"NEVER LET ME SLIP, 'CAUSE IF I SLIP, THEN I'M SLIPPIN":[1] CALIFORNIA'S PARANOID SLIDE FROM *BAKKE* TO PROPOSITION 209

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I. INTRODUCTION

The purpose of affirmative action is to give our nation a way to finally address the systematic exclusions of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination. . . .

Affirmative action has not always been perfect, and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come.

But the evidence suggests, indeed, screams that that day has not come.[3]

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[1] DR. DRE, *Nuthin' but a "G" Thang, on* THE CHRONIC (Death Row Records/Priority 1993).

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[3] 104 CONG. REC. S10306 (daily ed. July 19, 1995) (address by Pres. Clinton).

> I believe my civil rights record is impeccable, and I believe I have some credibility in this area. I am not out to destroy anybody or devastate anybody. I am out to take another look at what America should be. Can we have a color-blind society, which I think would meet the hopes and aspirations of 90 to 95 percent of all Americans? Some may want special preferences. . . . As I said earlier, unless I am totally wrong, we ought to take another look at the Executive order signed by President Johnson and see if it has been distorted, magnified, or whatever. The goal should be nondiscrimination. That was the original intent of it.[4]

> Affirmative action has not brought us what we want — a colorblind society. It has brought us an extremely color-conscious society. In our universities we have separate dorms, separate social centers. What's next — water fountains? That's not good, and everybody knows it.[5]

These statements represent several segments of the great American debate that promises to rage on. "Affirmative action is a time bomb primed to detonate in the middle of the American political marketplace."[6] Senate Majority Leader Bob Dole laid bare the politically charged nature of the affirmative action issue. While answering questions about his future Presidential aspirations, Dole announced on NBC's *Meet The Press* in February 1995 that he had ordered for review the compilation of a list of all bills and legislation that offer special preferences to minorities.[7] Dole, in announcing the comprehensive "review", simply made sure that he was not left behind in the affirmative action bashing begun in earnest with the election of the 1994 "Republican Revolution" Congress.

Indeed, an anti-affirmative action wave is sweeping the nation, from the halls of Capital Hill to the State of California.[8] The "Revolution" class of 1994, which saw the first Republican majority in Congress in 50 years, set out to end affirmative action on the federal level.[9] The 104th Congress chipped away at affirmative action when they "approved, and the President signed a measure (P.L. 104-7) repealing a program that allowed companies selling broadcast stations or cable television systems to minority-owned businesses to defer capital gains taxes."[10] Further bills introduced in the 104th and 105th Congress restrict af-

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[4] 104 CONG. REC. S3938-9 (daily ed. Mar. 15, 1995) (statement of Sen. Dole).

[5] Steven V. Roberts, *Affirmative Action on the Edge*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 35 (quoting former Education Secretary Bennett).

[6] *Id.* at 32.

[7] *See* Richard Lacayo, *A New Push for Blind Justice*, TIME, Feb. 20, 1995, at 39.

[8] *See id.* Andrew Hacker, the author of TWO NATIONS, an often cited study of race relations in the United States, believes "[r]eaction against affirmative action has been growing for a long time. . . . Even among liberals there is a feeling of weariness." *Id. But see* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998) (Bowen and Bok comprehensively respond to the waves of affirmative action critics with important statistics and gathered data).

[9] *See* Andorra Bruno, *Affirmative Action in the 104th Congress: Selected Legislation*, CRS ISSUE BRIEF, Oct. 25, 1995, at Summary.

[10] *Id.*

firmative action. These measures sought to ban preferential treatment in employment and prohibited preferential treatment with respect to federal contracts, programs, and employment.[11]

In California, more than one million signatures were gathered and affixed to a petition called the California Civil Rights Initiative,[12] which spawned the controversial Proposition 209 ("Prop. 209").[13] Prop. 209's core goal seeks complete elimination of affirmative action programs and preferential treatment in education, employment, and contracting at state and local levels in California.[14] This petition followed closely on the heels of a Governor Pete Wilson orchestrated vote by the University of California ("U.C.") Board of Regents to foreclose any further affirmative action consideration in admissions, hiring, or promotion on all U.C. campuses effective in 1996.[15]

In a historic showdown, the voters of California approved Prop. 209 in November 1996 by a 54.3% to 45.7% majority vote.[16] The advertising campaigns preceding the decisive vote, both for and against the measure, were explosive and dangerously divisive.[17] Indeed, California voters, for the second time in two years, blinked,[18] driving a wedge into the collective soul of race relations in the Golden State.[19]

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[11] *See id.*

[12] *See* K.L. Billingsley, *California to Vote on Banning Race-, Sex-based Preferences*, WASH. TIMES, Feb. 22, 1996, at A3.

[13] *See* Raphael J. Sonenshein, *Take the High Ground on Affirmative Action*, L.A. TIMES, July 26, 1996, at B9. *See also* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (comprehensively analyzing Prop. 209 and its ill-conceived direction and impact).

[14] *See* Billingsley, *supra* note 12.

[15] *See id.*

[16] *See* Dave Lesher, *Battle Over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A1.

[17] *See* Bill Stall & Dan Morain, *Prop. 209 Leading in Early Returns*, L.A. TIMES, Nov. 6, 1996, at A1 (specifying that David Duke was used as an anti-Prop. 209 image and Martin Luther King, Jr, was used as a pro-Prop. 209 image in advertisement campaigns). *See also* Dave Lesher, *Initiative's Backers, GOP Both Intensify Ad Campaigns*, L.A. TIMES, Nov. 1, 1996, at A3 (classifying Prop. 209 advertising as television wars.).

[18] Prop. 187, passed by California voters in November, 1994, sought to end all state aid, including health care and education, to illegal immigrants and their children. *See* George Ramos, *Thousands of Latinos March in Washington*, L.A. TIMES, Oct. 13, 1996, at A1. California, once the nation's leader in progressive legislation and thinking, has, in recent years, become a repudiator of inclusion and diversity and a champion of exclusion and divisiveness. *See id.*

[19] *See* Mateo Gold & Duke Helfand, *Rally Protests Prop. 209*, L.A. TIMES, Oct. 24, 1996, at B1 ("Police arrest 34 after a rally by 800 UCLA students moves off campus and closes Wilshire Boulevard for two hours."). *See also* Dave Lesher, *GOP Pulls King Segment From TV Ad for Prop. 209*, L.A. TIMES, Oct. 25, 1996, at A26 ("Republican Party officials sought to end a raging controversy over their upcoming television commercial for Proposition 209 . . . by removing an eight-second video of Martin Luther King, Jr.'s famous 'I Have a Dream' speech.").

The United States Court of Appeals for the Fifth Circuit and the United States Supreme Court recently joined this apparent wave of affirmative action repudiation. In the 1995 decision *Adarand Constructors v. Peña*,[20] the Supreme Court applied a more stringent Constitutional standard than had ever been applied to a federal government affirmative action employment case.[21] While the ruling did not eradicate affirmative action, the Supreme Court made the requirements to meet and pass Constitutional muster more difficult.[22]

In the recent fifth Circuit case *Hopwood v. Texas*,[23] the appeals court struck down as unconstitutional the University of Texas Law School's affirmative action program. Essentially, the application by the law school of a different admitting scale of Law School Admissions Test ("LSAT") scores and grade point averages ("GPA") for minority students as opposed to majority students was held to be in violation of the Equal Protection Clause of the U.S. Constitution.[24]

The arguments extended recurrently by opponents of affirmative action fall into two camps. The first camp justifies terminating affirmative action because the program has served its purpose, things are truly better now, integration has been achieved, and the time to retire the doctrine has come.[25] The second camp

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[20] 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed. 2d 158 (1995).

