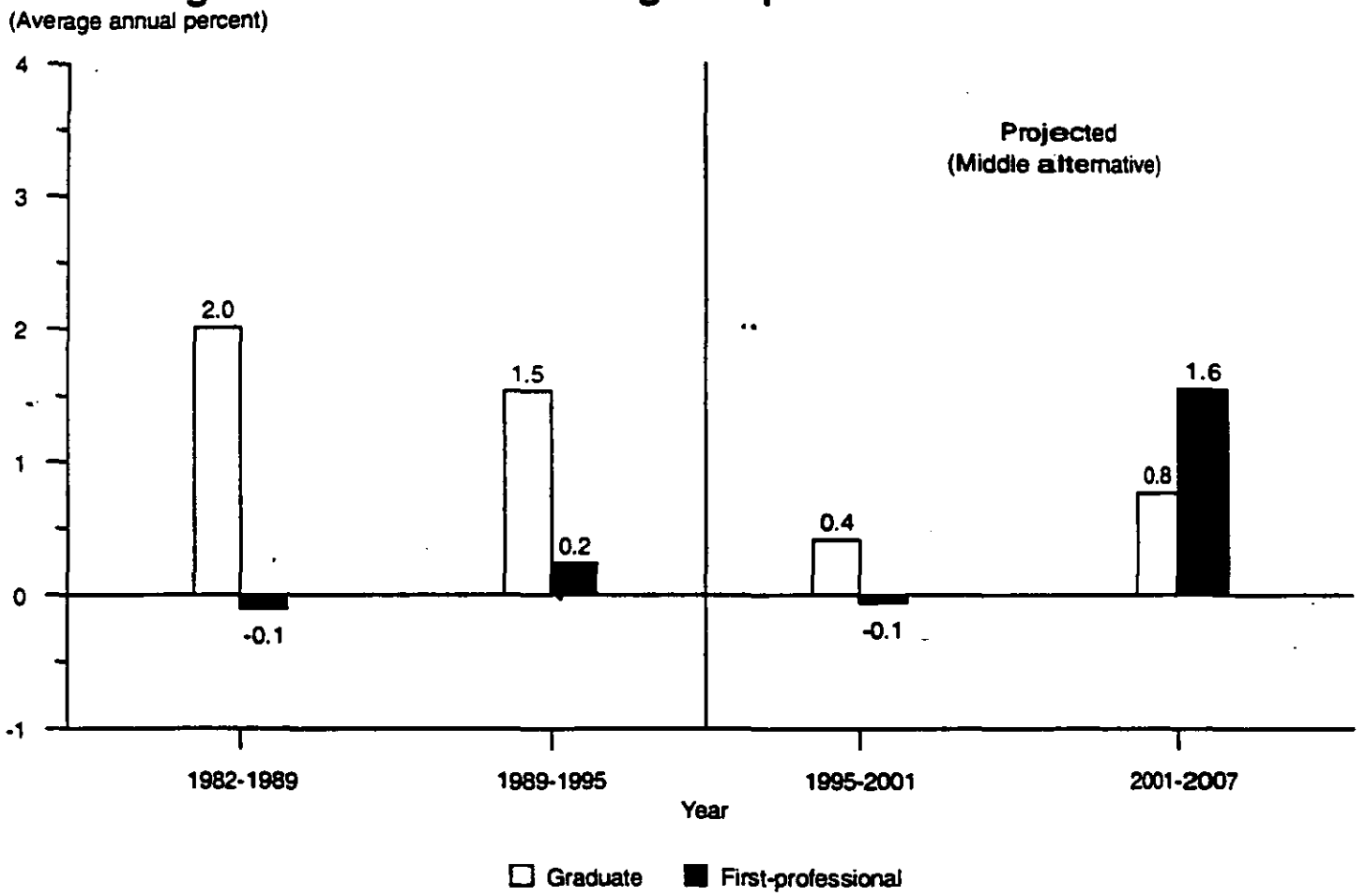


SOURCE: U.S. Department of Education, National Center for Education Statistics, "Fall Enrollment in Institutions of Higher Education" surveys; Integrated Postsecondary Education Data System (IPEDS), "Fall Enrollment" surveys; Projections of Education Statistics to 2006; and U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-20, "Social and Economic Characteristics of Students," various years.

Source: U.S. Dept. of Education, Digest of Education Statistics (1996)

ENROLLMENT AT PROFESSIONAL SCHOOLS WILL HOLD STEADY, THEN GROW

Average annual rates of change for postbaccalaureate enrollment



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

MORE OF ALL DEGREES, EXCEPT PH.D.'S, WILL BE AWARDED

Earned Degrees Conferred, by Level and Sex, With Projections: 1950 to 2006

[In thousands, except percent. Beginning 1960, includes Alaska and Hawaii. See *Historical Statistics, Colonial Times to 1970*, series H-751-763 for similar data. See also Appendix III]

YEAR ENDING	ALL DEGREES		ASSOCIATE'S		BACHELOR'S		MASTER'S		FIRST PROFES-SIONAL		DOCTOR'S	
	Total	Percent male	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
1950 [1]	497	75.7	(NA)	(NA)	329	103	41	17	(NA)	(NA)	6	1
1960 [1]	477	65.8	(NA)	(NA)	254	138	51	24	(NA)	(NA)	9	1
1965	660	61.5	(NA)	(NA)	282	212	81	40	27	1	15	2
1970	1,271	59.2	117	89	451	341	126	83	33	2	26	4
1975	1,666	56.0	191	169	505	418	162	131	49	7	27	7
1980	1,731	51.1	184	217	474	456	151	147	53	17	23	10
1985	1,828	49.3	203	252	483	497	143	143	50	25	22	11
1986	1,830	49.0	196	250	486	502	144	145	49	25	22	12
1987	1,823	48.4	191	245	481	510	141	148	47	25	22	12
1988	1,835	48.0	190	245	477	518	145	154	45	25	23	12
1989	1,873	47.3	186	250	483	535	149	161	45	26	23	13
1990	1,940	46.6	191	264	492	560	154	171	44	27	24	14
1991	2,025	45.8	199	283	504	590	156	181	44	28	25	15
1992	2,108	45.6	207	297	521	616	162	191	45	29	26	15
1993	2,167	45.5	212	303	533	632	169	200	45	30	26	16
1994, prel.	[illegible]	45.4	217	314	535	647	186	205	45	31	26	16
1995, proj.	2,247	45.3	216	314	535	657	195	210	45	32	27	16
2000, proj.	2,287	45.3	212	326	539	652	208	220	50	34	28	19
2004, proj.	2,451	44.6	222	354	580	708	212	240	55	36	24	21
2005, proj.	2,473	44.4	223	356	585	717	212	245	55	36	23	21
2006, proj.	2,497	44.2	224	360	591	725	212	250	55	37	22	21

NA Not available. [1] First-professional degrees are included with bachelor's degrees.

Source: U.S. National Center for Education Statistics, *Digest of Education Statistics*, annual; and *Projections of Education Statistics to 2006*, annual.

1.2

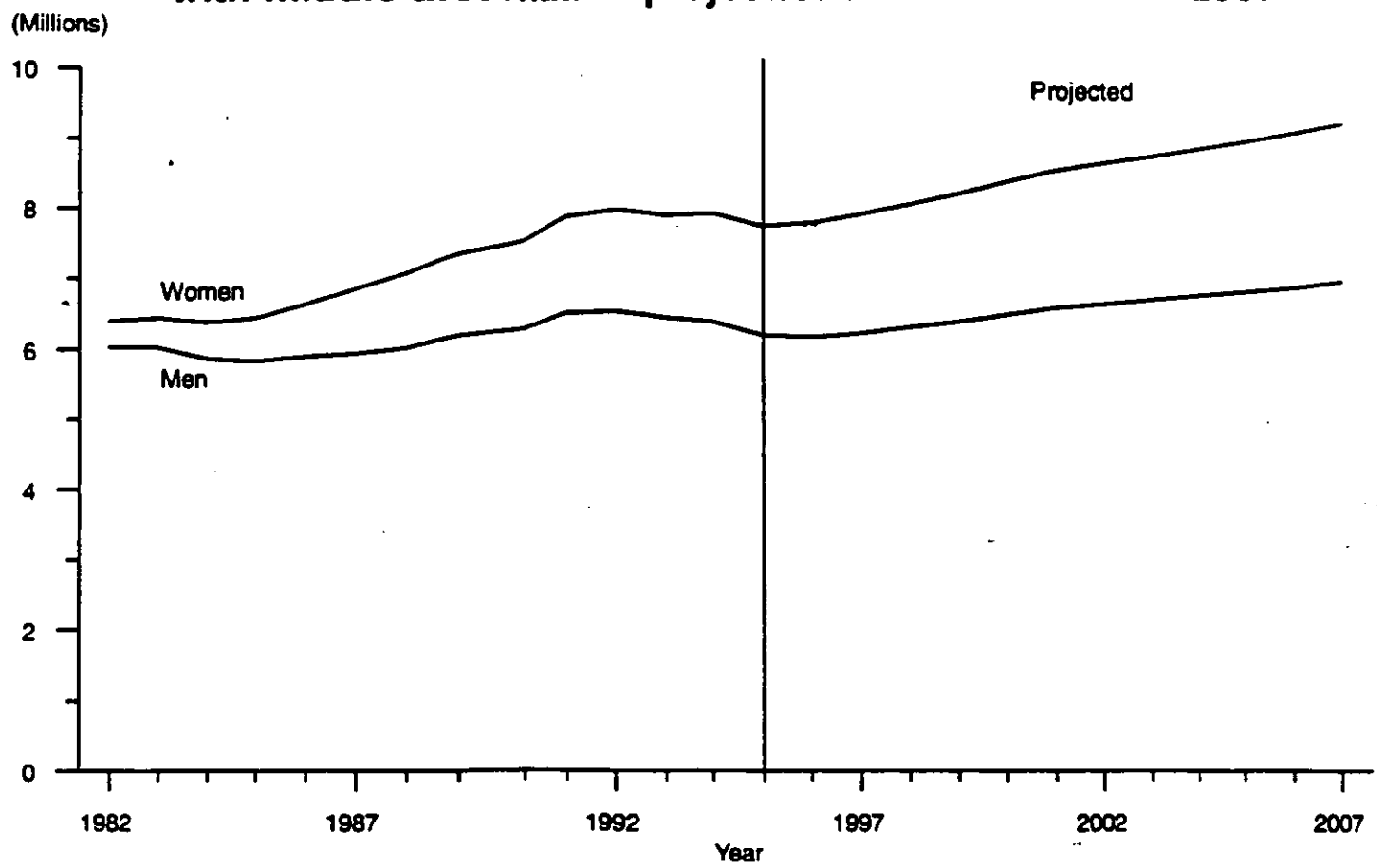
1.3

Source: Statistical Abstract of the United States, 1996.

WOMEN AND MEN

INCREASINGLY, WOMEN WILL ENROLL MORE THAN MEN

Enrollment in institutions of higher education, by sex, with middle alternative projections: Fall 1982 to fall 2007

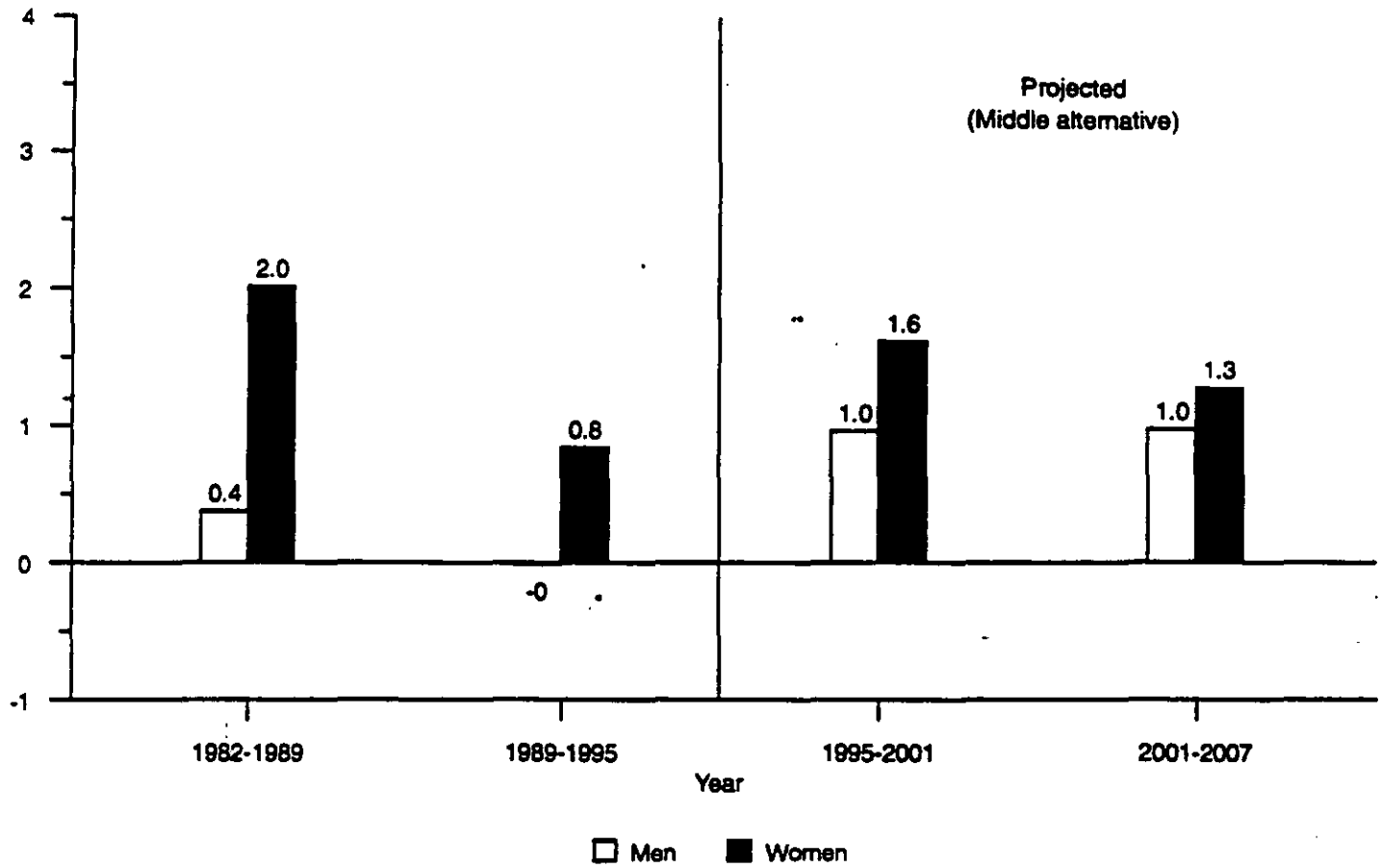


Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

FOR EVERY 20 MORE MEN ENROLLED THERE WILL BE PERHAPS 27 MORE WOMEN

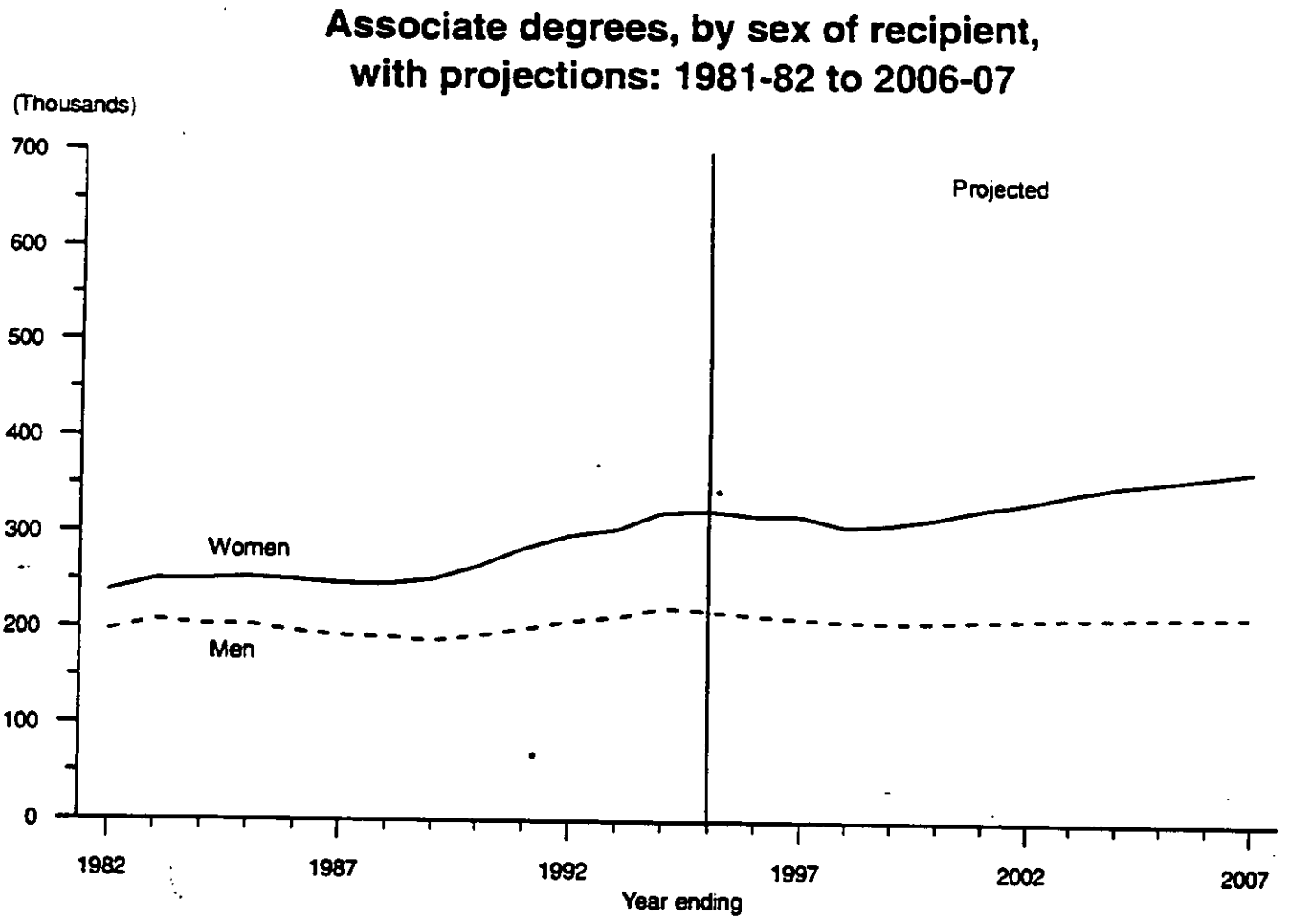
Average annual growth rates for total higher education enrollment, by se:

(Average annual percent)



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

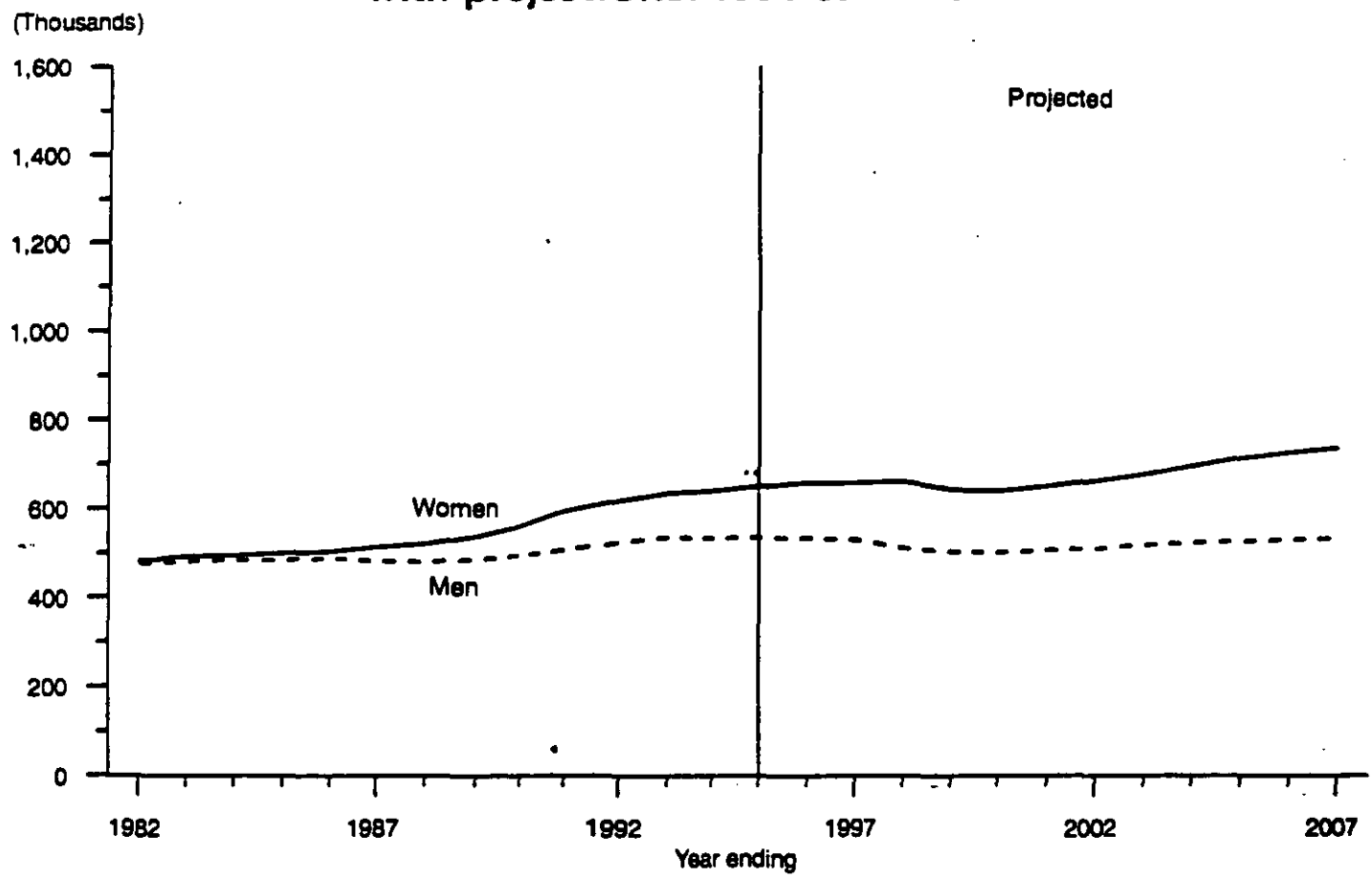
WOMEN WILL ATTEND COMMUNITY AND JUNIOR COLLEGES IN GREATER NUMBERS



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

WOMEN WILL RECEIVE MORE OF THE B.A.'S

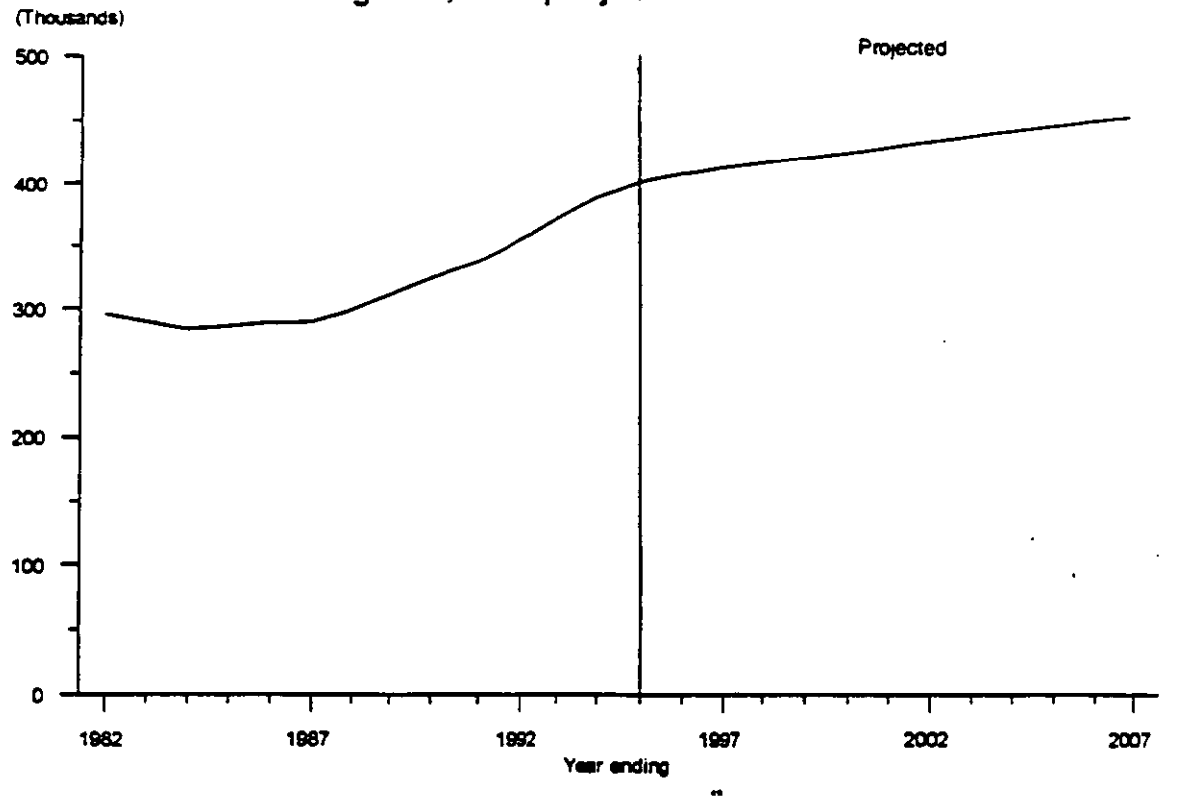
Bachelor's degrees, by sex of recipient, with projections: 1981-82 to 2006-07



