

## Affirmative Action and Minority Enrollments in Medical and Law Schools by Susan Welch and John Gruhl

Mark J. Sullivan

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## BOOK REVIEW

**AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS. By Susan Welch and John Gruhl. Ann Arbor, MI: The University of Michigan Press. 1998. Pp. viii, 224.**

MARK J. SULLIVAN\*

During an exchange at the third presidential debate on October 17, 2000, George W. Bush and Al Gore demonstrated that affirmative action is still a highly controversial issue at the forefront of America's political agenda. In response to a question about what role affirmative action would play in his administration, then-Governor Bush referred to a recently passed law in Texas that guarantees state university admission to all high school seniors who graduate in the top ten percent of their class.<sup>1</sup> Bush labeled this program "affirmative access" and stated that Texas universities are more diverse as a result of this law.<sup>2</sup> Then-Vice President Gore responded sharply by stating, "I don't know what affirmative *access* means; I do know what affirmative action means."<sup>3</sup> I know the governor's against it and I know I'm for it."<sup>4</sup>

And so continues the affirmative action debate in America. As then-President Clinton stated in a 1995 speech on the subject of affirmative action, "[i]t is, in a way, ironic that this issue should be divisive today, because affirmative action began 25 years ago . . . with bipartisan support."<sup>5</sup> It began simply as a means to an end of enduring national purpose—equal opportunity for all Americans."<sup>6</sup> But what really is affirmative action? This book review should help answer this question, at least with respect to how affirmative action applies to minority enrollments in medical and law schools.

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\* J.D. Candidate, University of Maryland School of Law, 2002.

1. See Dan Balz and Mike Allen, *Bush and Gore Argue Sharply on Education, Health Care*, WASH. POST, October 18, 1991, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. President Bill Clinton, *Mend It, Don't End It*, in *THE AFFIRMATIVE ACTION DEBATE* 258 (George E. Curry ed., 1996).

6. *Id.*

The term “affirmative action” was first invoked in 1961 by President John F. Kennedy when he signed Executive Order 10925 establishing the Committee on Equal Employment Opportunity.<sup>7</sup> This executive order also directed employers to hire workers “without regard to race, creed, color or national origin.”<sup>8</sup> President Lyndon B. Johnson followed up in 1965 with Executive Order 11246, “which required federal contractors to take affirmative action to provide equal opportunity without regard to a person’s race, religion, or national origin.”<sup>9</sup> President Johnson drew the analogy of two runners in a track meet.<sup>10</sup> The nation, Johnson concluded, could never expect two people in a race to have an equal chance of winning if one runner started at midpoint while the other began at the starting line.<sup>11</sup> Something had to be done to make the race fair.<sup>12</sup> In anti-discrimination law, this meant taking measures that went beyond merely ceasing or avoiding discrimination; it meant adopting measures that attempted to undo or compensate for the effects of past discrimination.<sup>13</sup> The scope of affirmative action soon expanded; in 1968, women were added to the protected groups.<sup>14</sup> In 1969, President Nixon added the requirement that all affirmative action plans must include minority and female hiring goals and timetables to which the contractor must commit its good-faith efforts.<sup>15</sup> With regard to discrimination of blacks, this political action was in response to what Harvard sociologist Cornel West called “the vicious legacy of white supremacy—institutionalized in housing, education, health care, employment, and social life.”<sup>16</sup>

The Supreme Court eventually had its say on the issue of affirmative action. The Court’s role in setting the legal boundaries of

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7. George E. Curry, *Introduction*, in *THE AFFIRMATIVE ACTION DEBATE* xiv (George E. Curry ed., 1996).

8. Pete Wilson, *The Minority-Majority Society*, in *THE AFFIRMATIVE ACTION DEBATE* 168 (George E. Curry ed., 1996).

9. Curry, *supra* note 7, at xiv.

10. Linda Faye Williams, *Tracing the Politics of Affirmative Action*, in *THE AFFIRMATIVE ACTION DEBATE* 243, 244 (George E. Curry ed., 1996).

11. *Id.*

12. *Id.*

13. *Id.*

14. Curry, *supra* note 7, at xiv.

15. *Id.*

16. Cornel West, *Affirmative Action in Context*, in *THE AFFIRMATIVE ACTION DEBATE* 31 (George E. Curry ed., 1996) (emphasizing that such a response was *weak*).

this issue serves as the foundation for Susan Welch and John Gruhl's book, *Affirmative Action and Minority Enrollment in Medical and Law Schools*.<sup>17</sup> The book centers on the 1978 landmark decision in the case of *Regents of the University of California v. Bakke*,<sup>18</sup> the Court's first substantive decision in the area of affirmative action in education. The ruling in *Bakke* invalidated the admissions plan of the medical school at the University of California-Davis, which reserved sixteen of 100 places in each year's entering class for racial minorities.<sup>19</sup> The divided Court held that the school could not reserve a certain number of places for minorities but could use race as a positive factor in admissions.<sup>20</sup> The ruling generally has been interpreted to mean that schools cannot use quotas but can practice affirmative action.<sup>21</sup> Although "affirmative action" has come to mean different things to different people (including George W. Bush and Al Gore), in general the concept entails positive steps, rather than just passive nondiscrimination, to advance equality in education and employment.<sup>22</sup>

In *Affirmative Action and Minority Enrollment in Medical and Law Schools*, Welch and Gruhl explore the impact of *Bakke*, beginning by placing this seminal case in the context of previous and subsequent cases.<sup>23</sup> They then consider *Bakke*'s impact in light of important social and demographic changes taking place in the black and Hispanic communities.<sup>24</sup> The authors survey the impact on both the law and medical school admissions officials and the minority applicants themselves.<sup>25</sup> They conclude by drawing all of this evidence together and making recommendations toward a new affirmative action policy.<sup>26</sup>

Welch and Gruhl's conclusions may surprise some. For instance, their data show only modest changes in minority enrollments in medical and law schools in the decade after *Bakke*, leading the

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17. SUSAN WELCH AND JOHN GRUHL, *AFFIRMATIVE ACTION AND MINORITY ENROLLMENT IN MEDICAL AND LAW SCHOOLS* (1998).