[21] *See* 115 S.Ct. at 2099.

[22] *See id.*

[23] *See* 78 F.3d 932 (5th Cir. 1996).

[24] *See id.* at 937.

[25] *See generally* Richard L. Russell, Jr., *A Minority Within a Minority*, L.A. TIMES, July 19, 1996, at B9 ("One year ago this week, the regents of the University of California voted to scrap the use of race and gender in admissions, contracting and hiring. The implied message was that equal opportunity existed for all and the time had come to restore the principles of 'equality and fairness' at the university."). Russell further states that the motives of the regents and the governor in pushing through this affirmative action eradication may not have been entirely pure:

> Politics played a major role in the regents' decision, most participants and observers that day acknowledge. The passage of time as well as the actions of those involved have since clarified the dynamics at work here.
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> The two protagonists last July were a governor seeking to launch an ultimately failed presidential campaign and a political crony of the governor who was uniquely positioned to call for the end of any consideration of race in the UC system.
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> Ward Connerly, the self-appointed spokesman for the regents on this matter, proved to be the perfect foil for Pete Wilson, and vice versa. Connerly, appointed by the governor, describes himself as living proof that a black man can become a success on his own merit, without any help from affirmative action. He steadfastly maintains that since he has succeeded, anyone can.
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> If you accept the notion that equal opportunity exists in [California], then of course all should be treated the same in regard to UC admissions, hiring and contracting. The governor and a majority of [governor appointed] regents came to this simple conclusion. But those who believe in simple answers to complex issues perhaps do not understand this issue—or do not want to.

Id. This viewpoint that affirmative action has served its purpose and run its course was additionally expressed by Sen. Dole in a Congressional address in 1995, *supra* note 4.

argues that affirmative action or "reverse discrimination"[26] is and was invidious from its inception and that it smacks of racism and discrimination against the majority white male class.[27] The question ultimately becomes "has affirmative action achieved its purpose?" Have the affirmative action objectives set out by Kennedy's and Johnson's Executive orders, as well as Nixon's policy, been achieved?

In an attempt to address the question of whether affirmative action's time has come and gone, this article will tie together two current issues: Prop. 209 and the U.C. Domestic Student Enrollment By Ethnicity and Level Statistical Admissions Report for the years 1984 through 1994. In bringing these together, this paper will adopt a singular model by which to compare the ultimate success of affirmative action programs against an attempt to determine the success or failure of such preferential efforts. This model will thus analyze a numerical evalua-

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[26] *See* Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 HOW. L.J. 587, 604 (1995). *See generally* Ruben Navarrette, Jr., *Will Outreach Programs Be the Next Target*, L.A. TIMES, July 28, 1996, at M6 (discussing a White thirteen year old's threat to sue the University of California for "reverse discrimination in a youth outreach program); Spann, *supra* note 13, at 226. A ballot pamphlet drafted by proponents of Prop. 209 cries, " 'Reverse discrimination' based on race or gender is just plain wrong!" *Id.*

[27] *See* John O. McGinnis, *The Peculiar Institution: Abolishing Affirmative Action*, NAT'L REV., Oct. 14, 1996, at 62. *See also* Roy L. Byrnes, Letters to the Times, *Arguments Pro and Con on Prop. 209*, L.A. TIMES, Oct. 23, 1996, at B8 (arguing that the "present discrimination against white men is repugnant."). Justice Sandra Day O'Connor in the *Shaw v. Reno* decision equates voting district reapportionment where race is taken into consideration as "bear[ing] an uncomfortable resemblance to *political apartheid*." 509 U.S. 630 (1993) (emphasis added). *But see* Jesse L. Jackson, *1995 Symposium Statement by Reverend Jesse L. Jackson*, 38 HOW. L.J. 449 (1995). Reverend Jackson responds to the White male charge of reverse discrimination in this keynote address given to the Howard Law School student body:

> Thus, our rights are under attack. Some of them are under attack because white males are frightened that they are losing. Well I want you, as future lawyers, to keep them from getting away with that. After all, white males *are* a minority as 33% of the American population—they have been so for a long time, and we had nothing to do with making them a minority.
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> I repeat, demographically, white males are a minority. But they are 80% of tenured professors, 80% of the U.S. Congress, 90% of the U.S. Senate, 97% of school superintendents, 92% of the top executives of all Forbes 400 industries, and 100% of all U.S. presidents. They own all of the professional athletic teams except the Cincinnati Reds—and Marge Schott inherited that.

Id. at 454. *See also* A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1598 (1994) (describing Senator Jesse Helms' use of divisive political commercials in the 1992 North Carolina Senatorial race against Harvey Gantt, an African-American candidate, where he portrays a "more qualified" White man being rejected for a job over a minority candidate due to discriminatory "racial quotas.").

tion of all University of California admissions statistics.[28]

Thus, in Part II, this article will deal with the verbal and legislative assault heaped upon affirmative action in the past few years, particularly involving Prop. 209 and the U.C. Board of Regents July 1995 decision ending race and gender consideration in admissions. Part III will seek to either justify or repudiate this assault by analyzing U.C. admissions statistics detailing the plight of a minority student in California both before and after affirmative action and where statistically a minority student might stand today regarding admittance to all U.C. schools. If, as many affirmative action opponents assert, affirmative action has accomplished its objectives, one would expect sharp increases in minority admittance to U.C. schools with a climbing representational slope through the years until the minority representation at U.C. schools favorably reflected against majority student representation. Hence, U.C. admissions statistics will help analyze minority representation at U.C. schools after the inception of affirmative action.

Part IV will attempt to accurately forecast what might occur if affirmative action is effectually repealed. Particularly important in this consideration will be the U.C. Board of Regent's 1995 decision.[29] Contiguous with this forecast will also be a brief attempt to project future Supreme Court action, and a 1996 Presidential election encapsulization, including whether affirmative action ever became a crucial election issue capable of turning the election. Part V will conclude this paper with a summary of findings and logical determinations that may be inferred therefrom.

II. RECENT VERBAL AND LEGISLATIVE ATTACKS

A. *The California Civil Rights Initiative and U.C. Regents*

The California Civil Rights Initiative ("CCRI") originated in Berkeley, California, under Thomas Wood and California State University anthropology professor Glynn Custred.[30] CCRI forbids California "to use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in employment, contracts and education."[31] The text of the entire CCRI, which seeks to mimic the language of

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[28] What better way to evaluate the effectiveness of affirmative action than by analyzing it in the context of education? Civil rights champions repeatedly noted education as the crucial factor in ending segregation and Jim Crow laws in the United States. *See generally* Brown v. Board of Education, 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950). Indeed, it was the *Bakke* decision that launched the judicial foray into the affirmative action question, and *Bakke* was an education case. *See* Bakke v. UC Board of Regents, 18 C.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

[29] *See* Billingsley, *supra* note 12.

[30] *See* K.L. Billingsley, *California Civil Rights Initiative Targets Affirmative Action*, WASH. TIMES, Jan. 9, 1995, at A3.

