1971

Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education

Robert M. O'Neil

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylj/vol80/iss4/1

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Perferential Admissions: Equalizing the Access of Minority Groups to Higher Education*

Robert M. O’Neil†

The preferential admission of minority students to college has become one of the most divisive issues in American higher education. It is also an explosive political issue, largely because the Vice President of the United States has determined to make it so. The importance of the issue derives from the fact that the admissions policies of an educational institution largely determine its mission and character—more than its structure or governance, the personality of its president, or even the interests and talents of its faculty. The student body is, after all, the primary constituency—not only the largest in size, but also the one for which the institution primarily exists. Thus when it appears that the admissions policies of the great majority of American colleges and universities have served, however unintentionally, to deny essential opportunities to a substantial segment of the citizenry, those policies must be critically reexamined.²

* This article has profited substantially from a careful reading and many suggestions by two colleagues, Professors Sanford Jay Rosen of the University of Texas (Austin) Law School, and Konrad von Moltke of the State University of New York at Buffalo.
† Professor of Law, University of California (Berkeley). A.B., A.M., LL.B., Harvard University. Counsel, Assembly on University Goals and Governance.


2. Virtually every recent comprehensive study of American higher education has urged the expansion of learning opportunities for members of racial minorities. E.g., ASSEMBLY ON UNIVERSITY GOALS AND GOVERNANCE, A FIRST REPORT 11 (1971); CARNEGIE COMMISSION
It is hardly surprising that the atmosphere accompanying this reexamination has been anything but calm. The very recent discovery of the critical underrepresentation of racial minorities on American campuses (both in student bodies and in faculties) has profoundly disturbed many in the academic community. Yet the prospect of preferentially admitting to college for the first time large numbers of students from radically different academic and cultural backgrounds seems to threaten basic educational values and convictions. Meanwhile, the pressure for expansion of minority enrollments collides directly with the rising academic aspirations and expectations of many lower middle class whites for whom college has for the first time in generations become a serious prospect.

During the past two or three years minority-group enrollments at predominantly white institutions have increased sharply, although many groups are still not represented in numbers proportional to their share of the total population. Such expansion has resulted largely from the application of special or preferential admissions policies, combined

3. A note about terminology is essential at the start of this analysis. The central term which will be used throughout—"preferential admission policies"—may mean many things. At one extreme, a preference may mean no more than tipping the balance in favor of one student rather than another when all other factors are roughly equal. Some choice must be made, and it is technically accurate to classify as a preference the criterion by which the tie is broken. This is, of course, the mildest form of preference. At the opposite extreme is the fixed quota—a guarantee that a certain percentage of the freshman class will consist of residents of the state, children of alumni, veterans, Catholics, pre-meds, or others. Such a preference may admit members of the preferred group whose objective abilities fall far below those of non-quota applicants thereby excluded. Conversely, of course, if the quota imposes a ceiling as well as a floor, it may serve to exclude members of the quota group who are actually superior to applicants outside the quota simply because the percentage has already been filled.

There is a wide range of options between the fixed quota and the factor that merely tips the balance when others are equal. Preference may sometimes be given by adding points to a standardized test score in a manner of a handicap when the raw score unfairly reflects the examinee's ability or potential. Or a test score may be disregarded altogether in appraising the performance of an individual or members of a group. Sometimes applicants will be admitted on the basis of a certain qualification that others do not share—graduate work in a particular field, military service, or business experience. In other cases an applicant who would otherwise be rejected may be preferred by conditional admission—that is, by acceptance contingent on satisfactory completion of a special preparatory program. Finally, the school may unconditionally admit students who are below usual standards in particular respects and expect to supplement the regular curriculum with offerings designed to remedy the deficiency. Through these and perhaps other methods may the benefits of an explicitly preferential policy be conferred upon persons who do not meet the standard criteria for admission but who possess other qualities which the admitting institution seeks.
Preferential Admissions

with vigorous recruiting efforts and major commitments of financial aid for disadvantaged students. As a consequence of these efforts, the percentage of entering minority undergraduates at many institutions doubled in the fall of 1968 and doubled again the following year. A similar expansion of minority enrollments has also occurred at the graduate level.

The recent gains in this sector argue strongly for continued application of special criteria. The case would be compelling, even conclusive, but for several substantial objections: first, that preferential admission standards depart sharply from traditional judgments based on academic ability and performance; second, that the use of race or ethnicity as a factor in student selection violates the Constitution; and third, that rapid expansion of minority enrollments may in various ways harm the majority students, the minority students, and the institutions at which they are brought together.

I. The Admissions Process and the Use of Preference

The claim that preferential admissions violate traditional academic standards rests upon an assumption, the fallacy of which should be apparent to anyone who clearly understands the admissions process: that is, that admissions decisions derive from simple mathematical pro-

For an unusual—indeed, virtually unique—discussion of the process and the extent of preferential admissions judgments in American higher education, see F. Crossland, MINORITY ACCESS TO COLLEGE 84-89 (1971) [hereinafter cited as CROSSLAND].


5. For the most recent figures on enrollment of Negro and "other" minority groups at 2,350 colleges and universities throughout the United States—virtually all institutions of higher learning—see Chronicle of Higher Ed., March 29, 1971, at 3-6, col. 1-5.

jections about the academic or intellectual ability of applicants. Although there is a grain of truth in this assumption, it seriously oversimplifies what may well be the most complex process in American higher education.

It may once have been the case that many college admissions officers simply ranked all applicants on the basis of high school grade-point averages and scores on standardized examinations such as the College Entrance Examination Boards (CEEB) or the American College Test (ACT). But in recent years the process has become increasingly sophisticated. A variety of other criteria now receive consideration and sometimes play a paramount role. Among the supplemental factors are letters of recommendation from teachers, counsellors, family friends, clergymen and others; appraisals by the principal; records of extracurricular and community service activities; and performance in a personal interview with a member of the admissions staff, a professor or an alumnus of the college. Moreover, the weight given to these criteria varies considerably among individual applications. There are, of course, easy cases at the top and bottom of the scale—students whom any college would be delighted to accept, and applicants who simply show little promise of doing the required work satisfactorily. But for the broad middle range of applicants who have substantially identical paper records, departure from pure mathematical projections of academic ability has been thought essential if any but the most arbitrary admissions choices are to be made. These departures have often taken the form of applying "special" or "preferential" standards to individuals and to members of certain groups.


8. See B. Fine, How To Be Accepted by the College of Your Choice, Appendix ("The College Fact-Finder") (rev. ed. 1966) [hereinafter cited as Fine], for a detailed survey of the rank ordering of twelve admissions factors or criteria commonly used by admissions officers. The factors ranked (quite differently by the institutions responding) were (1) high school grades; (2) rank in class; (3) CEEB test scores, senior year; (4) CEEB test scores, junior year; (5) CEEB achievement scores; (6) National Merit scores; (7) ACT test scores; (8) extracurricular record; (9) principal's recommendation; (10) other recommendations; (11) personal interview; and (12) family tie to or personal pressure brought to bear by an alumnus. Despite the consistently high priority given to high school grades, standardized test scores, and class rank, some institutions give first attention to the principal's recommendation, to recommendations from other persons who know the applicant, or to a personal interview. For the differing but equally varied judgments of selected high school counsellors about college entrance criteria, see Blai, Pressures and Practices in College Admissions, 43 College & Univ. 167 (1968).

Preferential Admissions

Colleges and universities have, for example, always sought out and made special concessions to holders of particular non-quantifiable talents—the ability to compose a sonata, to write a publishable poem, or to kick a field goal. The presence of such uniquely skilled persons in the student body, it has been felt, brings distinction as well as diversity to the university. For similar reasons, colleges have looked at applicants' leadership capacity and experience; the admissions officer is frequently convinced that a former student body or high school class president will distinguish himself and indirectly his alma mater in later life, and thus deserves certain dispensations in entrance requirements.

Relaxation of admissions criteria has also been thought to be warranted where the applicant is literally handicapped—through blindness, deafness, a serious physical disability, or recent migration to the United States after growing up in a non-English speaking home. It has been deemed only fair in such cases to weigh high school grades and test scores differently—either by disregarding them altogether and focusing on more subjective criteria such as the principal's recommendation or a personal interview; or by adding to those scores and grades a numerical handicap which will overcome a testing disability, thereby restoring the predictive value of such indices.

A quite different rationale for preferential admissions has been the university's desire to acquire or maintain the favor of certain parental groups. One thinks immediately of the sons or daughters of trustees, wealthy alumni or donors, powerful public officials or prominent persons in the arts whose familial association with the university will...


11. Professor Thresher notes on the basis of his quarter century as Director of Admissions at M.I.T. that admissions officers are "not unnaturally, drawn toward youngsters who have . . . demonstrated marked qualities of leadership." Although this preference reflects the conviction that "the college will gain through the splendor of its reputation as a place from which leaders come," Thresher questions both the intrinsic and extrinsic validity of such considerations. He doubts whether "we know a promising student when we see one." Thresher, supra note 7, at 56-57.

The degree of indulgence for overcommitment to extracurricular activities appears, however, to be on the wane. Benjamin Fine surveyed several hundred admissions officers asking, inter alia, whether "an imposing record of extracurricular work would compensate for a poor academic average." Sixty per cent of the respondents replied "absolutely not"; twenty per cent said "only rarely"; while the balance of the sample indicated they would compensate in this fashion. The survey did not ask, of course, what may be the more meaningful question—to what extent admissions officers would decide borderline cases in favor of the student with the broad activities record. Fine, supra note 8, at 174.

12. Special arrangements are often made for the administration of standardized tests to physically handicapped students. Foreign students from non-English speaking countries are typically allowed additional time, or an opportunity to consult a dictionary, in writing examinations.
bring it distinction if not wealth and may guarantee a celebrated commencement speaker four years hence. Nor is it a secret that the child of a faculty member has often been given special breaks when he or she wishes to study where the parent teaches, since guaranteed admission (as well as free tuition) is an effective weapon in the competition for faculty talent. Such preferences are justified by the desire of the institution to retain or to attract a resource deemed vital to its welfare.

Preferences based on sex represent yet another departure affording one group a priority by imposing higher standards on another group. Some coeducational colleges retain a balance between the sexes only by rigidly limiting the number of women they accept for each class. Thus quotas are sometimes adopted and enforced, with the result that standards for women remain substantially higher than for men.

Finally, geography has often been the basis for preferentially admitting certain applicants. Private universities have openly sought and preferred applicants from distant places; the student from California usually stands a better chance of getting into Harvard or Yale than a student with an identical record from Boston or New York—even though the West Coast student whose family fortune allows him to think seriously about going East already has a wider choice of collegiate options than the Bostonian or New Yorker who cannot afford to go West. The situation is precisely the reverse at the typical state-supported college or university; either by statute or regental regulation, preference is given to residents of the state through a variety of devices — higher nonresident tuition, higher grade-point average and test-score requirements for out-of-state students, and increasingly by quotas on nonresident enrollments.

13. Bowles, Pace and Stone comment: "All colleges give extra consideration to the children of alumni. Some carry it to the extent of automatic admission of alumni children who meet the entrance requirements; others go no further than giving alumni children the benefit of the doubt." F. BOWLES, C. PACE & J. STONE, HOW TO GET INTO COLLEGE 87 (rev. ed. 1968).
15. Jencks and Riesman observe that enrollment trends do "to some extent ..., reflect discrimination against women in college admissions," adding that "private institutions are often quite open about discrimination, establishing sex quotas quite independent of the number or talent of each group of applicants." JENCKS & RIESMAN, supra note 7, at 294. This problem has recently received considerable national attention. The Director of the Office for Civil Rights of the Department of Health, Education and Welfare has received no fewer than 250 allegations from women's organizations of sex bias by colleges and universities, many with regard to admissions practices. New higher education legislation introduced by the Administration in the spring of 1971 would apparently forbid grade differentials for male and female applicants. Higher Education & National Affairs, March 12, 1971, at 1.
17. Higher tuition charges for nonresident students are almost universal today, and the barriers are rising as the financial stringency increases. They have been the subject of
Preferential Admissions

It should therefore be clear that the preferential admission of minority students cannot be attacked because it defiles the purity of the admissions process or because it involves a departure from a judgment heretofore based solely on narrowly-defined academic merit. The concessions already made to the special needs of individual applicants and to institutional desires for diversity belie any such blanket indictment. The essential issue is not whether preferences should be allowed at all, but whether race or ethnic status should be permitted as a basis for dispensations of a kind long accorded other special groups.

II. Preferential Admissions and the Constitution

A second objection that has been made to preferential admission standards is that the use of race or ethnicity as a factor in admissions decisions violates the Constitution. The courts have not yet been considerable (and uniformly unsuccessful) litigation. E.g., Clarke v. Redeker, 405 F.2d 883 (8th Cir.), cert. denied, 396 U.S. 862 (1969); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966); Landwehr v. Regents, 156 Colo. 1, 396 P.2d 451 (1965); cf. American Commuters Ass'n v. Levitt, 405 F.2d 1148 (2d Cir. 1969); Annot., 83 A.L.R.2d 497 (1962). For recent surveys of nonresident tuition trends and differentials, see Chronicle of Higher Ed., May 31, 1967, at 1, col. 2-3.

Other forms of geographical discrimination result from higher entrance requirements or admission standards for nonresident applicants. In the spring of 1969, 25 land-grant colleges and universities reported having raised admission standards for nonresidents, while only 12 had increased standards for residents. Chronicle of Higher Ed., May 5, 1969, at 6, col. 3. More drastic is the absolute quota on nonresident enrollments. The Regents of the University of Wisconsin recently decreed that nonresident freshmen enrollment at state campuses be reduced to 15 per cent beginning in 1971; at Madison, 29 per cent of the undergraduates presently come from other states—suggesting that for the next several years the nonresident quota will be drastically reduced. Chronicle of Higher Ed., April 7, 1969, at 3, col. 2; Salpukas, Out-of-State Quotas Being Set at Colleges, N.Y. Times, April 11, 1971, § 1, at 41, col. 5-6.

In May, 1970, a special University committee reported to the Madison faculty its assessment of the probable impact upon the campus of the sharp curtailment of nonresident enrollment. Few of the departments surveyed thought the effects of the new policy beneficial; about half thought important educational interests might be jeopardized by such a restriction. The actual impact would depend, of course, upon the population to which the quota is applied—i.e., the entire system, the Madison campus, the division or the college, etc. See Memorandum of the University Committee-Madison to University of Wisconsin-Madison Faculty, May 11, 1970 (mimeo).

Finally, some discrimination results from restriction of scholarships and financial aids, such as the California State Scholarships and New York State Scholar Incentive Awards, to residents of the granting state. CAL. EDUC. CODE § 31203(a) (West 1969); N.Y. EDUC. LAW § 601-a(2)(c) (McKinney 1969). 18


If a state college or university were to alter its admissions criteria so as to extend a preference to disadvantaged applicants generally rather than to members of specified
squarely faced with this claim, and in dealing with it we are therefore forced to proceed by analogy, piecing together decisions which have skirted the periphery of this sensitive and complex issue. In analyzing the constitutionality of preferential admissions, it may be helpful to have a test case clearly in view. Assume that an unsuccessful white applicant to a state university discovers that black candidates with lower test scores and grades are being accepted for the entering class for which he has been rejected. He brings suit against the university alleging a denial of equal protection, contending that he was denied admission solely because of his race. Although admissions decisions are both flexible and discretionary, the requirement of standing to sue would not be a serious barrier to the maintenance of such a suit by a disappointed applicant.

At least three dispositions are theoretically available to a court dealing with such a case on its merits. First, a court might strike down the preference on the ground that the equal protection clause permits no use whatever of race or ethnicity—neither for beneficial nor detrimental purposes. Second, a court might hold that the desire to help rather than to harm the persons for whose protection the Fourteenth Amendment was enacted is pivotal, and that a benign racial classification should thus be judged by the same rational basis standard that is applied to classifications affecting business and other economic interests. Finally, a court might deem an allegedly ameliorative racial classification highly suspect or subject to rigid scrutiny and might then require the university to prove that its use is essential to the achieve-

rational minorities, the institution would presumably be required—in the event of a legal challenge—to prove only a rational connection between its admissions criteria and its goals. See P. FreuRD, ON LAW AND JusticE 44-47 (1968).

20. For more general discussion of many of the issues discussed in this section, see Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341; Kaplan, supra note 6; Vieira, Racial Imbalance, Black Separatism, and Permissible Classification By Race, 67 Mich. L. Rev. 1555 (1969) [hereinafter cited as Vieira].

21. There may be, of course, serious doubts in particular cases whether the institution is sufficiently "public" to be bound by the constraints of the Constitution, even though it is private in form and origin. See, e.g., Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); and see generally O'Neill, Private Universities and Public Law, 19 BUFFALO L. Rev. 155 (1970).

22. Since admitting an applicant or denying him admission is a discretionary act and since no college or university today employs test scores and grades as the sole admissions criteria, the decision to deny an application could not ordinarily be successfully challenged in the courts—at least as long as "any state of facts reasonably may be conceived to justify" the college or university's decision. See, e.g., McGowan v. Maryland, 366 U.S. 420, 426 (1961); pp. 701-05 supra. But as has recently been argued by Professor Ely, it does not follow from the fact that an act is discretionary that any criteria whatever may be employed in exercising discretion. More specifically, a claim that the actual choice of criteria on which admissions decisions were based was racially motivated should be sufficient to "trigger" judicial review. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1254-69 (1970) [hereinafter cited as Ely].
Preferential Admissions

ment of a compelling governmental objective. For reasons to be developed below, the final approach seems to be the only one consistent with the evolving interpretation of the equal protection clause; yet within this developing doctrine, college and university administrators should be able to defend preferential admissions policies.

A. The First Option: The Use of Race Is Per Se Unconstitutional

There is some authority for and a superficial appeal to the view that the Constitution is "color-blind" and that therefore the government may not use race for any purpose, no matter how compelling its reasons. In striking down legislation based on race, the Court has repeatedly cautioned that racial classifications are "highly suspect," are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose," and are "subject to the most rigid scrutiny." But the Court has gone on to suggest that racial differences may nevertheless

22. The suit brought by the aggrieved Caucasian applicant need not ask that the plaintiff be automatically admitted, but only that his application be reconsidered under a nonracial criterion. Thus the proper remedy—and one entirely sufficient to vindicate the plaintiff's constitutional claims with no standing problems—would be to send the file back to the admissions office for a comparative consideration uninfluenced by race or ethnicity. Thus the proper remedy—and one entirely sufficient to vindicate the plaintiff's constitutional claims with no standing problems—would be to send the file back to the admissions office for a comparative consideration uninfluenced by race or ethnicity.

