From Race Preferences to Race Discrimination: Does Proposition 209 Permit Remedial Affirmative Action?

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INTRODUCTION

Why are institutions that have eliminated all race-conscious admissions criteria and replaced them with race-neutral ones simultaneously accused, on one hand, of admitting *too few* African-Americans and Latinos and, on the other hand, of still admitting *too many*? It is possible that the accused universities have themselves to blame. Perhaps in fear of taking sides on the controversial issue of minority qualifications, public universities have created their own anti-preference limbo. The decisive factor for assessing the legal significance of preference-free admissions will be whether selective universities set out to justify the admissions policies that have severe adverse impact on minority admissions or whether they establish the factual and legal predicate necessary to invoke the federal program exception to Proposition 209's general prohibition against race-based action. As this Article explains, Proposition 209 has left public universities

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the discretion to accept the large racial disparities in admissions as an unfortunate consequence for which they bear no responsibility (adverse impact against racial minorities is justified) as well as the option of acknowledging the ways in which certain admissions criteria are not educationally necessary (adverse impact against racial minorities makes *prima facie* case for federal civil rights violation).

California voters adopted Proposition 209 to prohibit the state's public universities from discriminating against or granting "preferential treatment" to any individual or group on the basis of race in the operation of public education.[1] Since the passage of Proposition 209, admission rates for African-American and Latino applicants to California's most selective public universities have plummeted to pre-civil rights era lows. Before state anti-preference laws like Proposition 209 banned diversity-justified affirmative action, public universities were susceptible to charges of reverse discrimination against non-minorities. Now that diversity affirmative action has ended, the racial disparities in admission rates that have followed open universities to charges that their admissions policies affirmatively discriminate against racial minorities.

How should a university subject to state anti-preference laws defend the racially adverse impact of "affirmative action-free" admissions as legally justified? Alternatively, do state anti-preference laws give universities the broad discretion to take the polar opposite path? If the racially adverse impact of post-Proposition 209 admissions policies is not educationally justified, can public universities in states with anti-preference laws take voluntary steps to remedy the discrimination resulting from their admissions criteria? In such circumstances, would the re-adoption of race-based affirmative action be legal under state anti-preference laws? The answers hinge on the university's explanation of which selection criteria are educationally necessary *and* the circumstances under which universities may invoke the federal program exception to state anti-preference laws, permitting race-based affirmative action if necessary to maintain federal funds.[2]

I. UNIVERSITY ADMISSIONS UNDER STATE ANTI-PREFERENCE LAWS

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[1] The law also prohibits preferences in public employment and contracting. Cal. Const., art. I, §31 (a) provides:

> (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis or race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

[2] *See infra* __.

The combination of the U.S. Supreme Court's endorsement of narrowly tailored race-based admissions policies in higher education and state anti-preference laws like California Proposition 209 divides the country into the affirmative action equivalent of "smoking" and "non-smoking" zones. In the states designated for *Grutter*-type affirmative action, universities are guided by the Court's affirmative action jurisprudence. In "non-affirmative action" states, universities must comply with state anti-preference laws as well as federal constitutional and statutory law.

The passage of state laws like Proposition 209 in California,[3] Initiative 200 in Washington State[4] and One Florida Executive Order 99-281, has been an important and highly visible victory for opponents of race-based affirmative action in higher education admissions.[5] Selective universities have made significant efforts to comply with the race-neutrality requirements of state anti-preference laws.[6] Despite internal and external criticisms and concerns about the consequences, public institutions responded to the passage of anti-preference laws by eliminating the components of their admissions policies that allowed the explicit consideration of race.[7] At the time these state anti-preference laws were adopted, the Supreme Court's prior affirmative action cases suggested to many that the Court was on the path to rejecting the diversity rationale articulated by Justice Powell in *Bakke*.[8] Hence, the admissions policies crafted in response to the

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[3] Proposition 209, Cal. Const., art. I, §31, provides:

> (b) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis or race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

[4] Both Proposition 209, which added Section 31 to Article I of the California Constitution, and Initiative 200, which added § 49.60.40 to the Washington state code, provide that "[t]he state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race . . . in the operation of pubic employment, public education or public contracting."

[5] By holding that the University of Michigan law school had a compelling interest in the narrowly tailored use of race to admit a critical mass of minorities to serve its compelling interest in a diverse student body, the U.S. Supreme decline their invitation to expand these state-level victories to a nation-wide scale. *See* Grutter v. Bollinger, 539 U.S. 322 (2003).

[6] First, Board of Regents Resolution Special Policy 1 (SP-1)[6] and, next, Proposition 209, made voluntary affirmative action programs illegal under California state law. On July 20, 1995, the University of California Board of Regents adopted Special Policy 1. SP-1 provided, in part, that effective January 1, 1997, the University of California "shall not use race, religion, sex, color, ethnicity or national origin as criteria for admission to the University or to any program of study." In 2001, the Board of Regents rescinded SP-1 but affirmed that University admissions remain subject to Proposition 209.

[7] Use I-200 ruling to explain how affirmative action policies are not necessarily "preference" programs.

[8] 438 U.S. 356 (1978).

ban on race consciousness were thought to be the way of the future, making California universities virtual pioneers in the new "post-affirmative action" world.

Now that the Court has affirmed the constitutionality of narrowly tailored race-conscious policies in higher education admissions, universities in states with laws prohibiting diversity-justified affirmative action are the perfect crucible for examining the effect of ending race-conscious admissions policies. Have state anti-preference laws as applied to higher education admissions produced racially non-preferential, non-discriminatory admissions policies and practices?

A. *The Proposition 209 Example*

As the state anti-preference law with the longest track record, California's Proposition 209 is best-suited for analysis. Adding Article I, Section 31 to California's state constitution, Proposition 209 cemented into law a University of California Board of Regents Policy that was the precursor to the state anti-preference initiative.[9]

1. *Effect on Selective Admissions and Enrollment*

2.

Proposition 209 and other anti-preference provisions were promoted as solutions to the evil of "reverse discrimination" suffered by non-minority applicants to selective colleges and universities.[10] Laws like Proposition 209 were promoted as the means to end the unfair scenario of more qualified White and Asian applicants being denied admission because of racial "preferences" for African-Americans, Latinos and other groups benefiting from race-conscious decisionmaking in higher education admissions. Only *selective* colleges and universities -- institutions that received an overabundance of qualified applicants and ultimately select a small percentage of the qualified applicants who apply -- practiced the diversity affirmative action regularly criticized by affirmative action opponents.[11] Because race played little role in admissions to non-selective institutions (institutions without an overabundance of qualified applicants) even before California voters banned admissions preferences, measuring the direct effect of the elimination of Proposition 209 effect is best achieved by analysis of

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[9] *See supra* n.___ .

[10] *See* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

[11] Non-selective or relatively less selective colleges and universities do not fit this prototype of how racial preferences harm non-minorities. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

admissions at California's most selective public campuses: UC Berkeley and UCLA.[12]

As has been documented by numerous commentators, the post-Proposition 209 admissions policy changes at both UC Berkeley and UCLA had a significant negative impact on the admissions of historically underrepresented minorities. The declines in African-American and Latino admissions were so large that they drew significant attention. The fact that the anti-preference law had only a minimal effect on non-minority admissions is also documented,[13] but less widely acknowledged. Post-Proposition 209 changes in UC Berkeley and UCLA admissions policies resulted in a statistically dramatic *decrease* in the rates at which African Americans and Latino were admitted to the two institutions and an even more dramatic decrease in the number of African American and Latino students enrolled at the two institutions. In contrast, because Whites and Asians make up such a large proportion of the applicant pool and student enrollment at Berkeley and UCLA, the decrease in African-American and Latino admissions opened only a small number of additional slots for White and Asian applicants. Thus, White and Asian admissions were unchanged at UC Berkeley and increased only marginally at UCLA after Proposition 209.[14] Because admitting from the very small African-American and Latino applicants pools at rates as high as fifty percent netted very small overall numbers of African American and Latino admissions and enrolled students, White and Asian enrollment under pre-Proposition 209 admissions policies was extremely high and remained so under post-Proposition 209 policies.

For the UC Berkeley campus, the 1998 admissions cycle was the first during which the institution was prohibited from using race-based affirmative action. As noted above, the effects were statistically dramatic. Berkeley's admission rates for African-American and Latino applicants dropped almost

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[12] The drastic racial turnaround in admissions, as expected, only affected the state's most selective universities. Because non-selective institutions were able to admit all qualified students or any race, the institutions where Proposition 209 had the greatest effect were the selective University of California campuses like UC Berkeley and UCLA.