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

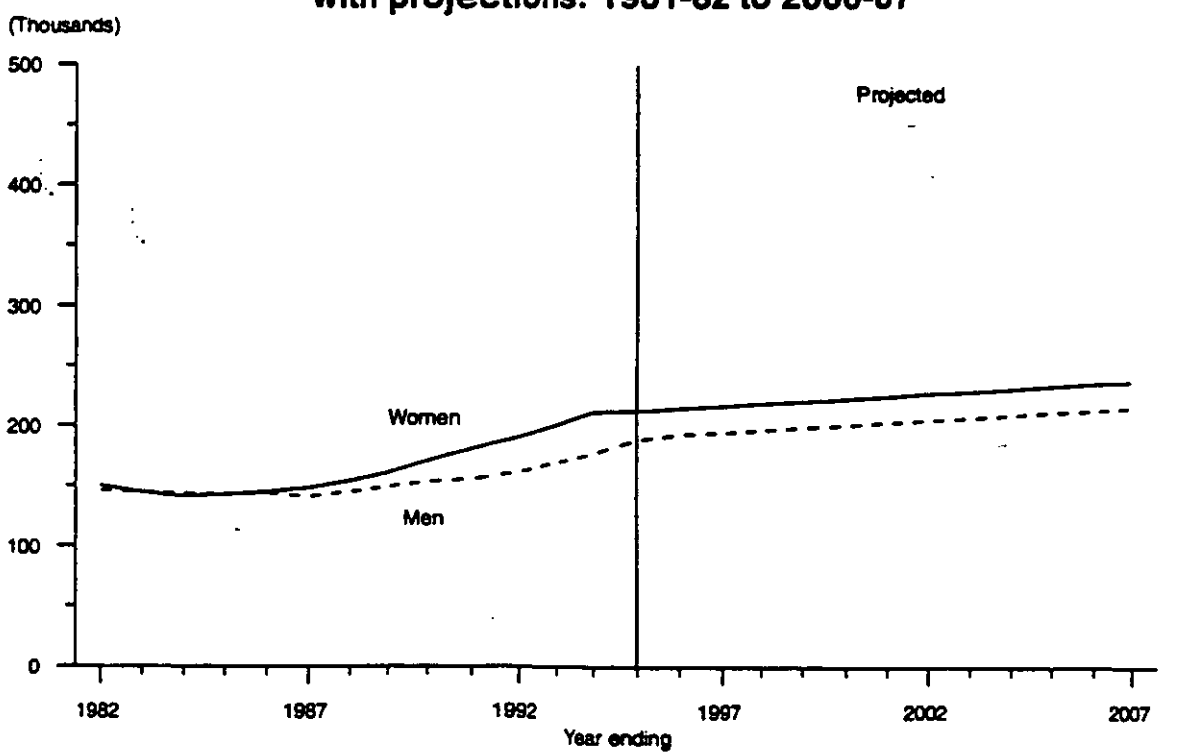
THERE WILL BE MORE M.A.'S

Master's degrees, with projections: 1981-82 to 2006-07



AND WOMEN WILL CONTINUE TO DOMINATE THEM

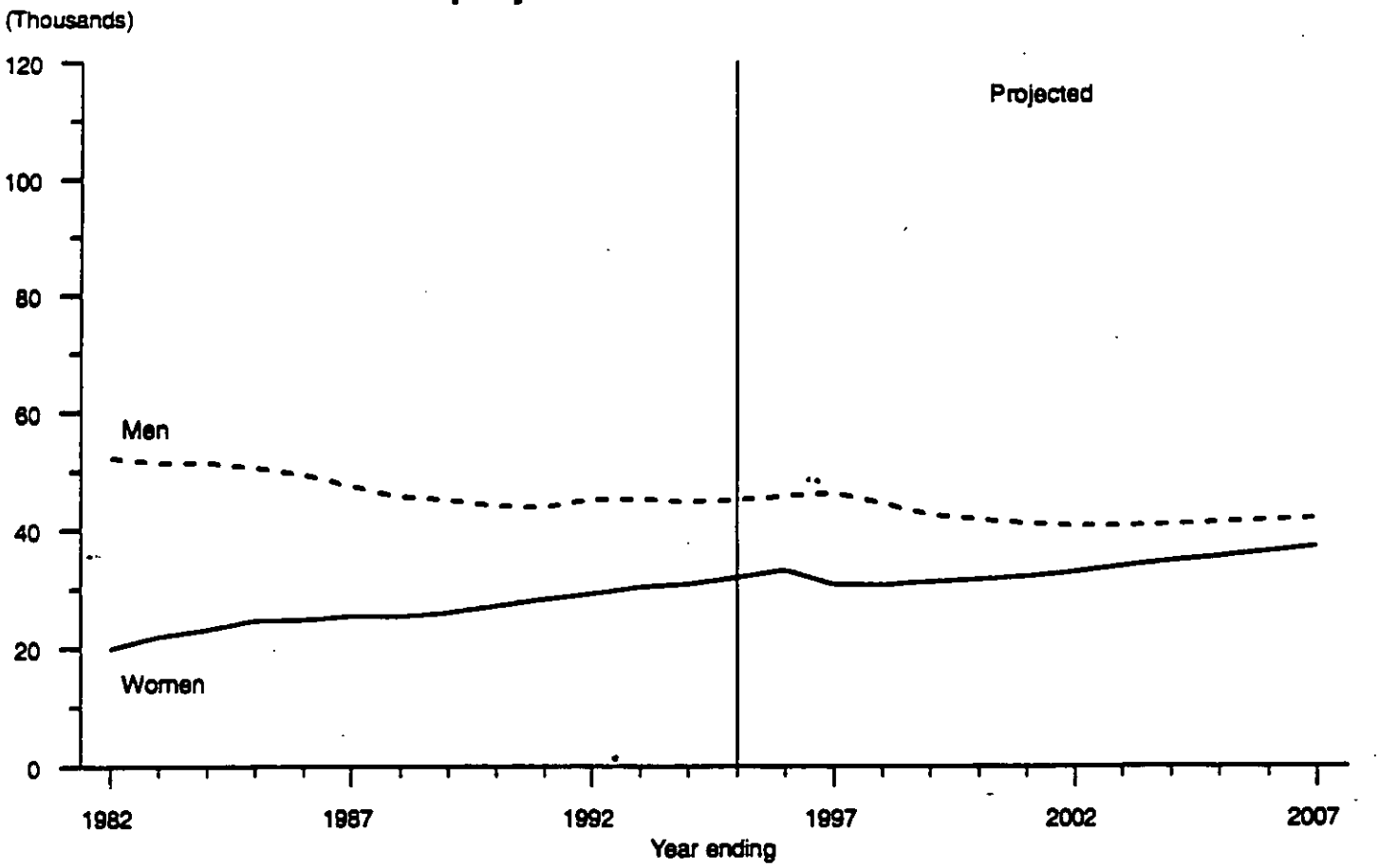
Master's degrees, by sex of recipient, with projections: 1981-82 to 2006-07



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

WOMEN WILL RECEIVE MORE, MEN FEWER, PROFESSIONAL DEGREES

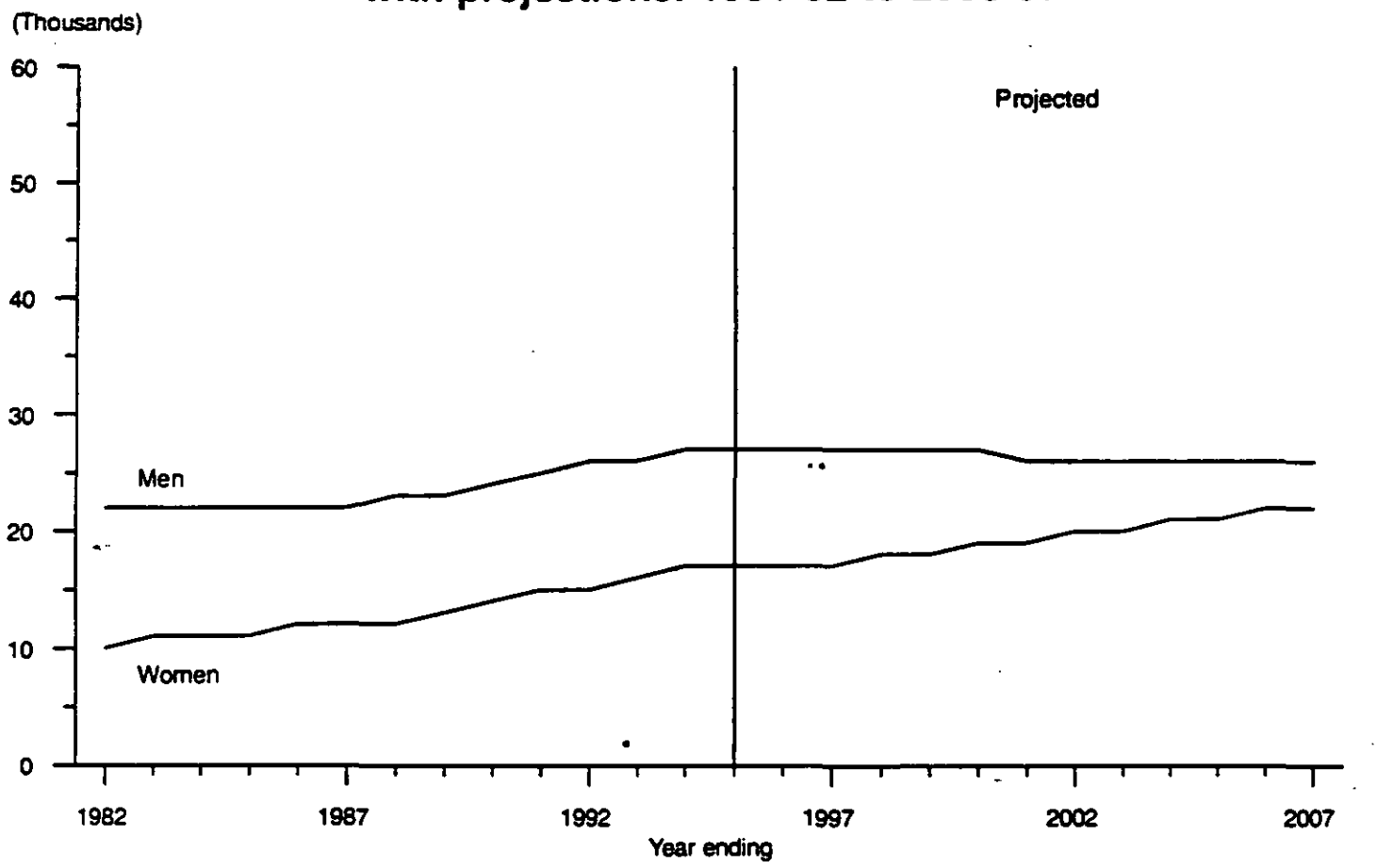
First-professional degrees, by sex of recipient, with projections: 1981-82 to 2006-07



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

PH.D'S TO WOMEN WILL INCREASE, APPROACHING PARITY WITH MEN

Doctor's degrees, by sex of recipient, with projections: 1981-82 to 2006-07



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

RACE AND ETHNICITY

MORE THAN TWO-THIRDS OF THE POPULATION INCREASE TO 2010 WILL BE BLACK AND HISPANIC AMERICANS

Resident Population—Selected Characteristics, 1790 to 1995, and Projections, 2000 to 2050

[In thousands. See also *Historical Statistics, Colonial Times to 1970*, series A 73-81 and A 143-149]

DATE	SEX		RACE					Hispanic origin
					Other			
	Male	Female	White	Black	Total	American Indian, Eskimo, Aleut	Asian and Pacific Islanders	
1790 (Aug. 2) [2]	(NA)	(NA)	3,172	757	(NA)	(NA)	(NA)	(NA)
1800 (Aug. 4) [2]	(NA)	(NA)	4,306	1,002	(NA)	(NA)	(NA)	(NA)
1850 (June 1) [2]	11,838	11,354	19,553	3,639	(NA)	(NA)	(NA)	(NA)
1900 (June 1) [2]	38,816	37,178	66,809	8,834	351	(NA)	(NA)	(NA)
1910 (Apr. 15) [2]	47,332	44,640	81,732	9,828	413	(NA)	(NA)	(NA)
1920 (Jan. 1) [2]	53,900	51,810	94,821	10,463	427	(NA)	(NA)	(NA)
1930 (Apr. 1) [2]	62,137	60,638	110,287	11,891	597	(NA)	(NA)	(NA)
1940 (Apr. 1) [2]	66,062	65,608	118,215	12,866	589	(NA)	(NA)	(NA)
1950 (Apr. 1) [2]	74,833	75,864	134,942	15,042	713	(NA)	(NA)	(NA)
1950 (Apr. 1)	75,187	76,139	135,150	15,045	1,131	(NA)	(NA)	(NA)
1960 (Apr. 1)	88,331	90,992	158,832	18,872	1,620	(NA)	(NA)	(NA)
1970 (Apr. 1) [3]	98,926	104,309	178,098	22,581	2,557	(NA)	(NA)	(NA)
1980 (Apr. 1) [4 5]	110,053	116,493	194,713	26,683	5,150	1,420	3,729	14,609
1990 (Apr. 1) [4 6]	121,244	127,474	208,710	30,486	9,523	2,065	7,458	22,354
1991 (July 1) [7]	122,951	129,187	211,017	31,110	10,011	2,107	7,904	23,381
1992 (July 1) [7]	124,436	130,603	212,957	31,659	10,423	2,142	8,280	24,272
1993 (July 1) [7]	125,812	131,988	214,805	32,174	10,821	2,177	8,644	25,198
1994 (July 1) [7]	127,085	133,265	216,496	32,669	11,184	2,210	8,974	26,099
1995 (July 1) [7]	128,314	134,441	218,085	33,141	11,529	2,242	9,287	26,994
2000 (July 1) [8]	134,181	140,453	225,532	35,454	13,647	2,402	11,245	31,366
2005 (July 1) [8]	139,785	146,196	232,463	37,734	15,784	2,572	13,212	36,057
2010 (July 1) [8]	145,584	152,132	239,588	40,109	18,019	2,754	15,265	41,139
2015 (July 1) [8]	151,750	158,383	247,193	42,586	20,355	2,941	17,413	46,705
2020 (July 1) [8]	158,021	164,721	254,887	45,075	22,780	3,129	19,651	52,652
2025 (July 1) [8]	164,119	170,931	262,227	47,539	25,284	3,319	21,965	58,930
2050 (July 1) [8]	193,234	200,696	294,615	60,592	38,724	4,371	34,352	96,508

NA Not available. [1] Persons of Hispanic origin may be of any race. [2] Excludes Alaska and Hawaii. [3] The revised 1970 resident population count is 203,302,031; which incorporates changes due to errors found after tabulations were completed. The race and sex data shown here reflect the official 1970 census count. [4] The race data shown have been modified; see text, section 1, for explanation. [5] See footnote 4, table 1. [6] The April 1, 1990, census count (248,718,291) includes count resolution corrections processed through March 1994 and does not include adjustments for census coverage errors. [7] Estimated. [8] Middle series projection; see table 3.

Source: Statistical Abstract of the United States, 1996.

BETWEEN 2000 AND 2010 THERE WILL BE 700,000 MORE BLACK 18-24 YEAR OLDS

No. 24. Projections of Resident Population, by Age, Sex, and Race: 2000 to 2025

[As of July 1. Data are for middle series; for assumptions, see table 3]

AGE, SEX, AND RACE	POPULATION (1,000)				PERCENT DISTRIBUTION			
	2000	2005	2010	2025	2000	2005	2010	2025
Total	**274,634**	**285,981**	**297,716**	**335,050**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	18,987	19,127	20,012	22,498	6.9	6.7	6.7	6.7
5 to 13 years old	36,043	35,850	35,605	40,413	13.1	12.5	12.0	12.1
14 to 17 years old	15,752	16,986	16,894	17,872	5.7	5.9	5.7	5.3
18 to 24 years old	26,258	28,268	30,138	30,372	9.6	9.9	10.1	9.1
25 to 34 years old	37,233	36,306	38,292	43,119	13.6	12.7	12.9	12.9
35 to 44 years old	44,659	42,165	38,521	42,391	16.3	14.7	12.9	12.7
45 to 54 years old	37,030	41,507	43,564	36,890	13.5	14.5	14.6	11.0
55 to 64 years old	23,962	29,606	35,283	39,542	8.7	10.4	11.9	11.8
65 to 74 years old	18,136	18,369	21,057	35,425	6.6	6.4	7.1	10.6
75 to 84 years old	12,315	12,898	12,680	19,481	4.5	4.5	4.3	5.8
85 years old and over	4,259	4,899	5,671	7,046	1.6	1.7	1.9	2.1
Male	134,181	139,785	145,584	164,119	48.9	48.9	48.9	49.0
Female	140,453	146,196	152,132	170,931	51.1	51.1	51.1	51.0
White, total	**225,532**	**232,463**	**239,588**	**262,227**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	14,724	14,618	15,142	16,630	6.5	6.3	6.3	6.3
5 to 13 years old	28,254	27,716	27,087	29,949	12.5	11.9	11.3	11.4
14 to 17 years old	12,412	13,177	12,951	13,166	5.5	5.7	5.4	5.0
18 to 24 years old	20,852	22,306	23,489	22,702	9.2	9.6	9.8	8.7
25 to 34 years old	29,657	28,705	30,099	32,831	13.2	12.3	12.6	12.5
35 to 44 years old	36,762	34,201	30,646	32,869	16.3	14.7	12.8	12.5
45 to 54 years old	31,247	34,574	35,911	29,010	13.9	14.9	15.0	11.1
55 to 64 years old	20,600	25,334	29,845	32,246	9.1	10.9	12.5	12.3
65 to 74 years old	15,846	15,844	18,101	29,733	7.0	6.8	7.6	11.3
75 to 84 years old	11,131	11,553	11,208	16,969	4.9	5.0	4.7	6.5
85 years old and over	3,866	4,434	5,108	6,122	1.7	1.9	2.1	2.3
Male	110,799	114,350	118,000	129,596	49.1	49.2	49.3	49.4
Female	114,734	118,113	121,588	132,631	50.9	50.8	50.7	50.6
Black, total	**35,454**	**37,734**	**40,109**	**47,539**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	3,127	3,244	3,454	3,964	8.8	8.6	8.6	8.3
5 to 13 years old	5,727	5,813	5,962	6,990	16.2	15.4	14.9	14.7
14 to 17 years old	2,414	2,735	2,727	3,104	6.8	7.2	6.8	6.5
18 to 24 years old	3,966	4,233	4,674	5,053	11.2	11.2	11.7	10.6
25 to 34 years old	5,172	5,212	5,489	6,514	14.6	13.8	13.7	13.7
35 to 44 years old	5,649	5,499	5,236	6,017	15.9	14.6	13.1	12.7
45 to 54 years old	4,111	4,909	5,326	5,007	11.6	13.0	13.3	10.5
55 to 64 years old	2,406	2,995	3,801	4,865	6.8	7.9	9.5	10.2
65 to 74 years old	1,675	1,781	2,033	3,901	4.7	4.7	5.1	8.2
75 to 84 years old	890	959	1,002	1,562	2.5	2.5	2.5	3.3
85 years old and over	317	354	396	541	0.9	0.9	1.0	1.1
Male	16,811	17,874	18,981	22,473	47.4	47.4	47.3	47.3
Female	18,643	19,860	21,129	25,066	52.6	52.6	52.7	52.7
American Indian, Eskimo, Aleut, total	**2,402**	**2,572**	**2,754**	**3,319**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	210	226	245	275	8.7	8.8	8.9	8.3
5 to 13 years old	418	409	429	516	17.4	15.9	15.6	15.5
14 to 17 years old	196	210	197	240	8.2	8.2	7.2	7.2
18 to 24 years old	283	323	342	368	11.8	12.5	12.4	11.1
25 to 34 years old	361	376	421	475	15.0	14.6	15.3	14.3
35 to 44 years old	354	351	349	459	14.8	13.7	12.7	13.8
45 to 54 years old	263	300	321	333	11.0	11.7	11.7	10.0
55 to 64 years old	152	186	225	276	6.3	7.2	8.2	8.3
65 to 74 years old	93	104	122	210	3.9	4.1	4.4	6.3
75 to 84 years old	51	59	65	109	2.1	2.3	2.4	3.3
85 years old and over	22	28	36	59	0.9	1.1	1.3	1.8
Male	1,185	1,266	1,354	1,629	49.3	49.2	49.2	49.1
Female	1,217	1,306	1,400	1,690	50.7	50.8	50.8	50.9
Asian, Pacific Islander, total	**11,245**	**13,212**	**15,265**	**21,965**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	926	1,040	1,170	1,628	8.2	7.9	7.7	7.4
5 to 13 years old	1,644	1,912	2,126	2,958	14.6	14.5	13.9	13.5
14 to 17 years old	729	864	1,008	1,362	6.5	6.5	6.6	6.2
18 to 24 years old	1,158	1,405	1,633	2,250	10.3	10.6	10.7	10.2
25 to 34 years old	1,863	2,012	2,283	3,300	16.6	15.2	15.0	15.0
35 to 44 years old	1,894	2,114	2,290	3,046	16.8	16.0	15.0	13.9
45 to 54 years old	1,409	1,724	2,006	2,539	12.5	13.1	13.1	11.6
55 to 64 years old	804	1,091	1,412	2,155	7.1	8.3	9.3	9.8
65 to 74 years old	522	640	802	1,581	4.6	4.8	5.3	7.2
75 to 84 years old	242	327	406	821	2.2	2.5	2.7	3.7
85 years old and over	55	83	130	324	0.5	0.6	0.9	1.5
Male	5,386	6,295	7,250	10,421	47.9	47.6	47.5	47.4
Female	5,859	6,918	8,015	11,543	52.1	52.4	52.5	52.6

Source: U.S. Bureau of the Census, *Current Population Reports*, P25-1130.

Source: Statistical Abstract of the United States, 1996.