24. The suit brought by the aggrieved Caucasian applicant need not ask that the plaintiff be automatically admitted, but only that his application be reconsidered under a nonracial criterion. Thus the proper remedy—and one entirely sufficient to vindicate the plaintiff's constitutional claims with no standing problems—would be to send the file back to the admissions office for a comparative consideration uninfluenced by race or ethnicity.
be recognized and classifications permitted if "there clearly appears in the relevant material some overriding statutory purpose . . . "

The persistent avoidance of a per se prohibition of racial classifications might be attributed simply to judicial precision or caution. Yet there would be little reason for such caution if the only issue were that of detrimental classification. The Japanese relocation cases27—decided during World War II under conditions that make their continuing vitality most doubtful28—were the last in which the Court sustained a use of race which had the effect of discriminating against or harming members of a racial minority.20 Indeed, the Justices have often affirmatively asserted during the post-War period that all harmful treatment of racial minority groups qua groups is impermissible.29 Thus the inference is strong that the constitutionality of racial classification has been kept open so that the Court could sustain, or at least consider de novo when the proper case arose, one or both of two possible remaining uses of race—that is, for neutral and/or ameliorative purposes.

There is at least one precedent which sustains an ostensibly neutral racial classification. In a brief per curiam opinion in Tancil v. Woolls,81 the Supreme Court seemingly allowed differentiation of citizens by race in the maintenance of county divorce records.32 One might infer from

26. Id. at 192-93.
28. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1090 (1969) [hereinafter cited as Developments]: "It now seems doubtful that any objective short of the exigencies of war-time emergency would justify the imposition of any long-time burdens on a racial basis, especially racial segregation. Indeed, even under crisis conditions, it is not clear that a state would be permitted to impose serious deprivations because of an individual's race."
29. The one possible exception to this conclusion is Swain v. Alabama, 380 U.S. 202 (1965), where the Supreme Court seemingly allowed the use of the prosecution's peremptory challenge to exclude black jurors for discriminatory purposes. Professor Vieira notes that "Swain seems to permit racially differentiated treatment to be predicated on community attitudes which are, by hypothesis, unreasonable. . . . [T]he Swain case may lend support to the use of racial classifications in other areas, including education, in which community attitudes have an important effect and in which injustice is not merely apparent but real." Vieira, supra note 26, at 1590.
30. E.g., Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. Atlanta, 350 U.S. 879 (1955); Gayle v. Browder, 392 U.S. 903 (1965); New Orleans Park Improvement Ass'n v. DeJesse, 358 U.S. 54 (1958). In fact, this proposition may have been settled—or its settlement strongly implied—as early as Buchanan v. Warley, 254 U.S. 60 (1917), where the Supreme Court refused to sustain racial classifications clearly detrimental to Negroes.
32. In Tancil, the Supreme Court affirmed unanimously and without opinion a district court decision, Hamm v. Virginia State Bd. of Elections, 320 F. Supp. 156 (E.D. Va. 1970), striking down state laws that maintained segregated voting and property records. But the same per curiam judgment also upheld a law (§ 20-101 (1950)) which required the state to identify the race of parties to every divorce decree. On direct appeal, both sides vigorously disputed the constitutionality of that law, which the district court expressly upheld. See Statement of Jurisdictional at 6-9, Tancil v. Woolls, 379 U.S. 19 (1964); Statement of Jurisdiction at 6-20, Virginia State Bd. of Elections v. Hamm, aff'd
this judgment that the Court has eschewed a per se test of racial classification only to deal with such essentially neutral, statistical uses of race as were involved in Tancil. The inference would be plausible but for two circumstances. First, the major precedents leaving open the basic issue of the per se illegality of racial classifications were the Florida and Virginia miscegenation cases, neither of which referred to the prior judgment in Tancil. Had the Court meant only to avoid the invalidation of neutral classifications of the Tancil sort, a citation would have been appropriate. Second, Tancil is hardly strong enough by itself to support a major exception to the Court's profound judgments involving racial discrimination. It merits only the deference usually accorded an unexplained per curiam affirmance of a rather complex district court judgment. Thus the reservation presumably reflects judicial concern for a much more important practice than the "neutral" use of race to classify divorce records.

B. The Second Option: A "Rational Basis" Test

A second possibility is that the courts might sustain a benign or beneficial racial classification if any rational basis for it could be found—that is, without giving careful scrutiny either to the permissibility of the goal or to the closeness of the relation between the goal and the means chosen to effect it. Use by the courts of a rational basis test in such cases would make the inquiry where race is used consistent with that traditionally undertaken when other classifications are challenged under the equal protection clause: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," and the goal of the classification will not be subjected to close analysis.

Several considerations—operative when racial classifications are employed but either totally absent or much weaker when economic classifications are at issue—appear to argue for the rejection of the ra-

sub nom. Tancil v. Woolis, 379 U.S. 19 (1964). The Supreme Court showed no inclination, however, to disturb that portion of the judgment below; the circumstances make it most unlikely that the Court's affirmance of this portion of the district court judgment could be attributed to mere inadvertence. See Vieira, supra note 20, at 1600-01.

The use of race involved in Tancil was neither ameliorative nor detrimental, but essentially neutral; it is hard to see how the keeping of divorce records on a racial basis could either benefit or harm black citizens of Virginia—though it is easy to see how (as the district court had held) segregation of voting and property lists might jeopardize equality. There is, moreover, a thin but plausible state interest in gathering certain vital statistics on a racial basis.

35. Recently the Supreme Court has deemed this the proper standard to apply even to welfare-ceiling regulations differentiating between large and small dependent families. Dandridge v. Williams, 397 U.S. 471 (1970).
tional basis test when racial classifications are challenged, in favor of more rigid scrutiny. In at least four respects, racial distinctions, whether beneficial or harmful to minorities, are more dangerous than almost any other type of differentiation among citizens. First, as Professor John Kaplan has shown, racial classifications are inherently divisive; they tend to invoke the latent and not-so-latent prejudices of persons on both sides of a line that all know exists but which acquires added importance from governmental recognition or sanction. Second, racial distinctions are immutable and indelible even when the government does not draw attention to them. To recognize a class based on race or ethnic-group membership is to reinforce barriers that cannot be crossed, and to give governmental sanction to differences among people for which they are in no way responsible and over which they have no control. Third, the power to classify on the basis of race is always dangerous, no matter how benign the original objectives. It seems undesirable for courts to employ a standard of scrutiny which allows preferential classifications to become too easily embedded in the law; today's minority may become tomorrow's majority, and the group that needs protection and assistance today may someday be the oppressor. More immediately, the information gathered by one person in order to prefer members of a particular racial group may be used by his successors to the detriment of that same group. Finally, as Professor Kaplan has also warned, "any legal classification by race weakens the government as an educative force." The legislature that enacts laws based on racial distinctions—whichever way they cut—will appear in the eyes of some to have departed significantly from principles of both equality and neutrality. These potentially adverse effects of racial classifications

36. See Kaplan, supra note 6, at 375-78.
37. In this respect, racial classifications are different from other distinctions—notably those based on wealth and place of residence—which the Supreme Court has on occasion subjected to a standard of review somewhat more rigorous than that generally undertaken in economic equal protection cases. See, e.g., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment). Although the language of "rigid scrutiny" is invoked in neither context, the manner of analysis and the rejection of colorable state interests supporting the respective classifications reveal a rigorous standard of review. Indeed, even in the economic context where the "rational basis" test governs, the Court has invalidated one classification creating a closed class from which small businesses could never escape no matter how large and prosperous they became. Morey v. Doud, 354 U.S. 457 (1957). But cf. James v. Valtierra, 39 U.S.L.W. 4488 (April 26, 1971).
38. The employment office that requests and retains photographs in order to help minority personnel may discover that others in the organization have a less benign interest in the same data. A program of separation initially sought by minority groups to serve or advance their own ends may turn out to be a system of segregation beneficial to others.
39. See Kaplan, supra note 6, at 379.
Preferential Admissions

assume added significance when the actual effects of the particular classification are uncertain. In those instances, a classification can be deemed "beneficial" or "ameliorative" only by a careful examination of legislative intent. Although Supreme Court discussions of legislative "motive," "purpose," and "intent" are confused and at times contradictory, the Court has usually disclaimed any inclination or competency to inquire into the motives of a legislature in enacting a law.

These policy considerations argue strongly for closer scrutiny of the justification for allegedly ameliorative racial classifications than is required in most other cases challenging the constitutionality of a state classification.

C. The Third Option: Allegedly Ameliorative Racial Classifications Call for "Strict Scrutiny," Must Not Be "Invidious," and Must Be "Rationally" Related to an "Overriding State Purpose"

The most relevant case law, together with the policy considerations noted above, strongly suggests that although racial classifications are not per se unconstitutional they will receive "strict scrutiny." One of the most important effects of this formulation is to place the burden of justification on the defendant. When race is shown as the basis of a classification, the responsible agency has the burden of establishing the validity of the classification, and any doubts or ambiguities are likely to be resolved in favor of the plaintiff. To survive a court's strict scrutiny, it appears that the state must offer persuasive proof on three separate issues: (1) that the classification is not "invidious;" (2) that the classification is related to an "overriding" or "compelling" state interest; and (3) that the use of race is a rational means of implementing that interest.

40. See generally Ely, supra note 22, at 1207-12.
41. In United States v. O'Brien, 391 U.S. 367, 383 (1968), the Supreme Court, quoting McCray v. United States, 195 U.S. 27, 56 (1904), declared:

The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be asserted. The O'Brien Court explained that an earlier statement in Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("Acts generally lawful may become unlawful when done to accomplish an unlawful end"), meant only that the inevitable effect of a statute on its face may render it unconstitutional. To ground the constitutionality of a racial classification on the benevolent "motives" of a legislature would necessitate an extremely difficult inquiry into the diverse subjective intentions of a group of law makers: "Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations, it becomes a dubious affair indeed." Flemming v. Nestor, 365 U.S. 608, 617 (1960). Cf. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810).
44. See Developments, supra note 28, at 1091-1101.
It remains to consider what the courts have required states to prove on each of these issues in analogous contexts and to test preferential admissions within this constitutional framework.

(1) "Invidious" Racial Classifications are Unconstitutional

The Supreme Court has consistently held unconstitutional any state action whose goal has been either (a) to segregate the races or (b) to ban certain activity on the basis of the race of the participants. The Court has not, however, been perfectly consistent in the terminology it has used in invalidating such laws. At times it has appeared to focus on the goal itself, articulating an "invidiousness" test to strike down laws implementing "impermissible state goals." More often it has looked to the means by which such goals have been effectuated and has held invidious and therefore unconstitutional racial classifications as a means of goal implementation.

In justifying its invalidation of state action whose purpose or method is to segregate the races or which makes race an element in a state criminal statute, the Court has consistently stressed the inevitable stigmatizing effect of such action. In Brown v. Board of Education, for example, the Supreme Court clearly recognized the social realities of "separate but equal" treatment and held that such state-imposed separation inherently and inevitably implied an official imprimatur of inferiority. The Court did not always explain why a particular form of segregation was "invidious" in many cases following Brown. But it apparently based its decisions on Brown's "stigma" theory since it struck down state segregation laws without considering either the state policy being served or the comparative quality of facilities available to members of each race.

47. An "invidiousness" test has been part of Fourteenth Amendment litigation since the Slaughter-House Cases were decided in 1873. E.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873); Strauder v. West Virginia, 100 U.S. 353, 367-08 (1879); Ex parte Virginia, 100 U.S. 339, 344-45 (1880); Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-25 (1961); Loving v. Virginia, 388 U.S. 1, 10 (1967).
51. The Court specifically noted that segregation inevitably stigmatized black children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.
52. After Brown, the Court found invidious racial discrimination in a variety of contexts. See, e.g., Schiro v. Bynum, 375 U.S. 393 (1964), aff'g mem. 219 F. Supp. 204 (E.D. La. 1963) (municipal auditorium); Turner v. City of Memphis, 399 U.S. 950 (1970) (airport
A preferential admissions system for minority-group students is clearly not a form of "invidious" discrimination as that test has been defined by the courts. The goal of preferential admissions is not to separate the races, but to bring them together.53 Moreover, no conduct is made criminal, so that the precedents which have struck down state statutes where race has been an element of criminality are irrelevant. But even more important than the obvious differences between the goal of a preferential admissions system and the goals the Court has in the past found to be impermissible or invidious are the differences in the effect of such a system. Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites. As Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia has argued:

[T]he function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational and because in our society it would not stigmatize whites.54

(2) Racial Classifications May Be Used Only to Implement an "Overriding" or "Compelling" State Interest

The determination that a preferential admissions system imposes no stigma on the majority population does not end the constitutional inquiry, however. The Supreme Court has consistently held that racial classifications must be part of a program which furthers an "overriding" or "compelling" state interest.55 The Court's requirement of an "overriding" state interest has been met by proof that a racial classification seeks to remedy the effects of past racial discrimination.56 For example,
the courts have frequently held that the provision of equal primary and secondary educational opportunity is so paramount a goal that racial classifications are permissible. White plaintiffs have frequently alleged that the constitutional mandate of "color-blindness" is violated by resort to racial guidelines to eradicate de jure segregation. It has, however, been uniformly held that school boards which have consciously used race in the past in an effort to separate pupils may now use racially-conscious policies to bring those pupils back together. The courts have sometimes ordered remedial programs for Blacks who have been disadvantaged by inferior all-Negro schools and have occasionally indicated that racial classifications are necessary to eradicate the vestiges of a dual school system once supported by positive law.

But the closest analogy to most college preferential admissions programs is found in the remedial programs which city school boards have voluntarily undertaken to eradicate the pernicious social, economic, and educational effects of residential segregation. While most courts have held that a state need not act affirmatively to end de facto segregation for which it has not been directly responsible, courts have gener-

57. See notes 58, 59, 60, 62 infra.
58. As Judge Sobeloff noted in Wanner v. School Board of Arlington County, 357 F.2d 452 (4th Cir. 1966):
If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve "consideration of race." When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions . . . their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution disapproves.
Preferential Admissions

ally allowed local school boards almost total discretion in selecting and implementing policies to overcome it. In fact, no court appears to have enjoined a school board plan designed to facilitate integration under conditions of residential segregation. In *Offermann v. Nikkowski,* the Second Circuit refused to enjoin the Buffalo School Board from implementing a plan to eradicate de facto school segregation despite the use of explicit racial classifications: “That there may be no constitutional duty to act to undo de facto segregation does not mean that such action is unconstitutional.” The Court continued: “Where [consideration of race] is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem.”

Courts have implicitly found that racial classifications may further “compelling” or “overriding” state interests in areas other than education and have accordingly upheld other remedial programs implemented by racial classifications. In the area of jury selection, lower courts have found efforts to overcome past discrimination against Blacks a sufficiently “compelling” state purpose to warrant the use of

For a more complete list of the relevant case law, see Bell, *School Litigation Strategies for the 1970's*, 1970 Wis. L. Rev. 257, 264 n. 1.


63. 248 F. Supp. 129 (W.D.N.Y. 1965), aff'd, 378 F.2d 22 (2d Cir. 1967).

64. 378 F.2d at 24-25. Also apposite, indeed persuasive, in this regard is the Third Circuit decision in *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), cert. denied, 99 S.U.L.W. 3482 (1971). There, a group of white teachers in Newark alleged that the Board of Education had bypassed the regular promotion schedule and procedure, and had given priority to black candidates for administrative positions primarily for reasons of race. The Court of Appeals recognized that the regular promotion schedule and procedure, and had given priority to black candidates for administrative positions primarily for reasons of race. The Court of Appeals recognized that the regulation was not for that reason unconstitutional, even though the Board was apparently under no constitutional mandate to promote integration: “State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment.” 431 F.2d at 1257.
rational classifications. Similar views of inclusive remedial rational classifications appear in cases involving relocation planning under urban renewal and racial balance in government housing units. One federal district court recently upheld affirmative action requirements promulgated by the Department of Labor in order to ensure minority hiring on federal construction projects.

65. In Brooks v. Beto, 395 F.2d 1 (5th Cir. 1968), a federal court was faced with a challenge to a state court criminal conviction based on an alleged equal protection violation arising from the intentional inclusion of Blacks on the grand jury which indicted the appellant. The court noted that grand juries were required to represent a cross-section of the community, yet there had never been a Black on a grand jury in the area even though Blacks represented 10 per cent of the population. The intentional inclusion was upheld:

How then is this Constitutional imperative to be achieved in a society that still bears the ugly scars of decades of racial segregation with all of its discriminations? For it is in this social structure that the problem arises . . . . It is inevitable, therefore, that jury selectors be conscious of those components of the community—racial, economic, etc.]. And where identifiable racial groups are significant elements, that means there must be an awareness of race as such [original emphasis].

66. In both instances, courts have implicitly recognized as an "overriding" state interest the provision of housing for persons displaced by urban renewal and the preservation of racial integration in government housing units, and have permitted racial classifications to be used to institute both policies. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 902 (2d Cir. 1968), plaintiffs alleged that special planning was not done for Black and Puerto Rican relocatees, and that the state thereby was allowing the racial discrimination of the housing market to operate, denying them equal protection. In holding that a cause of action had been stated, the Second Circuit noted that:

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required (footnotes omitted).

67. Contractors' Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002, 1009 (E.D. Pa. 1970). The Executive Order authorizing this program stated that the Government's objective was to require contractors and subcontractors to "take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Exec. Order No. 11,246, 30 Fed. Reg. 12319. To effectuate this policy, however, the Department of Labor found it necessary to include in the invitation for bids "specific goals for minority manpower utilization." Although the Plan was challenged under Title VII of the 1964 Civil Rights Act rather than under the Equal Protection Clause, the court nonetheless examined the purpose of the Plan and found it to be remedial and inclusive, not invidious or exclusive: "In light of all the circumstances, . . . the Plan sets forth a reasonable method to assure equal treatment for minority groups, if the contractor makes the required good faith effort." Contractors' Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002, 1011 (E.D. Pa. 1970), aff'd, 39 U.S.L.W. 2614 (3d Cir. April 22, 1971).
Preferential Admissions

In short, the analogy of the de facto school segregation and comparable cases strongly suggests the substantial or compelling character of the state interest served by a college preferential admission policy. By describing its objectives and its methods—in the manner to be outlined below—a state university should be able to demonstrate that the primary goal and probable effect of preferential policies are the equalization of access for disadvantaged minority groups.