18. 438 U.S. 265 (1978).

19. WELCH AND GRUHL, *supra* note 17, at 1.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 1-3.

24. *See id.* at 4.

25. *See id.* at 5.

26. *See id.*

authors to conclude that *Bakke* served to institutionalize rather than dramatically change affirmative action practices in medical and law schools.<sup>27</sup> They also conclude that *Bakke* had little impact on the applicant pool.<sup>28</sup> Non-legal factors, such as the condition of the economy, played a larger role in minority enrollment in medical and law schools than the *Bakke* ruling.<sup>29</sup> Private schools had more success in boosting the quality and quantity of their applicant pool than state universities.

Section I of this review presents a summary of the law both before and after *Bakke*, and then provides further details supporting these conclusions. It ends with the authors' suggestions for improving affirmative action in the future—suggestions that seek to minimize the divisiveness of the issue. Section II examines the strengths and weaknesses of the authors' conclusions, as well as the book itself. Welch and Gruhl's book is well written, cogent and illuminating. The authors' research was well planned and executed. The conclusions are supported by the data. Unfortunately, because Welch and Gruhl ground their work solely in the legal context of the subject, the book has to be read in conjunction with other material about affirmative action to gain an appreciation of its political context. The authors' dry and clinical approach did little to elicit the interest and passions that usually abound when discussing affirmative action. Although this was most likely the approach the authors strove for, the book is much less compelling than it otherwise could have been.

## I. SUMMARY OF AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS

### *A. Legal History of Affirmative Action and the Bakke Decision*

The authors begin exploring the legal roots of affirmative action by discussing the 1896 Supreme Court decision in *Plessy v. Ferguson*,<sup>30</sup> which established the separate-but-equal doctrine.<sup>31</sup> The

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27. *Id.* at 132.

28. *Id.* at 104.

29. *Id.* at 12.

30. 163 U.S. 537 (1896).

31. WELCH AND GRUHL, *supra* note 17, at 7.

Court upheld a Louisiana law mandating separate accommodations in trains, and in doing so validated the numerous Jim Crow laws requiring segregation in southern society.<sup>32</sup> In dissent, Justice John Harlan, himself a former slaveholder, stated that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>33</sup> According to the authors, “[t]he question of whether and under what circumstances could government policies not be color-blind is at the heart of the *Bakke* case.”<sup>34</sup>

The separate-but-equal doctrine was gradually overturned in cases like *Missouri ex el. Gaines v. Canada*,<sup>35</sup> in which the Supreme Court held that Missouri had to remedy the problem of not providing for a state university law school for blacks.<sup>36</sup> The National Association for the Advancement of Colored People (NAACP) was successful in other cases involving inadequate facilities for blacks in state graduate schools.<sup>37</sup> With this success, the NAACP moved to challenge segregation in grade schools and high schools, finally succeeding in the seminal case of *Brown v. Board of Education* in 1954.<sup>38</sup> The Court’s unanimous ruling invalidated de jure segregation in public schools.<sup>39</sup>

Unfortunately, progress in enforcing the ruling was slow.<sup>40</sup> Significant change did not come until Congress passed the Civil Rights Act of 1964, which cut off federal aid to school districts that practiced segregation.<sup>41</sup> But even then, de facto segregation still existed, in part due to residential patterns.<sup>42</sup> The Court upheld the bussing of school children in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>43</sup>

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32. *Id.*

33. 163 U.S. 537, 559 (1896).

34. WELCH AND GRUHL, *supra* note 17, at 7.

35. 305 U.S. 337 (1938).

36. WELCH AND GRUHL, *supra* note 17, at 8. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a clearly inferior black law school established in Texas under the separate but equal doctrine had to be substantially improved to be truly equal to the white law school, the University of Texas).

37. *Id.* at 9.

38. 347 U.S. 483 (1954).

39. WELCH AND GRUHL, *supra* note 17, at 9.

40. *Id.*

41. *Id.* at 10.

42. See *id.* at 10.

43. 402 U.S. 1 (1971).

(1971) as an affirmative step to remedy de facto segregation.<sup>44</sup> Even this did not appear to fully address the problem.<sup>45</sup>

The advancement of affirmative action from the administrations of Presidents Kennedy, Johnson, and Nixon entailed going beyond enforcing nondiscrimination to undertaking active measures to advance equality in education and employment. Considerable confusion and controversy arose over the definition and implementation of the requirement to identify "goals."<sup>46</sup> Many employers and educators interpreted "goals" as quotas, since it was easier to monitor the results than the process.<sup>47</sup> Although the objective was "equality of opportunity," many mistakenly pursued equality of results. Such blurred distinctions set the stage for the *Bakke* case.<sup>48</sup>

But *Bakke* was not the first affirmative action case, nor the first to reach the Supreme Court.<sup>49</sup> Five years earlier, the Court granted certiorari to hear the case of *DeFunis V. Odegaard*,<sup>50</sup> which involved a white male who applied to and was rejected by the University of Washington School of Law for two consecutive years.<sup>51</sup> The Court ultimately dismissed the case for mootness because DeFunis, who was eventually admitted to the school, was nearing graduation at the time of the hearing.<sup>52</sup> Nevertheless, Justices Brennan, Douglas, and Marshall dissented from the decision to dismiss, indicating that the question of affirmative action was so important that the Court needed to weigh in on it immediately.<sup>53</sup> This set the stage for *Bakke*.

