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## ARTICLE

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### THE RIVER RUNS DRY: WHEN TITLE VI TRUMPS STATE ANTI-AFFIRMATIVE ACTION LAWS

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*Opponents of affirmative action are waging a national battle over race-conscious admissions through state ballot initiatives like California's Proposition 209, Washington's Initiative 200, Michigan's Proposal 2, and Nebraska's Initiative 424. To comply with these new voter-approved, anti-affirmative action laws, public universities have eliminated their affirmative action policies, and this has had a negative impact on minority admissions rates. At the same time, federal antidiscrimination law—Title VI of the Civil Rights Act of 1964 and its implementing regulations—prohibits these universities from using selection criteria that have the effect of discriminating against applicants on the basis of their race. Legal scholars have largely ignored this*

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*tension between state anti-affirmative action laws and federal antidiscrimination law. Consequently, with seemingly little regard for Title VI federal civil rights law, public universities have been prone to assume that “affirmative action-less” admissions policies and plunging minority admissions are the inevitable outcome of compliance with state anti-affirmative action laws. At an affirmative action-less university, the river runs dry—the institution virtually stops admitting certain racial groups and presumes that state anti-affirmative action laws dictate such a result. This Article challenges this framing. Its point of departure is to explain how the prominent role of the SAT in selective college admissions, dictated in large measure by its importance in college-ranking and financial bond-rating systems, creates an incentive for universities to adopt “minority-deficiency” over “test-deficiency” explanations for racial differences in SAT scores. The Article then endeavors to shift the focus from the state law anti-“preference” constraints placed on public universities to the federal antidiscrimination constraints that Title VI imposes on the same institutions. It considers whether universities that completely abolish affirmative action to comply with state anti-affirmative action initiatives may actually be breaking the law with respect to Title VI. To demonstrate this point, this Article uses statistical tests for identifying Title VI disparate impact—“effect discrimination”—to analyze selective California and Washington public university admissions cycles after the enactment of anti-affirmative action laws. It finds racial disparities in admissions to affirmative action-less universities of sufficient magnitude that, if unjustified, could establish that an institution has a compelling interest in considering race to comply with federal antidiscrimination law. An important conclusion flows from this analysis. State anti-affirmative action laws may permit the consideration of race if undertaken to remedy federal “racial effect discrimination.”*

INTRODUCTION .....	1078
I. RECKONING WITH THE END OF AFFIRMATIVE ACTION .....	1086
A. <i>Genesis and Future of State Anti-Affirmative Action Laws</i> ...	1087
B. <i>The Structure of State Anti-Affirmative Action Laws</i> .....	1091
C. <i>Racial Impact on Selective Admissions</i> .....	1092
1. <i>Declining Minority Admissions and Enrollment Numbers</i> .....	1093
2. <i>Declining Rates of Minority Admissions</i> .....	1095
D. <i>Racial Disparity in Lieu of Racial Parity in Admissions</i> .....	1098
II. EVALUATING THE ROLE OF THE SAT	
IN SELECTIVE ADMISSIONS .....	1103
A. <i>University Ranking and Rating Based on Institutional Average SAT Score</i> .....	1105
B. <i>Debating Minority Deficiency Versus Test Deficiency</i> .....	1109

- 1. The Well-Meaning History and Intent of the SAT in College Admissions.....1113
- 2. Effectiveness of the SAT in Distinguishing Amongst Highly Qualified Applicants .....1114
  - a. *Predictive Ability of the SAT To Assess College Performance* ..... 1116
  - b. *Ability of the SAT To Predict Academic Performance of Racial Minorities*..... 1117
- C. *The Relationship Between Affirmative Action and the Racial Gap in SAT Scores*.....1118
- III. **ADMISSION DISPARITIES AS TITLE VI EFFECT DISCRIMINATION** ...1120
  - A. *Rationale and Enforcement Mechanisms for the Title VI Effect-Discrimination Standard* .....1122
  - B. *The Theory Underlying Title VI Racial Effect Discrimination* .....1124
  - C. *Proving Title VI Effect Discrimination* .....1128
    - 1. UC Berkeley and UCLA.....1131
    - 2. University of Washington .....1142
- IV. **THE DUTY TO COMPLY WITH TITLE VI AS A REMEDIAL RATIONALE FOR AFFIRMATIVE ACTION** .....1145
  - A. *Diversity as the Default Rationale for Affirmative Action in Higher-Education Admissions*.....1146
  - B. *Title VI Liability as a Remedial Rationale Under Federal Law*.....1148
  - C. *Permissibility of Remedial Affirmative Action Under State Anti-Affirmative Action Laws* .....1152
    - 1. Applying the Antipreference Provision to Test Deficiency.....1153
    - 2. Interpreting the Federal-Funding Exception .....1155
- V. **RESPONSIBILITY FOR RACIAL DISPARITY** .....1158
- CONCLUSION.....1159

## INTRODUCTION

It is simple justice that all should share in programs financed by all, and directed by the government of all people.

President Lyndon B. Johnson<sup>1</sup>

We have demonstrated for decades a steadfast resolve to admit and educate students of all races and ethnicities. . . . Our resolve has not changed. But the laws under which we operate have changed.

Robert Berdahl, University of California, Berkeley,  
Chancellor, 1997–2004<sup>2</sup>

Opponents of affirmative action are waging a national battle over race-conscious admissions through state ballot initiatives like California's Proposition 209, Washington's Initiative 200, Michigan's Proposal 2, and Nebraska's Initiative 424. To comply with these new voter-approved anti-affirmative action laws, public universities have eliminated their affirmative action policies, and this has had a negative impact on minority admissions rates. At the same time, federal antidiscrimination law—Title VI of the Civil Rights Act of 1964 and its implementing regulations—prohibits these universities from using selection criteria that have the effect of discriminating against applicants on the basis of race. Legal scholars have largely ignored this tension between state anti-affirmative action laws and federal antidiscrimination law. Consequently, with seemingly little regard for federal civil rights laws, public universities have been prone to assume that “affirmative action-less” admissions policies and plunging minority admissions are the inevitable outcome of compliance with state anti-affirmative action laws.<sup>3</sup>

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<sup>1</sup> U.S. COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION NO. 1, CIVIL RIGHTS UNDER FEDERAL PROGRAMS: AN ANALYSIS OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 5, available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr1101968.pdf>. President Johnson's statement regards the rationale for Title VI of the Civil Rights Act of 1964.

<sup>2</sup> Pamela Burdman, *Lawsuit Against UC Berkeley Claims 'Color-Blind' Admissions Policy is Unjust*, S.F. CHRON., Feb. 3, 1999, at A13. Berdahl made this statement on behalf of the University in response to the filing of a Title VI lawsuit (*Rios v. Regents of the University of California/Castaneda v. Regents of the University of California*) by rejected minority applicants after the University of California system ended affirmative action in admissions.

<sup>3</sup> Beginning with the passage of the first state anti-affirmative action law in California, public universities in states with such laws have opted to eliminate their race-based affirmative action policies and adopt policies that explicitly prohibit the grant of positive admissions consideration to racial minorities. After making this dramatic policy shift to “affirmative action-less” admissions, the affirmative action-less universities

Critics of affirmative action keep the focus on universities' compliance with state anti-affirmative action laws by pointing to the admission of minority students with scores on the SAT<sup>4</sup> below the institution's overall average SAT score as proof of illegal "under the table" affirmative action.<sup>5</sup> This Article makes the point that racial disparities in admissions have been, on numerous occasions, large enough to constitute prima facie evidence that affirmative action-less institutions are violating federal law. The same universities that are regularly accused of violating state anti-affirmative action laws appear to admit so few racial minorities that the institutions are vulnerable to the polar

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not only admit fewer overall numbers of African Americans, Latinos, and other underrepresented minorities, but the *rates* at which applicants from those racial groups are admitted have also declined significantly. The year after California enacted its anti-affirmative action law, admissions rates for African Americans, Latinos, and other underrepresented minorities applying to the most selective universities in California began an extended freefall. Admissions of applicants from those racial groups also declined at Washington's most selective university after that state's Initiative 200 took effect. Commentators have predicted that the elimination of affirmative action will have a similar negative impact on the admission of African Americans and Latinos applying to Michigan's most selective public universities. See, e.g., *Proposal 2: What Would it Mean to Public Colleges*, DETROIT FREE PRESS, Oct. 29, 2006, at 15A ("The [U]niversity [of Michigan] estimates the combined enrollment of black, Hispanic and American Indian students would drop from 14% to about 4% to 6% without affirmative action.").

<sup>4</sup> This Article uses "SAT" to refer to the SAT Reasoning Test, formerly named the SAT I: Reasoning Test. See College Board, *Frequently Asked Questions*, <http://www.collegeboard.com/student/testing/sat/about/sat/FAQ.html> (last visited Jan. 22, 2009). "SAT" was originally an abbreviation for the Scholastic Aptitude Test. *Id.*

<sup>5</sup> For the case of one professor who resigned from the admissions committee due to suspicion that UCLA was illegally admitting more black students, see, for example, Heather MacDonald, *How UC Is Rigging the Admissions Process*, L.A. TIMES, Sept. 7, 2008, at A34 ("Officials are perverting the law in a desperate attempt to increase black enrollment."); Seema Mehta, *UCLA Accused of Illegal Admitting Practices*, L.A. TIMES, Aug. 30, 2008, at B1; *Professor Protests over Black Admissions at U.C.L.A.*, N.Y. TIMES, Aug. 30, 2008, at A16. See also JOHN MOORES, A PRELIMINARY REPORT ON THE UNIVERSITY OF CALIFORNIA, BERKELEY ADMISSIONS PROCESS FOR 2002, at 3, 183-214 (2003), available at <http://www.universityofcalifornia.edu/news/compreview/mooresreport.pdf> (compiling newspaper articles regarding "the apparent uneven treatment afforded some applicants"); Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11 (arguing that academic programs are "rigging their admissions systems to admit underrepresented minorities . . . through the back door"). Multivariate regression analysis has also been used to measure the extent to which an applicant's race impacts her chance of admission. Correlations between the race of applicants, particularly African Americans and Latinos, and increased likelihood of admission are used to support claims that universities still "prefer" certain races in admissions. Opponents of affirmative action generally conclude, despite the fact that African Americans and Latinos are admitted at lower rates than other racial groups, that facially affirmative action-less admissions policies are still plagued by racial bias inconsistent with the requirements of state anti-affirmative action laws.

opposite accusation—that they rely on admissions criteria like the SAT in a manner that unjustifiably decreases the admissions chances of minority applicants in violation of federal law. As this Article explains, the extent to which a university is vulnerable to losing Title VI federal funds depends in large part upon whether an institution can rebut the charge that it uses the SAT in a manner that unfairly diminishes the admissions chances of qualified racial minorities.

In addition to being vulnerable to simultaneous allegations of improperly favoring and disfavoring the former beneficiaries of affirmative action, public universities in states with anti-affirmative action laws are under intense pressure to use admissions criteria that improve their prestige ranking and financial bond rating. Like high-school students who need high SAT scores to gain admission to top-ranked colleges or universities,<sup>6</sup> colleges and universities need high *average* SAT scores to place well in college-rankings systems like *U.S. News & World Report's* “America’s Best Colleges”<sup>7</sup> and to be rated highly by bond-rating systems like Moody’s and Standard & Poor’s.<sup>8</sup> Because universities with higher overall SAT score averages fare better in both systems,<sup>9</sup> reducing the focus on applicant SAT scores may have the unwelcome consequence of lowering a top-ranked university’s prestige standing and financial-strength rating. Thus, this Article considers whether universities could be reluctant to decrease emphasis on SAT scores even if they are aware that consideration of such scores is not essential to assessing applicants’ future college performance.

Many other projects that articulate perspectives on the use of race in higher-education admissions invoke the metaphor of the river. The image of the river has been used to represent “the flow of talent—particularly of talented black men and women—through the country’s system of higher education and on into the marketplace and the larger society.”<sup>10</sup> The metaphor has also been adopted to describe racial

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<sup>6</sup> I use the term “top-ranked” to refer to institutions ranked in the highest tier of the *U.S. News & World Report's* list of the “Best National Universities.” See, e.g., *Best National Universities*, U.S. NEWS & WORLD REP., Sept. 1, 2008, at 76, 76-78.

<sup>7</sup> See, e.g., Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144-45 (2003) (discussing the importance of the *U.S. News & World Report* college rankings).

<sup>8</sup> See *infra* Section II.A.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*, at xxi (1998) (detailing the long-term benefits of race-based affirmative action in higher-education admissions).

minorities as a “transformative” river that challenges “structural and symbolic subordination.”<sup>11</sup> In this Article, the river is the group of African American, Latino, and other minority students who would have been considered eligible to attend their state’s most selective university under the policies in place prior to the passage of state anti-affirmative action laws. Before the passage of state anti-affirmative action laws, the most selective universities in California, Washington, and Michigan<sup>12</sup> gave positive admissions consideration to African Americans, Latinos, and other “underrepresented minority”<sup>13</sup> applicants. The elimination of affirmative action to comply with state anti-affirmative action laws dams the river of such students. This Article considers whether affirmative action-less universities are potentially liable under Title VI when the river runs dry.

This Article does not take a position in the important but seemingly intractable normative debate as to the propriety of admitting

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<sup>11</sup> Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 963 (2001) (critiquing the use of the diversity rationale to defend affirmative action). For other uses of the river metaphor in this context, see Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000); David B. Wilkins, *Rollin’ on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000).

<sup>12</sup> Nebraska voters approved their state’s new anti-affirmative action law on November 4, 2008. That state’s flagship university—the University of Nebraska at Lincoln—is contemplating changes to its admissions policies. See Matthew Hansen, *Affirmative Action: Minority Contracts No Longer Assured*, OMAHA WORLD HERALD, Jan. 26, 2009; *Neb. Is Fourth State to Ban Affirmative Action*, CMTY. COLLEGE TIMES, Nov. 25, 2008.

<sup>13</sup> This Article uses the term “underrepresented minority” as some universities do—to refer to members of racial groups such as African Americans, Latinos, Filipinos, and Native Americans that are admitted to and attend colleges and universities in significantly lower proportions than their representation in the general and high-school populations. In the 1980s, undergraduate campuses in the University of California system began considering race as a factor in admissions to increase the admissions chances of applicants from these racial groups. See BOB LAIRD, *THE CASE FOR AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS* 60 (2005) (describing the University of California, Berkeley’s race-based affirmative action policies targeting “African American, Chicano, Filipino, Latino, and Native American students”). In the mid-1980s, the University of California, Berkeley phased out affirmative action for Filipinos. *Id.* at 66; see also William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 623 n.67 (2006) (noting that prior to Washington Initiative 200, the University of Washington Law School considered the race of Filipino applicants as an admissions plus factor); cf. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (exploring how Ronald Dworkin’s theory justifying affirmative action for certain minority groups can authorize “negative action” against Asian Americans, such as when a “university denies admission to an Asian American who would have been admitted had that person been White”).

students to elite colleges and universities based primarily on quantitative variables like high-school grades and SAT scores.<sup>14</sup> In assessing the legal implications of the significant declines in the *rates* of minority admissions since the passage of state anti-affirmative action laws, this Article does not address whether principles of “substantive equality” require compensation to members of subordinated groups for structural and societal discrimination against them.<sup>15</sup> Likewise, this Article does not challenge “the fairness or rationality” of admitting applicants based on predictions of their freshman grade point average—the conventional approach to selective-university admissions.<sup>16</sup> Instead, it analyzes whether large disparities in the admissions rates of different racial groups under affirmative action-less policies expose universities to liability under Title VI federal civil rights regulations promulgated to ensure that institutions receiving federal funding do not discriminate on the basis of race.

This Article has two central conclusions. First, it concludes that state anti-affirmative action laws do not prohibit race-conscious policies used for the purpose of remedying *unjustified* racial disparities in admissions. Second, the Article establishes that whether such racial disparities in admissions are legally justifiable under Title VI hinges on a normative assessment—whether SAT scores accurately reflect the college performance ability of minority applicants who apply to selective public universities. A major implication of these conclusions is that, although frequently accused of illegally favoring minorities using “under the table” affirmative action, affirmative action-less universities are admitting so few minorities that the racial disparities in admissions to those institutions establishes a rebuttable legal presumption of a Title VI disparate impact violation.

Additionally, this Article explains how college-ranking and bonding systems may drive top-ranked public universities to rely on “educationally insignificant”<sup>17</sup> differences in SAT scores in order to

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<sup>14</sup> For an exemplary discussion, see Gunier, *supra* note 7, at 121, who criticizes “our failure as a society to grapple with the complexity and arbitrariness of our current normative conceptions of merit.”

<sup>15</sup> For examples of effective and poignant critiques of liberal theory and conventional criteria for assessing merit to participate in selective higher education, see Lawrence, *supra* note 11, at 948-58; Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1473-81 (1997).

<sup>16</sup> Cf. Lawrence, *supra* note 11, at 954.

<sup>17</sup> Title VI regulations permit a federally funded university to use tests that have a racially discriminatory effect only if the institution can demonstrate that it must rely on the criterion to achieve a particular educational goal. The Title VI standard mirrors

boost their institution's overall SAT score average. It then articulates the importance of considering whether universities that select from an applicant pool with highly competitive non-SAT academic credentials—the strongest candidates in the state and, in some cases, the nation—are vulnerable to Title VI challenges because rejected minority applicants may allege that such institutions rely on the SAT for its prestige-enhancing capacity, not its capacity to weed out unqualified applicants.

The major focus of this Article is to make plain that, irrespective of the prestige enhancement or financial value of using any particular admissions criterion, universities subject to state anti-affirmative action laws are not exempt from the requirements of Title VI and that prestige-driven reliance on the SAT may not be an acceptable justification under the Title VI disparate impact standard. Title VI requires that federally funded universities remedy any unjustified racial disparities caused by reliance on a quantitative variable that decreases the admissions chances of qualified minority applicants at a higher rate than nonminority applicants.<sup>18</sup> In fact, federal civil rights laws require that institutions receiving federal funds rectify unjustified racially discriminatory impact and explicitly permit the use of affirmative action to do so.

In addition, this Article queries whether race-based admissions policies that are adopted to remedy potential Title VI violations constitute racial preferences prohibited by state anti-affirmative action laws. Likewise, it considers whether a rarely explored exception to state anti-affirmative action laws—the “federal-funding exception”—

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the Title VII standard. As an employer charged with violating Title VII may justify the use of selection criteria that have a racially discriminatory effect on minority job applicants by demonstrating that the use of such criteria is a “business necessity,” universities may justify reliance on admissions criteria that have a racially discriminatory effect by demonstrating that the use of such criteria is “educationally necessary” to assess the future college performance ability of student applicants. *See infra* Section III.B.

<sup>18</sup> Universities that use a specific numerical “cut score” for quantitative variables like SAT score and high school-grade point average (HSGPA) may be liable for violating Title VI even if race-based affirmative action results in a “bottom line” free of racially discriminatory impact. *See Connecticut v. Teal*, 457 U.S. 440, 450 (1982). Accordingly, the analysis in this Article is applicable to universities that are not bound by state anti-affirmative action laws and that use race-based affirmative action as part of a “multicomponent” admissions process that affords minority applicants the opportunity to compete equally with nonminority applicants. *See Id.* (observing that the Court “has consistently focused on” selection criteria “that create a discriminatory bar to *opportunities*,” instead of on the “bottom line” or “the overall number of minority or female applicants” actually selected).

permits the *remedial* use of affirmative action when universities are faced with evidence that their affirmative action-less policies result in Title VI racially discriminatory effect.<sup>19</sup> If so, even in states whose courts define racial preferences to include race-conscious policies adopted to correct a Title VI discriminatory impact, universities may invoke the federal-funding exception to defend the re adoption of race-conscious admissions policies as legally permissible under their state's anti-affirmative action laws.<sup>20</sup> The major practical implication of this analysis is that it identifies the requisite factual and legal predicate for considering race to remedy unjustified disparate impact on minority applicants without running afoul of state anti-affirmative action law.

This Article proceeds in four parts. Part I begins by describing the origins of state anti-affirmative action laws and the explicit connection that advocates of such laws make between the goals of the laws and the antidiscrimination objectives of federal civil rights laws like Title VI. It also explains the substantive legal requirements of existing state anti-affirmative action laws, assesses the effect that "affirmative action-less admissions policies"<sup>21</sup> have on the admissions rates of African American and Latino applicants to highly selective public universities, and highlights the fact that federal civil rights law prohibits recipients of federal funds from admitting minorities at significantly lower rates than nonminorities without sufficient justification.

Part II sets forth a brief history of the SAT as well as arguments for and against the use of the SAT to predict the college-performance ability of applicants. It compares the value and effectiveness of the SAT as a tool for predicting an applicant's college performance to the value and effectiveness of the SAT as a mechanism for enhancing a public university's standing in prestige rankings and financial bond-rating systems. In addition, this Part explains how a university's decision to eliminate affirmative action after the passage of a state anti-affirmative action law can result in racial disparities in overall admissions rates of sufficient magnitude to create a presumption of discrimination against certain racial groups.

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<sup>19</sup> No court has considered the important question of whether and under what circumstances a university may invoke the federal-funding exception to state anti-affirmative action laws.

<sup>20</sup> See *infra* subsection IV.C.2.

<sup>21</sup> I use this term to refer to the policies adopted by the California, Washington, and Michigan public university systems after their states' respective anti-affirmative action laws took effect.