(3) The Use of a Racial Classification Must Be a Reasonable Means of Implementing the Compelling State Interest

Once a constitutionally valid objective is established, it seems that no more than a "rational" relationship between means and purpose need be shown. In McLaughlin v. Florida, for example, the Court assumed that prevention of extramarital and premarital promiscuity represented a valid objective of state criminal legislation. But the use of race for this purpose—making interracial cohabitation an especially serious offense—was impermissible because the race of the parties bore no rational relationship whatever to the government's conceded interest in sexual propriety.

The preferential admission of members of certain racial minorities to college should be able to meet a "reasonable means" test or even a more stringent standard since racially-related educational deprivation is the evil at which preferential admissions programs are principally aimed. As the federal district court stated in Norwalk CORE v. Norwalk Board of Education, "[f]or this court to intervene in a case such as this [attempt to overcome de facto segregation by bussing] would be to discourage voluntary action by enlightened public officials attempting to correct one of the underlying causes of racial tension in this Nation."

One issue remains uncertain: whether a classification that is not invidious and is rationally related to a compelling state interest must further be justified by the negation of all possible non-racial alternatives. There appears to be no apposite case law. In other contexts—notably the regulation of speech and political activity—the Supreme

Several earlier cases indicate consistent judgments. Etheridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), required affirmative efforts to assure nondiscriminatory hiring where adherence to traditional patterns would produce an almost all-white work force. Another Ohio case, Weiner v. Cuyahoga Community College Dist., 238 N.E.2d 839 (Ohio Ct. Common Pleas 1968), aff'd, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), upheld voluntary efforts designed to assure the same end by rejecting the lowest bidder because of insufficient commitment to minority employment opportunities. 68. 579 U.S. 184 (1964).
69. Id. at 193.
Court has required proponents of restrictive measures to show that no less repressive means would serve the valid governmental interests.71 Given the concerns and hazards attending any explicit racial classification, it is at least arguable that the doctrine of the "less onerous alternative" should also apply here as well. For present purposes, that would mean racially explicit preferential admission policies would survive constitutional attack only if non-racial options were shown to be so far less effective in expanding minority collegiate opportunities as not to constitute feasible alternatives. This formulation would impose a high burden on the proponents of preference, but not a burden that is unreasonable or insurmountable.

III. The Case for Preferential Admissions

It now remains to consider the case for and against preferential admissions within this constitutional framework. We have already suggested what will be the outcome of the inquiry. It is the burden of the ensuing pages to demonstrate (1) that racial classifications in admission policies are invidious to no population group; (2) that such policies are reasonably and directly related to a compelling governmental interest; and (3) that other approaches to the problem of minority access would not constitute viable alternatives. We begin with an analysis of the present pattern of educational opportunities for minority groups in the United States.

A. Minority Group Access to Higher Education: The Present Pattern

American higher education has only very recently discovered a longstanding dereliction. "A few years ago," remarked an officer of the College Entrance Examination Board in 1969, "we did not have the problem of the black students because we did not have the students and did not know enough to worry about not having them. We still do not have the students but we worry about it a great deal."72 Until the last few years, minority students matriculated in significant numbers only at the essentially remedial-vocational junior or community colleges in the large cities, the meagerly supported black colleges of the Southeast and Border States, and at a handful of socially-conscious private

liberal arts colleges such as Antioch, Oberlin and Wesleyan. Elsewhere the absence of minority students was simply overlooked. Indeed, laws in many states designed to avert discrimination forbade asking questions about race or ethnic identity and thus virtually mandated ignorance about minority enrollments.

Beginning in the fall of 1967, the Civil Rights Office of the Department of Health, Education and Welfare conducted extensive surveys of college enrollment of Negroes and "other" minority students. The figures for 1970-71 showed very substantial increases over those for 1967-68 at many institutions. Meanwhile, comparable surveys of more specialized samples have been conducted by the American Council on Education (of all college freshmen), the National Association of State Universities and Land-Grant Colleges, the Association of American Universities and various professional societies of law, medical, and other schools. The findings of these recent surveys will be reviewed shortly.

73. For an historical review of the question, see Clement, The Historical Development of Higher Education for Negro Americans, 35 J. Negro Ed. 299 (1966). There have been a few notable exceptions to the general pattern of de facto exclusion of minority students from prestige institutions. See Gordon & Wilkerson, supra note 4, at 122-23. Interestingly, one of the small number of colleges that did seek out Negro students in the early days was Berea College in Kentucky. In 1908, however, the Supreme Court severely thwarted these efforts by sustaining against Berea's constitutional claims a state law that made it a crime to educate black and white students in the same place at the same time. Berea College v. Kentucky, 211 U.S. 45 (1908). Thus in condemning the slowness of most colleges and universities to move in this area, one must recognize that many formal barriers have only recently been lowered. For an excellent review of the historical barriers to black higher education and the startling recency of opportunities for access to white campuses, see Crossland, supra note 3 at 25-50.

74. E.g., Mass. Ann. Laws ch. 151C, § 2(c) (1969), which forbids employers to ask the race of job applicants, or colleges and universities to inquire into the race of prospective students.

75. The surveys were conducted to determine the extent of compliance with Title VI of the Civil Rights Act of 1964, 78 Stat. 252 (1964), 42 U.S.C. § 2000d (1964). The results were published in the Chronicle of Higher Education on three occasions—April 22, 1968, at 4, col. 1-5; April 21, 1969, at 4, col. 1-5; March 29, 1971, at 3, col. 1-5. After conducting two surveys in consecutive years, it was decided to pursue the inquiry on an alternate year basis. The next survey will thus be taken in the fall of 1972. No attempt has yet been made to identify minorities other than Blacks, save for the indiscriminate category "other."

76. For the most recent data, see American Council on Education, National Norms for Entering College Freshmen—Fall 1970, at 53 (1970). The ACE surveys do identify several racial/ethnic categories: "Caucasian/white"; "Negro/Black/Afro-American"; "American Indian"; "Oriental"; and "other". The reported data are not, however, broken down on an institutional or even regional basis, but only by type of institution—colleges for men, colleges for women, and coeducational colleges (which categories are then subdivided between nonsectarian and Catholic), and predominantly black colleges.

77. J. Egerton, State Universities and Black Americans (1969); A. Bayer & R. Boruch, The Black Student in American Colleges (1969); National Ass'n of State Universities & Land-Grant Colleges, Office of Institutional Research, Circular No. 150, April 1, 1970; and for a particularly effective regional study, College Entrance Examination Board, Admission of Minority Students in Midwestern Colleges (1970). For intensive studies of medical school minority enrollment, see Report of the Association of American Medical Colleges Task Force to the Inter-Associational Committee on Expanding Educational Opportunities in Medicine for Blacks and Other Minority
While trends prior to the late 1960's cannot be documented, it is almost certain that the access of minority students to selective institutions actually declined between World War II and the time of the recent surveys. San Francisco State College, the scene of bitter racial unrest at the end of the decade, provides a vivid illustration. In the late 1950's, just before the California Master Plan set new floors under the admission levels of the State Colleges—consigning students below that floor to the junior colleges—approximately twelve per cent of the students at San Francisco State were Black. By the late 1960's the percentage had dropped to four—a decline that can be attributed to rising admissions standards and mounting pressure for higher education in the Bay Area. Much the same undoubtedly happened elsewhere, though comparable figures are seldom available. Where many public institutions were once relatively open—for example, to returning G.I.'s who took advantage of post-war veterans' educational benefits—rapidly rising population pressures and demand, along with a steady shift from the private to the public sector, changed all that. Truly non-selective policies are seldom found today except at the bottom and at the fringe of the system—in the urban vocation-remedial junior colleges and at the proprietary institutions that charge high fees to educate academically marginal students no other college will accept. Very few state universities (Kansas and Ohio are the most notable exceptions) are still required by law to accept any resident of the state who can produce a high school diploma and passing test scores.

There are two distinct ways of measuring the present access of

Students (1970). For comparable data on law school enrollments, see Law Schools and Minority Groups (M. Katz ed. 1969). For the most sophisticated data on the distribution of black college students among various types of institutions of higher learning, see F. Crossland, Minority Access To College 51-35 (1971). This Ford Foundation study is particularly helpful in breaking down total enrollments between two and four-year colleges, and between traditionally black and traditionally white institutions.


80. See Jencks & Riesman, supra note 7, at 279-81. See also the observations of Harvard’s Director of Admissions, H. Doerrmann, Crosscurrents in College Admissions 2-4, 11 (1968). For an indication of the continuing rise in standards, see Chronicle of Higher Ed., May 5, 1969, at 6, col. 3, reporting steady rises in entrance levels for member institutions of the National Association of State Universities and Land-Grant Colleges. A somewhat different perspective is that of the Carnegie Commission on Higher Education, which argues that “the American system of higher education has always been an ‘open’ system... [with] a place at some college for everyone who wanted to go and could afford to go.” The Commission’s report on equal opportunity in higher education urges that “the system should remain open... as against those who now wish, for the first time in our history, to close it.” A Chance to Learn: An Action Agenda for Equal Opportunity in Higher Education 1 (1970).
Preferential Admissions

minority groups to higher education: first, through surveys of current enrollments; and second, by appraising the prospects of matriculation for members of particular groups. We shall approach the question from both perspectives.

The surveys conducted since 1967-68 show that somewhere between five and seven per cent of all college and university students throughout the United States are Black. The percentage is somewhat higher for freshmen, though estimates vary widely. For predominantly white campuses the figure is only three to five per cent, however, since about two-fifths of all black students attend predominantly Negro colleges. At the graduate level, the nonwhite enrollment is considerably lower—perhaps three per cent overall, of whom roughly half are at predominantly Negro institutions.

These comprehensive national figures conceal important variations in two directions. On the one hand, the records of particular institutions—Wayne State, Southern Illinois and the City University of New York in the public sector; Antioch, Chicago, Sarah Lawrence and Wesleyan in the private sector—are far above the national average, indicating, of course, that the record of many large public and private institutions is far below the average. On the other hand, the gross enrollment increases may be substantially greater than the net gains for several reasons. First, as John Egerton of the Race Relations Information Center cautions: "A disproportionate percentage of black students in predominantly white institutions are freshmen, and there is ample reason to suspect that their attrition rate is higher than that of white freshmen."
Second, there is disturbing evidence that the pool of minority matri-
culants has been redistributed more than it has been enlarged. Professor Clyde Summers has argued that this is essentially what has happened with respect to minority law students—as a result of preferential admis-
sion policies they have moved up a "notch" or two in the system, with-
out any substantial enlargement of opportunities overall. Elsewhere there is harder proof of this phenomenon. The growth rate at most Negro colleges has levelled off since 1968 (save to the extent white students may have been admitted to fill the gap); at some Negro insti-
tutions enrollment has actually declined, suggesting that white campuses have gained at least partially at the expense of black cam-
puses.

Third, these detailed enrollment data apply only to black students. There is no evidence that comparable gains have been achieved nationally by Mexican-Americans, Puerto Ricans, or American Indians. The column for "other" minorities invariably includes persons of Asian ancestry who have not been historically excluded to a comparable extent from most academic fields. It is therefore quite hazardous to extrap-
olate from recent experience with black enrollments a judgment that educational opportunities for all disadvantaged racial minorities have improved in the past several years.

Fourth, a disproportionate component of these gains is the rapid expansion of two-year junior and community colleges located in or near the ghetto and barrio. The experience of the City University of New York just before the advent of open admissions provides an illustration. Minority enrollments throughout the system increased steadily during the 1960's to about fifteen per cent at the close of the decade. But the comprehensive data were misleading. Black and Puerto Rican students were highly concentrated in several two-year units, notably Bronx and New York City Community Colleges. And far more nonwhites than whites were recorded as "non-matriculated," which meant that they probably were not in regular degree programs even at the four-year campuses. Thus the minority shares of the full-time enrollments at the senior units of the system were not radically different from major public universities elsewhere—three per cent Black and Puerto Rican at

data on the disproportionate share of minority students enrolled in the lower rather than upper division, see National Ass'n of State Universities and Land-Grant Colleges, Office of Institutional Research, Circular No. 150, April 1, 1970. See also CROSSLAND, supra note 8, at 14.

88. See CROSSLAND, supra note 8, at 38-49.
Preferential Admissions

Brooklyn and Queens Colleges; 6.1 per cent at City College (Uptown); and 6.6 per cent and 6.2 per cent respectively at Hunter-Park and Hunter-Bronx. The one exception was Bernard Baruch, which had a black president and was making the painful but effective transition from a business college to a liberal arts university center; minority enrollment there was fourteen per cent even before open admissions. Other recent studies confirm the CUNY pattern by finding pyramidal distribution of minority students in large city and state systems. The hard fact is that a good deal of the enrollment increase has occurred at junior and community colleges—two-year institutions that do not award baccalaureate degrees and may offer curricula only slightly more varied than those of the urban high schools.

Finally, there is evidence that much of the enrollment gain at four-year colleges and universities is a direct result of preferential admissions judgments. To the extent this is the case, the increases are only as durable as the institutional commitment to continued explicit preference for minority applicants. Hard data about preferential policies are available only for the law schools, where one recent survey of minority enrollments asked admissions officers to list the number of students who “in [their] judgment would probably not have been admitted had they not been members of a minority group.” Of the 1122 Black, Puerto Rican, American Indian and “other” students enrolled in 1968-69, more than a third (440) were said to have been preferentially admitted. While the increase over previous years somewhat exceeds that figure, the growth of minority enrollments would have been far less dramatic without widespread adoption of special admissions procedures. Moreover, the rapid increase between the mid- and late-1960’s may also reflect the fact that law schools got something of a head start on other graduate and professional fields, luring away from business schools and history departments minority college graduates who would have done post-baccalaureate work in any event. Whatever the explanation, the impressive gains that law schools, especially, have made in attracting minority students may be precarious.

89. N.Y. Times, Dec. 15, 1967, at 53, col. 2-5. Of course, both the numbers and the distribution of minority students have changed dramatically as a result of the open admissions policy inaugurated in the fall of 1970.
90. See College Entrance Examination Board, Admissions of Minority Students in Midwestern Colleges (1970); National Ass'n of State Universities and Land-Grant Colleges, Office of Institutional Research, Circular No. 150, April 1, 1970.
91. LSAT-CLEO-AALS Survey of Minority Group Students in Legal Education, Table I (mimeo. 1968). For later data, not including isolation of the preferentially admitted component, see Law Schools and Minority Groups (M. Katz ed. 1969); and Association of American Law Schools Newsletter, No. 70-2, May 4, 1970, at 3.
We have so far judged access solely in terms of the number or percentage of persons from a given group currently enrolled in college. There is a quite different measure: the prospect of matriculation and graduation for a minority-group member at a given point in life. The National Advisory Commission on Civil Disorders noted that "in the nation, approximately eight per cent of disadvantaged high school graduates, many of whom are Negro, attend college; the comparable figure for all high school graduates is more than fifty per cent."92 This contrast, of course, deals only with high school graduates. The Coleman Report and other data show that a black youth has only about one-third the chance of reaching graduation as his white counterpart; that is, he is nearly three times as likely to drop out of school before the end of senior year.93 Thus the prospect of matriculation for the ghetto black ninth or tenth grader may be something like one-eighteenth the prospect for the white middle class suburban youth. As a measure of access to higher education, this figure suggests a shocking disparity.

Socio-economic differentials, of course, underlie the prognosis. Ten years ago Christopher Jencks compared college prospects for high school students in the four ability and socio-economic quartiles of the population. Although some equalization has occurred since that time, the figures are still pertinent. The probabilities of college attendance for a student in the top quarter of his class in both ability and wealth were .87. For the student in the bottom quarter on both coordinates the chances were virtually nil, a mere .06. The distressing fact was that the student in the top academic bracket who came from a family in the poorest quartile had only a two in four (.48) chance of ever going to college.94 Socio-economic position—a factor closely related to race or ethnicity—bears heavily upon access to higher education.

Even these rather gloomy prospects are misleading. Data of this sort measure only access to the threshold, no more. If one seeks really to define the educational opportunities of minority groups, he must go beyond current surveys of fall freshmen enrollments and prospects for matriculation. What must be measured to get the full picture are the rate of retention and the prospect for graduation.95 Moreover, assuming

92. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 452 (1968).
95. Such limited information as does bear on retention rates seems to be in conflict. Within the same week, ASPIRA reported with alarm that 60 per cent of the Puerto Rican
that the rate of temporary attrition is disproportionately high for minority students (if only because of the personal and financial crises they are much more likely to face), a critical factor is the availability of reentry for persons who have dropped out but later wish to resume study. Yet there have been no systematic studies comparing the rate of return of minority and non-minority drop-outs.

Measurement of real access at the junior college level is even harder. Both minority enrollments and overall attrition rates appear to be higher at two-year than at four-year campuses. Even if that were not the case, one would have to know much more than we do currently about transfer prospects and opportunities for junior college graduates before appraising accurately the educational opportunity for the minority student who can afford to start college only at a two-year institution near his home.

Accordingly, one must be wary of projections based upon freshman or even overall enrollment data. There is an urgent need for harder data on the percentage of degrees awarded, professional entrance examinations passed and career opportunities realized. Until such data are available, we must recognize that in speaking of "access" we are probably talking only about the chance to start college somewhere, and nothing more.

B. Effects of the Underrepresentation

Any measure of denial of access is only as meaningful as the opportunity is significant to those who seek it. Thus it is essential to understand why, after all, higher education is important to minority groups. Only in this way can we assess the impact of restricted access.

students in college dropped out during the first two years; and a Westchester County program for underprepared black students reported a 91 per cent retention rate in its initial years. N.Y. Times, July 29, 1970, at 35, col. 1; July 19, 1970, § 1, at 59, col. 1. Other studies have found wide variations in success rates of minority student programs; see, e.g., Egerton, High Risk, Southern Ed. Rev., March 1968, at 3; April 1968, at 25. Compare the recent highly successful experience of the Scholarship, Educational and Defense Fund for Racial Equality; the group reports that only 23 of the 155 black college students it has assisted in the last seven years have dropped out. N.Y. Times, Aug. 2, 1970, § 1, at 37, col. 1 (city ed.). Generally comparable experiences and rather high retention rates are found in the survey of minority (mostly black) enrollments at Midwestern institutions. See College Entrance Examination Board, Admission of Minority Students in Midwestern Colleges 8-9 (1970) (retention rate of minority students "at about the same level" as for all students). Yet the Scholarship, Educational and Defense Fund study reluctantly concluded that "there are no reliable estimates or studies of the black student drop-out rate." N.Y. Times, Aug. 2, 1970, § 1, at 37, col. 1.

Concerning these problems and their probable impact on college experience, see generally H. Astin, Educational Progress of Disadvantaged Students (1970).