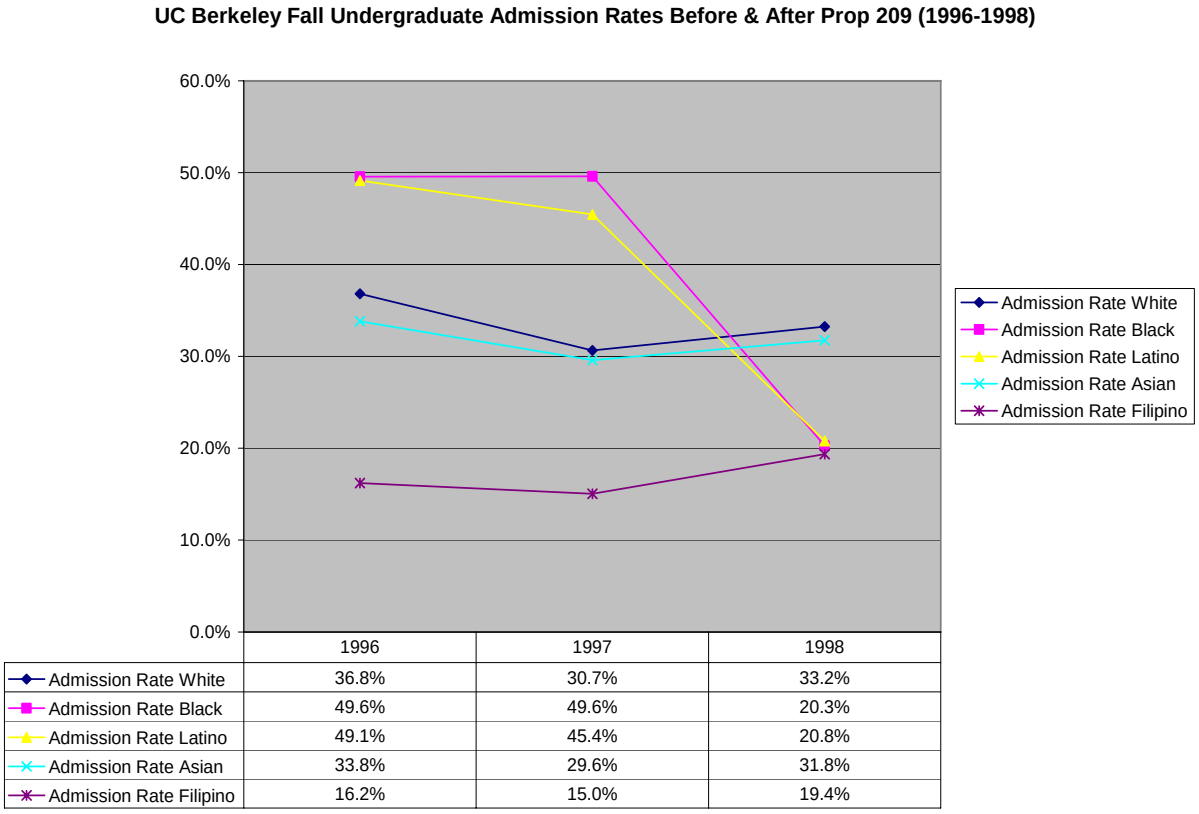
[13] *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (racial preferences do not harm non-minorities as a group in the same proportion that they benefit minorities). Because African Americans and Latinos are a very small numerical minority as compared to Whites and Asians in California's college applicant pool, the existence or absence of admissions "preferences" for those two racial groups has minor effects on overall White and Asian admissions and enrollment statistics.

[14] Due to the very small numbers of African-American and Latino applicants, even peak affirmative action admission rates of close to fifty percent never raised Latino admissions above 15% or African-American admissions above 8% at UC Berkeley. Stated another way, Whites and Asians were still the largest groups of enrolled students during the heyday of admissions preferences for African-American and Latino applicants. *See infra* __.

thirty percentage points (much more than half) to 20.3% and 20.8%, respectively. The clear and immediate effect of the elimination of Berkeley's voluntary race-based affirmative action policies was drastic declines in minority admission rates. By 1998, UCLA admission rates for African-American and Latino applicants dropped close to half to 24% and 25%, respectively.

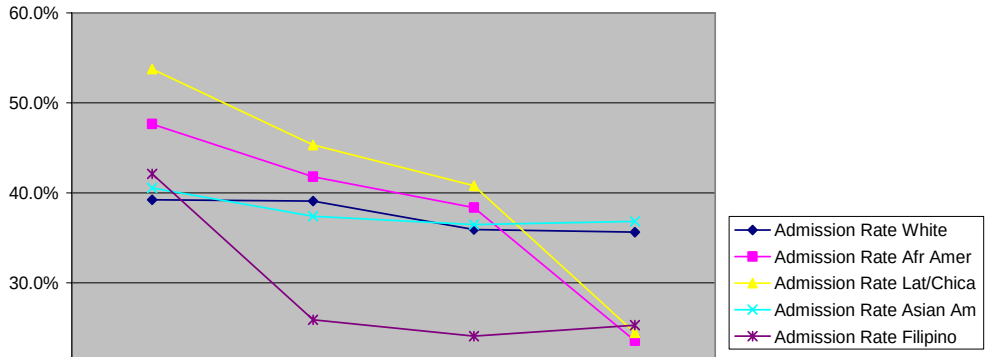
Figures 1a and 1b compare pre- and post-Proposition 209 admission rates by race. When diversity-based affirmative action was eliminated, African-American, Latino, minority and non-minority admission rates did not equalize at UC Berkeley and UCLA. Instead, admission rates for the former beneficiaries of *Grutter*-type affirmative action plummeted so low that admission rates for White and some Asian applicants far exceeded Latino and African-American admission rates for both campuses. As seen in Figures 1a and 1b, the admission rate for 1998 White applicants to UC Berkeley and UCLA exceeded the African-American admission rate by 12-13 percentage points (33% compared to 20% for UC Berkeley and 36% compared to 24% for UCLA).

Figure 1a.



	1996	1997	1998
Admission Rate White	36.8%	30.7%	33.2%
Admission Rate Black	49.6%	49.6%	20.3%
Admission Rate Latino	49.1%	45.4%	20.8%
Admission Rate Asian	33.8%	29.6%	31.8%
Admission Rate Filipino	16.2%	15.0%	19.4%

Figure 1b.



	1995	1996	1997	1998
Admission Rate White	39.2%	39.1%	35.9%	35.6%
Admission Rate Afr Amer	47.7%	41.8%	38.4%	23.6%
Admission Rate Lat/Chica	53.8%	45.3%	40.8%	24.5%
Admission Rate Asian Am	40.5%	37.4%	36.5%	36.8%
Admission Rate Filipino	42.1%	25.9%	24.1%	25.3%

The admissions data compiled in Figure 2a reveals that immediately following the implementation of the first anti-preference admissions policies, the percentage of Latino student enrollment dropped from 15% of overall 1997 Berkeley campus enrollment to 8% of 1998 Berkeley enrollment. Similarly, the African-American percentage of overall Berkeley enrollment dropped from 8% in 1997 to 4% in 1998. From 1995-1998, as shown in Figure 2b, the percentage of UCLA enrolled students who were Latino dropped from over 22% to 11% and African-American enrollment dropped from 7% to 3.5%. Both Figures 2a and 2b confirm that White and Asian students overwhelmingly comprised the largest portion of UC Berkeley and UCLA enrolled students during California's most aggressive affirmative action policies to increase admissions of Latinos and African-American students. The figures also show that Proposition 209 did not substantially increase White and Asian admission rates after race-conscious admissions policies became illegal under California state law.[15]

[15] At UC Berkeley, the new anti-preference admissions policies did not change White and Asian student enrollment percentages. The percentage of White students enrolled remained constant at 28% and the Asian student enrollment also remained constant at 36%. The percentage of White and Asian enrollment at UCLA increased by only a few percentage points after Proposition 209 became law.

In addition to analyzing the impact Proposition 209 had on the admission and enrollment of individual racial groups, it is equally, and, possibly more, important to consider the extent to which anti-preference law has changed overall racial diversity at California's most selective public universities. Not surprisingly, the lower admission rates for underrepresented minorities that followed Proposition 209 did have a significant impact on the racial diversity of UC Berkeley and UCLA undergraduate student enrollment.[16] In the year before the implementation of the anti-preference policy, student enrollment at UC Berkeley was 38%* Asian, 28% White, 15%Latino and 8% Black. After the elimination of race-conscious admissions policies, significant decreases in African-American and Latino enrollment, a small increase in Asian enrollment and no change in White enrollment combined to result in less racial diversity in enrollment (40% Asian, 28% White, 8% Latino and 4% Black). From 1995 to 1998, UCLA's racial diversity also decreased substantially from 36%* Asian, 26% White, 22% Latino and 7% Black to 36% Asian, 30% White, 11% Latino and 11% Black.[17]

[16] The University of California often used the term "underrepresented minority" to describe groups like African Americans, Latinos, Filipinos and Native Americans whose were admitted and enrolled at significantly lower rates than the representation in the applicant pool/state high school population.

* This figure combines the general Asian category in Figure 2a with the Filipino Asian sub-category.

* This figure combines the general Asian category in Figure 2b with the Filipino Asian sub-category.