Allan Bakke was a thirty-three-year-old, white male who worked as an engineer at a National Aeronautics and Space Administration (NASA) laboratory in California.<sup>54</sup> When he applied to medical school at the University of California-Davis in 1973, he

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44. WELCH AND GRUHL, *supra* note 17, at 11.

45. *See id.* at 10-12 (noting that as more whites moved from the cities to the suburbs, and as other whites transferred from public to private schools, de facto segregation actually increased).

46. *See id.* at 13.

47. *Id.*

48. *See id.* at 14.

49. *Id.*

50. 414 U.S. 1038 (1973).

51. WELCH AND GRUHL, *supra* note 17, at 14.

52. *Id.* at 15.

53. *Id.*

54. *See id.* at 17.

was one of over 2,000 applicants competing for only 100 spaces.<sup>55</sup> His records indicated that he scored above the ninetieth percentile in three of the four categories on the Medical College Admission Test (MCAT).<sup>56</sup> His scores were higher than the average student accepted, but still he was rejected by Davis.<sup>57</sup> Bakke discovered that the school had reserved sixteen of its one hundred spaces for “disadvantaged students.”<sup>58</sup> All of the disadvantaged students were black or Hispanic. Bakke also discovered that the “disadvantaged students” accepted into the medical school had lower scores than he did on their admissions tests.<sup>59</sup> Bakke sued the university in California state court.

The California District Court judge rejected the university’s argument that it could take race into account in admissions.<sup>60</sup> Yet the judge also rejected Bakke’s demand for admission, because the plaintiff could not prove that he would have been admitted without the existence of the special program.<sup>61</sup> Both sides appealed to the California Supreme Court, which ruled that the university could not take race into account in admissions because it violated the equal protection clause.<sup>62</sup> The court emphasized that the university could only use a program for disadvantaged students if the program was available for all races.<sup>63</sup> The court also ordered the university to accept Bakke.<sup>64</sup>

The university appealed and the U.S. Supreme Court granted certiorari.<sup>65</sup> This was such a high profile case that 117 organizations filed fifty-one amicus curiae briefs, including the Carter administration.<sup>66</sup> This brief asserted that “rigid quotas” are exclusionary and therefore unconstitutional, whereas “flexible

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55. *See id.*

56. *See id.* at 16.

57. *See id.* at 18.

58. *Id.*

59. *See id.*

60. *See id.* at 20.

61. *See id.*

62. *See id.* at 20.

63. *See id.*

64. *See id.* at 21.

65. *Id.*

66. *Id.*



affirmative action programs using goals" should be acceptable.<sup>67</sup> All of the major media outlets followed the case closely.<sup>68</sup>

In June 1978, the U.S. Supreme Court issued its decision.<sup>69</sup> There was no majority opinion.<sup>70</sup> In six separate opinions the justices split on the two key issues.<sup>71</sup> One bloc of four concluded that both the quota and any use of race as a positive factor in admissions were invalid, while another bloc of four concluded that both were valid.<sup>72</sup> Justice Powell, the swing vote, maintained that the quota was unconstitutional, but the use of race as a positive factor in admissions was not.<sup>73</sup> Powell thus provided the fifth vote for one issue for each side, and his opinion became the controlling opinion.<sup>74</sup>

Justice Stevens, writing for Chief Justice Burger and Justices Rehnquist and Stewart, stated that the denial of admission to Bakke violated Title VI of the Civil Rights Act of 1964, which stipulates, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."<sup>75</sup> Justice Brennan, writing for Justices Blackmun, Marshall, and White, said the university's special admissions program and its rejection of Bakke did not violate the equal protection clause.<sup>76</sup> Brennan said that a state government may adopt race-conscious programs if the goal is "to remove the disparate racial impact its actions might otherwise have, and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large."<sup>77</sup> "Unlike discrimination against racial minorities," Brennan wrote, "the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood

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67. *Id.*

68. *Id.*

69. *Id.* at 22.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 23.

that they will be treated as second-class citizens because of their color.”<sup>78</sup>

In a separate opinion, Justice Marshall underscored the irony that for most of the country’s history the Supreme Court interpreted the Constitution to allow many forms of discrimination against blacks, but now when a state acts to remedy the effects of this history, a majority of the Court interprets the Constitution to disallow the effort.<sup>79</sup> Marshall asserted that a group-based program is legitimate because of the group-based discrimination that preceded it.<sup>80</sup> Justice Blackmun voiced the same point, arguing that “[i]n order to get beyond racism, we must first take account of race.”<sup>81</sup>

Justice Powell’s controlling opinion expressed his ambivalence on the issue.<sup>82</sup> Powell said that because race is a “suspect classification” the Court should apply “strict scrutiny” to any law or policy that classifies according to race.<sup>83</sup> Powell said that quotas were an unacceptable means of implementing affirmative action, but that race in itself was an acceptable means to attain a more diverse student body.<sup>84</sup> Powell’s opinion had the effect of diminishing the relevance of the African American’s experience for affirmative action purposes.<sup>85</sup> Unlike Justice Marshall, he was unwilling to recognize the unique experience of discrimination suffered by blacks in America.<sup>86</sup> In short, Powell called for admissions programs that were “flexible enough to consider all pertinent elements of diversity.”<sup>87</sup> Powell’s emphasis on diversity established the foundation for an affirmative action that would continue indefinitely.<sup>88</sup>

Many were dissatisfied with the opinion, especially the lack of clarification between what constituted a quota-based system and what constituted a goal-based system.<sup>89</sup> The opinion’s ambivalence on this delicate issue left most confused. With an eye toward media coverage

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78. *Id.*

79. *Id.* at 23-24.