BETWEEN 2000 AND 2010 THERE WILL BE 1.4 MILLION MORE HISPANIC 18-24 YEAR OLDS

Projections of Hispanic and Non-Hispanic Populations, by Age and Sex: 2000 to 2025

(As of July 1. Resident population. Data are for middle series; for assumptions, see table 3)

AGE AND SEX	POPULATION (1,000)				PERCENT DISTRIBUTION			
	2000	2005	2010	2025	2000	2005	2010	2025
Hispanic origin, total [1]	**31,366**	**36,057**	**41,139**	**58,930**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	3,203	3,580	4,080	5,662	10.2	9.9	9.9	9.6
5 to 13 years old	5,651	6,215	6,654	9,479	18.0	17.2	16.2	16.1
14 to 17 years old	2,170	2,672	2,867	3,944	6.9	7.4	7.3	6.7
18 to 24 years old	3,679	4,270	5,101	6,560	11.7	11.8	12.4	11.1
25 to 34 years old	5,181	5,414	6,059	8,748	16.5	15.0	14.7	14.8
35 to 44 years old	4,836	5,421	5,562	7,345	15.4	15.0	13.5	12.5
45 to 54 years old	3,049	3,927	4,833	5,791	9.7	10.9	11.7	9.8
55 to 64 years old	1,717	2,260	2,997	5,272	5.5	6.3	7.3	8.9
65 to 74 years old	1,120	1,308	1,606	3,595	3.6	3.6	3.9	6.1
75 to 84 years old	568	748	896	1,771	1.8	2.1	2.2	3.0
85 years old and over	183	242	345	763	0.6	0.7	0.8	1.3
Male	15,799	18,082	20,557	29,276	50.4	50.1	50.0	49.7
Female	15,566	17,975	20,582	29,654	49.6	49.9	50.0	50.3
Non-Hispanic White, total	**197,081**	**199,802**	**202,390**	**209,117**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	11,807	11,367	11,445	11,510	6.0	5.7	5.7	5.5
5 to 13 years old	23,125	22,072	21,063	21,396	11.7	11.0	10.4	10.2
14 to 17 years old	10,444	10,769	10,230	9,622	5.3	5.4	5.1	4.6
18 to 24 years old	17,510	18,443	18,880	16,785	8.9	9.2	9.3	8.0
25 to 34 years old	25,144	23,806	24,631	24,935	12.8	11.9	12.2	11.9
35 to 44 years old	32,382	29,299	25,628	26,278	16.4	14.7	12.7	12.6
45 to 54 years old	28,485	31,024	31,541	23,797	14.5	15.5	15.6	11.4
55 to 64 years old	19,039	23,285	27,137	27,490	9.7	11.7	13.4	13.1
65 to 74 years old	14,825	14,660	16,653	26,504	7.5	7.3	8.2	12.7
75 to 84 years old	10,607	10,868	10,394	15,373	5.4	5.4	5.1	7.4
85 years old and over	3,694	4,209	4,788	5,428	1.9	2.1	2.4	2.6
Male	96,438	97,946	99,381	103,169	48.9	49.0	49.1	49.3
Female	100,624	101,856	103,009	105,948	51.1	51.0	50.9	50.7
Non-Hispanic Black, total	**33,568**	**35,485**	**37,466**	**43,511**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	2,929	3,016	3,187	3,571	8.7	8.5	8.5	8.2
5 to 13 years old	5,391	5,430	5,531	6,339	16.1	15.3	14.8	14.6
14 to 17 years old	2,285	2,568	2,647	2,831	6.8	7.2	6.8	6.5
18 to 24 years old	3,751	3,975	4,354	4,609	11.2	11.2	11.6	10.6
25 to 34 years old	4,863	4,883	5,111	5,942	14.5	13.8	13.6	13.7
35 to 44 years old	5,347	5,154	4,877	5,521	15.9	14.5	13.0	12.7
45 to 54 years old	3,922	4,654	5,008	4,613	11.7	13.1	13.4	10.6
55 to 64 years old	2,301	2,850	3,601	4,498	6.9	8.0	9.6	10.3
65 to 74 years old	1,608	1,695	1,921	3,634	4.8	4.8	5.1	8.4
75 to 84 years old	862	919	947	1,457	2.6	2.6	2.5	3.3
85 years old and over	310	344	381	496	0.9	1.0	1.0	1.1
Male	15,871	16,760	17,676	20,494	47.3	47.2	47.2	47.1
Female	17,697	18,725	19,790	23,017	52.7	52.8	52.8	52.9
Non-Hispanic American Indian, Eskimo, Aleut, total	**2,054**	**2,183**	**2,320**	**2,744**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	180	192	206	229	8.8	8.8	8.9	8.4
5 to 13 years old	352	347	364	429	17.1	15.9	15.7	15.6
14 to 17 years old	165	175	166	198	8.0	8.0	7.1	7.2
18 to 24 years old	239	268	282	304	11.6	12.3	12.1	11.1
25 to 34 years old	303	316	349	390	14.7	14.5	15.0	14.2
35 to 44 years old	301	293	290	372	14.7	13.4	12.5	13.6
45 to 54 years old	231	259	272	275	11.2	11.8	11.7	10.0
55 to 64 years old	136	164	195	227	6.6	7.5	8.4	8.3
65 to 74 years old	82	91	106	176	4.0	4.2	4.6	6.4
75 to 84 years old	46	52	57	92	2.2	2.4	2.4	3.4
85 years old and over	21	27	34	52	1.0	1.2	1.4	1.9
Male	1,008	1,070	1,136	1,342	49.1	49.0	48.9	48.9
Female	1,046	1,113	1,184	1,401	50.9	51.0	51.1	51.1
Non-Hispanic Asian, Pacific Islander, total	**10,584**	**12,454**	**14,402**	**20,748**	**100.0**	**100.0**	**100.0**	**100.0**
Under 5 years old	867	973	1,093	1,526	8.2	7.8	7.6	7.4
5 to 13 years old	1,524	1,787	1,993	2,770	14.4	14.4	13.8	13.4
14 to 17 years old	680	803	944	1,277	6.4	6.4	6.6	6.2
18 to 24 years old	1,080	1,311	1,521	2,114	10.2	10.5	10.6	10.2
25 to 34 years old	1,744	1,887	2,141	3,104	16.5	15.2	14.9	15.0
35 to 44 years old	1,793	1,998	2,165	2,876	16.9	16.0	15.0	13.9
45 to 54 years old	1,344	1,644	1,910	2,415	12.7	13.2	13.3	11.6
55 to 64 years old	770	1,046	1,354	2,055	7.3	8.4	9.4	9.9
65 to 74 years old	500	615	771	1,516	4.7	4.9	5.4	7.3
75 to 84 years old	231	311	387	787	2.2	2.5	2.7	3.8
85 years old and over	51	78	123	308	0.5	0.6	0.9	1.5
Male	5,065	5,928	6,835	9,838	47.9	47.6	47.5	47.4
Female	5,520	6,526	7,567	10,910	52.1	52.4	52.5	52.6

[1] Persons of Hispanic origin may be of any race.

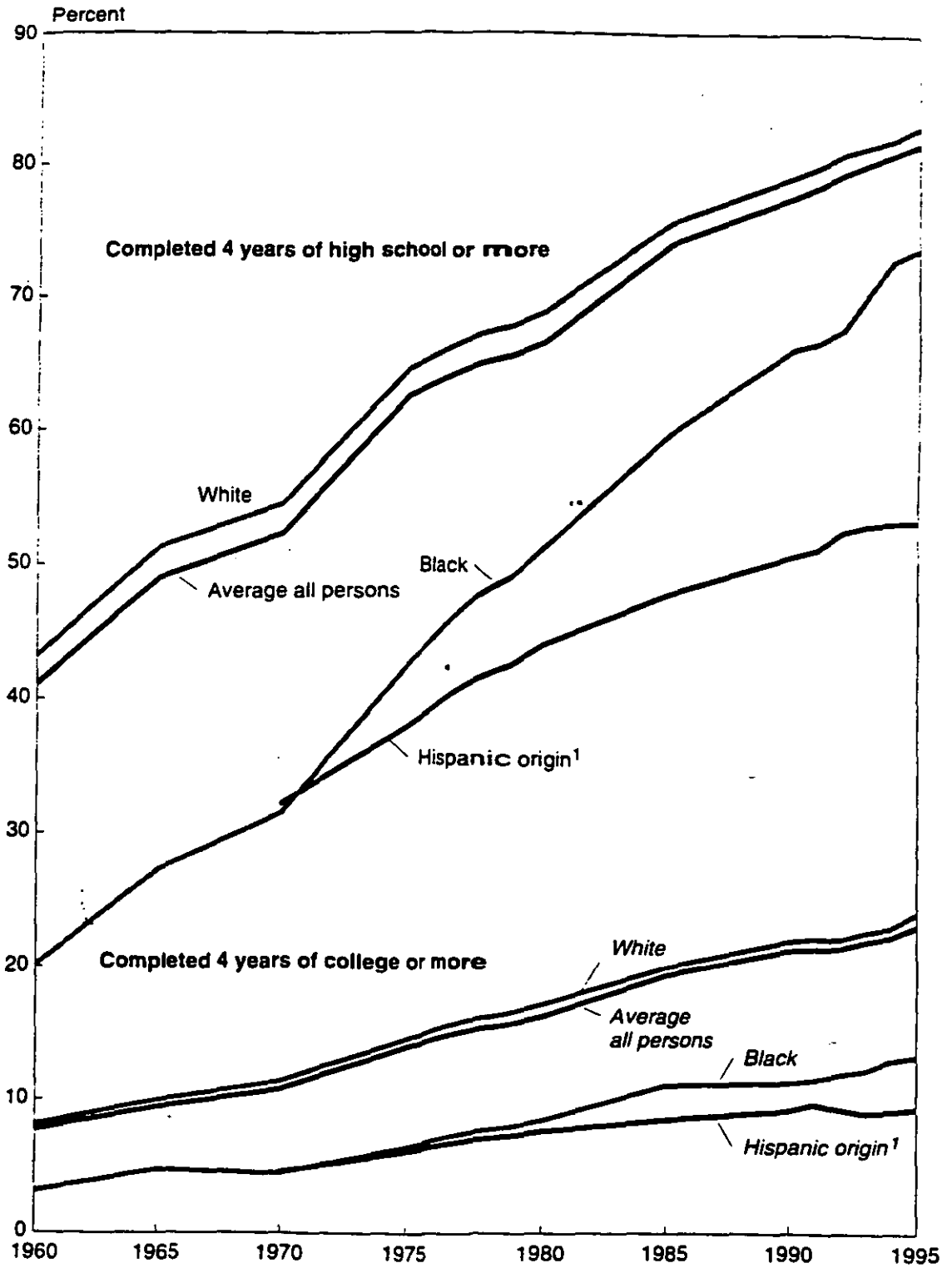
Source: U.S. Bureau of the Census. *Current Population Reports*, P25-1130.

Source: Statistical Abstract of the United States, 1996.

COLLEGE GRADUATION-RATES ARE INCREASING MORE SLOWLY FOR BLACK AND HISPANIC AMERICANS THAN FOR WHITES

Educational Attainment by Race and Hispanic Origin: 1960 to 1995

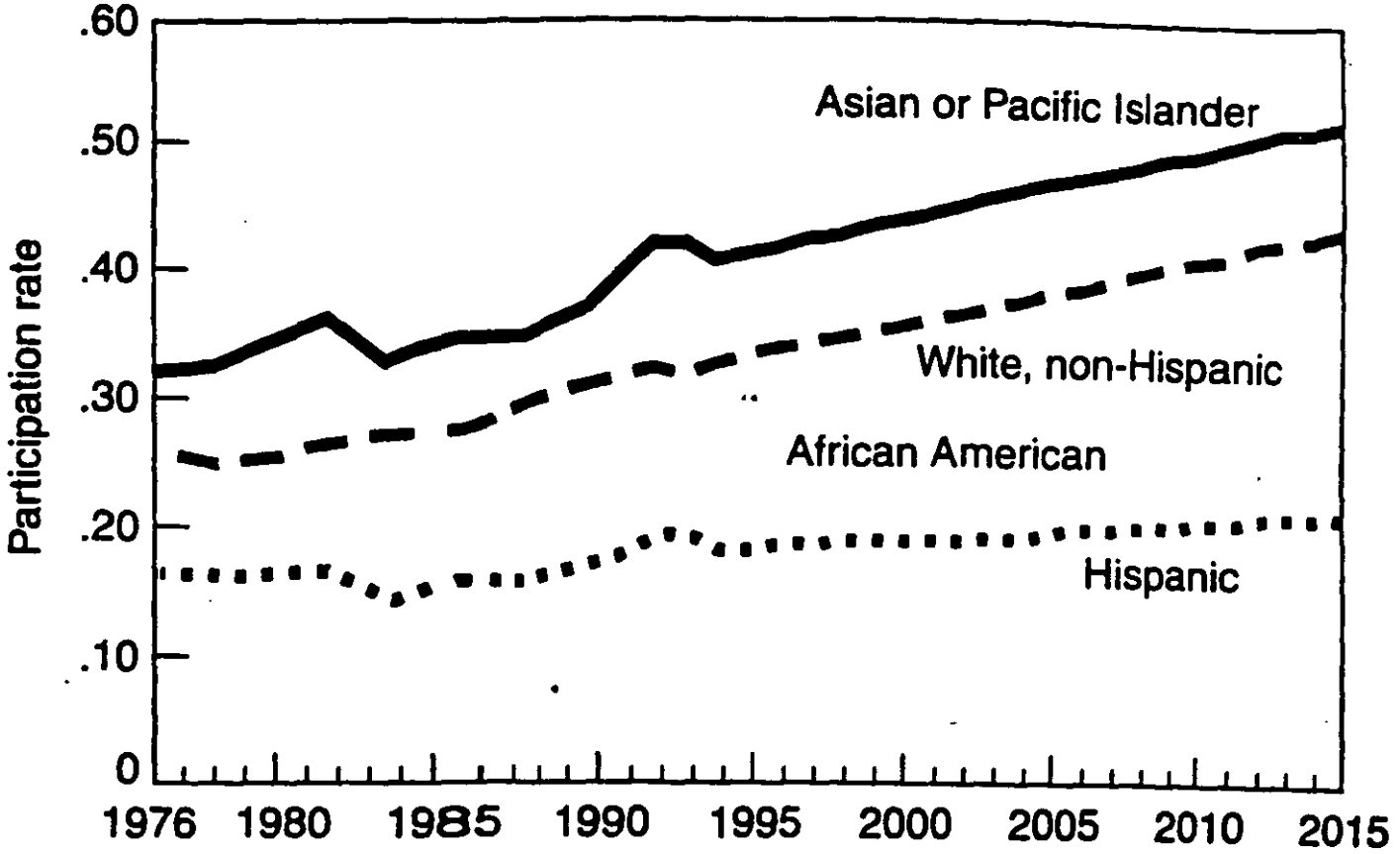
(For persons 25 years old and over)



[1] Persons of Hispanic origin may be of any race. Data for 1960 and 1965 not available for persons of Hispanic origin.
Source: Charts prepared by U.S. Bureau of the Census. For data, see table 241.

Source: Statistical Abstract of the United States, 1996.

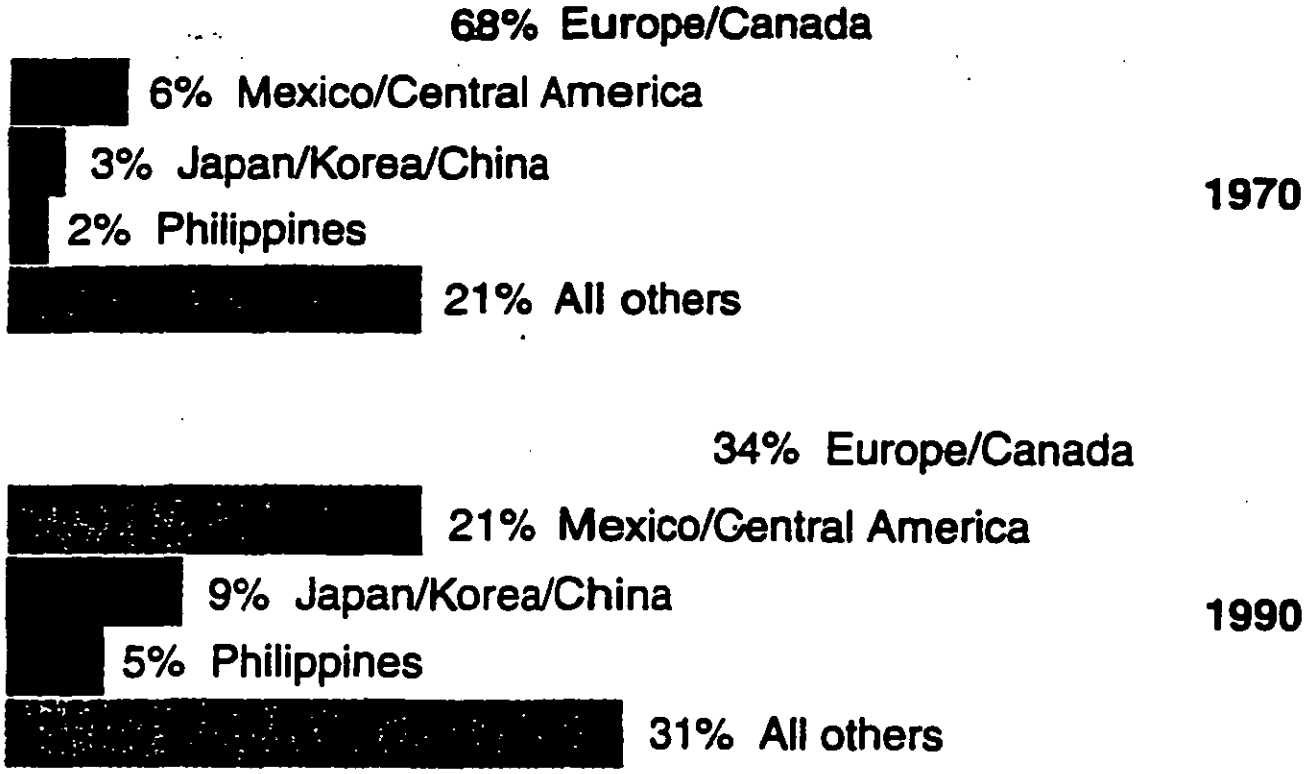
ASIANS AND WHITES ARE CLIMBING THE LADDER OF EDUCATIONAL OPPORTUNITY MUCH FASTER THAN BLACKS AND HISPANICS



Rate of Participation of Different Ethnic/Racial Groups in Higher Education

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

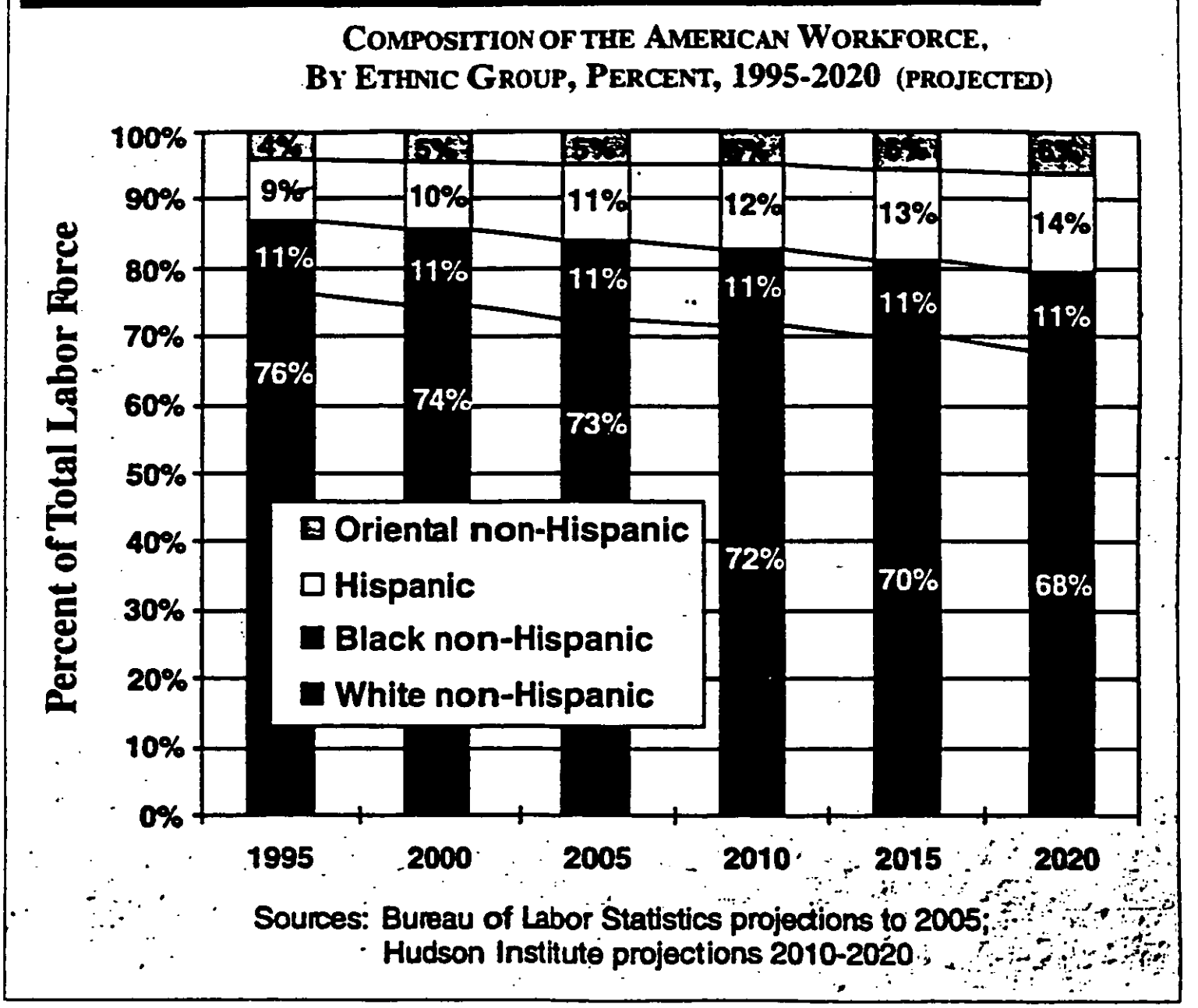
FEWER EUROPEAN IMMIGRANTS, MORE LATINOS AND ASIANS



Changing Composition of America's Immigrant Population

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

The Ethnic Composition of the American Workforce is Gradually Changing



Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

WHILE LESS POLITICAL AND MORE JOB-DRIVEN THAN BEFORE, FRESHMEN WANT BETTER RACIAL UNDERSTANDING

Values Important to College Freshmen
(% Indicating Essential or Very Important)[1]

	Boomer Years			13th Generation		
	1966	1972	1978	1980	1985	1992
Creativity						
– Accomplished performing arts	11	12	13	12	11	11
Contribution to science	13	11	14	15	13	18
– Write original works	15	17	14	14	11	12
– Creating artistic work	15	17	14	14	11	12
Professional Life						
– Authority in field	66	61	73	73	71	69
Recognition for contribution	43	37	50	54	55	55
Expert-finance/commerce	13	16	—	—	26	—
Administrative responsibility	29	24	36	39	43	41
– Successful own business	53	45	48	49	52	42
Personal Well-Being						
* Well-off financially	44	41	60	63	71	73
– Develop philosophy of life	83[2]	71	56	59	43	46
Raise a family	71[3]	65	62	63	70	71
Political Involvement						
– Political affairs	58	49	37	40	38[4]	39
Influence political structure	—	46	15	16	16	20
– Participate in community action	—	29	27	27	26	26
Becoming a community leader	26	15	—	—	—	31
Social Involvement						
– Help others	69	67	65	65	63	63
→ Racial understanding	—	—	34	33	32	42
* Influence social values	—	30	31	32	33	43
Environmental action	—	45	27	27	20	34

1980 - 92

– = DECREASE

* = 10 POINT OR GREATER INCREASE

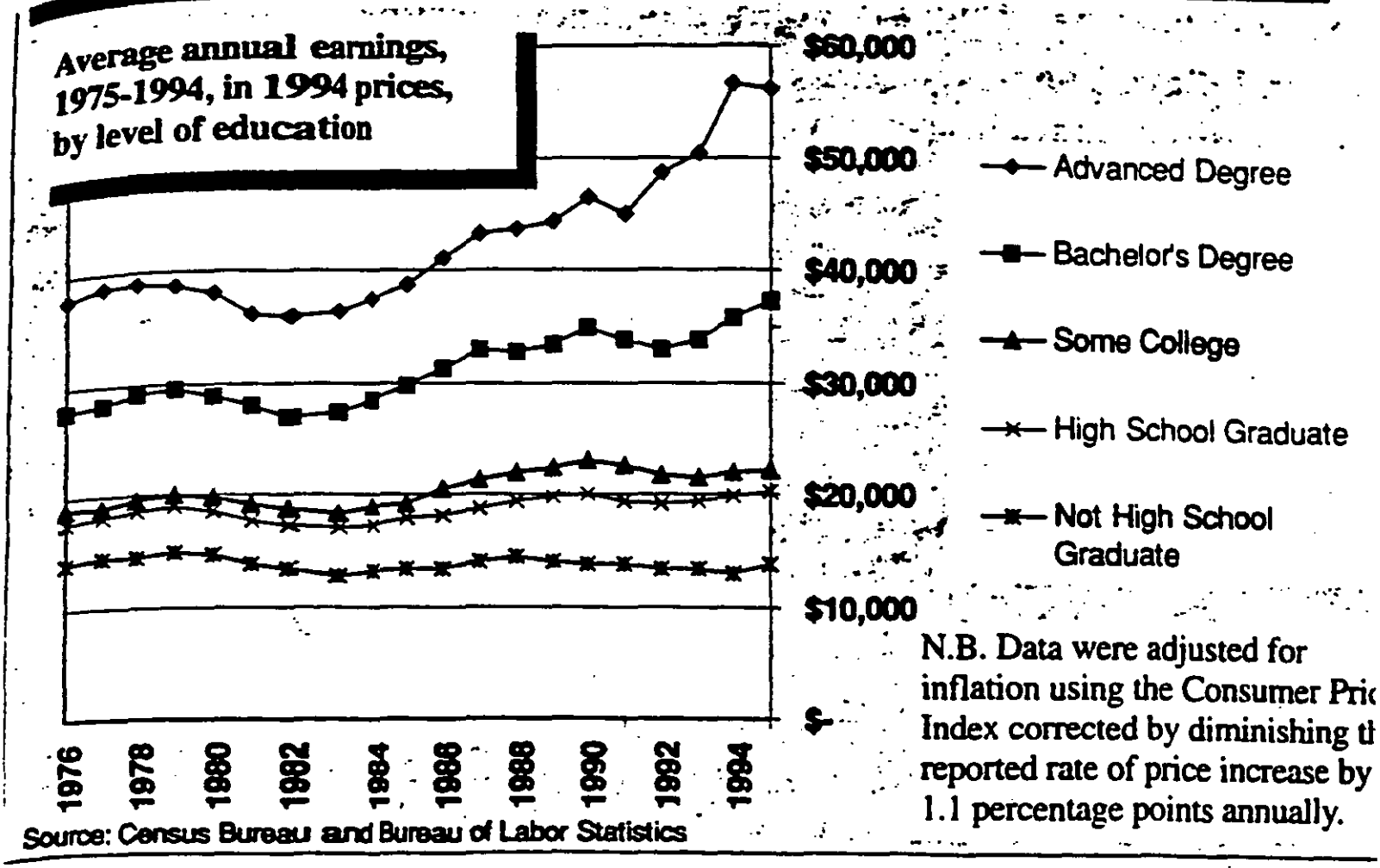
[1]Source: Astin, A.W., Green, K.C., and Korn, W.S. 1987. The American Freshman: Twenty Year Trends, 1966-1985. The Higher Education Research Institute and American Council on Education. Los Angeles: University of California. "The American Freshman: National Norms for Fall 1992." The Higher Education Research Institute and American Council on Education. Los Angeles: University of California as reported in the Chronicle of Higher Education. 1994. The Almanac of Higher Education. Chicago: University of Chicago Press.
[2]1967 data. [3]1969 data. [4]1984 data.