96. See generally D. Knoell, People Who Need College: A Report on Students We Have Yet To Serve (1970) [hereinafter cited as Knoell].
It is common knowledge that the baccalaureate degree, once thought a luxury, is now a necessity for most careers and for social advancement. Christopher Jencks and David Riesman have observed that “the bulk of the American intelligentsia now depends on universities for a livelihood and virtually every would-be member of the upper middle class thinks he needs some university’s imprimatur, at least in the form of a B.A. and preferably in the form of a graduate or professional degree as well.”

What is true for the achievements of the majority is equally true for the aspirations of the minority.

Even if a college degree were not intrinsically valuable, the collateral effects of limited access of minority groups would be disturbing. Graduate and professional schools are virtually restricted to holders of baccalaureate degrees. As we have seen, the percentage of minority students in graduate schools is far below the undergraduate ratios. And the number of minority persons holding graduate and professional degrees is not only lower than that for the entire population; graduate-undergraduate ratios are substantially lower within the minority sector of the academic community. Thus expansion of minority participation in the professions demands an almost geometric increase in the number of minority persons receiving college degrees.

The career effects of minority underrepresentation can perhaps be seen best by again using the legal profession as an illustration. While Blacks comprise about twelve per cent of the population of the United States, they represent only about one per cent of the bar. Even if the total size of the profession remained constant, observes Professor Ernest Gellhorn, “an additional 30,000 Negro attorneys would need to be trained before the Negro would achieve parity in the legal profession.” Yet even these figures do not tell the whole story. Only seventeen per cent of all black attorneys practice in the South, where half of the nation’s black citizens still live. Mississippi has a black population of nearly a million, but there are only seventeen black lawyers practicing in the state. In Georgia, the situation is little better. There are...
thirty-four black lawyers in Georgia which has a black community of 1.2 million persons. Of these, however, twelve work in state or federal agencies and are thus unavailable to the private client. Thus the actual net underrepresentation is greater than even the gross figures indicate.

The sparse evidence available for other minority groups indicates a comparable or even more acute underrepresentation. In the city and county of Denver, for example, about nine per cent of the population is Chicano or Mexican-American. Yet only ten of the city's 2000 attorneys (one half of one per cent) have Spanish surnames. The situation is no better, according to local estimates, in other communities with significant non-black minority populations. Finally, there is no more than a handful of American Indians now practicing law and ready to serve the legal needs of a population of over half a million.

The problem defined by these figures is critical only if minority groups really need minority lawyers to serve their legal interests. Several factors do suggest a special role for the attorney who grew up in the ghetto or barrio and returns there to practice. First, the bar as presently structured simply does not meet the full range of the minority community's needs. "Legal services are still the reserve of middle and upper incomes," notes Professor Gellhorn. "Government sponsored and voluntary legal services programs, while expanding, do not fill the need. They are not available in all parts of the country, are limited by an inability-to-pay test, and do not provide representation in all types of cases." The need is particularly compelling where the cause of the

102. Emory University School of Law, Report to the Field Foundation: 1966-67 Pre-Start Program for Prospective Negro Law Students 5 n.6 (mimeo. 1967).
104. See for the first authoritative data concerning the situation in California, consistent with the Denver figures, Reynoso, La Raza, The Law, and the Law Schools, 1970 Toldeo L. Rev. 809, 814-16. Although the Chicano or Mexican-American population of California is roughly 12 per cent of the total, less than one per cent of the bar have Spanish surnames. Hence the ratio of Anglo attorneys to Anglo clients is 1:530, while the comparable ratio for the Chicano community is 1:9,482. Id. at 816.
105. For the past several summers the University of New Mexico School of Law has sponsored a summer training and scholarship program to prepare American Indians for the study of law. The program's brochure notes that "this project will give to American Indians representation in the legal profession almost totally lacking until now. No American Indian has ever received a law degree from the universities of Arizona, New Mexico or Utah. No American Indian is presently practicing in New Mexico or Arizona, although these two states have over 125,000 Indians." Special Scholarship Program in Law for American Indians, 1968 brochure, at 4. On the other hand, it is encouraging that the nation's law schools reported 71 American Indian students enrolled during the academic year 1969-70. Association of American Law Schools Newsletter, No. 70-2, May 4, 1970, at 5.
106. Gellhorn, supra note 103, at 1074.
minority client is an unpopular one. White attorneys guided by principle or noblesse oblige will sometimes take a controversial case in a Southern court, but the hazards are such (even when a non-resident white is admissible pro hac vice) that representation is by no means uniformly available. Moreover, the white lawyer is far less likely to understand the background of the case, to be able to interview witnesses from the minority community (because of cultural and linguistic barriers), or to be able to establish the necessary rapport with his client. Certain tasks can be best performed by one who knows the terrain.

Other considerations reinforce the case. Minority attorneys suggest to youthful members of the community not only that there are ways of "making it," but also that there is some hope of changing the system through legal institutions rather than solely by self-help. The success which persons from the community achieve through admission to the practice of law constitutes both an avenue and an evidence of advancement. Increased minority-group representation in such high-status professions as law and medicine constitutes by itself an important socio-economic achievement certain to have multiplier effects in the next generation. Finally, increasing minority-group representation in the bar fosters the development of responsible and articulate community leadership, thus facilitating the participation of minority groups in the processes and institutions of government.

Continued underrepresentation—one attorney for every 28,500 Blacks throughout the South, or one per 60,000 in Mississippi—clearly thwarts these important objectives. Yet the law schools can do only so much on their own initiative to remedy the situation. The minority law school applicant must typically possess a college degree. If he is to be a good lawyer—or even if he is to be prepared to pass the bar exam—he must have a good undergraduate education. The potential for reform within the law schools and other professional schools, when all

109. There is one possibly countervailing consideration. Some surveys suggest that minority clients sometimes distrust or lack confidence in minority lawyers. See Note, The Negro Lawyer in Virginia: A Survey, 51 VA. L. REV. 521, 555-36 (1965). They fear that attorneys from their own community will be discriminated against in court, will have less elaborate libraries and other research tools, and are less well educated than the more expensive and more remote white attorneys who sit in plusher offices and seem to wield more "clout." The remedy for such lack of confidence, of course, is not to give up, but rather to train more and better minority lawyers who can win the respect of minority clients, and to integrate them sufficiently into the legal profession that their services will no longer appear second-class.
Preferential Admissions

are competing for a tiny pool of minority graduates, depends upon the willingness of colleges and universities to expand significantly their minority-group undergraduate enrollments. Only the colleges can generate the graduate and professional students who will be the black lawyers, Chicano physicians and Indian teachers of the future.

C. Roots of the Problem: Causes of Minority Underrepresentation

Certain obstacles restrict the access of all groups to higher education. Even as the United States approaches what some have termed an era of "universal higher education," barely half of all high school graduates ever start college and only about a third of college-age persons are actually enrolled at any given time. Quite clearly, therefore, minority groups are not alone in finding higher learning elusive. Yet the factors that restrict access for all segments of the population create especially high barriers for a youth from the ghetto, the barrio and from the reservation. The severity of these obstacles, moreover, bears little relationship to the desire for or utility of higher education to members of those groups.

In fairness, one caveat is essential at the outset. Few of these barriers have been created by the institutions of higher learning themselves. Save perhaps in the Deep South and in a few Border States, there has been little conscious attempt to exclude minority-group applicants solely for reasons of race or color. Indeed, the colleges and universities outside the South have tried in various ways to remedy the worst inequities caused by external forces. They have provided special scholarships for the poor (sometimes unclaimed for lack of applicants); their schools of education have sought to improve instruction in the ghetto classroom; and they have established branch campuses or extension centers to bring learning opportunities closer to people too poor or too busy to travel far in search of learning. But these efforts are largely irrelevant to the present inquiry. Our goal is not to assess blame for the exclusion of minority students, but only to determine its causes. Factors beyond the control of the university are therefore quite as germane as those for which it is directly responsible.


The number of minority students in col-

111. Something should be said about the factors that affect college attendance among any group. The recent report of the Carnegie Commission on Higher Education suggests that the five most relevant factors "that influence college attendance . . . are income level of family, ethnic grouping, geographic location, age, and quality of early schooling." A CHANCE TO LEARN: AN ACTION AGENDA FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION 3 (1970). See also Crossland, supra note 3, at 53-54.
lege depends directly upon the rate at which minority youths receive high school diplomas. As we have seen, completion rates for minority students appear to be lower than for the total population, despite recent improvements.112 But graduation rates tell only part of the story. It is well-known that high school counsellors and advisers tend to channel more minority than majority youth into technical and vocational tracks that may render them ineligible for college.113 The differentiation may actually be increasing in some areas. In New York City, twenty-four per cent of the graduating classes of eight high schools in the most depressed areas received academic diplomas in 1957. Ten years later in the same schools the percentage declared by their diplomas to be eligible for college had dropped to thirteen.114 Thus whatever gains may have occurred in the retention of students have perhaps been offset by the declining quality of the education and the certification they receive.

Other barriers disproportionately impede the access of the disadvantaged. Neither the tradition nor the expectation of college attendance exists in the minority community to the extent that it does in the middle class environment from which the majority of college students typically emerge. Indeed, overt hostility toward higher education is sometimes found in minority communities, compounded by a measure of fear and a sense of remoteness or irrelevance about college.115

Mounting financial barriers have also deterred applications from many who are poor, and have thus affected minority students disproportionately. For example, of the black students who actually reach college, a majority come from families with incomes below $6000, while only fourteen per cent of the families of white college students fall in that bottom sector of the economic scale.116 Jencks and Riesman rightly

112. See, e.g., Report on Higher Education to the Secretary of Health, Education and Welfare 60 (mimeo. 1971); A. Astin, Racial Considerations in Admissions, supra note 9, at 138 n. 16; H. Astin, Educational Progress of Disadvantaged Students 22-24 (1970) (the latter source reviewing factors bearing on retention rates for minority and non-minority disadvantaged students).

113. See W. Moore, Against the Odds 221 (1970) [hereinafter cited as Moore]. For some harsh comments on the effects of such counseling on the motivation and self-perception of minority youth, see W. Grier & P. Cobbs, Black Rage 131 (1968).


115. See G. Morgan, The Ghetto College Student: A Descriptive Essay on College Youth from the Inner City 44-52 (1970); Moore, supra note 113, at 56-57, 99; W. Grier & P. Cobbs, Black Rage 142-45 (1968). This factor may represent a declining barrier, however. One recent study observed that “contrary to general expectations, the [students] reported positive family attitudes toward their attending college.” Knoell, supra note 97, at 75.

116. See Brown, Allocating Limited Resources, in The Campus and the Racial Crisis 156, 199 (1970). These findings were clearly confirmed in the junior college-community
observe that most black families are in a poor position to make any contribution whatever to their children's college expenses.\textsuperscript{117}

Proximity of college is also a vital determinant of access. Proximity has at least two dimensions—the one geographical, the other psychological. Studies during the past decade and a half have shown a striking correlation between distance from home to campus and the rate of college attendance.\textsuperscript{118} The relationship is high for all groups, but again largely for economic reasons, it is especially striking in the minority community. The significance of physical distance is strongly reinforced—again with special relevance for minority groups—by the concept of cultural distance. One recent study notes that going to any college, even close to home, may mean for the minority student "leaving one cultural setting (in which he is quite comfortable) for another (in which he is quite uncomfortable)."\textsuperscript{119} The study continues:

It may mean being required to operate within a value or attitude structure that has in the past been unacceptable to him. It may mean reading, writing, and listening to a language in which he has never felt competent. It may mean attempting the difficult task of establishing social relations with students who have never lived in circumstances like his and who have concerns quite different from his own. In short, he may have to leave his neighborhood and travel to a "foreign" institution, be it uptown, downtown, out of town, or out of state.\textsuperscript{120}


If many minority youth with college potential do not complete high college study, despite the very low costs of attending those institutions. See Knoell, \textit{supra} note 97, at 115, 174. See also McKendall, \textit{Breaking the Barriers of Cultural Disadvantage and Curriculum Imbalance}, 46 \textit{Phi Delta Kappan} 307, 308-09 (1965); Ware & Determan, \textit{The Federal Dollar, the Negro College and the Negro Student}, 35 \textit{J. Negro Ed.} 459, 465 (1966). The recent joint study of opportunities for minority students in medicine concluded that "the main barrier today for the minority students in attending medical schools is the inadequacy of financial aid," and developed an ambitious, comprehensive program to overcome the deficit. \textit{Report of the Association of American Medical Colleges Task Force to the Inter-Association Committee on Expanding Educational Opportunities in Medicine for Blacks and Other Minority Students} (1970).

For the several reasons reviewed here, one recent study concludes that "the severely disadvantaged do not... survive the school system" so that the pre-college self-selective process—beyond the control of the colleges and universities—vitaly determines the availability of minority applicants, and the type of persons who apply. C. Atkinson, A. Etzioni \\& I. Tinker, \textit{Post-Secondary Education and the Disadvantaged: A Policy Study} 74-75 (1969).

\textsuperscript{117} Jenkins \& Riesman, \textit{supra} note 7, at 442. See also Centra, \textit{Black Students at Predominantly White Colleges: A Research Description} 5-6 (mimeo. 1970).

\textsuperscript{118} E.g., Knoell, \textit{supra} note 97; Southern \textit{Regional Education Board, The Black Community and the Community College} (1970).

\textsuperscript{119} R. Ferrin, \textit{Barriers to Universal Higher Education} 28-29 (1970). This study, prepared for the Access Research Office of the College Entrance Examination Board, contains a thorough review of various barriers to minority student access to higher education.

\textsuperscript{120} \textit{Id.}
school, it is equally clear that many who do graduate and wish to continue their education are not admitted to college. This fact has given rise to charges that the traditional measures of eligibility upon which most colleges principally rely—standardized test scores and high school grades—are "unfair" or "discriminatory." This charge is as difficult to appraise as it is serious.  

The allegation of bias in admission criteria is susceptible of two quite different interpretations. On the one hand, it could mean simply that standardized test scores and grades operate to exclude from college a disproportionate number of minority-group applicants, including many who would undoubtedly do satisfactory academic work if admitted. On the other hand, those who charge that standardized tests and high school grades are unfair to minorities may mean something quite different: that these criteria are invalid as predictors of the probable college performance of nonwhite or Spanish-speaking youth, and thus exclude minority applicants who are more qualified than whites who are admitted.

Available data appear to support the first interpretation but not necessarily the second. It is widely acknowledged that standardized tests do serve to exclude disproportionate numbers of minority applicants. It is also conceded that some who are thus excluded could do competent college work and would probably graduate.  

But the same

121. Serious doubts have recently arisen on many of these issues within the educational testing community. Late in 1970 the distinguished Commission on Tests, drawn from many parts of the academic community, presented a rather critical report to its sponsor, the College Entrance Examination Board. The Commission concluded, inter alia, that standardized tests "do not tend to reduce the competitive disadvantages of being other than white and middle class; in fact they seem to almost perfectly reflect the bias against 'disadvantaged' groups that results in their relatively depressed scholastic attainment." While urging the retention rather than complete abandonment of college-entrance tests, the Commission found need for "considerable modification and improvement if they are to support equitable and efficient access to America's emerging system of mass post-secondary education." COLLEGE ENTRANCE EXAMINATION BOARD, REPORT OF THE COMMISSION ON TESTS—I. RIGHTING THE BALANCE 52, 54 (1970). Similarly self-critical are the recent observations of Dr. Henry S. Dyer, Vice President of the Educational Testing Service, who has termed grade-equivalency scores based on standardized tests "psychological and statistical monstrosities" which may be particularly unfair to children in ghetto schools because they are developed by persons unfamiliar with those schools. N.Y. Times, March 28, 1971, at 19, col. 1-5; N.Y. Times, March 28, 1971, § 4, at 9, col. 1-4.


122. See, for example, the comments of the Vice President of the Educational Testing Service to this effect, Dyer, Toward More Effective Recruitment and Selection of Negroes for College, 36 J. NEGRO ED. 216, 227 (1967).
Preferential Admissions measures also limit access for many majority students who would perform adequately (some, perhaps, better than other applicants accepted solely or primarily on the basis of superior paper records). Such mismatching is inevitable in the nature of predictive criteria that are valid only in gross and are bound to be erroneous in particular cases. Exclusion of some qualified applicants is also inevitable in a time when most colleges and universities receive more applications from students capable of doing satisfactory work than can possibly be accommodated. But the central fact remains and is not deflected or diluted by some unfairness to majority groups: traditional entrance criteria do exclude disproportionate numbers of minority applicants.

On the other hand, it is far less clear that tests and grades inaccurately or unfairly predict the college performance of minority applicants. The Research Director of the American Council on Education recently posited, after reviewing many relevant studies, that “the traditional admissions criteria, far from discriminating against black students, favor them somewhat, in that they over-predict slightly how well the students will do academically during the freshman year.” Other findings are consistent with this conclusion. For the moment, then, one may have to accept the hypothesis that standardized tests do not unfairly project or predict minority student performance—although very recently no less an authority than the Vice President of the Educational Testing Service acknowledged that the application of I.Q. and grade equivalency tests is “frequently biased against [B]lacks” because those who develop the tests and interpret the scores are unfamiliar with ghetto schools.

This paradox—that standardized tests predict accurately but exclude disproportionately—has led some observers to the view that minority students are inherently less capable of doing college work than are

123. A. Astin, Racial Considerations in Admissions, supra note 9, at 131.
124. For a general discussion and review of the literature, see Jensen, Selection of Minority Students in Higher Education, 1970 TOLEDO L. REV. 403, 440-47. For more specific studies, see, for example, Cleary, Test Bias: Prediction of Grades of Negro and White Students in Integrated Colleges, 5 J. ED. MEASUREMENT 115, 123 (1968); Richardson, Assessing Student Performance in College (ERIC Clearinghouse Report No. 2 on Higher Education 1970); Stanley & Porter, Correlation of Scholastic Test Scores With College Grades for Negroes Versus Whites, 4 J. ED. MEASUREMENT 199, 216 (1967); Crossland, supra note 3, at 55-61.
members of other groups. This rather simplistic and dangerous hypothesis overlooks various factors that may help to reconcile seemingly incompatible conclusions. An examination of these factors supports the hypothesis that traditional college admission criteria are indeed unfair to minority applicants—even if they do accurately predict academic performance.