80. *Id.* at 24.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 25.

85. *Id.* at 27.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 29-31.

of the ruling, Justice Brennan announced that the “central meaning of today’s opinion is this: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.”<sup>90</sup> Justice Powell did not agree that this was the central meaning of his opinion, but he did not disagree publicly.<sup>91</sup> Many said that the opinion gave both sides of the issue something.<sup>92</sup> The opinion probably appeased whites who dreaded quotas, and thus slowed the backlash against civil rights that would become more prominent in the 1980s and 1990s.<sup>93</sup> At the same time, the opinion allowed institutions to continue practicing affirmative action, albeit in a manner not as overtly quota-oriented as practiced by Davis.<sup>94</sup>

*Bakke* stood as the only Supreme Court decision involving affirmative action in school admissions until the 1990s.<sup>95</sup> The Court did, however, decide other affirmative action cases in the decade after *Bakke*, most involving employment.<sup>96</sup> In general, the Court upheld affirmative action practices in employment.<sup>97</sup> If anything, these decisions, stating that race could be used as a positive factor, reinforced the impact of *Bakke*.<sup>98</sup>

While the Supreme Court was generally supportive of affirmative action during the decade that followed the *Bakke* decision, the Reagan administration was trying to dismantle the program.<sup>99</sup> It was apparent in the early 1980s that Reagan appointees to key civil rights positions in government were abandoning the federal

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90. *Id.* at 28.

91. *Id.*

92. *Id.* at 29-32.

93. *Id.*

94. *Id.* at 29 (noting that the Court, particularly Justice Powell, was impressed with goal-oriented affirmative action programs in place at Harvard and Princeton, which expanded the concept of diversity to include students from disadvantaged economic, racial, and ethnic groups).

95. *Id.* at 32.

96. *Id.* at 32-35. (See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a set-aside of federal contract funds for minority businesses because of the history of widespread discrimination in the construction industry. See also *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which permitted use of a quota in a craft training program at a chemical plant in Louisiana because of past discrimination of black craft workers.)

97. See *id.*

98. *Id.*

99. *Id.* at 35.

government's leadership role in promoting affirmative action.<sup>100</sup> Throughout this period, however, public opinion on affirmative action appeared to have changed very little.<sup>101</sup> Most whites supported affirmative action for blacks provided there were no rigid quotas.<sup>102</sup> Most Americans "accepted giving special attention to minority status in hiring and admissions."<sup>103</sup>

*B. The Social and Demographic Context of Bakke*

Notwithstanding that the ruling in *Bakke* satisfied virtually no one, "for at least a decade after the decision it had the aura of settled law."<sup>104</sup> Welch and Gruhl remind their readers of this supportive legal setting prior to launching into an analysis of the social and demographic changes in the black and Hispanic communities during the 1960-1990 time period.<sup>105</sup> The authors began their examination of African Americans in 1960, because it marked the start of the period when black youths started enrolling in college in significant numbers.<sup>106</sup> The authors began their examination of the status of Hispanics in 1970, because that was when the U.S. Census Bureau first began collecting and publishing systematic data on Hispanics.<sup>107</sup>

Beginning in Chapter Two, "The Context of *Bakke*: Resources and Competition," Welch and Gruhl present the readers with statistical information that lends perspective to the impact of the *Bakke* decision. For instance, the authors state that the black population in America today is twelve percent, up two percent from its level in 1960.<sup>108</sup> The Hispanic population today is nine percent, almost twice as high as it was in 1980.<sup>109</sup> The authors also present information on minority income and wealth, two resources that are crucial to an individual's chances of obtaining a college education.<sup>110</sup> The income of black

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100. *Id.*

101. *Id.*

102. *Id.* at 36.

103. *Id.* (citing to SIGELMAN AND WELCH, BLACK ATTITUDES ON RACE AND INEQUALITY: A DREAM DEFERRED 126-39 (1991)).

104. WELCH AND GRUHL, *supra* note 17, at 36.

105. *Id.* at 36-37.

106. *Id.* at 37.

107. *Id.*

108. *Id.* at 38.

109. *Id.*

110. *See id.*

individuals, in constant dollars, had risen fifty percent from 1960 until 1988, a decade after the *Bakke* ruling.<sup>111</sup> Though this trend suggests that black families are increasingly able to send their children to college and professional school, a closer examination may suggest other conclusions.<sup>112</sup>

The income of blacks remains far lower than that for whites; in 1990 it was only fifty-five percent of the income of whites.<sup>113</sup> Also, the income of blacks actually fell throughout the 1980s, as most of the progress in increasing the income of blacks occurred between 1960 and the early 1970s.<sup>114</sup> Thus, in terms of being able to send their children to college, blacks were better off in the late 1970s than in the late 1980s.<sup>115</sup> The income of Hispanics tracked with that of blacks since 1980, falling throughout the decade and remaining significantly below that of whites.<sup>116</sup> The income of Hispanics throughout this period remained slightly higher than the income of blacks.<sup>117</sup>

The authors discuss other social trends in the black and Hispanic communities that could have affected the attendance of these two minority groups in law and medical schools. In exploring the effect of primary and secondary education upon professional school enrollment, Welch and Gruhl note that since 1960 blacks have made steady gains.<sup>118</sup> Between 1960 and 1994 the percentage of blacks that graduated from high school increased from twenty percent to sixty-five percent.<sup>119</sup> "Unlike income gains, which stagnated in the late 1970s and early 1980s, education gains continued."<sup>120</sup> The primary and secondary educational levels of Hispanics are lower than that of blacks.<sup>121</sup> Still, the proportion of Hispanics with a high school

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111. *Id.* at 38-39.