Source: Philip D. Gardner, Collegiate Employment Research Institute, Michigan State University, "Demographic and Attitudinal Trends: The Increasing Diversity of Today's and Tomorrow's Learner" (1994).

THE ECONOMIC VALUE OF HIGHER EDUCATION

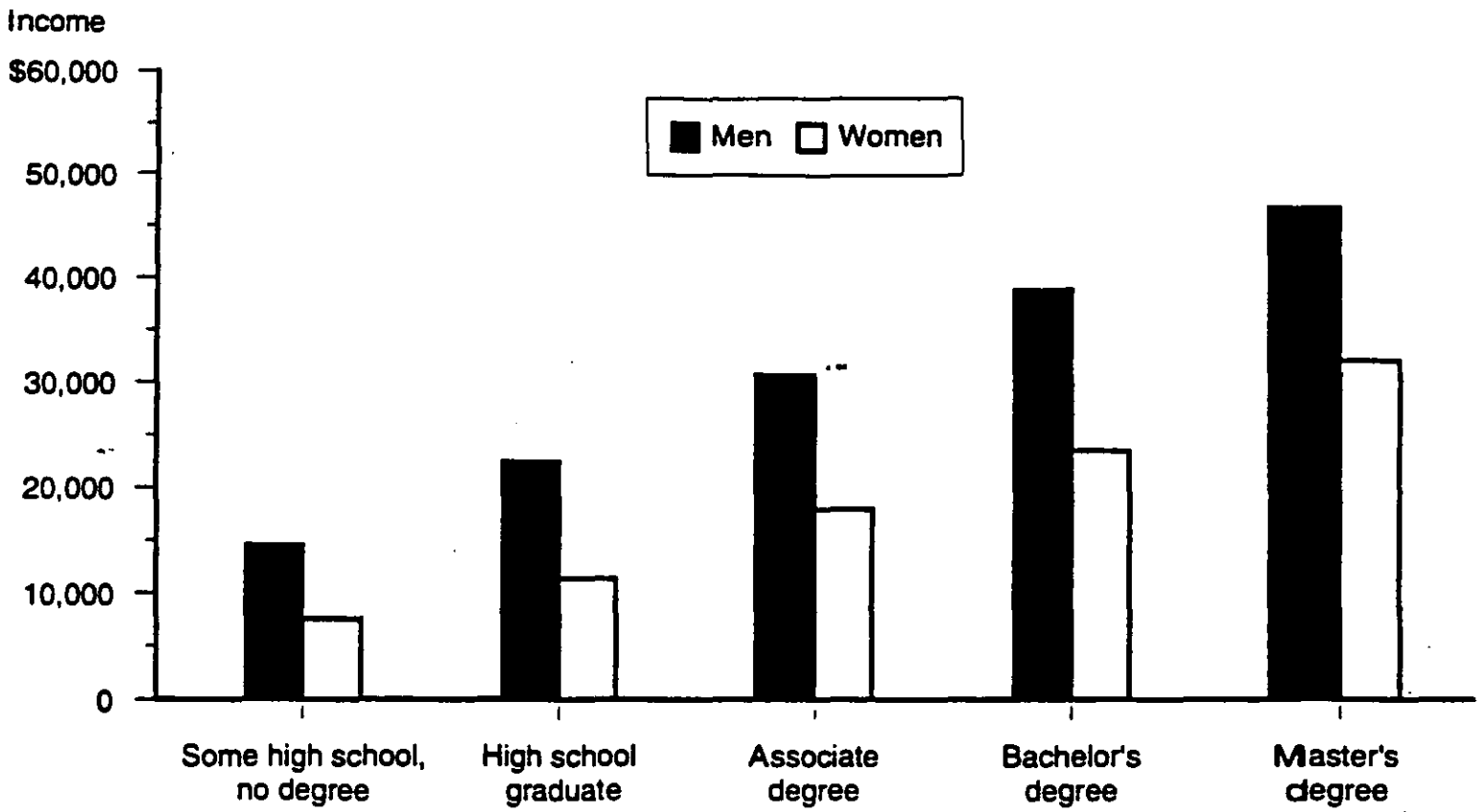
COLLEGE AND ADVANCED DEGREES ARE A TERRIFIC INVESTMENT

ON AVERAGE, BETTER EDUCATED WORKERS EARN BETTER



Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

Median annual earnings of workers 25 years old and over, by highest degree attained and sex: 1994



SOURCE: U.S. Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P-60, *Monthly Inco of Households, Families, and Persons in the United States: 1994*.

Source: U.S. Dept. of Education, Digest of Education Statistics (1996).

JOB TRENDS

HOW WELL PREPARED WILL AMERICANS BE FOR THE MILLIONS OF NEW JOBS?

U.S. JOB GROWTH TO 2005

(Based on BLS projections. Numbers are in thousands.)

Total employment in 1994		**127,014**
***Minus:* Jobs vacated due to retirements and other departures from the labor force between 1994 and 2005**	**31,937**	
***Plus:* Replacements to fill those vacated jobs between 1994 and 2005**	**29,491**	
***Plus:* Jobs added due to economic growth between 1994 and 2005**	**20,140**	
***Equals:* Total employment in 2005**		**144,708**
***Minus:* Employment in 1994**	**127,014**	
***Equals: Net* job growth between 1994 and 2005**		**17,694**

Note that the total number of jobs to be newly filled between 1994 and 2005 consists of replacements (29,491 thousand) plus jobs added due to economic growth (20,140 thousand) for a total of 49,631 jobs. That is much larger than net job growth (17,694 thousand).

Source: Bureau of Labor Statistics N.B. 2005 is the last year for which the BLS has prepared projections.

Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

HEALTH CARE JOBS WILL BOOM; OLD-TECHNOLOGY JOBS WILL FADE

Employment Projections, by Occupation

Civilian Employment in the Fastest Growing and Fastest Declining Occupations: 1994 to 2005

[Occupations are in order of employment percent change 1994-2005 (moderate growth). Includes wage and salary jobs, self-employed and unpaid family members. Estimates based on the Current Employment Statistics estimates and the Occupational Employment Statistics estimates. See source for methodological assumptions. Minus sign (-) indicates decrease]

OCCUPATION	EMPLOYMENT (1,000)				PERCENT CHANGE 1994-2005		
	1994	2005 [1]					
		Low	Moderate	High	Low	Moderate	High
X = HEALTH, ELDERLY							
Total, all occupations [2]	127,015	140,261	144,708	150,212	10.4	13.9	18.3
FASTEST GROWING							
Personal and home care aides	179	382	391	397	114.0	118.7	122.3
Home health aides	420	832	848	863	98.3	102.0	105.7
Systems analysts	483	893	928	972	84.9	92.1	101.3
Computer engineers	195	355	372	394	81.8	90.4	101.9
Physical and corrective therapy assistants and aides	78	141	142	143	82.3	83.1	84.5
Electronic pagination systems workers	18	32	33	34	77.2	82.8	88.2
Occupational therapy assistants and aides	16	28	29	29	80.0	82.1	86.5
Physical therapists	102	182	183	185	78.9	80.0	81.9
Residential counselors	165	284	290	295	72.7	76.5	79.5
Human services workers	168	284	293	303	68.8	74.5	80.0
Occupational therapists	54	91	93	95	68.7	72.2	77.3
Manicurists	38	63	64	64	68.7	69.5	69.9
Medical assistants	206	329	327	324	59.9	59.0	57.9
Paralegals	110	170	175	179	54.3	58.3	62.4
Medical records technicians	81	125	126	130	53.5	55.8	59.8
Teachers, special education	388	545	593	648	40.6	53.0	67.2
Amusement and recreation attendants	267	398	406	414	49.2	52.0	55.2
Correction officers	310	430	468	513	38.5	50.9	65.2
Operations research analysts	44	65	67	69	45.5	50.0	55.8
Guards	867	1,248	1,282	1,322	44.0	47.9	52.5
Speech-language pathologists and audiologists	85	120	125	130	40.3	46.0	52.8
Detectives, except public	55	77	79	80	41.7	44.3	47.2
Surgical technologists	46	64	65	68	39.3	42.5	48.6
Dental hygienists	127	182	180	178	43.3	42.1	40.1
Dental assistants	190	271	269	266	43.1	41.9	40.0
Adjustment clerks	373	505	521	540	35.1	39.6	44.6
Teacher aides and educational assistants	932	1,211	1,296	1,393	29.9	39.0	49.5
Data processing equipment repairers	75	100	104	108	33.3	38.2	44.1
Nursery and greenhouse managers	19	26	26	26	38.3	37.5	37.3
Securities and financial services sales workers	246	328	335	343	33.6	36.6	39.5
Bill and account collectors	250	334	342	351	33.3	36.5	40.1
Respiratory therapists	73	96	99	104	32.3	36.4	43.8
Pest controllers and assistants	56	75	76	78	33.2	35.6	38.6
Emergency medical technicians	138	178	187	197	29.0	35.6	42.6
FASTEST DECLINING							
X = TECHNOLOGY CHANGE							
Letterpress operators	14	4	4	4	-72.2	-71.3	-70.5
Typesetting and composing machine operators [3]	20	6	6	6	-72.0	-71.1	-70.2
Directory assistance operators	33	10	10	10	-71.5	-70.4	-69.4
Station installers and repairers, telephone	37	10	11	11	-71.5	-70.4	-69.4
Central office operators	48	14	14	15	-71.4	-70.3	-69.2
Billing, posting, and calculating machine operators	96	32	32	33	-67.2	-66.7	-66.1
Data entry keyers, composing	19	6	6	7	-67.7	-66.6	-65.5
Shoe sewing machine operators and tenders	14	4	5	7	-70.9	-63.6	-53.8
Roustabouts	28	13	13	16	-54.2	-55.0	-43.5
Peripheral EDP equipment operators	30	13	13	14	-56.9	-54.8	-52.3
Cooks, private household	9	5	5	4	-48.1	-49.2	-50.5
Motion picture projectionists	8	4	4	4	-46.4	-47.3	-48.0
Rail yard engineers, dinkey operators, and hostlers	6	3	4	4	-44.3	-40.4	-36.5
Central office and PBX installers and repairers	84	50	51	53	-41.0	-39.1	-37.1
Computer operators, except peripheral equipment	259	157	162	168	-39.6	-37.7	-35.3
Statement clerks	25	15	16	16	-39.8	-37.7	-35.5
Housekeepers and butlers	20	13	12	12	-36.1	-37.5	-39.1
Drilling/boring machine tool setters and set-up operators [4]	45	28	30	32	-38.1	-34.9	-29.6
Fitters, structural metal, precision	14	9	9	10	-38.3	-34.6	-29.4
Mining, quarrying, and tunneling occupations	18	11	12	13	-39.5	-33.9	-27.8
Typists and word processors	646	418	434	452	-35.2	-32.8	-30.0
Photoengraving and lithographic machine operators [3]	5	3	3	3	-33.7	-32.1	-30.5
Boiler operators and tenders, low pressure	18	12	12	13	-34.5	-31.9	-29.1
Railroad brake, signal, and switch operators	19	12	13	14	-35.8	-30.8	-26.1
Lathe and turning machine tool setters and set-up operators [4]	71	47	50	54	-34.2	-30.6	-24.9
Cement and gluing machine operators and tenders	36	24	25	27	-34.0	-30.1	-25.3
EKG technicians	16	11	11	12	-31.5	-29.7	-26.6
Machine tool cutting operators and tenders, metal and plastic	119	80	85	92	-32.8	-28.9	-22.8
Paste-up workers	22	16	16	17	-30.1	-27.8	-25.7
Shoe and leather workers and repairers, precision	24	16	17	19	-33.8	-27.6	-19.4
Bank tellers	559	391	407	423	-30.1	-27.3	-24.4

[1] Based on low, moderate, or high trend assumptions. [2] Includes other occupations, not shown separately. [3] Includes tenders. [4] Includes metal and plastic.

Source: U.S. Bureau of Labor Statistics, *Monthly Labor Review*, November 1995.

Source: Statistical Abstract of the United States, 1996.

SOCIAL, BUSINESS, AND MECHANICAL SERVICE WORK WILL INCREASE

Employment by Selected Industry, With Projections: 1983 to 2005

[Figures may differ from those in other tables since these data exclude establishments not elsewhere classified (SIC 99). In addition, agriculture services (SIC 074, 5, 8) are included in agriculture, not services. See source for details. Minus sign (-) indicates decrease]

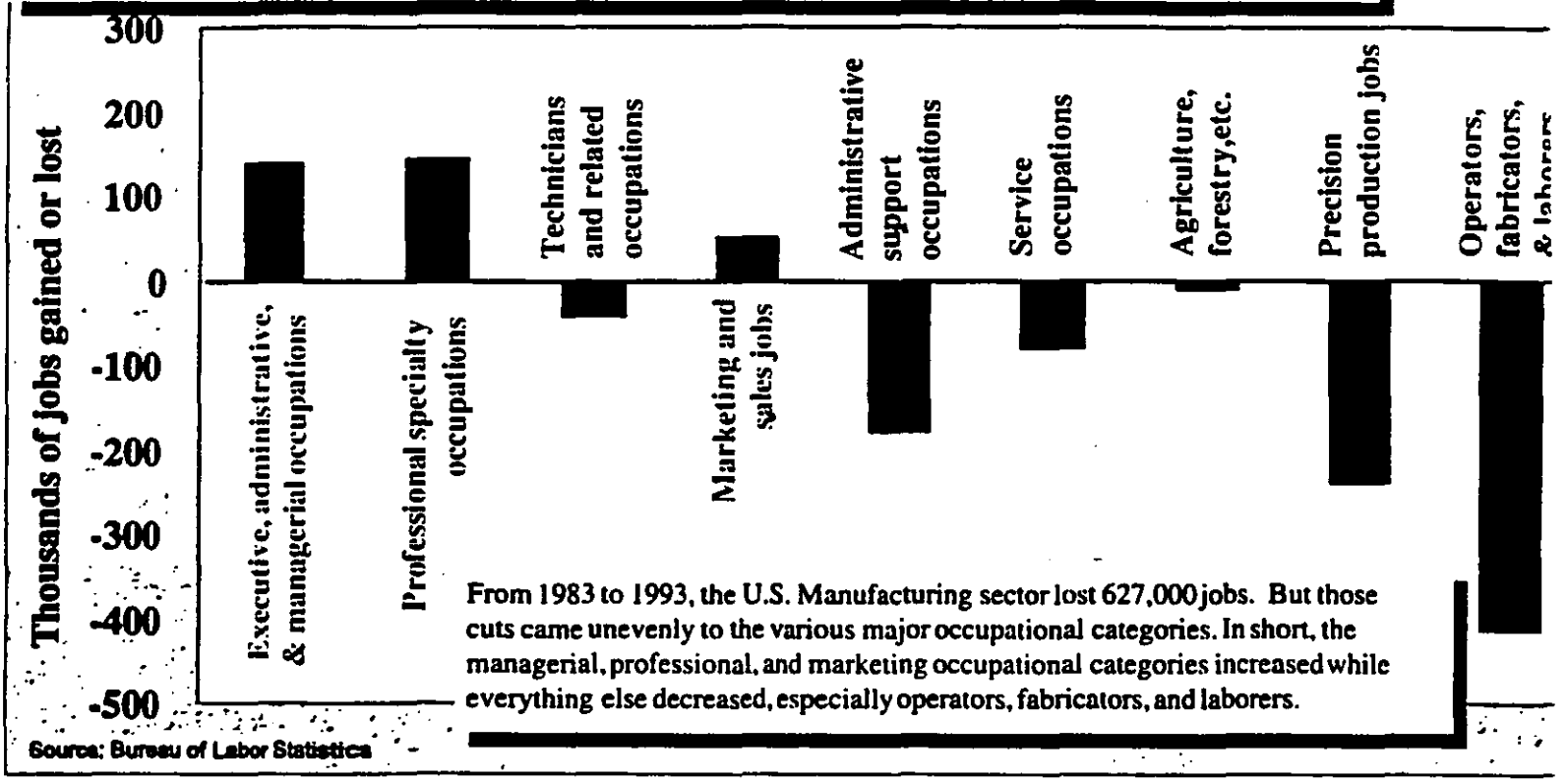
INDUSTRY	1987 SIC [1] code	EMPLOYMENT (1,000)			ANNUAL GROWTH RATE	
		1983	1994	2005, proj. [2]	1983-1994	1994-2005, proj. [2]
Total	(X)	102,404	127,014	144,708	2.0	1.2
Nonfarm wage and salary	(X)	89,734	113,340	130,185	2.1	1.3
Goods-producing (excluding agriculture)	(X)	23,328	23,914	22,930	0.2	-0.4
Mining	10-14	952	601	439	-4.1	-2.6
Construction	15,16,17	3,946	5,010	5,500	2.2	0.9
Manufacturing	20-39	18,430	18,304	16,991	-0.1	-0.7
Durable manufacturing	24,25,32-39	10,707	10,431	9,290	-0.2	-1.0
Lumber and wood products	24	670	752	685	1.1	-0.9
Furniture and fixtures	25	448	502	515	1.0	0.2
Stone, clay and glass products	32	541	533	434	-0.1	-1.8
Primary metal industries	33	632	699	532	1.6	-2.5
Blast furnaces/basic steel products	331	341	239	155	-3.2	-3.9
Fabricated metal products	34	1,368	1,387	1,181	0.1	-1.5
Industrial machinery and equipment	35	2,052	1,985	1,769	-0.3	-1.0
Computer equipment	357	474	351	263	-2.7	-2.6
Electronic and other electric equipment [3]	36	1,704	1,571	1,408	-0.7	-1.0
Communications equipment	366	279	244	210	-1.2	-1.3
Electronic components	367	563	544	553	-0.3	0.1
Transportation equipment	37	1,731	1,749	1,567	0.1	-1.0
Motor vehicles and equipment	371	754	899	775	1.6	-1.3
Instruments and related products	38	990	863	798	-1.2	-0.7
Measuring/controlling devices	382	300	264	248	-0.5	-1.2
Medical instruments and supplies	384	198	265	306	2.7	1.3
Miscellaneous manufacturing industries	39	370	391	404	0.5	0.3
Nondurable manufacturing	20-23,26-31	7,723	7,873	7,700	0.2	-0.2
Food and kindred products	20	1,612	1,680	1,696	0.4	0.1
Tobacco manufactures	21	68	42	26	-4.2	-4.2
Textile mill products	22	742	673	568	-0.9	-1.5
Apparel and other textile products	23	1,163	969	772	-1.6	-2.1
Paper and allied products	26	654	691	708	0.5	0.2
Printing and publishing	27	1,298	1,542	1,627	1.6	0.5
Chemicals and allied products	28	1,043	1,061	1,067	0.2	0.1
Petroleum and coal products	29	196	149	140	-2.4	-0.5
Rubber/misc. plastics products	30	743	952	1,030	2.3	0.7
Leather and leather products	31	205	114	65	-5.2	-4.9
Service producing	(X)	66,407	89,425	107,256	2.7	1.7
Transportation, communications, utilities	40-42,44-49	4,958	6,006	6,431	1.8	0.6
Transportation	40-42,44-47	2,748	3,775	4,251	2.9	1.1
Communications	48	1,324	1,305	1,235	-0.1	-0.5
Electric, gas, and sanitary services	49	887	927	945	0.4	0.2
Wholesale trade	50,51	5,283	6,140	6,559	1.4	0.6
Retail trade	52-59	15,587	20,438	23,094	2.5	1.1
Eating and drinking places	58	5,038	7,069	8,089	3.1	1.2
Finance, insurance, and real estate	60-67	5,466	6,933	7,373	2.2	0.6
Services	70-87,89	19,242	30,792	42,810	4.4	3.0
Hotels and other lodging places	70	1,172	1,618	1,899	3.0	1.5
Personal services	72	869	1,139	1,374	2.5	1.7
Business services [3]	73	2,948	6,239	10,032	7.1	4.4
Advertising	731	171	224	250	2.5	1.0
Services to buildings	734	559	855	1,350	3.9	4.2
Personnel supply services	736	619	2,254	3,564	12.5	4.3
Computer and data processing services	737	416	950	1,611	7.8	4.9
Auto repair, services, and garages	75	619	971	1,345	4.2	3.0
Miscellaneous repair shops	76	287	334	400	1.4	1.7
Motion pictures	78	268	471	591	5.3	2.1
Video tape rental	784	54	138	165	8.9	1.7
Amusement and recreation services	79	853	1,344	1,844	4.2	2.9
Health services	80	5,986	9,001	12,075	3.8	2.7
Offices of health practitioners	801,2,3,4	1,503	2,546	3,525	4.9	3.0
Nursing and personal care facilities	805	1,106	1,649	2,400	3.7	3.5
Hospitals, private	806	3,037	3,774	4,250	2.0	1.1
Health services, n.e.c. [4]	807,8,9	341	1,032	1,900	10.6	5.7
Legal services	81	602	927	1,270	4.0	2.9
Educational services	82	1,225	1,822	2,400	3.7	2.5
Social services	83	1,188	2,181	3,639	5.7	4.8
Museums, botanical, zoological gardens	84	43	79	112	5.8	3.2
Membership organizations	86	1,510	2,059	2,336	2.9	1.2
Engineering, management, and services	87,89	1,673	2,607	3,494	4.1	2.7
Government	(X)	15,670	19,117	20,990	1.7	0.9
Federal government	(X)	2,774	2,870	2,635	0.3	-0.8
State and local government	(X)	13,096	16,247	18,355	2.0	1.1
Agriculture	01,02,07,08,09	3,508	3,623	3,399	0.3	-0.6
Private households	88	1,247	966	600	-2.3	-1.7
Nonagriculture self-employed and unpaid family	(X)	7,914	9,085	10,324	1.3	1.2

X Not applicable. [1] 1987 Standard Industrial Classification; see text, section 13. [2] Based on assumptions of moderate growth; see source. [3] Includes other industries, not shown separately. [4] N.e.c. means not elsewhere classified.

Source: U.S. Bureau of Labor Statistics, *Monthly Labor Review*, November 1995.