[31] *Id.*

the 1964 Civil Rights Act championed by President Lyndon B. Johnson, states, in part:

> (a) Neither the State of California nor any of its political sub-divisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education, or public contracting.
> (b) This section shall apply only to state action taken after effective date of this section.
> (c) Allowable remedies for violations of this section shall include normal and customary attorney's fees.
> (d) Nothing in this section shall be interpreted as prohibiting classifications based on sex which are reasonably necessary to the normal operation of the State's system of public employment or public education.
> (e) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
> (f) Nothing in this section shall be interpreted as prohibiting state action which is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.
> (g) If any part of this section 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 U.S. Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.[32]

This CCRI language constituted the bulk of a petition requiring 100,000 signatures for inclusion on the November 1996 California ballot for consideration by the entire state.[33] However, the Initiative struggled early and often and seemed doomed just days before the petition deadline, since it was short by over 30,000 signatures.[34] Governor Pete Wilson intervened at the final hour, and, through the use of the power of the State Capital, circulated the petition to have the requisite signatures affixed to the Initiative before the deadline.[35] Thus, Prop. 209 was given much needed life.

Prop. 209 generated fierce California combat as mostly White male proponents of ending affirmative action battled mostly people of color in opposition.[36]

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[32] *See* CCRI CALIFORNIA CIVIL RIGHTS INITIATIVE, PROHIBITION AGAINST STATE DISCRIMINATION OR PREFERENTIAL TREATMENT, INITIATIVE CONSTITUTIONAL AMENDMENT, PROPOSAL FOR THE STATEWIDE BALLOT, 1996 (1995).

[33] *See* Billingsley, *supra* note 12.

[34] *See id.*

[35] *See id.*

[36] *See* Dan Morain, *The Times Poll: Proposition 209 Still Holding Strong Lead*, L.A. TIMES, Oct. 25, 1996, at A1 (quoting Poll numbers prior to the election showing White men supporting Prop. 209 55% to 29% while African-Americans opposed the measure 45% to 37% and Latinos opposed it 42% to 38%). *See also* Bettina Boxall, *Asians and Latinos Divided Over Prop. 209*, L.A. TIMES, Nov. 1, 1996, at A3 (citing an AsianWeek

With the camps clearly divided from the inception of the ballot measure, and with emotions running at a fevered pitch,[37] the California electorate clashed repeatedly and heatedly.[38] One of the areas of disagreement concerned the actual language used in the proposition.[39] Opponents of Prop. 209 claimed that the language used was purposefully confusing and was presented in such a way that a reader would not know that the true intent of the measure was to eradicate affirmative action programs.[40] Proponents of Prop. 209 asserted that the language

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poll finding that 57% of Asian-Americans favored affirmative action).

[37] *See generally* Bari Reed, Stephen Sprague & Richard A. Reynolds, Letters to the Times, *Prop. 209 and State Affirmative Action*, L.A. TIMES, Oct. 31, 1996, at B8; David M. Sherr, Jeff Bishop, Tom Harrison, Valerie Ferguson & Peter M. Small, Letters to the Times, *Controversy Over Prop. 209*, L.A. TIMES, Nov. 4, 1996, at B4; C.J.D. Hughes, Roy L. Byrnes & M. Yvonne Turner, Letters to the Times, *Arguments Pro and Con on Prop. 209*, L.A. TIMES, Oct. 23, 1996, at B8.

[38] *See generally* R.M. Greene, Robert Boone & Joel Garfield, Letters to the Times, *Prop. 209 Debate at Cal State Northridge*, L.A. TIMES, Oct. 1, 1996, at B6; Enid V. Blaylock, Michael A. Estes & Allan J. Favish, Letters to the Times, *Racial Preferences and Civil Rights Measure*, L.A. TIMES, Oct. 4, 1996, at B8.

[39] *See* Bill Stall, *Prop. 209's Fate May Hinge on 2 Words*, L.A. TIMES, Oct. 31, 1996, at A1 ("The potentially pivotal importance of the words "affirmative action" in the debate over Proposition 209 became apparent again . . . with the release of a new opinion poll showing growing opposition to the measure.").

[40] *See* Sonia Nazario, *Celebrities Urge Defeat of Prop. 209*, L.A. TIMES, Oct. 28, 1996, at A3 ("[T]he language of the initiative is deceptive, calling itself a "civil rights initiative."). When voters in field polls were told that Prop. 209 would "ban discrimination and preferential treatment, 59% supported the measure in a statewide July poll by the *Times*. When those same voters were read the opponents' description — that the measure would 'effectively eliminate state-run affirmative action programs' — support dropped 11%" to just 48% supporting Prop. 209. *See also* Bettina Boxall, *A Political Battle Grinds on as a War of Wording*, L.A. TIMES, Oct. 1, 1996, at A3. "Other polls have tracked similar trends." *Id.* at A22. Thus, "opponents complain bitterly that everything from the name supporters chose for Proposition 209 (the California Civil Rights Initiative) to its phraseology is packed with mom and apple-pie buzzwords that mask its true impact." *Id.* Boxall continues:

> In this linguistic duel, the advantage rests with proponents. Even Proposition 209 foes concede that the wording of the initiative is extremely appealing. "We believe the straight language is our toughest opponent," said Pat Ewing, manager of the Campaign to Defeat 209. The measure, an amendment to the California Constitution that would ban state and local government affirmative action programs tailored to women and minorities, makes no mention of affirmative action. Rather, the initiative says that state and local government "shall not discriminate" or "grant preferential treatment" on the basis of race, sex or national origin in the sectors of public employment, education or contracting. "I think the people who came up with this were very, very smart," said Michael Siler, an assistant political science professor at Cal State L.A. "When we go in the voting booth, the mind is going to click and we're going to say, 'Yes, I'm against preferences.' "

Id. As early as July and as late as September, California voters supported Prop. 209 by a 59-60% to 25-29% margin. *See* Dan Morain, *60% of State's Voters Say They Back Prop.*

matched that of the 1964 Civil Rights Act and that no confusion or attempt to confuse existed.[41] When official state election materials were released in July 1996, both sides sought to initiate state court actions, asking judges to allow and disavow certain language that would ultimately appear within the proposition on the November ballot.[42] This topic became increasingly bitter as several polls showed California voters shifting position on affirmative action when different words were used in poll questions.[43]

209, L.A. TIMES, Sept. 19, 1996, at A1. However, as language visibility increased, and awareness was raised, the wide lead the proposition enjoyed through most of the fall "narrowed dramatically" leading into early November. Annie Nakao, *Prop. 209 Lead Shrinks*, S.F. EXAMINER, Oct. 30, 1996, at A1 ("41% say they oppose affirmative action measure, up from 32 % three weeks ago."). Due to increased visibility, increased partisanship, and sharply contrasting images on radio and television ads, "[t]he battle over Proposition 209 has narrowed dramatically to 5 points in the last week of the campaign." *Id.* The new numbers indicated 46% in favor, 41% opposed, and 13% still undecided.

[41] *Cf.* Eric Slater, *Riordan Against Initiative to Ban Preferences*, L.A. TIMES, July 20, 1996, at A1. When Los Angeles Republican Mayor Richard Riordan came out against Prop. 209 claiming that he was against many affirmative action programs but nevertheless against the initiative because it was divisive, California Governor Pete Wilson responded:

> To say that you are opposed to preferences, quotas and set-asides—all the tools of reverse discrimination—but oppose the "California civil rights initiative," which would prohibit them, is double talk. It's like saying that you oppose racial discrimination but are against the Civil Rights Act of 1964, which prohibits discrimination.