112. *Id.*

113. *Id.* at 39. *See also id.* at 43 (relating to black wealth and noting that although black net worth has increased since 1967, the gain was far overshadowed by the increasing wealth of whites).

114. *Id.* at 40.

115. *Id.*

116. *Id.* at 40.

117. *Id.*

118. *Id.* at 44.

119. *Id.*

120. *Id.*

121. *Id.* at 46.

education increased from around thirty-two percent in 1970 to fifty percent in 1988.<sup>122</sup>

Welch and Gruhl also discuss the trends in financial aid during this time period. The availability of financial aid affects the black and Hispanic applicant pool for medical and law schools. Federal aid, in the form of grants, rose dramatically in the early 1970s, but began a downward spiral in real dollars that continued throughout the 1980s.<sup>123</sup> Shrinking federal student aid hits minority students disproportionately hard, in large part due to the disparity between whites and both minority groups in income and net worth.<sup>124</sup> Black and Hispanic students are far less likely than white students to have the family resources to consider taking a huge loan to finance an education.<sup>125</sup>

The authors examine how competition in general for entrance into medical and law school increased in the early 1960s, the same time as the Civil Rights Act opened the doors of many institutions to black Americans.<sup>126</sup> Until the early 1960s, admission to even the most desirable law and medical schools was relatively easy.<sup>127</sup> In 1960, for instance, 517 out of 708 applicants were accepted at the University of California Law School, Boalt Hall.<sup>128</sup> "Within six years, the baby boom had arrived" to the professional school ranks, and "the number of applicants skyrocketed."<sup>129</sup> Hence, it became much more difficult to gain entry into both medical and law schools. High grades and high standardized test scores became crucial.<sup>130</sup> In both medical and law school, increasing emphasis was placed on the LSAT or MCAT scores throughout the 1960s and 1970s.<sup>131</sup> Since minority groups had not fared particularly well relative to whites in standardized tests, this shift in emphasis did not comport with the goals of many schools to increase their ranks of black and Hispanic students.<sup>132</sup> If not for affirmative action programs, only a small number of minority students

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122. *Id.*

123. *Id.* at 47.

124. *Id.* at 47-49.

125. *Id.* at 49.

126. *Id.* at 52.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 52-53.

131. *Id.*

132. *Id.*

would have gained entry into professional school during this time period.<sup>133</sup> If professional schools had strictly employed race-blind admission procedures using standardized test scores as the principal measurement of merit, a much smaller fraction of minority students would have gained entrance.

### C. *Perceptions of Bakke and Its Impact*

In Chapter Three, "Perceptions of *Bakke* and its Impact," Welch and Gruhl discuss data collected from their survey of current admissions officials in medical and law schools. In 1989, the authors sent a survey questionnaire to every accredited law and medical school in existence in 1976.<sup>134</sup> The survey was intended to determine what law and medical school admissions officials thought about the effect of the *Bakke* ruling.<sup>135</sup>

Based on the survey data, Welch and Gruhl conclude that despite admissions officers' almost universal recognition of the Court's holding in *Bakke*, "its perceived impact was that it reinforced practices that by 1978 had become institutionalized."<sup>136</sup> These practices included making minority status a positive factor in admissions.<sup>137</sup> Relatively few of the survey respondents believed that the decision significantly changed the way their university's admissions process was conducted.<sup>138</sup> If anything, most believed that the *Bakke* decision modestly improved the chances of minority applicants to enter medical and law schools.<sup>139</sup>

In Chapter Five, "*Bakke* and Admissions Decisions," Welch and Gruhl consider whether the number and quality of minority applicants changed as a result of the *Bakke* decision.<sup>140</sup> The authors conclude that the admissions data supported the conclusion that *Bakke* had little impact on the applicant pool.<sup>141</sup> The number of black and Hispanic applicants to medical and law school remained relatively stable in the

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133. *Id.* at 58.

134. *Id.* at 61.

135. *Id.*

136. *Id.* at 82.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 107.

141. *Id.*

decade following the *Bakke* decision.<sup>142</sup> Certain factors influenced whether an individual law or medical school experienced a change in the quantity and quality of minority applicants.<sup>143</sup> The nature of the university had some effect on the changing level of applications.<sup>144</sup> Major state universities did not succeed in improving either the quantity or quality of their applications compared with private schools.<sup>145</sup> Some state universities did experience an increase in minority applications, however, especially those located in urban areas where more minorities tend to live.<sup>146</sup> In sum, the data served to reinforce the authors' conclusion that the *Bakke* decision did not dramatically change affirmative action practices in medical and law schools. Rather the decision effectively institutionalized the already existing affirmative action practices.

#### D. *Authors' Conclusions*

"Minority enrollment in medical and law school began increasing substantially in the mid-1960s" after the passage of civil rights legislation and "after the efforts of professional organizations and the schools to boost minority opportunities."<sup>147</sup> "Minority enrollment peaked in the mid-1970s, before the *Bakke* decision in 1978."<sup>148</sup> Both proponents and opponents of affirmative action alike predicted that the *Bakke* decision would determine the extent of minority enrollment in professional schools in the years following.<sup>149</sup> "But *Bakke* did not have these effects."<sup>150</sup> Based on their systematic study of *Bakke's* impact, Welch and Gruhl conclude that its effect on boosting or curtailing minority enrollment was far less than either side predicted.<sup>151</sup> "Nonetheless, the decision was significant because it

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142. *Id.* at 131.

143. *Id.* at 132.

144. *Id.*

145. *Id.* at 105.