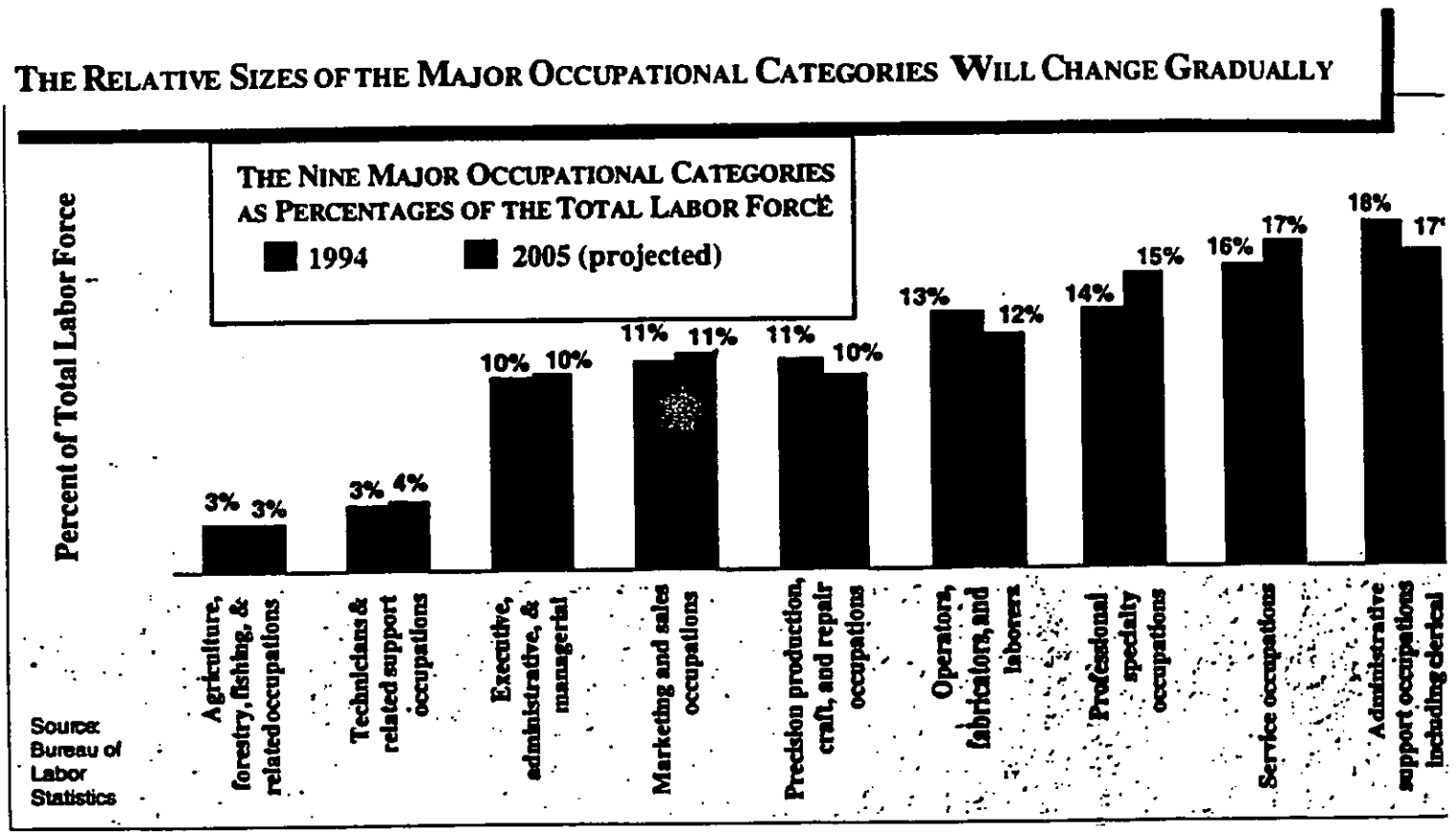
Source: Statistical Abstract of the United States, 1996.

Although Manufacturing Employment as a Whole Dropped from 1983-1993, Managerial, Professional, and Marketing Jobs Actually Increased



Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

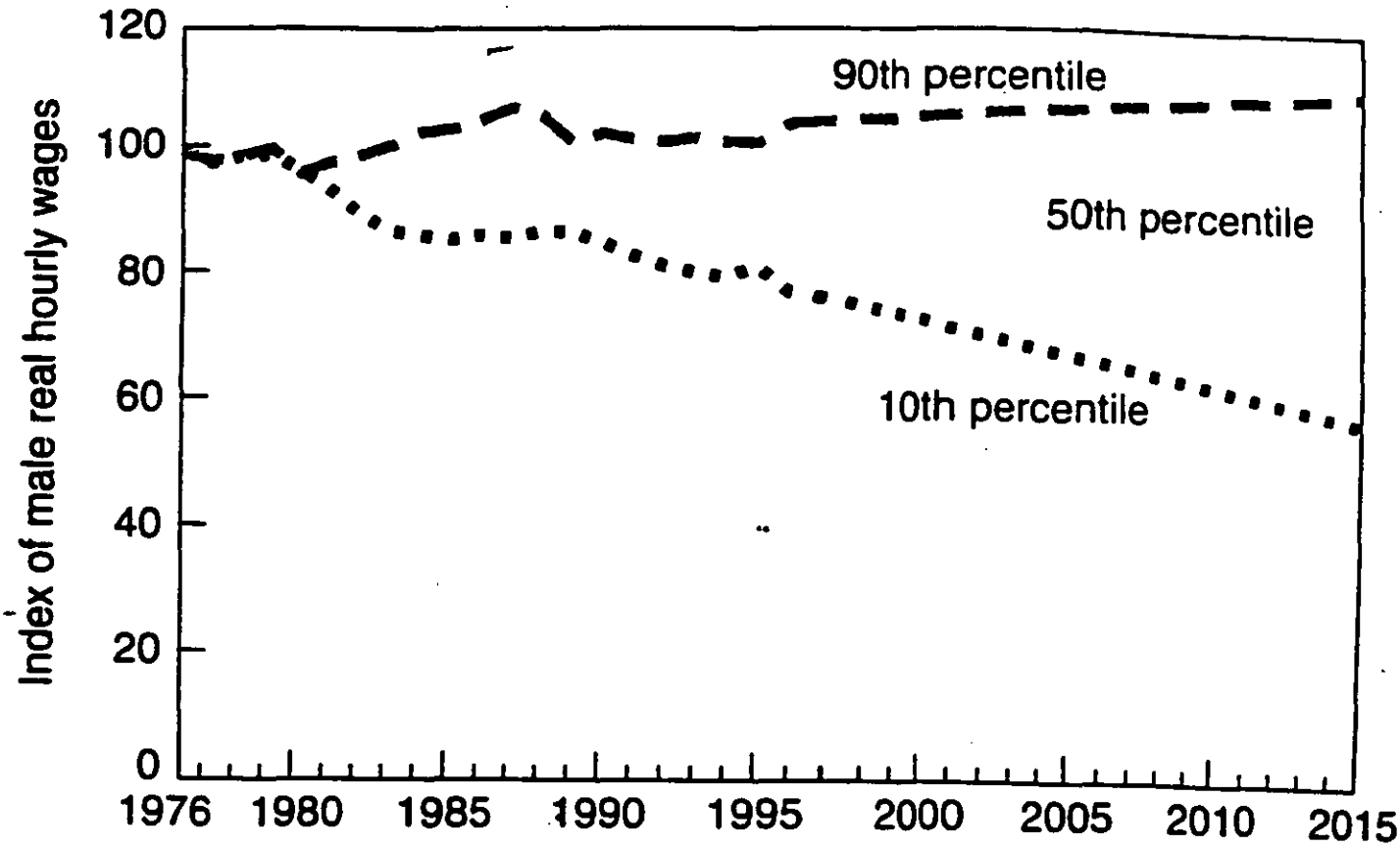
SERVICE, ADMINISTRATIVE, AND PROFESSIONAL WORKERS WILL BE A LARGER PART OF THE WORKFORCE



Source: 2020: Work and Workers in the 21st Century (The Hudson Institute) (1997).

INCOME TRENDS

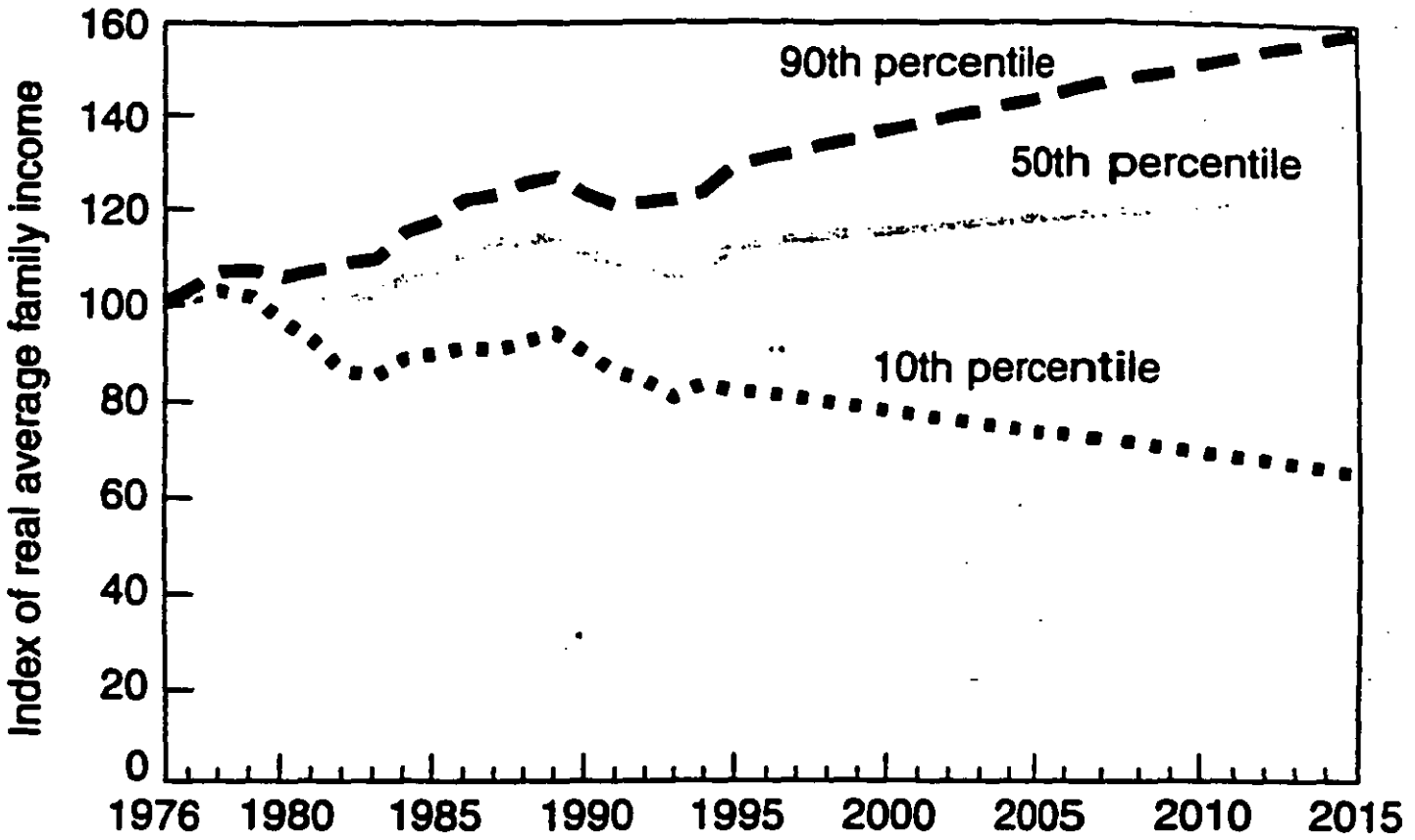
THE GAP BETWEEN HIGH-PAID AND LOW-PAID WORKERS IS INCREASING



Long-Term Trends in Hourly Wages of Male Workers

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

THE GAP BETWEEN AFFLUENT AND POOR FAMILIES IS INCREASING



Long-Term Trends in Family Earnings

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

FRESHMEN INCREASINGLY BELIEVE GRADUATE SCHOOL ESSENTIAL TO ECONOMIC SECURITY

Important Reasons Cited by College Freshmen (in %) For Going to College: Selected Years[1]

	1971	1978	1982	1985	1992
* Parents wanted me to go	23	29	33	—	34
Could not find a job	—	4	7	—	8
Get away from home	—	8	10	—	15
Get a better job	74	75	78	—	78
Gain general education	59	68	66	61	62
* Improving reading/study skills	22	38	39	40	41
Become more cultured	29	34	34	33	38
** Make more money	50	60	70	70	73
Learn things that interest me	69	74	72	73	73
** Prepare for graduate school	34	44	45	46	55
Mentor encouraged me to go	—	—	—	—	14
Meet new/interesting people	45	57	55	—	—
Nothing else to do	2	2	2	2	—

[1]Source: Astin, A.W., Green, K.C., and Korn, W.S. 1987. The American Freshman: Twent Year Trends, 1966-1985. The Higher Education Research Institute and American Council on Education. Los Angeles: University of California. "The American Freshman: National Norms for Fall 1992." The Higher Education Research Institute and American Council on Education. Los Angeles: University of California as reported in the Chronicle of Higher Education. 1994. The Almanac of Higher Education. Chicago: University of Chicago Press.

* = AT LEAST 10% INCR

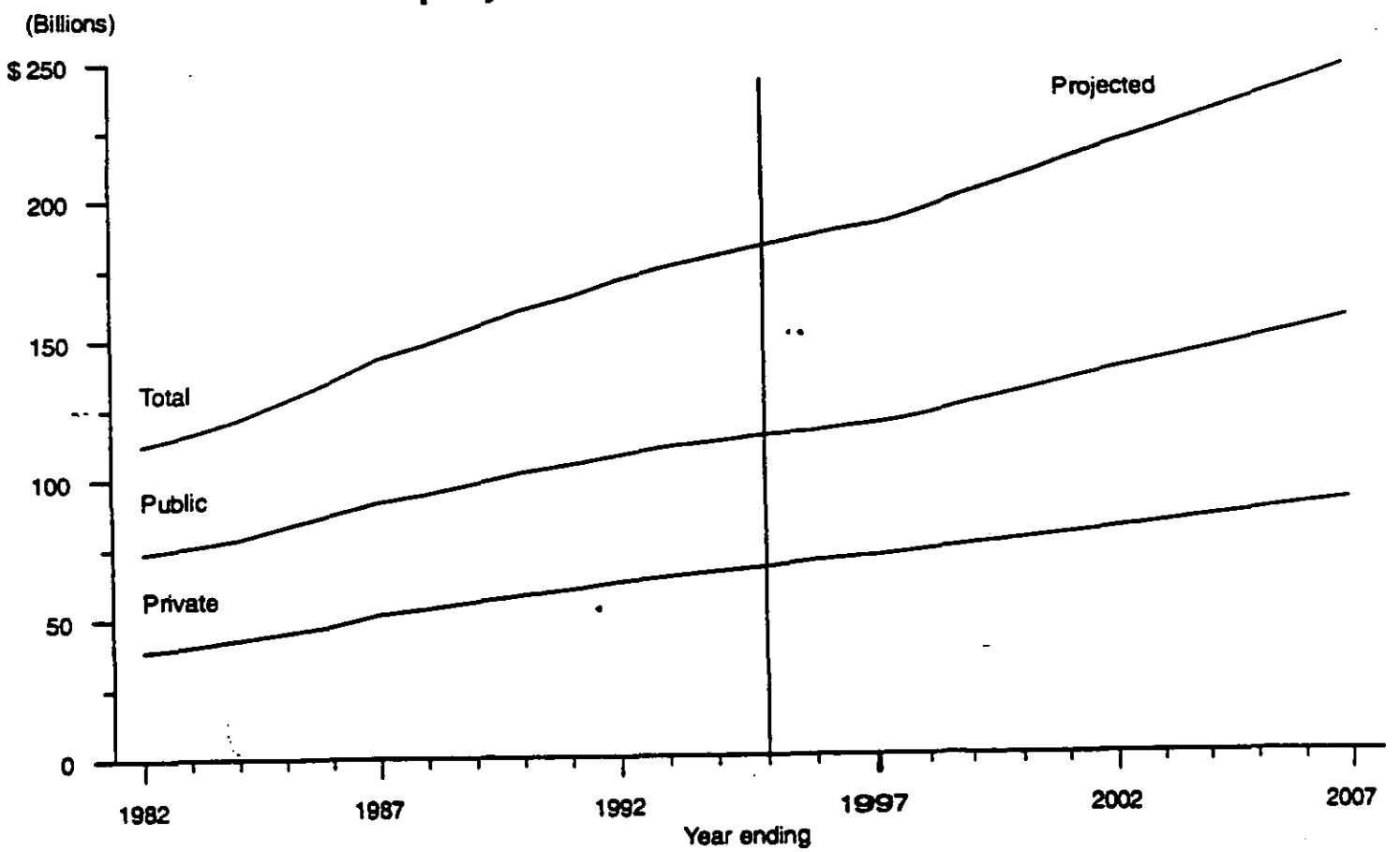
** AT LEAST 20% INCR

Source: Philip D. Gardner, Collegiate Employment Research Institute, Michigan State University, "Demographic and Attitudinal Trends: The Increasing Diversity of Today's and Tomorrow's Learner" (1994).

SOURCES OF FUNDS

EXPENDITURES AT PUBLIC AND PRIVATE INSTITUTIONS WILL INCREASE AT ABOUT THE SAME RATE, ALTHOUGH PRIVATE ENROLLMENTS WILL BE FLAT

Current-fund expenditures of public and private institutions of higher education (in constant 1994-95 dollars), with middle alternativ projections: 1981-82 to 2006-07



Source: U.S. Dept. of Education, Projections of Education Statistics to 2007 (1997).

THE COST OF EDUCATING A PUBLIC UNIVERSITY STUDENT WILL INCREASE MUCH MORE THAN INFLATION

Educational and General Expenditures and Educational and General Expenditures per Full-Time-Equivalent (FTE) Student of Public Four-Year Institutions, With Alternative Projections: 50 States and Washington, D.C., 1979-1980 to 2004-2005

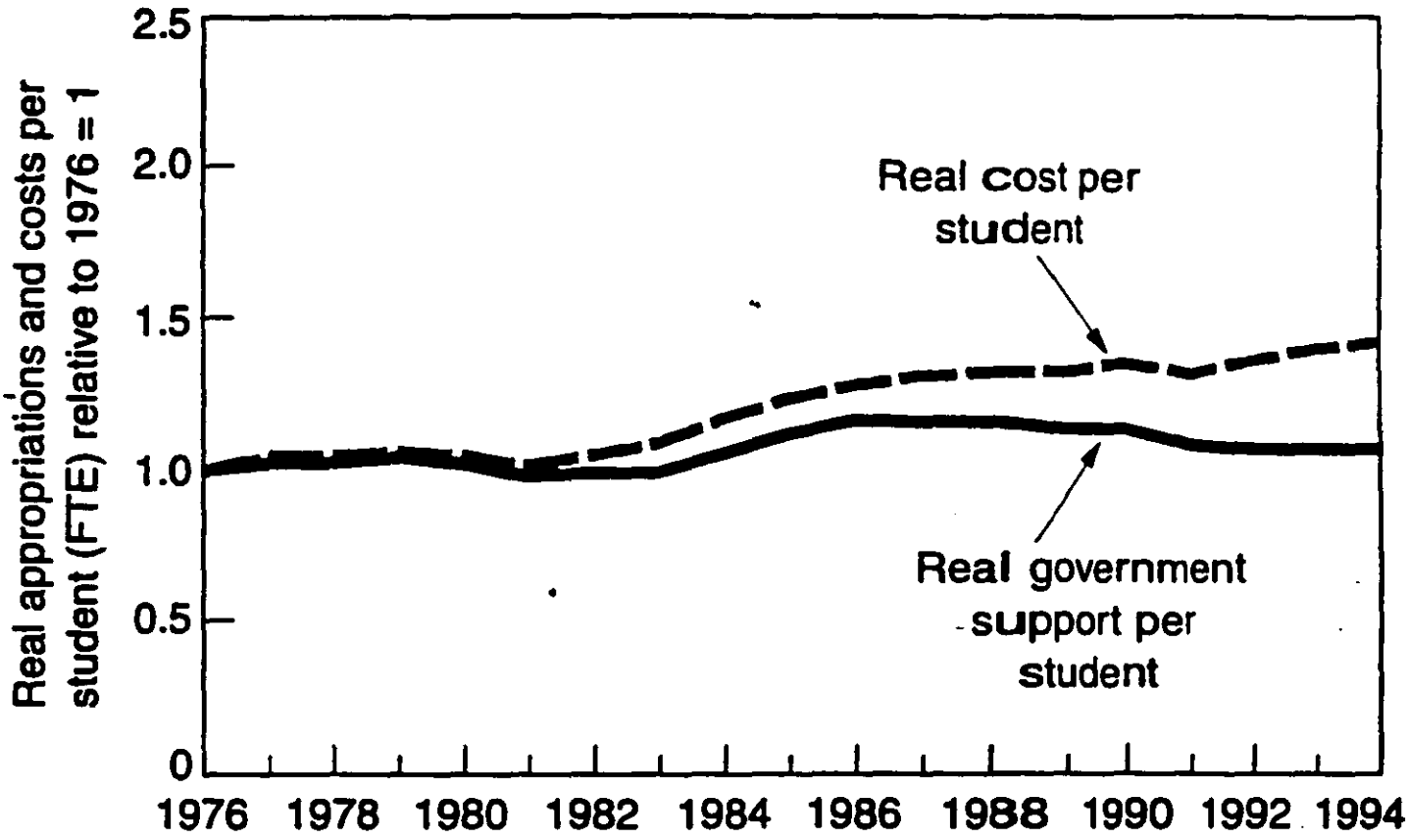
Year ending	Full-time-equivalent enrollment (in thousands)	Current-fund expenditures			
		Constant 1992-93 dollars[1]		Current dollars	
		Total (in billions)	Per student in FTE	Total (in billions)	Per student in FTE
1980	4,059	$44.6	$10,993	$24.3	$5,985
1981	4,158	44.6	10,723	27.1	6,515
1982	4,209	44.5	10,579	29.4	6,986
1983	4,221	45.6	10,796	31.4	7,434
1984	4,266	47.3	11,087	33.8	7,917
1985	4,238	50.3	11,859	37.3	8,800
1986	4,340	53.2	12,545	40.6	9,580
1987	4,295	55.7	12,976	43.5	10,130
1988	4,396	57.8	13,143	47.0	10,686
1989	4,506	59.7	13,252	50.8	11,270
1990	4,620	62.1	13,433	55.3	11,968
1991	4,740	63.1	13,302	59.3	12,504
1992	4,796	64.2	13,392	62.3	12,988
1993[2]	4,800	66.1	13,769	66.1	13,769
1994[2]	4,935	67.8	13,747	69.7	14,116
Middle alternative projections					
1994	4,942	70.0	14,155	74.1	14,998
1995	5,044	72.2	14,304	79.1	15,676
1996	4,942	74.4	15,063	84.4	17,074
1997	4,962	76.7	15,464	90.1	18,162
1998	5,006	78.9	15,758	96.0	19,184
1999	5,077	81.1	15,969	—	—
2000	5,158	83.2	16,135	—	—
2001	5,230	85.3	16,319	—	—
2002	5,294	87.5	16,520	—	—
2003	5,326	89.6	16,822	—	—
2004	5,390	91.9	17,041	—	—
Low alternative projections					
1994	4,942	69.9	14,152	74.7	15,115
1995	5,044	71.9	14,249	80.6	15,970
1996	4,942	74.0	14,967	87.2	17,643
1997	4,962	76.2	15,366	94.6	19,062
1998	5,006	78.4	15,656	102.4	20,455
1999	5,077	80.5	15,856	—	—
2000	5,158	82.6	16,015	—	—
2001	5,230	84.7	16,198	—	—
2002	5,294	86.8	16,399	—	—
2003	5,326	89.0	16,705	—	—
2004	5,390	91.2	16,916	—	—
High alternative projections					
1994	4,942	70.0	14,158	73.9	14,952
1995	5,044	72.5	14,369	78.8	15,614
1996	4,942	75.0	15,177	83.8	16,952
1997	4,962	77.3	15,585	88.9	17,919
1998	5,006	79.5	15,891	94.3	18,836
1999	5,077	81.8	16,113	—	—
2000	5,158	84.0	16,293	—	—
2001	5,230	86.2	16,484	—	—
2002	5,294	88.4	16,694	—	—
2003	5,326	90.6	17,008	—	—
2004	5,390	92.9	17,234	—	—

SOURCE: U.S. Department of Education, National Center for Education Statistics, "Financial Statistics of Institutions of Higher Education" and "Fall Enrollment in Colleges and Universities" surveys. (Table was prepared September 1994.)

NOTE: Projections in current dollars are not shown after 1999 due to the uncertain behavior over the long term.

1. Based on the Consumer Price Index for all urban consumers (from Bureau of Labor Statistics, U.S. Department of Labor).
2. Projected.