First, a negative correlation would be surprising in view of the homogeneity of the factors being paired—traditional admission standards and traditional college curricula and grading practices. "Any other result would be startling," observes Professor Ernest Gellhorn of judgments about the predictive validity of the Law School Admission Test. "The . . . test is a mirror image of the law schools. Thus, the cultural bias, if any, is not inherent in the test, but rather is in the law schools and in their teaching and testing methods." Present curricula and methods of evaluation were, of course, designed for the predominantly white, middle class students whom the application of traditional entrance standards has brought to most American campuses. Moreover, the tests have been refined over the years to do a better job of predicting what we are now told they do predict. Even if minority students do slightly less well under these circumstances than projected, that is hardly surprising. Where curricula and evaluation procedures have been redesigned to reflect the special needs and interests of minority students, rather different correlations seem likely.

Second, virtually all the correlation and validation studies have

126. The suggestion is found in, for example, Humphreys, Racial Differences: Dilemma of College Admissions, 168 SCIENCE 167 (1969).
127. Gellhorn, supra note 100, at 1069, 1089.
128. Of course the great disparities between the quality of ghetto and suburban secondary schools are also highly relevant to any judgment of this sort. What is known of inner city elementary and secondary education received by many minority children confirms the Kerner Commission's charge that these schools "have failed to provide the educational experience which could help overcome the effects of discrimination and deprivation." REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 428 (1968). Studies support David K. Cohen's thesis that "in addition to the negative effects of attending schools whose populations are lower class, Negro students suffer from the special effect of the racial composition of their schools." Cohen, Policy for the Public Schools: Compensation and Integration, 38 HARV. ED. REV. 114, 119 (1968). A recent comprehensive study of those schools commissioned by the College Entrance Examination Board suggests that the situation may well be even worse in the schools of the Southwest where large numbers of Mexican-American or Chicano children are concentrated. T. CARTER, MExican-AmuCANS IN SCHOOL: A HIsTORY OF EDUCATIONAL NECILECT (1970). On the status of educational opportunities for the other major Spanish-speaking group, see PuERTo RICAN CHILDREN IN MAINLAND SCHOOLS, pt. IV (Cordasco & Buchioni eds. 1968).
preferential admissions involved *freshman* grades rather than total academic performance. Adjustment to the strange, new and often seemingly hostile environment of a mostly white campus obviously takes more time for the minority than for the majority student. The freshman year is undoubtedly the hardest for most students, but it is especially so for the youth who has seldom ventured outside the ghetto or the barrio. Thus it is not surprising, as Helen Astin recently concluded from a detailed study of the educational progress of minority undergraduates, that “disadvantaged students enhance their self-esteem and increase their educational and occupational aspirations as they complete one year of their college work.”¹¹¹ Like many other “slow starters” (most of whom have less valid reasons for late blooming), minority students cannot be fairly judged on the basis of first-year grades alone. Correlation studies which stop at the end of freshman year are thus biased in a subtle but most pernicious way.

Third, the populations being compared in most validation studies are not really comparable. When one contrasts the performance of *all* minority students in a class with that of *all* other students, the pairing is superficially credible. In fact, however, a far higher percentage of the minority students come from inadequate secondary schools; a far higher number are desperately poor and will have to work many hours; a far higher proportion will either have heavy and time-consuming family responsibilities or will lack the reinforcement and support that white middle class students typically derive from stable families.¹¹² The proper comparison would thus be between minority students and similarly disadvantaged white students—of whom there are far, far too few on most college and university campuses. The critical issue is whether poor black students from, let us say, Cleveland’s East Side perform better or worse in college than the sons or daughters of Polish or Czech steel workers from the city’s West Side—not whether the Blacks do as well as Shaker Heights graduates with the same predicted grade-point average. Until we have comparisons of really comparable samples, the issue must remain conjectural.

Fourth, even a comparison of similarly disadvantaged majority and minority students would not really be quite fair. The working class white student no doubt finds difficulty adjusting to the social and

---

academic life of a campus peopled largely by the children of white collar and professional families. But the barriers are nothing like those that face the lower-middle or lower class Black or Chicano—barriers of which we have spoken in the previous section. Until these subtle psychological pressures have been overcome, the academic record of the minority student cannot be expected to reflect fairly his real potential.

Finally, the validation studies have dealt almost exclusively with Blacks—that is, with English-speaking minority students. Whether or not standardized tests with a heavy verbal emphasis are unfair to Blacks from a culturally disadvantaged background, the probable prejudice to students who have grown up speaking Spanish is undeniable. Several recent lawsuits have challenged the fairness and constitutionality of classifying large numbers of Mexican-American children as "educationally mentally retarded" on the basis of standardized English-language tests. One court has held the tests invalid and ordered that the Chicano children be reexamined in their native tongue as well as in English. Meanwhile, San Francisco public school officials admitted that retesting in Spanish showed that some 45 per cent of the Mexican-American children originally classified "educationally mentally retarded" were in fact of average intelligence or better. Thus substantial numbers of Spanish-speaking children have been moved from lower-track classes—in which college preparation was virtually impossible—to the academic mainstream, often with special bilingual instruction and counselling. And the use of the tests themselves as appraisers of intelligence or academic potential has been severely discredited.

The limitations of standardized tests are matched by comparable inequities in reliance upon high school grades or rank. A recent review of relevant research led two scholars to indict "the relative ineffectiveness of high school grades in predicting freshman grade-point averages of black students." Among the causes of a rather low correlation, they cited "(a) invalidity of grades in high school and/or college, particularly for black males; (b) unreliability of grades and grade reporting in black

133. See pp. 799-31 supra.
134. Martinez v. State Bd. of Ed., No. C-70 37 LHB, N.D. Cal., Jan. 7, 1970. See also Los Angeles Times, Feb. 7, 1970, § 2, at 1, col. 1. For a thoughtful and critical analysis of some of the legal issues involved in these and related cases, see Quintero, Constitutional Equality Under Law: La Raza and the Use of Standardized Tests (unpublished course paper submitted to the author and on file at the University of California School of Law (Boalt Hall)).
high schools; (c) intergroup differences in personality characteristics; and (d) restriction in range due to selection processes. Whatever may be their other shortcomings, the study concluded that standardized tests at least had a measure of predictive validity not found in high school grades.

It is not easy to conclude whether traditional admissions criteria are discriminatory against minority applicants beyond the extent to which they are exclusionary. But this much at least is clear: substantial numbers of minority students will not be enrolled at predominantly white campuses unless one of the following changes occurs: (1) the quality of secondary education for minority students is dramatically improved; (2) financial and social barriers that now impede assimilation of minority students are sharply reduced; (3) alternative tests and predictive measures are developed that do not disproportionately exclude minority-group applicants; or (4) the use of traditional admission criteria is adjusted to overcome the effects of their uniform application.

Each of the foregoing changes is highly desirable. But it will be many years, perhaps generations, before equality is achieved in secondary education, or the social and financial barriers are reduced. In the shorter run, there is some hope for predictive instruments that more fairly and accurately appraise the potential of minority and disadvantaged students; new tests have already been used experimentally with some success. But for the immediate future—the next five to ten years at least—only a selective and preferential use of traditional measures will assure expansion of minority enrollments.

137. Id.
138. For discussion of a third predictive index sometimes invoked—rank in class—see Cooke, Rank in Class Is Obsolete, 43 College & Univ. 242 (1968); Evaluating the Applicant: The Role of Rank in Class, 42 College & Univ. 512 (1967).
139. For some imaginative and hopeful developments along these lines, see Knoell, supra note 97, at 136-38, describing prospects for tests with a lower verbal emphasis than is currently found in standardized examinations. There has also been extensive discussion of these policy issues within the educational testing profession. For a comprehensive re-examination of the premises and implications of college testing, see College Entrance Examination Board, Report of the Commission on Tests: I. Righting the Balance (1970).
140. Bowdoin College has taken a much bolder step. Early in 1970 the faculty decided to abandon reliance altogether upon the standardized test scores. The Director of Admissions explained that such tests “tend to work in favor of advantaged elements of our society, while handicapping others.” Chronicle of Higher Ed., Feb. 2, 1970, at 1, col. 1. Bowdoin felt it could do better making its own judgment about “the highly motivated student, whatever the level of test scores.” N.Y. Times, Jan. 19, 1970, p. 47, col. 1-2.

It is arguable that what Bowdoin has done voluntarily may come to be constitutionally compelled, at least in the public sector. The Supreme Court has dropped at least a hint this way, albeit in a statutory rather than in a constitutional context. Griggs v. Duke Power Co., 91 S. Ct. 849 (1971), holds that under Title VII of the Civil Rights Act of 1964 an employer may not require a high school diploma or passing scores on a standardized intelligence test when (a) these criteria are not reasonably related to the job; (b) their
D. Black Students and White Universities: The Consequences of Segregation and Integration

To this point the argument has been that minority students need and deserve the educational opportunities that white colleges and universities can provide. In fact, however, the relationship is one of interdependence: predominantly white institutions have as great a need to become less white as nonwhite students have to make them less white. This proposition goes to the very heart of an institution of higher learning. It presupposes that college should not simply provide four years of formal education for its students, but should also serve as a microcosm of the society in which graduates will live as citizens. Thus colleges should, perhaps least of all social institutions, create a kind of insulation from racial minorities with their unique cultural heritages.

This proposition compels critical assessment of the effect of a preferential admission decision. When a selective institution decides to admit a Black or Chicano or Puerto Rican student instead of a superficially better "qualified" Anglo, it is obvious that the applicant thus rejected was marginal in any case. Had the class admitted been a bit smaller, had more of the applicants admitted on the first round decided to accept, etc., that particular Anglo student would have been rejected anyway. The minority student admitted in his place may be less likely to graduate, but if he does receive his degree the chances are somewhat greater that he will distinguish both himself and his alma mater in later life. Moreover, the prospects of attending graduate school now seem higher for the minority student who completes the course than for the white who is expected to get through with a gentleman's C and does only that.

Minority students may also be catalysts for beneficial institutional

application excludes a substantially higher proportion of blacks than whites; and (c) the effect of such exclusion is to perpetuate a past policy of explicitly discriminatory hiring.

Of course, the holding in Griggs does not extend beyond the statutory concern with employment discrimination. At least one lower court, however, has ruled unconstitutional a hiring pattern that reflected rigid adherence to scores on a standardized test, where black and white performance was widely disparate and the test bore little intrinsic relation to the jobs involved. Arrington v. Massachusetts Bay Transp. Authority, 366 F. Supp. 1355 (D. Mass. 1969). The analogy to college admission procedures is, of course, imperfect. Judgments about applicants are never made solely on the basis of test scores and grades, though mathematical indices may play a dominant role. Moreover, the uniform national tests are surely not entirely irrelevant to the purpose for which they are used, as they may be in the employment cases. Yet if other measures are available which serve equally well without differentiating so sharply between minority applicants and others, a strong case can be made against continued reliance upon the present tests and high school grades. This is clearly not the occasion to explore the range of alternatives. For the moment it is enough to observe that the constitutional issue must eventually be faced.

738
change. One of the most frequent and widely-implemented demands is for minority-group studies—initially Black or Afro-American studies, later Mexican-American and Puerto Rican, Native American and Eskimo programs.\textsuperscript{141} There has been extensive debate about the value of such programs for minority students; some black scholars (like Sir Arthur Lewis) charge that they tend to be a diversion and a delusion.\textsuperscript{142} But even those who doubt the worth of black studies for Blacks accept Kenneth Clark's view that "it is whites who need a program of black studies most of all."\textsuperscript{143} Yet few whites would be exposed to La Raza or Native American studies without the presence of substantial numbers of minority students—even though foreign regional studies have been integral parts of universities for some decades.

Admission of minority students may incidentally benefit disadvantaged white groups in two ways. First, the experience in the City University of New York suggests that a program designed initially to help minorities has benefited poor white ethnic groups at least as much. Columbia sociologist Amitai Etzioni recently observed that "for every one [B]lack or Puerto Rican who entered the City University [under] open admission, there were two . . . whites who entered the system who would not otherwise have been in it."\textsuperscript{144} Secondly, there is evidence that black students are becoming concerned (as already evident at Antioch) about greater democratization in the selection of white students. They appear to prefer white classmates from hard-hat homes in Hamtramck, West Allis or Lackawanna to those from suburban upper middle class communities in Westchester, Montgomery and San Mateo Counties. Children of Southern and Eastern European families may be less sympathetic but more congenial. If forced to choose, there is evidence that each group would prefer the other to the upper middle class white Anglo students who have dominated most campuses until now.\textsuperscript{145} Thus in curious ways the interests of white ethnic groups may

\textsuperscript{141} See, e.g., BLACK STUDIES IN THE UNIVERSITY: A SYMPOSIUM (A. Robinson, C. Foster & D. Ogilvie eds. 1969).


\textsuperscript{143} N.Y. Times, May 23, 1969, at 29, col. 3. Adoption of an ethnic studies program may, of course, raise important and difficult questions with regard to the allocation of priorities and resources, especially in a time of fiscal stringency for American higher education. This discussion is intended to take no position on the ultimate desirability of such programs for any particular institution; that question must be decided in terms of the needs and curricular goals of each campus.

\textsuperscript{144} Los Angeles Times, March 17, 1971, § 1, at 20, col. 2.

\textsuperscript{145} Id. Recent surveys have suggested there may be greater tensions between "white
come to be closely tied with those of the minorities toward whom they have often been hostile in matters of housing and employment.

The production and recruitment of minority faculty may also depend upon preferential student admission policies. There can be no major expansion of the nonwhite or Spanish-speaking professoriat until graduate schools turn out very many more minority scholars with a commitment to teaching—unless, of course, universities are to revise substantially their notion of qualifications for academic positions. Given the competing pressures of other occupations, a geometric expansion of minority enrollment may well be required to produce even arithmetic increases in minority faculties, at least without decimating the faculties of the black colleges. There is a second and subtler factor. The Black or Chicano Ph.D. has many options open to him and faces a difficult choice. Other institutional variables being constant, he will presumably seek evidence of commitment to equality of educational opportunity and is most likely to find such evidence in a vigorous minority student program.

Moreover, the ability of the urban university to assume meaningful partnership in the community depends in part upon its responsiveness to minority-group needs and demands. Without minority persons who are members of the academy as well as of the community, the basis for understanding and discussion of common problems, interests and concerns is tenuous. As with recruitment of minority faculty, however, there is another and subtler dimension. The community looks to the university for signs of interest and good faith. A reorientation of the admissions policy provides very tangible evidence of commitment to shared goals. On the other hand, a refusal to move in this direction may evidence hostility or aloofness to the surrounding community. The case for opening the gates to students of families that have been passed by for generations is especially compelling in the case of urban institutions like Chicago, Columbia, Wayne, Temple, Southern California and St. Louis. These institutions simply cannot escape the community that

native Americans of Anglo-Saxon stock and Blacks than between Blacks and members of white ethnic groups. See generally Schroeder, Ethnic America, 1971-1 Editorial Research Rep. 47, 61.

146. On the implications and dangers of such raiding, see Hechinger, Black Colleges Now Face A Black "Brain Drain", N.Y. Times, Dec. 29, 1968, § 6 (magazine), at 11, col. 5-7.

147. See Editorial, Academic Community and the Black Student, 40 J. House Ed. 64, 66 (1969). Even at a time when opportunities for white Ph.D.'s have dropped off sharply in the United States, steady increases in demand for black scholars are reported. N.Y. Times, March 30, 1970, at 21, col. 2-7.
surrounds them. The unhappy case of the Columbia gymnasium suggests some of the problems created by this proximity.\textsuperscript{148}

IV. Alternatives to Preferential Admissions

The case for preferential admissions rests primarily upon the positive premises just reviewed. But final judgment must await the assessment of possible alternatives. If the same ends can be served as well without resort to racial classifications and preferences, the case in favor of using them becomes less compelling, not only as a matter of public policy but perhaps even of constitutional law.\textsuperscript{149}

At the start, it seems clear that the status quo is not a viable option. Continued reliance upon official assurances of "nondiscrimination" in admission standards will not substantially expand educational opportunities for minority groups.\textsuperscript{150} These policies have not served that end in the past; indeed, as we have seen, they have in the past failed even to check the declines in the proportion of minority students on white campuses.\textsuperscript{151} Unless the number and paper qualifications of minority applicants were to increase disproportionately vis-a-vis majority applicants—a development which seems most unlikely under present conditions—perpetuation of traditional policies would effect no significant change in existing racial imbalances. Meanwhile, tuition and fees are rising at such a rate that access for all poor and disadvantaged groups


\textsuperscript{149} See discussion of the constitutional issues, pp. 705-18 supra.

\textsuperscript{150} The President of the American Council on Education has commented:

Removing barriers to entry and proclaiming that doors are open to all... will not suffice. A long history of neglect and deprivation can be offset only by strenuous efforts over an extended period of time, and we must begin now... Our democratic credo does not sanction the permanent singling out of any category of individuals for preferential treatment, but... remedial measures are necessary and amends are due for past deprivation.


\textsuperscript{151} There is evidence that continued "nondiscrimination" may not even hold present ground. The most comprehensive and detailed survey of minority enrollments concluded that during the years between the 1940's and the late 1960's: "Numerically, Negroes and other minorities have gained ground; proportionately, they have slipped further behind." J. Egerton, State Universities and Black Americans 93 (1969) (emphasis added).

The same phenomenon has been viewed with alarm by the Task Force on Higher Education which recently submitted its report to the Secretary of Health, Education and Welfare. "While Blacks have lately shared in the growth of enrollments," notes the report, "they have not gained in proportion to their numbers." Within the past five years, a comparison of black and non-black enrollment increases reveals that "Blacks accounted for only nine per cent of the enrollment growth." Report on Higher Education to the Secretary of Health, Education and Welfare 57-58 (mimeo. 1971).
is jeopardized. But even with vigorous recruitment efforts and the redirection of much financial aid, it seems unlikely that present patterns of access will permanently raise minority enrollments above the five or six per cent level.

At least four alternative approaches to the use of preferential admissions based on race do, however, merit fuller discussion: (1) greater reliance on the predominantly black colleges, where much minority higher education is already provided; (2) expansion of junior and community colleges, which are already opening many new doors to minority and disadvantaged students; (3) some special or general form of "open" admissions; and (4) preferences accorded on the basis of general disadvantage.