Part III applies the evidentiary standard that federal courts would use to determine whether a university's admissions policies violate Title VI regulations under the theory that the institution's reliance on an admissions criterion like the SAT has an unjustified racially discriminatory impact on minority applicants. This Part analyzes admissions rates by race at the University of California, Berkeley (UC Berkeley) and the University of California, Los Angeles (UCLA) since California Proposition 209 took effect, and at the University of Washington since Washington Initiative 200 took effect.<sup>22</sup> The analysis of admissions rates includes data on applicants with high school grade point averages (HSGPA) of 4.0 and higher who applied to UC Berkeley during that institution's first year of affirmative action-less admissions. Part III also identifies admissions cycles since the passage of current state anti-affirmative action laws for which racial disparities were of sufficient magnitude to constitute evidence of Title VI "effect discrimination." It then articulates the challenges that universities may have in justifying reliance on the SAT as educationally necessary.<sup>23</sup>

Part IV contrasts the "diversity rationale" for race-based affirmative action in higher-education admissions with the remedial rationale, examining whether the remedial rationale is available to universities in states with anti-affirmative action laws who might seek to use race-based measures to avoid Title VI liability. Here, the Article introduces an analytic framework to be used by the increasing number of state courts that will be called upon to interpret state anti-affirmative action laws. The antipreference and federal-funding exception provisions of such laws may be reasonably construed by state courts to permit race-based affirmative action for the purpose of eliminating racial discrimination. In other words, state anti-affirmative action laws may be interpreted to permit universities to readopt affirmative action for the remedial purpose of complying with federal antidiscrimination law.

Part V distinguishes the legal constraints that state anti-affirmative action laws impose on public universities from the normative assessment that those institutions make regarding the capacity of the SAT to make significant distinctions within a pool comprised of highly qualified applicants. It concludes that state anti-affirmative action laws do not require universities to "normalize" admitting certain racial groups

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<sup>22</sup> Because the fall 2008 admissions cycle will be the first complete admissions cycle under Michigan's new affirmative action-less policy since Proposal 2 took effect on December 23, 2006, Part III does not include an analysis of Michigan admissions rates by race. See *infra* note 53.

<sup>23</sup> See *infra* Section III.B.

at significantly lower rates than others. Part V conceives state anti-affirmative action laws much like a legal default rule to prohibit race-based policies designed to favor minority applicants lacking the ability to perform well in college. It views this new genre of laws as contemplating circumstances in which the remedial consideration of race could be legally justified. Thus, this Part explains, instead of turning solely on the strictures of state anti-affirmative action law, whether racial disparities in admissions warrant the remedial consideration of race turns on how a university assesses the qualifications of the minority students in its applicant pool.

### I. RECKONING WITH THE END OF AFFIRMATIVE ACTION

Proposition 209 generally forbids [race-based] action. But there are exceptions to the rule established by Proposition 209. If the failure to employ [race] would result in ineligibility for a federal program with a loss of federal funds, . . . Proposition 209 would not preclude it.

Connerly v. State Personnel Board<sup>24</sup>

In very important ways, states with anti-affirmative action laws are a national crucible for examining the potential impact of a future Supreme Court ruling rejecting the diversity rationale for affirmative action in higher-education admissions. To date, California, Washington, Michigan, and Nebraska have passed laws that prohibit public universities, as well as other state entities, from discriminating or granting preferences on the basis of race.<sup>25</sup> After the passage of these laws, the public universities in those states adopted policies prohibiting the consideration of race as an admissions criterion.<sup>26</sup> The impact of affirmative action-less policies on minority admissions rates at those institutions has been dramatic.<sup>27</sup> In some instances, African American and Latino admissions declined to pre-Civil Rights Era lows.<sup>28</sup>

Because this Article goes beyond detailing the effects that state anti-affirmative action laws and the end of race-based affirmative action have had on admissions to the most selective universities, the focus of this Article is a virtually unexplored inquiry: whether affirma-

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<sup>24</sup> 112 Cal. Rptr. 2d 5, 39 (Ct. App. 2001) (citing CAL. CONST. art. I, § 31(e), (h)).

<sup>25</sup> See *infra* Section I.A (detailing the political and legal campaign against state-sponsored affirmative action).

<sup>26</sup> See *infra* note 52 and accompanying text. Universities in Nebraska may soon follow suit. See *supra* note 12.

<sup>27</sup> See *infra* Section I.C.

<sup>28</sup> See *id.*

tive action-less admissions policies produce such large racial disparities that the magnitude of those disparities constitutes evidence of Title VI discriminatory effect. This Part examines the background, language, and demographic impact of current state anti-affirmative action laws.

#### A. *Genesis and Future of State Anti-Affirmative Action Laws*

State anti-affirmative action laws<sup>29</sup> are the product of a political and legal campaign to end state-sponsored affirmative action.<sup>30</sup> The laws are touted in ballot-initiative voter guides and campaign materials as a new category of “civil rights laws” modeled on Title VI of the Civil Rights Act of 1964.<sup>31</sup> In November 1996, California became the first

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<sup>29</sup> This Article does not include Florida’s anti-affirmative action law because of the numerous ways in which the Florida law’s substance and background differ from other state anti-affirmative action laws. On November 9, 1999, Florida Governor Jeb Bush issued Executive Order No. 99-281. Pursuant to Governor Bush’s “One Florida” plan, the Florida State Board of Education amended the Florida state administrative code to prohibit racial preferences. See FLA. ADMIN. CODE ANN. r. 6C-6.002(3)(c), (7) (2008). The Florida Administrative Code provision states the following: “Neither State University System nor individual university admissions criteria shall include preferences in the admissions process for applicants on the basis of race, national origin or sex.” *Id.* at r. 6C-6.002(7). Many have speculated that Governor Bush introduced the One Florida executive order to blunt plans by California businessman Ward Connerly to place the controversial, racially charged issue of affirmative action on the ballot at a time when it could have negatively impacted his brother’s bid for president. See, e.g., Rick Bragg, *Affirmative Action Ban Meets a Wall in Florida: A Businessman’s Campaign Is Unwelcome*, N.Y. TIMES, June 7, 1999, at A16.

<sup>30</sup> See LEE COKORINOS, *THE ASSAULT ON DIVERSITY* 31-57 (2003) (examining several campaigns against affirmative action).

<sup>31</sup> See *id.* at 11 (noting that “the opponents of affirmative action have been able to deftly utilize the civil rights vocabulary”); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 189 (1997) (noting that Proposition 209 was “[f]ormally denominated the ‘California Civil Rights Initiative’”). See generally Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1 (detailing the campaign to place anti-affirmative action initiatives on many state ballots).

The ballot-pamphlet argument in favor of California Proposition 209 made explicit reference to “the historic Civil Rights Act” and said that the initiative was called the “California Civil Rights Initiative” because it “restates” the Civil Rights Act of 1964. PETE WILSON ET AL., *ARGUMENT IN FAVOR OF PROPOSITION 209* (1996), available at <http://vote96.sos.ca.gov/BP/209yesarg.htm>. The pro-Proposition 209 argument provided in the official state voter guide explicitly promised that the state law would not undermine federal antidiscrimination laws like Title VI:

A generation ago, we did it right. We passed civil rights laws to prohibit discrimination . . . .

. . . .

. . . Government must judge all people equally, without discrimination!

state in the nation to adopt a state anti-affirmative action law.<sup>32</sup> Cali-

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And, remember, Proposition 209 keeps in place all federal and state protections against discrimination!

....

The only honest and effective way to address inequality of opportunity is by making sure that *all* California children are provided with the tools to compete in our society.

*Id.*

The *Rebuttal to Argument Against Proposition 209* in the official Proposition 209 ballot pamphlet is more explicit in its assertion that affirmative action remains permissible under the state anti-affirmative action law: “Affirmative action programs that don’t discriminate or grant preferential treatment will be UNCHANGED. . . . It does NOTHING to any existing constitutional provisions. . . . Anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act.” DANIEL E. LUNGREN ET AL., REBUTTAL TO ARGUMENT AGAINST PROPOSITION 209 (1996), available at <http://vote96.sos.ca.gov/BP/209norbt.htm>. Similarly, the argument in favor of Washington Initiative 200 assured voters that the Washington anti-affirmative action law would not impact current anti-discrimination laws. The ballot pamphlet for voters stated that “Initiative 200 does not end all affirmative action programs” and that it “prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university.” JOHN CARLSON ET AL., ARGUMENTS FOR INITIATIVE 200 (1998), available at <http://www.smartvoter.org/1998nov/wa/state/meas/i200/>.

Arguments made by the proponents of Michigan Proposal 2 also identified its central purpose as consistent with federal civil rights laws. See The Michigan Civil Rights Initiative, <http://www.michigancivilrights.org> (last visited Feb. 15, 2009) (“Proposal 2 . . . [r]eflects the colorblind language of the 1964 Civil Rights Act—because equal treatment is the essence of civil rights.”). Proponents of the Michigan anti-affirmative action law also directly linked Proposal 2 to the Civil Rights Act of 1964 in their arguments contained in the voter guide. See Mich. Civil Rights Initiative Campaign, *Official Ballot Language Proposal 06-02*, in LEAGUE OF WOMEN VOTERS OF MICHIGAN, NONPARTISAN MICHIGAN VOTER GUIDE 2006, at 30, available at <http://www.lwvmi.org/documents/LWVGuide06.pdf> (“This Initiative mirrors the landmark 1964 Civil Rights Act and advances civil rights by prohibiting discrimination and preferential treatment based on race, sex and color.”).

<sup>32</sup> First, University of California Board of Regents Resolution Special Policy 1 (SP-1) and, next, Proposition 209, made voluntary affirmative action programs illegal under California state law. The University of California Board of Regents adopted Special Policy 1 on July 20, 1995. SP-1 provided, in part, that “[e]ffective January 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.” The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) § 2 (July 20, 1995) [hereinafter UC Regents, SP-1], available at <http://www.universityofcalifornia.edu/news/compreview/sp1.pdf>. In 2001, the Board of Regents rescinded SP-1 but affirmed that University admissions remain subject to Proposition 209. See The Regents of the University of California, Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2, RE-28 (May 16, 2001), available at <http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf>.

ifornia Proposition 209, a ballot initiative prohibiting the state from discriminating or granting preferences on the basis of race, is the model for other state anti-affirmative action laws.<sup>33</sup> Proposition 209 took effect in August 1997; its implementation was delayed by litigation alleging that the state law violated the Fourteenth Amendment's Equal Protection Clause. In 1998, two years after the passage of Proposition 209, a second state anti-affirmative action law, Washington Initiative 200, was approved by Washington state voters.<sup>34</sup> The text of Initiative 200 is virtually identical to the text of Proposition 209.<sup>35</sup>

After success in California and Washington, the major proponents of state anti-affirmative action ballot initiatives pledged to reverse the practical effect of the Supreme Court's 2003 decision in *Grutter v. Bollinger*<sup>36</sup> by means of an amendment to Michigan's constitution. In *Grutter*, the U.S. Supreme Court held that the Fourteenth Amendment's Equal Protection Clause permits universities to use race as a factor in admissions, so long as its use is nonnumerical and holistic.<sup>37</sup> Michigan Proposal 2, another carbon copy of California's initiative, was approved by Michigan voters in November 2006.<sup>38</sup> Like the California and Washington university systems had done, the University of Michigan system eliminated race-based affirmative action.<sup>39</sup> When Proposal 2 took effect, the law school that the U.S. Supreme Court made the model for race-conscious admissions across the country became an affirmative action-less institution.

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<sup>33</sup> Proposition 209 provides that "[t]he 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." CAL. CONST. art. I, § 31(a). *But cf.* Spann, *supra* note 31, at 207 (noting several ambiguities in the language of Proposition 209).

<sup>34</sup> Initiative 200 took effect in December 2006, shortly after its passage in November 2006. *See* WASH. REV. CODE ANN. § 49.60.400(2) (West 2008).

<sup>35</sup> *Compare id.* § 49.60.400(1) (Initiative 200), with CAL. CONST. art. I, § 31(a) (Proposition 209). Both provisions provide that "[t]he state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race . . . in the operation of public employment, public education or public contracting."

<sup>36</sup> 539 U.S. 306 (2003).

<sup>37</sup> *See id.* at 343-44 ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

<sup>38</sup> When voters passed Nebraska Initiative 424 in November 2008, Nebraska became the fourth state to adopt a state anti-affirmative action law. Nebraska public universities are in the midst of assessing admissions policies compliance with the new state law. *See supra* note 12.

<sup>39</sup> *See infra* notes 44-45 and accompanying text.

The end of affirmative action in higher-education admissions in California, Washington, Michigan, and, possibly, Nebraska<sup>40</sup> may be the tip of a large anti-affirmative action iceberg. Buoyed by the success of several state ballot initiatives, opponents of affirmative action have made the state-by-state adoption of anti-affirmative action laws a central component of their overall strategy to end affirmative action. In fact, key leaders in the strategy to end affirmative action have announced several other states identified as targets for future anti-affirmative action ballot initiatives.<sup>41</sup> Thus, there is good reason to believe that the number of states with anti-affirmative action laws will continue to increase. It is also possible that the Supreme Court may reverse its position on the constitutionality of race-based affirmative action undertaken by universities to increase racial diversity—the diversity rationale for affirmative action.

The departure of Justice O'Connor—the author of the *Grutter* opinion upholding the constitutionality of affirmative action—and subsequent changes in the Supreme Court's membership suggest that a future decision on race-based affirmative action may reject the diversity rationale, which has been the Court's primary basis for preserving race-based affirmative action in higher education. In addition, the *Grutter* decision itself may contain the seeds of its own destruction: Justice O'Connor's language stating the majority's expectation that, within twenty-five years, affirmative action will no longer be necessary.<sup>42</sup> Opponents of affirmative action, on and off the Court, interpret this language to impose a twenty-five-year time limit on the availability of race-conscious admissions.<sup>43</sup> If the Court were to reject the diversity rationale, selective public universities throughout the country would likely react by eliminating affirmative action, mimicking the reactions of selective public universities in California, Washington, and Michigan to the passage of state anti-affirmative action laws. Therefore, the possibility that affirmative action-less universities that admit minority applicants at significantly lower rates may be liable under Title VI has major implications for higher-education admissions across the nation.

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<sup>40</sup> See *infra* note 52.

<sup>41</sup> Lewin, *supra* note 31 (reporting that both defenders and opponents of affirmative action agree that anti-affirmative action ballot initiatives “can succeed almost anywhere”).

<sup>42</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>43</sup> See, e.g., *id.* at 351 (Thomas, J., dissenting) (“I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.”).

### B. *The Structure of State Anti-Affirmative Action Laws*

The texts of the current state anti-affirmative action laws are very similar. One of the four state ballot initiatives, Washington's Initiative 200, became a statute while the others, Proposition 209, Proposal 2, and Initiative 424 amended the California, Michigan, and Nebraska constitutions, respectively.<sup>44</sup> The central provisions of all four of the laws are identical: "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."<sup>45</sup>

Interestingly and importantly, none of the laws explicitly prohibits "affirmative action." In fact, the term "affirmative action" appears nowhere in their text. Each law prohibits racial "discrimination" and racial "preferences" without defining either term<sup>46</sup> and each law includes a textual exception that makes the central provision inoperative in certain circumstances when federal funding is at stake.<sup>47</sup> All told, state anti-affirmative action laws do not impose an absolute ban on race-conscious action.<sup>48</sup>

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<sup>44</sup> CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; Neb. Const. art. I, § 30; WASH. REV. CODE ANN. § 49.60.400 (West 2008).

<sup>45</sup> CAL. CONST. art. I, § 31(a); MICH. CONST. art. I, § 26(2); Neb. Const. art. I, § 30(1); WASH. REV. CODE ANN. § 49.60.400(1). Michigan's anti-affirmative action law includes an additional clause with repetitive language explicitly directed at the state's public colleges and universities: "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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." MICH. CONST. art. I, § 26(1).

<sup>46</sup> Race-based affirmative action is arguably permissible under these provisions so long as it does not constitute "discrimination" or "preferential treatment." See MICH. CIVIL RIGHTS COMM'N, "ONE MICHIGAN" AT THE CROSSROADS: AN ASSESSMENT OF THE IMPACT OF PROPOSAL 06-02, at 16-17 (2007) (interpreting Proposal 2 to allow some forms of affirmative action programs); Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 DRAKE L. REV. 697, 711 (2003) (arguing that within the context of university admissions policies that rely on standardized tests of limited predictive ability, "taking race into account is equalizing treatment" and "a correction for the use of admissions criteria in which racial preferences are embedded").

<sup>47</sup> CAL. CONST. art. I, § 31(e); MICH. CONST. art. I, § 26(4); Neb. Const. art. I, § 30(5); WASH. REV. CODE ANN. § 49.60.400(6).

<sup>48</sup> In addition to the federal-funding exception, current state anti-affirmative action laws include exceptions for certain gender classifications, CAL. CONST. art. I, § 31(c); MICH. CONST. art. I, § 26(5); Neb. Const. art. I, § 30(3); WASH. REV. CODE ANN. § 49.60.400(4), as well as for existing court orders and consent decrees, CAL. CONST. art. I, § 31(d); MICH. CONST. art. I, § 26(9); Neb. Const. art. I, § 30(4); WASH.

The fact that state anti-affirmative action laws neither prohibit all race consciousness nor place an absolute ban on racial preferences is made explicit by the presence of the language that this Article refers to as the “federal-funding exception.” According to the federal-funding exception, anti-affirmative action laws “do[] not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.”<sup>49</sup> A few government entities, including the City and County of San Francisco, have attempted to employ this exception to defend their continued use of affirmative action policies.<sup>50</sup> The federal-funding exception, however, has never been invoked by a public college or university.<sup>51</sup> Instead of invoking the exception, selective institutions subject to anti-affirmative action laws have simply ceased considering race in admissions. Thus, state anti-affirmative action laws have had a dramatic impact on the racial demographics of the most selective public institutions in states with such laws without the inclusion of an explicit textual prohibition against “affirmative action.”

### C. *Racial Impact on Selective Admissions*

In response to the passage of their states’ anti-affirmative action laws, state university systems typically transform themselves from institutions that use race-conscious admissions policies into what this Arti-

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REV. CODE ANN. § 49.60.400(5). All three state anti-affirmative action laws also expressly acknowledge the supremacy of federal law. Each contains a provision stating that if the law conflicts with federal law, the section shall be implemented “to the maximum extent” permissible by federal law and the United States Constitution. CAL. CONST. art. I, § 31(h); MICH. CONST. art. I, § 26(7); Neb. Const. art. I, § 30(8); WASH. REV. CODE ANN. § 49.60.400(9).

<sup>49</sup> MICH. CONST. art. I, § 26(4); Neb. Const. art. I, § 30(5); WASH. REV. CODE ANN. § 49.60.400(6). The California law is worded slightly differently but without any substantive distinction: “Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.” CAL. CONST. art. I, § 31(e).

<sup>50</sup> See, e.g., *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 730 (Ct. App. 2004) (holding that the Sacramento Municipal Utility District’s affirmative action program did not qualify for the federal-funding exception and was thus unconstitutional).

<sup>51</sup> The Michigan Civil Rights Commission has identified the federal-funding exception as a potential means of justifying the use of affirmative action after the passage of Proposal 2 in the employment context but it has made no mention of the exception’s applicability to higher-education admissions. See MICH. CIVIL RIGHTS COMM’N, *supra* note 46, at 27-29.

cle terms affirmative action-less institutions.<sup>52</sup> Because the University of Michigan's post-Proposal 2 decision to end its affirmative action policies and the passage of Nebraska's Initiative 424 took place more recently, this Article focuses on the data for affirmative action-less admissions cycles in California and Washington.<sup>53</sup> The impact of the shift to affirmative action-less admissions at California and Washington universities can be examined based on many years of admissions data. Generally, the major effect of the end of affirmative action has been that the most selective public universities have admitted fewer overall *numbers* of students from underrepresented racial groups. Significantly for determining whether institutions are complying with Title VI federal civil rights law, affirmative action-less admissions in California and Washington have also led to decreased *rates* of admission of underrepresented minority applicants.<sup>54</sup>

### 1. Declining Minority Admissions and Enrollment Numbers

Most commentary on the impact of state anti-affirmative action laws on public university admissions has focused on the substantial decline in *numbers* of underrepresented minority applicants admitted to and enrolled in the states' most selective universities. Clearly, this emphasis is warranted in light of the very large decrease in the number of students from particular racial groups admitted to the most selective universities in states with anti-affirmative action laws.<sup>55</sup>

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<sup>52</sup> SP-1 eliminated race as an admissions criterion prior to the passage of California Proposition 209. See UC Regents, SP-1, *supra* note 32; Open Letter from Mary Sue Coleman, President, Univ. of Mich., & Teresa A. Sullivan, Provost & Executive Vice President for Academic Affairs, Univ. of Mich., to the Univ. of Mich. Campus Cmty., Proposal 2 Next Steps (Jan. 10, 2007), available at <http://www.umich.edu/pres/speeches/070110prop2.html> (announcing the University of Michigan's decision to stop considering race when selecting applicants); see also Zachary Gorchow, *California, Washington Give Clues to Impact of Proposal 2*, DETROIT FREE PRESS, Nov. 29, 2006, at 2B.

<sup>53</sup> Proposal 2 took effect on December 23, 2006. The U.S. Court of Appeals for the Sixth Circuit lifted a stay granted by the district court to the University of Michigan, Michigan State University, and Wayne State University that would have permitted the institutions to delay compliance with the new law until mid-2007. See *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 240 (6th Cir. 2006); see also Audrey Williams June & Peter Schmidt, *Court Tells Michigan Universities To Comply Immediately with Preference Ban*, CHRON. HIGHER EDUC., Jan. 12, 2007, at A25.