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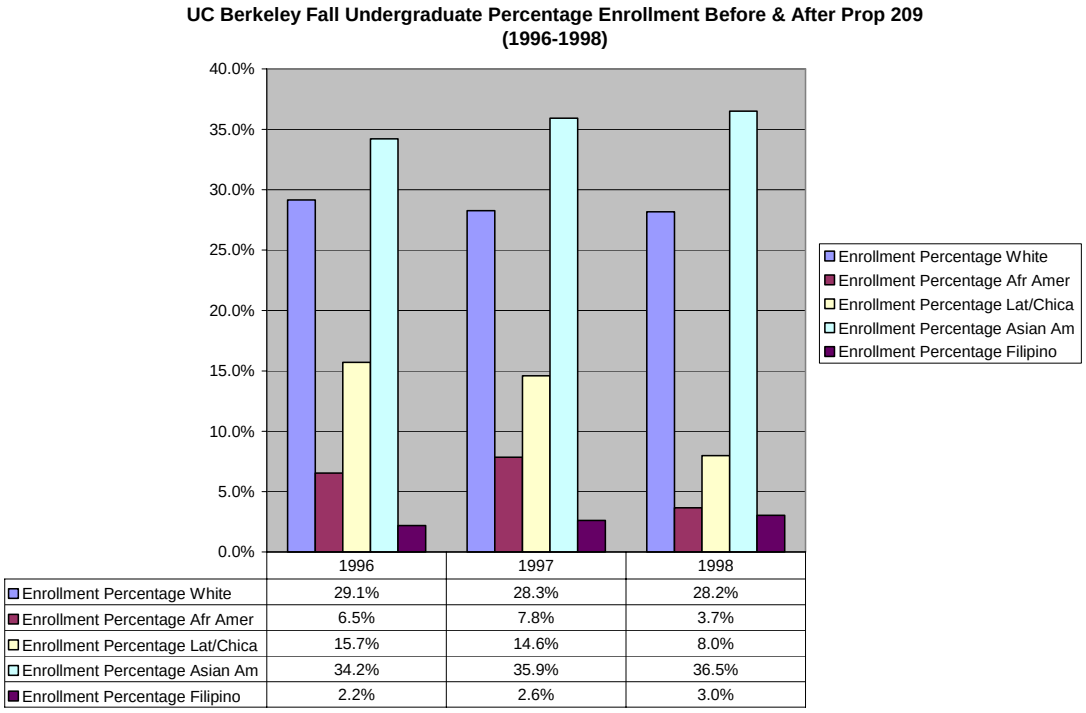
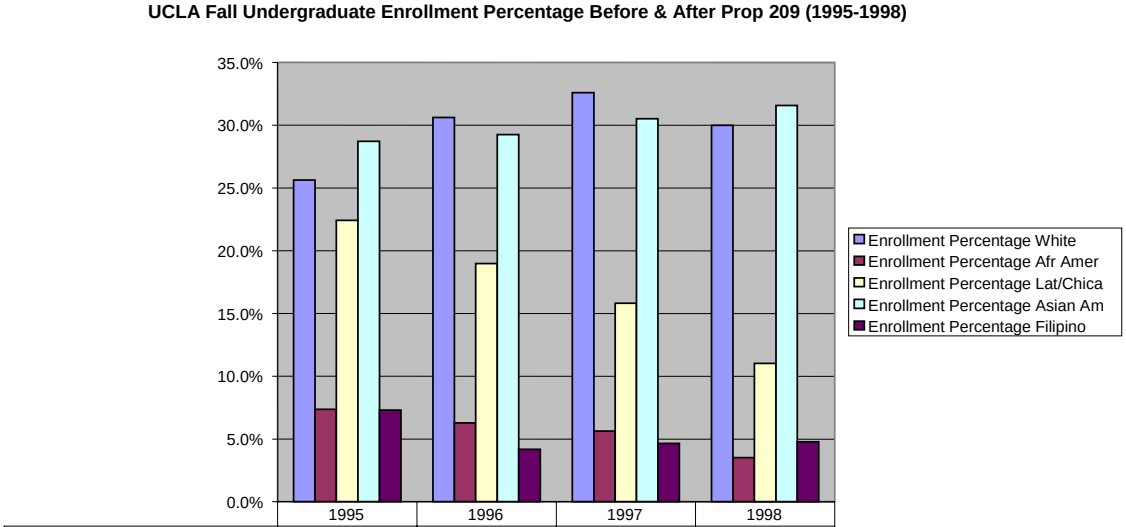
Figure 2a.



	1996	1997	1998
Enrollment Percentage White	29.1%	28.3%	28.2%
Enrollment Percentage Afr Amer	6.5%	7.8%	3.7%
Enrollment Percentage Lat/Chica	15.7%	14.6%	8.0%
Enrollment Percentage Asian Am	34.2%	35.9%	36.5%
Enrollment Percentage Filipino	2.2%	2.6%	3.0%

Figure 2b.

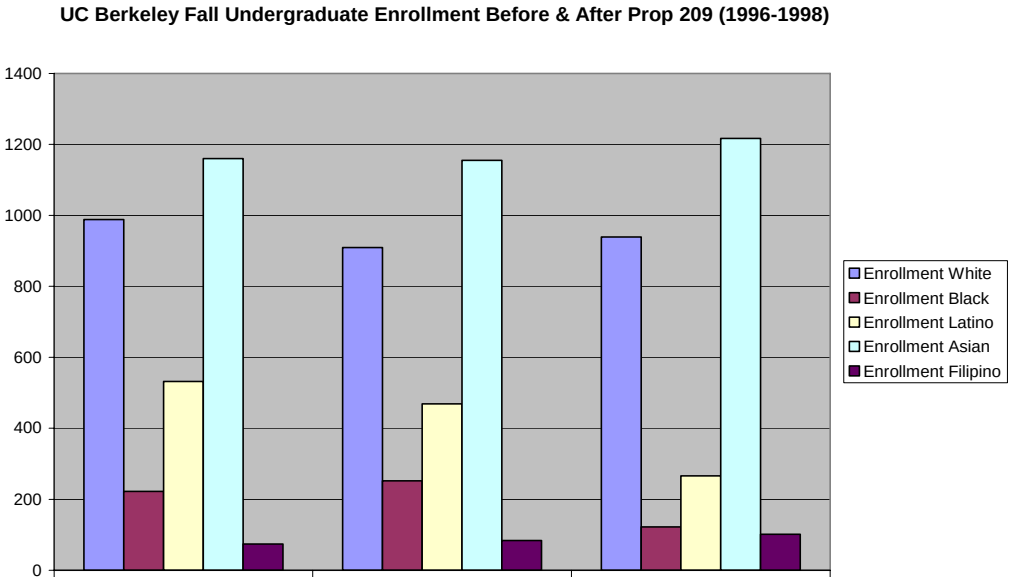


	1995	1996	1997	1998
Enrollment Percentage White	25.6%	30.6%	32.6%	30.0%
Enrollment Percentage Afr Amer	7.4%	6.3%	5.6%	3.5%
Enrollment Percentage Lat/Chica	22.4%	19.0%	15.8%	11.0%
Enrollment Percentage Asian Am	28.7%	29.2%	30.5%	31.6%
Enrollment Percentage Filipino	7.3%	4.2%	4.6%	4.8%

By presenting the numerical differences in enrollment by race at UC Berkeley and UCLA, Figure 3a and Figure 3b show that 1) the already relatively smaller number of African-American and Latino students enrolled at UC

Berkeley and UCLA dropped by almost half following the elimination of race-conscious diversity affirmative action after Proposition 209 became law.[18]

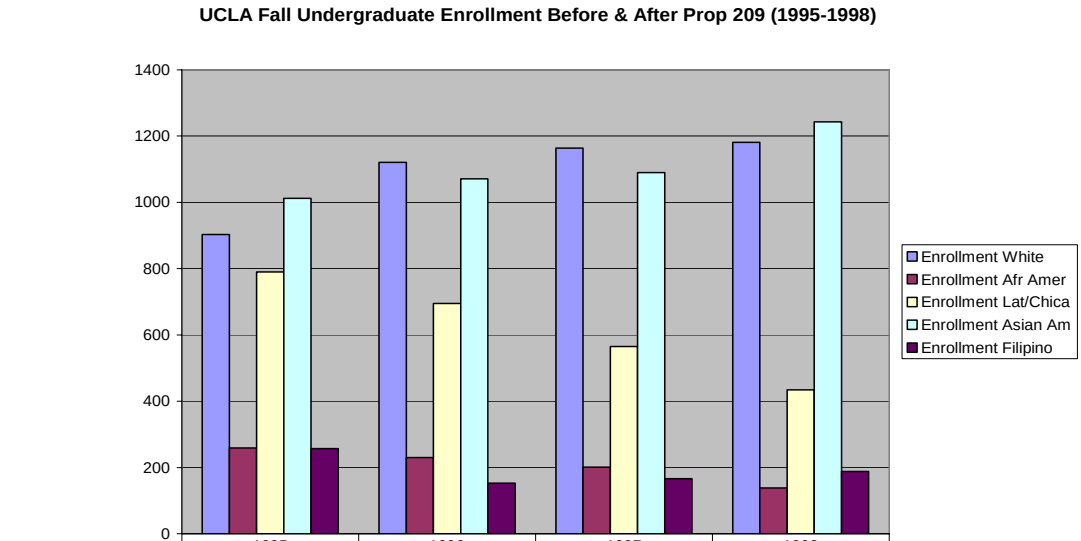
Figure 3a.



	1996	1997	1998
Enrollment White	988	909	939
Enrollment Black	222	252	122
Enrollment Latino	532	469	266
Enrollment Asian	1160	1155	1217
Enrollment Filipino	74	84	101

[18] Notably, this opened few additional seats for White and Asian applicants. The first post-Proposition 209 cycle of admissions policies increased White student enrollment by 30 students and Asian student enrollment by 89 students. This increase of 119 students was one student more than the 118-student increase in overall total UC Berkeley enrollment between 1997 and 1998. In contrast, African-American undergraduate enrollment decreased by 130 students (an approximately 50% decrease in enrollment). Latino enrollment also saw a very large decrease of 203 students. *See University of California Application, Admissions and Enrollment of California Resident Freshman for Fall 1995 through 2004 at* http://www.ucop.edu/news/factsheets/Flowfrc_9504.pdf.

Figure 3b.