A. Black Students and Black Colleges

There are two threshold reasons why the full need for minority-group higher education cannot be met through the predominantly black colleges: first, such colleges exist (outside Puerto Rico) only for black students and not for other racial minorities; and second, heavier reliance on the black colleges would completely fail to integrate the homogeneous student bodies of predominantly white institutions. In fact, such a policy would directly undermine efforts now being made to desegregate higher education systems in Southern and Border States—systems with a degree of racial separation that would not be

152. Between 1960 and 1965, tuition and fees in the public sector increased annually by about 7 per cent—significantly more rapidly than any other component of institutional support. Toward A Long-Range Plan For Federal Financial Support For Higher Education 45-46 (1969). But the real escalation came in the fall of 1969; in just one year average tuition charges for the leading state universities rose 16.5 per cent for resident students and 13.6 per cent for nonresidents. At certain institutions, moreover, the increases were much greater—75 percent at Purdue and Indiana, 68 percent at public institutions in Iowa, and 50 per cent for nonresidents at Ohio State. N.Y. Times, Aug. 31, 1969, at 1, col. 5, at 32, col. 1-2; N.Y. Times, Sept. 28, 1969, at 41, col. 1-2; Chronicle of Higher Educ., Sept. 29, 1969, at 1, col. 5.

153. It has been argued that alternatives such as more vigorous recruiting and greater commitment of financial aid would eventually bring about such increases without preferential admission policies. See, e.g., Graglia, supra note 6, at 351, 353. In the long run, such measures may well suffice. But in the short run, recent experience certainly argues that preferential admission policies are necessary to bring about substantial enrollment increases. Such policies are, moreover, justified by the exclusionary if not discriminatory nature of the traditional admissions criteria. See pp. 751-37 supra. Then, too, there could be nothing more frustrating or damaging to minority-group aspirations than to "recruit" students for places in college that simply do not exist. If an institution of higher learning is unwilling to admit students in whom it arouses hopes and expectations, it would be far wiser and more humane not to undertake the recruiting efforts at all and thus avoid raising false hopes.

tolerated in the secondary or even elementary schools.\textsuperscript{155}

Another major drawback to such an approach is that increased reliance on the black colleges would come at a time when these institutions face a most uncertain future. The core of their plight is financial.\textsuperscript{156} It is estimated that as many as 50 of the 128 black institutions in this country might have to close simply from lack of funds, despite the valiant efforts of the United Negro College Fund, major foundations and other sources.\textsuperscript{157} Federal government appropriations, distributed on a basis that tends to make the rich richer and the poor poorer, have been virtually unavailable in large amounts except to Howard and Federal City College.\textsuperscript{158} Meanwhile the urgent quest for black scholars by major Northern and Western universities has brought massive raiding of the black campuses and has created an unprecedented "black brain drain" at just the time these institutions are seeking to bolster their own faculties.\textsuperscript{159} Black colleges can seldom compete in terms of salaries, teaching loads, research facilities, library collections or fringe benefits with the wealthy universities that now desperately seek black and other minority talent.\textsuperscript{160}

Thus it is quite unrealistic to expect the black colleges to provide educational opportunities that the white universities do not. The

\begin{quote}

\textsuperscript{155} Such conditions (and efforts to remedy them) are not confined to the Deep South. There are several virtually all-black colleges in Ohio and Pennsylvania. See N.Y. Times, Aug. 25, 1969, at 32, col. 4-8, for an account of efforts to desegregate the Pennsylvania system.

\textsuperscript{156} See Norheimer, \textit{Negro Colleges Challenged by Soaring Budgets, Rising Enrollments, Competition and Student Demands}, N.Y. Times, Dec. 22, 1969, at 19, col. 1-8. Recent national studies have drawn urgent attention to the plight of the black colleges and urged increased support for these institutions. See, e.g., \textit{Report of the President's Commission on Campus Unrest} 107-16 (1970); \textit{Carnegie Commission on Higher Education, From Isolation to Mainstream: Problems of the Colleges Founded for Negroes} (1971). The problem of survival is certainly not new. See Badger, \textit{Colleges That Did Not Survive}, 35 J. NEGRO ED. 306 (1966), reporting that perhaps 200 predominantly Negro colleges have been started in the century since the Civil War but have closed, mostly for lack of funds. See generally Crossland, supra note 5, at 36-42.


\textsuperscript{158} See N.Y. Times, July 18, 1969, at 10, col. 5-8; Ware & Determan, \textit{The Federal Dollar, the Negro College and the Negro Student}, 35 J. NEGRO ED. 459 (1966). There are in fact 17 predominantly black land-grant colleges, but they also appear to have shared less than proportionately in the benefits of that program. See Wright, \textit{The Negro Land-Grant Institutions}, 15 IMPROVING COLLEGE & UNIV. TEACHING 254 (1967).

\textsuperscript{159} See Los Angeles Times, Nov. 12, 1969, § 1A, at 8, col. 1-8.

\textsuperscript{160} See Huyck, \textit{Faculty in Predominantly White and Predominantly Negro Higher Institutions}, 35 J. NEGRO ED. 381, 387-90 (1966). Although this article is rather dated, the gap has presumably widened, if anything, as a result of other trends described above.

743
imminent prospect, in fact, is that black colleges may be unable to continue in the role they have served in the past. With nearly two-fifths of the nation's black undergraduates still on black campuses, that prospect is alarming. Under the best of assumptions, the black colleges do not represent an alternative to preferential admission, but only a supplement.

B. Junior Colleges and Minority Students

For comparable reasons, greater reliance on junior and community colleges does not constitute a viable alternative. At best, a two-year college can only prepare students to transfer to a four-year college which alone can confer a baccalaureate degree. At worst, the vocational-remedial junior college simply prolongs for two critical years the racial isolation and inadequate preparation plaguing most minority students so as to reduce rather than enhance the prospect that they will ever receive degrees. Meanwhile, the suggestion that large numbers of minority students can suddenly be integrated at the start of their junior year into virtually all-white student bodies simply defies reason and experience. If integration is to work at all—and especially if it is to serve the beneficial ends of which we have already spoken—it must occur when all students matriculate. The longer the process of absorption is delayed, the greater are the risks—both socially and academically—and the poorer are the prospects for real individual and institutional

162. This is clearly not the place to pursue the intense and sometimes bitter debate about the role and potential of the black colleges. Compare, e.g., Jencks & Riesman, The American Negro College, 37 Harv. Ed. Rev. 3 (1967), with "The American Negro College": Four Responses and a Reply, 37 Harv. Ed. Rev. 451 (1967). As former Harvard College Dean John Monro has frequently observed since joining the faculty at Miles College in Alabama, these institutions educate many students for whom no other higher learning opportunities exist. Monro has argued that "if Miles closed, 90 per cent of the black kids in Birmingham could just forget" about higher education. Greenhouse, The Reincarnation of John Monro, N.Y. Times, March 15, 1970, § 6 (magazine), at 56. See also Fuchs, The Dean of Harvard Goes South, Parade Magazine, Nov. 30, 1969, at 22.

Also dangerous are the implications for minority collegiate opportunities of the "phasing out" of predominantly Negro institutions. Recent experience in Florida suggests what may happen. After the "integration" of the Florida system in 1965, it is reported that black enrollments declined in some institutions. In 1964, Gibbs Junior College, the largest Negro junior college in the state, had some 936 Blacks during its final year of operation. In 1965, only 500 black students attended nearby St. Petersburg Junior College; by 1967 the figure had declined to 348; and in 1968 the estimate was 272—with no corresponding increase in nonwhite enrollments elsewhere in the system. R. Ferrin, Barriers to Universal Higher Education 32-33 (1970). Compare comments on the effects which the phasing out of the only predominantly black law school in Texas might have upon black access to legal education. Jones, The Sweatt Case and the Development of Legal Education for Negroes in Texas, 47 Texas L. Rev. 671, 689 (1969). Cf. Carl, The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor, 20 J. Legal Ed. 21, 29-32 (1967).
Preferential Admissions

gain. As with the black colleges, the two-year institutions should remain an option. They well serve the needs of the minority student who does not wish a regular baccalaureate program or who is simply not initially equipped for the demanding academic curriculum or the impersonality of most large four-year institutions.

C. Open Admissions

Perhaps the most widely heralded answer to the demand of racial minorities and of other disadvantaged groups for higher education is an open-admissions policy such as the one recently adopted by the City University of New York. The subject of open admissions is exceedingly complex and it has been the focus of extensive study and debate. Its inaugural period in the City University is furnishing extensive data for detailed study and evaluation. It would therefore be premature to devote more than a few paragraphs here to a matter which deserves extensive treatment later.

It is, however, relatively clear that a policy of open-admissions in a large metropolitan area with a substantial minority population (such as New York) will increase significantly the number and percentage of minority students enrolled. But the prospects for meaningful integration of a more comprehensive educational system via open admissions are uncertain. Some large state university systems like that of California have reacted to the rising enrollment pressure of open-admission commitments by becoming highly selective at the top and increasingly stratified between levels; they have imposed rising transfer standards on those to whom the lowest level is indeed "open" but who seek later advancement. Thus the critical test of open admissions from our

163. Even under ideal circumstances, when all students start as freshmen at the same time, there are bound to be serious problems of assimilation and identification. See Miller, Problems of the Minority Student on Campus, 55 Liberal Ed. 18, 22 (1969); and see generally the essays in The Minority Student on the Campus: Expectations and Possibilities 61-86 (R. Altman & P. Snyder eds. 1970).

For discussion of the special contribution that junior and community colleges have made to expansion of minority group educational opportunities, see Knoell, supra note 97; Southern Regional Education Board, The Black Community and the Community College (1970).

164. No major studies will, of course, be available before the fall of 1971. For early comments reflecting some misgivings, see Hechinger, What Open Admissions Does and Does Not Mean, N.Y. Times, Oct. 11, 1970, § 4, at 9, col. 1-3. For a somewhat more hopeful reappraisal of the program six months later, see Hechinger, Prophets of Doom Seem to Have Been Wrong, N.Y. Times, March 28, 1971, § 4, at 11, col. 1-5. Early in the year Mayor Lindsay was sufficiently optimistic about the program to urge that the private colleges and universities of the state should join with the City University in opening their doors to disadvantaged students. N.Y. Times, Oct. 22, 1970, at 1, col. 5-6.


166. See O'Neil, Beyond the Threshold: Changing Patterns of Access to Higher
perspective lies in the retention and completion rates of minority students admitted without regard to grades and test scores.

More importantly, very few institutions can afford—either in terms of physical space, personnel or fiscal resources—to throw their doors open to all who wish to attend. Thus open admissions does not at the present time represent for most colleges and universities a feasible alternative to some more selective approach. Rather, it represents a special solution—and a commendable one—for certain institutions with particular constituencies and exceptional resources.

D. A Preference Extended on the Basis of General Disadvantage

We observed in discussing the constitutionality of preferential admissions programs that no substantial constitutional issue arises if some students are singled out for special treatment so long as the preference is accorded to "the most disadvantaged segment of the community, whether economically, educationally or politically." When a preferential policy is thus defined, the only constitutional burden placed on the university is that of demonstrating a rational relation between the goals of such a policy and the means chosen to achieve those goals. This burden should typically be met with relative ease.

Despite its probable lawfulness, however, a policy of preference designed to redress general economic, educational or political disadvantage does not usually represent a feasible alternative to explicit racial or ethnic preference. Because of the fiscal and physical constraints determining the size of most student bodies, few institutions of higher learning can simply open their doors initially to all victims of disadvantage. They must therefore limit their attack upon the problem—either by preferring the first to apply or the most promising members of the disadvantaged group (an approach which would disproportionately exclude racial and ethnic minorities); or by employing the very sort of race-conscious selectivity to which a more comprehensive preference seems a theoretical alternative. There is really no way out of this dilemma except in the kind of melting-pot metropolis where open admissions works well. If a college or university truly seeks a substantial increase in students from a particular minority or disadvantaged group, it must choose them directly and explicitly. A broadly inclusive prefer-

---


Preferential Admissions

Preferential admittance class constitutes at best a crude, blunt instrument for a task that requires considerable precision.

* * * * * *

This analysis of possible alternatives supports the conclusion that there is no effective substitute for the explicit use of race as a preferential criterion for most colleges and universities.

V. The Implementation of Preferential Policies Based on Race: Who May/Should Be Preferred, By What Means, and How Much?

However persuasive the case in favor of preferential admission standards based on race, the difficult question of implementation remains. It is essential to consider implementation in conjunction with the positive case for preferential admissions already outlined because several of the most common criticisms of the preferential admission of members of certain racial minorities to college are directed as much to the feasibility as to the desirability of such policies. Any discussion of implementation must consider at least three related questions: (A) who may/should be preferred, (B) by what means should a preference be extended and (C) how much of a preference should be applied? Analysis of these questions must be preceded, however, by a discussion of the ultimate goal of any preferential admissions program.

Implicit in much of the foregoing discussion is the notion that the percentage by which any group is “underrepresented” in institutions of higher learning should be measured by using the percentage of such groups in the total population as the norm. This notion in turn is based on two assumptions: (1) that in the absence of “structural disabilities” ease of access to higher education would be equal for all groups in society; and (2) that the actual rates of matriculation for all groups in society under conditions of equal ease of access would be equal.

One problem with this set of assumptions, of course, is to define satisfactorily the concept of “structural disabilities.” In broad outline, the concept refers to inequalities in opportunities caused not by “individual capabilities” but by the effects of certain “societal structures.” An obvious example of a “structural disability” would be the institutionalization of racial discrimination against black people in a variety of social, economic and political organizations.168 More elusive to

168. I am referring here both to discrimination by private individuals that is not cognizable under the Fourteenth Amendment because of the absence of any state action
describe, but potentially no less severe in impact, are dislocations in
the allocation of certain "social goods" and certain "merit goods."

While it is obvious when a person—such as a Black living in the inner
city—suffers from "structural disabilities" (the reinforcing pressures
of the barrio and the ghetto), our ideas of fairness and equality have
not yet matured to the point where we can describe satisfactorily (from
a consistent ethical position) when we would consider that such dis-
abilities have been removed and when opportunities are, in fact, as
"equal" as they can be, given variations among individuals.

Moreover, proportionality cannot be posited as the ultimate goal of
preferential admissions programs because the second assumption noted
above involves a critical non sequitur. The removal of structural dis-
abilities does not necessarily ensure equal rates of matriculation.
The latter, much more than the former, is dependent on the level of
motivation within various groups for higher education. To be sure,
group motivation is influenced by structural factors. A somewhat lower
level of motivation for higher education among certain racial minorities
is partially traceable to the structural disabilities suffered by these
groups: an unequal share of society's social and merit goods and the
effects of discrimination directed at members of the group conspire to
impede access to higher education; one of the effects of unequal access
is the deflection of group aspirations from higher education into more
accessible areas. But the full sociological and psychological story is much
more complicated. Group motivations are influenced by cultural or
historical factors as well as by ability and opportunity. One may find
confirmation of this fact in the disparate rates of matriculation in
undergraduate, graduate and professional schools for groups in our
society which are not so clearly structurally disadvantaged.

A college or university contemplating a preferential admissions pro-
gram should view its long-range goal as affording large percentages of
all groups in society both the opportunity and ability to make free

and to officially sanctioned discrimination which although initiated by private parties
would be held to violate the Fourteenth Amendment under, for example, Shelly v.
Kraemer, 334 U.S. 1 (1949).

169. See generally R. Musgrave, THE THEORY OF PUBLIC FINANCE—A STUDY IN PUBLIC
ECONOMY 3-27 (1959). For a discussion of the legal aspects of what I have termed "struc-
tural disabilities," see Michelman, The Supreme Court, 1968 Term, Foreword, On Pro-
tecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).

170. For comments on the inequitable distribution of elementary and secondary educa-
tion funds, and legal implications of that inequity, see the seminal work of Coons, Clune
and Sugarman. J. Coons, W. Clune & S. Sugarman, PRIVATE WEALTH AND PUBLIC EDUCA-
tION (1970); Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitu-

171. See generally Davis, UNDERGRADUATE CAREER DECISIONS (1965).
and equal choices in the educational or career market place. Some disparity in the actual rates of college matriculation should be anticipated if individual decisions to enroll are viewed from this perspective, since college represents merely one alternative in a market place in which numerous career alternatives are equally open and accessible.

Rejection of complete proportionality of matriculation rates to population as the ultimate goal of preferential admissions does not mean, however, that proportionality cannot or should not be used as a rule-of-thumb for policy-makers and administrators who are charged with designing and carrying out preferential admissions programs. If no structural disabilities existed, one might expect the rate of matriculation of all groups to be roughly equal. Yet precision in the statement of objectives is hardly required at a time when minority enrollment remains so far short of proportionality. It will be time enough to consider fine shadings if ever the goal of proportionality comes within view. Until that time, advocates of a different objective have at least the burden of showing the inappropriateness or unsoundness of rough proportionality as a target. In the short run, too, proportionality has some obvious practical advantages. Resort to alternatives, such as individual group demands or expectations, would involve difficult interpretive and administrative problems. Moreover, the delusive certainty which may be implied by an individual university's attempt to assess the extent to which differences in enrollments derive from factors unrelated to structural disabilities can largely be avoided if proportionality is used as the short-term, flexible guideline. Thus both practical and philosophical considerations point toward proportionality as the appropriate interim target, whatever may be the ultimate objective of expanded educational opportunity for minority groups.\footnote{Recent projections contained in the Ford Foundation study of minority access provide practical contours to the concept of proportionality. The study describes the degree of underrepresentation of each of the four principal minority groups—Blacks, Puerto Ricans, Mexican-Americans, and American Indians—and extrapolates figures by which the enrollments of each group would have to be increased in 1970-71 to achieve rough population proportionality. The projections are admittedly crude for several reasons acknowledged by the author, but are nonetheless helpful in understanding the numerical implications of a commitment to proportionality. \textit{Crossland, supra} note 3, at 16-17, 20-21.}

A. \textit{Who May/Should Be Preferred?}

The question of who may be preferred is in some respects very different from asking who should be preferred. The first question goes to the legality of preferential policies, the second goes to the wisdom or feasibility of applying a preference to certain individuals or groups.
As we have seen, because of the limited fiscal resources of many colleges and universities, the legally permissible scope of preferential policies is wider than the scope of the preferential program many colleges and universities will actually be able to undertake. Once this fact is recognized and we limit our focus to preferences based on race, the answers as to who may and who should be preferred begin closely to resemble one another. As we shall see in the ensuing discussion, many of the same factors or tests are entitled to great weight in both determinations.

Clearly, it would not do either as a matter of constitutional law or of public policy to extend a preference to all racial minority groups because some minorities—Jews\textsuperscript{173} for example, and Asians in many fields\textsuperscript{174}—need no special help in seeking higher education even though in many sectors of American life they still suffer discrimination. In the event of a legal challenge, the public college or university would be hard-pressed to demonstrate that the state has a compelling interest in a system of such preferences. Moreover, the educational institution's limited fiscal resources could be better directed toward groups which can show a more pressing need for special assistance.