<sup>54</sup> The rate of admission for a particular racial group is the number of admits identified within that racial category divided by the number of applicants of the same race.

<sup>55</sup> The reason that the University of California's decision to prohibit race-based affirmative action has had minimal impact on admissions to less selective and nonselective universities in that system is likely because affirmative action is typically only

The most selective California institution, UC Berkeley, admitted fewer than half the number of African American and Latino<sup>56</sup> students during the first affirmative action–less admissions cycle than that institution had admitted just one year before. In 1998, the number of *admitted* African American students dropped from 545 to 236, and the number of Latino admits dropped from 1246 to 619.<sup>57</sup> Like the admissions numbers, enrollment numbers for African Americans and Latinos also declined substantially. The number of *enrolled* African American students dropped by more than half under UC Berkeley's affirmative action–less admissions policies from 252 to 122 freshmen in a class of over 3000 freshman students,<sup>58</sup> and enrolled Latino students declined from 469 to 266.<sup>59</sup>

In 1999, the first year of affirmative action–less admissions at the University of Washington, that institution also admitted and enrolled smaller numbers of African American and Latino students.<sup>60</sup> During the first year of post–Initiative 200 admissions, the number of African American applicants *admitted* to the University of Washington declined from 254 to 173,<sup>61</sup> and the number of African American fresh-

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utilized at highly selective institutions. Cf. BOWEN & BOK, *supra* note 10, at xxvi (“Within the realm of higher education, we are concerned only with academically selective colleges and universities. The main reason is that the debate surrounding race-sensitive admissions is relevant primarily within these institutions.”).

<sup>56</sup> The term “Latino” in this Article refers to individuals identified as either “Latino” or “Chicano” by the University of California. Accordingly, all University of California data labeled “Latino” combines data reported separately by UC campuses as “Latino” and “Chicano.”

<sup>57</sup> UNIV. OF CAL. OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA APPLICATION, ADMISSIONS AND ENROLLMENT OF CALIFORNIA RESIDENT FRESHMEN FOR FALL 1995 THROUGH 2004, at 1, [http://www.ucop.edu/news/factsheets/Flowfrc\\_9504.pdf](http://www.ucop.edu/news/factsheets/Flowfrc_9504.pdf) (last visited Feb. 15, 2009). The trends were similar for other underrepresented racial minorities such as American Indians (the category used in the report), whose admissions numbers also dropped by half from fifty-nine to twenty-seven students. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* African American enrollment also decreased. *Id.* As a result, the African American percentage of overall UC Berkeley freshman student enrollment decreased from 7.8% to 3.7% and the Latino percentage dropped from 14.6% to 8.0%. *Id.* White enrollment at Berkeley was virtually unchanged—28.3% in 1997 and 28.2% in 1998—while Asian enrollment (combining the UC categories of “Asian American” and “Filipino”) increased slightly from 38.5% to 39.5%. *Id.*

<sup>60</sup> University of Washington Freshman Applications by Year, Ethnicity and Outcome 1 (2008) (on file with author) [hereinafter University of Washington Data]. This data is based on the latest information available to the University of Washington Office of Academic Record Management as of August 7, 2008. In this data, the term “Hispanic” is used rather than “Latino.” Admissions and enrollment numbers for Native American and Pacific Islander students also declined. *Id.*

<sup>61</sup> *Id.*

men *enrolled* declined by one-third—decreasing from 121 enrolled African American students (in 1998) to 81 (in 1999) out of over 4000 students.<sup>62</sup> Likewise, between 1998 and 1999, fewer Latino applicants were admitted—with the number of Latino admits decreasing from 377 (in 1998) to 312 (in 1999).<sup>63</sup> The number of Latino students enrolled also declined—from 188 students to 131.<sup>64</sup>

## 2. Declining Rates of Minority Admissions

It is virtually inevitable that ending affirmative action policies designed to increase the representation of “underrepresented” racial groups would result in the selection of a smaller number of applicants from those racial groups.<sup>65</sup> Yet, Title VI operates on the assumption that even if racial groups are admitted in smaller numbers, fair and nondiscriminatory selection processes are expected to result in relatively equal *rates* of admission for all racial groups.<sup>66</sup> This is significant

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<sup>62</sup> *Id.* Accordingly, the African American percentage of overall freshman enrollment declined from 3.0% to 1.9%. *Id.* The University of Washington increased African American enrollment to 105 for the next admissions cycle in 2000. This increase was facilitated by the institution’s decision to increase the freshman class by 902 students. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* That decline resulted in a decrease in the Latino percentage of overall freshman enrollment from 4.6% to 3.0%. *Id.*

<sup>65</sup> The Supreme Court has held that universities may consider the race of applicants in order to admit a “critical mass” of students from racial groups that make up very small percentages of the overall applicant pool. *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003). Admitting a “critical mass” of racial minorities means admitting underrepresented minorities in sufficiently “meaningful numbers” that they do not feel isolated and are thereby encouraged to participate in the classroom. *See id.* at 318. The Court has interpreted the Fourteenth Amendment to permit (public) universities that have a compelling interest in “diversity” to use “narrowly tailored” race-conscious admissions policies that typically operate to admit underrepresented minorities like African Americans, Latinos, and Native Americans at higher rates than whites and some Asian racial groups. *See id.* at 334.

<sup>66</sup> Comparison of admissions rates by race—essentially disparate impact analysis—can be presented as evidence to prove violations of Title VI as well as other provisions of the Civil Rights Act of 1964. *See, e.g., Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977) (“[S]tatistics can be an important source of proof in employment discrimination cases, since ‘absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.’” (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977))). Title VI prohibits unjustified racial disparities resulting from race-based affirmative action policies designed to remedy past or current racial discrimination. *See infra* Section III.A. Based on the assumption that all racial groups should have a fair opportunity to participate in federally funded programs, the fact that a university admits members of one racial group at lower rates

because certain racial minorities were not only admitted to and enrolled at UC Berkeley in smaller overall *numbers* under affirmative action-less policies, but African Americans and Latinos were among underrepresented racial groups that were admitted to UC Berkeley at substantially lower *rates* than other racial groups.<sup>67</sup>

During UC Berkeley's first post-Proposition 209 admissions cycle (1998), white and non-Filipino Asian American applicants were admitted at rates of 33.2% and 31.8%, respectively.<sup>68</sup> In contrast, the African American admissions *rate* of 20.3% and the Latino admissions *rate* of 20.8% were significantly lower.<sup>69</sup> The magnitude of the post-Proposition 209 racial disparity in admissions rates was so great that African American, Latino, and Filipino students who were denied admission to UC Berkeley in 1998 sued the institution for violating Title VI.<sup>70</sup>

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than other races constitutes prima facie proof that the institution's selection criteria discriminate on the basis of race. *Hazelwood*, 433 U.S. at 307-08.

<sup>67</sup> See *supra* note 57 and accompanying text.

<sup>68</sup> Rates of admission for UC campuses were calculated by the author based on admissions and enrollment data made publicly available by the UC Office of the President. See UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, *supra* note 57, at 1.

<sup>69</sup> Some Asian American racial groups were admitted at lower rates than African Americans and Latinos. For instance, the comparable Filipino admissions rate was 19.4%. *Id.* Filipino Americans were considered officially underrepresented in the University of California system and Pacific Islanders are considered underrepresented minorities within the University of Washington system. See, e.g., LAIRD, *supra* note 13, at 61 (describing Filipinos as an underrepresented group at Berkeley). It is also worth noting that the increases in admissions of whites and some Asian American racial groups do not translate into large increases in white and Asian enrollment relative to the size of the white and Asian applicant pool. Because African Americans and Latinos are a very small numerical minority as compared to Whites and Asians in the typical college applicant pool, ending affirmative action increases the admissions chances of whites and Asians only marginally. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046-48 (2002) (concluding that racial preferences do not harm nonminorities as a group in the same proportion that they benefit minorities).

<sup>70</sup> See Complaint at 3, *Rios v. Regents of the Univ. of Cal.*, No. 99-0525 (N.D. Cal. Feb. 2, 1999), available at [http://www.naacpldf.org/content/pdf/u\\_berkeley/Castaneda\\_v\\_UC\\_Regents.pdf](http://www.naacpldf.org/content/pdf/u_berkeley/Castaneda_v_UC_Regents.pdf), settled *sub nom.* *Castaneda v. Regents of the Univ. of Cal.* (N.D. Cal. June 9, 2003). For information on the settlement, see Press Release, NAACP Legal Defense Fund, Settlement Reached in Suit over Discriminatory Admissions Process at UC Berkeley (June 17, 2003), <http://www.naacpldf.org/content.aspx?article=5>. When this case was filed in 1999, I was a staff attorney at the NAACP Legal Defense and Educational Fund, Inc., and served as head counsel of the legal team representing the plaintiffs in this case. This litigation has been the subject of substantial commentary. See, e.g., Evelyn Nieves, *Civil Rights Groups Suing Berkeley over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A9 (reporting on a press conference held by *Rios* plaintiffs and their attorneys from the NAACP Legal Defense and Educational

Like UC Berkeley, the University of Washington admitted African American, Latino, and other underrepresented minority applicants at lower rates than white and certain Asian American racial groups under its affirmative action-less policies. During the University of Washington's first year of affirmative action-less admissions, the University admitted African Americans (60.9% admissions rate), Latinos (72.4% admissions rate), Pacific Islanders (69.4% admissions rate), and Native Americans (70.2% admissions rate) at lower rates than it had when affirmative action policies were in place.<sup>71</sup> In contrast, admissions rates for white and non-Pacific Islander Asian American applicants increased to 78.9% and 80.5%, respectively.<sup>72</sup>

As discussed further in Part III, federal courts have held that a federally funded university must justify admissions practices that select students of different races at significantly different rates.<sup>73</sup> Statistical calculations of the magnitude of racial disparity in selection rates constitute evidence of racial discrimination by a federally funded educational institution under the Title VI "effect" theory of discrimination. If, for example, instead of admitting students of all races at close to equal rates, a university admits African American applicants at a rate

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Fund, Inc., the Asian Pacific American Legal Center of Southern California, the American Civil Liberties Union of Northern California, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and the Mexican American Legal Defense and Educational Fund); *see also* Asian Law Caucus et al., *Facts and Fantasies About UC Berkeley Admissions: A Critical Evaluation of Regent John Moores' Report*, 2 HASTINGS RACE & POVERTY L.J. 53, 64-67 (2004) (discussing *Castaneda's* role in changing UC Berkeley's admissions policies); William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 187 (2002) (citing *Castaneda* as an example of disparate impact discrimination); Lawrence, *supra* note 11, at 946-47 (observing that the *Rios* litigation "directly turns the upside down logic of 'reverse discrimination' right side up" and posits "a different view of what constitutes equality, a different remedy requested, and, ultimately, a different conception of justice"); Daria Roithmayr, *Left over Rights*, 22 CARDOZO L. REV. 1113, 1127-31 (2001) (identifying the *Rios/Castaneda* lawsuit as "a specific example of strategic rights in action"); Alan E. Schoenfeld, *Challenging the Bounds of Education Litigation: Castaneda v. Regents and Daniel v. California*, 10 MICH. J. RACE & L. 195, 210-15 (2004) ("[I]t is evident that *Castaneda* exerted extraordinary pressure on the higher education community and spurred them to substantive change."); Burdman, *supra* note 2.

<sup>71</sup> Rates of admission for the University of Washington were calculated by the author based on admissions and enrollment data provided by the University of Washington. *See supra* note 60.

<sup>72</sup> *Id.* Calculation of the admissions rate for "Hawaiian Pacific Islanders" based on the number of such applicants who applied and were admitted shows that Pacific Islanders were admitted to the University of Washington at a substantially lower rate than "Asian Americans." *See* University of Washington Data, *supra* note 60.

<sup>73</sup> *See infra* Section III.C.

that is significantly lower than the admissions rates for white applicants, Title VI discriminatory effect analysis becomes relevant.<sup>74</sup> If racial differences in rates of admission to a particular university reach the magnitude that federal courts deem evidence of Title VI discriminatory effect, Title VI requires that the institution be able to justify the use of the selection criteria that led to the racial disparity.<sup>75</sup> If the university cannot justify the use of a selection criterion that has a racially discriminatory impact—a criterion that causes admissions rates to diverge from racial parity—the U.S. Department of Justice may find that institution to be in violation of Title VI disparate impact regulations. The basic principle underlying the Title VI theory of effect discrimination is that individuals of all races should enjoy equal access to federally funded institutions and services. Accordingly, federal courts have interpreted Title VI regulations in a manner that has the practical effect of requiring federally funded universities to justify large racial disparities.

#### D. *Racial Disparity in Lieu of Racial Parity in Admissions*

Title VI disparate impact theory presumes that “racial parity”—equal admissions rates for all racial groups—would result if selection policies were free of race-conscious decision making and there were no significant disparities in the qualifications of applicants across racial groups. Under a racial parity scenario, there would be little or no difference between the admissions rates for African Americans, Latinos, whites, and Asian Americans because racial groups would be admitted at equal or close to equal rates. Presumably, racial parity in admissions rates is the ideal to which both federal antidiscrimination laws like Title VI and state anti-affirmative action laws aspire.<sup>76</sup> If the difference between the admissions rates of the different racial groups is of sufficient magnitude, it is a “racial disparity.” The statistical disparity, in and of itself, can be evidence of racial discrimination under the Title VI discriminatory effect theory.<sup>77</sup>

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<sup>74</sup> The standard that federal courts apply to determine whether a racial disparity in admissions rates is of legal significance is discussed in Section III.C.

<sup>75</sup> As explained in Section III.C, deviations from racial parity can be justified if there is a “valid necessity” to select based on criteria that result in the underrepresentation of a particular racial group.

<sup>76</sup> Again, state anti-affirmative action laws are modeled after Title VI.

<sup>77</sup> Of course, Title VI standards apply to applicants of all races. White litigants frequently allege Title VI claims in federal lawsuits challenging affirmative action, as Barbara Grutter, Jennifer Gratz, and Allan Bakke have. See *Grutter v. Bollinger*, 539

Since the late 1970s, the typical Title VI race-discrimination charges levied against top-ranked public universities have been claims that an institution's affirmative action policy purposefully discriminates against white applicants on the basis of their race.<sup>78</sup> But, in states with anti-affirmative action laws, disproportionate rejection of minority applicants should shift the focus to the Title VI threat to institutions.<sup>79</sup> If the racial disparities in admissions rates since the passage of state anti-affirmative action laws are of sufficient magnitude, they establish the prima facie factual predicate necessary to prove Title VI effect discrimination.

Figures 1 and 2 are visual illustrations of the relative *rates* of admissions by race before and after the passage of the anti-affirmative action laws in California and Washington, respectively. The experiences of California and Washington selective public universities reveal that instead of bringing an end to racial disparities in admissions, racial differences in admissions rate continue to be the norm after the passage of state anti-affirmative action laws.<sup>80</sup> The figures show shifts from higher to lower admissions rates for African American and Latino students after the passage of the California and Washington anti-affirmative action laws.

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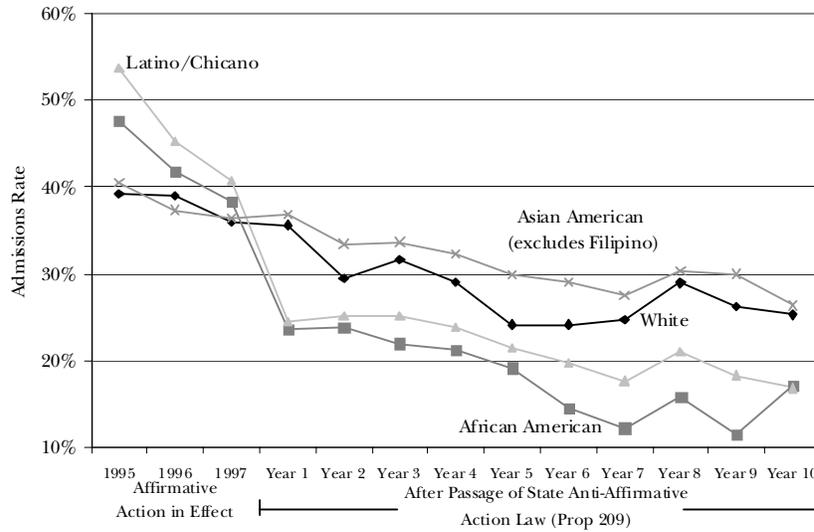
U.S. 306, 317 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 250 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 270 (1978). However, plaintiffs alleging "reverse discrimination" do not invoke the Title VI discriminatory effect theory. They would instead argue that the explicit consideration of race as part of an affirmative action policy constitutes purposeful racial discrimination in violation of Title VI under the discriminatory intent theory, identical to the standard for establishing a violation of the Fourteenth Amendment's Equal Protection Clause. See *Grutter*, 539 U.S. at 326-27.

<sup>78</sup> See, e.g., *Grutter*, 539 U.S. 306 (University of Michigan Law School); *Gratz*, 539 U.S. 244 (University of Michigan undergraduate); *Bakke*, 438 U.S. 265 (UC Davis Medical School); *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005) (University of Washington Law School); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (University of Georgia); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *vacated*, 95 F.3d 53 (5th Cir. 1996) (University of Texas Law School). These plaintiffs also alleged violations of the Fourteenth Amendment's Equal Protection Clause.

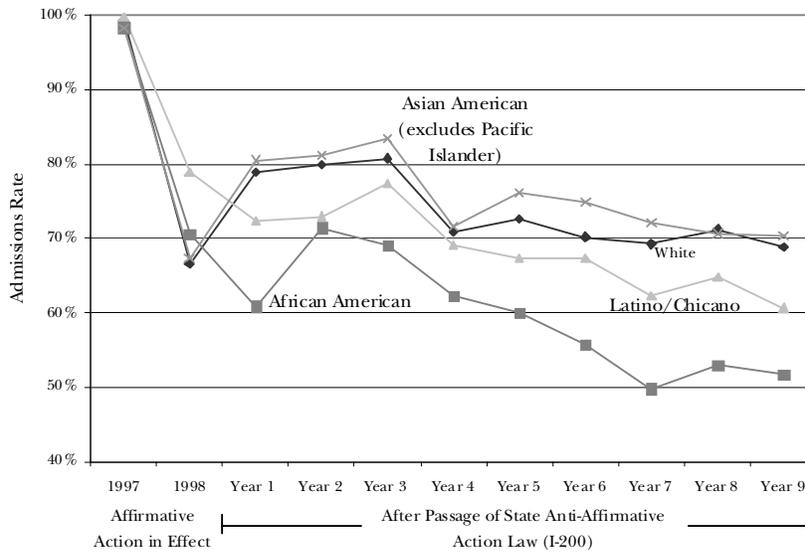
<sup>79</sup> After *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), that threat is the possibility that the United States Department of Justice may, either on its own or spurred by charges filed by rejected minority applicants, find that a publicly funded educational institution is violating Title VI. See *infra* Section III.A.

<sup>80</sup> The data points in Figure 1 are taken from the UCLA post-Proposition 209 admissions cycles. See UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, *supra* note 57, at 2. The data points in Figure 2 are taken from the University of Washington post-Initiative 200 admissions cycles. See University of Washington Data, *supra* note 60, at 1. Years following the adoption of anti-affirmative action laws are labeled by how many affirmative action-less cycles have passed.

**Figure 1: California Example of Affirmative Action–Less Admissions Effect on Freshman Admission Rates by Race**



**Figure 2: Washington Example of Affirmative Action–Less Admissions Effect on Freshman Admission Rates by Race**



In the California example (data from UCLA), there is racial disparity in favor of African American and Latino applicants prior to the passage of Proposition 209 and racial disparity disfavoring those same groups after the California anti-affirmative action law went into effect. When affirmative action was in effect in California, the African American and Latino admissions-rate lines were higher than the white and non-Filipino Asian American lines. Prior to the passage of Proposition 209 in California, the distance between the African American and Latino admissions lines and white and non-Filipino Asian American lines shows the impact of giving positive admissions consideration to minority applicants. During the year immediately before the passage of Washington's anti-affirmative action law (data from the University of Washington), 1998, the admissions-rate lines of African American and Latino applicants were higher than the admissions-rate lines of white and non-Pacific Islander Asian American applicants.<sup>81</sup>

In the first year without affirmative action ("Year 1" on Figures 1 and 2), the admissions-rate lines for African Americans and Latinos drop in both the California and Washington examples. Far from bringing equal admissions rates for all races, the end of affirmative action in the California Proposition 209 example shows a very steep decline in both African American and Latino admissions rates. After both Proposition 209 and Initiative 200 took effect, the African American and Latino admissions-rate lines and the white and Asian American lines cross—replacing a racial disparity in admissions rates favoring African Americans and Latinos with a racial disparity favoring whites and Asian Americans.<sup>82</sup> Hence, affirmative action-less admissions in California and Washington appear to have resulted in racial

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<sup>81</sup> Washington's most selective public university is less selective than the California example—it rejects a smaller percentage of applicants. Two years before the end of affirmative action in Washington, 1997, African American (98.4% admissions rate), Latino (99.7% admissions rate), white (99.3% admissions rate), and non-Filipino Asian American (98.3% admissions rate) applicants were admitted at rates close to racial parity.

<sup>82</sup> If included in Figure 1, Filipino admissions rates would be lower than or comparable to African American and Latino enrollment and admissions rates and, therefore, substantially lower than the "Asian American" admissions, enrollments and admissions rates depicted in the figures. See UNIV. OF CAL. OFFICE OF THE PRESIDENT, *supra* note 57, at 2 (listing admissions data by ethnicity for UCLA from 1995 to 2004). Similarly, if included in Figure 2, Pacific Islander admission, enrollment and admissions rates would be lower than the "Asian American" enrollment and admissions rates depicted in the figures. See University of Washington Data, *supra* note 60 (listing admissions data by ethnicity for the University of Washington from 1998 to 2003).

disparity disfavoring African American and Latino applicants.<sup>83</sup> Neither anti-affirmative action law resulted in racial parity in admissions.

Federal statutory and constitutional law permits racial disparities if appropriately justified. However, unjustified racial disparities of great magnitude—a large distance between the admissions-rate lines on Figures 1 and 2—may be offered as evidence that a university's admissions policy violates Title VI's prohibition against the use of selection criteria that have an unjustified racially discriminatory effect.<sup>84</sup> For instance, were it to be shown that an admissions criterion like SAT score has a disproportionate negative impact on African American and Latino applicants but is necessary for universities to identify which applicants have the college performance ability to be successful at their institutions, the gap between the admissions rates of African American and Latino applicants and white and Asian American applicants might be justified under Title VI federal antidiscrimination law.<sup>85</sup> But, if universities rely on SAT scores more than necessary to identify which applicants will be successful at the institutions, Title VI federal antidiscrimination law requires that the institutions either decrease reliance on the selection criterion that has a racially discriminatory effect or adopt remedial affirmative action policies to compensate for the unjustified racial impact.<sup>86</sup> Part II of this Article examines the role of the SAT as an admissions criterion at highly selective, top-ranked public universities. It also explains the opposing views as to whether the SAT's predictive capacity is strong enough to justify racially disparate impact caused by its use as an admissions criterion.

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<sup>83</sup> Whether the magnitude of the racial disparity is sufficient to constitute evidence of Title VI discriminatory effect is a question of federal law. *See infra* Section III.C.

<sup>84</sup> Selecting applicants from one racial group at less than four-fifths of the selection rate for other racial groups may be used by plaintiffs to prove both purposeful racial discrimination and racially discriminatory effect under Title VI. *See infra* Section III.B.

<sup>85</sup> In fact, courts have interpreted the Title VI discriminatory effect theory to permit a defendant university to rebut evidence of discriminatory effect by demonstrating that reliance on a particular selection criterion is "educationally necessary." *See infra* Section III.B.

<sup>86</sup> *See infra* Section IV.B.

## II. EVALUATING THE ROLE OF THE SAT IN SELECTIVE ADMISSIONS

Many universities, faced with the problem of having to choose from among thousands of highly qualified applicants, have adopted practices that give too much weight to the SAT.

Richard Atkinson, President, University of California, 1995–2003<sup>87</sup>

In states with anti-affirmative action laws, the debate over the fairness and validity of the SAT as an admissions criterion is particularly salient. How a university evaluates the SAT's precision as a predictor of applicants' college performance ability is implicated in assessing whether racial disparities in admissions after the elimination of affirmative action violate the Title VI disparate impact standard. If a university's admissions criteria—such as the SAT—are fair and valid mechanisms for distinguishing amongst the pool of high-school students who apply to that institution, racial disparities in admissions are simply an accurate reflection of the lesser academic qualifications of African Americans and Latinos. If the SAT's predictive capacity is limited but maintaining a high institutional average SAT score is important to the university's prestige and status, institutions could be accused of overrelying on the SAT in admissions for a “noneducational” purpose. The primary point of contention between the two contrasting views is whether African American and Latino applicants are disqualified from being educated at top-ranked state universities when their SAT scores are lower than the average SAT score of white and some Asian American applicants or lower than the university's institutional average SAT score.<sup>88</sup>

Under the first view, the operating assumption is that large racial disparities in rates of admission to an affirmative action-less university

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<sup>87</sup> Richard C. Atkinson, President, University of California, The 2001 Robert H. Atwell Distinguished Lecture at the 83rd Annual Meeting of the American Council on Education (Feb. 18, 2001), *available at* <http://www.ucop.edu/news/sat/speech.html>.

<sup>88</sup> Professor Lawrence explains the findings of the authors of *Shape of the River* as follows:

[W]hile blacks as a group scored lower than whites as a group on standardized tests, the difference in these scores did not mean that blacks were unqualified for the education they received. Bowen and Bok say that the difference in scores between black and white applicants to these schools is better explained by the fact that white applicants are spectacularly well qualified than by the assumption that black applicants were not qualified. More than 75% of the black applicants in the study had higher math SAT scores, and more than 73% had higher verbal SAT scores, than the national average of white test-takers.

Lawrence, *supra* note 11, at 941 n.48 (citing BOWEN & BOK, *supra* note 10, at 18-19).

need no explanation because they track racial disparities in SAT scores. From this position, the fact that the average SAT score of African American and Latino high-school students is, on average, lower than the average score of white and Asian American students supports a presumption that African American and Latino applicants to top-ranked public universities are not qualified to attend such institutions.<sup>89</sup> This presumption is so strong that the fact that the rate of admission of African American and Latino applicants may be much lower than the rate of admission for applicants of other races is rarely discussed by commentators who accuse institutions of granting admissions preferences to minority applicants in violation of state anti-affirmative action law.<sup>90</sup>

The contrasting view is that selective universities often use SAT scores in a manner of questionable practical value in assessing student college performance ability.<sup>91</sup> Proponents of this position would likely reject the conclusion that African American and Latino high-school students who apply to their state's flagship university with high grades but SAT scores below the institution's average score are unqualified to attend the university. Adherents to this perspective would also likely challenge the assumption that racial disparities in rates of admission to affirmative action-less universities are wholly the result of deficiencies in the academic qualifications of African American and Latino applicants. Accordingly, the historical basis and rationales for university reliance on the SAT as an admissions criterion are relevant to evaluating the state and federal legal constraints on the admissions policies of federally funded, public universities.

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<sup>89</sup> STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE*, ch. 14 (Touchstone 1999) (1997).

<sup>90</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367, 408-10 (2004) (arguing that law schools either "'race-track' admissions or add large boosts to black applications"); Vikram Amar & Richard H. Sander, *A Mismatch Effect?*, *L.A. TIMES*, Sept. 26, 2007, at A25 ("[A]ffirmative action . . . enables hundreds of minority law students to attend more elite institutions than their credentials alone would allow."). Subsumed within this analysis, there appears to be an assumption that the pool of African American applicants to these institutions is so utterly unqualified that the gap between the admissions rates for these institutions should reflect even lower rates of underrepresented minority admissions and even larger racial disparities in admissions rates.

<sup>91</sup> Such policies do eliminate potential Title VI liability for unjustified exclusion of minorities based on SAT scores. *Cf.* *Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (holding that "bottom-line" results neither preclude Title VII plaintiffs from establishing a prima facie case nor provide employers with a defense to disparate impact allegations).

A. *University Ranking and Rating Based on Institutional Average SAT Score*

In recent years, university leaders have become increasingly critical of the role of the SAT in selective higher-education admissions decision making.<sup>92</sup> In a now-famous speech in which he recommended the elimination of the SAT as a criterion for admission, University of California President Richard Atkinson expressed concern that “America’s overemphasis on the SAT is compromising our educational system.”<sup>93</sup> What Atkinson did not mention in his speech is the pressure that prestige rankings and financial-strength rating systems impose on universities to maximize their institutions’ average SAT scores. In addition to serving as a tool for distinguishing among college applicants, educational-rating publications use SAT scores to compare colleges and universities. The fact that an institution’s prestige ranking and bond rating are tied to its reliance on SAT scores means that institutions concerned about their rankings and ratings have a strong incentive to use SAT scores irrespective of whether the SAT has the capacity to identify meaningful distinctions between applicants with very strong non-SAT academic credentials.<sup>94</sup>

First published in 1983, the *U.S. News & World Report (U.S. News)* rankings began incorporating quantitative statistical categories in 1989.<sup>95</sup> The relative weights of the ranking categories, including institutional average SAT score, are periodically adjusted by the publication at its discretion.<sup>96</sup> Since their first publication, the *U.S. News* rank-

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<sup>92</sup> See, e.g., Jacques Steinberg, *Challenge Revives SAT Test Debate*, N.Y. TIMES, Nov. 19, 2001, at A14 (describing former University of California President Richard Atkinson’s later-revised recommendation that the University of California cease requiring the SAT).

<sup>93</sup> Atkinson, *supra* note 87.

<sup>94</sup> See Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 508 (2007) (concluding, based on a literature review, that a main factor leading to the increased reliance on standardized test scores in college admissions is “selective institutions’ attempts to climb the pecking order in various college ranking systems, such as the *U.S. News and World Report* and *Baron’s*, [which tip] the weights placed on student test scores”); Guinier, *supra* note 7, at 154-55 (explaining that “hard numbers” like SAT scores tend to dominate admissions decisions because selective colleges and universities “become committed to admitting mostly those students whose test scores protect the institution’s own rankings”).

<sup>95</sup> See Elizabeth F. Farrell & Martin Van Der Werf, *Playing the Rankings Game*, CHRON. HIGHER EDUC., May 25, 2007, at A11, A14, A16 (describing the development of the rankings).

<sup>96</sup> See *id.* (noting that “one year’s figures should not be compared with previous years’ because editors ‘change the methodology every year’”).

ings have been subject to strong criticism.<sup>97</sup> The two most salient critiques of the system are, first, that the *U.S. News* ranking criteria and weighting of those criteria lack any empirical or theoretical basis,<sup>98</sup> and, second, that the rankings can be manipulated by “ranksteering”—the practice of making higher-education admissions and administrative decisions in a manner designed to move higher on university ranking lists.<sup>99</sup>

There is strong anecdotal and empirical evidence that the real-world impact of a university’s average SAT score on its *U.S. News* ranking is significantly greater than the explicit formula weight reported by *U.S. News* to calculate rankings.<sup>100</sup> Although the *U.S. News* rankings formula gives average SAT score an explicit weight of 7.5%, studies indicate that a university’s mean SAT score affects where institutions fall in the prestige rankings to a much larger degree.<sup>101</sup> Reports of institutional success in “moving up” in the prestige rankings are often linked to increases in an institution’s average SAT score.<sup>102</sup>

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<sup>97</sup> See, e.g., Nicholas Thompson, *Playing With Numbers: How U.S. News Mismeasures Higher Education and What We Can Do About It*, WASH. MONTHLY, Sept. 2000, at 16, 16 (criticizing the rankings for “push[ing] schools to improve in tangential ways and fuel[ing] the increasingly prominent view that colleges are merely places in which to earn credentials”).

<sup>98</sup> See NAT’L OPINION RESEARCH CTR., A REVIEW OF THE METHODOLOGY FOR THE *U.S. NEWS & WORLD REPORT’S* RANKINGS OF UNDERGRADUATE COLLEGES AND UNIVERSITIES (1997), available at <http://www.washingtonmonthly.com/features/2000/norc.html> (concluding that “the weights used to combine the various measures into an overall rating lack any defensible empirical or theoretical basis”). The National Opinion Research Center report also notes that many studies indicate that the *U.S. News* rankings are “sensitive to relatively small changes in the weighting scheme.” *Id.*; see also Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 508-12 (2007) (demonstrating the unreliability of *U.S. News* rankings of law schools).

<sup>99</sup> See Julie Rawe, *The Rankings Revolt*, TIME, Apr. 2, 2007, at 49, 50 (describing the “pernicious” practice of “ranksteering”).

<sup>100</sup> See, e.g., Thomas J. Webster, *A Principal Component Analysis of the U.S. News & World Report Tier Rankings of Colleges and Universities*, 20 ECON. EDUC. REV. 235, 243 (2001) (“The main finding of this study is that the actual contributions of the 11 ranking criteria examined differ explicitly from the explicit [*U.S. News*] weighting scheme because of the presence of severe and pervasive multicollinearity.”).

<sup>101</sup> See, e.g., Alon & Tienda, *supra* note 94, at 498 (stating that their findings about the weight of the test “may be an underestimation”).

<sup>102</sup> Farrell & Van Der Werf, *supra* note 95, at A14, A16, report that “[o]ver the last five years, the average SAT score of enrolling first-year students has risen 30 points, to 1219” at Baylor University—a university that moved up the rankings from the unranked third tier to rank 81st among national universities. Further, they noted that Chapman University improved its *U.S. News* ranking from 90th to 11th among its peer institutions by setting a minimum SAT score requirement of 740 and increasing the

Research relying on regression analyses and simulations indicate that selective colleges and universities have responded to increased internal and external emphasis on rankings and ratings by increasing their emphasis on SAT scores as an admissions criterion.<sup>103</sup> This appears to be a very rational institutional reaction in light of findings that a university's average SAT score has greater actual effect on an institution's ranking than other higher-weighted ranking criteria because the other non-SAT criteria seem to be greatly impacted by the institution's average SAT score.<sup>104</sup> The institutional average SAT category is likely multicollinear. If this is true, the *U.S. News* rankings could be, in effect, double, triple, or quadruple counting institutional average SAT score criteria in its rankings.<sup>105</sup> Consequently, keeping a close watch on how an applicant's SAT score will impact the institution's average SAT score—a form of ranksteering—has become commonplace at selective universities.<sup>106</sup>

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minimum score “another 10 or 20 points” each year so that the “minimum SAT score is now 1050.” *Id.*

<sup>103</sup> See Alon & Tienda, *supra* note 94, at 498-99 (finding a temporal change in the weight placed on SAT scores as compared to class rank between 1982 and 1992 and describing the fact that “test-score weights exceed those for class rank at the more selective institutions, and this gap widened substantially over time” as depicting a “shifting meritocracy”).

<sup>104</sup> See J. Fredericks Volkwein & Kyle V. Sweitzer, *Institutional Prestige and Reputation Among Research Universities and Liberal Arts Colleges*, 47 RES. HIGHER EDUC. 129, 143 (2006) (“Among all 447 institutions, median SAT score and compensation for full professors, not adjusted for cost-of-living, appear as strong indicators of prestige.”); Webster, *supra* note 100, at 243 (finding that “when the effects of multicollinearity were explicitly considered,” the institutional average SAT score ranked first as “the most significant ranking criterion,” while “academic reputation, which is the most heavily weighted [*U.S. News*] ranking criterion[,] . . . ranked fourth”).

<sup>105</sup> Webster notes that

[t]he importance of [average SAT scores] in explaining the [*U.S. News*] tier stems not only from its direct effect on tier rankings but also from its *indirect* effect on seven of the remaining ten ranking criteria, including (in descending order) actual graduation rates, predicted graduation rates, retention rates, alumni contributions, academic reputation, the percentage of enrolled students who graduated in the top ten percent of their high school class, and the acceptance rate.

Webster, *supra* note 100, at 243 (emphasis added).

<sup>106</sup> See Lloyd Thacker, *Editor's Stories I*, in COLLEGE UNRANKED 55, 58 (Lloyd Thacker ed., 2005) (“The groundswell of interest in managing image by improving rank has also resulted in giving more weight to SAT scores when admitting students, since a college's average SAT scores are given significant consideration in determining its rank.”).

Average institutional SAT scores are also used by bond-rating agencies to assess a university's financial viability. The three major financial rating agencies—Moody's Investors Service, Standard & Poor's, and Fitch Ratings—consider average SAT scores as part of their credit analyses.<sup>107</sup> Because it has become increasingly common for colleges and universities to issue bonds to raise money for major expansion projects,<sup>108</sup> many institutions have a very direct financial incentive to try to increase their overall average SAT score. The fact that average SAT score is used to gauge institutional financial health as well as prestige encourages admissions officials to place even greater weight on SAT scores as an admissions criterion.<sup>109</sup>

The institutional-level SAT competition has become so intense that educational leaders analogize the pressure on universities to increase their average SAT score to the pressure on nations to increase their nuclear weapons capability.<sup>110</sup> Like world leaders who recognize the fatal danger that nuclear armament poses for every nation involved, university leaders complain that the race to increase average SAT scores poses an incredible danger to the future of higher education.<sup>111</sup> So similar is the predicament of university leaders to that of

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<sup>107</sup> See, e.g., STANDARD & POOR'S, PUBLIC FINANCE CRITERIA 176 (2007), available at [http://www2.standardandpoors.com/spf/pdf/products/PF\\_Criteria\\_Book\\_2007.pdf](http://www2.standardandpoors.com/spf/pdf/products/PF_Criteria_Book_2007.pdf) (stating that standardized test scores can "enhance[] a school's ability to withstand a decline in demand"); Standard & Poor's, *University of Washington; Lease; Public Coll/Univ—Unlimited Student Fees*, RATINGSDIRECT, Apr. 15, 2008, at 2-3, available at <http://www.washington.edu/admin/treasury/pdfs/S&PReport2008GRB.pdf> (assigning AA+ rating to the University of Washington's general revenue refunding bonds, series 2008, based on, among other factors, the fact that "[s]tudent quality is good, with average SAT scores for fall 2007 at 1196"); Press Release, Stevens Inst. of Tech., Stevens Receives "A"s from Standard & Poor's and Moody's Investor's Services with Bond Ratings' Upgrades (Aug. 12, 1998), available at <http://www.stevens.edu/press/pr/pr019.htm> (citing Moody's report as stating that "S.A.T. scores of 1290 indicate student quality is high").

<sup>108</sup> See Audrey Williams June, *Under the Ratings Agency's Microscope*, CHRON. HIGHER EDUC., Jan. 27, 2006, at A27 (noting the increasing use of bonds "to finance the apartment-style residence halls, gleaming fitness centers, and academic buildings that have cropped up on campuses").

<sup>109</sup> See Bruce J. Poch, *Sanity Check*, in COLLEGE UNRANKED, *supra* note 106, at 52.

<sup>110</sup> See, e.g., Atkinson, *supra* note 87 ("In many ways, we are caught up in the educational equivalent of a nuclear arms race. We know that this overemphasis on test scores hurts all involved, especially students. But we also know that anyone or any institution opting out of the competition does so at considerable risk.").

<sup>111</sup> See Rawe, *supra* note 99, at 49 (noting college presidents' displeasure with the rankings system). In fact, university leaders have expressed concern that the K-12 educational system is increasingly focused on skills that correlate to success on the SAT and other standardized tests at the expense of teaching students the critical-thinking

nations that they face a fear analogous to the fear of nations that disarmament will make them weak in the eyes of the world; universities fear that decreasing reliance on SAT scores will weaken their position in college-ranking systems.

B. *Debating Minority Deficiency Versus Test Deficiency*

The large declines in African American and Latino admissions to top-ranked public universities after the passage of anti-affirmative action laws have reinvigorated those who criticize how universities rely on SAT scores. Central to the debate over the proper role of SAT scores in selective admissions is whether it is appropriate or accurate to equate an applicant's SAT score with her college performance ability. According to the SAT-critical view, using the SAT as the tipping factor for admissions decisions is not a valid way of distinguishing between candidates at the most qualified end of the minority-applicant pool. The pro-SAT view is that selective universities appropriately rely on SAT scores because the scores are the best means of identifying which applicants will succeed at top-ranked institutions. Which of these views is correct is a hotly contested issue.

It is also important to note that the persistent and pervasive racial gap in SAT scores raises the stakes in the debate over how much SAT reliance is justified. In the midst of disagreement as to the proper role of the SAT as an admissions criterion, an explanation for the racial gap in SAT scores remains elusive.<sup>112</sup> Generally, there are two major categories of opposing theories explaining the racial gap in SAT scores: "minority-deficiency" theories and "test-deficiency" theories. Minority-deficiency theories accept as given that the racial gap in test scores measures a true deficiency in minority academic preparedness. A prominent minority-deficiency theory posits that African Americans score lower on standardized tests like the SAT because they live in homes with fewer books and have parents less likely to have attended college and who are less likely to read with them on a regular basis.<sup>113</sup>

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and analytical skills that they need to perform well in college and beyond. *See generally* PETER SACKS, *STANDARDIZED MINDS* (1999).

<sup>112</sup> *See generally* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) (collecting various essays that attempt to explain the racial gap in test scores).

<sup>113</sup> This theory can be described more specifically as a theory of African American "cultural deficiency." *See* Meredith Phillips et al., *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 112, at 103, 107-08 (discussing the impact of environmental conditions on test results).

Another theory points to African American youth's rejection of "acting white" as evidence of a counteracademic culture that depresses African American test performance.<sup>114</sup>

Test-deficiency theories, however, posit that the SAT is itself deficient as an academic measurement tool, particularly in predicting the future success of minority applicants.<sup>115</sup> The research of educational psychologist Claude Steele has led him to posit a leading test-deficiency theory. Steele's increasingly significant theory contends that the racial gap in SAT and other standardized-test scores is the effect of the "stereotype threat" on African American test-takers—consciousness that the gender, racial, or other demographic group to which one belongs is expected (stereotyped) by society to perform poorly in a particular milieu.<sup>116</sup> When steps are taken to eliminate the threat of negative academic stereotypes about African Americans before they take a particular test, the gap between African Americans'

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<sup>114</sup> See, e.g., Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of Acting White,"* 18 URB. REV. 176, 176 (1986) (using ethnographic data to argue that "the fear of being accused of 'acting white' causes a social and psychological situation which diminishes black students' academic effort and thus leads to underachievement"). But see James W. Ainsworth-Darnell & Douglas B. Downey, *Assessing the Oppositional Culture Explanation for Racial/Ethnic Differences in School Performance,* 63 AM. SOC. REV. 536, 536 (1998) (rejecting Fordham & Ogbu's oppositional culture theory based on analysis of the National Education Longitudinal Study's data of African American, Asian American, and non-Hispanic white high school sophomores).

<sup>115</sup> See, e.g., Kidder & Rosner, *supra* note 70, at 147-57 (analyzing the disparate impact of the construction of SAT questions); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance,* 52 AM. PSYCHOLOGIST 613, 613-15 (1997) (discussing how the stereotype threat influences the standardized-test performance of women and African Americans); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal,* 84 CAL. L. REV. 953, 957 (1996) (arguing that standardized tests are more predictive of parental socioeconomic status and "past opportunities" than of educational achievement).

<sup>116</sup> See Steele, *supra* note 115, at 619-24. Steele's theory has been tested and supported by a vast array of empirical research on the impact of stereotype threat on performance. See, e.g., Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat,* 35 J. EXPERIMENTAL SOC. PSYCHOL. 29, 29 (1999) (finding that "stereotype-threatened white males performed worse on a difficult math test than a nonstereotype-threatened control group"); Catherine Good et al., *Problems in the Pipeline: Stereotype Threat and Women's Achievement in High-Level Math Courses,* 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 17, 17 (2008) (proposing "that even among the most highly qualified and persistent women in college mathematics, stereotype threat suppresses test performance"); Jeff Stone et al., *Threat Effects on Black and White Athletic Performance,* 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999) (demonstrating that the stereotype threat can negatively impact sports performance); Nai Chi Jonathan Yeung & Courtney von Hippel, *Stereotype Threat Increases the Likelihood that Female Drivers in a Simulator Run over Jaywalkers,* 40 ACCIDENT ANALYSIS & PREVENTION 667 (2008).

and whites' test scores closes.<sup>117</sup> Extensive stereotype-threat research suggests that factors unrelated to the academic preparedness of African American and Latino students could skew standardized test scores in a manner that contributes to the racial gap in SAT scores.<sup>118</sup>

Other test-deficiency theories contend that standardized tests like the SAT are less useful in predicting the academic success of certain racial groups because the SAT does not measure the counterdiscrimination and counterstereotype skills that minority students need to be successful in college.<sup>119</sup> Some of these theories also maintain that the SAT is constructed in a manner that disadvantages racial minorities. For example, trial SAT questions answered correctly by higher proportions of African Americans and Latinos are less likely to become bona fide SAT questions than questions answered correctly by white test-takers who have, on average, higher SAT scores.<sup>120</sup>

Identifying the cause of the racial gap in SAT scores is interconnected with determining the proper level of emphasis on the SAT as an admissions criterion. Absent a definitive explanation of the racial gap in SAT scores, the minority-deficiency and test-deficiency theories strongly influence the views of college applicants, universities, and other significant stakeholders in higher education. If the minority-deficiency theory is correct, maintaining or increasing current levels of reliance on SAT scores is in harmony with identifying applicants most prepared to succeed academically in college. If the test-deficiency theory is correct, however, decreasing reliance on SAT scores is consistent with, and not a deviation from, basing admissions decisions on applicants' academic competence and likelihood of academic success.

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<sup>117</sup> See Steele, *supra* note 115, at 614.

<sup>118</sup> See generally Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995) (suggesting that the stereotype threat itself "may interfere with the intellectual functioning of [African American] students").

<sup>119</sup> See, e.g., Jairo N. Fuertes & William E. Sedlacek, *Using Non-Cognitive Variables to Predict the Grades and Retention of Hispanic Students*, C. STUDENT AFF. J., Spring 1995, at 30 (finding that Hispanic students' "ability to identify and combat perceived interpersonal and institutional racism" was predictive of their success in college); Terence J. Tracey & William E. Sedlacek, *A Comparison of White and Black Student Academic Success Using Noncognitive Variables: A LISREL Analysis*, 27 RES. HIGHER EDUC. 333, 334 (1987) (arguing that certain "less intellectual" traits are "highly related to academic success").

<sup>120</sup> Kidder & Rosner, *supra* note 70, at 153 (arguing that "facially-neutral SAT test construction will have a strong tendency to eliminate items . . . on which African Americans and Chicanos outperform Whites").

Prior to the passage of state anti-affirmative action laws, the nation's selective universities were permitted, under both state and federal law, to use affirmative action. The Supreme Court has held in *Grutter* and *Regents of the University of California v. Bakke* that certain race-based affirmative action is legally permissible.<sup>121</sup> Before state universities in California, Washington, and Michigan ended their race-based affirmative action policies, the positive admissions consideration afforded to underrepresented minorities pursuant to such policies counterbalanced the negative impact that the racial gap in SAT scores would otherwise have had on African American and Latino admissions rates.<sup>122</sup> But, at institutions without affirmative action, nothing counterbalances the disparate impact of SAT reliance. Therefore, it is of enhanced significance in states with anti-affirmative action laws whether the minority-deficiency theory or the test-deficiency theory

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<sup>121</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *supra* notes 36-37 and accompanying text.

<sup>122</sup> This counterbalancing eliminated disparities in the racial composition of the applicants actually admitted. However, even universities using race-based affirmative action are vulnerable to Title VI charges that the use of a particular selection criteria has an unjustified racially discriminatory effect on applicants, regardless of whether affirmative action eliminates that impact on the "bottom-line" of admissions. See *supra* note 91 and accompanying text. Interestingly, Justice Thomas, a staunch critic of race-based affirmative action, was the member of the Court in *Grutter* who most explicitly described the manner in which universities have traditionally used affirmative action as a corrective for the deficiencies in tests like the SAT:

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. . . . The [University of Michigan] Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test.

*Grutter*, 539 U.S. at 369-70 (Thomas, J., dissenting). Justice Thomas refused to condone race-conscious admissions because the University of Michigan Law School's need to use affirmative action was a "self-inflicted wound[]." *Id.* at 350. Justice Powell, however, reached a very different conclusion in *Bakke* regarding the legal significance of test deficiency. He suggested that the need to use race as a corrective for deficiencies in a test's predictive ability may constitute a compelling state interest. See *Bakke*, 438 U.S. at 306 n.43 (suggesting that racial classification could offset "some cultural bias in grading or testing procedures"). Professor Tomiko Brown-Nagin has noted, "But for the University's heavy reliance upon discriminatory admissions criteria as a sorting mechanism, the aspirations for diversity and selectivity would not be in tension." Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 800 (2005).

explains the racial gap in SAT scores.<sup>123</sup> Hence, it is valuable to consider how the SAT came to play such a prominent role in higher-education admissions, the history of the SAT as an admissions criterion, and the competing theories as to whether such a role is proper.

### 1. The Well-Meaning History and Intent of the SAT in College Admissions

During the 1930s, the President of Harvard University, James Bryant Conant, led the country in adopting the original Scholastic Aptitude Test (SAT) as a criterion for assessing college applicants.<sup>124</sup> Using a standardized test to assess the intellectual capacity of college applicants was a radical and egalitarian concept in Conant's day.<sup>125</sup> Prior to the use of the SAT, college-admissions officers relied on a close-knit network of private and elite preparatory school headmasters to channel the children of America's aristocracy into higher education.<sup>126</sup> Conant believed that using tests designed to measure intelligence and mental aptitude was the means to realizing the "natural aristocracy" advocated by Thomas Jefferson.<sup>127</sup> Pleased that the SAT was very similar in format to mental-measurement tests developed by the French psychologist Alfred Binet,<sup>128</sup> creator of the first modern intelligence test,<sup>129</sup> Conant decided to use the SAT to award scholarships to

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<sup>123</sup> See, e.g., Harris, *supra* note 46, at 711 (arguing that, within the context of university admissions policies that rely on standardized tests of limited predictive ability, "taking race into account is equalizing treatment" and "a correction for the use of admissions criteria in which racial preferences are embedded"); Sturm & Guinier, *supra* note 115, at 957 (claiming that standardized tests such as the SAT and the LSAT have limited predictive ability).

<sup>124</sup> See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 38 (1999) (describing Conant's move to give scholarships based on SAT scores due to his belief that the SAT measures natural intelligence); see also Guinier, *supra* note 7, at 131-33 (explaining Conant's goal of providing elite institutions with merit-based selection criteria); cf. Roithmayr, *supra* note 15, at 1488-92 (describing the "racist and nativist" origins of modern standardized tests and their connection to the eugenics movement). For more on Roithmayr's claim, see JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 21 (1988).

<sup>125</sup> See LEMANN, *supra* note 124, at 52 (describing Conant's radical idea to provide merit-based access to joining the elite governing class).

<sup>126</sup> See, e.g., JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 26-39 (2005) (describing the long history and regularity of elite private boarding schools sending graduates to Harvard, Princeton, and Yale).

<sup>127</sup> LEMANN, *supra* note 124, at 42-43.

<sup>128</sup> *Id.* at 17.

<sup>129</sup> *Id.* at 17-18.

Harvard University. For Conant, the major appeal of the SAT was that it could be used to select applicants based on their intellectual capacity, without regard to whether they had the economic means to attend elite preparatory high schools.<sup>130</sup>

## 2. Effectiveness of the SAT in Distinguishing Amongst Highly Qualified Applicants

The SAT remains such a prominent criterion in college admissions because of its unique capacity to provide a standardized yardstick for comparing students from high schools across the country at minimal monetary expense to colleges and universities.<sup>131</sup> In recent years, the most esteemed colleges and universities in the country have seen an increase in the academic qualifications of high-school applicants.<sup>132</sup> The average SAT scores, HSGPAs, and breadth of extracurricular experiences of students applying to selective colleges and universities are at all-time highs.<sup>133</sup> So, while James Conant needed the SAT to help Harvard find intellectual diamonds in the rough who might not otherwise be discovered, today's most selective higher-education institutions need the SAT to help them select among a glittering assortment of extremely appealing applicants.

By combining an applicant's SAT score with his HSGPA, universities typically create a numerical composite index score that admissions officers use to compare and rank applicants quantitatively.<sup>134</sup> A major ostensible reason that colleges require applicants to take the SAT is that an applicant's SAT score offers admissions officers information that assists them in predicting whether a student is likely to succeed at their institution. Educational-measurement experts produce institution-specific data about the future success of high-school students by

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<sup>130</sup> *Id.* at 38.

<sup>131</sup> *See, e.g.*, ROBERT F. FULLINWIDER & JUDITH LICHTENBERG, *LEVELING THE PLAYING FIELD* 119 (2004).

<sup>132</sup> *See, e.g.*, BOWEN & BOK, *supra* note 10, at 29-30 (pointing out that competition for admission at selective schools has increased dramatically, with SAT scores for both white and African American applicants continuing upward).

<sup>133</sup> *Id.*

<sup>134</sup> The LSAT plays a similar role in law school admissions, with law schools typically placing even greater emphasis on composite scores (derived from LSAT scores and undergraduate grade point average) than undergraduate institutions. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 2 (1997) (noting that undergraduate GPAs and LSAT scores are the criteria most heavily relied on in admissions decisions).

comparing the entering SAT scores of prior applicants with their first-year grades during college. Although the HSGPA of applicants are more predictive of college success (defined by first-year grades) than are SAT scores alone, many studies have found that relying on a combination of SAT and HSGPA is more predictive than using HSGPA alone.<sup>135</sup> Universities also use the SAT because it serves as a uniform measurement tool that offsets concerns about the lack of consistency in high-school grading criteria and the increasingly common practice of giving higher grades to students to increase their college-admissions competitiveness.

The other major argument in favor of requiring applicants to submit SAT scores as part of their college applications is that using SAT scores to evaluate students is extremely efficient. Each year, the number of applicants to the nation's most prestigious colleges and universities increases.<sup>136</sup> Institutions must either increase the size of their admissions staffs to evaluate the larger numbers of applications that they receive or devise more efficient means of assessing applicants. Universities can use SAT scores to winnow the pool of qualified applicants even further based on the assumption that high-school grades should be augmented by a more objective and more standardized assessment measure.

The SAT also makes assessment of a geographically diverse applicant pool more efficient because it provides a numerical score that can be used to compare applicants from any high school in any part of the country. Since the test takers, not universities, bear the direct costs of the SAT testing system, requiring applicants to submit SAT scores as well as high-school grades saves money as compared to paying admissions officers to gather information about unfamiliar schools in unfamiliar geographic locales. Moreover, unlike a student-written personal statement or listing of extracurricular involvement, SAT scores can be easily entered into and ranked by a computer at minimal cost to the institution.

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<sup>135</sup> See, e.g., Saul Geiser & Maria Veronica Santelices, *Validity of High School Grades in Predicting Student Success Beyond the Freshman Year: High School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes* (Ctr. for Studies in Higher Educ., Univ. of Cal., Berkeley, Research & Occasional Paper Series, CSHE.6.07, June 2007), [http://cshe.berkeley.edu/publications/docs/ROPS.GEISER\\_SAT\\_6.13.07.pdf](http://cshe.berkeley.edu/publications/docs/ROPS.GEISER_SAT_6.13.07.pdf) (presenting study results showing that high-school grades are the best predictor of four-year college grades).

<sup>136</sup> See COLLEGE UNRANKED, *supra* note 106, at 4.

a. *Predictive Ability of the SAT To Assess College Performance*

Critics of the central role that the SAT has come to play in college admissions question whether the test adds enough real-world predictive value to compensate for its role in decreasing the admissions chances of members of lower-scoring racial, gender, and socioeconomic groups.<sup>137</sup> Specifically, they question both the outcome that the SAT is designed to predict—first-year college grades—and what they perceive to be the test’s limited ability to predict that outcome.<sup>138</sup> The Educational Testing Service (ETS), the manufacturer of the SAT, reports that a high-school student’s SAT score explains approximately thirteen percent of the variance in first-year college grades, less than would be explained if universities relied on high-school grades alone.<sup>139</sup> SAT critics point to the ETS’s own studies as well as institution-specific studies to support their view, under the common, not psychometric, usage of the term “predict,” that the SAT adds little predictive value to admissions decisions and is a weak predictor of graduation rates.<sup>140</sup>

Moreover, critics believe that the SAT has limited value because it does a worse job than high-school grades alone in predicting grades beyond the first-year of college.<sup>141</sup> This is really a subargument of the larger criticism that the SAT has no predictive ability to forecast what

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<sup>137</sup> See Sturm & Guinier, *supra* note 115, at 974 (“It is widely recognized that high school grades are more predictive of college freshman-year grades than the SAT. Perhaps even more significant is the extremely small increase in predictiveness gained by using the SAT in conjunction with high school grades.”).

<sup>138</sup> See Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 22 (1994) (examining the backlash against affirmative action policies and arguing that affirmative action is not “preferential treatment” but instead a means of providing “greater equality of opportunity in a social context marked by pervasive inequalities”).

<sup>139</sup> See REBECCA ZWICK, *FAIR GAME?: THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION* 116 tbl.5-2 (2002). Zwick reports the results of an ETS report that finds an overall correlation of SAT verbal and math with college GPA of 0.36 and an overall correlation of HSGPA with college GPA of 0.39. The percent of the variation in college GPA is calculated by squaring the SAT correlation of 0.36.

<sup>140</sup> See Sturm & Guinier, *supra* note 115, at 971-74 (“Indeed, empirical and statistical evidence suggests that many of those who are excluded based on test results could perform comparably to those admitted.”). The incremental increase in overall correlation from considering the SAT instead of relying on HSGPA alone is 0.09. ZWICK, *supra* note 139, 116 tbl.5-2.

<sup>141</sup> See, e.g., Geiser & Santelices, *supra* note 135, 1 (“[HSGPA] is consistently the best predictor not only of freshman grades in college, . . . but of four-year college outcomes as well.”).

is most important—how applicants will perform in real life. They point to the success of relatively lower-scoring students as compared to higher-scoring ones and to anecdotal evidence that the SAT has underpredicted the success of many highly successful individuals.<sup>142</sup> The SAT is also often criticized for its inability to predict success “beyond college” as well as its demonstrated correlation to the test-taker’s socioeconomic status and parents’ education. Critics also contend that reliance on the SAT operates to the benefit of the children of the rich and well-educated.<sup>143</sup>

b. *Ability of the SAT To Predict Academic Performance of Racial Minorities*

Defenders of the SAT and the ETS often respond to allegations that the SAT is racially biased against minority test-takers by pointing to studies that show that the SAT “over-predicts” the first-year grades of African American test-takers.<sup>144</sup> This point can be countered by the fact that some institution-specific and longitudinal studies<sup>145</sup> find that the SAT scores of African American students do a poor job of predicting whether they will graduate from college.<sup>146</sup> At some selective universities, African American students with lower SAT scores are more likely to graduate than African American students with SAT scores in the highest range.<sup>147</sup> These findings question how well SAT scores predict African American graduation rates or the likelihood that African American students will graduate from highly selective institutions. Studies have also found that for African American students with equivalent SAT scores, those attending more selective universities are more likely to graduate than African American students with the same SAT scores who attend less selective universities.<sup>148</sup>

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<sup>142</sup> See, e.g., John Cloud, *Should SATs Matter?*, TIME, Mar. 12, 2001 (reporting that Senator Paul Wellstone’s combined SAT score was “under 800 Combined! Yet he went on to become a Phi Beta Kappa” and that Rhodes Scholar Bill Bradley had a verbal SAT score of 485).

<sup>143</sup> See Sturm & Guinier, *supra* note 115, at 989 (“[T]he SAT is more strongly correlated with every measure of socio-economic background than is high school rank.”).

<sup>144</sup> SACKS, *supra* note 111, at 267.

<sup>145</sup> See BOWEN & BOK, *supra* note 10, at 59-65 (demonstrating that the SAT is generally a poor indicator of African American graduation rates at selective schools).

<sup>146</sup> See Gregg Thomson, *Is the SAT a “Good Predictor” of Graduation Rates? The Failure of “Common Sense” and Conventional Expertise and a New Approach to the Question* (Dec. 1998) (unpublished manuscript, on file with author).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; BOWEN & BOK, *supra* note 10, at 61.

C. *The Relationship Between Affirmative Action and the Racial Gap in SAT Scores*

The persistence of racial differences in SAT scores even when selecting among applicants with very strong academic credentials<sup>149</sup> puts the SAT at the heart of the affirmative action debate. A half-century after Conant revolutionized higher-education admissions by using the SAT to open higher education to those beyond the economic elite, critics of the SAT contend that, were it not for affirmative action, the test would keep the door to the nation's most selective colleges closed to minority applicants.<sup>150</sup> The net impact may be that institutions give less weight to the SAT in order to counteract differences in average SAT scores of categories of applicants—the racial, gender, and socioeconomic gaps in SAT scores. An institution with the goal of admitting students who possess demographic characteristics that coincide with categorical differences in SAT scores may find it necessary to consider those characteristics as a positive factor in admissions to counterbalance the impact of SAT reliance.<sup>151</sup> In other words, group differences in SAT scores can influence admissions officers to give less weight to the SAT scores of certain applicants based on whether their enrollment at the institution would fulfill the institution's need for particular characteristics among its student body.<sup>152</sup>

In selecting among large pools of applicants, selective universities base a portion of their admissions decisions on whether a particular student's admission will fulfill particular institutional goals. An institution typically seeks to fulfill its needs for students from certain categories for each entering class.<sup>153</sup> Decades of analysis of SAT scores

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<sup>149</sup> See William Julius Wilson, *The Role of the Environment in the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 112, at 434-40. Of course, many individual female, African American, Latino, economically disadvantaged, and rural test-takers do score extremely well on the SAT and, thus, have scores higher than the national SAT average. See also BOWEN & BOK, *supra* note 10, at 26-31 (providing examples of minority students with exceptional SAT scores).

<sup>150</sup> See Strum & Guinier, *supra* note 115, at 992 (“[R]eliance on [existing methods] for determining merit screens out a disproportionate number of . . . people of color who apply for positions.”).

<sup>151</sup> A simple example of this would be the decision to consider an applicant's extraordinary talent as a poet or athlete as an admissions plus factor even if his or her SAT score fell below the institution's average SAT score for entering freshmen.

<sup>152</sup> See generally COLLEGE UNRANKED, *supra* note 106.

<sup>153</sup> Most universities have institutional priorities that prompt them to admit athletes, students with wealthy parents willing to donate large sums of money to the institution, children of alumni, students from rural as well as urban and suburban geo-

have shown a variety of group disparities when students are separated based on certain categories. Specifically, men score, on average, better than women;<sup>154</sup> whites and some Asian groups score better than Latinos and African Americans;<sup>155</sup> the rich score better than the poor;<sup>156</sup> and city dwellers score better than students from rural communities.<sup>157</sup>

Under the U.S. Constitution, this type of “category-conscious” decision making is subject to the strictest level of judicial review if it is shown to be race based. Unlike most positive admissions considerations based on nonracial categories, the use of a student’s race as an admissions plus factor is subject to the highest degree of federal judicial scrutiny.<sup>158</sup> Before state anti-affirmative action laws, universities with race-conscious affirmative action policies focused on whether their race-based admissions practices met the Supreme Court’s application of the federal constitutional standard of strict scrutiny.

To date, following the passage of a new state anti-affirmative action law, public universities in states subject to the new anti-affirmative action laws seem to have chosen to abolish their race-based

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graphic areas, poor and middle-class students, male as well as female students, and racial minorities. *See generally id.*

<sup>154</sup> *See, e.g.,* Sturm & Guinier, *supra* note 115, at 992 n.169.

<sup>155</sup> *See, e.g.,* WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, C. BD. REP. NO. 99-5, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION 2 tbl.1 (1999).

<sup>156</sup> *See, e.g.,* LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 71 (2002).

<sup>157</sup> *See, e.g.,* SAT Results: Suburbanites Outscore City, Country Dwellers, DAILY REP. CARD, Aug. 27, 1992.

<sup>158</sup> *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”). Under strict scrutiny, a university still has the discretion to consider standardized admissions test scores to varying degrees depending upon the race of the applicant so long as it does so as part of a holistic, nonnumerical, non-quota-based admissions process. *See* Grutter v. Bollinger, 539 U.S. 306, 336-37 (2003) (“[A] university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual . . .”). The Court’s rationale for treating universities’ consideration of race differently from their consideration of nonracial classifications is that relying on racial classifications is inherently suspect and offensive to the principle of equal protection. *See id.* at 333 (discussing how governments are constrained in how they may draw racial distinctions). In fact, the Court has explicitly rejected the argument that equal protection requires institutions to adopt the race-neutral approach to increasing racial diversity—decreasing emphasis on standardized tests scores for all racial groups. *See Id.* at 340 (rejecting the district court’s suggestion of decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores as a race-neutral means of increasing the admissions of underrepresented minorities because such an approach “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both”).

affirmative action policies without leaving open the option of considering race for the purpose of avoiding potential Title VI liability to minorities. As a result, the numbers of African American, Latino, and other underrepresented minority students admitted to these institutions dwindled, and the rate of African American and Latino admissions went from higher than average to lower than average.<sup>159</sup>

The key inquiry of this Article is whether state anti-affirmative action laws permit universities to adopt race-conscious practices if remedial in nature—designed to compensate for admissions disparities that a university suspects result from invalid use or overuse of standardized test scores. For institutions with admissions statistics that reveal racial disparities in admissions of a magnitude that satisfies the Title VI standard for effect discrimination, anti-affirmative action laws could, in the appropriate factual circumstances, permit the use of race-based affirmative action. As Part III explains in greater detail, an institution that has lower-than-average minority admissions rates and is unable to justify the degree to which it relies on SAT scores is vulnerable to charges that its admissions policy violates Title VI disparate impact regulations. The key factual question would be whether the institution has evidence that the remedial consideration of race is necessary to avoid Title VI liability.

### III. ADMISSION DISPARITIES AS TITLE VI EFFECT DISCRIMINATION

Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Griggs v. Duke Power Co.<sup>160</sup>

This Part explains the standard applied by federal courts to determine whether a university's admissions policies result in a Title VI racially discriminatory effect—a racial disparity in selection that is substantial enough to constitute evidence of discrimination.<sup>161</sup> Using ac-

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<sup>159</sup> The number of applicants with wealthy parents and parents who attended the university, special talent admits, and socioeconomic and geographic diversity admits would likely decline in a similar fashion if the institutions relied heavily on SAT scores for applicants within those categories.

<sup>160</sup> 401 U.S. 424, 436 (1971).

<sup>161</sup> See *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (observing that when expected results and actual results differ by more than two or three standard deviations, the statistical disparity in selection rates constitutes evidence of a Title VI dispa-

tual admissions data from the University of California campuses at Berkeley and Los Angeles and the University of Washington, this Part applies a “rule-of-thumb” test for identifying racially discriminatory effect—“the four-fifths rule”<sup>162</sup>—and a more sophisticated chi-square statistical test to the admissions cycles since the elimination of affirmative action at those institutions. The results of this analysis reveal that the racial disparities in admissions to affirmative action-less public universities have on numerous occasions been of sufficient statistical significance to make a prima facie case of Title VI disparate impact.<sup>163</sup>

Statistical evidence that a university’s admissions policy violates Title VI’s prohibition against effect discrimination could be the basis for an institution’s decision to readopt race-based affirmative action. Universities in states with anti-affirmative action laws could reasonably argue that federal and state law permit remedial consideration of race in admissions to correct *unjustified* racial disparities. Title VI federal antidiscrimination law explicitly requires that institutions receiving federal funds remedy any unjustified racially discriminatory impact and, as this Article explains, it is inconsistent with the antidiscrimination language and spirit of state anti-affirmative action laws for state courts to interpret such laws in a manner that classifies remedial race-based admissions policies—the use of race to comply with federal antidiscrimination law—as a prohibited preference.<sup>164</sup> Moreover, universities with clear statistical evidence that their admissions policies have a Title VI racially discriminatory effect against minorities have a strong basis for invoking a little-used provision of state anti-affirmative action laws—the federal-funding exception—on the reasoning that, as

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rate impact). Courts have interpreted Title VI to require that the racial disparity exist not just within the overall applicant pool but also within the subpopulation of “qualified” applicants. In other words, there is proof of Title VI discriminatory effect if, considering only *qualified* applicants, the racial disparities are large enough to be statistically significant. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (“Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination.”).

<sup>162</sup> See 29 C.F.R. § 1607.4(D) (2008) (explaining the “four-fifths rule” for adverse impact).

<sup>163</sup> It may have been possible to show statistically significant racial disparities caused by particular admissions criteria such as the SAT prior to the elimination of race-based affirmative action based on the Court’s decision in *Connecticut v. Teal*, 457 U.S. 440 (1982). However, after eliminating affirmative action—a policy that ameliorates the statistical impact of using an admissions criterion that has a disproportionately negative impact on racial minorities—statistical evidence of Title VI discriminatory effect can be found through analysis of overall “bottom line” admissions outcomes.

<sup>164</sup> See *infra* Part IV.

outlined below, failure to consider race as a remedy puts their institution at risk of losing Title VI federal funds.

A. *Rationale and Enforcement Mechanisms for the Title VI Effect-Discrimination Standard*

As President Johnson explained when the landmark Civil Rights Act of 1964 was enacted, the rationale for prohibiting race discrimination in the administration of federally funded programs is simple.<sup>165</sup> Congress provides “[f]ederal financial assistance” to support various public and private activities by state and local governments, private institutions, businesses, and individuals in the form of federal grants, loans, contracts, and other federal support.<sup>166</sup> “Title VI rests on the power of Congress to fix the terms on which federal funds are made available”<sup>167</sup> to prohibit entities that receive federal funds from engaging in discrimination.<sup>168</sup>

U.S. Department of Education regulations promulgated to enforce Title VI set forth the “specific discriminatory actions” that recipients of federal funds must avoid.<sup>169</sup> These regulations—often referred to as “Title VI disparate impact regulations”—state that a recipient of federal funds may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”<sup>170</sup> A violation of Title VI regulations does not require proof of purposeful

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<sup>165</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 1, at 5 (“It is simple justice that all should share in programs financed by all, and directed by the government of all people.”).

<sup>166</sup> 42 U.S.C. § 2000d (2006).

<sup>167</sup> Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn’t Be So Easy*, 58 FORDHAM L. REV. 939, 943-46 (1990). Watson explains that the primary purpose of Title VI was to provide a means for dismantling racial segregation in education using Congress’s spending power, *id.* (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 599 (1983)), while Congress enacted Title VII pursuant to its commerce power, *id.* (citing *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979)).

<sup>168</sup> Section 601 of Title VI, 42 U.S.C. § 2000d, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Liability under Title VI itself is identical to the Federal Equal Protection Clause in its requirement that plaintiffs prove discriminatory intent. See *Washington v. Davis*, 426 U.S. 229, 240 (1976) (discussing cases holding that challengers have to show discrimination).

<sup>169</sup> 34 C.F.R. § 100.3(b) (2008) (italics omitted).

<sup>170</sup> *Id.* § 100.3(b)(2).

discrimination.<sup>171</sup> Thus, Title VI disparate impact regulations prohibit federally funded universities from using selection criteria in a manner that constitutes effect discrimination.<sup>172</sup>

In *Alexander v. Sandoval*, the Supreme Court ruled that no private right of action exists to enforce Title VI disparate impact regulations.<sup>173</sup> Whether rejected minority applicants may bring Title VI effect-discrimination cases under 42 U.S.C. § 1983—an approach endorsed by Justice Stevens in his dissent in *Sandoval*<sup>174</sup>—has not been decided definitively by the Court.<sup>175</sup> However, even if private enforcement of Title VI regulations is precluded, individuals are still permitted to file complaints with the U.S. Department of Education

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<sup>171</sup> See *Alexander v. Choate*, 469 U.S. 287, 293-95 & n.11 (1985) (explaining *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)). In *Guardians Ass'n v. Civil Service Commission*, a majority of the Court held that a violation of Title VI required proof of discriminatory purpose, while a different majority held that proof of discriminatory effect suffices when the suit is brought to enforce regulations issued pursuant to Title VI. 463 U.S. at 608 n.1 (Powell, J., concurring) (detailing the multiple holdings of the Court). Recently, in *Alexander v. Sandoval*, the Court assumed that proof of discriminatory impact was sufficient to demonstrate a violation of the Title VI regulations. 532 U.S. 275, 281-82 (2001) (“[R]egulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups . . .”). See also Watson, *supra* note 167, at 949 (“The issue of whether Title VI and its implementing regulations proscribe unintentional discrimination with a disproportionate adverse impact has had a tortured history in the Supreme Court.”).

<sup>172</sup> Some members of the Court have been critical of this interpretation. They would limit the reach of Title VI regulations to intentional discrimination. See, e.g., *Sandoval*, 532 U.S. at 286 n.6 (discussing disparate impact regulations and § 601); see also Lawrence, *supra* note 11, at 948 n.71 (“Given the bare majority in *Guardians* and the change in composition of the Court since the holding of that case, it remains to be seen whether the Court will continue to defer to the [Department of Education’s] regulations for implementing Title VI.”).

<sup>173</sup> 532 U.S. at 293.

<sup>174</sup> *Id.* at 300 (Stevens, J., dissenting) (“Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . .”). A plaintiff who sues under 42 U.S.C. § 1983 is alleging a constitutional tort of sorts because officials have violated her federal civil rights. *Id.*

<sup>175</sup> The rule established by the Court in *Gonzaga v. Doe* presents a considerable hurdle to plaintiffs seeking to enforce disparate impact regulations using § 1983. 536 U.S. 273, 287-88 (2002) (discussing only individual entitlements as being enforceable under § 1983). A number of circuits have rejected Justice Stevens’s approach. See, e.g., *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006) (overruling *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994), and relying on a combined reading of the Court’s decisions in *Gonzaga* and *Sandoval* to hold that a federal regulation such as the U.S. Housing Act cannot independently create an enforceable § 1983 right); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003) (holding that disparate impact regulations are unenforceable under § 1983); *S. Camden Citizens v. N.J. Dep’t of Env’t. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (same); *Harris v. James*, 127 F.3d 993, 1010 (11th Cir. 1997) (same).

Office of Civil Rights (OCR) alleging that an institution's admissions policies have a Title VI discriminatory effect on the basis of race.<sup>176</sup>

It is the responsibility of the OCR to investigate charges of discrimination filed against educational institutions. If the OCR determines that a university has violated Title VI regulations, it may refer the charge to the U.S. Department of Justice (DOJ). The DOJ is statutorily authorized to file suit against a university for failure to comply with Title VI regulations. Because federal civil rights enforcement agencies have an independent responsibility to charge and investigate institutions suspected of failing to comply with federal antidiscrimination laws, the DOJ and the OCR have the authority and responsibility to investigate a university for failing to comply with Title VI and its regulations even in the absence of a complaint from a rejected applicant.<sup>177</sup>

### B. *The Theory Underlying Title VI Racial Effect Discrimination*

The theory of discriminatory effect as a form of racial discrimination was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*<sup>178</sup> In *Griggs*, African American employees sued the Duke Power Company, alleging that the institution of a new high-school-diploma requirement and general-intelligence-test score cutoff as selection criteria constituted employment discrimination.<sup>179</sup> The Court recognized that the criteria's disproportionately negative effect on African American job applicants was "directly traceable to" state-sanctioned discrimination in educational opportunities. The Court held that the

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<sup>176</sup> See U.S. DEP'T OF JUSTICE, INVESTIGATION PROCEDURES MANUAL FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS ALLEGING VIOLATIONS OF TITLE VI AND OTHER NONDISCRIMINATION STATUTES (1998), available at <http://www.usdoj.gov/crt/cor/Pubs/manuals/complain.pdf>; U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 104-05 (2001), available at <http://www.usdoj.gov/crt/cor/coord/vimanual.pdf>; U.S. Dep't of Justice, Educ. Opportunities Section, Frequently Asked Questions, <http://www.usdoj.gov/crt/edo/faq.php> (last visited Feb. 15, 2009). A class of "minorities and women qualified for graduate school admission" filed an OCR complaint accusing the University of California of violating Title VI and Title IX disparate impact regulations after eliminating race- and gender-based affirmative action pursuant to UC Regents Resolution SP-1. Letter from Cal. Women's Law Ctr., Equal Rights Advocates, Mexican Am. Legal Def. & Educ. Fund, and NAACP Legal Def. & Educ. Fund, Inc., to Stefan Rosenzweig, Regional Director, Office of Civil Rights, Region IX, U.S. Dep't of Educ. (Mar. 19, 1997) (on file with author).

<sup>177</sup> See 34 C.F.R. § 100.3 (2008) (detailing prohibited discrimination).

<sup>178</sup> 401 U.S. 424 (1971).

<sup>179</sup> The intelligence-test requirement was added on the same day that Title VII of the Civil Rights Act of 1964, which required that employers cease race discrimination in employment, took effect. *Id.* at 427.

educational discrimination resulted in an unjustified adverse impact in violation of Title VII because the power plant did not demonstrate that a high-school diploma and a particular intelligence-test score were necessary to perform the jobs in question at the power plant.<sup>180</sup> The Court interpreted Title VII, the provision of the Civil Rights Act of 1964 applicable to employment discrimination, to prohibit employers from using facially race-neutral practices that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>181</sup> Under this analysis, the use of these selection criteria was illegal because none of the criteria was a “business necessity”—a criterion vital to assessing an employee’s ability to perform the job.<sup>182</sup>

The Supreme Court’s language in *Griggs* is instructive in applying disparate impact theory to minority claims that heavy weighting of SAT scores as an admissions factor is not an educational necessity. The Court in *Griggs* explained that selection tests must be used in a valid manner—the tests must be able to accurately measure applicant performance:

Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.<sup>183</sup>

To evaluate a rejected minority applicant’s claim that a university relies on the SAT in a manner that constitutes Title VI effect discrimination, federal courts would employ the educational equivalent of the *Griggs* analysis.

In order to avoid liability, a university would likely have to justify the use of the SAT as related to an applicant’s college performance ability. Specifically, if rejected minority applicants are able to demonstrate that the use of the SAT as an admissions criterion has a racially discriminatory effect, the onus is on the university either to rebut the statistical evidence proving discriminatory effect or to convince the

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<sup>180</sup> *Id.* at 430-31.

<sup>181</sup> *Id.* at 430.

<sup>182</sup> *Id.* at 431.

<sup>183</sup> *Id.* at 436.

court that the use of the criterion causing the effect is an “educationally necessity.”<sup>184</sup> The Court’s rationale in *Griggs* suggests that the essence of the business necessity justification is that employers are permitted to rely on a selection criterion that puts minority applicants disproportionately at a disadvantage *if* the criterion accurately measures an applicant’s ability to perform the job in question.<sup>185</sup> Accordingly, the ability of universities to defend reliance on SAT scores as an educational necessity will hinge upon what qualifications a high-school student needs to attend a selective public university.

The key factual question is whether reliance on the SAT is necessary to ensure that minority applicants have the requisite college performance ability to attend certain selective public universities in states with anti-affirmative action laws.<sup>186</sup> Even if courts accept “admitting only those applicants predicted to have the highest grade point average at the end of their freshman year” as the mission of highly selective public universities—the mission that best justifies relying on the SAT—judges might be persuaded that the SAT has limited value in assessing college performance ability when the vast majority of an institution’s applicants have stellar academic credentials. More specifically, courts could very well be convinced by expert testimony that considering SAT scores as well as high-school grades does not add substantially to institutions’ ability to predict first-year college grades when compared to prediction based on high-school grades alone.<sup>187</sup>

Universities with admissions outcomes that reveal evidence of Title VI racial effect discrimination may also run the risk that courts will decide that selective institutions rely on the SAT for reasons unrelated to assessing the college performance ability of applicants. If rejected

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<sup>184</sup> The exact contours of educational necessity are not perfectly clear. Unlike the Title VII business necessity standard, courts have had fewer opportunities to develop what constitutes an educational necessity. To rebut statistical evidence of racial effect discrimination, a university will need to identify the goals of its admissions policy and demonstrate a manifest relationship between those goals and the selection criteria resulting in adverse impact. To present objective evidence that a nexus exists between the admissions criterion and a particular educational goal, it will be necessary for the university to explicitly identify the goal(s) of its admissions policy. See *Cureton v. NCAA*, 37 F. Supp. 2d 687, 701 (E.D. Pa. 1999) (outlining the requirements of identified legitimate and substantive goals), *rev’d on other grounds*, 198 F.3d 107 (3d Cir. 1999).

<sup>185</sup> See *Griggs*, 401 U.S. at 436 (allowing certain disadvantageous selection criteria if they are “demonstrably a reasonable measure of job performance”).

<sup>186</sup> This inquiry subsumes the issue of how college performance ability should be measured. Should it be based on freshman grades, overall college grade point average, graduation rates, postgraduation success, or some other outcome?

<sup>187</sup> See *supra* subsection II.B.2.

minority applicants have the requisite college performance ability, one could argue that highly selective universities do not need the SAT to weed out incompetent applicants, but instead rely on the SAT to fulfill their institutional desire to have a high overall SAT average in order to boost their prestige and bond ratings. With the increasing value placed on a university's average SAT score by students, alumni, professors, community stakeholders, and competing institutions (whose views play an important role in shaping institutional reputation), courts might conclude that a university's contention that it uses SAT scores to evaluate student academic skills is a pretext for relying on the SAT in maintaining top-ranked status.

An accused university could respond that the pressure to perform well in college rankings is itself an educational necessity that justifies the disparate impact of the SAT on minority applicants. In such a circumstance, the highly ranked public university would be contending that it must maintain a high average SAT score to preserve its institutional prestige, much like an employer for whom it is a business necessity to increase profit margins. A high ranking makes an institution more attractive to students, alumni, faculty, donors, investors, and entities that award public and private research grants. However, it is unclear whether admitting that it had a nonacademic reason for relying on the SAT—the SAT's rankings- and prestige-enhancing value—would suffice as an educational necessity that justifies using an admissions criterion that has Title VI racially discriminatory effect.

In fact, a strong counterargument to a university's attempt to justify its reliance on the need to remain elite would be that the use of the SAT to maintain a high institutional average score is not tied to the assessment of individual academic merit.<sup>188</sup> If the underlying principle of federal antidiscrimination law is to protect individuals from being denied opportunities based on nonmeritocratic criteria, universities could find it difficult to rebut the claims of rejected minority applicants that the use of the SAT is unjustified. In fact, rejected minority applicants could present other admissions criteria, such as high-school grades, that provide very similar levels of prediction of

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<sup>188</sup> In fact, a few universities have explicitly acknowledged that the goal of higher placement in college-ranking systems has created a new admissions need category—students with stratospherically high SAT scores. Admissions officials and universities admit that some of these students are admitted solely based on their SAT scores and that, absent the pressure on the institution to maintain a high average SAT score, many such students would not be selected based solely on meritocratic principles.

applicants' academic potential as "less discriminatory alternatives" to the SAT and rebut the university's showing of educational necessity.<sup>189</sup>

Some selective public universities, particularly those that regularly deny admission to hundreds and thousands of qualified applicants of all races,<sup>190</sup> may have difficulty convincing courts that reliance on the SAT is justified by educational necessity. In those circumstances, the elimination of affirmative action with continued reliance on the SAT could expose a university to federal liability under Title VI—even where the university eliminated affirmative action to comply with a state anti-affirmative action law. Such a university could be at risk of losing federal funding should federal agencies charged with enforcing federal antidiscrimination law investigate and conclude that SAT scores add so little predictive value over high-school grades alone that their use as a selection criterion has an unjustified racially discriminatory effect on minority applicants. If racial disparities in admissions outcomes are of sufficient magnitude to constitute evidence of a Title VI racially discriminatory effect, universities subject to state anti-affirmative action laws are vulnerable to charges that their admissions practices violate Title VI and place them in jeopardy of losing federal funds.

### C. Proving Title VI Effect Discrimination

The legal standard for proving Title VI discriminatory effect is modeled after the standard set by courts in effect-discrimination cases in the Title VII employment context. The first requirement for mak-

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<sup>189</sup> Cf. *Allen v. City of Chicago*, 351 F.3d 306, 316 (7th Cir. 2003) (applying the Title VII employment discrimination burden-shifting test by which the plaintiffs are "required to specify an alternative, prove that the alternative [is] equally valid and prove that the alternative [is] less discriminatory"). This is particularly true if rejected minority applicants demonstrate that the use of the SAT eliminates minority applicants with other academic qualifications that have been predictors of success of minority applicants in the past. See BOWEN & BOK, *supra* note 10, at 61 (finding that the graduation rates of African Americans in the lower SAT score bands increased with the selectivity of the school that they attended); see also Robin Nicole Johnson et al., Ralph J. Bunche Ctr. for Afr. Am. Stud., *Gaming the System: Inflation, Privilege, and the Under-Representation of African American Students at the University of California*, BUNCHE RES. REP., Jan. 2008, at 1, 6 ("For example, in the fall of 2007, the average high school GPA for entering African American freshmen was 4.08. By comparison, entering Asian and white freshmen posted average GPAs of 4.33 and 4.31, respectively. In other words, the typical black freshman presented a GPA that was less than three-tenths of a grade point lower than the one presented by the typical white or Asian freshman." (footnote and citations omitted)).

<sup>190</sup> Cf. Atkinson, *supra* note 87 ("America's overemphasis on the SAT is compromising our educational system.").

ing a Title VI disparate impact claim is evidence of a racially discriminatory effect on minority applicants. Effect discrimination is typically proven by a statistical showing of a significant racial disparity in selection rates within the qualified applicant pool.<sup>191</sup> In the context of selective higher-education admissions, Title VI effect discrimination may be established by presenting evidence that a federally funded educational institution utilizes an admissions criterion like the SAT in a manner that selects qualified minority applicants at significantly lower rates than nonminorities.<sup>192</sup> While there is no single formula for determining when racial disparities in admissions are so great that minorities can rely upon them to prove racial discrimination,<sup>193</sup> courts have referred to the four-fifths (or eighty-percent) rule endorsed by the Equal Employment Opportunity Commission as a rule of thumb for evaluating adverse impact under both Title VII and Title VI.<sup>194</sup>

Racial disparate impact under the four-fifths rule exists when the rate of selection of applicants of a particular race is *less than eighty per-*

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<sup>191</sup> See *supra* Section III.B.

<sup>192</sup> See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983) ("Title VI reaches unintentional, disparate-impact discrimination . . ."); see also, e.g., *Bd. of Educ. of N.Y. v. Harris*, 444 U.S. 130, 151 (1979) (upholding the standard of discriminatory impact); *Cureton v. NCAA*, 198 F.3d 107, 112 n.4 (3d Cir. 1999) ("Many cases have applied [disparate impact] theory to educational institutions and practices."); *United States v. LULAC*, 793 F.2d 636, 648-49 (5th Cir. 1986) (recognizing the disparate impact test for Title VI cases); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) ("The plaintiff first must show by a preponderance of the evidence that a facially neutral practice has a racially disproportionate effect."), *abrogated on other grounds*, *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989), *rev'd on other grounds*, 503 U.S. 467 (1992); *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984) ("A prima facie case is demonstrated by showing that the tests have a discriminatory impact on black schoolchildren."). Next, the defendant university is given the opportunity to rebut the evidence of discriminatory effect by demonstrating that the selection criterion that resulted in the admission of disproportionately fewer racial minorities is required by educational necessity. See *Larry P.*, 793 F.2d at 981 n.6 ("In a Title VI case, once a prima facie case has been established the burden is on the defendant to demonstrate that the criteria used are required by educational necessity."). If the defendant university successfully demonstrates that the racially disparate impact of its admissions policy is educationally justified, the institution is still liable for violating Title VI if the plaintiff presents a less discriminatory alternative to the challenged criterion. See *id.* at 983 (refusing to find that the disparate impact was caused by nondiscriminatory factors).

<sup>193</sup> See *Harris*, 444 U.S. at 151 (declining to lay out a prima facie test for disparate impact); *Larry P.*, 793 F.2d at 982 (same).

<sup>194</sup> See *Connecticut v. Teal*, 457 U.S. 440, 443 n.4 (1982) (describing the Uniform Guidelines on Employment Selection Procedures adopted by the Equal Employment Opportunity Commission).

cent (four-fifths) of the rate of selection of applicants of other races.<sup>195</sup> A number of more sophisticated statistical analyses may also be employed to demonstrate that the racial impact of a particular selection criterion is sufficiently adverse to be considered prima facie evidence of racial discrimination. In addition to the four-fifths rule, chi-square analysis, confidence-interval analysis, and probability distribution analysis are statistical tests used to demonstrate the adverse impact of selection decisions.<sup>196</sup> Courts rely on the results of such statistical analyses to determine whether the success rates for racial groups differ by a statistically significant degree; if such prima facie disparate impact is established, discriminatory animus should be presumed and the burden placed on the entity making selections to demonstrate that its policies are not racially discriminatory.<sup>197</sup> In other words, courts rely on evidence of statistical significance to determine whether a rebuttable presumption of race discrimination is appropriate.

To evaluate whether reliance on the SAT in states adopting anti-affirmative action laws creates a significant discriminatory effect within the meaning of Title VI, this Part applies the four-fifths test and the Pearson chi-square statistical test to several years of affirmative actionless admissions at the most selective universities in California and Washington. Chi-square analysis tests the likelihood that differences in selection outcomes are a product of chance. Applying four-fifths and chi-square analysis to the post-Proposition 209 admissions cycles at UC Berkeley and UCLA reveals evidence of a statistically significant racially discriminatory impact on African American applicants for almost all of the admissions cycles considered.<sup>198</sup> The exceptions appear to be admissions cycles at UC Berkeley during which the institution was a defendant in a Title VI lawsuit filed by rejected minority applicants.<sup>199</sup> The magnitude of racial disparity in UCLA admissions cycles when African American and Latino admissions rates were compared to white admissions rates was statistically significant for each of the ten

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<sup>195</sup> See 29 C.F.R. § 1607.4(D) (2008) (detailing the federal four-fifths standard for adverse impact).

<sup>196</sup> See *Cureton*, 198 F.3d at 111 (analyzing the standard deviation from the mean of required SAT scores in a discrimination suit brought by African American athletes against the NCAA).

<sup>197</sup> See, e.g., *Harris*, 444 U.S. at 151 (concluding that once disparate impact has been established, “the burden is on the party against whom the statistical case has been made” to rebut the presumption of discrimination).

<sup>198</sup> See *infra* Tables 1-4.

<sup>199</sup> See *supra* note 70.

years following the passage of Proposition 209.<sup>200</sup> When limited to the pool of 1998 UC Berkeley applicants with very high grades, the racial disparity in rates of admission remained statistically significant under both tests.<sup>201</sup> This analysis reveals a similar impact on Latino applicants for the majority of affirmative action-less admissions cycles at UC Berkeley and UCLA since the passage of Proposition 209.<sup>202</sup> There were several University of Washington admissions cycles for which the racial disparity in admissions rates comparing African Americans and whites as well as Latinos and whites were statistically significant under chi-square analysis.<sup>203</sup> However, the racial disparity comparing Latino and white applicants to the University of Washington was not statistically significant under the four-fifths rule.<sup>204</sup>

### 1. UC Berkeley and UCLA<sup>205</sup>

For the first affirmative action-less admissions cycle following the passage of Proposition 209, the 1998 cycle, UC Berkeley's and UCLA's admissions rates for African American and Latino applicants dropped so low compared to the admissions rate for white applicants that the disparity violated the four-fifths rule. For UC Berkeley, the 33.2% white admissions rate compared to a 20.3% African American and 20.8% Latino admissions rates. Similarly, at UCLA, the 35.6% white admissions rate compared to 23.6% African American and 24.5% Latino admissions rates. At both institutions, the African American and Latino selection rates were less than four-fifths the white rate—evidence of significant racial disparity according to the four-fifths rule.

Table 1 and Table 2 show four-fifths-rule analyses for the first ten years of affirmative action-less admissions cycles at UC Berkeley and UCLA. The admissions cycles for which the African American or Latino admissions rate is less than four-fifths of the white admissions rate are shaded. Based on comparisons of the African American and white

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<sup>200</sup> See *infra* Table 4.

<sup>201</sup> See *infra* Tables 5-6.

<sup>202</sup> See *infra* Tables 1-6.

<sup>203</sup> See *infra* Table 8.

<sup>204</sup> See *infra* Table 7.

<sup>205</sup> The analysis in this section is based upon data made publicly available by the University of California Office of the President. See UNIV. OF CAL. OFFICE OF THE PRESIDENT, *supra* note 57. The data for applicants with HSGPA of 4.0 and higher for the fall 1998 UC Berkeley admissions cycle is taken from the plaintiffs' press materials (on file with author) and the First Amended Complaint, *Rios v. Regents of the University of California*, (N.D. Cal. Mar. 24, 1999) (No. 99-0525).

admissions rates between 1998 and 2007, six of UC Berkeley's post-Proposition 209 admissions cycles resulted in racial disparities that exceed the four-fifths standard and are thus substantial.<sup>206</sup> For the same period, four of the UC Berkeley admissions cycles violated the four-fifths rule when the white and Latino admissions rates were compared.

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<sup>206</sup> Proving unlawful race discrimination under a disparate impact theory requires presenting statistical evidence that the questioned policy or practice affects persons of a particular race or ethnicity more harshly than persons of other races or ethnic backgrounds. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). While there is no rigid formula for establishing disparate impact, "statistical disparities must be sufficiently substantial." *Id.* at 995.

**Table 1: UC Berkeley Rates of Undergraduate Admission 1996–2007<sup>207</sup>**

	White	Afr. Amer.	Lat./Chicano
1998	33.2%	20.3%	20.8%
1999 <sup>208</sup>	29.9%	28.2%	27.9%
2000	30.2%	28.4%	27.5%
2001	29.3%	24.9%	26.9%
2002	26.9%	22.7%	24.9%
2003	26.4%	19.3%	22.9%
2004	28.5%	15.4%	20.5%
2005	29.4%	19.9%	23.4%
2006	24.4%	17.4%	20.3%
2007	25.9%	16.9%	19.7%

At UCLA, the differences in African American and white admissions rates were large enough to qualify as racially discriminatory impact under the four-fifths rule in nine of the ten post-Proposition 209 UCLA admissions cycles. The Latino/white disparity in UCLA's post-Proposition 209 admissions rates violated the four-fifths rule in six of the ten undergraduate admissions cycles between 1998 and 2004.

<sup>207</sup> Because there are disparities in admissions rates when specific Asian subgroups are compared (e.g., the admissions rate for Filipinos in 1998 is 19.4% whereas the admissions rate for the general category of Asian Americans is 31.8%), whites have been selected as the group with the highest selection rate.

<sup>208</sup> For the four-year period from March 1999 to March 2003, UC Berkeley's undergraduate admissions policy was the subject of a federal lawsuit alleging that the institution's admissions policy rejected African American, Latino, and Filipino applicants in violation of Title VI and its disparate impact regulations. *See* Consent Decree, *Castaneda v. Regents of the Univ. of Cal.*, No. 99-0525 (N.D. Cal. June 6, 2003), 2003 U.S. Dist. LEXIS 9743.

The shaded areas in Table 1 are the rates that violate the four-fifths rule. The 1998 African American admissions rate of 20.3% and Latino rate of 20.8% are less than four-fifths of the 33.2% admissions rate of white applicants. The 2003 admissions rate of 19.3% for African American applicants is also less than four-fifths of the 26.4% 2003 white admissions rate. Likewise, the 2004 admissions rate of 15.4% for African Americans and 20.5% rate for Latinos, the 2005 admissions rate of 19.9% for African Americans and 23.4% rate for Latinos, the 2006 admissions rate of 17.4% for African Americans and the 2007 admissions rate of 16.9% for African Americans and 19.7% rate for Latinos are all less than four-fifths of the respective admissions rates for white applicants for those admissions cycles.

**Table 2: UCLA Rates of Undergraduate Admission 1996–2007<sup>209</sup>**

	White	Afr. Amer.	Lat./Chicano
1998	35.6%	23.6%	24.5%
1999	29.5%	23.9%	25.2%
2000	31.7%	22.0%	25.2%
2001	29.0%	21.3%	23.9%
2002	24.2%	19.2%	21.5%
2003	24.1%	14.5%	19.7%
2004	25.8%	12.2%	17.7%
2005	28.9%	15.8%	21.1%
2006	26.2%	11.5%	18.3%
2007	25.3%	17.1%	16.8%

Chi-square analysis of the racial differences in the same admissions outcomes is even more telling. The chi-square analysis of the post–Proposition 209 cycles at the same institutions shows that there is an exceptionally high probability of a relationship between admissions and race (disfavoring African Americans and Latinos) under affirmative action–less admissions. Table 3 analyzes ten admissions cycles starting after the enactment of Proposition 209 (1998–2007), showing,

<sup>209</sup> As discussed *supra* note 207, whites have been chosen as the group with the highest selection rate due to the disparities in admissions rates when specific Asian subgroups are compared (e.g., the admissions rate for Filipinos with HSGPAs of 4.0 or higher in 2002 is 16.5% whereas the admissions rate for the general category of Asian Americans is 29.9%).

The shaded areas in Table 2 are the rates that violate the four-fifths rule. Examining the 1998 and 2000 admissions rates, African Americans were admitted at rates of 23.6% and 22.0%, respectively, while Latinos were admitted at rates of 24.5% and 25.2%; these figures were less than four-fifths of the white admissions rate of 35.6% and 31.7%. During the three admissions cycles of 2001 to 2003, the undergraduate admissions rates of African Americans (21.3%, 19.2% and 14.5%) to UCLA were consistently less than four-fifths of the white admissions rates (29.0%, 24.2%, and 24.1%). In 2004, the Latino admissions rate of 17.7% was well below the white admissions rate of 25.8%. The 2004 African American admissions rate far surpassed the standard necessary to constitute a violation of the traditional four-fifths rule. That year, the admissions rate for African Americans of 12.2% was less than 50% of the white admissions rate of 25.8%. In 2005, the African American admissions rate of 15.8% was almost 50% less than the white admissions rate of 28.9%, and the Latino rate of 21.1% was less than four-fifths the white rate. Likewise, the 2006 African American admissions rate of 11.5% and the Latino rate of 18.3% as well as the 2007 African American admissions rate of 17.1% and the Latino rate of 16.8% were all less than four-fifths of the white admissions rate for those years.

by race, the actual number of UC Berkeley applicants admitted and denied, rates of admission, and the number of admits and denials expected if admissions were independent of race. The Table also presents the Pearson chi-square value ( $\chi^2$ ) for a two-by-two contingency table comparing African American and Latino admissions to admissions of white applicants as well as the probability of the deviation from expected values occurring by chance (p-value).

By contrasting the number of admissions and denials that would be expected for African American and Latino applicants as compared to white applicants (based on their representation in the applicant pool), the chi-square value and its corresponding p-value explain the likelihood that the racial disparities are due to chance. It is generally accepted that p-values less than 0.05 are statistically significant. For both UC Berkeley and UCLA, the p-values reflect extremely strong statistical significance for almost every post-Proposition 209 admissions cycle. Only two admissions cycles have p-values that do not rise to the level of statistical significance—the two cycles at UC Berkeley immediately following the filing of a lawsuit charging the institution with discriminating against underrepresented minorities in violation of Title VI.<sup>210</sup>

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<sup>210</sup> Thus, the period during which racial differences in UC Berkeley admissions rates were not statistically significant was the period during which the University was a defendant in a civil rights lawsuit alleging that the institution had discriminated against racial minorities in admissions.

**Table 3: Chi-square Analysis of Racial Differences in Rates of Undergraduate Admission at UC Berkeley<sup>211</sup>**

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
1998	White <sup>212</sup>	2370	4759	33.2	2240	4889	78.1	< 0.0001***
	Afr. Amer.	236	928	20.3	366	788		
	White	2370	4759	33.2	2109	5020	156.3	< 0.0001***
Latino	619	2358	20.8	880	2097			
1999 <sup>213</sup>	White	2558	5994	29.9	2542	6010	1.2	0.2624
	Afr. Amer.	293	745	28.2	309	729		
	White	2558	5994	29.9	2517	6035	4.0	0.0453 <sup>†</sup>
Latino	728	1884	27.9	769	1843			
2000	White	2550	5892	30.2	2531	5911	1.6	0.2038
	Afr. Amer.	338	852	28.4	357	833		
	White	2550	5892	30.2	2488	5954	8.0	0.0047**
Latino	885	2329	27.5	947	2267			
2001	White	2601	6273	29.3	2551	6323	10.6	0.0011**
	Afr. Amer.	323	973	24.9	373	923		
	White	2601	6273	29.3	2538	6336	7.3	0.0067**
Latino	995	2702	26.9	1058	2639			

<sup>211</sup> The degrees of freedom ( $df$ ) = 1 for all calculations; p-value refers to the two-tailed p-value, the probability that the variation between the actual and expected admissions rates for the racial groups happened due to chance alone. The superscripts indicate whether variation is statistically significant: <sup>†</sup> denotes a p-value  $\leq 0.1$ , indicating “marginal statistical significance;” \* denotes a p-value  $\leq 0.05$ , indicating “statistical significance;” \*\* denotes a p-value  $\leq 0.01$ , indicating “strong statistical significance;” and \*\*\* denotes a p-value  $\leq 0.001$ , indicating “very strong statistical significance.” Many of the p-values described as “< 0.0001” in this Table are so small that there is a less than one chance in 1,000,000 that admissions are independent of race.

<sup>212</sup> As explained *supra* note 207, whites were chosen as the comparison group rather than Asian Americans because the broad category of “Asian Americans” fails to distinguish between Asian American ethnic groups that may or may not fall within the category of underrepresented minorities.

<sup>213</sup> For the three-year period from March 1999 to March 2003, UC Berkeley’s undergraduate-admissions policy was the subject of the *Rios/Castaneda* federal lawsuit alleging that the institution’s admissions policy rejected African American, Latino, and Filipino applicants in violation of Title VI and its disparate impact regulations. See First Amended Complaint, *supra* note 205.

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
2002	White	2503	6803	26.9	2401	6905	40.3	< 0.0001***
	Afr. Amer.	302	1262	22.7	404	1160		
	White	2503	6803	26.9	2448	6858	5.5	0.0185*
2003	Latino	1001	3013	24.9	1056	2958	35.3	< 0.0001***
	White	2519	7036	26.4	2424	7131		
	Afr. Amer.	302	1262	19.3	397	1167	19.4	< 0.0001***
2004	White	2519	7036	26.4	2414	7141	107.6	< 0.0001***
	Latino	1011	3407	22.9	1116	3302		
	White	2719	6808	28.5	2558	6969	103.6	< 0.0001***
2005	Afr. Amer.	216	1187	15.4	377	1026	56.4	< 0.0001***
	White	2719	6808	28.5	2472	7055		
	Latino	927	3598	20.5	1174	3351	59.2	< 0.0001***
2006	White	2972	7121	29.4	2852	7241	44.8	< 0.0001***
	Afr. Amer.	289	1320	19.9	409	1040		
	White	2972	7121	29.4	2777	7316	39.0	< 0.0001***
2007	Latino	1111	3637	23.4	1306	3442	68.5	< 0.0001***
	White	3188	9865	24.4	3073	9980		
	Afr. Amer.	324	1539	17.4	439	1424	85.2	< 0.0001***
2008	White	3188	9865	24.4	3020	10,033	68.5	< 0.0001***
	Latino	1201	4717	20.3	1369	4549		
	White	3005	8593	25.9	2863	8735	85.2	< 0.0001***
2009	Afr. Amer.	309	1517	16.9	451	1375	85.2	< 0.0001***
	White	3005	8593	25.9	2756	8842		
	Latino	1208	4922	19.7	1457	4673		

Eighteen of the twenty p-values for the probability that racial differences in admission to UC Berkeley occur by chance are statistically significant, with the vast majority registering p-values less than 0.0001, indicating a very strong degree of statistical significance.

Table 4 analyzes ten admissions cycles at UCLA starting after the enactment of Proposition 209 (1998–2007), and shows the actual number of students admitted and denied, the rates of admission, and the number of admits and denials expected if admissions were independent of race; it also presents the Pearson chi-square value for a two-by-two contingency table comparing African American and Latino admissions to admissions of white applicants, and the probability of the racial disparities in admissions happening by chance.

**Table 4: Chi-square Analysis of Racial Differences in  
tax of Undergraduate Admission at UCLA<sup>214</sup>**

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
1998	White <sup>215</sup>	2999	5415	35.6	2868	5546	70.4	< 0.0001***
	Afr. Amer.	294	953	23.6	425	822		
	White	2999	5415	35.6	2698	5716	154.0	< 0.0001***
Latino	969	2991	24.5	1270	2690			
1999	White	3097	7403	29.5	3032	7468	17.5	< 0.0001***
	Afr. Amer.	313	995	23.9	378	930		
	White	3097	7403	29.5	2971	7529	26.6	< 0.0001***
Latino	1022	3033	25.2	1148	2907			
2000	White	3289	7100	31.7	3163	7226	57.5	< 0.0001***
	Afr. Amer.	325	1155	22.0	451	1029		
	White	3289	7100	31.7	3083	7306	63.7	< 0.0001***
Latino	1152	3422	25.2	1358	3126			
2001	White	3178	7771	29.0	3074	7875	39.8	< 0.0001***
	Afr. Amer.	326	1205	21.3	430	1101		
	White	3178	7771	29.0	2996	7953	47.0	< 0.0001***
Latino	1256	4000	23.9	1438	3818			
2002	White	2936	9198	24.2	2859	9275	21.4	< 0.0001***
	Afr. Amer.	337	1420	19.2	414	1343		
	White	2936	9198	24.2	2826	9308	16.8	< 0.0001***
Latino	1310	4790	21.5	1420	4680			
2003	White	2959	9302	24.1	2799	9462	88.1	< 0.0001***
	Afr. Amer.	277	1639	14.5	437	1479		
	White	2959	9302	24.1	2768	9493	48.3	< 0.0001***
Latino	1306	5322	19.7	1497	5131			
2004	White	2859	8685	24.8	2668	8876	135.0	< 0.0001***
	Afr. Amer.	215	1543	12.2	406	1352		
	White	2859	8685	24.8	2564	8980	121.0	< 0.0001***
Latino	1147	5346	17.7	1442	5051			

<sup>214</sup> For an explanation of this statistical analysis, see *supra* note 211.