Id. at A25. Furthermore, supporters of Prop. 209 claim that "there is nothing devious about the wording" of the initiative. Boxall, *supra* note 40, at A22.

[42] *See* Boxall, *supra* note 40, at A22. On the topic of linguistics, Boxall continues:

> Initiative foes wanted Proposition 209's ballot title and summary to mention affirmative action. Supporters wanted the state legislative analyst's office to drop various references to affirmative action in its report on the initiative's impact. Each side emerged from the court fight with wins and losses. But the pro-209 camp walked away with the key victory. The title of the initiative—which voters will see on the ballot— describes the measure as a "prohibition against discrimination or preferential treatment."

Id. Because race and gender discrimination have long been illegal, opponents of Prop. 209 claimed that inclusion of a ban on "discrimination" was a ploy to "play off [of] people's emotions and deceive them." *Id.*

[43] *See* Stall, *supra* note 39, at A20. "In a recent polls [sic] of likely voters, the Field Poll received far different results regarding support for Proposition 209 than did a *Los Angeles Times* poll only a few days earlier. A key reason appears to be the inclusion of the words "affirmative action" in the questions." *Id.* Including the words "affirmative action" revealed a close 46% to 41% margin in favor of the Prop. 209. Without the words "affirmative action" the poll showed a much wider 47% to 32% margin in favor of the initiative. *See id.* The importance of the "language game" played here cannot be understated. *See* Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 How. L.J. 1, 5 (1997) (discussing Wittgenstein's description of words and categories as arbitrary and in need of construction in order to define social reality). Thus, the state court judges' decisions to exclude the phrase "affirmative action" on the ballot also cannot be understated. Such language battles continue

Ultimately, pro-209 forces prevailed and the CCRI secured its place on the California ballot as Prop. 209, complete with the exact language that its proponents hoped and fought for leading up to the election. Notwithstanding the tightening of the race until election day, Prop. 209 passed with an 8% margin of victory.[44]

A second matter of passionate debate argued vigilantly prior to the election, and continuing today, deals with the topic of preferential treatment as a whole. At the very same time that Prop. 209 was being sold and trumpeted by Ward Connerly and Governor Wilson as an action to do away with unfair preferences based on race and gender, Governor Wilson and many regents simultaneously granted preferences to incoming U.C. students based on personal relationships, friendships with parents, and associations with large benefactors.[45] Thus, while

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in the State of Washington as voters prepare to weigh in on the future of affirmative action with an election day, November 3, 1998, vote. *See Affirmative Action on Washington Ballot*, (visited Oct. 5, 1998) <http://www.pointcast.com>. ("Forget statistics and stories of jobs lost or won. The future of affirmative action in Washington state may hinge on a few carefully chosen words."). *Id.* The same language dispute that beleagured California voters now confronts Washington voters. *See id.* "On November 3, voters will see this question on the ballot: 'Shall government entities be prohibited from discriminating against or granting preferential treatment to individuals or groups based on race, sex, color, ethnicity, or national origin?' " *Id.* Affirmative action supporters objected to such language as misleading and preferred that the ballot state: "Do you want to end the use of affirmative action for women and minorities?" *Id.* "If affirmative action campaigns elsewhere and polls in Washington state are any indication, the wording could make all the difference. While supporters say they support affirmative action, they tend to oppose it when . . . it [is] described as 'discriminatory' or 'preferential.' " *Id.*

[44] *See* Lesher, *supra* note 16.

[45] *See* Amy Wallace, *VIPs Do Influence Some Admissions, UC Provost Says*, L.A. TIMES, May 17, 1996, at A1 ("Last July the regents voted to abolish race and gender preferences in the university's admissions, contracting and hiring policies. After recent revelations that some regents themselves sought to exert influence on behalf of particular applicants, some have accused the board of publicly attacking preferences while privately trying to exploit them."). *See also* Editorial, *Regents Must Deal With Preferential UC Admissions*, L.A. TIMES, May 20, 1996, at B4. The *Los Angeles Times* Editorial board issued a stinging rebuke:

> A majority of the 26 University of California regents are digging themselves deeper and deeper into a hole on the issue of admissions policy. Last July, the regents made the shocking, and we think dead wrong, decision to toss out the policy of affirmative action on admissions. Now the board is jumping around on how to deal with disclosures of high-level influence on student admissions at the nation's most prestigious public campuses.
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> On Thursday, UC Provost C. Judson King told the board that the admissions influence issue had created what he gingerly called "a dichotomy." Prospective students are specifically discouraged from including letters of recommendation with their applications. But, King disclosed, if letters are included they will be considered. What's an applicant to do?
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> The proof of the pudding lies in King's acknowledgment that letters or inquiries from

formulating and imparting the virtues of a "color-blind" California, Wilson, Connerly, and the U.C. Board of Regents were secretly and behind closed doors practicing "affirmative action for the affluent."[46] The argument relied on most stridently by proponents of Prop. 209 was that unqualified minorities were "taking" the seats of more qualified majority students.[47] Statistically and realistically

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regents, legislators and other big shots, including of course, major donors to the UC campuses, *do* make a difference. A *Los Angeles Times* investigation uncovered this problem.

But in the wake of the affirmative action decision, which was said to undo special treatment for applicants, the continuation of high-level influence on admissions seems strange and unfair. The board will have to dig its way out of this one. *Id.* at B4. In response, the regents claimed that the number of students admitted under special preferential consideration was minute, just ".03% of the 40,000 admissions typically granted each fall." *Id. But see* Editorial, *Public Education Myths Fuel the Push for Prop. 209*, L.A. TIMES, Oct. 28, 1996, at B4 (reporting that just 4% of all students accepted by U.C. schools would not be eligible were it not for special exceptions, those special exceptions including athletics, musical ability, artistic ability, low socioeconomic status, rural location, leadership, community service, race and gender, physical disability, and unofficial exceptions for children of influential Californians, major donors and friends of U.C. regents). Thus, the travesty of unfair race and gender preferences sought to be shut down by Prop. 209 affected only a small portion of merely 4% of admittees while the regents own claim of preferential minutiae sits at .03%.

[46] Michael J. Wenzl, Letters to the Times, *Donations and UCLA Admissions*, L.A. TIMES, May 14, 1996, at B6 ("It should be pointed out that once a great public institution is 'privatized,' one can hardly be surprised when it adopts policies that favor those who are donating large sums of money—affirmative action for the affluent."). Public opinion rained upon Governor Wilson and the Board of Regents, forcing the regents to adopt a hastily drawn, vaguely worded resolution "that cautioned against any attempts to 'influence inappropriately' the outcome of individual admissions decisions and called upon regents to "take care to avoid the fact or appearance of self-dealing or special interest." Wallace, *supra* note 45, at A22.