146. *Id.*

147. *Id.* at 133.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*



legitimated and institutionalized the practice of affirmative action in admissions decisions.”<sup>152</sup>

The studies’ conclusions were reasonably straightforward. Admissions officials in response to the survey said that the impact of *Bakke* on their admissions decisions was minimal.<sup>153</sup> Data analysis of acceptances and enrollments confirm the officials’ impressions. “The most significant finding about individual schools is that those with the most minorities the year before *Bakke* were the ones with the most minorities the decade after.”<sup>154</sup>

The authors also review recent trends in minority enrollment in medical schools. At the undergraduate level, enrollment of blacks and Hispanics grew dramatically in the early 1990s.<sup>155</sup> The same basic trend occurred in medical and law schools, with the black enrollment in first-year medical classes being nearly forty percent higher in 1995 than it was in 1988.<sup>156</sup> At the same time, however, there has been political and legal pressure to end affirmative action practices. The holding in *Hopwood v. University of Texas Board of Regents*<sup>157</sup> placed affirmative action practices in education in the legal limelight again.<sup>158</sup> A three-judge panel of the Fifth Circuit Court of Appeals overturned a district court decision and ruled that the University of Texas Law School could not use race or ethnicity as a factor in admissions.<sup>159</sup> This decision appeared to fly in the face of the holding in *Bakke*. The university appealed to the Supreme Court, but the justices of the Court denied certiorari.<sup>160</sup> Although this is binding precedent only in the Fifth Circuit states of Texas, Louisiana, and Mississippi, it may signify

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152. *Id.*

153. *Id.* at 134.

154. *Id.* at 135.

155. *Id.* at 143.

156. *Id.* at 144.

157. 78 F.3d 932 (1996).

158. *Id.* at 147 (noting that in this case a white woman, Cheryl Hopwood, and three white men sued the University of Texas Law School after being denied admission, challenging the school’s goal of holding 10 percent of its seats for Mexican Americans and five percent of its seats for blacks, and using lower standards for LSAT scores).

159. *Id.* at 148-49.

160. *Id.* at 149.

a more conservative judiciary's response to the question of affirmative action in university admissions today.<sup>161</sup>

Pressure from the political arena has also placed affirmative action programs on the defensive.<sup>162</sup> The Republican-controlled Congress has led "major attacks on affirmative action" since the congressional elections in 1994.<sup>163</sup> Such attacks prompted President Clinton to make a forceful statement in support of properly administered affirmative action programs.<sup>164</sup> President Clinton's "mend it; don't end it" proclamation in 1995 stood for his administration's support for affirmative action.<sup>165</sup>

Welch and Gruhl then move into some thought-provoking discussion on affirmative action as it is applied in American society today.<sup>166</sup> According to the authors, the changing composition of America will force people to rethink affirmative action. "Increased immigration of nonwhites increases our racial and ethnic pluralism"<sup>167</sup> and raises the question of how ethnic groups like Vietnamese, Haitians, and Cubans fit into the affirmative action equation. Because of intermarriage, racial ambiguity is increasing, thus challenging the very definition of "race."<sup>168</sup> Such a categorization of Americans by race is essential to the operation of affirmative action.<sup>169</sup> Although the authors do not focus on gender-based affirmative action, they make it clear that "women too have benefited from affirmative action in higher education and employment."<sup>170</sup> They also question whether such gains would be sustained if affirmative action as applied to women disappeared.

Welch and Gruhl explore areas of common ground between those who support affirmative action and those who oppose it. They state that there is broad agreement that affirmative action should not

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161. *Id.* at 150 (noting that the holding in *Hopwood* may ultimately have to be resolved by the Supreme Court, which through recent decisions has suggested that it may be willing to weaken, if not discard, Justice Powell's opinion in *Bakke*).

162. *Id.*

163. *Id.* at 151.

164. *Id.*

165. *Id.*

166. *See id.* at 161.

167. *Id.*

168. *See id.* at 162.

169. *Id.* at 163.

170. *Id.* at 164.

cover those unqualified for jobs or university admissions.<sup>171</sup> There is also agreement that affirmative action was not meant to last indefinitely.<sup>172</sup> The difficult questions, however, are how and when it should end.<sup>173</sup> When have the historical vestiges of discrimination been eliminated? There is agreement that repealing affirmative action would not make a significant difference in increasing the number of whites gaining access to competitive professional schools.<sup>174</sup> Just a "few more would be admitted to medical and law schools without the existence of affirmative action programs."<sup>175</sup> There is also some agreement that standardized test scores alone are an inadequate surrogate for merit.<sup>176</sup>

Welch and Gruhl end the book with a few of their own thoughts toward a new affirmative action policy in America. The authors believe that affirmative action will continue to be criticized despite the lack of evidence that discrimination against whites is a widespread problem.<sup>177</sup> This is, in part, because affirmative action seems to conflict with the American value of individualism.<sup>178</sup> The authors also believe that since discrimination against blacks remains in society today, it is too early to end affirmative action, at least the original intent of the concept as aptly expressed by President Johnson.<sup>179</sup> Welch and Gruhl believe in narrowing present day affirmative action back to its roots of covering only those groups that have historically suffered discrimination.<sup>180</sup> The authors state that any rollback of the practice, either through the legislature or the court, would be perceived as a step backward in America's commitment to racial equality.<sup>181</sup> Welch and Gruhl think that proposals to reform affirmative action by basing it on class rather than on race would be unworkable.<sup>182</sup> Indexing class in today's society would be even more

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171. *Id.* at 165.

172. *Id.* at 166.

173. *Id.*

174. *Id.* at 166.

175. *Id.*

176. *Id.* at 167.