GOVERNMENT SUPPORT FOR HIGHER EDUCATION HAS LAGGED



Government Appropriations to Higher Education over 20 Years

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

R&D SUPPORT, ESPECIALLY FEDERAL SUPPORT, HAS DECLINED IN CONSTANT DOLLARS

R&D Expenditures: 1960 to 1995

[Includes basic research, applied research, and development. Defense-related outlays comprise all research and development spending by Dept. of Defense, including space activities, and a portion of Department of Energy funds. Space-related outlays are those of the National Aeronautics and Space Administration; they exclude space activities of other Federal agencies, estimated at less than 5 percent of all space research and development spending. Minus sign (-) indicates decrease]

YEAR	CURRENT DOLLARS (bil. dol.)			CONSTANT (1987) DOLLARS [1]		ANNUAL PERCENT CHANGE [3]		PERCENT OF TOTAL R&D OUTLAYS				
								Federally funded defense/space-related			Other outlays	
	Total	Defense space related	Other	Total (bil. dol.)	Percent of GDP [2]	Current dollars	Constant dollars	Total	Defense	Space	Non-Federal	Federal
1960	13.5	7.5	6.0	52.0	2.6	9.4	7.6	55	52	3	35	
1965	20.0	10.8	9.3	70.6	2.9	6.3	3.7	54	33	21	35	1
1970	26.1	11.4	14.7	74.6	2.6	2.0	-3.2	44	33	10	43	1
1973	30.7	11.9	18.9	74.9	2.3	7.9	1.7	39	32	7	47	1
1974	32.9	11.8	21.1	73.9	2.3	7.0	-1.4	36	29	7	49	1
1975	35.2	12.3	23.0	72.2	2.2	7.2	-2.3	35	27	7	49	1
1976	39.0	13.4	25.6	75.0	2.2	10.8	3.9	34	27	8	49	1
1977	42.8	14.3	28.5	76.7	2.2	9.6	2.2	33	27	7	50	1
1978	48.1	15.3	32.8	80.1	2.2	12.5	4.4	32	26	6	50	1
1979	54.9	16.6	38.4	84.1	2.2	14.2	5.0	30	25	6	51	1
1980	62.6	18.4	44.2	87.6	2.3	13.9	4.3	29	24	5	53	1
1981	71.9	21.2	50.6	91.4	2.4	14.8	4.3	30	24	5	54	1
1982	80.0	24.6	55.4	95.5	2.5	11.3	4.5	31	26	5	54	1
1983	89.1	28.3	60.9	102.3	2.6	11.4	7.1	32	27	4	54	1
1984	101.2	31.8	69.3	111.2	2.7	13.5	8.7	31	28	3	55	1
1985	113.8	37.5	76.3	120.6	2.8	12.5	8.5	33	30	3	54	1
1986	119.6	40.5	79.1	123.3	2.8	5.0	2.3	34	31	3	55	1
1987	125.4	43.2	82.2	125.4	2.8	4.9	1.7	34	31	3	54	1
1988	132.9	43.7	89.2	128.0	2.7	6.0	2.1	33	30	3	55	1
1989	141.0	43.4	97.6	130.0	2.7	6.1	1.6	31	27	4	58	1
1990	151.5	44.4	107.1	134.1	2.7	7.5	3.2	29	25	4	59	1
1991	160.1	42.9	117.2	136.4	2.8	5.6	1.7	27	22	4	62	1
1992	164.5	41.1	123.4	136.3	2.7	2.7	-0.1	25	21	4	63	1
1993	165.8	40.6	125.2	134.4	2.6	0.8	-1.4	25	21	4	64	1
1994, prel.	169.1	41.3	127.8	134.3	2.5	2.0	-0.0	24	20	4	64	1
1995, est.	171.0	41.0	130.0	132.1	2.4	1.1	-1.6	24	20	4	65	1

[1] Based on GDP implicit price deflator. [2] GDP = Gross Domestic Product. [3] Change from immediate prior year.

Source: U.S. National Science Foundation, *National Patterns of R&D Resources*, annual.

Source: Statistical Abstract of the United States, 1996.

UNIVERSITIES ARE SHOULDERING A HEAVIER PART OF THE R&D LOAD

R&D Source of Funds and Performance Sector: 1970 to 1995

[In millions of dollars. See headnote, table 958]

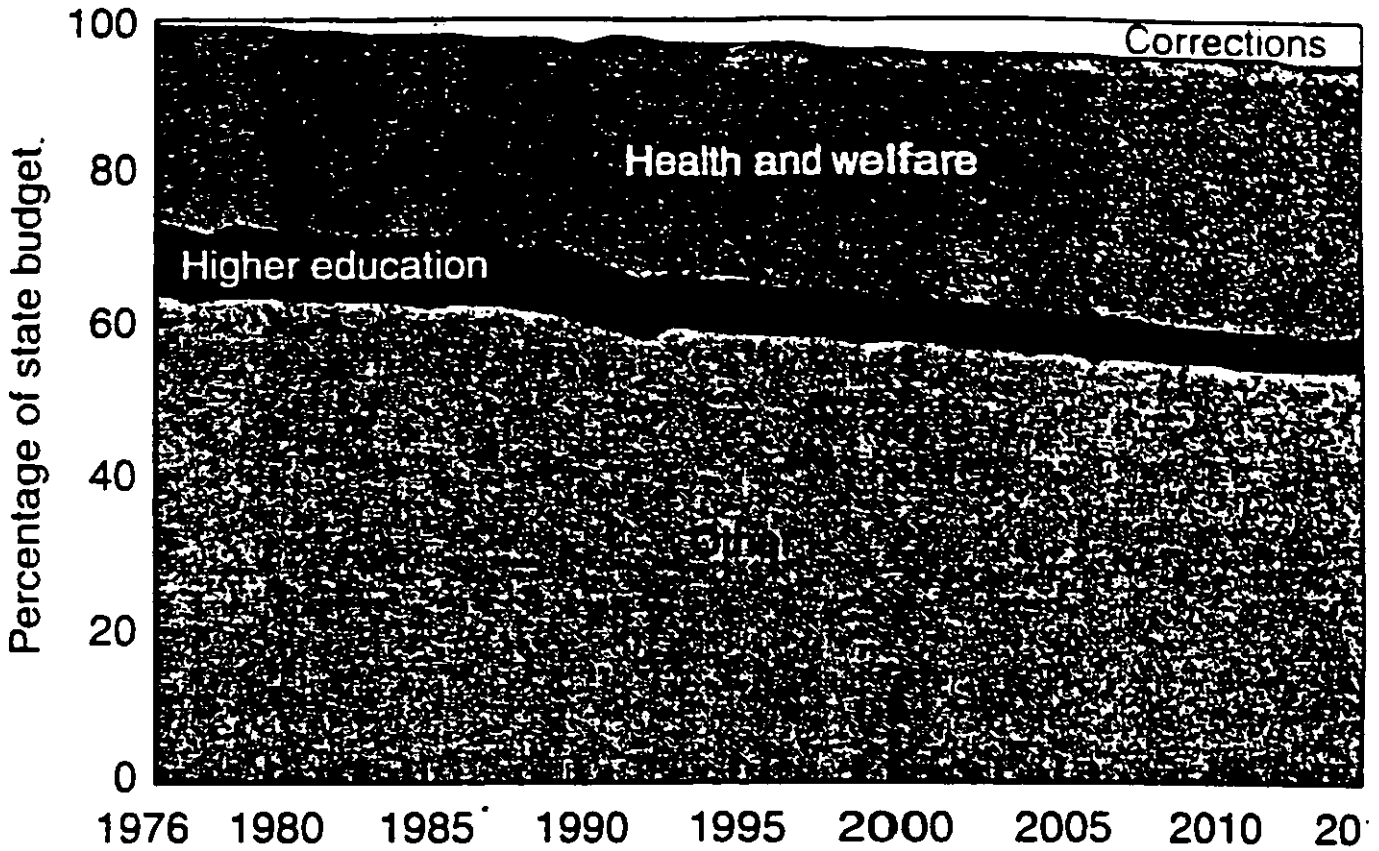
YEAR	Total	SOURCE OF FUNDS				PERFORMANCE SECTOR				
		Federal Govt.	Industry	Univ., colleges	Other [1]	Federal Govt.	Industry	Univ., colleges	Associated FFRDC's [2]	Other [1]
Current dollars:										
1970	26.134	14.891	10.444	462	337	4.079	18.067	2.335	737	916
1975	35.213	18.109	15.820	749	535	5.354	24.187	3.409	987	1.276
1980	62.596	29.455	30.912	1.326	903	7.632	44.505	6.063	2.246	2.150
1985	113.818	52.127	57.978	2.369	1.344	12.945	84.239	9.686	3.523	3.425
1987	125.376	57.913	62.643	3.192	1.628	13.413	92.155	12.152	4.206	3.450
1988	132.889	59.546	68.044	3.463	1.836	14.281	97.015	13.462	4.531	3.600
1989	140.981	59.893	75.046	3.921	2.121	15.121	102.055	14.975	4.730	4.100
1990	151.544	61.493	83.380	4.329	2.342	16.002	109.727	16.283	4.832	4.700
1991	160.096	60.219	92.485	4.835	2.557	15.238	116.952	17.577	5.079	5.250
1993	165.849	60.224	97.645	5.111	2.869	16.556	118.334	19.911	5.298	5.750
1994, prel.	169.100	61.050	99.650	5.350	3.050	17.200	119.700	20.950	5.250	6.000
1995, est.	171.000	60.700	101.650	5.500	3.150	16.700	121.400	21.600	5.300	6.000
Constant (1987) dollars: [3]										
1970	74.597	42.622	29.673	1.335	966	11.789	51.327	6.749	2.130	2.602
1975	72.237	37.396	32.162	1.574	1.105	11.248	49.161	7.162	2.074	2.593
1980	87.649	41.385	43.118	1.878	1.268	10.810	62.071	8.588	3.181	2.999
1985	120.599	55.245	61.418	2.512	1.425	13.727	89.236	10.271	3.736	3.628
1987	125.376	57.913	62.643	3.192	1.628	13.413	92.155	12.152	4.206	3.450
1988	127.991	57.386	65.492	3.343	1.770	13.785	93.373	12.994	4.374	3.465
1989	130.025	55.275	69.169	3.624	1.958	13.975	94.060	13.840	4.372	3.779
1990	134.135	54.587	73.604	3.865	2.079	14.288	96.846	14.538	4.314	4.148
1991	136.385	51.407	78.652	4.143	2.183	13.057	99.449	15.062	4.352	4.464
1993	134.428	48.876	79.069	4.155	2.328	13.460	95.817	16.188	4.307	4.656
1994, prel.	134.292	48.569	79.031	4.866	2.426	13.716	94.925	16.787	4.187	4.758
1995, est.	132.078	46.989	78.381	4.270	2.437	12.966	93.601	16.770	4.115	4.626

[1] Nonprofit institutions. [2] University associated federally-funded R&D centers. [3] Based on gross domestic product implicit price deflator.

Source: U.S. National Science Foundation, *National Patterns of R&D Resources*, annual.

Source: Statistical Abstract of the United States, 1996.

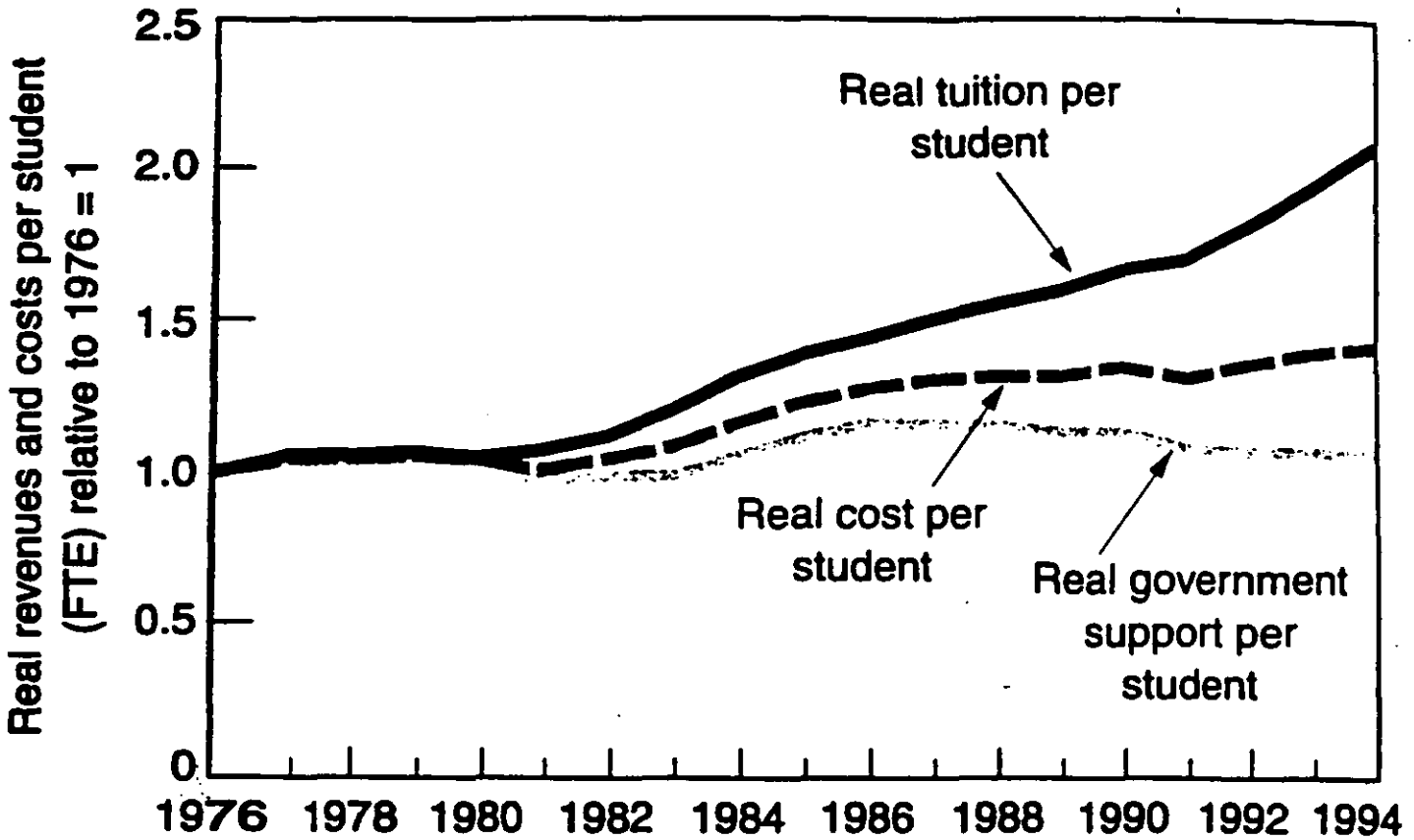
STATES ARE INVESTING IN HEALTH AND PRISONS, WHILE HIGHER EDUCATION TRAILS



Distribution of State Expenditures

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

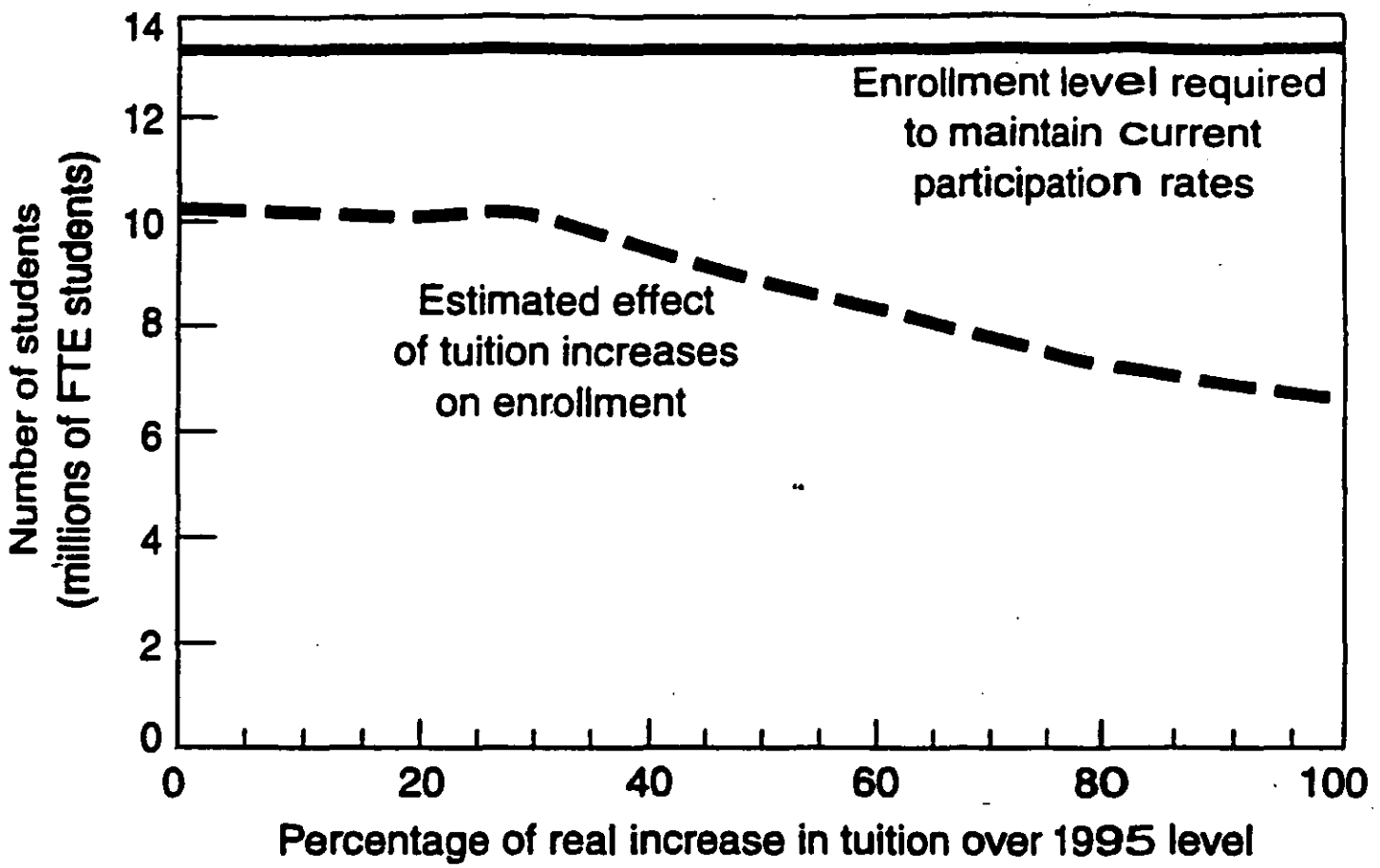
COLLEGES ARE TAKING HEAT FOR USING TUITION TO PAY A SOMEWHAT LARGER PART OF EDUCATION COST



Growth of Tuition

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND)(1997).

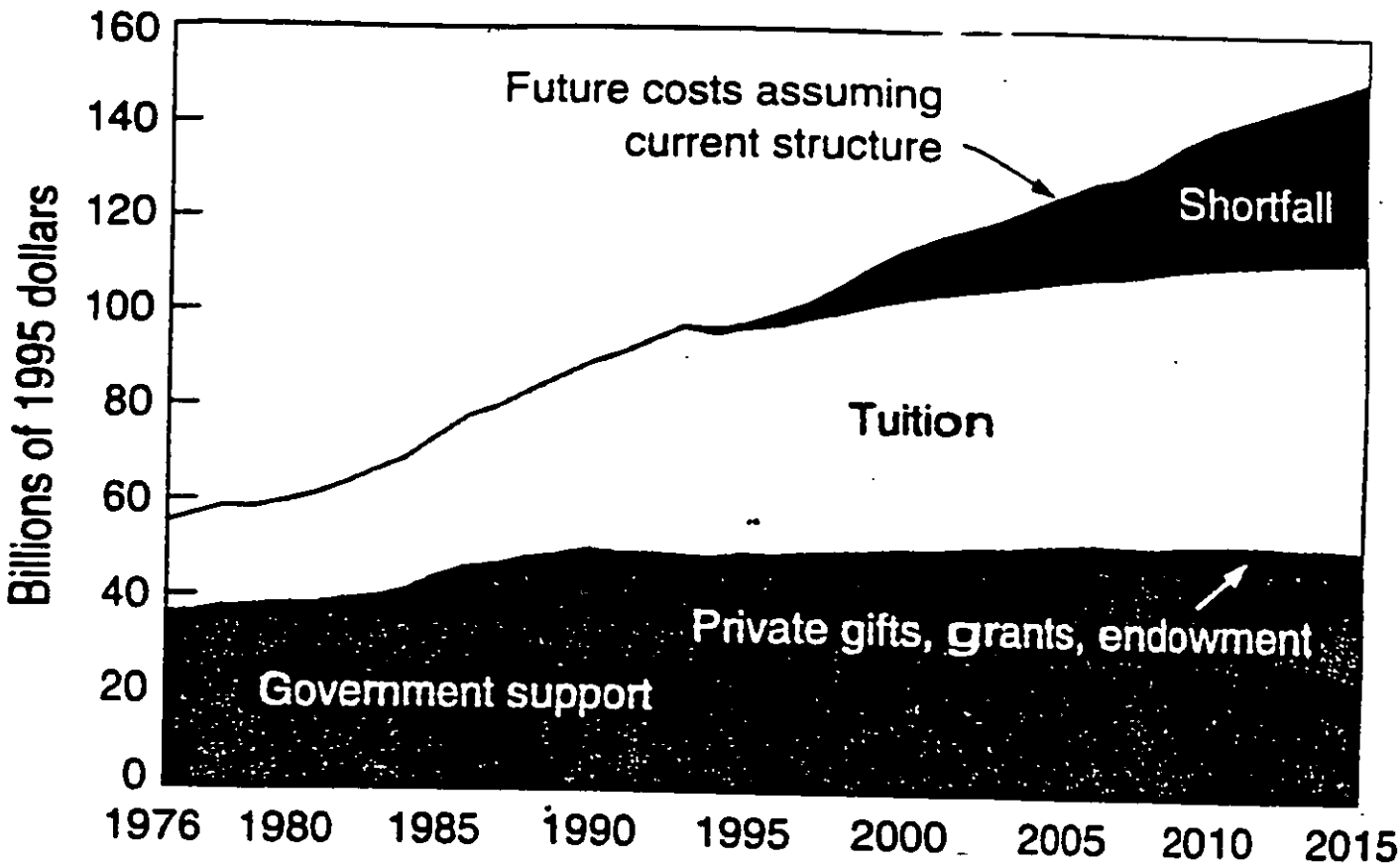
INCREASED TUITIONS CAN THWART INCREASED ENROLLMENTS



Effect of Increasing Tuition on Enrollment

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND) (1997).

IF TUITIONS, GOVERNMENT SUPPORT, AND PHILANTHROPY INCREASE ONLY AS PROJECTED, THEN INSTITUTIONAL DEFICITS, CONSOLIDATIONS, SHRINKING, AND STRESS ARE LIKELY



Funding Shortfall Facing Higher Education in the Next 20 Years

Source: Breaking the Social Contract -- The Fiscal Crisis in Higher Education, Council for Aid to Education (an independent subsidiary of RAND) (1997).

THE QUESTION OF PUBLIC SUPPORT

AMERICA'S WORLD LEADERSHIP IS ATTRIBUTABLE TO PAST INVESTMENT IN HIGHER EDUCATION

Percentage of GNP Devoted to Higher Education

Country[a]	*Year*	*Early 1970s*	*Mid 1980s*
Australia	1975–88	1.36	0.99
Finland	1970–88	0.60	0.71
France	1975–84	0.68	0.67
Germany	1970–86	1.02	1.18
Greece	1974–88	0.54	0.83
Japan	1970–85	0.66	0.88
Netherlands	1970–84	1.87	1.97
Norway	1975–87	1.08	1.04
Spain	1972–86	0.22	0.51
United Kingdom	1984		0.80
United States	1970–85	2.10	2.33

Source: Financing Higher Education: Current Patterns, Organization for Economic Cooperation and Development, 1990.

[a] Australia: total commonwealth government grants to higher education as percentage of GDP.

Finland: total expenditure on higher education as percentage of GNP.

France: total public expenditure on higher education as percentage of GDP (excluding funds for research).

Germany: total expenditure on higher education as percentage of GNP.

Greece: total expenditure on higher education as percentage of GDP.

Japan: public and private expenditure on higher education as percentage of GNP.

Netherlands: total expenditure on higher education as percentage of GNP.

Norway: total higher education expenditure as percentage of GNP.

Spain: total expenditure on higher education as percentage of GNP.

United Kingdom: public current expenditure on higher education as percentage of GNP.

United States: total expenditure on higher education as percentage of GNP (includes purchases of land, buildings, and equipment).

Source: U.S. Dept. of Education, Digest of Education Statistics (1996).