[47] *See* Editorial, *Public Education Myths Fuel the Push for Prop. 209, supra* note 45. In response to the unqualified minority displacing the more qualified white student theory, the *Los Angeles Times* Editorial Staff provided the following:

> MYTH: Proposition 209 would eliminate a system that promotes the admission of unqualified minorities.
>
> REALITY: Ninety-six percent of the students admitted into the UC system are among the top 12.5% of the state's graduating high school seniors. About 4% of students accepted by UC would normally not be eligible but are admitted by special exception; many are athletes, of all races and ethnicities. Most high school graduates, regardless of gender, race or ethnicity, don't make the 12.5% cut. Those who do are high achievers.
>
> Another part of the myth: By taking up UC spots, African-Americans and Latino students are squeezing out whites and Asian-Americans. Wrong again. Blacks made up slightly more than 4%, or 5,016, of all 1995 undergraduate students in the statewide UC system. Latinos made up about 14%, or 17,024. (The system wide undergraduate student body numbered 121,738.) Further, all UC-eligible California students are offered spots within the nine-campus system. * * *
>
> Proposition 209 would not touch most preferences regularly used in state educa-

speaking, this argument fails.[48] Nevertheless, hype, politicization, and mistaken perception drove Prop. 209 to statewide victory. The measure effectively eliminated race and gender as preferential considerations while systematically protecting and maintaining favored treatment for the powerful, affluent, influential, and talented friends of governors and regents. Now, following California's lead, additional states stand ready to bring their own anti-affirmative action campaigns to their next election.[49]

III. STATISTICAL ANALYSIS

A. *Using California U.C. Admissions Standards as a Litmus Test*

What better litmus test to use in analyzing whether affirmative action has run its course, than the school system that brought America and California *Regents of the University of California v. Bakke*,[50] Executive Order W-124-95,[51] the Adoption of Resolution: Policy Ensuring Equal Treatment— Admissions,[52] and

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tion, hiring and contracts—it targets only women and minorities.

Id. Thus, preferences and exceptions for myriad reasons continue to exist while a plus factor consideration for race or gender is outlawed under Prop. 209. *See id.*

[48] *See id. See also* Russell, *supra* note 25. Russell states clearly that it is *impermissible* for the U.C. to admit unqualified students:

> In attempting to justify their vote last year, some regents seemed to be saying that UC was pulling ineligible students off the streets of South-Central Los Angeles and turning away eligible students. What nonsense. The state's Master Plan for Higher Education call for UC to choose from among the top 12.5% of graduating high school seniors, but they are not necessarily admitted to the campus of their choice.

Id. See also Ellis Close, *Cutting Through the Race Rhetoric*, NEWSWEEK, Sept. 28, 1998, at 75 (reviewing William Bowen & Derek Bok's recent book THE SHAPE OF THE RIVER wherein Close reports that the book "dispassionately demolish[es] one conservative [affirmative action] shibboleth after another"). Close quotes Bowen and Bok as finding in their book: "If white students filled all the places created by reducing black enrollment, the overall white probability of admission would rise by only 1.5 percentage points." *Id.*

[49] *See* Rene Sanchez & Sue Anne Pressley, *Minority Admissions Fall With Preferences Ban*, WASH. POST, May 19, 1997, at A11 ("campaigns to stop the use of racial preferences on campuses—in some cases modeled after the examples set in California and Texas—are growing nationwide.").

[50] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978).

[51] Exec. Order No. W-124-95, "To End Preferential Treatment and to Promote Individual Opportunity Based on Merit" (Ca. 1995).

[52] Memorandum To The Board Of Regents: Item For Action (July 20, 1995) (U.C. Board of Regents provisional language adopted in compliance with Governor Executive Order calling for end of race or gender based preference in the U.C. admissions, hiring, or contracting process) (on file with author). *See also* Jeffrey B. Wolff, Comment, *Affirmative Action in College and Graduate School Admissions—The Effects of* Hopwood *and the Actions of the U.C. Board of Regents on its Continued Existence*, 50 SMU L. REV. 627, 654 n.230-31 (1997) (citing *Los Angeles Times* report detailing the U.C. Board of Regents vote to end affirmative action in U.C. policies).

Prop. 209? If, as opponents of affirmative action assert, this remedial measure accomplished its purpose,[53] then admissions statistics should bear this out clearly. One would expect significant statistical jumps in African-American and Latino representation as race and gender based preferential treatments progress. Any statistical leap should be counterbalanced by an adverse drop in White representation in U.C. admission statistics.

B. *U.C. Davis Admissions — Pre-*Bakke *(1978)*

The United States Supreme Court in *Bakke* considered for the first and only time (thus far) the role that race may permissibly play in educational pursuits, particularly in higher education admission policies.[54] In its landmark decision, the Court pronounced the doctrine that has been the law of the land since 1978: race or national origin may permissibly be considered as a "plus" factor in the admissions process.[55] To consider race as a factor in the admissions process, "the educational institution must support its action with a 'compelling interest.' Among the 'interests' identified by the Court as compelling is obtaining the educational benefits of a diverse student body."[56] The *Bakke* holding determined that "setting aside a fixed number of admission spaces to ensure that members of a specified race are admitted" is invalid as not narrowly tailored enough.[57]

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[53] *See* Russell, *supra* note 25 (quoting Ward Connerly, the chairman of CCRI and a U.C. Regent, stating "[w]e have done all that we're going to do to level the playing field with regard to race."). The author, Richard Russell, Jr., also a U.C. Regent, observes of Connerly:

> I have spent the past year at regents' meetings with Connerly, read his various pronouncements in the press and find that the person who emerges is different from the principled advocate Connerly holds himself out to be. Connerly states that race is largely irrelevant in America today, yet he has taken up the fight for fairness for whites and Asians.

Id.

[54] *See Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978).

[55] *See* 438 U.S. at 311-19.

[56] Letter from John E. Palomino, Regional Civil Rights Director, United States Department of Education, to Dr. Chang-Lin Tien, Chancellor, University of California, Berkeley 12 (Mar. 1, 1996) ("Palomino") (responding to and rejecting a complaint filed by an individual challenging Berkeley's affirmative action program as discriminatory toward white students). This response rejected the claim and analyzed Berkeley's policy against the *Bakke* standard finding that the policy fit comfortably within the *Bakke* doctrine:

> Colleges and universities have a First Amendment right to seek diversity in admission to fulfill their academic mission through the "robust exchange of ideas." However, the use of race-conscious means must be narrowly tailored to meet this objective.
>
> Whether a college's use of race or national origin as a factor in the admission process is sufficiently "narrowly tailored" involves a case-by-case determination based on the particular circumstances involved.

Id. at 1, 12.

[57] *Id.* at 12 ("The goal of diversity will not support the use of quotas as a means.").

Prior to the 1978 *Bakke* decision declaring U.C. Davis' program unconstitutional, the medical school employed a program wherein each year's entering class 16 out of 100 seats were set aside for minority students.[58] In the years 1970 through 1975, 500 students were admitted into the medical school.[59] Of those 500 admitted students, 119 were minorities (African-American, Latino, or Asian).[60] Without annually reserving 16 seats for minorities during that five year period, only 48 minority students out of 500 admitted would have been minorities.[61] Not all 71 students of color admitted into U.C. Davis's medical school would have been admitted if not for the school's efforts to increase minority representation.

Of the 48 minority students admitted into the medical school outside of the 16 seat reservation, 41 were Asian.[62] Hence, in a five year period, only seven (six Latino, one African-American) out of 500 students admitted under Davis's general program were non-Asian students of color.[63] If one considers neither the cultural bias in the established testing and general admissions program, nor the fact that the entire admissions process for all of the University's programs has been developed and administered by White males, then the lack of "qualified" minority applicants in U.C. Davis's program is striking.

Unquestionably, something had to be done to include minorities in U.C. Davis's medical program and something presumably needed to be done by all U.C. schools if they ever hoped to achieve the goal of diversity outlined in *Bakke*.