	1995	1996	1997	1998
Enrollment White	903	1121	1164	1181
Enrollment Afr Amer	259	230	201	138
Enrollment Lat/Chica	790	695	565	434
Enrollment Asian Am	1012	1071	1090	1243
Enrollment Filipino	257	153	166	188

2. *Long-Term Racial Disparities in Admissions Rates*

In the decade since Proposition 209 amended the California Constitution, racial disparities in admission rates have existed. The general trend of much lower admission rates for the former beneficiaries of affirmative action has remained consistent in the years since California's anti-preference law has been in effect. As is true nationally, the most selective public universities in the state, UC Berkeley and UCLA, practiced the strongest version of diversity-justified affirmative action before the passage of Proposition 209. As explained in detail above and reflected in Figures 1a and 1b, post-Proposition 209 admissions policies brought a quick end to the trend of higher admission rates for African-American and Latino applicants when California state law permitted diversity-justified affirmative action.[19]

Figure 4a and Figure 4b show that starting in underrepresented minority 1998 admission rates (rates for Latino and African-American applicants to UC Berkeley and UCLA) not only plummeted from higher than average to lower

[19] At that time, like other universities across the rest of country, selective California campuses relied on Justice Powell's decision in *Bakke* for constitutional authority to use race-based affirmative action to promote diversity.

than average, they began a period of large and persistent racial disparities in admission rates at California's most selective campuses. The trend in admission rates since the state anti-preference law has been applied to higher education admissions in California is that the former beneficiaries of diversity affirmative action have been admitted *consistently* at significantly lower rates than White applicants.

For UC Berkeley, shown in Figure 4a, pre and post-Proposition 209 admissions have generally trended from significantly greater rates of minority admissions when diversity affirmative action was permitted under state law to significantly lower admissions rates once the anti-preference provision was in effect. From 1999-2000, UC Berkeley admissions policies produced a short period of relatively equal admission rates by race. [20] Since the 2000 UC Berkeley admission cycle, the UC Berkeley trend returned to large racial disparities in admission rates with minorities admission rates continuing to decline.

As is clear in Figure 4b, UCLA's racial spread of admission rates during diversity affirmative action was not as wide as UC Berkeley rates. In other words, minorities were admitted at higher rates than non-minorities but significantly higher. Since the end of race-conscious admissions policies, the trend in UCLA admissions has been a very large and often statistically significant racial gap in admissions rates.[21]

[20] This equalization of admission rates coincides with a lawsuit filed by disappointed minority applicants to UC Berkeley charging that the campus' post-Proposition 209 admissions policies discriminated against certain racial minorities in violation of federal constitutional and statutory law. *See Rios v. The Regents of the University of California*, No. 99-0525 (N.D. Ca filed Feb. 2, 1999) (subsequently renamed *Casteneda v. The Regents of the University of California)*.

[21] *See infra* ___.

Figure 4a.

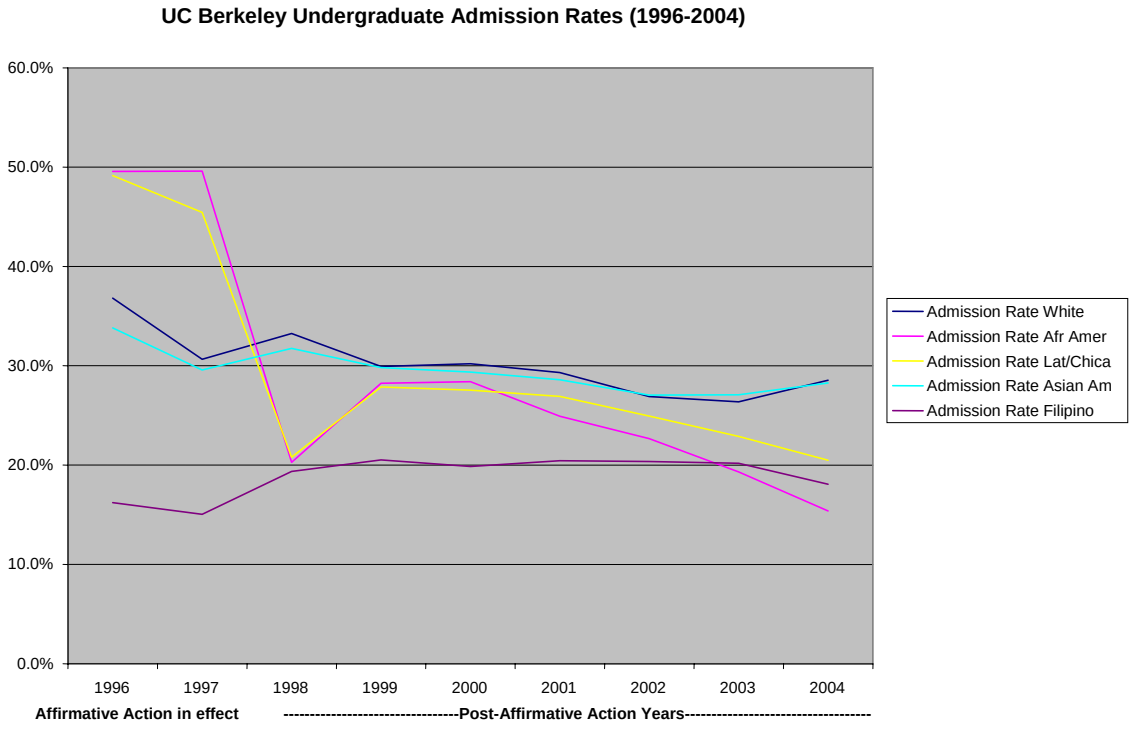
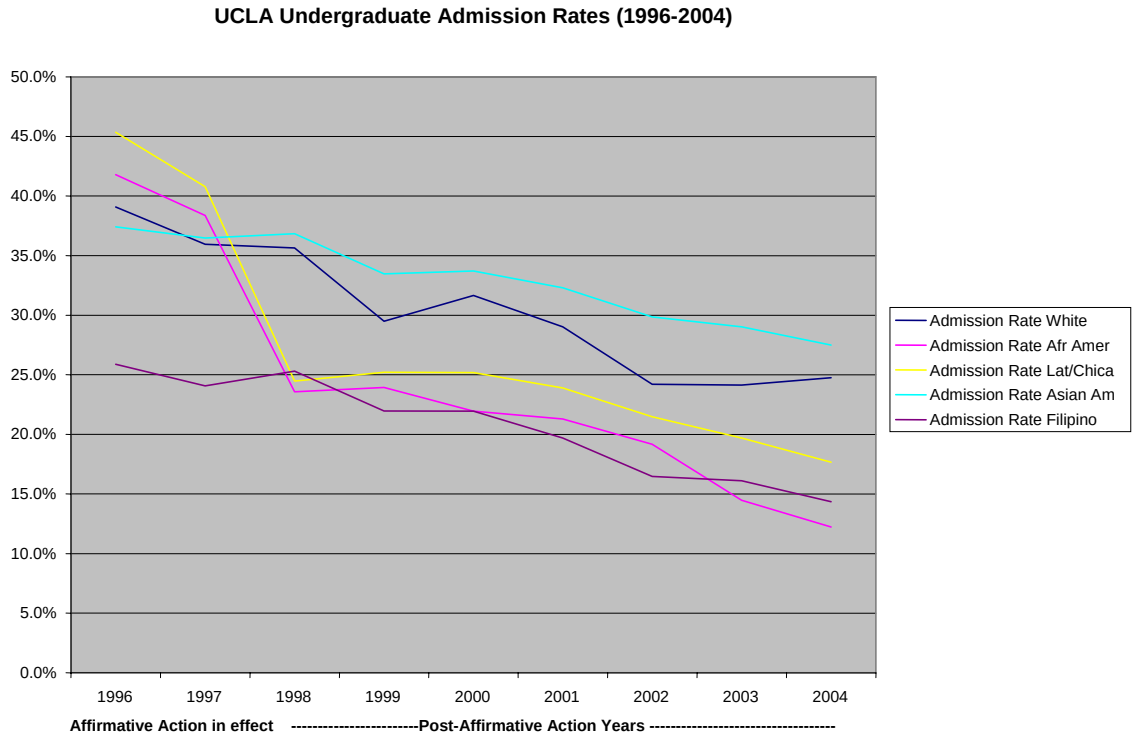

UC Berkeley Undergraduate Admission Rates (1996-2004)
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
1996
1997
1998
1999
2000
2001
2002
2003
2004
Affirmative Action in effect
----------Post-Affirmative Action Years----------
Admission Rate White
Admission Rate Afr Amer
Admission Rate Lat/Chica
Admission Rate Asian Am
Admission Rate Filipino

Figure 4b.



B. *Evidence of Federal Civil Rights Violation*

1. *Disparate Impact Theory*

In addition to the more familiar disparate treatment theory, the U.S. Supreme Court has also recognized, under federal civil rights statutes, a disparate "impact" theory of race discrimination. Under this theory, selection practices that affect applicants of a particular race or ethnicity more harshly than applicants of other races or ethnicities without sufficient government justification violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000e, a federal anti-discrimination law applicable to public universities. In particular, federal regulations promulgated pursuant to Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[22] prohibit universities that receive federal funds

[22] Title VI provides that:

> 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.

42 U.S.C. § 2000d. Although the Supreme Court has held that Title VI itself reaches only instances of intentional discrimination, actions have a disparate racial impact can be redressed through agency regulations designed to implement the purposes of Title VI. Alexander v. Choate, 469 U.S. 287, 293 (1985) (explaining Guardians Ass'n v. Civil Service Comm'n, 463 U.S.

from using admissions policies that have an unjustified negative impact on racial minorities, even in the absence of intentional discrimination. [23]

Pursuant to U.S. Department of Education regulations implementing Title VI of Civil Rights Act of 1964, a university violates this federal law if it utilizes admissions criteria "which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin." [24] Charges that universities have violated Title VI under the disparate impact theory of racial discrimination often criticize universities for using admissions criteria that place too great an emphasis on quantitative factors like standardized tests scores, scores on Advanced Placement standardized tests, and numbers of Advanced Placement courses taken and insufficient emphasis on qualitative factors that are better measured by more holistic review of applicant qualifications.[25] In part, these claims rest on the more general theory that institutions are prohibited from continuing to rely, to the detriment of minority applicants, on the same

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582 (1983)). In *Guardians,* a majority of the Court held that a violation of Title VI required proof of discriminatory purpose and a different majority held that proof of discriminatory effect suffices when the suit is brought to enforce regulations issues pursuant to Title VI. More recently, in *Sandoval*, the Court assumed that proof of discriminatory impact was sufficient to demonstrate a violation of the Title VI regulations. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

[23] As a general rule, public universities, as well as many private universities, receive substantial levels of federal funding. The University of California is not an exception. Section 602 of Title VI requires federal fund recipients to avoid facially neutral policies that have a unjustified negative impact on racial minorities, even in the absence of intentional discrimination. Section 602 of Title VI provides, in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract . . . , is authorized and directed to effectuate the provisions of [Section 601] of this title with respect to such program or activity by issuing rules, regulations or orders of general applicability . . . .