177. *See id.* at 170-176.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.* at 172-74.

difficult than indexing race.<sup>183</sup> Finally, Welch and Gruhl state that the *Bakke* case legitimized a strategy that has allowed many minority students to enter medical and law schools.<sup>184</sup> Even if the Supreme Court reverses the *Bakke* holding, the authors believe that the practice of affirmative action will continue, although the phrase itself will not be used.<sup>185</sup> The institutional commitment to increasing the number of minorities and furthering the goal of diversity will persist.<sup>186</sup>

## II. ANALYSIS

Affirmative action in present day American politics is an emotionally charged and polarizing issue. In writing a book about affirmative action in professional schools, Welch and Gruhl weigh in on a debate that has become particularly heated during the last decade. Rather than tackle the issue by appealing to emotions, Welch and Gruhl take a dispassionate, almost clinical approach. The authors' apparent goal was to rationally explore the effect affirmative action has had on black and Hispanic enrollments in medical and law schools. Welch and Gruhl's principal conclusion is that *Bakke* served to institutionalize rather than dramatically change affirmative action practices already in place by the late 1970s in medical and law schools.<sup>187</sup> In the decade after *Bakke*, enrollments of minority students in professional schools neither increased nor decreased significantly. Most readers would find this conclusion surprising, especially given the strident rhetoric that has surrounded the issue of affirmative action over the last decade. But is the authors' conclusion sound and well supported?

### *A. What Was Bakke's Effect on Affirmative Action in Professional Schools?*

Welch and Gruhl answer this question primarily through reliance upon data they collected in their survey of admissions officers

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183. *See id.*

184. *See id.* at 174-76.

185. *See id.*

186. *See id.*

187. *Id.* at 134-35.

at medical and law schools. Given their explanation of the survey method, it appears that the authors' research was well planned and executed. The overall response rate of both schools was fifty-six percent.<sup>188</sup> Sixty-eight percent of law school respondents and eighty-six percent of medical school respondents completed the entire survey.<sup>189</sup> The authors publish the list of medical and law schools that responded to the surveys, and the list includes many of the most prominent schools in each field.<sup>190</sup> Moreover, there does not appear to be a difference in the type of schools that submitted the response and those that did not.<sup>191</sup> To some extent this strengthens the legitimacy of the authors' survey data.

In reaching their conclusion about the effect of the *Bakke* decision, Welch and Gruhl also studied data concerning minority demographics and professional school enrollment in the time period associated with affirmative action.<sup>192</sup> The minority school enrollment data in the decade following the *Bakke* decision showed almost no growth in black and Hispanic enrollment from 1978 to 1988.<sup>193</sup> This alone would lead most observers to conclude that the *Bakke* decision had no significant impact upon minority enrollment in medical and law schools. The authors use the demographic data—data related to population trends, income and wealth trends, financial aid trends, and overall application trends—to explain why minority enrollment in these schools failed to increase after *Bakke*.<sup>194</sup> Finally, the authors logically conclude from their survey data that the *Bakke* decision simply institutionalized already existing affirmative action practices in most law and medical schools.<sup>195</sup>

Thus, using existing data and a well-executed survey, Welch and Gruhl are able to make a rather significant conclusion about the impact of the seminal Supreme Court case dealing with the issue of affirmative action. This conclusion would have been more satisfying, however, if the authors had bolstered their research with actual interviews of black and Hispanics who enrolled in professional schools

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188. *Id.* at 179.

189. *Id.*

190. *Id.* at 181.

191. *See id.*

192. *Id.* at 37.

193. *Id.* at 131.

194. *Id.*

195. *Id.* at 82.

both before and after *Bakke*. It also would have been more satisfying if the authors had collected more data on the income level of the black and Hispanic students who were accepted into professional schools. This information would have told us more about the economic and social status of the minorities that benefited from affirmative action. Were they the sons and daughters of economically disadvantaged parents, who themselves never had access to higher education and its attendant benefits? Or were they primarily the sons and daughters of doctors and lawyers? Interviews with minorities that benefited from affirmative action would also have shed more light on what truly led these individuals to apply to medical school in the wake of this momentous Supreme Court decision. In the end, however, these omissions detract little from the force of the authors' conclusions. Besides, it is not too late to conduct such research, and it could later be the foundation of another book on this subject.

*B. Did Welch and Gruhl's Approach to the Subject Advance the Effectiveness of Their Message?*

Welch and Gruhl take an unemotional, clinical approach to this effort, and for the most part this approach was effective. Much has been written about this subject, but little of it has been nonpartisan and based upon research. Welch and Gruhl's detached approach legitimized the strength of their conclusions. One is hard pressed to detect the authors' preconceived notions of the impact of affirmative action. They simply let the law and the data guide them to their conclusions, which themselves are spare and understated. After being subjected to non-empirical, emotional rhetoric on the subject of affirmative action throughout the decade of the 1990s, it was refreshing to read a view based almost exclusively on empirical data.

It is only in the last few pages of the book that the authors share their opinion on the subject—and even then, their opinions are measured. This was both intriguing and frustrating. It was intriguing because the reader finally perceives that the authors have an opinion on the subject. It was frustrating because it leaves the reader wanting to read more. Perhaps this is the authors' intent: they simply want to add a little color to the book at the end to show the readers that they too have an opinion on this emotional issue. But they cut the effect of

the book short by failing to expand upon these opinions on the future of affirmative action.