If race is to be used to key the preference, the college or university's legal and policy positions are strongest when favoring those racial minorities who not only have been underrepresented, but who have disproportionately been (a) victims of overt racial discrimination; (b) socio-economically disadvantaged; (c) unfairly appraised by standardized tests; and who are (d) graduates of over-crowded, run-down and badly-staffed high schools. Most Black, Spanish-American and American Indian applicants clearly meet these criteria and therefore present the strongest claims for special consideration.

Once a racial group has been singled out for preferential treatment, an important subsidiary issue is whether the preference may or should be applied equally to all members of the group, regardless of special personal circumstances which set the individual applicant apart from the group which has been granted the preference. What, for instance, of the son of a prosperous black physician or attorney who has attended a good preparatory school but still has only mediocre grades and test

\textsuperscript{173} Nathan Glazer estimates that there are about 325,000 Jewish college and university students enrolled in the United States. Glazer, \textit{The Jewish Role in Student Activism}, in \textit{Youth in Turmoil} 95 (1969). This number works out to roughly twice the Jewish share of the national population. \textit{The 1970 World Almanac} 261 (1969).

\textsuperscript{174} The Carnegie Commission on Higher Education observes that “Japanese-Americans and Chinese-Americans are well represented in higher education and are not now educationally disadvantaged.” \textit{Carnegie Comm'n on Higher Education, A Chance To Learn} 2 (1970).
Preferential Admissions

scores? Superficially, it would seem that the case for extending a preference to such an applicant would be relatively weak because he is not educationally "disadvantaged." Yet, as Professor Graham Hughes observes, "in the short run at least the mere fact of a person's being black in the United States is sufficient reason for providing compensatory techniques even though that person may in some ways appear fortunate enough in his personal background." Although the black applicant may not have suffered educational disadvantage, he is likely to have suffered from some of the other disadvantages experienced by most other members of his race just because he is black. Once he has graduated, moreover, the son of the black physician or attorney is likely to be as valuable as other black graduates in symbolizing to black youth generally that a college education is indeed accessible to them. The wealthy black applicant can also presumably afford to pay his own way, so that his admission will take no financial aid away from needier students, black or white. Finally, administrative convenience is an added factor arguing for an undifferentiated group racial preference. Those individuals within the target group who would not as individuals qualify for special treatment would not be significant enough numerically to require the college or university to seek them out and differentiate them from other members of their race. Thus the presumption in favor of the Black, Chicano, Puerto Rican or Indian should probably apply even in those rare cases where some indicia of disadvantage are absent.

B. By What Means Should a Preference Be Extended?

A college or university that wishes to increase its share of minority students through preferential admissions could set rough guidelines in at least three general forms. First, the guidelines could be set as a total or comprehensive minority share, with no breakdown of components.

175. Hughes, Reparations for Blacks, 43 N.Y.U.L.Rev. 1053, 1073 (1968). See also Nat Hentoff's comment: "To prevent the continued exclusion of the 'underclass' there will have to be extensive 'compensatory treatment' for the poor and unskilled of all colors. But ... there has for so long been an additional disadvantage in being black . . . ." N. HENTOFF, THE NEW EQUALITY 95-96 (1965).

176. Despite its essential focus on particular disadvantaged racial groups, any preferential policy should contain sufficient flexibility and humanity to encompass members of other groups who have suffered comparable deprivation and may thus make comparable claims on institutional resources. Accordingly, children of recent immigrants or other white applicants from severely disadvantaged backgrounds might receive individual preferences even though no special consideration would be given to the group of which they are members. It should be noted, however, that a large share of today's college students are "disadvantaged" in comparison to earlier generations. Recent Census Bureau data show that two-thirds of current undergraduates in the United States come from homes in which neither parent attended college. Chronicle of Higher Ed., Feb. 15, 1971, at 3, col. 1-3.
Second, they could also be set as a specific group commitment for each of the principal minority groups—an undertaking to seek a Black percentage of roughly X, a Chicano share of roughly Y, an Indian share of approximately Z, and so on as other groups were identified that suffered from sufficiently critical disadvantage to justify a group preference. Finally, the guidelines could be expressed as an exclusive commitment to a single racial minority—an effort to seek a given ratio of Blacks, or Chicanos, or Indians, to the exclusion of other minorities. Numerous variations could be devised from these general forms of extending preferences. But the three general forms presented here should indicate something of the scope of the possibilities. The form that a particular college or university should choose to implement its preferential policies will depend on several factors which will be in many cases unique to the college or university making the choice. The major factor, of course, will be the scope of the preferential commitment undertaken. This in turn will depend on such matters as the institution’s fiscal resources, location, the need for flexibility—factors which we have briefly considered above but which can be most profitably reintroduced in the context of considering how much of a preference is proper.

C. How Much of a Preference?

Even after proportionality is accepted as the rough short-term guideline for preferential admissions, how much of a preference a particular college or university should extend still depends on a number of complicated determinations. One of the most important of these is the identification of a relevant population base. Although a coherent national strategy on the problem of unequal access to higher education is the ideal, national minority shares may not afford adequate guidance to institutions of higher learning for the simple reason that no college or university has a truly representative national student body.

If a college or university’s program of preference is to be operationally consistent with the primary mission of the institution—that is, to provide educational opportunities for a constituency that is roughly coterminous with the source of the college or university’s operating funds—it seems that the recruitment and selection of minority-group students should also very broadly reflect the demographic character of the economic support base of the institution as a whole. More specifically, (a) the target population for the state-supported college or university should be the population of the state as a whole; (b) the target population for the publicly-supported municipal university
Preferential Admissions

should be the population of the metropolitan area; (c) the target population for the privately-supported college or university should be the population of the states from which the bulk of the students come—with the profile fashioned by weighting the states in rough proportion to their representation among the total student body. Mathematical nicety is certainly not required, even if feasible. The important first step is to set some manageable basis on which to determine ranges appropriate to each institution.

Once ultimate goals or objectives have been determined, clearly they cannot be achieved in a single year. Realistic interim goals should therefore be established at the outset. One appropriate model or guide to follow in the "phasing" of minority enrollments would be the Philadelphia Plan. This federal policy requires affirmative action to increase gradually the ratios of minority workers on federal construction contracts.\(^{177}\) Four factors determine the setting of both interim and final minority employment "ranges" for each trade or craft under the Philadelphia Plan: (1) the current extent of minority-group participation in the trade; (2) the availability of minority-group persons for employment in such trade; (3) the need for training programs in the area and/or the need to ensure demand for those in or from existing training programs; and (4) the impact of the program on the existing labor force.\(^{178}\)

The analogy is imperfect, of course, for the employment of minority workers is a vastly different process from the admission of minority students. But comparable criteria could be developed for the setting of realistic minority shares: first, the current extent of minority enrollment on the particular campus, in the region, and nation-wide; second, the annual number of high school graduates of each minority group in the target region; third, the number of applications received in past years from members of each minority; fourth, the capacity and commitment of other colleges and universities in the target area to recruit and accept minority students; fifth, the academic and financial needs of minority students within the target area; and finally, the effect upon the

---


total student body of various levels of institutional effort to meet those academic and financial needs.

These data should then be carefully reviewed in a proceeding rather like that used to set minority employment ranges under the Philadelphia Plan.\textsuperscript{179} The comments of various interested groups should be invited in determining the feasibility of interim and final goals. The goals initially set should be subject to periodic reconsideration in light of changes in the relevant factors. Major revisions should be avoided, however, both because minority-group expectations depend on the commitments, and because the setting of goals by neighboring institutions is necessarily an interdependent process.

VI. "Some Strange Madness": The Nonconstitutional Case Against Preferential Admissions

Any complete discussion of preferential admissions demands an appraisal of the attacks that have been mounted and the validity of the contentions offered to support them. At least five distinct concerns have arisen. The strength of each should be assessed within the context of the implementation plans already outlined.

A. Preferential Admissions Unfairly Exclude Qualified Non-Minority Applicants

Vice President Agnew, reflecting the views of many others, has argued: "For each youth unprepared for a college curriculum who is brought in under a quota system, some better-prepared student is denied entrance. Admitting the obligation to compensate for past deprivation and discrimination, it just does not make sense to atone by discriminating against and depriving someone else."\textsuperscript{180} This argument has a certain superficial appeal. In analogous contexts—employment and housing, for example—the displacement objection is persuasive. Implementation of a preferential policy may result in laying off or


\textsuperscript{180} Chronicle of Higher Ed., April 20, 1970, at 1, col. 5. \textit{See also} Graglia, \textit{supra} note 6, at 351, 352. A different though related concern has been raised by a black economist on the UCLA faculty: that preference for what he terms "authentic ghetto types" in preferential programs may arbitrarily and unfairly exclude middle class minority students who do not as readily fit the expectations of the program. Sowell, \textit{Colleges Are Skipping Over Competent Blacks to Admit 'Authentic' Ghetto Types}, N.Y. Times, § 6, at 36. There are also some indications that the hostility of white ethnic groups toward some such programs may reflect their exclusion from activities for which they pay part of the costs. \textit{See} Schroeder, \textit{Ethnic America}, 1971-1 \textit{EDITORIAL RESEARCH REP.} 47, 48.
Preferential Admissions

discharging white workers. The effects of reverse discrimination may well be divisive, creating tensions and hostilities both on and off the job. Comparable evils may attend rigid enforcement of racial quotas in the sale and rental of housing.

These concerns apply with greatly reduced force, if at all, to higher education. A preference for a minority applicant does not necessarily "displace" a white student. Higher education is not a static system, and admissions officers need not play a zero-sum game. The equal opportunity programs of many colleges and universities have relied upon net increases in entering classes—sometimes stretching already overtaxed institutional resources even thinner, but thereby avoiding reductions in opportunities for non-minority students. Also, the admissions process is necessarily more flexible and subjective than the hiring practices of most employers of skilled and semi-skilled labor. Thus it is much harder to say with confidence that an "inferior" student has been admitted while a "superior" student has been excluded than it is to make a comparable judgment about a large firm's blue-collar hiring patterns.

Nor do preferential admissions policies in higher education invite objections similar to those made against "benign quotas" in the housing context. If a housing project is to be effectively integrated, some arbitrary ceiling on the number of minority tenants must presumably be imposed, else occupancy will soon pass the "tipping point" and may drive out many white families. Surely preferential admissions neither generates such concern nor warrants the imposition of any comparable ceiling. There is not a single case of a four-year college or university that began as predominantly white and has since become populated predominantly by minority-group students. In fact, integration of the black colleges in West Virginia and Missouri has actually proceeded faster than that of the white colleges in the North and West. A few institutions such as Meharry Medical College and Howard Law School are approaching racial balance. No one at Wayne State seriously

181. But see Kaplan, supra note 6, at 363, 373.
182. Id. at 375-78. See also Winter, Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern, 34 U. Citi. L. Rev. 817, 854 (1967).
183. See pp. 701-05 supra, for a description of the complexity and flexibility of the admissions process.
185. On the reverse "integration" of certain traditionally black colleges, especially in the Border States, see Crossland, supra note 3, at 37. The author adds an important caveat: There are perhaps ten to twenty institutions of rather recent origin whose student
argues that white students will be driven out or will leave in droves now that the black enrollment has reached sixteen per cent. The next step is to get Wayne’s enrollment up to twenty per cent, or Southern Illinois’ to fifteen per cent, not to keep either school from becoming all-black. Thus pressures that may operate in the public housing or residential property contexts simply are not relevant to higher education.

The preferential admission of minority applicants may, however, hurt the individual majority student in a subtler way. An inevitable cost of expanding minority enrollment is the reallocation of scholarship and financial aid funds. Since these funds are relatively static at most institutions—and even under government programs reflect only per capita increments—admission of large numbers of very poor students places a heavy drain on earmarked institutional resources. Some universities have found it necessary to commit a major share of the financial aid budget (including loans and work-study funds) to four or five per cent of the student body. The result is that non-minority students, at least half of whom typically need some financial help to stay in college, must meet rapidly rising educational and living costs with their now diminished shares of a relatively static fund. Government subvention may offset this pressure to a limited extent; but most government funds for students are allocated and disbursed by the university and are neither earmarked for nor augmented by the presence of minority students.187 A few private fellowships are available exclusively to minority students; but (like the John Hay Whitney, Herbert Lehman and Ford Black Studies fellowships) they are reserved chiefly for graduate study, or (like the National Medical-Sloan Foundation Scholarships) they are

bodies are made up predominantly of students from various minority groups. For the most part, they are two-year junior and community colleges located in or near the ghetto or barrio—Bronx and New York City Community Colleges; Compton, Laney, Merritt and East Los Angeles in California; Kennedy-King, Malcolm X and Olive-Harvey City Colleges in Chicago. But there are a few four-year institutions as well, of which Federal City College is the most notable example. These campuses are predominantly Black (or Mexican-American or Puerto Rican) but are not among the traditionally black institutions that have longer histories and different origins.

186. Fred Hechinger has observed with regard to the open enrollment policy at the City University of New York: “The colleges have not, as had been feared, turned into black and Puerto Rican ghetto institutions.” Hechinger, Prophets of Doom Seem To Have Been Wrong, N.Y. Times, March 28, 1971, § 4, at 11, col. 2.

187. E.g., Centra, Black Students at Predominantly White Colleges: A Research Description at 5-6 (mimeo. 1970); College Entrance Examination Board, Admission of Minority Students in Midwestern Colleges, at 7-8 (mimeo. 1970). There are very few proportional allocation figures for particular institutions. Boston University did announce in the fall of 1969 that about 40 per cent of its financial aid budget for the freshman class went to minority students comprising somewhat less than 10 per cent of the students. N.Y. Times, Nov. 15, 1969, at 44, col. 1 (city ed.).
Preferential Admissions

available only to students with impressive paper records who may have many possible sources of outside financial support. In the few instances in which state legislatures have appropriated special funds for the support of minority students, the effect appears to have been principally to divert monies that in other years would presumably have gone into increased faculty salaries, reduced teaching loads, capital construction, library expansion, or any of the myriad other claims on state support for higher education. And in the private sector, where the institution itself makes the choice, the temptation to put the bulk of the funds where the pressure is greatest may cause a major realignment of priorities.

Ordinarily the need might be met largely with loans. But for minority students, many of whom came to college carrying not only their own past debts but those of a dependent family as well, the utility of loans (even without interest charges) is far less than for middle-class students. Economist Howard Bowen has concluded from his extensive study of the financing of higher education that "heavy reliance on loans would present a serious obstacle to low-income students." Only grants or other forms of direct subvention (such as work-study payments) are adequate for the truly needy student. Thus the actual net cost of a large minority student program may in fact exceed the apparent dollar cost because of the composition of the financial-aid package.

The composition of the student body may consequently be altered in two distinct ways. First, there is the prospect (much more in the private than the public universities) of a gradual erosion of middle class access, so that student bodies may come to be composed largely of the wealthy and the poor—of those who can still afford to pay all the costs of a higher education and those who can pay none but are seen as deserving of full subvention. Second, such commitments may gradually alter the geographical distribution of student bodies. If non-minority students are chosen increasingly because of their ability to support themselves, a de facto preference for in-state students may result even at private institutions. In California or New York, where the Cal-State or Regents Scholarships cannot be taken out of the state and where students

188. See Announcement of the National Medical-Sloan Foundation Scholarships for 1969-70 ("Applicants must be talented college students who have demonstrated outstanding achievement in college [and] who have been scored above average in the Medical College Admission Test."). See also Announcement of Graduate Fellowships for Negroes in Business Administration, 1968 (Open only to "students who have done work of high quality in their undergraduate programs and who hold degrees from accredited colleges and universities ").


190. CAL. EDUC. CODE § 31203(a)-(West 1969); N.Y. Educ. Law § 601-a(2) (McKinney
from many other states cannot bring their stipends with them, Stanford and USC may well take California students in preference to New Yorkers, while Cornell and Columbia may take New Yorkers over Californians, sacrificing geographic diversity in the interests of economy.

These collateral consequences do not necessarily argue against inauguration of minority students programs. They do suggest, however, some important hidden costs, both to the institution and to the other students. No college or university which undertakes such a program should expect the drain on its resources to be temporary. Once embarked on minority student education, turning back is not easy. The costs are likely to increase rather than decline (even if total educational costs remain static, as they surely will not) as recruiters reach farther down the socio-economic scale to provide opportunities for the neediest segments of society. Thus the institution that makes such a commitment should be prepared not only for high initial costs but for a long-term reallocation of fiscal priorities.

B. Preferential Policies Necessarily Involve the Use of Quotas Under Which Absolutely Unqualified Students Are Admitted to College

A second objection to preferential admissions policies has come from critics who consistently confuse the issue by implying that any commitment to increase minority enrollments involves an obligation to accept a certain number of clearly unqualified applicants simply to fill a predetermined formula. The suggestion is pernicious and has compounded the popular misunderstanding of what colleges and universities should be trying to accomplish.

If the setting of percentage ranges or goals within the realistic expectation of an institution's recruitment capacity constitutes a quota, then so be it. But the principal vices of quotas—chiefly operative against minority groups in the past—do not inhere in such formulae as we have outlined here. They impose no ceilings upon minority enrollments; the institution that can find more students ready for college may, of course, exceed the target figure. And these ranges are flexible in ways that quotas are not; they permit gradual matching of institutional desires and institutional capacity. Finally, they are only self-imposed


goals. If in a particular year achievement proves impossible, there is no suggestion that students will somehow be rounded up and registered simply to fill the predetermined percentage.

Thus it helps little to apply the label “quota” and thereby invoke all the fears and anxieties this word naturally conjures—not only among middle class whites, but equally among the Irish, the Jews and many other national or ethnic groups who have historically been victims of vastly different sorts of restrictions. What is vital is a rational appraisal of the precise nature and effect of the types of goals we have proposed here.

C. Preferential Policies Are Unrealistic

A closely related criticism has come from those who argue that however designed, in terms of quotas or goals, preferential policies are not feasible because not enough qualified minority high school graduates exist to meet even modest goals. In his major attack on preferential admissions, Vice President Agnew relied heavily upon an official of the Ford Foundation who argued that “given present standards, it’s preposterous and statistically impossible to talk about boosting black enrollment to ten per cent even over the next five years.” There is other respectable support for the view that proportionality may be unattainable. Professor Arthur Jensen, the controversial educational psychologist at Berkeley, argues that the number of minority students ready for the rigors of college work falls far below the current demands and expectations for enrollment increases.