42 U.S.C. § 2000d-1.

Liability under Section 601 of Title VI is identical to the federal equal protection clause in its requirement that plaintiffs prove discriminatory intent. *See* Washington v. Davis, 426 U.S. 229 (1976).

[24] 34 C.F.R. § 100.3 (b)(2) (emphasis added).

[25] Various University of California graduate and undergraduate campuses have been accused of post-affirmative action discrimination. Boalt Law School's 1997 admissions cycle and several University of California medical schools were the subject of complaints filed with the U.S. Department of Education Office of Civil Rights alleging that as a result of the adoption of UC Board of Regents Special Policy 1 (SP-1), the University of California has violated its obligation as under Title VI and its implementing regulations. The UC Berkeley undergraduate campus was the defendant in a federal lawsuit filed in 1998 that challenged the admission of African Americans, Latinos and Filipinos at substantially lower rates than Whites and other Asians as violating the 14th Amendment Equal Protection Clause, Title VI of the Civil Rights Act of 1964 and its implementing regulations. The Los Angeles undergraduate and law school campuses of the University of California (UCLA) have also been subject to heavy criticism for admitting almost negligible numbers of African Americans. See also Charles Lawrence III, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 Colum. L. Rev. 928 (2001).

discriminatory criteria that benefited disproportionately whites in the era of racially segregated higher education.

The disparate impact theory of race discrimination was first recognized by the Supreme Court in *Griggs v. Duke Power*.[26] In *Griggs*, the Court explained the rationale for interpreting Title VII, the provision of the Civil Rights Act of 1964 applicable to employment discrimination, to prohibit employers from using facially race-neutral practices that "operate to freeze the status quo of prior discriminatory employment practices."[27] The Supreme Court's language in *Griggs* is instructive in applying the theory to facially neutral higher education admissions criteria that have significant adverse impact on certain racial groups.

> Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commended is that any tests used must measure the person for the job and not the person in the abstract.[28]

The same disparate impact theory of discrimination underlies the Court's recognition that educational institutions receiving federal funds violate Title VI regulations if they utilize criteria that have the unjustified *effect* of discriminating on the basis of race. [29] Universities violate federal civil rights law if they use selection criteria that produce racial disparities of substantial magnitude[30] but do not bear a demonstrable relationship to the educational goals of the institution.[31] In *Griggs*, the Court held that the high school diploma and general intelligence test score requirements for power plant employees had not been demonstrated to relate to employee job-performance ability.[32] Because the Duke Power Company could not demonstrate that the use of these selection criteria was a "business

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[26] 401 U.S. 424 (1970).

[27] Griggs, 401 U.S. at _____.

[28] *Id.* at __.

[29] *See* Guardians Assoc.;*See, e.g.,* Board of Education of New York v. Harris, 444 U.S. 130, 151 (1979); Cureton v. National Collegiate Athletic Assoc., 198 F.3d 107, 112 n. 4 (3rd. Cir. 1999) ("Many cases have applied this theory to educational institutions and practices."); Larry P. v. Riles, 793 U.S. F.2d 969, 982 n. 6 (1986); *U.S. v. LULAC,* 793 F.2d 636, 648-49 (5th Cir. 1986); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

[30] *See supra* ____.

[31] *See* 34 C.F.R. § 100.3 (b)(2).

[32] Griggs, 401 U.S. at ____.

necessity," the Court held that the disproportionate negative effect on African-American job applicants of relying on the criteria was *unjustified* adverse impact in violation of Title VII. When this theory of race discrimination is applied to the college admissions context, Title VI disparate impact regulations place the burden on federally funded universities to justify the use of admissions criteria that have an adverse racial impact on minorities.

2. *Establishing Prima Facie Case of Disparate Impact*

The standard of proof for a Title VI disparate impact claim first requires the plaintiff to make a prima facie case of racially discriminatory impact, usually by means of a statistical showing.[33] Next, the university is given the opportunity to rebut the plaintiff's prima facie case by demonstrating that the admissions policies that resulted in the admission of disproportionately fewer racial minorities are required by educational necessity.[34] If the defendant university successful demonstrates that the racially disparate impact of its admissions policies is educationally justified, the plaintiff is still given the opportunity to present less discriminatory alternatives to the challenged policy.[35]

The essence of a violation based on the disparate impact theory of race discrimination is establishing that the accused entity has violated a discriminatory "effects" test. In Title VII employment discrimination cases, it is well established that a *prima facie* case of adverse impact has been made when a racially neutral practice selects members of one race at a rate that is less than eighty percent (or four-fifths) of the selection rate for the racial group with the highest selection rate.[36] The same approach is applicable to racially neutral admissions practices used by public universities since state anti-preference laws eliminated *Grutter*-type affirmative action.[37]

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[33] The Supreme Court no longer recognizes a private right of action of plaintiffs to enfore the disparate impact regulations promulgated pursuant to Title VII. *See* Sandoval, 532 U.S. at 293. However, individuals may still file charges with U.S. Department of Education Office of Civil Rights. Individuals may charge educational institutions receiving federal funds with violating the Title VI implementing regulations under a disparate impact theory of race discrimination. As the federal agency charged with enforcing these federal anti-discrimination provisions, the Department of Education Office of Civil Rights (OCR) can investigate charges that a universities admissions criteria have an unjustified adverse impact on the basis of race. Insert cite. OCR can also stop federal funds to a university on this ground.

[34] *See* Larry P. v. Riles.

[35] *Id.* at __.

[36] Connecticut v. Teal, 457 U.S. 445, 445 n.4 (1982) (describing the Uniform Guidelines on Employment Selection Procedures adopted by the Equal Employment Opportunity Commission).

[37] Board of Education of New York v. Harris, 444 U.S. 130, 151 (1979); Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984).

While there is no single formula for determining when racial disparities in admissions are so disparate that minorities can rely upon them to make a prima facie case of discrimination,[38] courts view the "four-fifths (or eighty-percent) rule" endorsed by the Equal Employment Opportunity Commission as a "rule of thumb" for evaluating adverse impact. A number of more sophisticated statistical analyses may also be employed to demonstrate that the racial impact of a particular selection criterion is sufficiently adverse to be considered *prima facie* evidence of race discrimination.[39]

Using California public universities' post-Proposition 209 admissions policies as an example, my analysis in Part I demonstrates that racial disparities for several UC Berkeley and UCLA admissions cycles establish a *prima facie* case of race discrimination under the Title VI disparate impact theory. Between 1998 and 2004, three cycles of post-Proposition 209 admissions at UC Berkeley have resulted in disparate impact against Latinos or African Americans that is "substantial"[40] under the eighty-percent rule.[41] During the same period, the

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[39] In addition to the "eighty percent" of "four-fifths" rule, standard deviation, chi square, confidence intervals and probability distribution are all examples of statistical tests used to demonstrate adverse impact of selection decisions. *See* Cureton. The rationale behind these standards is that when success rates for racial groups differ by this degree, discriminatory animus may be presumed or the effect is functionally equivalent to discriminatory animus.

[40] Proving unlawful race discrimination under a disparate impact theory requires presenting statistical evidence that the questioned policy or practice affects persons of particular race or ethnicity more harshly than persons of other races or ethnic backgrounds. Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 994 (1988). While there is no rigid formula for establishing disparate impact, "statistical disparities must be substantial." *See Watson*, 487 U.S. at 994-95.

[41] The shaded areas in Figure 6 are the rates that violate the 80 percent rule. The 1998 African American admission rate of 20.3% and Latino rate of 20.8% are less than 80 percent of the 33.2% admission rate of White applicants. The 2003 admission rate of 19.3% for African-American applicants is also less than 80 percent of the 26.4% White admission rate. Finally, the 2004 admission rates of 15.4% for African Americans and 20.5% rate for Latinos is also less than 80 percent of the admission rate for White applicants.

Figure 5.

UC Berkeley Undergraduate Admission Rates 1996-2004*

	White	Afr Amer	Lat/Chicano	Asian Am	Filipino
1998	**33.2%**	**20.3%**	**20.8%**	**31.8%**	**19.4%**
1999	**29.9%**	**28.2%**	**27.9%**	**29.8%**	**20.5%**
2000	**30.2%**	**28.4%**	**27.5%**	**29.4%**	**19.9%**
2001	**29.3%**	**24.9%**	**26.9%**	**28.6%**	**20.4%**
2002	**26.9%**	**22.7%**	**24.9%**	**27.0%**	**20.4%**
2003	**26.4%**	**19.3%**	**22.9%**	**27.1%**	**20.2%**
2004	**28.5%**	**15.4%**	**20.5%**	**28.3%**	**18.1%**

selection rate for African-American applicants was less than four-fifths (eighty-percent) of the selection rates for White applicants in six (all but one) of UCLA's undergraduate admissions cycles. The "eighty-percent rule" established disparate impact against Latinos in three of six admissions cycles.[42]

3. *Justifying Adverse Impact: Educational Necessity*

The existence of substantial racial disparities in admission rates at universities that eliminated race-conscious diversity-affirmative action in order to comply with Proposition 209 does not in and of itself violate federal civil rights laws. However, the analysis in Part I demonstrates that several admissions cycles at UC Berkeley and UCLA under post-Proposition 209 facially, race-neutral admissions practices are likely sufficient to make a *prima facie* case that the admissions policies of these campuses violate federal civil rights law. A *prima facie* case of race discrimination under the Title VI disparate impact theory

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*In light of the fact that there are vast disparities in admission rates when specific Asian subgroups (i.e. Filipinos, Koreans, Chinese or Japanese), Whites have been selected as the group with the highest selection rate.

[42] The shaded areas in Figure 7 are the rates that violate the 80 percent rule. The 1998, 2000, the African American admission rates of 23.6%, 22.0% and the Latino admission rates of 24.5% and 25.2% were less than 80 percent of the White admission rate of 35.6% and 31.7%. From 2001 to 2003, the undergraduate admission rate of African Americans (21.3%, 19.2% and 14.5%) to UCLA was consistently less than 80 percent of the White admission rate (29.0%, 24.2% and 24.1%). In 2004, the Latino admission rate of 17.7% was well below the White admission rate of 25.8%. The 2004 African-American admission rate of far surpassed a violation of the traditional 80 percent rule. That year, the admission rate for African Americans of 12.2% was l*ess than 50 percent* of the White admission rate of 25.8%.

Figure 6.

UCLA Undergraduate Admission Rates 1996-2004*

	White	Afr Amer	Lat/Chicano	Asian Am	Filipino
1998	**35.6%**	**23.6%**	**24.5%**	**36.8%**	**25.3%**
1999	**29.5%**	**23.9%**	**25.2%**	**33.5%**	**22.0%**
2000	**31.7%**	**22.0%**	**25.2%**	**33.7%**	**21.9%**
2001	**29.0%**	**21.3%**	**23.9%**	**32.3%**	**19.7%**
2002	**24.2%**	**19.2%**	**21.5%**	**29.9%**	**16.5%**
2003	**24.1%**	**14.5%**	**19.7%**	**29.0%**	**16.1%**
2004	**25.8%**	**12.2%**	**17.7%**	**27.5%**	**14.4%**

*In light of the fact that there are vast disparities in admission rates when specific Asian subgroups (i.e. Filipinos, Koreans, Chinese or Japanese), Whites have been selected as the group with the highest selection rate.

places the burden on the universities charged to justify their disproportionate rejection of racial minorities as "educationally necessary."[43]

Universities may justify policies that may disproportionately reject minorities, such as heavy reliance on standardized test scores like the SAT I and SAT II or scores on Advanced Placement tests, on the basis that using these tests to make admissions decisions is of "educational necessity" or bears "a manifest demonstrable relationship" to the selection of applicants who possess college-performance ability.[44] The educational necessity requirement may be fairly substantial, but it is far from insurmountable. In fact, the Supreme Court's decision in *Wards Cove* and Congressional action to reverse the decision by adoption of the Civil Rights Act of 1991 make it difficult to discern whether, once a *prima facie* case of discriminatory impact has been made against the defendant university, the institution carries the burden of persuasion or the lesser burden of production to justify its admissions practices as legal under federal civil rights laws.[45]

Ultimately, to satisfy either burden (of production or persuasion), a university operating an admission policy with a substantial adverse racial effect on minorities is obligated to offer proof or prove that its admissions practices serve identified and legitimate educational goals.[46] To present objective evidence that a "nexus" exists between the admissions criterion and a particular educational goal, it will be necessary for the university, first, to explicitly identify the goal(s) of its admissions policy and, second, demonstrate a manifest relationship between those goals and the selection criteria resulting in adverse impact against minority college applicants.[47] If the adverse racial impact is *unjustified*, the language of the federal regulations promulgated pursuant to Title VI are easily interpreted to require recipients of federal funds to "take affirmative action" to remedy the unjustified racial disparities in admission rates or lose federal funding for failure to comply with the requirements of the regulation.[48]

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[43] Again, this is standard mirrors the Title VII requirement that employers justify employment practices that disproportionately selection non-minorities over minorities as justified by "business necessity." *See* Griggs v. Duke Power Co..

[44] *See* New York v. Harris, 444 U.S. 130, 151 (1979); Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1984); Georgia State Conference of Branches of NAACP, 775 F.2d at 1418.

[45] Cite statute and explain history of 1991 Act in relation to Wards Cove decision. *See* Wards Cove, 490 U.S. at 659.

[46] *See* Cureton v. NCAA, 37 F. Supp. 2d 687, rev'd on other grounds, 198 F.3d 107 (1999).

[47] *Id.*

[48] The relevant Title VI regulations state:

> (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

But, what does the amorphous phrase "take affirmative action" mean in the context of an institution without intent to discriminate against racial minorities but which may be unable to demonstrate a sufficient nexus between its admissions criteria and legitimate *educational* goals?

2. *Remedying the Effects of Discriminatory Admissions Criteria*

Does federal law permit a university to remedy the effects of violations of federal anti-discrimination laws that define discrimination under a theory of discriminatory impact as well as discriminatory purpose? Despite disapproving dicta in the *Sandoval* decision, the U.S. Supreme Court has not rejected the Title VI disparate impact theory of discrimination.[49] Nor has the court explicitly excluded non-intentional discrimination from the category of discrimination that may be remedied through narrowly tailored race-based affirmative used to meet a compelling objective.

In *Wygant v. Jackson Board of Education*, there was no majority reasoning in support of the Court's judgment that a school boards race-conscious teacher layoff policy violated the Equal Protection Clause. Justice Powell's decision, announcing the judgment of the Court in *Wygant*, along with Justice O'Connor's concurring opinion very clearly affirmed the Court's view that public educational institutions operate under "two interrelated constitutional duties" to 1) to use "race-conscious remedial action" if necessary to remedy racial discrimination and 2) to act in accordance with the core purpose of the Fourteenth Amendment "to do away with all governmentally imposed discriminations based on race." [50] In *Wygant*, the disagreement amongst the Justices revolved around the type of "factual predicate" public entities should be required to present in order to demonstrate the constitutionality of its voluntary race-conscious affirmative action policy.[51] The Court has been consistently and overwhelming in favor of the use of race-conscious action to remedy the effects of past discrimination. In *City of Richmond v. Croson*, the Court resolved the issue it had left outstanding in *Wgyant* – what type of evidence does a public school or

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(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

34 C.F.R. §100.3 (6).

[49] *See infra n.*__.

[50] *See Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277 (1986) (Powell, J.) (citing North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971) and Palmore v. Sidoti, 466 U.S. at 432).

[51] *See* Wygant at 278

employer need to have to justify its conclusion that there has been prior discrimination.[52]

The five-justice majority in *Croson* made it very clear that it is insufficient for a public entity to simply declare that its use of a racial classification is for a remedial purpose[53]. The Court found that the City of Richmond lacked a "strong basis in evidence for its conclusion that remedial action was necessary"[54] because there was "nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[55] Hence, the Court has established a rule for public entities that it believes "facilitate[s] a voluntary remedy" in cases where the public employer or public school believes it may have a duty to counteract the effects of discrimination.[56] The rule, as articulated in *Croson*, is that a public entity "need not admit conclusive guilt for past discrimination's current effects before going forward with a remedial plan,"[57] but it would need to establish "something approaching" a *prima facie* case of race discrimination for its race-conscious affirmative action policy to be constitutional.

The *Croson* majority strongly supports the conclusion that a public entity is free to rely on statistical disparities of the type analyzed in Part I to establish the factual predicate to justify its use of race-conscious affirmative action. So long as the public employer bases its analysis on the relevant (qualified) statistical pool, "[t]here is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination under Title VII."[58] The Court's reasoning seems to be that if a gross statistical disparity standing alone can satisfy the requirements of a prima facie case for race discrimination, it certainly satisfies the lesser

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[52] *Id.* The other important issue in *Wygant* was the Court's requirement that the evidence relate to discrimination by the public entity that adopts the remedial affirmative action policy. The Court rejected the possibility of permitting public employers or public school justify their affirmative action policies based on evidence of societal discrimination or discrimination by a different public entity. Instead, the Court required "some showing or prior discrimination by the government unit involved." *Id.* at 274.

[53] Croson at 725 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances or good intention cannot suffice." (internal citations omitted)).

[54] (Croson at 725 (quoting O'Connor's concurring opinion in Wygant, 476 U.S. at 277)).

[55] *Id.*

[56] Wessmann, 160 F.3d at 820 (Lipez, J., dissenting); *see also Wygant* at 291(seeking to avoid an evidentiary standard that traps public employer "between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken") (O'Connor, J., concurring).

[57] Wessmann at 820 (Lipez, J., dissenting).

[58] Croson at 726 (internal quotations omitted) (quoting Hazelwood School Dist. V. United States, 433 U.S. 299, 307-308 (1977).

requirement of "something approaching" a prima facie case.[59] Nothing in the Court's opinions considering the factual predicate required to justify a voluntary remedial affirmative action policy suggests that entity must present evidence of their own discriminatory intent to demonstrate their need to remedy of the effects of past or current discrimination. To the contrary, the Court has often acknowledged the precarious position such a rule would impose upon public employers or other public entities willing to take voluntary steps to remedy their own discrimination.[60]

In addition to the affirmative obligation Title VI regulations impose on federally funded universities to use "affirmative action" to eliminate admissions policies that have an unjustified adverse impact on minorities, [61] the Court's affirmative action jurisprudence has consistently recognized the government's compelling interest in adopting race-conscious policies if narrowly tailored to *remedy* discrimination. Thus, in states without anti-preference laws, selective

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[59] The majority in Croson was clearly aware of the different evidentiary requirements for alleging violations of certain federal anti-discrimination laws. The Court explicitly acknowledged that "[t]here is no doubt that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern and practice of discrimination under Title VII." Croson at 725-26 (internal quotations omitted) (citing Hazelwood School Dist v. United States, 433 U.S. 299, 307-308 (1977)).

[60] In fact, concurring in *Wygant*, Justice O'Connor wrote:

> . . . Public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. When these employers . . . act on the basis of information that gives them a sufficient basis for concluding that remedial action is necessary, a requirement [of a finding of their own discrimination before they act] should not be necessary.

See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). This analysis is certainly applicable to the selective admissions context.

> . . . [I]n cases where there may be a duty to counteract the effects of past discrimination, the Supreme Court has set evidentiary standards that facilitate a voluntary remedy. A government entity need not admit conclusive guilt for past discrimination's current effects before going forward with a remedial plan. Instead, it must satisfy the court that the evidence before it establishes a prima facie case of a causal link between past discrimination and the current outcomes addressed by the remedial program.

Wessmann, 160 F.3d at 820 (Lipez, J., dissenting) (reasoning that substantial racial disparities in admission rates to selective Boston Latin Examination High School constituted a compelling justification for use of race-based affirmative action).

[61] *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986) (O'Connor, J, concurring) ("A violation of federal or statutory requirements does not arise with the making of a finding; it arises when the wrong is committed.") As noted by Justice O'Connor in *Wygant*, the Supreme Court and Congress have placed consistent emphasis on the value of voluntary efforts to further the objectives of federal anti-discrimination laws. *Id.* at 290. In fact, the value is even greater when a public entity acts to remedy discrimination, "both because of the example its voluntary assumption of responsibility sets and because the remediation of government discrimination is of unique importance." *Id.*

public universities may, consistent with federal law, adopt voluntary race-conscious affirmative action policies under a remedial justification.[62]

II. ANTI-PREFERENCE CONSTRAINTS ON RACE-CONSCIOUS ACTION

The Fourteenth Amendment permits selective public universities in California to adopt voluntary race-conscious admissions policies to remedy admissions practices that would otherwise violate federal anti-discrimination laws like Title VI and its regulations. An important question to consider is whether Proposition 209 permits remedial race-based affirmative action. Analyzing this question requires interpreting the plain language of Proposition 209 and voter intent regarding race-conscious actions taken to counteract the effects of past or ongoing race discrimination.

A. *The Federal Program Exception to Proposition 209*

The California Supreme Court has interpreted Proposition 209 to "set a different course" from the federal law governing race-based affirmative action.[63] In *Hi-Voltage Wire Works v. City of San Jose*, the Supreme Court of California decided that the U.S. Supreme Court's equal protection jurisprudence has "no bearing" on the construction of Proposition 209.[64] After clearly acknowledging that the Fourteenth Amendment Equal Protection Clause permits narrowly tailored race-conscious action to remedy discrimination, the court in *Hi-Voltage* interpreted Proposition 209 to provide California citizens with "greater protection" against race discrimination and race preferences by imposing a *per se* rule against any government use of race.[65] Of course, such a rule, banning all race-conscious actions, would prohibit selective California universities from using race-based remedial affirmative action.

However, voters that have approved state anti-preference laws did include an important exception to the otherwise strict rule against race-conscious

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[62] *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 352 (1978) (joint opinion of Brennan, White, Marshall and Blackmun, J.J., concurring in judgment in part and dissenting in part).

[63] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Ca. 4th 537, 561 (2000)

[64] *Id.* at 567.

[65] *Id.* Specifically, the court observed: "Unlike the equal protection clause, [Proposition 209] categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling interest' exception; we find nothing to suggest the voters intended to include on sub silentio." *Id.*

action set forth in the *Hi-Voltage* decision.[66] Proposition 209 has an exception for race-conscious actions "which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state."[67] As explained by a California appellate court,

> Proposition 209 generally forbids [race-conscious remedial affirmative action]. But there are exceptions to the rule established by Proposition 209. If the failure to employ [race-based remedial measures] would result in ineligibility for a federal program with a loss of federal funds, or if federal law or the United States Constitution required, rather than merely permitted, the use of the scheme, Proposition 209 would not preclude it.[68]

Its plain language and the voter intent behind the provision support construing the federal program exception in a manner that minimizes the negative fiscal impact of anti-preference laws. In other words, voters did not intend the passage of Proposition 209 to result in the loss of large amounts of federal funding contingent upon state government compliance with federal anti-discrimination discrimination laws.[69] The federal program exception to Proposition 209 is an explicit textual articulation of a rationale sufficient to justify a California public universities decision to adopt remedial race-based admission policies. If the narrowly tailored use of race in the admissions process is necessary *to maintain* the university's current level of federal funding or even, interestingly, if the use of race is necessary *to obtain*, in order for the university to be eligible for a new federal program, it seems that the institution would have demonstrated the state law equivalent of a compelling interest sufficient to justify the use of a racial classification.

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[66] In addition to the federal programs exception discussed at length in this Article, Proposition 209 also includes an exception for bona fide qualifications based on gender and for existing court orders and consent decrees.

[67] Cal. Const., art. I, §31, subdivision (e).

[68] Connerly v. State Personnel Bd., 92 Cal. App. 4th 16, 39 (2001); C&C Construction, Inc. v. Sacramento Mun. Util. Dist., 122 Cal. App. 4th 284, 300 (2004). ([t]he California Constitution allows race-based discrimination for no other reason other than to maintain federal funding).

[69] *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide,* 44 UCLA L. REV. 1335, 1387(1997) ("[The federal program exception] was simply meant to foreclose any possible campaign argument that '[t]he CCRI would cost California voters $X million in federal money,'based on some program that opponents might have unearthed.").

B. *Federal Law Supremacy to State Anti-Preference Law*

In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit Court of Appeals held that Title VII does not pre-empt Proposition 209 and that Section 1104 of Title XI "also generally limits the pre-emptive effect of all titles of the Civil Rights Act."[70] The *Coalition* decision rests on the Ninth Circuit's conclusion that Proposition 209's prohibition against race-based affirmative action does not conflict with federal law. In fact, Proposition 209 expressly acknowledges the supremacy of federal anti-discrimination law.[71]

But, as correctly observed by the Ninth Circuit, Proposition 209 would only conflict with federal law in circumstances where the federal law *required*, not simply permitted, race-based affirmative action. As discussed above, the Equal Protection Clause permits voluntary race-conscious action to remedy discrimination[72] and federal statutes like Title VI place an affirmative duty on government entities to remedy the effects of their prior or current race discrimination.[73] The issued raised by the enactment of laws like Proposition 209 is the extent to which a public entity subject to such a law must use race-neutral actions to remedy the effects of race discrimination. What factual and legal predicate is required in order for a California public university's failure to adopt race-based remedial measures to conflict with federal law? Are there any circumstances under which a public university can assert that it has an affirmative federal obligation to use remedial affirmative action?

III. PERMISSIBILITY OF REMEDIAL AFFIRMATIVE ACTION

As the following analysis explains, it is a common, but nevertheless flawed, assumption that public universities in states with anti-preference laws are powerless to redress racial disparities in admission rates of the degree identified in Part I of this Article. To the contrary, public universities may, in effect, determine for themselves whether federal law or programs require the institution to take remedial action, and, even more significantly, whether it requires race-based remedial action.

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[70] Coalition for Economic Equity v. Wilson, 122 F.3d 692, 710 (1997). The district court in *Coalition I*, also found that Title VI and Title IX did not pre-empt Proposition 209. *See* Coalition for Economic Equity v. Wilson, 946 F.Supp. 1480, 1517-19 (N.D. Cal. 1996).

[71] Cal. Const., art. I, §31, subdivision (h) provides: "If any part or parts of [Proposition 209] are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit."

[72] *See infra* pp.__.

[73] *See infra* pp.__.

Because of the unique role universities play in defining their institution-specific mission and goals, the federal requirement exception to Proposition 209 has significant implications for selective admissions to California public universities.[74] First, federal law as well as state anti-preference law function to give universities unfettered discretion in deciding whether to justify large racial disparities in admission rates or to remedy those disparities.[75] Second, institutions that distinguish their legitimate educational goals from their also legitimate, but non-educational, goals, may argue that they possess the institutional expertise to remedy the unjustified adverse impact on minorities with actions that best protect the fiduciary interests of the electorate.

A. *Institutional Discretion in Justification or Remediation*

In the context of higher education, the federal anti-discrimination requirement that applies to a federally funded university with admissions policies that result in legally significant levels of adverse impact is the Title VI prohibition against educational programs that have an unjustified discriminatory effect on particular races. The legal standard by which university compliance with Title VI is judged hinges upon the nexus between the institution's educational goals and the criteria that disproportionately eliminate underrepresented minorities.[76] It is well-documented that heavy weighting of scores on standardized tests like the SAT I result in significantly lower selection rates for African-Americans, Latinos and many other racial groups.[77] However, universities would have difficulty demonstrating a nexus between heavy reliance of SAT scores as an admission criteria and success beyond the first year of college or graduate school.[78]

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[74] *See* Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California's Proposition 209*, 44 SANTA CLARA L. REV. 457, 458 (2004) ("the proper interpretation of [the federal program] exception will be the most heated battleground over the initiative's enforcement").

[75] This establishes the position that the failure of certain racial minorities to satisfy entrance requirements in the same proportion as other races is not a measure of their ultimate performance in college or graduate school but a result of the institution's important, but non-educational, goals to maintain or obtain a certain level of institutional prestige and reputation.

[76] *See supra* p.___.

[77] *See generally* Fredrick Vars & William Bowen, *Scholastic Aptitude Test Scores, Races and Academic Performance in Selective Colleges and Universities*, *in* THE BLACK-WHITE TEST SCORE GAP 457 (Christopher Jenks & Meredith Phillips eds. ,1998); INEQUALITY BY DESIGN (Claude S. Fischer et al. eds., 1996); JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT (1988).

[78] In other words, relying heavily on the criterion that has the most negative effect on minority admissions has a nexus to the non-educational goal of maximizing institutional selectivity and prestige but not to the educational goal of distinguishing *between* applicants that meet the university's minimum qualifications. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 65, 259 (1998) ("In short, above a threshold of 1100, SAT scores have a very limited role to play in

A university taking the position that admitting students based on differences in SAT I scores relates to a legitimate *educational* goal is justifying the racially discriminatory effects of its admissions policies and thereby demonstrating compliance with Title VI and its regulations. On the other hand, universities also have unlimited discretion to acknowledge the limitations of criteria like SAT I scores. Institutions may establish the factual predicate for remedial affirmative action by acknowledging the centrality that *non-educational* goals play in their decision to rely so heavily on criteria that disproportionately disadvantage racial minorities. The degree to which factors like the standard error of measurement and limitations in predictive validity of differences in SAT scores within pools of highly qualified applicants are examples of facts that stack up on the side of remedial affirmative action. Anti-preference laws in no way restrict the ability of educational institutions to acknowledge the absence of nexus between overly dominant reliance on criteria such as SAT scores and educational objectives. Instead, institutions may determine that their inability to establish that racial disparities are justified stems from the fact that the criteria causing the adverse impact are related to the institution's non-educational goals.

Continuing the SAT score example, if public universities establish a factual predicate based on substantial statistical disparities of the type described in Part I and have also establish that the racially adverse impact is caused by its admissions policies is not justified by educational necessity, the federal program exception is applicable according to the plain language of the provision. For instance, if a university has evidence that the degree to which it relies on SAT scores and certain other quantitative criteria do not relate to educational goals as required by federal law, the public university needs to remedy the unjustified admissions disparities to maintain federal funds. The manner and veracity with which institutions identify legitimate educational goals, distinguish them from non-educational goals, and the extent to which they acknowledge that higher education admissions are driven by non-educational factors support the institutional position that either federal law requires the use of remedial affirmative action or that the adverse impact of its admissions policies fall within the federal program exception to the state anti-preference law: it needs to be remedied in order to maintain eligibility for federal funds.

Under federal law, failure to comply with Title VI disparate impact regulations is not contingent on the university admitting to discriminatory intent to depress the admissions of certain races. The factual predicate needed to justify remedial action required by federal law exists so long as university officials are

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explaining differences in graduation rates.) (*"the more selective the college attended, the lower the black dropout rate")* (emphasis in the original).

aware that their reliance on criteria like SAT I scores have a racially discriminatory impact and are not justified by educational necessity. Specifically, when an institution has evidence that criteria such as SAT scores predominant the admissions process more than educationally necessary, they are ineligible for Title VI federal funding because of the Title VI prohibition against maintaining programs that disproportionately exclude racial minorities for reasons unrelated to *educational* goals. In addition to attempting to satisfy generally vague educational goals,[79] most university admission policies are driven by important non-educational goals (i.e., maintaining or improving the institution's national standing in rankings or, more generally, maintaining or enhancing the institution's selectivity, prestige, and fundraising prospects).

B. *Invoking the Federal Requirement Exception*

Even if, as explained n Part II, the Fourteenth Amendment Equal Protection Clause permit race-based remediation if a university has a strong basis in evidence that its admissions practices violate Title VI, it certainly does not necessarily follow that similar remedial race-conscious action is legal under state anti-preference laws like Proposition 209. The critical question in states with anti-preference laws is what legal and factual predicates would be required above and beyond the federal law constraints set forth by the Court in *Croson*. It stands to reason that state anti-preference laws should be construed to require public universities seeking to re-adopt affirmative action under a "remedial rationale" to establish a legal and factual predict more demanding than the strong basis in evidence sufficient to constitute a compelling interest under federal equal protection standards. Courts should look to the language of anti-preference laws and, to the extent it can be discerned, the voter intent behind the adoption of initiatives like Proposition 209.

In fact, because universities have the broad discretion to set and evaluate their compliance with educational and non-educational goals, the federal requirement exception to a law like Proposition 209 is susceptible to the critique that it operates as a major loophole to what should be a *per se* ban on race-conscious affirmative action. This possibility has already prompted firm opponents of race-based affirmative action to argue for a narrow construction of the exception. Commentators like Professor Eugene Volokh favor a rule that would require a public entity wishing to invoke the federal program exception to demonstrate that it would be literally impossible to be eligible for the program

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[79] See Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 HARV. L. REV. 113 (2003).

without using race.[80] Given the central role that race-based affirmative action in higher education played in the debate leading up to the vote on Proposition 209, it seems absurd to suggest that the universities that used to practice such overt racial preferences in minorities admissions have the discretion to invoke the federal requirement exception under any but the most extreme circumstances.

Still, there is at least one significant argument against construing the federal funding requirement so to require a public university exhaust every conceivable race-neutral alternative. The crux of this argument is that the federal program exception should not be construed so narrowly that it is virtually impossible for a public agency to establish or maintain federal funds.[81] If the purpose of the federal program exception to Proposition 209 was to assure voters that ending racial preferences would not leave California to foot the bill for key state functions receiving federal financial support. The public discourse that accompanied the passage of Proposition 209 focused much more pointedly on why voters should reject race-based affirmative action used to effectuate *Bakke-Grutter*-type diversity goals than it did on Proposition 209 as a prohibition against race-based remedial affirmative action. In fact, most voters understood Proposition 209 to be an anti-discrimination provision that was not in conflict with federal anti-discrimination laws.

Accordingly, the rule for invoking the federal program exception to Proposition 209 should acknowledge that the voters intended that the state's public universities would retain the discretion to exercise sound and good faith judgment to assess when using race-based policies protected their financial interest in maintain current levels of federal funding as well as the discretion to determine that race-based action is legitimately necessary to obtain additional funds. The fact that the plain text of the exception includes the phrase "to obtain" implies voter intent to give higher education institutions leeway to use race if necessary to comply with the dictates of federal anti-discrimination law.

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[80] *Id.* at 1387 (describing subsection (e) of Cal. Const. Art. I § 31 as a "narrow exception" and observing that "[i]f it's possible to be eligible without the [race-based] discrimination, then the discrimination is prohibited, because it's not true that the action 'must be taken' for eligibility"). Professor Volokh was "a legal advisor to the pro-CCRI [Proposition 209] campaign and participated in the late stages of the initiative's drafting." *Id.* at 1335 n.a.

[81] The plain language on its face does not require a public entity to exhaust administrative remedies nor to obtain a final administrative or judicial determination that its race-based affirmative action program is required as a condition of eligibility for federal funding in order to fall within the federal funding exception. Likewise, the ordinary meaning of the federal program would not require that public agency actually lose or be threatened with the loss of federal funds before the exception would apply. *See C&C Construction* at 299 (observing that "[a] construction that would require a state entity to become *ineligible* for federal funds before it can lawfully implement a race-based affirmative action program required by federal law" is "inconsistent with the language and purpose" of the federal funding exceptions) (first emphasis added).

Such an interpretation still leaves a very large distance between the U.S. Supreme Court's holding in *Grutter v. Bollinger* that the Fourteenth Amendment Equal Protection Clause recognizes "diversity" as a compelling interest that can justify narrowly tailored use of race in selecting applicants for admissions to public universities[82] and Proposition 209's general rule against race-conscious measures. In the end, voter intent as to the breadth or narrow constraints of the federal program exception cannot be fairly ascertained without clarity from public universities as to whether consistent adverse impact on minorities is educationally necessary or evidence of non-compliance with Title VI and its disparate impact regulations. In the then years since the elimination of diversity affirmative action in California, universities seem reticent to engage in candid articulation of institutional goals and their impact on minority admission rates. At a time when racial diversity has dropped to lower than many imagined possible in a state as racially diverse as California, the consequences of keeping the California stakeholders in the dark are great. Selective public universities willing to explicitly acknowledge that have substantial non-educational purposes for relying on criteria, could open a path in Proposition 209's colorblind paradigm for compliance with the dictates of federal anti-discrimination law.

CONCLUSION

Nothing in state anti-preference laws diminishes a university's obligation to avoid discrimination against minorities. So, institutional risk aversion to accusations that they are guilty of using minority racial preferences may best explain the failure of public universities to use such a powerful exception to Proposition 209 -- an exception that allows race-based affirmative action to protect the former beneficiaries of affirmative action are from *non-minority preferences*. Of course, anti-preference laws like Proposition 209 should be equally capable of ensuring that minority admissions are based upon individual merit as they are of eliminating reverse discrimination against non-minorities. The ultimate goal of laws like California's Proposition 209 was obviously to decrease minority admissions to eliminate racial "preferences" but neither the anti-discrimination nor anti-preference goals of Proposition 209 are served by admission practices that push minority admission rates lower than legally permitted under federal law.

[82] Grutter v. Bollinger, 539 U.S. 322, 325 (2003).