C. *U.C. Admissions — Post-*Bakke *(1978-1996)*

In response to the *Bakke* decision and the obvious need for marked improvement within the California higher education system, the California State Legislature acted decisively:

> In order to address underrepresentation of minorities in higher education the California State Legislature passed, in 1974, Assembly Concurrent Resolution (ACR) 151 and in 1984, ACR 83. To address this vital state interest, the State Legislators instructed the State-funded Institutions, such as the U.C. system, to increase opportunity for underrepresented minority groups (URM) and ensure diversity in higher education. In 1988, the Regents of the University of California adopted the "University Policy on Undergraduate Admissions" (U.C. Policy) to be implemented in the Fall 1990 Term. The U.C. Policy states that in addition to achieving its mission and historic commitment to provide places for all eligible California residents, it also "seeks to enroll, on each of its campuses, a student body that, beyond meeting the University's eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that encompasses the

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[58] *See Bakke*, 438 U.S. at 275-76.

[59] *See id.* at 275.

[60] *See id.* at 276.

[61] *See id.*

[62] *See id.*

[63] *See id.*

broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California."[64]

U.C. undergraduate enrollment encompassing the entire nine-campus system reported that in 1980, two years after *Bakke* and six years after the California Legislature's first mandate, over 70.2% of all students enrolled within were White.[65] Also in 1980, U.C. statistics indicated the following minority representations of all students enrolled: 12.6% Asian, 5.3% Chicano/Latino, 3.6% African-American, and 8.3% divided between American Indian (0.5%), International (2.3%), and Declined to State (5.5%).[66]

Four years later, U.C. enrollment in 1984 indicated the following representations of all undergraduate students enrolled: 67.2% White, 16.6% Asian, 6.6% Chicano/Latino, and 4.0% African-American. The total undergraduate enrollment figure in 1984 showed that 106,167 students took classes at U.C. campuses.[67]

Five years later, in 1989, and presumably after U.C.'s administration of affirmative action programs to the fullest, U.C. undergraduate enrollment lists the following representations of all students enrolled: 57.8% White, 20.7% Asian, 10.6% Chicano/Latino, and 4.7% African-American.[68]

The final available statistical measure is a 1994 enrollment report of the 122,321 students in the undergraduate programs. By this time, affirmative action programs were administered for over fifteen years. In 1994, 45.8% of enrolled undergraduate students were White, 29.8% were Asian, 13.2% were Chicano/Latino, 4.0% were African-American, and 1.0% were American Indian.[69]

An additional statistical report shows a yearly percentage enrollment figure for each ethnic group for the years 1984 through 1994.[70] If affirmative action programs were implemented religiously, the numbers should have shown an increase in African-American and Latino enrollment through the eleven year period with a corresponding decrease in White and Asian enrollment during the same period. This hypothetical statistical change would be due to the fact that U.C. classified African-Americans, Latinos, Chicanos, and American Indians as underrepresented and Whites and Asian-Americans as not underrepresented.[71]

However, the 1984 African-American enrollment in U.C. undergraduate programs showed that 4,209 Black students comprised 4.2% of the total undergraduate enrollment at U.C.[72] Ten years later, in 1994, 4,852 Black students made up

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[64] Palomino, *supra* note 56, at 3-4. This U.C. policy outlines a complex structure of categorizing, using many different factors in determining admission offers to U.C. campuses. *See id.* at 4-12.

[65] *See* University of California (U.C. Office of the President, Stud. Academic Services), Student Ethnicity Rep. C85330 (1995) [hereinafter Ethnicity Report].

[66] *See id.* at 5.

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.* at 11.

[71] *See* Palomino, *supra* note 56, at 5.

[72] *See* Ethnicity Report, *supra* note 65, at 11.

4.2% of all U.C. enrolled undergraduate students.[73] After ten years of affirmative action programs, African-American representation within U.C. campuses had increased 0%.

In 1989, the number of African-American students in the U.C. system marked a watershed event when African-American representation within the over 100,000 student system climbed to an all time high of 4.9%.[74]

Similarly, Latino representation within the U.C. system stood at 2.3% in 1984 (2,353 students). After ten years of progressive affirmative action programs, in 1994, Latino students made up 4.2% (4,839) of all those enrolled.[75] This was a climb of only 1.9% in representation over ten years. This number seems astonishing when contrasted against the White enrollment numbers of 60,000 students and the Asian enrollment number of 30,000 students.[76] It is difficult to imagine what injustice the U.C. Regents sought to remedy when they outlawed race and gender plus factor consideration in admissions. Prop. 209 presents an equally muddled picture.

White students experienced a significant decline in enrollment numbers and percentage of student population between 1980 and 1994.[77] In 1980, White students comprised over 70% of all enrolled students (approximately 65,000). In 1989, White enrollment dropped to 57.8% (about 69,000 out of 124,000). By 1994, White enrollment fell to 45.8% of all enrolled U.C. students.[78] However, the statistical drop of White student representation within U.C. is not counterbalanced by a sharp increase in underrepresented minority representation, as an opponent of affirmative action would assert. Rather, the soft decline in White student representation is mirrored almost identically by a soft incline in Asian-American student representation (12.6% in 1980, 16.6% in 1984, 20.7% in 1989, and 29.8% in 1994).[79]

The increase in Asian-American student representation and the consequent decline in White student representation *cannot* be attributed to affirmative action programs. Asian-Americans have not been considered an "underrepresented minority" for purposes of preferential admissions within U.C. for at least nine years.[80]

D. *U.C. Admissions — Today (1997)*

Prior to the historic vote on Prop. 209, Charles Young and Chang-Lin Tien, two of the U.C. system's most prominent chancellors, Young at UCLA and Tien at U.C. Berkeley, spoke out against the measure.[81] The chancellors argued the

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[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.* at 5.

[78] *See* Ethnicity Report, *supra* note 65 at 5.

[79] *See id.*

[80] Palomino, *supra* note 56, at 5.

[81] *See* Amy Wallace & Bettina Boxall, *Chancellors Say Prop. 209 Would Hurt Educa-*

initiative would "erode the quality of higher education" and send a message of hate to California's minority residents.[82]

Since the November 1996 passage of Prop. 209, prognosticators have forecast dire consequences for African-American and Latino representation within state schools.[83] While hard statistical evidence of such predictions must wait until the 1998 season of undergraduate admissions has been completed, it can already be said that the U.C. system struggles to implement the new system even as over 50,000 high school seniors wait to see what happens to their applications.[84] Indeed, early reports indicate that the U.C. Board of Regent's decision to outlaw affirmative action already devastated minority representation within its law school admissions process.[85] Further, early statistics demonstrate that the *Hop-*

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tion, L.A. TIMES, Oct. 21, 1996, at A3 ("[T]he chancellors said Proposition 209 would turn their campuses into bastions of Asian Americans and whites, cutting attendance of blacks and Latinos—already a relatively small number—by at least half. Both chancellors said such a decrease would diminish the education of all students.").

[82] *Id.*

[83] *See* Amy Wallace, *Prop. 209 to Have Immediate Effect on UC Applicants*, L.A. TIMES, Nov. 9, 1996, at A1. Wallace reports:

> UC President Richard C. Atkinson, who issued a statement the day after the election pledging the university's continuing commitment to diversity, has said that if race and gender preferences are removed and not replaced by any other mechanisms, there will be a "great reduction" in the number of underrepresented minorities who attend UC. * * *
>
> Moreover, UCLA and UC Berkeley released reports recently predicting that elimination of race and gender preferences in admissions would cut the number of underrepresented students at those campuses by 50% to 70%.