PRIVATE INVESTMENT IN HIGHER EDUCATION DISTINGUISHES U.S.A. AND JAPAN FROM OTHER NATIONS

Sources of Income of Higher Education Institutions

Country and period[a]	*General public funds*	*Fees*	*Other income*
Australia			
1987	87.96	2.11	9.93
Finland			
Public institutions			
1987	85.00	n.a.[b]	15.00
France			
All institutions			
1975	93.00	2.90	4.20
1984	89.50	4.70	5.80
Germany			
All higher education			
1986	68.50	0.00	31.50
Japan			
Private four-year institutions			
1971	9.00	75.80	51.10
1985	15.00	65.80	19.10
Public institutions			
1970	83.10	2.00	14.90
1987	63.10	8.80	28.00
All institutions			
1971	53.06	31.69	15.20
1985	41.99	35.78	22.20
Netherlands			
All institutions			
1985	80.00	12.00	8.00
Norway			
Public institutions			
1975	95.00	n.a.	5.00
1987	90.00		10.00
Spain			
Universities			
Mid 1980s	80.00	20.00	n.a.
United Kingdom			
Universities			
1970–71	71.20	6.30	22.40
1986–87	55.00	13.70	31.30
Polytechnics (England only)			
1986–87	72.40	16.20	11.40
United States			
Private institutions			
1969–70	20.70	38.60	40.60
1984–85	18.40	38.70	42.90
Public institutions			
1969–70	61.10	15.10	23.70
1984–85	59.30	14.50	26.30
All institutions			
1969–70	46.50	20.50	29.90
1986	44.80	22.40	32.80

Source: Financing Higher Education: Current Patterns, Organization for Economic Cooperation and Development, 1990.

[a] Finland: Figures for fees not available but very small.
France: Expenditure of National Ministry of Education.
Japan: 73 percent of other income is revenue of hospitals attached to universities.
Norway: Figures for fees not available but very small.
United Kingdom: Almost all the fees of undergraduate students are paid out of public funds. This amounts to about half the fee income of universities and probably a greater proportion of the fee income of polytechnics.
United States: Figures include all government expenditure at all levels. Loans and grants to students amounted to about 80 percent of fees in 1969–70 and 95 percent in 1984–85

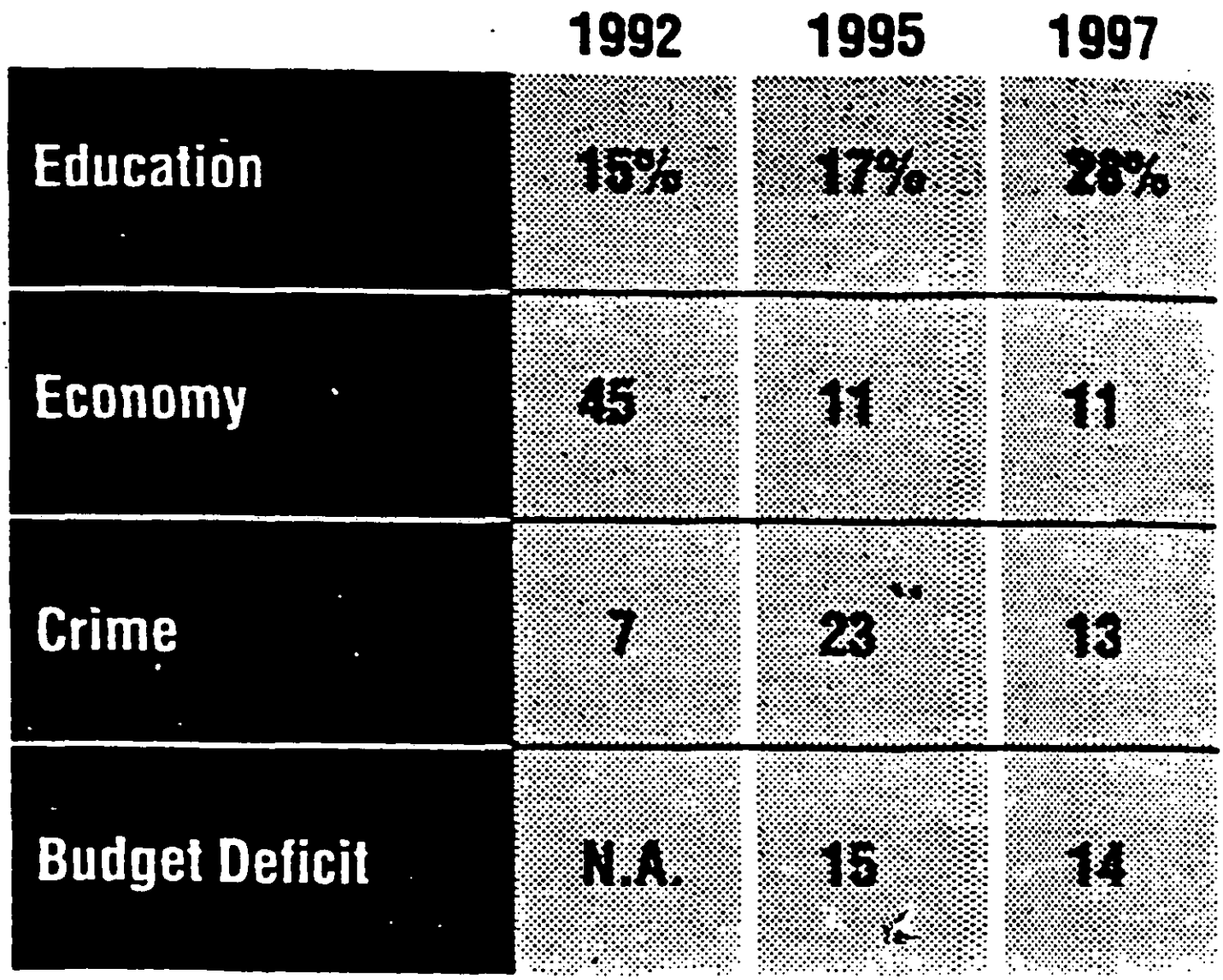
[b] n.a. not available.

Source: U.S. Dept. of Education, Digest of Education Statistics (1996).

MORE THAN TWICE AS MANY AMERICANS BELIEVE EDUCATION THE TOP PRIORITY THAN BELIEVE THE ECONOMY, CRIME OR THE BUDGET IS

Education Agenda

Which issue is the most important for the federal government?



Source: The Wall Street Journal, September 19, 1997.

THE IMPACT OF TECHNOLOGY

A TIMELINE FOR THE EVOLUTION OF TECHNOLOGY

2003 — Entertainment on Demand
2004 — Videoconferencing
2005 — PC Convergence
2006 — Advanced Data Storage
CFCs Are Replaced
Distance Learning
Entertainment Centers
Hybrid Vehicles Common
PCS Gains Markets
Standard Digital Protocol
2007 — Computer Sensory Recognition
Computerized Self-Care
Groupware Systems
Modular Software
2008 — Genetically Produced Food
Half of Household Waste Recycled
Information Superhighway
Parallel Processing Computing
Personal Digital Assistants
2009 — Broadband Networks
Electronic Banking/Cash
Holistic Health Care
Intelligent Agents
Ubiquitous Computing Environment
2010 — Alternative Energy Sources
Expert Systems
"Green" Environmental Methods

Source: Marvin Cetron and Owen Davies, Probable Tomorrows: How Science and Technology Will Transform Our Lives in the Next Twenty Years (1997).

2011 — Buckyballs and Buckytubes
Electric Cars Are Common
Mass Customization
Organic Energy Sources

2012 — CIM Used in Most Factories
Computer Language Translation
Farm Chemicals Drop by Half
Machine Learning

2013 — Gene Therapy
Half of Autos Recyclable
Major Diseases Cured
On-Line Publishing

2014 — Aquaculture
Ceramic Engines
Computerized Vision Implants
Optical Computers

2015 — Alternative/Organic Farming
Factory Jobs Drop to 10 Percent
Hydroponic Produce
Industrial Ecology
Neural Networks
Precision Farming
Superconducting Materials

2016 — Energy Efficiency
Fossil Fuels Cut Greenhouse Gas
Fuel Cell Electric Cars
Intelligent Transportation Systems
Material Composites
Nanotechnology
Recycled Goods
Sophisticated Robots

2017 — Biochips
Fuel Cells
High-Speed Maglev
2018 — Automated Highway Systems
Cloning/Organ Replacement
Half of Goods Sold Electronically
New Materials from Space
2019 — Private Space Ventures
Synthetic Body Parts
Telecommuting
2020 — Farm Automation
Fission Power
Genetic Engineering
Hydrogen Energy
Urban Greenhouses
2022 — Artificial Foods
2023 — Clustered Communities
2024 — Personal Rapid Transit
2025 — Hypersonic Air Travel
2026 — Fusion Power
Intelligent Materials
2027 — Self-Assembling Materials
2028 — Permanent Moon Base
2037 — Manned Mars Mission
2042 — Stellar Exploration
2049 — Extraterrestrial Contact
2062 — Near-Light Speed Achieved

No. 96-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,
Petitioner,

v.

SHARON TAXMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION FOR HIGHER EDUCATION, AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND ADMISSIONS OFFICERS, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, COLLEGE AND UNIVERSITY PERSONNEL ASSOCIATION, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, COUNCIL OF GRADUATE SCHOOLS, COUNCIL OF INDEPENDENT COLLEGES, HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES, NASFA: ASSOCIATION OF INTERNATIONAL EDUCATORS, NATIONAL ASSOCIATION FOR COLLEGE ADMISSIONS COUNSELING, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, *ET AL.* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The *amici* are national associations that represent public and independent higher education institutions and educators who serve those institutions. For decades *amici* have been working to achieve diversity in American higher education. They have done this for two reasons: they know from deep experience that with greater diversity comes better education; they also know that diversity advances knowledge in ways that break down stereotyped preconceptions, thereby preparing young people for our pluralistic society.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been filed with the Clerk.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its approximately 1700 members include a substantial majority of the colleges and universities in the United States. Among its many initiatives to advance diversity, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, co-chaired by former Presidents Ford and Carter, which issued a report on minority matriculation, retention, and graduation, entitled *One-Third of a Nation*.

The other *amici* on this brief are the American Association for Higher Education (represents over 8,700 faculty, administrators, students, trustees, and others; works to improve undergraduate education), American Association of Collegiate Registrars and Admissions Officers (promotes standards and practices in enrollment and instructional management), American Association of Community Colleges (represents 1,100 two-year institutions), American Association of Dental Schools (represents all 55 U.S. dental schools), American Association of State Colleges and Universities (represents over 370 state colleges and universities; sponsors research and publishes reports on higher education), American Association of University Professors (represents some 44,000 faculty members and research scholars; defends academic freedom and the free exchange of ideas in higher education), Association of American Law Schools (represents law schools and serves as law teachers' learned society; works to improve the legal profession through legal education), Association of American Medical Colleges (represents all 125 accredited U.S. medical schools), Association of American Universities (represents 62 major research universities), Association of Catholic Colleges and Universities (represents 211 colleges and universities), Association of Community College Trustees (represents over 6,000 board members who govern community, technical, and junior colleges), Association of Governing Boards of Universities and Colleges (serves some 32,000 trustees, regents, and other senior administrators responsible for 1,700 colleges, universities, and independent

schools), College and University Personnel Association (represents more than 1,800 college and university human resource departments), Council for Advancement and Support of Education (represents over 3,000 education institutions and other organizations), Council of Graduate Schools (represents over 400 universities enrolling 85% of U.S. graduate students), Council of Independent Colleges (represents over 400 independent liberal arts colleges and universities), Hispanic Association of Colleges and Universities (represents over 200 institutions enrolling two-thirds of Hispanic Americans in higher education), NASFA: Association of International Educators (represents 8,000 international educators), National Association for College Admissions Counseling (represents nearly 6,500 admissions and financial aid officers and counselors), National Association for Equal Opportunity in Higher Education (represents the nation's 117 historically black colleges and universities), National Association of College and University Business Officers (represents chief administrative and financial officers at over 2,100 institutions), National Association of Independent Colleges and Universities (represents 840 independent colleges and universities on public policy issues before the federal government), National Association of State Universities and Land-Grant Colleges (represents over 170 public research universities), and National Association of Student Personnel Administrators (serves student affairs administrators at all levels).

Because of *amici*'s understanding of the crucial importance of diversity in education, they view the decision below with alarm. The court of appeals condemned all diversity-based programs that involve faculty, notwithstanding that the court had no record upon which to judge either the educational value of such programs or the extent to which the programs serve compelling interests and advance the goals of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994 & West Supp. 1997). *Amici* therefore file this brief to (1) explain the importance of diversity in education and the strong consensus of educators that supports it; (2) argue that properly constructed diversity programs do in fact meet the

requirements of Title VII; (3) ask the Court to reject the unnecessarily broad pronouncement of the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals acknowledged that "the benefits flowing from diversity in the educational context are significant indeed." (Pet. App. at 44a.) It nevertheless concluded that any reliance on race for purposes of creating diversity is impermissible, because "a non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII." (*Id.* at 43a.)

The court of appeals was wrong to decide whether diversity could *ever* justify consideration of race under Title VII. It should instead have decided only whether diversity justified the action taken in this case. *Amici* believe that the court of appeals failed to take into account the critical purposes diversity in education serves, both in improving the quality of education and in fostering the mutual regard on which effective education depends.

The data showing those educational benefits make clear that many cases of "non-remedial" diversity-based consideration of race would be permissible under Title VII. That is so for two reasons. First, many diversity-based decisions in education have been narrowly tailored to serve compelling interests, thereby meeting the constitutional standard. And because they meet the constitutional standard, they satisfy Title VII. Second, and in any event, because diversity-based decisions that take race into account often further the goals of Title VII by breaking down intolerance and discriminatory preconceptions, such decisions pass muster under the standard announced in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

Because many diversity-based decisions made by educators would meet that standard, the Court should reject the court of appeals' categorical denunciation of all such decisions. The Court also should clarify the standard for such decisions, but should expressly leave for another day the permissibility of

using diversity in other contexts, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1994 & West Supp. 1997), and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1134 *et seq.* (1994 & West Supp. 1997).

ARGUMENT

I. DIVERSITY IMPROVES EDUCATION.

The primary evidence of the beneficial effects of diversity in education comes in two forms. First, social science research provides concrete findings of measurable positive effects of diversity on educational outcomes. Second, there is a strong consensus among educators, representing a broad spectrum of institutions, that diversity is essential to the institutions' missions. Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype.

"Diversity" can of course signify many things, but to educators it generally denotes the quest for heterogeneity of backgrounds, experiences, beliefs, and viewpoints at their institutions. Educators seek diversity in a variety of categories, such as geography, economic status, intellectual interest, language, area of talent, gender, age, religion, nationality, culture, race, and ethnicity. Educators value diversity among both faculty and students, and in primary and secondary as well as higher education. Because this case involves the pursuit of racial diversity, we focus on that dimension. Unless otherwise stated, we mean here racial and ethnic diversity.

Amici recognize that faculty, not student, diversity is before the Court here, and that there can be salient distinctions between the two. Nevertheless, for several reasons we refer in this brief to both kinds of diversity. First, much of the evidence analyzing the value of diversity in the educational setting addresses it as an institutional matter and therefore necessarily considers both student and faculty diversity. Second, that evidence shows that the benefits of student and

faculty diversity are often the same. And third, the two kinds of diversity are interrelated and mutually reinforcing. For example, as noted below, a growing body of research findings shows that faculty diversity is valuable not only in itself but also as a key factor in maintaining student diversity.[2]

Recent studies have addressed whether recruitment of a racially diverse faculty and student body contributes to broader institutional efforts to educate students. The studies find that such diversity initiatives produce concrete educational benefits for white as well as minority students. In one study, Alexander Astin surveyed 25,000 students in 217 four-year colleges over four years, assessing attitudes, values, beliefs, career plans, achievement, and degree completion. He analyzed, among other things, how students were affected by "Institutional Diversity Emphasis," a concept that embodies five measures of a college's pursuit of diversity goals, including the institution's commitment to increasing the number of minority faculty and students. Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How are Students Affected?*, 25 Change 44, 45 (Mar./Apr. 1993).

Astin concluded that "a strong emphasis on diversity" is associated with "widespread beneficial effects on a student's cognitive and affective development." *Id.* at 48. "[T]he weight of the empirical evidence," he found, "shows that the actual effects on student development of emphasizing diversity and of student participation in diversity activities are overwhelmingly positive." Alexander W. Astin, What Matters in College? 431 (1993). The research shows that students who interact more with students of different backgrounds and are given an opportunity to discuss issues of race and culture tend to be more successful in college. Direct student experiences with diversity, including socializing with

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[2] Much of what we describe here applies to both higher and secondary education. However, because the expertise of *amici* is in higher education, we focus on that context.

members of other ethnic groups and participating in activities designed to promote cultural awareness, are positively associated with many measures of academic development and achievement. Astin, *Diversity and Multiculturalism on the Campus*, at 46.

Students, particularly whites, who socialize across racial groups express greater satisfaction with the college experience. Octavio Villalpando, *Comparing the Effects of Multiculturalism and Diversity on Minority and White Students' Satisfaction with College* 12 (Nov. 9, 1994) (paper presented at the Annual Meeting of the Association for the Study of Higher Education, Nov. 10-13, 1994). Undergraduates who study with students from a different racial or ethnic group report greater growth in their acceptance of people of different races and cultures, cultural awareness, and tolerance of people with different beliefs. Sylvia Hurtado, *Linking Diversity and Educational Purpose: How the Diversity of the Faculty and Student Body May Impact the Classroom Environment and Student Development 8-9* (paper presented at Civil Rights Project Conference on Non-Racial Standards and Minority Opportunity, Harvard Univ., Apr. 1997).

Research findings also show positive effects of racially diverse educational experiences on students' subsequent behavior at work and in the world at large. Attendance at a racially mixed school affects decisions that students, both white and black, subsequently make concerning with whom they choose to work and socialize. Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. of Negro Educ. 394, 403 (Summer 1994). Both blacks and whites who attend racially mixed schools are more likely to work in racially mixed firms. Blacks from racially diverse elementary schools are more likely to have white social contacts, live in integrated neighborhoods, and evaluate white co-workers positively. *Id.*

Other studies are consistent with these findings. Thus, it has been shown that a person's prejudice towards stigmatized groups, such as mental patients or people with AIDS, is lessened by personal contact with members of the group. *See, e.g.*, Donna M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups*, 60 J. of Personality and Soc. Psych. 531 (1991); James L. Werth & Charles G. Lord, *Previous Conceptions of the Typical Group Member and the Contact Hypothesis*, 13 Basic and Applied Soc. Psych. 351 (1992). Such studies support earlier findings that the interactions made possible by diversity lessen prejudice. Recruitment and retention of minority faculty members contributes to an "environment of racial tolerance and equality on our campuses," by exposing non-minority students to minority faculty. Walter E. Massey, *If We Want Racially Tolerant Students, We Must Have More Minority Professors*, The Chronicle of Higher Educ. 76 (July 15, 1987).

Efforts to achieve faculty diversity strongly support these positive effects. A study of 743 professional graduate programs conducted in the 1970s, as blacks were beginning to enter such programs in greater numbers, concluded that "the presence of black faculty may be the most important contributor to successful recruitment, enrollment, and graduation of black students." James E. Blackwell, Mainstreaming Outsiders: The Production of Black Professionals 106 (1981). An institution's commitment along various dimensions to diversity supports retention of minority students. Morgan Appel et al., *The Impact of Diversity on Students: A Preliminary Review of the Research Literature* ix (Ass'n of Am. Colleges and Universities 1996).

Other studies support Astin's conclusions about the benefits of institutional commitment to diversity, integral to which is hiring minority faculty. For example, research has found that such a commitment is linked with student academic success and relatively low racial tensions on campus. Daryl G. Smith et al., *Paths to Success: Factors*

Related to the Impact of Women's Colleges, 66 J. of Higher Educ. 245 (May/June 1995); Hurtado, *Linking Diversity and Educational Purpose*. Overall, the research indicates a powerful positive impact of diversity initiatives on minority and white students. Appel, *The Impact of Diversity on Students*, at ix.

Consistent with the research findings, there has long been a broad consensus among leading educators that diversity has a profound impact on the quality of education. As President William Bowen of Princeton University stated, in an essay quoted by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978):

> [T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. * * * [A] great deal of learning occurs informally * * * through interactions among students of both sexes; of different races, religions and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents and perspectives; and who are able * * * to learn from their difference and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Many higher education leaders have identified the "educational value of a learning environment that include[s] students from different backgrounds and perspectives." Harold T. Shapiro, *Affirmative Action: A continuing discussion —A continuing commitment*, Princeton Weekly Bulletin (Oct. 16, 1995). The president of Harvard University has observed:

> A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level—to see

> issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views.

Neil L. Rudenstine, *Why a Diverse Student Body is So Important*, The Chronicle of Higher Educ. B1 (Apr. 19, 1996). The president of Stanford University stated:

> First, we want a rich educational environment to challenge our students. Students learn much from one another. Second, we want to be faithful to our task to educate leaders for a diverse and complex society—a society that will, we hope, overcome the undue tendencies toward stratification. This cannot be done unless the country's demographic diversity finds a presence on campus.

Gerhard Casper, *Statement on Affirmative Action at Stanford University* 5-6 (Oct. 4, 1995). The President of the University of Michigan said:

> We know that diversity is an advantage because we have seen our academic standards rise, not drop.

See American Council on Educ., *Making the Case for Affirmative Action in Higher Education: What You Can Do to Safeguard Affirmative Action on Campus and in Your Community* 21 (June, 1996); *id.* at 19-23 (reporting public statements by the presidents of Duke, Williams College, University of Texas at Dallas, Harvard, University of Akron, Princeton, Massachusetts Institute of Technology, University of Michigan, Stanford, City University of New York, Claremont Colleges, the University of North Carolina, and the Regents of the University of Maryland).

This strong commitment to diversity is shared by leaders of higher education institutions of every type.[3] For example, the American Association of State Colleges and Universities

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[3] A letter indicating a commitment to diversity sent by a broad coalition of 23 higher education associations is reprinted in *Making the Case for Affirmative Action*, at 27-29.

("AASCU") noted its members' belief that "fostering diversity and respect for difference is a fundamental goal of higher education and should be among the highest priorities of every university." American Ass'n of State Colleges and Universities, *Policy on Racism and Campus Diversity* (Mar. 1989). "[F]aculty members from diverse backgrounds bring multiple perspectives and often different foci for teaching and research to the campus." American Ass'n of State Colleges and Universities, *Access, Inclusion and Equity: Imperatives for America's Campuses* 32 (1997).

Likewise, the Association of American Universities, which includes 60 of the country's most prestigious research universities, has announced its members' belief that diversity is "central to the very concept of education in our institutions." *See On the Importance of Diversity in University Admissions*, The N.Y. Times, Apr. 24, 1997, at A27 ("AAU Statement"). The AAU members stated that without diversity "the quality and texture of * * * education * * * will be significantly diminished," and warned that substantial restrictions on the institutions' pursuit of diversity would impinge on their ability to educate:

> A very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students. Equally, a significant part of education in our institutions takes place outside the classroom, in extracurricular activities where students learn how to work together, as well as to compete; how to exercise leadership, as well as to build consensus. If our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide will be significantly diminished.

Id. The AAU Statement explained how higher education institutions strive to achieve diversity:

> For several decades—in many cases, far longer—our universities have assembled their student bodies to take into account many aspects of diversity. The most effective admissions processes have done this in a way

> that assesses students as individuals, while also taking into account their potential to contribute to the education of their fellow-students in a great variety of ways. We do not advocate admitting students who cannot meet the criteria for admission to our universities. We do not endorse quotas or "set-asides" in admissions. But we do insist that we must be able, as educators, to select those students—from among many qualified applicants—who will best enable our institutions to fulfill their broad educational purposes.

Id. *See also* American Ass'n of Community Colleges, *Statement on Inclusion* (Apr. 12, 1997); American Council on Educ. Bd. of Directors, *Statement on Affirmative Action and Diversity* (May 25, 1995) ("A diverse faculty and staff is essential for colleges and universities to provide quality in teaching, scholarship, and service to the campus and the community."); Amherst College, *Statement on Diversity* (May 25, 1996); Council of Graduate Schools, *Building an Inclusive Graduate Community: A Statement of Principles,* 30 Communicator 1 (June 1997); American Ass'n of Univ. Professors, *Affirmative Action*, Academe 38 (July-Aug. 1997).

Educators are committed to diversity both for its effects on the quality and effectiveness of education within the academy and for its role in fostering lifelong tolerance and mutual respect, a fundamental purpose of education. "We simply must learn to work more effectively and more sensitively with individuals of other races," President Bowen wrote in the essay Justice Powell cited,

> and a diverse student body can contribute directly to the achievement of this end. * * * If people of different races are not able to learn together in this kind of setting, and to learn about each other as they study common subjects, share experiences, and debate the most fundamental questions, we shall have lost an important opportunity * * *.

Bowen, *Admissions and the Relevance of Race*, at 10. *See also Making the Case for Affirmative Action*, at 23. This contact engenders appreciation of differences and teaches students that racial differences often mask deeper similarities. Rudenstine, *Why A Diverse Student Body Is So Important*, at B2.