There are several answers to these claims. First, all the projections assume the application of “present standards” and thus of the very criteria which have historically kept the number of minority students low. Second, these estimates assume the existing curricula, often of marginal interest to minority students, and current patterns of academic evaluation—at a time when both are undergoing extensive criticism and reexamination. Third, these predictions of potential enrollment pools involve a kind of reductio ad absurdum. One of Professor Jensen’s authorities, for example, figures the total number of black male high school graduates regularly admissible to a prestige college under

192. Largely because of their historical abuse and oppressive potential, quotas have been vigorously opposed particularly by Jewish groups in the past. See Kaplan, supra note 6, at 382-83 & n.45 (1966). For the vehement opposition of the National Jewish Community Relations Advisory Council to current ethnic quotas, see N.Y. Times, June 28, 1969, at 14, col. 3.


present standards to be a mere 1050\(^1\) at a time when more than twice that number of black students are enrolled and doing satisfactory academic work in graduate schools of law alone\(^2\). Another estimate raises the national pool to 3000,\(^3\) which is roughly the number of black students currently enrolled at Wayne State University alone.\(^4\)

Perhaps the best projections derive from experience under vigorous recruiting programs. The lesson of Upward Bound, New York State's SEEK program, and the open enrollment policies of Rutgers in 1969-70 and CUNY in 1970-71 suggests that if opportunities are available, eligible students can be found to fill them.\(^5\) The success of the New York College Bound Corporation in identifying and preparing minority students who would otherwise have dropped out of high school is consistent with this view.\(^6\) The true potential of vigorous recruiting and imaginative college preparatory programs has hardly been tapped; any estimates of the pool of college candidates in past or even present terms are thus unreliable.\(^7\)

D. Minority Students Divide and Disrupt the Campus

A fourth major premise of the attack on preferential programs is that minority students bring with them to previously tranquil campuses the dread disease of disorder. Vice President Agnew has said they infect peaceful institutions with "the growing militancy of increasing numbers of students who confuse social ideals with educational opportunities." The Vice President has darkly hinted that black students are to blame for "the smoking ruins of a score of college buildings."\(^8\) A member of the House of Representatives has put the case even more forcefully. He argues that some large universities have admitted under a "dual standard of education . . . a lot of young people who wouldn't qualify"
Preferential Admissions

under regular criteria. Instead of being quietly grateful, as initially hoped, “many who are now in the forefront of leading the rioting and the unrest in our universities are the very people that [sic] have been admitted into these universities at lower standards.”

It would be disingenuous to deny any correlation between the presence of large groups of minority students and campus tension or disorder. Experiences at Oshkosh, Urbana, San Fernando Valley State, Cornell, and a host of other recently “integrated” campuses suggest some relationship between minority students and demonstrations. These particular protests would not have occurred without recruitment of minority students and special admission standards. It is less clear, however, that white students would not otherwise have taken up the cause of the Blacks who were historically excluded, with consequences at least as grave for the campus. Moreover, black students clearly have no monopoly on campus violence. The most serious period of disruption in American academic history—the weeks following the Cambodia invasion in May 1970—involves virtually no minority student activity, even after the killings at Jackson State.

There are, however, subtler dangers of conflict and polarity within the student body. The series of misunderstandings at Cornell illustrates some of the risks. Black students construed as “racist” some objectively neutral or merely thoughtless acts and statements by white students. The white students in turn were baffled by the black students’ response. A cross was burned in front of a black women’s dormitory—an act which, though clearly hostile, may not have been perpetrated by any members of the university community. Seizure of Willard Straight Hall by the black students raised the stakes; the white campus community was shocked and frightened when heavily armed and seemingly defiant black students emerged after the occupation. Black students were further alienated by the apparent hypocrisy of permitting white


students to keep rifles for hunting and to use them for ROTC drill, and so on.

Such experiences suggest how difficult it may be to achieve the cultural cross-fertilization that represents a major goal of expanding minority enrollments. Such experiences suggest how difficult it may be to achieve the cultural cross-fertilization that represents a major goal of expanding minority enrollments.207 Whites may be anxious for closer contact and association. But minority students understandably take a less sanguine view of their social mission—like the black Yale student who asked the dean for a black roommate because “we're tired of being textbooks for whites,”208 and the junior at Wesleyan who said he didn’t “give a damn for educating white boys about what it's like to be black.”209 Administrators seldom fully appreciate the time a minority student has to spend just being Black or Chicano or Puerto Rican on a campus where he is still to his fellow students something of a curiosity.210 These pressures are bound to produce some tensions and at times open hostility on campuses with significant minority enrollments.

E. Preferential Programs May Jeopardize the Interests of Minority Students Themselves

Some observers, genuinely sympathetic to the plight of disadvantaged minorities, have argued that the greatest risks of preferential admissions may be to the persons who are preferred. John P. Roche has expressed this concern:

Once the decision was made that Negro or “culturally underprivileged” youngsters should be admitted to first-class colleges, without the usual prerequisites, the escalation began. . . . Nobody has actually worried about the anguish of the poor Negro kids who have been dumped into a competitive situation, have been thrown with inadequate preparation into water well beyond their capacity to swim.211

Several possible effects of preferential admissions upon minority students themselves generate this concern. First, the self-confidence of a student specially admitted to a selective college may be undermined by

207. For observations on the difficulties of creating an atmosphere congenial to minority students on a predominantly white-Anglo campus, see, for example, Centra, Black Students at Predominantly White Colleges: A Research Description 15 (mimeo. 1970); Proctor, Racial Pressures on Urban Institutions, in The Campus and the Racial Crisis 25-34 (1969); Gomez, A Chicano Student's Perspective of the White Campus, in The Minority Student on the Campus: Expectations and Possibilities 75-81 (R. Altman & P. Snyder eds. 1970); Quidachay, The Hostile College Environment: An Asian-American Student's View, in id., at 83-86.
208. See N.Y. Times, Jan. 19, 1969, at 19, col. 3.
the realization that he is in school only because of his race and not because of his ability or performance. Not only may the student whose grades were marginal feel this way; the minority student who had high grades and would have been admitted on his paper record may also wonder whether he too is a "special admit." Few minority students can be absolutely sure their applications were objectively judged, vital though such assurance is for the student who is convinced he can make it on his own.

Second, there is a critical problem of evaluation of academic performance. If minority students admitted preferentially are thrown immediately into the general pool, many are likely to sink before they can learn to swim well. When they founder, the institution may respond in either of two ways. It may, on the one hand, strictly enforce its regular requirements and suspend, expel or place on probation those students who do not measure up during the first semester. The consequences of a high initial failure rate are predictable, not only in shattering the confidence of students thus disqualified, but also in deterring younger students from trying to run the same course. On the other hand, the school could alter its regular academic requirements by refusing to fail out any minority student who completes the work, regardless of the objective quality of his performance. The effects of such a policy upon students could be disastrous: not only the students who are

212. See Graglia, supra note 6, at 357. The extent to which this phenomenon operates would depend, of course, on the extent to which minority students were earmarked as "special" students in matters other than admissions. For some problems that have arisen in one institution with a major commitment to a generally successful minority recruitment program, see Margolis, The Two Nations at Wesleyan University, N.Y. Times, Jan. 19, 1970, § 6 (magazine), at 9.

213. Vice President Agnew implied that preferential admission policies may seriously undermine academic currency: "America will give the diplomas from Michigan the same fish eye that Italians now give diplomas from the University of Rome." Chronicle of Higher Ed., April 20, 1970, at 2, col. 2. The report of the HEW Task Force dealt specifically with this issue, however, and concluded: "Different criteria have clearly been used for admission of some minority students, but there is little or no evidence of any change in degree standards. The career performance of Blacks seems roughly comparable to that of other students." Report on Higher Education to the Secretary of Health, Education and Welfare 56 (mimeo. 1971) (emphasis added).


215. On the hazards of such a course, see Burton & Lewis, Reflections and Suggestions for Further Study Concerning the Higher Education of Negroes, 36 J. Negro Ed. 236, 287 (1967); Beichman, Will Teacher Be the New Drop-Out?, N.Y. Times, Dec. 7, 1969, § 6 (magazine), at 48-49. Prof. Thomas Sowell comments:

Even where the intellectually oriented black student makes his way into and through college without being directly harmed ... he cannot be unaffected by the double standard which makes his degree look cheap in the market and his grades suspect to those concerned with academic standards. Worst of all, he cannot even have the full confidence within himself that he really earned them.

Sowell, Colleges Are Skipping Over Competent Blacks To Admit 'Authentic' Ghetto Types, N.Y. Times, Dec. 13, 1970, § 6 (magazine), at 49.
artificially buoyed in this way, but even more the minority students who need no such handicap, may be forever stigmatized by subtle suspicion that their degrees are worth less than the degrees given to other students. If this were the only option, the institution would do a greater service to the minority community by undertaking no special program at all.

The third alternative, of course, is to chart a special course for minority students who cannot enter the general competition without initial help. Many approaches have been tried during the past several years and there is now a substantial literature about special compensatory programs. Success has been spotty, and the reasons for failure vary as widely as the institutions experiencing it. Much more information is needed before any confident predictions can be made about programs appropriate for particular student groups. The principal danger that inheres in special programs for special students is that the knowledge that one is a patient or an experimental subject may set him apart in ways damaging to his self-confidence and disparaging of prospects for his success. Meanwhile, creation of special programs for minority students may jeopardize the very goal of integration that largely justifies different admissions standards in the first place. There is a danger that colleges and universities, like large and theoretically integrated high schools, may develop internal tracking so stratified that academic gains will be offset by social losses.

For the minority student on the integrated campus, certain frustrations may impair the value of the experience. There will almost certainly be financial problems—both for the student who starts with nothing and finds himself deeper in debt because college costs more than he had expected or because his scholarship is lower than he had anticipated, and for the older student who gives up a steady job in hopes of improving his prospects but finds the road long, rough, and costly. Both types of students probably make a far heavier commitment to higher education once they seek it than do even the poorer majority students. The consequences of failure are correspondingly graver, psychologically as well as financially.

216. See, e.g., Berger, University Programs for Urban Black and Puerto Rican Youth, 49 Ed. Record 382 (1968).
217. For general surveys of relevant materials, see W. Trent, College Compensatory Programs for Disadvantaged Students (ERIC Clearinghouse Report No. 3 1970); C. Shulman, Recruiting Disadvantaged Students (ERIC Clearinghouse Report No. 3, 1970).
219. For discussion of the special financial problems and needs facing minority students, see Crossland, supra note 3, at 64-66.
Meanwhile, the promises that drew the minority student into college may prove elusive. Career opportunities often appear far less attractive close up than they were at a distance—partly because discrimination and segregation are still rampant in many sectors of American life; and partly because access to professional occupations may depend upon surmounting entrance barriers (bar examinations, medical licensing tests or internships, CPA exams, and the like) over which the university has no control and for which it can incompletely prepare the minority students admitted under special standards. Whatever the cause, a discovery that the lure of higher education is partly a mirage will inevitably bring frustration and tension to the minority student.

Then there is the sheer isolation of the minority student on the integrated campus. Where the university is set in an urban area, the problem is largely alleviated by access to a minority community. But the situation is vastly different in Urbana, Ithaca, Oshkosh and other places where sheer loneliness and physical isolation have undoubtedly aggravated black student malaise. Remoteness need not breed frustration, of course, as the long success of Antioch, Wesleyan, Oberlin and of Iowa's summer exchange program with Rust College suggest. But there are dangers in the rural or small town setting that demand careful attention and sensitive preparation before bringing to the campus minority students who have spent little time outside the ghetto or barrio and may regard the middle-class white farm community as the most hostile place on earth.

220. Presently, for example, the expected lifetime earnings of a white college graduate are $395,000; for a black college graduate, $185,000. Daniel, Needed: A Reexamination of Plans for Disadvantaged Negro Youth, 35 J. NEGRO ED. 199 (1965). Black students do, however, appear to have substantially higher aspirations for graduate study. See H. Astin, Educational Progress of Disadvantaged Students 6, 28-30 (1970); E. Ginzberg, The Middle Class Negro in the White Man's World 64-65 (1967). For discussion of possible remedies and alternative approaches to career barriers, see R. Calvert, Employing the Minority Group College Graduate (1969).

Very recent studies of success rates of minority students on state bar examinations suggest an additional and very serious sort of barrier. A special committee of the Philadelphia Bar Association conducted an intensive study of black performance on the Pennsylvania bar and concluded: "Statistical evidence demonstrates that a grossly disproportionate percentage of Blacks fail each examination and there is lacking any available hypothesis other than race by which to explain these proportions." The Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Examination Procedures—Racial Discrimination in Administration of the Pennsylvania Bar Examination, 44 TEMPLE L.Q. 141, 149 (1971). For the detailed supporting data, see id. at 171-78. For consistent data regarding the California bar examination, though based upon a smaller sample, a shorter time span and less rigorous analytical tools, see Ashburne, The Black Graduate v. the California Bar Examination (unpublished paper submitted to the author in a course in minority groups and legal education, spring semester, 1970).

Within the institution, too, a sense of isolation may exist that is partly, but only partly, overcome by admission of a "critical mass" of minority students.\textsuperscript{222} Ironically, this feeling of separation and distance may be exacerbated by the curiosity and the friendliness of white students who seem to minority students to be seeking "textbooks for their liberalism." Beset by such feelings, minority students may demand separate dormitory wings, black studies or La Raza programs, soul food in the cafeteria, or other physical indicia of a separateness of which they are at least as aware as the institution and the students seeking to "integrate" them.\textsuperscript{223} The administration is likely to react badly to requests for such special living quarters and separate academic programs—either by rigidly rejecting the demands, or by nervously accepting them too eagerly. An overly self-conscious response from the administration may increase the sense of distance and separateness, thereby escalating demands and setting in motion a cycle that is not easily halted.

Minority students are different, as they are well aware. The responsibility of the institution that seeks to attract and keep them is to maintain enough difference but not too much. If even the majority students themselves cannot define the optimal relationship to the rest of the institution, white administrators cannot be expected to prescribe it without help. Perhaps only a long and often painful period of accommodation in each institution will establish a viable entente—a degree of contact and familiarity that is collegial, but breeds neither contempt nor fear. In this way, the minority students may retain their identity and their individuality, yet share views and experiences with students who are eager to know them better and to live and work with them.

\textsuperscript{222} James Alan McPherson has observed, on the basis of his experience both as a black student and teacher of black students at predominantly white institutions, that feelings of anxiety and dependence upon friendly whites "can be reduced only when there are enough blacks on white campuses to establish an interdependent, self-sufficient black community." McPherson, \textit{The Black Law Student: A Problem of Fidelities}, \textit{Atlantic Monthly}, April 1970, at 98.

\textsuperscript{223} The most graphic experience with student demands for separatism was the controversy over the special black dormitory at Antioch, which brought federal Government charges of violation of the 1964 \textit{Civil Rights Act} (since Antioch received federal funds and was thus bound by the antidiscrimination mandate of Title VI). \textit{N.Y. Times}, April 14, 1969, at 32, col. 1-8. Eventually Dr. Kenneth B. Clark resigned his position as a trustee of Antioch in anger over administration acceptance of the black student demands for separate facilities. \textit{N.Y. Times}, May 23, 1969, at 29, col. 3-5. Meanwhile, the Department of Health, Education and Welfare had backed down and told Antioch the program could be maintained as long as students were not excluded solely on the basis of race or color; they could, however, be denied admission because the program director felt their backgrounds were not "relevant" to the program. \textit{N.Y. Times}, May 8, 1969, at 1, col. 7-8. The victory was pyrrhic, however. The Afro-American Unity House was quietly disbanded during the winter of 1970 with the consent of all parties. \textit{N.Y. Times}, Feb. 1, 1970, \textsection 1, at 28, col. 7-8.
VII. Conclusion

The ultimate fate of preferential admissions will not be determined in the courts. The critical judgments may be made initially, but not ultimately, on the campuses of the nation’s institutions of higher learning. Increasingly, as the financial plight of American colleges and universities becomes worse, the key decisions will all be fiscal and will therefore be made by legislators, private benefactors and foundation boards. Legal limitations and constitutional constraints will play only a subordinate role in the decision-making process. Yet the vital political and policy judgments cannot be made responsibly or intelligently under a constitutional cloud that now creates confusion and intensifies already divisive forces in this field. The non-constitutional obstacles to implementation of preferential policies are so difficult, and feelings and emotions likely to run so high in any event, that every effort should be made to avoid needless controversy and pointless litigation. A better understanding of the constitutional issues may facilitate solution of non-legal problems. Yet it is quite clear we are only beginning to provide equitable educational opportunity for those who have historically been excluded from our campuses.
The Yale Law Journal
Volume 80, Number 4, March 1971

BENJAMIN W. HEINEMAN, JR.
Editor-in-Chief

PETER B. HAMILTON
JOHN P. RUFF
Article Editors

ROBERT F. CARTER
DAVID B. COOK
RONALD J. GILSON
JAMES R. HUNTWORK
WILLIAM C. KELLY, JR.
DAVID E. KENDALL

Note & Comment Editors

DEAN D. AULICK
GEORGE A. BERMAN
RICHARD A. BLOCK
BARBARA A. BROWN
GREGORY L. COLVIN
RICHARD J. DANZIG
RICHARD D. DIAMOND
JOHN J. DYSTEL
S. ALLEN EARLY, III
J. MICHAEL EISNER
REID L. FELDMAN
HENRY M. FIELDS
BRUCE G. FREEDMAN
NANCY GERTNER
JEFFREY I. GLEKEL
SUSAN A. GOLDBERG
STEPHEN J. HADLEY
TIMOTHY S. HARDY
OLOF K. HEllÉN
ANDREW D. HURWITZ
STANLEY N. INGBER
BALLARD JAMIESON, JR.
THOMAS M. JORDE
KENNETH M. KAUFMAN
DAVID H. KAYE
MARC S. KOPLIK
JOHN B. KUHNS
HAROLD J. KWALWASSER
LAURENCE S. LUSTGARTEN
HAROLD A. McDougall, III
ELLIOTT MEISEL
STEPHEN R. MUNZER
ERIC R. NEISSER
STEPHEN A. OXMAN
ROBERT C. POZEN
DAVID W. SCHNEIDER
DAVID M. SCHULTE
THOMAS J. SEGAL
STEPHEN M. SHAPIRO
GEOFFREY B. SHIELDS
JERRY L. SIEGEL
BRADFORD C. SNELL
SIDNEY H. STEIN
DANIEL J. STEINBOCK
ALEXANDER R. SussMAN
LINDA L. TEBESCHI
MARK V. TUSHINET
RICHARD P. WILD
ALAN J. WILENsky
JERALD L. WILKerson
PETER E. YAEGER

Business Secretaries  M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

Student Contributors to This Issue

Stanley N. Ingber, Constitutional Limitations on the Naturalization Power
Timothy S. Hardy, Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange
Alan J. Wilensky, Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals