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AFFIRMATIVE ACTION AT THE UNIVERSITY OF CALIFORNIA

MICHAEL W. LYNCH*

INTRODUCTION

Affirmative action has been one of the most hotly contested public policy issues in recent years. Although programs of affirmative action (broadly defined as those programs that seek to give racial and ethnic minorities and women an institutional preference in hiring, university admissions and government contracting) are ubiquitous, they have for the most part been implemented and overseen by the least democratic branches of our government, the courts and administrative bureaucracies. As a result, the public knows very little about how these programs actually operate and affect people's lives.

Unlike many other states, affirmative action programs have come under public scrutiny in California at least twice in recent years. In 1995, the Regents of the University of California system, after much deliberation, voted to end race-based decision-making in the systems' admissions, hiring and contracting. In 1996, the voters of California approved a constitutional amendment prohibiting California governments from using race, ethnicity and gender as decision-making factors.

This paper examines affirmative action in the undergraduate admissions programs of two of the University of California systems' most prestigious schools, UC Berkeley and UCLA, in light of these recent events. This paper describes how race-based decision-making permeates the entire admission process, how far the federal government will go to legitimize such practices, and ultimately how such practices have undermined the principle of equality upon which our government rests.

BACKGROUND

On July 20, 1995, the University of California Board of Regents reversed more than thirty years of increasingly race-conscious decision-making at the country's most prestigious public system of higher education. The Regents attracted national

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media attention when they enacted two resolutions to end racial preferences in admissions, hiring and contracting.¹ The resolution to end racial preferences in admissions stated: "[T]he 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."² This resolution increased the proportion of freshmen to be admitted solely on the basis of academic achievement from a range of 40-60% to a range of 50-75%.

The Chancellors of the nine University of California (UC) campuses were unanimous in their opposition to the resolution as were many administrators and faculty members. Following the Regents' vote, Larry Vanderhoef, the Chancellor of UC Davis told the *New York Times*, "I am not yet ready to concede that we will not be able to pursue diversity, even with these new rules."³ Another UC official said that admissions officers were sure to find a way to "wiggle around" the new rules.⁴ And Cornelius Hopper, the Vice President of Health Affairs for the University of California, said that "creative faculties" should "be able to find ways to achieve diversity."⁵ The *New York Times* reporter concluded that "many in the academic community appeared to be convinced that they could merely do an end run around the Regents' mandate."⁶

Although the leaders of the UC Academic Senate opposed the policy,⁷ this may be more a measure of academic timidity than of professorial perceptions. A poll conducted by the Roper Center for Public Opinion Research at the University of Connecticut found that a plurality of the faculty supported the ideas driving the Regents' policy.⁸ In the same vein, it is widely reported by the media that students are against the policy, although such an unlikely source as UC Berkeley's student news-

1. SP-1, The Board of Regents, Office of the Secretary, July 12, 1995; SP-2, The Board of Regents, Office of the Secretary, July 12, 1995.

2. SP-1, *supra* note 1.

3. William H. Honan, *On a California Campus, Diversity Goals Go Unchanged*, N.Y. TIMES, July 24, 1995, at A2.

4. *Id.*

5. *Id.*

6. *Id.*

7. Amy Wallace, *UC Defends Race, Gender Preferences*, L.A. TIMES, July 11, 1995, at A3.

8. Roper Center Survey of Faculty Opinion about Affirmative Action at the University of California, conducted Dec. 7-19, 1995.

paper editorialized in favor of the policy.⁹ And this support was no fluke. UC Berkeley's student newspaper also endorsed Proposition 209, which promises to end racial preferences in California's public sector.¹⁰

Controversy erupted again in January 1996, when UC President Richard C. Atkinson, an opponent of the Regents' new policies, announced that the race-neutral admission policies would not take effect until the Fall of 1998, a year after the resolution's backers had planned for it to take effect. This outraged Governor Wilson and Regent Ward Connerly, who authored the resolutions, and Atkinson, who had only recently been appointed to the UC's top post, backtracked on his unilateral declaration and struck a compromise. The Regents' policy would be implemented for the class entering in the Spring of 1998.¹¹

While this was big news at the time, it has since been rendered moot by electoral events. On November 5, 1996, California voters passed Proposition 209, an amendment to the state constitution, which provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."¹² Vindicating the Regents' controversial vote, the people of California, whose taxes support the UC system, let it be known that they not only support the Regents' policy, but want it extended across the entire public sector and enshrined in the state constitution. To their credit, UC administrators decided not to buck the will of the voters. UC Provost C. Judson King issued a letter shortly after the election instructing UC's nine chancellors to eliminate race, sex, color, ethnicity and national origin from the admission process for the approximately 20,000 applicants who will apply for admission in the Fall of 1998.¹³ However, a federal district judge issued a preliminary injunction against Proposition 209, and for the time being, the UC cannot use the legal authority of the Proposition to eliminate racial preferences.¹⁴ Opponents of the Regents' decision are

9. K.L. Billingsley, *Berkeley Students Endorse Giving up Affirmative Action*, WASH. TIMES, Sept. 26, 1995, at A3 (quoting THE DAILY CALIFORNIAN, Sept. 21, 1995).

10. THE DAILY CALIFORNIAN, Nov. 4, 1996.

11. B. Drummond Ayres, Jr., *Apology in Dispute on Affirmative Action*, N.Y. TIMES, Jan. 30, 1996, at A8.

12. Proposition 209, cl. A.

13. Amy Wallace, *Prop. 209 to Have Immediate Effect on UC Applicants' Education*, L.A. TIMES, Nov. 9, 1996, at A1.

14. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996) (order granting preliminary injunction).

attempting to block its implementation for graduate admissions by asking the Equal Employment Opportunity Commission to define graduate students as employees. If they succeed, graduate admissions would be treated as hiring, which would mean that race-based decision-making might be required due to the federal dollars the university receives.¹⁵

THE ADMISSIONS PROCESSES AT UC BERKELEY AND UCLA

In order to discuss affirmative action in the UC system, its role in providing Californians with educational opportunity must be placed in context. The UC system is the top-tier institution in California's three-tier public higher education system that includes nine University of California (UC) campuses,¹⁶ twenty-two California State University (CSU) campuses, and one hundred and six open-enrollment community colleges.

The UC system encompasses eight undergraduate campuses, four law schools, five medical schools and a complete range of graduate programs. Due to its heavily subsidized tuition, UC's various programs are extremely good bargains for California residents. Its best law and medical schools enjoy national reputations. The same holds true for its undergraduate programs, especially those at UC Berkeley and UCLA, whose degrees bestow upon their recipients prestige comparable to that of the most exclusive and expensive private institutions in America. Although controversies over affirmative action often focus on the professional schools and these top two undergraduate schools, the other six undergraduate schools offer quality education at a very competitive price for California residents.

UC's mandate is to accept the top 12.5% of California's graduating high-school seniors.¹⁷ The slightly less prestigious CSU system is charged with educating the top 33% of the state's graduating seniors.¹⁸ The community colleges, which offer lower division classes for students planning to transfer to a four-year program and vocational classes for students seeking to develop directly marketable skills, accept any California resident, even students who have not graduated from high school. The gradu-

15. Kenneth R. Weiss, *Complaint Filed on UC Preferences Ban*, L.A. TIMES, Jan. 11, 1997, at A18.

16. The nine campuses are composed of eight undergraduate campuses and UC San Francisco, which is strictly a graduate health sciences school.

17. Letter of Finding from John E. Palomino, Regional Civil Rights Director, United States Dep't of Educ., Office of Civil Rights, to Dr. Chang-Lin Tien, Chancellor, University of California, Berkeley 3 (Mar. 1, 1996) (on file with NOTRE DAME J.L. ETHICS & PUB. POL'Y) [hereinafter UCB LOF].

18. *Id.*

ates of the community colleges may transfer to a UC or CSU school with grades lower than would be expected of an entering freshman.¹⁹

The UC system has a problem. Its mission, as outlined in the University of California's Master Plan, is to educate those students performing academically in the top 12.5% of California's graduating high school class.²⁰ Resolutions adopted by the California General Assembly in 1974 and 1984, however, directed the UC system to ensure diversity in its student body.²¹ In 1988, the UC Regents adopted a policy on undergraduate admissions which stated, in part, that beyond its more narrow mission, the university "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 broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California."²² Administrators have interpreted this policy to mean that entering classes should approximately reflect the ethnic proportions of the graduating high school class.²³

Unfortunately, high school graduates from the state's various ethnic groups do not qualify for admission to the UC system in equal proportions.²⁴ This means that any ethnic group whose members qualify for admission to the UC system at a rate of less than 12.5% will be under-represented in the system if admissions standards are not lowered for that group (and all other factors are held constant). Likewise, any ethnic group whose members qualify for admission to the UC system at a rate exceeding 12.5% will be over-represented unless members of that group are discriminated *against* in the admission process (or a great number choose, for some reason, not to attend a UC institution).

Table I shows the racial and ethnic breakdown of 1990 high school graduates and their UC eligibility rates for 1990, the last year for which published data is available.

19. *Id.*

20. *Id.* at 3.

21. Assembly Concurrent Resolution No. 151 (1974); Assembly Concurrent Resolution No. 83 (1984).

22. UCB LOF, *supra* note 17, at 3-4.

23. Arthur Hu, *Another View of Affirmative Action*, ASIAN WEEK, April 5, 1996, at 7.

24. Michael Lynch, *Choosing by Color: Affirmative Action at the University of California*, CLAREMONT INST. BRIEFING, Sept. 7, 1995, at 45.

TABLE I—RACIAL AND ETHNIC COMPOSITION OF CALIFORNIA
HIGH SCHOOL GRADUATES, THEIR RATE OF ELIGIBILITY
FOR ADMISSION TO THE UC SYSTEM, AND
THEIR PROPORTION OF THE UC
ELIGIBLE APPLICANT POOL FOR 1990²⁵

	<i>Percent of California High School Graduates</i>	<i>Percent Eligible for Admission to UC System</i>	<i>Percent of UC Eligible Applicant Pool</i>
<i>American Indian</i>	1%	NA	NA
<i>Asian American</i>	14%	40%	30%
<i>Chicano/Latino</i>	23%	7%	8%
<i>African American</i>	7%	8%	3%
<i>White</i>	55%	21%	59%

There are significant disparities in the eligibility rates for the various ethnic groups. While four in ten Asian-American California high school graduates were eligible for admission to the UC system, only one in five white graduates were eligible, and less than one in ten African-American and Hispanic graduates were eligible.

Table I also illustrates that the varying eligibility rates for the different racial and ethnic groups produce a qualified applicant pool with a racial and ethnic composition that differs dramatically from that of the graduating high school seniors. While Asian-Americans students constituted only 14% of the graduating high school seniors in 1990, they accounted for 30% of the students eligible for admission to the UC system. White students accounted for 55% of high school graduates and 59% of the UC eligibility pool. African-American and Hispanic students, however, constituted approximately 7% and 23% respectively of the high school graduates, but accounted for only 3% and 8% respectively of the students eligible for admission to the UC system.

These underlying demographic realities, over which the UC system has little control, render impossible its goal of enrolling a class that matches the racial and ethnic proportions of the state's high school graduates at each of the eight UC undergraduate campuses. Since admission to the various UC institutions is not coordinated, each institution attempts to meet this mandate,

25. The figures used in column one of this table are taken from *Information Digest: A Reference Guide for Student Affirmative Action at the University of California*, Fall 1995, at 57 [hereinafter *Information Digest*]. The figures used in column two are taken from *Information Digest*, at 13. The figures used in column three are compiled from information provided to the author by the California Postsecondary Education Commission.

effectively competing against the others, as well as other colleges and universities, for minorities from a limited applicant pool. The UC system's two most sought-after undergraduate schools, UC Berkeley and UCLA, enroll a disproportionate number of the targeted minorities headed for the UC system. These schools can accomplish this, however, only by using a race-conscious admission process.

TABLE II—1995 UC BERKELEY UNDERGRADUATE
ADMISSION MATRIX²⁶

<i>Social Diversity Score (SDS)</i>	<i>Academic Index Score (AIS)</i>						
	1	2	3	4	5	6	7
Resident Minority with Econ. Disadv. (1)							
Resident Minority (2)							
Non-resident Minority (3)							
Significant Economic Disadvantage (4)							
Educational Disadvantage							
Economic Disadvantage (5)							
Resident							
Domestic Non-resident							
Foreign Non-resident							

	AUTOMATIC ADMISSION
	DISCRETIONARY ADMISSION*
	DISCRETIONARY DENIAL**
	AUTOMATIC DENIAL

- (1) This category includes: (a) American Indian, African-American or Chicano residents and Low SES or disability; (b) disabled residents and Low SES; and (c) residents who are re-entry applicants (over 24 years old).
- (2) This category includes: (a) American Indian, African-American or Chicano residents; and (b) Latino residents and Low SES or disability.
- (3) This category includes: (a) Latino residents; and (b) American Indian, African-American, or Chicano non-residents.
- (4) This category includes Very Low SES applicants.
- (5) This category includes: (a) Latino non-residents; and (b) Low SES.

Very Low SES is defined as: (a) neither parent holds four-year college degree, (b) neither parent is employed in professional or managerial occupation, and (c) family has annual income below \$39,635.

Low SES is defined as: (a) neither parent has education beyond high school graduation; (b) parents are employed in clerical, operative, service, homemaker, or laborer position; and (c) family has annual income of less than \$50,000.

*Applicants in this category are granted or denied admission after their file has been reviewed.

**Applicants in these categories are denied Fall admission but given an option to enroll in Spring.

26. Letter from Bob Laird, UC Berkeley Office of Undergraduate Admission and Relations with Schools, to Michael Lynch, Pacific Research Institute (Apr. 12, 1996) (on file with NOTRE DAME J.L. ETHICS & PUB. POL'Y).

UC Berkeley used the admissions matrix pictured above to admit the 1995 entering class of the College of Letters and Science. Under this admission system, an applicant was categorized according to two variables: an Academic Index Score (AIS), and a Social Diversity Score (SDS). The AIS was determined by adding an applicant's grade point average (multiplied by 1,000) and combined Scholastic Aptitude Test (SAT) and Achievement Tests scores. The SDS was determined by an applicant's racial or ethnic background, place of citizenship and residency, socio-economic background, and educational background.

In 1995, applicants to UC Berkeley were admitted in the following manner: all applicants whose Academic Index Score placed them in category 1 were admitted, regardless of their Social Diversity Score. This group accounted for approximately 51% of the admits and satisfied the UC's requirement that 40-60% of students be admitted on academic qualifications alone. The average GPA of these 3,360 students was 3.99 and the average combined SAT score was 1363.

A second group of applicants whose AIS placed them in categories 2-4, and who were either members of a targeted minority group, economically disadvantaged, or educationally disadvantaged, were also automatically admitted. A third group of applicants' AIS placed them in categories 2-7, and were not domestic non-resident or foreign applicants, were admitted after their files were reviewed by the admissions staff. The average GPA of these two admission groups was 3.79 and the average combined SAT score was 1118.

A fourth group of 190 students was admitted by exception, which means that these students were not UC eligible but had special athletic or artistic talents, or otherwise had demonstrated the ability to succeed at UC Berkeley. Up to 6% of entering students can be admitted in this manner. Less than 3% of all UC undergraduates in 1995 were admitted by exception, but more than 80% of the students admitted by exception were either African American or Hispanic. More African-American and Hispanic students were admitted by exception than by academic achievement alone. Four times as many African-American students were admitted by exception than by academic achievement alone.

It is important to note two things at this point. First, every student who was admitted in the first three groups was in the top 12.5% of the high school graduates, and thus was qualified to attend UC Berkeley. The controversy surrounding the use of racial and ethnic criteria in the admissions process, therefore, is not about admitting unqualified applicants; it is about admitting

applicants with lower academic credentials. A careful examination of the matrix illustrates why this is an issue. In the pursuit of diversity, UC Berkeley prefers non-resident minority applicants over resident, non-minority applicants with similar academic accomplishments. Non-resident minority applicants are automatically admitted with an AIS in category 3, but resident non-minority, non-disadvantaged applicants are generally rejected in the same category.

The second thing to note is that while the UC reports its data in three admissions categories (academic achievement only, academic achievement and social diversity factors, and exception), there were really four ways in which individuals were admitted to UC Berkeley in 1995. These four ways were: (1) automatic admission on the basis of academic achievement alone; (2) automatic admission on the basis of both academic achievement and social diversity factors; (3) discretionary admission on the basis of academic achievement and social diversity factors; and (4) admission by exception. This raises some interesting issues. First, it is impossible to be admitted on the basis of extracurricular achievement delineated in a file unless the file is actually read. In 1995, all minority applicants, except non-resident Latinos, received a full review of their admission files regardless of their grades, parental income, or state of residence. California residents with no claim to disadvantage, however, had their files reviewed only if their AIS placed them in category 2—a range in which every minority student was automatically admitted. This practice was brought to the Regents' attention and was changed. For the entering class of 1996, both UC Berkeley and UCLA reviewed each applicant's file before deciding to deny an applicant admission.

Table III displays by racial and ethnic category the manner of acceptance and the academic achievement of the applicants who were accepted to attend the College of Letters and Science at UC Berkeley in 1995.

It is clear from this table that the gate through which individuals enter UC Berkeley is largely segregated by racial category. While 71% of Asian-American students and 67% of white students enter UC Berkeley based solely on academic performance, only 4% of African-American students, 5% of Chicano students, 10% of American Indian students, and 24% of Latino students are admitted to UC Berkeley via this mechanism. This produces an entering class with wide discrepancies in SAT scores and GPAs.

TABLE III—MANNER OF ACCEPTANCE AND ACADEMIC ACHIEVEMENT OF APPLICANTS ACCEPTED TO ATTEND UC BERKELEY IN 1995, CATEGORIZED BY RACIAL AND ETHNIC GROUP²⁷

	Number of Acceptances	Percent Accepted by AIS Alone	Percent Accepted by AIS & SDS	Percent Accepted by Exception	Average GPA	Average SAT
<i>African American</i>	552	4%	79%	17%	3.56	1029
<i>American Indian</i>	122	10%	86%	4%	3.72	1149
<i>Asian American</i>	2027	71%	28%	0%	3.97	1312
<i>Chicano</i>	1031	5%	89%	6%	3.70	1048
<i>Latino</i>	273	24%	74%	2%	3.83	1137
<i>White</i>	2100	67%	33%	1%	3.93	1312
<i>Other</i>	91	66%	34%	0%	3.95	1280
<i>No Data</i>	300	74%	26%	0%	3.96	1330
<i>International</i>	114	72%	26%	2%	3.92	1304

Until 1996, UCLA also admitted students based on a matrix, although its matrix differed slightly from UC Berkeley. In 1994, approximately 69% of all students were admitted to UCLA on the basis of academic achievement alone.²⁸ Ninety-five percent of white students and 84% of Asian-American students were admitted solely on the basis of their academic achievement, while only 12% of African-American students and 17% of Hispanic students were admitted on this basis.²⁹

A second track, one that evaluated students on the basis of academic credentials and such factors as race and parental income, was responsible for 16% of 1994 acceptances.³⁰ Thirty-five percent of African-American students and 42% of Hispanic students were accepted on this track, while only 3% of white students and 11% of Asian-American students were admitted this way.³¹ A third track existed to evaluate students who failed to gain admission via the other two tracks. This track admitted one out of six students in 1994. More than 50% of the African-American students and 41% of the Hispanic students admitted to UCLA gained admission through this track.³²

27. The figures used in this table are compiled from information provided to the author by the UC Berkeley Office of Undergraduate Admissions.

28. See Christopher Shea, *Under UCLA's Elaborate System Race Makes a Big Difference*, CHRON. OF HIGHER EDUC., April 28, 1995, at A12.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

Like UC Berkeley, UCLA's multi-tiered admission process produced significant disparities in entering freshmen GPA's and SAT scores. In 1994, the average GPA and combined SAT scores for entering freshmen were: 3.45 and 951 for African Americans; 3.60 and 966 for Chicanos; 3.76 and 1016 for Latinos; 4.03 and 1182 for Asian Americans, and 3.97 and 1186 for whites.³³ (It is possible to earn a GPA of up to 4.50 with credit for advanced placement classes.)

UC Berkeley and UCLA have developed very elaborate and often inscrutable admissions systems to ensure that the racial and ethnic proportions of entering freshmen classes are as close to the racial and ethnic proportions of graduating high school seniors as possible. Due to the underlying reality of the academic performance of high school seniors, however, UC Berkeley and UCLA have had to rely heavily on race and ethnicity as criteria for admission, as UC Berkeley's admissions matrix illustrates. In practical terms, the race-based admissions processes at UC Berkeley and UCLA have meant that any targeted minority who is minimally eligible for admission to the UC system is given a spot at the system's most prestigious schools while applicants from non-preferred racial and ethnic groups must meet much higher standards. This is not by accident, but by design. Doctor Rae Lee Siporin, the Director of Undergraduate Admissions at UCLA, notes that UCLA already admits all of the targeted minority students in the top of the 12.5% range but most of them are in the bottom portion of the 12.5% range. UCLA ensures diversity by using race or ethnicity as a criterion.

Critics of race-based admissions propose that while race is an unacceptable criterion, a color-blind policy that gave preferences for economically-disadvantaged students would be acceptable. Since the parental income of targeted minority students entering the UC system is on average lower than that of other students, these critics reason that this would have the happy side effect of boosting minority admissions without the racial stigma. Unfortunately, they are wrong. UC Berkeley and UCLA already use economic disadvantage as a factor in their matrices, although it is a much less significant factor than race or ethnicity. It is true that targeted minority students, on average, come from homes with lower income than white or Asian-American students; it is also true that there are plenty of high-performing poor white and Asian-American students who would displace better-off targeted

33. Letter from Rae Lee Siporin, Director, UCLA Undergraduate Admissions and Relations with Schools, to Michael Lynch, Pacific Research Institute (Aug. 16, 1996) (on file with NOTRE DAME J.L. ETHICS & PUB. POL'Y).

minorities if race was removed as a criterion and economic disadvantage was emphasized. "For us, black students in the bottom end of the pool are not particularly disadvantaged," UCLA's Siporin notes. "Most of our black population is more middle class than not."³⁴ It is precisely these students, middle-of-the-road academic performing minorities, that the race-conscious admission matrices are designed to admit.

THE OFFICE OF CIVIL RIGHTS' INVESTIGATION OF THE ADMISSIONS PROCESSES AT UC BERKELEY AND UCLA

In 1989, *Asian Week* columnist Arthur Hu filed an official complaint with the Office of Civil Rights at the U.S. Department of Education alleging that UC Berkeley and UCLA maintained "quotas and differential admissions standards at the University of California at Berkeley and Los Angeles which discriminate not only against Asians, but against all racial groups."³⁵ In brief, Hu's complaint accused the UC system, primarily through UC Berkeley and UCLA, of maintaining quotas for minority group admissions based on representation among the state's high school graduates. In the wake of the California General Assembly's 1984 resolution that stressed the need for diversity at the UC,³⁶ the number of minority admits increased dramatically while that of whites fell, especially at competitive schools. Hu based his complaint on this evidence. Hu wrote:

UC claims that it uses goals, but not quotas to admit minorities according to state proportions. In 1988, UC has actually admitted all minorities in equal to, or even greater than graduate proportions. Since this is caused by affirmative action, and is not based on qualifications, but on numerical goals, this policy is a[n] . . . illegal quota in fact, if not in name.³⁷

Hu pointed out that by concentrating minority students at UC Berkeley and UCLA, the UC system "discriminates against whites and Asians who apply to these campuses."³⁸ Hu claimed that this "also discriminates against minorities at other campuses such as UC Santa Cruz because it makes them [the campuses]

34. *Id.*

35. Complaint letter by Arthur Hu, to Gary Curran, United States Dep't of Educ. (May 22, 1989), at 1 (on file with NOTRE DAME J.L. ETHICS & PUB. POL'Y) [hereinafter *Hu Complaint*]. The *Hu Complaint* can be accessed at <http://www.halcyon.com/arthurhu/>

36. A.C.R. No. 83, *supra* note 21.

37. *Hu Complaint*, *supra* note 35, at 1-2.

38. *Id.* at 2.

primarily white and Asian."³⁹ This is a direct consequence of the high minority acceptance rates at UC Berkeley and UCLA.

The Office of Civil Rights (OCR) is charged with ensuring that colleges and universities which receive federal money do not discriminate. OCR carries out this mission primarily by enforcing Title VI of the 1964 Civil Rights Act which it has interpreted to mean that "no person in the United States shall on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies."⁴⁰ In addition, OCR seeks to ensure that "a recipient [of federal money] may not directly or through contractual arrangements on the grounds of race, color, or national origin treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefits provided under the program."⁴¹ Complicating, if not contradicting, these first two seeming prohibitions against classification and differential treatment based on race, OCR regulations state that "even in the absence of a prior finding that a recipient has discriminated in the past, 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."⁴²

These were the standards against which the legality of UC Berkeley's admissions policy was judged. The first two standards prohibit treating people differently depending on their race and ethnicity while the third standard states that a university "may take affirmative action." If these sections are to be internally consistent, then racial preferences cannot be considered "affirmative action." That is, affirmative action programs are proscribed from using racial preferences. They can, however, concentrate on recruitment.

In a letter dated March 1, 1996, nearly seven years after the original complaint was filed, OCR released its findings. After review of the process and still undisclosed data, the OCR concluded that UC Berkeley did not discriminate based on race.⁴³ Among other things mentioned, OCR found that "[t]he program

39. *Id.*

40. UCB LOF, *supra* note 17, at 2.

41. *Id.*

42. *Id.*

43. *Id.* at 1.

employed no quotas or set-asides, and all students, regardless of race or national origin, competed with all other students."⁴⁴ Furthermore, any problem associated with not being admitted to UC Berkeley was mitigated by the fact that applicants were free to apply again, were offered admission at a later date, or, if UC-eligible, guaranteed a spot at a less competitive UC school. The official Letter of Finding (LOF) found:

Any impact of the affirmative action component on students who were not admitted to UC Berkeley was substantially diminished by the fact that all UC-eligible students must be admitted by the System to one of the UC campuses, and many students achieved admission to UC Berkeley subsequent to an initial denial of admission.⁴⁵

To arrive at its conclusion of non-discrimination, OCR's investigation focused on the 1993 admissions process.⁴⁶ There is plenty in OCR's own Letter of Finding to make one wonder how it concluded that UC Berkeley does not "on the ground of race, color, or national origin treat an individual differently from others in determining whether he satisfied any admission [or] enrollment requirement."⁴⁷ OCR stopped short of saying that all applicants were judged by the same standards regardless of race, which would, of course, be untrue. OCR concluded that "the process ensured that no applicant was considered or excluded from consideration for selection solely on the basis of race or national origin."⁴⁸ This simply means that UC Berkeley put all of the applicants on the same grid before it gave preferences depending on racial and ethnic classification. Clearly, individuals were held to different standards depending solely on their race and ethnicity. OCR dismissed Hu's complaint, which alleged that by concentrating minorities at two schools, the admissions process denied a diverse student body at other schools, by pointing out that the individual schools and applicants are the ones making the decisions.

Finally, OCR determined that UC Berkeley's racially determined admissions matrix "did not impose an undue burden on non-beneficiaries . . . [because] by state law, all UC-eligible students must receive admission to a UC campus Thus, no student would experience exclusion from the opportunity to

44. *Id.*

45. *Id.*

46. In this article, I have used 1995 UC Berkeley data because it is the most complete data available to the public. Although OCR based its investigation on 1993 data, it did not release this data with its Letter of Finding.

47. UCB LOF, *supra* note 17, at 2.

48. *Id.*

receive a University of California education."⁴⁹ This "UC Riverside is just as good as UC Berkeley" logic should apply to targeted minority students as well. It is never explained why UC Santa Cruz equals UC Berkeley for white and Asian-American students, but not for preferred minority students. Or why, for example, deferred admission to UC Berkeley is considered the equivalent of a direct admission for in-state white and Asian-American students, when this same standard apparently is not applied to targeted minorities, some of whom are wealthy or out-of-state residents.

While OCR conducted a seven-year investigation of UC Berkeley undergraduate admissions policies that concluded with a highly qualitative Letter of Finding, its investigation of UCLA was highly statistical.⁵⁰ But like its LOF for UC Berkeley, OCR's statistical investigation of UCLA sought more to obfuscate than to clarify. OCR focused its investigation of UCLA on whether the school discriminated in its admissions process against Asian-American applicants. Incredibly, to determine whether this was the case, it compared Asian-American admission rates, controlled for various factors such as grades and test scores, with white admission rates controlled for the same factors. After examining the data, OCR "did not find that UCLA has established quotas or admission caps for Asian applicants, nor did OCR find that UCLA had engaged in discrimination against Asian applicants in the implementation of its admission programs."⁵¹

What is incredible about this investigation is that OCR restricted its range of comparison to white and Asian-American applicants. "To determine compliance, OCR sought to determine whether UCLA treated Asian applicants different from non-minority applicants on the basis of race in its admissions process."⁵² The Letter of Finding continued, "OCR first examined whether Asian applicants were admitted at comparable or significantly disparate rates compared to white applicants. If Asian applicants were admitted to UCLA at a rate significantly lower than that of white applicants, OCR then sought to determine whether this lower rate was a result of differences in qualifications."⁵³

49. *Id.* at 14.

50. See letter from John E. Palomino, Regional Civil Rights Director, United States Dep't of Educ., Office for Civil Rights, to Charles E. Young, Chancellor, University of California at Los Angeles (Sept. 8, 1995) (on file with NOTRE DAME J.L. ETHICS AND PUB. POL'Y) [hereinafter UCLA LOF].

51. *Id.* at 1.

52. *Id.* at 2.

53. *Id.* at 3.

Individuals from both of these groups are disadvantaged under UCLA's admission process relative to preferred minorities. In essence, OCR ensured that it would find nothing meaningful with this sleight of hand. Such a comparison is tantamount to evaluating whether African Americans were discriminated against in the Jim Crow South by comparing their treatment with that afforded to American Indians. It is a useless exercise in results-driven research. The story, of course, is that like African Americans and American Indians in the Jim Crow South, both whites and Asian Americans are disadvantaged in UCLA's admission procedures. That Asian Americans are treated equally as bad as whites tells us nothing of interest. It is also hard to square such an investigative restriction with OCR's own mandate

that a recipient [of federal money] may not directly or through contractual or other arrangements on the ground of race, color, or national origin treat an individual differently from others in determining whether he satisfies any admission, enrollment, or quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefits provided under the program.⁵⁴

OCR, in a separate section, examined UCLA's affirmative action program. As it would find for UC Berkeley in 1993, it essentially determined that since the school was under pressure to achieve racial diversity, and since this diversity could not be achieved without treating people differently based on their race, UCLA was justified in holding different applicants to different standards based solely on their race.⁵⁵

CONCLUSION

At least two interesting and important things emerge from OCR's investigation into the admissions policies at UC Berkeley and UCLA. The first is the degree to which affirmative action is no longer a separate program but is rather inseparably intertwined with the whole admission process. It is meaningless to talk about affirmative action admits in the context of UC Berkeley and UCLA, unless one is referring to the few individuals who are admitted by exception solely because of their race. (This number may be very small, as this category exists to admit students who have special talents, such as athletes, musicians, etc., who will greatly benefit the school but who do not have the aca-

54. *Id.* at 2.

55. *Id.* at 12-16.

demic credentials to attend the schools.) The point of affirmative action is no longer to benefit disadvantaged individuals, but rather to achieve group representation. These are separate goals. The former emphasizes recruiting individuals who have actually suffered identifiable harm and offering them a leg up. The latter presumes whole races of people are disadvantaged, even those with large incomes and professional parents, and grants them automatic institutional preference. The extent to which affirmative action is no longer separate from the general admissions process is evidenced by the fact that in the wake of the Regents' vote to end race as a consideration in admissions, the UC schools are having to develop whole new admissions procedures.

A second issue is the corrupting influence these race-conscious programs have had on our governing institutions. The pursuit of proportional representation under the heading of diversity has corrupted our notions of equality and fairness. Equality no longer means, in the ringing words of the Declaration of Independence, that "all men are created equal, that they are endowed by their Creator with unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."⁵⁶ It now means that racial and ethnic groups have an entitlement to proportional representation in America's most sought after institutions, whether they be spots at prestigious universities or jobs in corporate or government bureaucracies.

Similarly, fairness is no longer defined as a process characteristic, where every individual is judged by the same standards, whether it be three strikes in baseball, a ten-foot basket in basketball, a single grading curve on standardized tests, or a single admission standard for sought after colleges and universities. Fairness is now defined as a result characteristic, as in every group is entitled to its "fair share," regardless of whether individuals from that group have put in the work necessary to earn it. Thus, OCR does not hesitate to ignore its mandate to ensure that schools do not discriminate based on race so long as that discrimination is necessary to produce the result of diversity.

The pursuit of proportional representation has transformed our governmental institutions from being impartial umpires to being active players in the game and therefore being complicit in the discrimination that is occurring. At the heart of the American philosophy of government is that our government, which rules only by the consent of the governed, exists to secure our

56. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

rights.⁵⁷ These rights belong to individuals, not groups, and therefore require that government not make distinctions based on race. Those in power realize that this is still the common understanding of rights among Americans, even if it might not be so in university faculty lounges. They also realize that people would not appreciate a government which discriminates against them or enables other governmental institutions to discriminate against them. As a result, enforcing institutions, like OCR, seek to cover it up with contradictory regulations and selective investigations.

This is exactly what OCR did when it released, after a seven-year investigation, what can only be described as a whitewash. If it had been interested in determining whether or not UC Berkeley and UCLA discriminated based on race in their respective admissions policies, all it had to do was send matched pairs of individuals at varying levels of academic achievement to apply to these schools. It could have controlled just about every factor but race. This is, after all, what the Justice Department does to ferret out discrimination in the housing market. But the fact is that OCR had no interest in investigating whether UC Berkeley and UCLA discriminate based on race because it approves of the discrimination, since it is designed to produce racial proportionality. Instead, OCR conducted a seven-year investigation that culminated in a fifteen-page letter whose second page asserts that UC Berkeley's undergraduate admissions program "employed no quotas or set asides, and all students, regardless of race or national origin, competed with all other students,"⁵⁸ and whose next thirteen pages illustrated in great detail how this was not the case. A good analogy for the admissions processes at UC Berkeley and UCLA is a basketball game in which everyone plays on the same court, but some individuals, depending on their race and ethnicity, receive four points per basket while others receive two points per basket. The final score, of course, is tallied in aggregate terms for everyone.

Almost as disheartening as the corruption of the fundamental principles upon which our government rests, is the complete impotence of these programs to solve the broader problem at which they are aimed. In essence, we are sacrificing our fundamental principles, for which we shall continue to pay a high price well into the future, for little tangible gain. While aggressive, race-conscious admissions procedures are able to boost African-American and Hispanic representation at the two most presti-

57. *See id.*

58. UCB LOF, *supra* note 17, at 2.

ous schools, these programs do nothing to increase these groups' representation in the UC system as a whole.

UC Berkeley and UCLA, by applying lower standards to minority students, have been enrolling a disproportionate amount of minority students in the UC system. In 1994, 36% of all undergraduates, but 43% of targeted minorities, attended these two schools. By contrast, 33% of all UC undergraduates admitted in 1994 attended these two schools, but only 21% of white students.⁵⁹

It must be noted that the effects of race-based admissions are largely localized at UC Berkeley and UCLA, and have done little to help the UC system achieve its impossible goal of matching the ethnic proportions of the graduating high-school class. For the UC system as a whole, the percentage of African-American students enrolling remained roughly constant from 1984 to 1994, starting at 4.2% in 1984, peaking at 4.9% in 1989, and then falling to 4.2% by 1994. Over this same period, American Indians doubled their representation from 0.5% to 1%, Chicanos increased steadily from 4.7% to 9.9%, and Latinos increased their representation from 2.3% to 4.2%. Asian Americans made large gains, increasing from 14.9% to 27.8%, while white representation steadily decreased from 68.2% to 45.1%.⁶⁰

For each of these years, UC missed its target of matching the ethnic proportion of California's graduating seniors. In 1984-85, 8.4% of the graduating high school class was African American and 18.6% of this class was Hispanic. In the 1985 entering UC class, 4.7% of students were African American, and 9.6% were Hispanic.⁶¹ By 1994, African Americans were projected to be 7.3% of the graduating high school class, and constituted 4.3% of the entering UC freshmen.⁶² Hispanics were projected to be 30.8% of the graduating class, but constituted 15.6% of the entering UC freshmen.⁶³ UC Berkeley, which is able to accept a disproportionate amount of UC-eligible minorities, was able to make 8.4% of its 1995 acceptances African American and 19.9% of its 1995 acceptances Hispanic, hitting its target for African Americans but falling well short for Hispanics.⁶⁴ In that same year, UCLA's entering class was 7.5% African American and

59. Computations were made from data derived from *Information Digest*, *supra* note 25, at 2, 4.

60. *Id.* at 5.

61. *Id.* at 3, 57.

62. *Id.*

63. *Id.*

64. Information provided to the author by the UC Berkeley Office of Undergraduate Admissions.

22.3% Hispanic, also well above the UC average.⁶⁵ In short, the data show that while the UC system as a whole has been unsuccessful in hitting its diversity targets for undergraduate programs, the most selective schools have been much more successful in making progress on the road to racial parity.

In the end, it is clear that UC administrators are committed to proportional representation and that they will attempt to achieve it by any available means. That the Regents restricted these means as of Fall 1998 with their recent policy is certainly true. That the California Civil Rights Initiative, which passed on November 5, 1996, essentially enshrines the Regents' policy in the California Constitution is true, if it passes a court challenge. What is more uncertain is whether the UC administrators will actually comply with these mandates. It is still an open question whether students applying to the UC system will ever play not only on the same court, but also by the same rules.

65. Information provided to the author by the UCLA Office of Undergraduate Admissions and Relations with Schools.