Id. at A28.

[84] *See id.* at A1. Early returns suggest that *Hopwood* and Prop. 209 created severe consequences at undergraduate institutions. *See* Roy B. Shilling, Jr., *Ruling's Impact on Minority Enrollment Could Spread*, U.S.A. TODAY, Sept. 4, 1998, at A17. One president of a selective liberal arts college in Georgetown, Texas, Southwestern University, reports that minority enrollment plummeted from 21% in 1995 to 8% in 1998. *See id.* President Shilling does not attribute this fall to minority students not being sufficiently qualified, but instead cites the eradication of all scholarships that considered race forcing "high-achieving African-American and Hispanic students" to look elsewhere "without the support of race-targeted competetive scholarships or other financial aid." *Id.* President Shilling responded to affirmative action opponents by stating "[a]s a college president who first stepped into this role in 1969, during the height of the civil rights struggle, I'm saddened to see a return to less enlightening times." *Id.*

[85] *See* Sanchez & Pressley, *supra* note 49, at A1. Sanchez and Pressley report that for 1997:

> At UCLA's law school, 21 black students have been selected for next fall's class—an 80 percent drop from last year and the lowest number of African Americans offered admission since about 1970. At the UC-Berkeley law school, 14 blacks have been accepted in a class of 792, down from 75 last year. The decline among Hispanic students at each law school is similar. Graduate programs were the first to be affected by the new race-neutral policy ordered by university regents.

wood decision had an equally deleterious affect on minority law school admissions offers at the University of Texas Law School.[86]

E. *Statistical Conclusions and Inferences*

The argument that unqualified minority students seize the seats of more qualified White students in the U.C. admissions system due to affirmative action is

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Id. The Dean at UCLA's law school, recognizing that "the number of white and Asian American students being admitted . . . has risen sharply this spring" while noting the drop in Black and Latino representation states "[w]e're very distressed—it's a huge drop . . . [a]nd its even worse than it appears because we'll be lucky to get even half of those students to come to the campuses." *Id.* This prognastication has proven true. Of U.C. Berkeley's 14 admitted African-American law students, *zero* accepted admission into the 1997 entering law class. *Facing a Sea of White Faces in Law School*, S.L. TRIB. at A11 (July 12, 1997) [hereinafter *Sea of White*]. Berkeley saw its law school admissions plummet from 75 black students accepted in the 1996 entering class (20 enrolled) to just 14 accepted in the 1997 entering class (with one enrolled due to a student's deferred admission from the 1996 class until 1997). *Id.* Latino acceptance and enrollment rates also cascaded downward at Berkeley as just 14 Latino students will enroll in 1997 in contrast to the 28 that enrolled in 1996. *Id.* A similar free-fall has ocurred at UCLA's law school. Administrators expect 10 African-American students to enroll, when 19 enrolled in 1996. *Id.*

[86] *See* Sanchez & Pressley, *supra* note 49, at A11. "At both the University of California and the University of Texas, the effect of landmark new prohibitions on racial preferences has been swift and dramatic, and it is raising alarm on campuses nationwide about the consequences of losing affirmative actions." *Id.* at A1. University of Texas statistics indicate that, like the UCLA and Boalt Hall law school admissions,:

> The same patterns also are emerging at the University of Texas flagship campus in Austin—where graduate and undergraduate programs were subject to new policies this year. Ten black students—compared with 65 last year—have been admitted for the fall to the law school, and nearly 400 fewer black and hispanic students have been offered admission as undergraduates, a 20 percent decline.

Id. Of the ten African-American students admitted, the U.T. law school is expecting just four to enter the 1997 class. *See Sea of White, supra* note 84, at A11. The ten acceptances and the four enrollees is down from 65 accepted and 31 enrolled in 1996. *Id.* Latino enrollment at U.T. law school plunged just as drastically from 42 in 1996 (70 accepted) to 21 in 1997 (34 admitted). *Id.* Affirmative action critics point to these statistics as direct evidence "that with affirmative action policies, too many minority students who are not meeting standards are still being admitted." Sanchez & Pressley *id.* at A11. However, others, including the Dean of U.T. law school bemoan the startling statistics:

> The effect is going to be devastating. . . . It is tragic because as one of the leading law schools in the nation, we have been enormously successful in terms of the numbers of African American and Mexican American lawyers we produced. This school [UT law school] has 650 African American alumni and 1,350 Mexican American alumni, and there is no law school in the country that has produced anywhere near as many Mexican American lawyers.

Id.

statistically baseless.[87] African-American enrollment numbers, for all intents and purposes, stagnanted since the inception of U.C. affirmative action programs.[88] Latino enrollment numbers have been miniscule as well.[89]

White complainants have no statistical measure supporting their complaints. Indeed, taking special preferences into account (such as those by including U.C. Regents and California Governor Wilson's intervention), the total number of minority students considered preferentially (somewhere between 1 and 4%) runs barely ahead of the number of White students given special preference through affirmative action for the affluent (somewhere between 1 and 3%).[90] While some gleefully dance on the apparent coffin of affirmative action,[91] it is clear that affirmative action is not going down quietly and without a fight.[92] In truth, while a Republican controlled Congress and a Reagan-Bush-dominated federal judiciary's actions cause many to seek to declare the demise of affirmative action,[93] small victories for affirmative action proponents show clearly that those who value diversity may prevail in the long run.[94]

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[87] *See* Ethnicity Report, *supra* note 65.

[88] *See id.*

[89] *See id. See also* Close, *supra* note 48.

[90] *See supra* notes 44-48 and accompanying text.

[91] *See* Eric S. Cohen, *Affirmative Action: Rest in Peace,* CAMPUS, Spring 1998, at 1 ("Recent (and perhaps pending) legal victories across the nation are sending a strong message to America's colleges and universities regarding racial preferences: Americans are fed up with affirmative action as now practiced, no matter how well-intentioned, well-meaning, or morally superior its defenders claim to be.").

[92] *See* David Hess, *House Vote Supports Affirmative Action,* S.L. TRIB., May 7, 1998, at A1. Hess reports that the House of Representatives defeated an amendment to an education bill that would have banned affirmative action programs at public colleges and univerisities. *See id.* "The 249 [to] 171 vote against the amendment was the second decisive defeat this year for a legislative proposal aimed at overturning affirmative action." *Id. See also* Stephen Burd, *House Votes Down Proposal to Bar Racial Preferences in Admission,* THE CHRON. OF HIGHER ED., May 15, 1998, at A35. Burd further reports that had Congress passed the education bill, including the anti-affimative action amendment, President Clinton would have vetoed it. *See id.*; *see generally* Richard Willing, *Black Jurist Conference Begins with Controversy,* U.S.A. TODAY, Sept. 25, 1998, at A7 (describing conflict between black federal judges and anti-affirmative action lecturer).

[93] *See generally* Tony Mecia, *Affirmative Action Challenged in Colleges Across America,* CAMPUS, Spring 1998, at 3; Mark Levin, *Texas-sized Hullabaloo Erupts When Truth is Spoken in Austin,* CAMPUS, Spring 1998, at 4; Jeremy Beer, *The Psychology of the Mob: Ignore the Facts, Hype the Party Line,* CAMPUS, Spring 1998, at 5.