Educators' belief about the benefits of diversity in the academy is not new. As President Rudenstine has shown, educators began to discuss diversity and the idea it signifies at least "as early as the mid-nineteenth century." Harvard Univ., *The President's Report 1993-1995*, at 3 (undated). John Newman recognized the importance of colleges at which "a multitude" of students would "come together and freely mix with each other" and where "they are sure to learn one from another, even if there be no one to teach them." *Id.* at 4. And Harvard president Felton wrote on the eve of the Civil War that gathering students "from different and distant States must tend powerfully to remove prejudices, by bringing them into friendly relations." He added: "Such influences are especially needed in the present disastrous condition of public affairs." *Id.*

In sum, educators' experience with diversity demonstrates its value in enhancing the quality of the academic experience and combating intolerant, discriminatory viewpoints. As next discussed, the wisdom of the most informed experts is entitled to considerable deference in the Court's review.

II. THE STRONG EDUCATIONAL CONSENSUS SUPPORTING DIVERSITY IS ENTITLED TO DEFERENCE FROM THIS COURT.

For several reasons, the Court should give great weight to the findings of educators that diversity is critical to educational quality. First, these determinations are made at the core of academic freedom and as the Court has recognized are a First Amendment concern. Academic freedom safeguards not only "'[t]eachers and students [who] must always remain free to inquire, to study and to evaluate,'" *Keyishian* v. *Board of Regents of Univ. of N.Y.*,

385 U.S. 589, 603 (1967) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)); it also protects "autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 n.12 (1985). The historic independence of the academy is composed of "'four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., joined by Harlan, J., concurring in the result)). "[W]ho may teach" and "who may be admitted to study" are paradigmatic examples of academic judgment. This is particularly so when the judgments address what composition of the faculty or student body will best promote academic goals such as improving educational achievement and confronting intolerance.

A second reason to defer to educators' conclusion that diversity improves education is that such matters "require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (quoting *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 89-90 (1978)).

The final reason for deference is the "vital national tradition" of pluralistic local decisionmaking in education, *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977), a tradition founded in the earliest experience of the Republic. *See Milliken* v. *Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to *quality of the educational process.*") (emphasis added); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy * * *."). American colleges

and universities, which attract some half-million students from other nations, are the envy of the world in part because of our virtually unique tradition of governmental deference to educators' judgment about how the work of educating should be conducted.

III. NARROWLY TAILORED PROGRAMS DESIGNED TO PROMOTE DIVERSITY ARE PERMISSIBLE UNDER TITLE VII.

Because the court of appeals failed to acknowledge the powerful educational consensus supporting diversity, it failed to accord it legal significance or deference. That consensus demonstrates two ways in which properly constructed diversity programs are permissible under Title VII. First, such programs serve compelling interests that meet stringent constitutional standards and thus necessarily also meet Title VII standards; and second, diversity-based initiatives can be crafted to meet Title VII by advancing statutory goals and minimizing burdens on third parties.

A. Such Plans Are Permissible Under Title VII Because They Satisfy Constitutional Standards.

Promoting educational goals by pursuing faculty diversity furthers a compelling interest, and carefully crafted race-conscious programs, properly conducted, can be narrowly tailored to achieve that interest. And because a race-conscious policy that meets the constitutional standard would also meet Title VII, the court of appeals was wrong to reject all such efforts out of hand.

1. The Court's precedents and the consensus among educators show that diversity in education serves a compelling interest.

The Court has never held that the Constitution bars education institutions from deciding for educational reasons to pursue a racially diverse faculty. Indeed, the Court's precedents strongly support the proposition that promoting faculty diversity serves a compelling interest.

First, in the only case in which the Court has addressed the legality of pursuing faculty diversity, a majority of the Court implicitly or explicitly endorsed its constitutionality. In *Wygant* v. *Jackson Board of Education*, four justices expressly would have held that faculty diversity is a compelling interest. *See* 476 U.S. 267, 306 (1986) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting); *id.* at 315 (Stevens, J., dissenting). Justice O'Connor, while not expressly agreeing, was careful to distinguish the "role model" theory offered to justify the affirmative action plan in that case from the very different goal of promoting racial diversity among the faculty, *id.* at 288 n. * (O'Connor, J., concurring in part and concurring in the judgment), and observed that diversity had already been found "'compelling,' at least in the context of higher education," *id.* at 286.

Second, the Court has endorsed the proposition that higher education institutions have a compelling interest in a diverse student body. In fact, the Court expressly endorsed Justice Powell's *Bakke* opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990). Although the level of scrutiny applied to federal programs in *Metro Broadcasting* was overruled in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995), the Court in *Adarand* did not overturn *Bakke* regarding diversity. *See id.* at 258 (Stevens, J., joined by Ginsburg, J., dissenting); *see* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1768 (1996).[4]

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[4] The United States has consistently held that use of race as a factor in narrowly tailored decisions regarding student admissions and financial aid is constitutional. *See, e.g.*, 34 C.F.R. § 100.3(b)(6)(ii) (1996); Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8760-62 (Dep't of Educ. Policy Guidance Feb. 23, 1994); Letter from Judith A. Winston, Gen. Counsel, Dep't of Educ. to College and Univ. Counsels 2 (Sept. 7, 1995); Letter from Judith A. Winston, Gen. Counsel, Dep't of Educ. to College and Univ. Counsels 1 (July 30, 1996); Letter from Walter Dellinger, Acting Solicitor Gen. to Judith A. Winston, Gen. Counsel, Dep't of Educ. 2 (Apr. 10, 1997).

The principles the Court relied on in *Bakke* apply to the interest in a diverse faculty. Justice Powell's opinion set forth two reasons for finding a compelling interest in student diversity. The opinion cited "[t]he freedom of a university to make its own judgments as to education" and noted that student diversity was "widely believed" to enhance the quality of education. *Bakke*, 438 U.S. at 312. Decisions involving faculty implicate both principles. Further, as discussed above, a diverse faculty advances the same educational goals that Justice Powell found were "widely believed" advanced by student diversity.

Finally, as Justice Stevens has noted and as the data cited in Section I show, values such as racial understanding and tolerance are best learned through direct contact with those towards whom students may previously have held prejudiced beliefs. *See supra* pp. 7-8. There is no substitute for this direct experience. "It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting). The educational benefit of diversity is derived not from an assumption that all members of one race think alike or that race is a proxy for a particular point of view, but rests instead on the finding that diversity enables students to discover the falsity of such stereotyped assumptions. "[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land." *Id.*

Each of these interests, as described by several Members of the Court, is sufficiently compelling to justify consideration of race as one factor in decisions about faculty as well as students. Further, as we argue in the following sections, educators can make such decisions in a manner that is narrowly tailored and is consistent with the Constitution and Title VII.

2. Race-conscious programs, properly conducted, can be narrowly tailored means to achieve this compelling interest.

The guidelines the Court in *Bakke* set forth for narrowly tailored race-conscious student admissions are pertinent in the faculty context. To begin with, racial quotas and separate hiring procedures have been found impermissible.

> In * * * an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.

Bakke, 438 U.S. at 317.

Bakke is consistent with the Court's subsequent discussions of narrow tailoring of race-conscious action in other contexts. The Court has identified at least four factors to be considered: (1) the necessity of the relief and the efficacy of alternative remedies; (2) the relationship of the numerical goals to the relevant labor market; (3) the flexibility and duration of the relief, including availability of waiver provisions; and (4) the impact of the relief on rights of third parties. *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *id.* at 187 (Powell, J., concurring); *see also* Memorandum from Walter Dellinger, Assistant Attorney Gen., Dep't of Justice to General Counsels 10 (June 28, 1995). Programs aimed at achieving faculty diversity can account for each factor.

First, race-conscious initiatives are a necessary means to achieve the institutional goals of educators, and no alternative "remedy" can achieve the racial diversity necessary to accomplish these goals. The education community has carefully considered whether programs based on factors other than race, such as income or geography, could be effective. Powerful evidence shows that use of solely race-neutral factors simply could not produce the racial diversity needed for critical educational interactions at selective universities. *See* Theodore Cross, *Why the Hopwood Ruling Would*

Remove Most African Americans From the Nation's Most Selective Universities, J. of Blacks in Higher Ed. 66 (Spring 1996) ("[A] new law requiring race-blind admissions would very likely produce freshman classes that would be little more than 1 percent black."); Thomas J. Kane, *Racial and Ethnic Preference in College Admissions* 20 (unpublished manuscript, Harvard University, Mar. 1997) (finding, based on extensive analysis, that "'class' will be a very poor substitute for race for a college seeking racial balance"); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 19-27 (1997) (showing that minority admissions to ABA accredited law schools would decrease significantly if race-neutral criteria were used); William G. Bowen, No Limits 18, 37 *in* The American University: National Treasure or Endangered Species? (Ronald G. Ehrenberg ed., 1997) (Transcript of speech at Cornell University, May 21, 1995) (finding that use of exclusively race-blind criteria at selective universities would reduce black enrollment from approximately eight to two percent). Thus, "alternative remedies" to race-conscious affirmative action are not available. *See Paradise*, 480 U.S. at 171.

Diversity-based programs should also take into account appropriate goals. *Id.* One principle that defines these goals is that the number of individuals from a group must be large enough to represent the diversity within that group. For example, as explained in the *Harvard College Admissions Program* attached as an appendix to Justice Powell's opinion in *Bakke*:

> [Ten] or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. * * * Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving

> the benefits to be derived from a diverse student body * * *.

438 U.S. at 323 (appendix to opinion of Powell, J.).

> Available pedagogical literature strongly supports the following: Tokenism is the enemy of diversity. Members of groups previously excluded from access to legal education [for example], when enrolled in small numbers, often experience feelings of alienation and isolation that not only limit the individual student's ability to achieve his or her full potential, but also silence the very voices that are critical to building a diverse and intellectually stimulating law school. Enrolling a *critical mass* of students from traditionally underrepresented backgrounds provides students with meaningful access to the curriculum and promotes robust exchange of ideas among students of different backgrounds, thereby providing all students with the educational benefits of a diverse student body.

Rachel F. Moran et al., *Statement of Faculty Policy Governing Admission to Boalt Hall and Report of the Admissions Policy Task Force* 5 (Aug. 31, 1993) (emphasis added). These findings illustrate how a court, informed by testimony of education experts, can assess whether a diversity-based affirmative action program is narrowly tailored.

Diversity-based programs can also be assessed based on their "flexibility and duration * * * including the availability of waiver provisions." *Paradise*, 480 U.S. at 171. A flexible program would contain aspirational goals, not quotas, use race as a "plus" among other factors, and maintain a general pool of applicants, rather than a separate "track" for particular racial groups. With respect to duration, given that the goal of the diversity-based programs is educational rather than remedial, it would not make sense to require them to end when some remedial goal had been achieved; rather, the

initiative would continue until diversity occurred "naturally," *i.e.*, without institutional attention to the racial, ethnic or other diversity served. One way for a court to ensure narrow tailoring along this temporal dimension would be to require the institution periodically to re-evaluate the need for the program.

Finally, the narrow tailoring of a diversity-based affirmative action program should be judged based on its impact on "rights of third parties." *Id.* This determination is no different here than in the context of remedial affirmative action and reflects the importance of employing race or ethnicity as a "plus" factor, to ensure legitimate competition among candidates of all races. *See Bakke*, 438 U.S. at 318 (opinion of Powell, J.).

There are thus available limiting principles according to which diversity-based programs can be narrowly tailored to achieve the compelling educational benefits that flow from diversity. Such programs can therefore be crafted to survive strict scrutiny under the Equal Protection Clause.

3. Because diversity-based affirmative action programs are constitutionally permissible, they are also permissible under Title VII.

The court of appeals dismissed the Board's arguments that its plan furthered a compelling interest, and appeared to conclude that the constitutionality of the Board's decision was irrelevant. (Pet. App. at 43a) ("we have not found anything in the Board's arguments to convince us that this case requires examination beyond statutory interpretation"). The court's holding that Title VII bars *all* non-remedial affirmative action implies that even programs that met constitutional standards would violate Title VII. That is incorrect.

Title VII's constraint on affirmative action was "not intended to extend as far as that of the Constitution." *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 628 n.6 (1987). The Court has noted the "narrowness of [its] inquiry" in the Title VII context, where

an employer's affirmative action plan involved no state action and thus implicated no constitutional concern. *Weber*, 443 U.S. at 200. Because "Title VII * * * was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments," *id.* at 206 n.6, *quoted in Johnson*, 480 U.S. at 627 n.6, it is difficult to see how it could be interpreted as going even further than the Constitution in its prohibitive effect. This is particularly so in the context of affirmative action.

There is "no indication that Congress intended [in enacting Title VII] to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination." *Bakke*, 438 U.S. at 340 n.17 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Moreover, Title VII should not be construed as prohibiting what the Constitution would permit: "Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply * * * that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination *or other compelling ends*." *Id.* (emphasis added). At the very most, Title VII should be held to prohibit *as much as* the Constitution would, but no more. *See Johnson*, 480 U.S. at 649 (O'Connor, J., concurring); *id.* at 664-65 (Scalia, J., joined by Rehnquist and White, JJ., dissenting).

The legislative history confirms this. It reveals the depth of congressional concern that the statute not authorize undue federal government interference in private decisions, especially those designed to eradicate discrimination. For instance, members of Congress demanded that "management prerogatives, and union freedoms * * * be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt.2 at 29 (1963), *quoted in Weber*, 443 U.S. at 206. Section 703(j) of the Act was proposed to prevent "undue 'Federal Government interference with private businesses because of some Federal employee's ideas about racial

balance or racial imbalance.'" *Weber*, 443 U.S. at 206 (quoting 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller)). The statute therefore preserved a sphere in which private employers could undertake "voluntary affirmative efforts to correct racial imbalances." *Id.* These concerns about federal governmental interference in private employment decisions counsel strongly against an expansive reading of Title VII in the education context.

Further, the Court has held already that Title VI does not bar affirmative action that satisfies constitutional standards. *See infra* p. 26 & n.5. Title VII should not be interpreted differently in this respect than Title VI, because "[t]here is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution." *Bakke*, 438 U.S. at 340 n.17 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

For these reasons, the court of appeals erred in concluding that the compelling interests served by faculty diversity were irrelevant to its Title VII analysis. If education institutions can demonstrate that a narrowly tailored diversity-based affirmative action program furthers a compelling interest, such a program should be held permissible under Title VII.

B. Such Plans Are Also Permissible Because They Advance the Goals of Title VII.

As the Court has recognized, an affirmative action program may also be permitted under Title VII if it advances the goals of the statute and does not "unnecessarily trammel" interests of non-minorities. The court of appeals erred in deciding that no program designed for any non-remedial purpose could ever sufficiently advance the purposes of the statute. That decision certainly cannot be supported by the record in this case. Further, as demonstrated by the findings reported above, diversity-based affirmative action plans can directly advance the core goal of Title VII by combating the intolerance that Title VII was designed to eradicate.

The legislative history of the 1972 amendments to Title VII demonstrates that the statute was intended not only to remedy past discrimination but also "to ameliorate the conditions which have led to the persistence of these practices." S. Rep. No. 415, 92nd Cong., 1st Sess., at 4 (1971). Congress specifically intended to approve, not ban, affirmative action that breaks down "existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination." *Id.* at 12.

That purpose is especially evident in the legislative history of Title VII's application in the education field. For example, there was concern that the credibility of the government's promise to prohibit discrimination would be undermined by underrepresentation of minorities, particularly in education, law enforcement, and the administration of justice, because "these governmental activities * * * are most visible to the minority communities." H.R. Rep. No. 238, 92nd Cong., 1st Sess., at 17 (1971). *See also* S. Rep. No. 415, 92nd Cong., 1st Sess., at 10 (1971). Congress was especially concerned with the role of education in curbing the prejudiced attitudes that lead to discrimination:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development.

Id. at 12.

Pursuit of faculty diversity precisely advances the congressional goal of eliminating root causes of discrimination. First, a diverse faculty advances tolerance and lessens prejudice among students. And racial diversity uniquely performs this function in a way other pedagogical techniques cannot. *See supra* p. 17. Further, a diverse faculty facilitates recruitment and retention of a diverse student body and provides a support network for minority students. It thus makes possible the cross-racial student interactions that have additional positive effects on racial

attitudes for all students. *See supra* pp. 6-7. For all these reasons, not only is appropriate diversity-based affirmative action in faculty employment decisions permitted under Title VII, but the statute's core purposes are served by it. Accordingly, provided a diversity-based program does not unnecessarily trammel interests of non-minorities, it should be held consistent with Title VII. *Weber*, 443 U.S. at 208.

IV. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' BROAD DENUNCIATION OF ALL DIVERSITY-BASED AFFIRMATIVE ACTION PROGRAMS.

As *amici* have shown, diversity-based affirmative action programs can be structured to accomplish, and narrowly tailored to meet, compelling interests. As they have also shown, such programs can be designed to meet the goals of Title VII. For these reasons, the court of appeals' broad rejection of all such programs should not stand. Instead, for several reasons, *amici* urge the Court to decide only the validity of the program presented by this case.

First, the record does not support creation of a *per se* rule here at all, even a rule holding that faculty diversity may never be a valid factor in a lay-off decision under Title VII. As *amici* have demonstrated, there may in fact be circumstances in which such action would be permissible. Under the established standards, the Court considers whether an affirmative action plan "unnecessarily trammel[s] the interests of the white employees." *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 630. The court of appeals decided that because the Board's decision resulted in Respondent being laid off, the decision necessarily violated Title VII for that reason alone. (Pet. App. at 46a.) However, there is no record here to support a determination that consideration of race as one factor in a lay-off decision would *always* result in a burden on a white employee sufficient to violate Title VII. For example, this case does not present the question whether a decision grounded in a more clearly defined policy would have been permitted. The majority of the court of appeals placed great weight on what it characterized as the policy's

"utter lack of definition and structure" in deciding that the Board's decision unnecessarily trammeled Respondent's interests. (Pet. App. at 44a.) This record simply does not support a conclusion one way or the other as to whether the law would be offended if a board of education or education institution systematically based its decisions on a clearly defined policy.

Further, the Court should not decide that diversity can never be a permissible factor in a *non*-lay-off situation. If the Court found, for example, that the Board's decision unnecessarily burdened Respondent's interest in retaining her job, then the Court might on that basis find a Title VII violation. The related but different question whether a diversity-based faculty hiring or promotion decision would violate Title VII was not presented to the court of appeals in this case and, again, there is no record on which the court of appeals should have decided it here. *See Wygant*, 476 U.S. at 282 ("hiring goals * * * do not impose the same kind of injury that layoffs impose").

A fortiori the Court should not decide whether diversity is a permissible goal for an affirmative action program involving students, under Title VI of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972. Indeed, even if the Court agreed with the broad holding below, this Court's decision should be limited to the context of employment decisions under Title VII. That is because the Court's precedents strongly support the permissibility of non-remedial affirmative action in decisions affecting students, under the Constitution, Title VI, and Title IX. Further, the factual context of college student-related decisions is so different from the facts presented in this case that it would be imprudent for the Court to settle "an issue of great national importance," *Texas* v. *Hopwood*, 116 S. Ct. 2581 (1996) (mem.) (denying cert.) (opinion of Ginsburg, J., joined by Souter, J.), without benefit of an adequate record.[5]

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[5] As noted, Justice Powell's controlling opinion for the Court in *Bakke* declared that a university has a compelling interest in treating race as one of many factors relevant to admissions to

Similarly, the Court repeatedly has interpreted Title IX under the same principles as Title VI. *See, e.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 694-95 (1979); *Grove City College* v. *Bell*, 465 U.S. 555, 566 (1984); *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 70-71 (1992). "Title IX was patterned after Title VI * * *." *Grove City*, 465 U.S. at 566; *Cannon*, 441 U.S. at 694. In *Cannon*, the Court noted that "the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." 441 U.S. at 696. The Court has not addressed specifically the valid goals for affirmative action efforts based on gender under Title IX. Nevertheless, the commonality between Title VI and Title IX indicates that, at a minimum, Title IX does not proscribe affirmative action permissible under Title VI and the Constitution. Since student body diversity is an appropriate purpose for affirmative action under Title VI and the Constitution, that goal would also support affirmative action under Title IX.[6]

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secure for all students the educational benefits of student diversity. 438 U.S. at 314 (opinion of Powell, J.); *see also id.* at 328 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part). In *Bakke* and subsequently, the Court has made clear that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (citing *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); *id.* at 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *id.* at 612-13 (O'Connor, J., concurring in the judgment); *id.* at 639-43 (Stevens, J., dissenting)). Therefore, in *Bakke* the Court implicitly held that student diversity is also a permissible goal under Title VI. 438 U.S. at 287.

[6] The United States government, through regulations implementing Title VI, supports voluntary efforts to create racial diversity in educational programs, even in the absence of a finding of prior discrimination. *See* 34 C.F.R. § 100.3 (b)(6)(ii) (1996); 34 C.F.R. § 100.5(i) (1996) (regulations issued May 9, 1980); 20

There are yet more reasons why the Court should reject the broad holding of the court of appeals and limit its decision to the facts of this case. The judicial and congressional endorsement of diversity as a legitimate goal in education has given rise to deeply settled expectations, on the part of institutions and students, that counsel against their reversal. *See Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 854, 856 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). After the Civil Rights Act of 1964, universities and colleges throughout the nation initiated and enhanced efforts to increase minority student representation. In 1978, a majority of the Court agreed in *Bakke* that neither the Equal Protection Clause nor Title VI prohibits a university from establishing "affirmative action programs that take race into account." 438 U.S. at 325 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *id.* at 320 (opinion of Powell, J.). Following that endorsement, affirmative action became an even more widely accepted and deeply integrated component of many college and university admissions strategies.

These initiatives contributed to a substantial increase in minority attendance. In 1965, only 4.9% of college students ages 18-24 were African-American, the same proportion as in 1955. "Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily (in 1970, 7.8 percent of college students were black; in 1980, 9.1 percent; and in 1990, 11.3 percent)." *Affirmative Action Review: Report to the President* 12 (July 19, 1995). Despite this progress, blacks and Hispanic-Americans are still substantially less likely to attend college than whites. American Council on Educ., *Making the Case for Affirmative Action in Higher Education: What You Can Do to Safeguard Affirmative Action on Campus and in Your Community* 15 (June 1996). That disparity in turn has led to disparities in graduate

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U.S.C. § 7202 (West Supp. 1997); 34 C.F.R. § 280.1 (1996); 20 U.S.C. § 7205 (West Supp. 1997); 34 C.F.R. § 280.1 (1996).

enrollment and has impeded the institutions' efforts to remedy persistent under-representation of minorities in the professoriate. *See* Deborah J. Carter & Reginald Wilson, *Fourteenth Annual Status Report on Minorities in Higher Education* 40 (Am. Council on Educ. 1996).

For the Court now to reverse nearly twenty years of post-*Bakke* affirmative action in college admissions would have a devastating impact on minority representation on campuses, particularly but by no means exclusively at our leading institutions.[7]

> [I]f admissions decisions at [the nation's most prestigious universities] were made on the basis of grade point averages and SAT scores, and without regard to race, perhaps 1 percent or 2 percent of all students accepted for admission to these schools would be black. Without the highly targeted push of affirmative action it appears that two thirds of the approximately 3,000 African-American freshmen now enrolled each year at the nation's 25 highest-ranked universities would be denied admission to these schools.

Robert Bruce Slater, *Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans*, J. of Blacks in Higher Ed. 57, 57 (Summer 1995) (citing Theodore Cross, *Suppose There Was No Affirmative Action at the Most Prestigious Colleges and Graduate Schools*, J. of Blacks in Higher Ed. 44 (Spring 1994); Theodore Cross,

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[7] The experience of the University of Texas Law School after *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *cert denied*, 116 S. Ct. 2581 (1996), and the University of California after passage of Proposition 209 is arresting. Black applications to the University of Texas Law School dropped 42% in 1997. In California, black applications fell 8.2%, while overall applications increased. Peter Applebome, *Universities Report Less Minority Interest After Action to Ban Preferences*, N.Y. Times, Mar. 19, 1997, at B12. Three black students enrolled in the 1997-98 entering class at the University of Texas Law School, compared to 31 in 1996-97. Peter Applebome, *Affirmative Action Ban Changes a Law School*, N.Y. Times, July 2, 1997, at A14.

What If There Was No Affirmative Action in College Admissions? A Further Refinement of Our Earlier Conclusions, J. of Blacks in Higher Ed. 52 (Autumn 1994)).

For all these reasons, the Court should limit its ruling in this case to the particular Title VII lay-off situation presented, and should make clear that it is not forbidding all other uses of diversity in other contexts or under other statutes.

CONCLUSION

The Court should reverse the judgment below and hold that Title VII permits use of race as a factor in narrowly tailored faculty employment decisions to promote diversity. If the Court affirms the judgment, it should do so on the basis of the particulars of the record before it and should reverse the court of appeals holding that Title VII bans all non-remedial affirmative action. In any event, the Court should leave undisturbed settled law recognizing the legitimacy of pursuing diversity through narrowly tailored means in decisions involving students.

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