*C. Is it Necessary to Read this Book in Conjunction with Other Material on the Subject of Affirmative Action?*

As stated in the opening section of the book review, since Welch and Gruhl ground their work so strongly in the case law surrounding affirmative action, the reader may benefit by reading the book in conjunction with other literature on the subject. Affirmative action has been prominent in the national discourse throughout the last decade. There has been a strong push, especially in the wake of the Republican takeover of Congress in 1994, to roll back affirmative action as it applies to admission to institutions of higher education.<sup>196</sup> There has been an equally strong push from those on the left to resist any rollback of affirmative action.<sup>197</sup> Both movements have been accompanied by heated rhetoric.<sup>198</sup>

Although Welch and Gruhl touch upon the political discourse on affirmative action in the 1990s,<sup>199</sup> they do not discuss it in enough detail to give the reader a feeling for the depth of convictions on both sides of the argument. Affirmative action has been an emotionally charged issue during the last decade, and it is difficult to fully appreciate the full scope of it in the brief overview Welch and Gruhl provide in the final chapter of the book.<sup>200</sup> Their overview does provide the reader with an accurate, though sparse, picture of the political climate surrounding the affirmative action debate this decade. It is not enough, however, to give the book's conclusions their full

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196. See generally Jesse L. Jackson, Sr., *Race Baiting and the 1996 Presidential Election Campaign*, in *THE AFFIRMATIVE ACTION DEBATE* 288 (George E. Curry ed., 1996).

197. See *id.* (emphasizing that conservatives in 1996 were using affirmative action as a wedge issue to "capitalize on voter's fears through scapegoating and blame").

198. *Id.* at 290 (stating, for instance, that "[w]hen Bob Dole, Pete Wilson, and others blame our economic woes on affirmative action programs, they are using race as a cover for a failed economic policies"). See also Charles T. Canady (Republican Congressman from Florida), *The Meaning of American Equality*, *THE AFFIRMATIVE ACTION DEBATE* 278-279 (George E. Curry ed., 1996) (stating, for instance, that "[s]omething more is going on here than a narrow concern on the part of white men for their economic self-interest," and that "[a]ffirmative action incites a strong—and predominately negative—public reaction because it has very direct implications for the meaning of American equality.").

199. See WELCH AND GRUHL, *supra* note 17, at 150-53.

200. *Id.*

impact. As a result, it is best to read Welch and Gruhl's book in conjunction with supplementary material that exposes the depth of the polarization on this issue. Such supplemental reading will heighten the experience of reading this book.

It may also bring the reader up to date on the issue of affirmative action. Although Welch and Gruhl published their book in 1998, their principal conclusions concern the status of affirmative action ten years after the *Bakke* decision (1988).<sup>201</sup> And although they discuss the legal and political context of affirmative action up until 1997,<sup>202</sup> and they collect some data on enrollment through 1995, they shy away from basing their conclusions on this recent information. There are several possible explanations for Welch and Gruhl's aversion to using recent data. One is that they spent a lot of time writing the book, and they were less confident in any predictions made based on recent data. Another is that the recent data may be difficult to interpret at this point. It appears that minority enrollment in medical and law schools seems to have increased in recent years,<sup>203</sup> and Welch and Gruhl's theory of the *Bakke* decision's impact does not comport with such an increase. Most likely, however, Welch and Gruhl are simply being cautious interpreters of data and are unwilling to draw a conclusion from the most recent of data. The authors may have their eye on a follow-up book that will bring the picture up to date now that the Clinton administration has ended. The prosperity that has accompanied the Clinton administration, especially that of the last four years, could very likely affect the enrollment of minorities in professional schools and thus add a new dynamic to the impact of the *Bakke* decision.

*D. Did Welch and Gruhl Provide Meaningful Insight into the Issue of Affirmative Action?*

Without a doubt, Welch and Gruhl provide meaningful insight into the issue of affirmative action in this book. Although much has been written about the subject in recent years, the authors share a new perspective on affirmative action with their rational, empirical

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201. *Id.* at 131-32.

202. *See id.* at 156.

203. *See id.* at 144-45.



approach. Often one thinks about this subject only from an emotional perspective. Minorities and affirmative action supporters may tend to focus on the doors that affirmative action has opened for them in American society throughout the years. Many on this side of the argument would view affirmative action as a just means of remedying past discrimination. Those opposed to affirmative action, on the other hand, may tend to focus on the doors that affirmative action could close for them, especially in the highly competitive institutions of medical and law school. Neither side would be likely to form their opinions on the issue based on a careful and objective study of the law and supporting data. Welch and Gruhl compel their readers to give cool and objective consideration to the subject. Most readers, I suspect, will come away from this book forming new thoughts on affirmative action. Many may even change their opinion.

That is if they read the book. One of the more frustrating things about the book is that it will most likely remain on the back shelf of many law libraries collecting dust. The authors were not effective in writing a book that would attract a wide audience. Instead, this book will appeal to a small audience, primarily those with a scholarly interest on the subject of affirmative action. This is unfortunate for many reasons. For one, the authors were able to communicate their message in a cogent, well-written manner. Considering the difficult nature of writing a book based upon case law and statistical data, the authors did an outstanding job of writing clearly. Another reason why the authors should have striven for broader appeal is that they provide new insight into this issue. Finally, an appeal to a broader audience could have had the effect of advancing the level of the political discourse on affirmative action. The dialogue in recent years has unfortunately become mired in ideology.

### III. CONCLUSION

Welch and Gruhl's *Affirmative Action and Minority Enrollments in Medical and Law Schools* provides profound new insight into the issue of affirmative action in professional schools in the decade after the seminal *Bakke* case. The authors' objective and data-intensive approach to the subject allows them to confidently conclude that the Supreme Court's 1978 decision only helped to

institutionalize affirmative action programs already in place at the time in American universities. Many readers will be surprised by the authors' conclusions, especially the lack of change in minority enrollment in professional school in the decade following the *Bakke* decision. More readers, however, will be surprised by how their own opinions change after reading a book that discusses affirmative action on the basis of objective data.