[94] The City of Houston recently defeated a city proposition ending affirmative action programs in Houston. *See Affirmative Action on Washington Ballot, supra* note 4. *See also* Hess, *supra* note 92.

IV. BRIEF FORECAST

A. *November 1996 Election*

The 1996 Presidential election in California was supposed to be, in part, about affirmative action.[95] Bill Clinton won California handily, and the Republican Party, while overwhelmingly supporting Prop. 209, could not engender support for their party or their candidate by trumpeting the anti-affirmative action message.[96] In fact, the issue of Prop. 209 proved to be an issue of internal divisiveness for the Republican party.[97] Not until Bob Dole made California a desperate late priority in his 1996 Presidential bid, did he use the eradication of affirmative action as a lynchpin issue.[98] Notwithstanding the late arrival of Senator Dole, the politicization of anti-affirmative action activisim became fashionable in conservative circles through the maneuverings of California Governor Pete Wilson, whose aborted attempt at the 1996 Presidency was, at its very core, supported by his use of the U.C. Regents decision to end affirmative action[99] and his last second revival of Prop. 209 from its CCRI petition death bed.[100]

Nevertheless, in his 1997 State of the Union address, President Clinton again voiced support for increasing diversity and minority opportunity through the use of appropriate affirmative action programs.[101] Clinton voiced continued support of affirmative action on a consistent "mend it, don't end it basis."[102] In recent criticism of Prop. 209, Clinton warned that the repeal of affirmative action "could have a 'devastating' impact on educational opportunities for minorities."

Indeed, university administrators carefully develop programs and plans that continue to value diversity and admit students of color. Simultaneously, they abide by the preferential prohibitions keeping with the overt written intentions of such bans and seriously undermining the covert and unwritten intentions.[103]

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[95] *See* Maria L. LaGanga, *Prop. 209 Applies Best Principles of Nation, Dole Says*, L.A. TIMES, Oct. 29, 1996, at A1.

[96] *See* Bill McAllister, *No Push by GOP to End Affirmative Action*, L.A. TIMES, July 15, 1996, at A18.

[97] *See id.*

[98] *See* LaGanga, *supra* note 95.

[99] *See* Russell, *supra* note 25.

[100] *See* Billingsley, *supra* note 12.

[101] *See generally* John F. Harris & Peter Baker, *Clinton Says He'll Mount 'Crusade' for Education*, WASH. POST, Feb. 5, 1997, at A1.

[102] *See* 104 Cong. Rec. 510306, *supra* note 3. *But see* Jackson, *supra* note 27 (stating that one must beware of individuals who may sit in the White House in professed support but are often wolves in sheeps clothing).

[103] *See generally* Sanchez & Pressley, *supra* note 49, at A11. However, while school officials try creatively to recreate admissions standards, students of color have received a message from California and Texas.

> But already there are signs that the *Hopwood* case may be discouraging minority students from applying to Texas campuses—a trend also evident in California. At the University of Texas law school, the flashpoint of the affirmative action debate, appli-

B. *Supreme Court Movement*

By denying certiorari in the *Hopwood* case,[104] the Supreme Court again refused to consider changing the law that was determined in *Bakke*.[105] The Supreme Court also recently refused to review a Ninth Circuit decision upholding Prop. 209. Thus, *Bakke* is still the law of the land outside of the Fifth Circuit and California. "It is . . . noteworthy that the [Supreme] Court's denial of certiorari was not accompanied by any dissent or comment from any Justice, although it seems likely that . . . some of the Justices on the current Court would have deemed the Constitutional issues raised by Proposition 209 to be worthy of . . . review."[106] However, it does not seem far off, particularly with the current right lean of the Court, that a case will come before the Court where the facts are such that a definitive ruling on the state of affirmative action will be made.[107]

The Supreme Court will have a number of opportunities in the near future to determine the fate of affirmative action nationwide.[108] While the exact reason the Supreme Court Justices have refused to weigh in on *Hopwood* and *Coalition for Econ. Equity* (Prop. 209) is open to speculation, affirmative action opponents should realize that Supreme Court limitations on affirmative action have only been narrowly approved in 5 to 4 votes.[109] One retirement from the majority five Justices followed by one President Clinton Supreme Court appointment would

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> cations from black students fell 42 percent this year. Among undergraduates, applications from blacks declined by 26 percent and applications from Hispanics by 23 percent.

Id. Such changes, the large drop in minority applications received and the massive drop in offers of admissions to African-American and Lation students, prompted University of Texas law professor Patrick Wooley to say "[i]'m concerned that we're moving toward the resegregation of the law school." *Id. See also* Shilling, *supra* note 84.

[104] *See* David G. Savage, *Court Lets Stand Ruling Against Race Preference*, L.A. TIMES, July 2, 1996, at A12.

[105] *See* Spann, *supra* note 13, at 193 ("The Supreme Court declined to enter the doctrinal debate . . . concerning the constitutionality of Proposition 209, electing to deny certiorari rather than address the merits of the pending facial challenge to Proposition 209.").

[106] *Id.* at 199 (citing Coalition for Econ. Equity v. Wilson, 118 S.Ct. 397, *cert. denied*, 122 F.3d 692 (9th Cir. 1997)).

[107] *See id.* at 198-201.

[108] *See id.* at 199-200. Spann explains that each time a particular affirmative action program is invalidated by Prop. 209, the United States Supreme Court will be asked to determine the constitutionality of the proposition by reviewing state appellate decisions. *See id.* at 200. Furthermore, as the State of Washington prepares to vote on an anti-affirmative action measure, undoubtedly, the Supreme Court will be asked to review the initiative if it passes. *See id.* "In a recent poll, the majority of Washington voters said they support affirmative action. But the same poll found 53% of them supported abolishing affirmative action when such programs were defined as granting 'preferential treatment' to women and minorities." *Id.*

[109] *See generally* Adarand v. Pena, 515 U.S. 200 (1995) (limitations approved by a divided court 5 to 4); City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989).

likely swing the Reagan-Bush-dominated Supreme Court into a 5 to 4 vote in favor of "mending not ending" affirmative action. The "wave" of anti-affirmative action sentiment is a tenuous wave indeed.

V. CONCLUSION

The passage of Prop. 209 and the decision rendered in *Hopwood v. Texas* now mean that a California university or a university located within the Fifth Circuit may consider the fact that "[a] farm boy from Idaho can bring something to . . . [a] College that a Bostonian cannot offer,"[110] but is summarily stonewalled from considering that "a black student can usually bring something that a white person cannot offer."[111] In essence, Fifth Circuit judges and California voters mandated that while preferential consideration given to students for athletic ability, musical talent, artistic flair, leadership skills, physical disability, affluent lineage, friendships with Deans, Presidents, Governors, and regents, and having influential parents is fine when determining university admissions, preferential consideration due to race and gender is not fine.

Once again, the majority White voters of California, and the majority White male Fifth Circuit and Ninth Circuit benches outnumbered and outvoted minorities and, thereby, determined what rights (or lack thereof) people of color possess. Higher education does not appear to be one of those rights.

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[110] *Bakke*, 438 U.S. at 316. The Court further states:

In practice, this new definition of diversity has meant that race has been a factor in some admission decision. When the Committee on Admissions reviews the large middle groups of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases.

Id.

[111] *Id.*