<sup>215</sup> As discussed *supra* note 207, whites were chosen as the comparison group rather than Asian Americans because the broad category of Asian Americans fails to distinguish between Asian American ethnic groups.

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
2005	White	3351	8225	28.9	3157	8419	128.7	< 0.0001***
	Afr. Amer.	266	1420	15.8	460	1226		
	White	3351	8225	28.9	3020	8556	135.2	< 0.0001***
Latino	1387	5197	21.1	1718	4866			
2006	White	3792	10681	26.2	3514	10959	222.7	< 0.0001***
	Afr. Amer.	250	1926	11.5	528	1648		
	White	3792	10681	26.2	3398	11075	172.9	< 0.0001***
Latino	1401	6246	18.3	1795	5852			
2007	White	3351	9910	25.3	3387	9874	5.8	0.0163*
	Afr. Amer.	374	948	17.1	338	984		
	White	3351	9910	25.3	2914	10346	215.0	< 0.0001***
Latino	1424	7014	16.8	1860	6604			

All twenty of the UCLA p-values for racial differences in admissions outcomes are statistically significant. Strikingly, nine of the ten p-values for the difference in African American and white admission outcomes and ten of the ten comparisons of the Latino and white admission outcomes are smaller than 0.0001, indicating there is virtually no chance that the racial disparities are due to “luck of the draw.”<sup>216</sup>

This statistical evidence that UC Berkeley and UCLA post-Proposition 209 admissions outcomes are statistically dependent on the variable of race is typical of evidence relied upon by plaintiffs seeking to establish a prima facie case of Title VI racial effect discrimination.<sup>217</sup> Even when the analysis is limited to academically qualified applicants, racial disparities in admission remain sufficient in magnitude to constitute evidence of Title VI effect discrimination. In other words, affirmative action-less admissions policies have also resulted in

<sup>216</sup> This type of analysis is not designed to explain why admissions and race are dependent variables. Accordingly, after a prima facie case of Title VI effect discrimination has been established, the university has the opportunity to persuade the court that the selection criteria resulting in racially disparate impact is “educationally necessary” to identify which applicants have the requisite college performance ability to attend the institution. See *supra* text accompanying notes 184-190. In effect, the institution must demonstrate that African American and Latino high-school students applying to their institutions are disproportionately less likely to have the requisite college performance ability than white high-school applicants.

<sup>217</sup> See, e.g., First Amended Complaint, *supra* note 205 at paras. 5-7.

lower rates of admission of African American and Latino applicants with the strong academic credential of HSGPA of 4.0 or higher.<sup>218</sup>

Table 5 shows that during the first year of affirmative action–less admission policies (1998), UC Berkeley admitted African American and Latino applicants with grade point averages of 4.0 and higher at lower rates than white and Asian American applicants with the same grades. The racial disparities in admissions rates violated the four-fifths rule. The admissions rate of 38.5% for African American applicants with HSGPAs of 4.0 and higher is less than four-fifths (79.9%) of the 48.2% admissions rate for white applicants with HSGPAs in the same range. The admissions rate of 39.7% for Latino applicants with HSGPAs of 4.0 and higher is just slightly more than four-fifths (82.3%) of the 48.2% admissions rate for white applicants with HSGPAs in the 4.0-and-higher range.<sup>219</sup>

**Table 5: UC Berkeley Rates of Undergraduate Admission  
for Applicants with HSGPAs of 4.0 or Higher<sup>220</sup>**

	White	Afr. Amer.	Lat./Chicano
1998	48.2%	38.5%	39.7%

<sup>218</sup> Even if institutions like UC Berkeley and UCLA attempt to rebut statistical evidence of discriminatory effect on the ground that the overall applicant pool is not the relevant pool for Title VI analysis, courts may be persuaded that the vast majority of the applicants in the African American and Latino applicant pools to selective public universities, like the overall applicant pool to selective public universities, is overwhelmingly comprised of students who have the requisite college performance ability to attend those public universities. *See* BOWEN & BOK, *supra* note 10, at 30 (observing that competition for admission to academically selective schools increased so dramatically between 1976 and 1989 that “even with race-sensitive admissions, the average SAT score for black matriculants in 1989 was slightly higher than the average SAT score for all matriculants in 1951”). In addition, like plaintiffs charging that a particular hiring criterion has the effect of discriminating against job applicants on the basis of gender, race, religion, or national origin, rejected minority applicants filing charges with the Office for Civil Rights might choose to present statistical analysis demonstrating that the use of the SAT as a selection criterion has a racially discriminatory impact on minority applicants with stellar academic credentials. *See* *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (noting the relevance of statistics in Title VII cases).

<sup>219</sup> Chi-square analysis of this disparity is in fact “very strongly statistically significant.” *See infra* Table 6, (showing a p-value of less than 0.0001).

<sup>220</sup> As discussed, *supra* note 207, whites have been selected as the group with the highest selection rate because of significant admissions disparities among Asian subgroups (e.g., the admissions rate for Filipinos with GPAs of 4.0 or higher is 31.6% whereas the admissions rate for the general category of Asian American is 50.6%).

Shaded boxes show disparities in admissions rates large enough to constitute discriminatory impact under the four-fifths rule.

Table 6 shows that there was a statistically significant disparity disfavoring African American and Latino applicants with high school grade point averages of 4.0 or better in the first affirmative action–less UC Berkeley admissions cycle (the 1998 cycle).<sup>221</sup> It includes the number of 4.0 or better students admitted and denied, the rates of admission, the number of admits and denials expected if admissions of applicants with GPAs of 4.0 or higher were not dependent on race, the Pearson chi-square value, and p-value.

**Table 6: Chi-square Analysis of Racial Differences in Rates of Undergraduate Admission at UC Berkeley for Applicants with HSGPAs of 4.0 or Higher**<sup>222</sup>

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
1998	White <sup>223</sup>	2185	2347	48.2	2164	2368	8.26	< 0.004**
	Afr. Amer.	89	142	38.5	110	121		
	White	2185	2347	48.2	2113	2419	24.6	< 0.0001***
	Latino	412	626	39.7	484	554		

Based on the p-values in Table 6, there is only a 0.4% chance that race was not a factor in the higher rejection rate for African American high-school students with 4.0 and higher HSGPAs than the rate of rejection of white high-school students with those grades. The chance that race was not a factor in the difference in the admissions outcomes for Latino students with HSGPAs of 4.0 and higher and white applicants with the same grades is minimal. Like the analysis of the overall applicant pool, analysis of an even more qualified subset of the applicant pool could be offered as prima facie evidence of a Title VI racial effect discrimination against African American and Latino applicants to UC Berkeley and UCLA after the enactment of a state anti-affirmative action law.<sup>224</sup>

<sup>221</sup> Only fall 1998 data for applicants with 4.0 and higher HSGPAs is publicly available.

<sup>222</sup> See *supra* note 211 (explaining the statistical significance values).

<sup>223</sup> See *supra* note 207 (explaining the selection of whites, rather than Asian Americans, as the comparison group).

<sup>224</sup> See, e.g., First Amended Complaint, *supra* note 205, at paras. 3-11.

## 2. University of Washington

In the first year of affirmative action-less admissions at the University of Washington (the 1999 admissions cycle), admissions rates for African American and Latino applicants dropped lower than the admissions rate for white applicants. In that year, the admissions rate for white applicants was 78.9%, whereas the admissions rates for African American and Latino applicants were 60.9% and 72.4%, respectively.<sup>225</sup> Table 7 shows a four-fifths rule analysis of the first nine years of post-Initiative 200 admissions cycles at the University of Washington.

**Table 7: University of Washington Rates of Undergraduate Admission 1998–2007<sup>226</sup>**

	White	Afr. Amer.	Lat./Chicano
1999	78.9%	60.9%	72.4%
2000	79.9%	71.4%	73.0%
2001	80.7%	69.1%	77.5%
2002	70.9%	62.3%	69.1%
2003	72.6%	59.9%	67.3%
2004	70.2%	55.7%	67.3%
2005	69.2%	49.8%	62.3%
2006	71.2%	52.9%	64.7%
2007	68.8%	51.8%	60.6%

Five of the nine post-Initiative 200 admissions cycles violate the four-fifths rule for identifying racially discriminatory effect when comparing admissions rates of white and African American applicants. None of the University of Washington admissions statistics violates the rule when Latino admissions rates are compared to white rates, however.

<sup>225</sup> See University of Washington Data, *supra* note 60.

<sup>226</sup> See *supra* note 207 (explaining selection of whites as the group with the highest selection rate because of intragroup disparities within the Asian American population—e.g., the admissions rate for Filipinos in 1998 is 19.4%, whereas the admissions rate for the general category of Asian Americans is 31.8%).

Shaded boxes show disparities in admissions rates large enough to constitute discriminatory impact under the four-fifths rule. There are no shaded Latino/Chicano boxes because none of the disparities in admissions rates is large enough to constitute discriminatory impact under the four-fifths rule.

**Table 8: Chi-square Analysis of Racial Differences in Rates of Undergraduate Admission at University of Washington<sup>227</sup>**

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
1999	White <sup>228</sup>	5774	1541	78.9	5725	1590	52.2	< 0.0001***
	Afr. Amer.	173	111	60.9	222	62		
	White	5774	1541	78.9	5747	1568	10.4	0.0013**
	Latino	312	119	72.4	339	72		
2000	White	6141	1548	79.9	6114	1575	13.8	0.0002**
	Afr. Amer.	235	94	71.4	315	67		
	White	6141	1548	79.9	6115	1574	11.0	0.0009**
	Latino	289	107	73.0	315	81		
2001	White	6116	1461	80.7	6085	1492	23.0	< 0.0001***
	Afr. Amer.	192	86	69.1	223	55		
	White	6116	1461	80.7	6102	1475	2.9	0.0902†
	Latino	347	101	77.5	361	87		
2002	White	6204	2544	70.9	6170	2579	14.3	0.0002**
	Afr. Amer.	261	158	62.3	296	124		
	White	6204	2544	70.9	6196	2552	0.7	0.4062
	Latino	327	146	69.1	335	138		
2003	White	6376	2411	72.6	6328	2459	30.4	< 0.0001***
	Afr. Amer.	239	160	59.9	287	112		
	White	6376	2411	72.6	6343	2444	8.8	0.0031**
	Latino	461	224	67.3	494	191		
2004	White	5994	2548	70.2	5934	2608	41.1	< 0.0001***
	Afr. Amer.	244	194	55.7	304	134		
	White	5994	2548	70.2	5975	2567	2.6	0.1035
	Latino	483	235	67.3	502	216		
2005	White	6017	2678	69.2	5929	2766	78.4	< 0.0001***
	Afr. Amer.	237	239	49.8	325	151		
	White	6017	2678	69.2	5965	2730	16.8	< 0.0001***
	Latino	521	315	62.3	573	262		
2006	White	6438	2609	71.2	6333	2714	91.0	< 0.0001***
	Afr. Amer.	325	289	52.9	430	184		
	White	6438	2609	71.2	6383	2664	17.1	< 0.0001***
	Latino	615	335	64.7	670	280		

<sup>227</sup> See *supra* note 211 (explaining the statistical analysis).

<sup>228</sup> See *supra* note 207 (explaining selection of the comparison group).

Year	Race	Admits	Denials	Percent Admitted	Expected Admits	Expected Denials	$\chi^2$	p-value
2007	White	6604	2989	68.8	6504	3089	78.6	< 0.0001***
	Afr. Amer.	324	302	51.8	424	202		
	White	6604	2989	68.8	6517	3076	32.7	< 0.0001***
	Latino	719	467	60.6	806	380		

Several of the racial disparities in the bottom-line admissions outcomes at the University of Washington's post-Initiative 200 admissions cycles appear sufficiently large to establish Title VI racially discriminatory effect against African American and Latino applicants. However, the four-fifths and chi-square analyses reveal that the racial disparities in admissions at the University of Washington are, in several instances, smaller than the racial disparities at UC Berkeley and UCLA. This is particularly true when the Latino admissions rate is compared to the white admissions rate. University of Washington admissions outcomes that are neither statistically significant nor violative of the four-fifths rule would make it difficult for rejected minority applicants to prove Title VI discriminatory effect.

Since the passage of Proposition 209, racial disparities in admission to UC Berkeley and UCLA have been consistently statistically significant and have always disfavored African American and Latino applicants, including those with very high grade point averages.<sup>229</sup> The racial disparities in admission to the University of Washington since the passage of Initiative 200 have also consistently disfavored African Americans and Latinos, but there have been some affirmative action-less admissions cycles at the University of Washington that do not appear to constitute evidence of Title VI effect discrimination. Having applied statistical tests to assess whether admissions outcomes at affirmative action-less universities constitute evidence of Title VI effect discrimination, this Part concludes that a very significant number of post-Proposition 209 and post-Initiative 200 admissions cycles resulted in racial disparities of a large enough magnitude to jeopardize Title VI federal funding received by UC Berkeley, UCLA, and the University of Washington. The next question to consider is whether public universities with evidence that their admissions outcomes constitute evidence of Title VI effect discrimination may, consistently with state anti-affirmative action law, readopt race-based affirmative action as a remedial measure.

<sup>229</sup> See Tables 3, 4, & 6 and accompanying text.

#### IV. THE DUTY TO COMPLY WITH TITLE VI AS A REMEDIAL RATIONALE FOR AFFIRMATIVE ACTION

Congress' intent to encourage voluntary compliance with the requirements of Title VI (and VII, for that matter) has always been a backdrop to the scheme of evidentiary burdens the federal courts have placed on litigants pursuant to that legislation.

Wessmann v. Gittens<sup>230</sup>

When affirmative action-less admissions policies result in very large racial disparities in admissions rates, minorities and the DOJ are positioned to challenge facially race-neutral admissions criteria, such as the SAT, under the theory that such considerations have an unjustified racially discriminatory effect. This potential Title VI liability—the prospect that rejected minority applicants will file Title VI complaints with the OCR and that such charges could result in loss of federal funding—could give public universities subject to state anti-affirmative action laws the option of articulating a corrective (remedial) rationale for race-conscious admissions. In other words, state anti-affirmative action law, like federal constitutional and statutory law, may permit institutions to use race-conscious admissions policies for the purpose of lessening racial disparities in admissions rates that constitute evidence of Title VI effect discrimination.<sup>231</sup>

It is well established that the Fourteenth Amendment's Equal Protection Clause permits race-based affirmative action for the purpose of remedying the effects of race discrimination.<sup>232</sup> Similarly, Title VI regulations permit federally funded institutions “to take affirmative action”—a phrase that has been interpreted to mean race-conscious remedial measures—for the same purpose.<sup>233</sup> If a recipient of federal

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<sup>230</sup> 160 F.3d 790, 819-20 (1st Cir. 1998) (Lipez, J., dissenting) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 336 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part)); *see also* *Johnson v. Transp. Agency*, 480 U.S. 616, 630 n.8 (1987) (discussing the role of voluntary compliance in reaching the goals of Title VII).

<sup>231</sup> It is also important to note that if, in the future, the Supreme Court rejects the diversity rationale for affirmative action, the remedial rationale may be the only justification for race-conscious admissions available to universities to justify affirmative action.

<sup>232</sup> *See, e.g., Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992) (“A voluntary, race-conscious affirmative action plan does not violate constitutional standards if it is narrowly tailored to serve a compelling state interest. A public employer is justified in undertaking an affirmative action program if it does so to remedy a history of past discrimination.” (citations omitted)).

<sup>233</sup> The relevant Title VI regulations provide as follows:

financial assistance has been found to have “previously discriminated against persons on the grounds of race, color, or national origin,” Title VI regulations *require*, as well as permit, the institution to voluntarily adopt a race-based affirmative action policy.<sup>234</sup>

The question raised by the passage of state anti-affirmative action laws is whether these new laws permit race-based remedial affirmative action. And, if so, do state anti-affirmative action laws permit such corrective race consciousness to remedy the effects of disparate impact discrimination? This Part considers whether institutions may use race-conscious affirmative action to correct racial disparities that constitute evidence of Title VI discriminatory effect, examining the specific context of admissions to selective public universities in states with anti-affirmative action laws.

A. *Diversity as the Default Rationale for Affirmative Action in Higher-Education Admissions*

The major distinction between the remedial and diversity rationales for affirmative action is the identified purpose behind the policy. Affirmative action policies adopted for the purpose of achieving diversity in higher education may be considered “diversity justified.”<sup>235</sup> If the purpose of an affirmative action policy is to correct the effects of

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

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

34 C.F.R. § 100.3(b)(6) (2008) (emphasis added).

<sup>234</sup> *Id.*

<sup>235</sup> In the *Grutter* decision and its companion case *Gratz*, the Court set forth the parameters for the diversity-justified use of affirmative action in higher-education admissions, noting that policies aiming to promote diversity must still meet the narrowly tailored requirement. See *Gratz v. Bollinger*, 539 U.S. 244, 273-75 (2003) (holding that the “points” system used in admissions decisions by the University of Michigan’s College of Literature, Science, and the Arts was “not narrowly tailored to achieve [the] asserted compelling interest in diversity” because the plan failed to “offer applicants the [requisite] individualized selection process”); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (finding that the University of Michigan Law School’s admissions scheme bore “the hallmarks of a narrowly tailored plan” as the admissions committee considered race or ethnicity “flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant”).

racial discrimination, the U.S. Supreme Court classifies the policy as remedial affirmative action.<sup>236</sup> However, the diversity rationale, not the remedial rationale, for affirmative action has been the rationale most frequently invoked by universities since its conception by Justice Powell in *Bakke*.<sup>237</sup>

In contrast to the single-Justice opinion in *Bakke* supporting the diversity rationale, a five-Justice majority of the Court recognized the diversity rationale for affirmative action as constitutionally legitimate in *Grutter*.<sup>238</sup> The *Grutter-Bakke* diversity rationale is a win-win for universities. Unlike institutions adopting affirmative action pursuant to the remedial rationale, a university invoking diversity as its justification for considering race in admissions is not placed in the awkward position of relying on evidence of its own purposeful or disparate im-

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<sup>236</sup> Professor Charles Lawrence has explained the difference between the remedial and diversity rationales for affirmative action:

Arguments that focus on past and continuing discrimination against minorities, women and other groups are often called “backward-looking.” They argue for affirmative action to make amends for or to rectify the effects of past injustices. By contrast, “forward-looking” arguments for affirmative action make sparing reference to past or current wrongdoing, and instead defend affirmative action as a means to some desirable future goal. The liberal or “diversity” defense [for affirmative action] articulates its purpose as “forward-looking” . . . .

Lawrence, *supra* note 11, at 952-53 (footnote omitted).

<sup>237</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-13 (1978). Justice Powell reasoned that the First Amendment afforded universities a unique academic freedom to create a diverse student body so long as race was one of multiple components of “diversity.” *Id.* at 312. Universities often rely exclusively on the diversity rationale to defend the constitutionality of their race-based admissions policies. See *Grutter*, 539 U.S. at 334 (upholding an individualized admissions plan); *Gratz*, 539 U.S. at 275 (striking down a point-based admissions scheme); *Smith v. Univ. of Wash., Law Sch.*, 392 F.3d 367, 375-76 (9th Cir. 2004) (upholding an individualized plan); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (striking down a “mechanical” plan); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (noting that while the defendant law school invoked a remedial rationale, its arguments relied more heavily on the diversity rationale), *vacated*, 95 F.3d 53, 53 (5th Cir. 1996).

<sup>238</sup> More recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court applied the highest level of scrutiny to the consideration of race in individual K-12 student assignments. 127 S. Ct. 2738, 2751-54 (2007). Justice Kennedy’s concurring opinion invokes diversity to justify race-conscious policies (but not race-specific individualistic decisions) taking into account the racial composition of schools and neighborhoods in elementary and secondary education on grounds of the school board’s interest in creating a racially diverse educational environment. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy argues that race should be a component of diversity but that other demographic factors should be considered as well. *Id.*

pact racial discrimination.<sup>239</sup> Moreover, when selective universities invoke the diversity rationale, those institutions are rarely called upon to identify explicitly the characteristics that qualify or disqualify minority applicants. While diversity-justified affirmative action does not eliminate universities' Title VI liability for using admissions criteria that have an unjustified racially discriminatory effect, it does obscure the discriminatory impact of the policy through "bottom-line" admissions decisions that seem to favor minority applicants.<sup>240</sup> Thus, when practiced by universities prior to the passage of state anti-affirmative action laws, diversity-justified affirmative action may have ameliorated the racially discriminatory impact of the institution's reliance on the SAT.

B. *Title VI Liability as a Remedial Rationale Under Federal Law*

In contrast, if the diversity rationale is unavailable to an institution—as seems to be true currently with respect to noneducational public entities—the U.S. Supreme Court has held that the Equal Protection Clause permits the government to adopt race-conscious policies under the remedial rationale for affirmative action. Specifically, the Court has held that a public institution may voluntarily adopt remedial affirmative action policies based on evidence that the entity's selection practices violate the civil rights of minority job applicants or minorities seeking government contracts. In *Adarand Constructors, Inc. v. Peña*<sup>241</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>242</sup> the Court explained the parameters of a public entity's use of race-based affirmative action. In these cases, the Court established that a public entity may use affirmative action to correct for the effects of its own discrimination or the effects of private discrimination in which the public entity is a "passive participant."<sup>243</sup> Considered in concert with Justice

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<sup>239</sup> See, e.g., Lawrence, *supra* note 11, at 956 ("Perhaps the University's rejection of the remedial defense can be explained by its concern that by admitting its own discriminatory practices it would expose itself to liability . . .").

<sup>240</sup> In order to admit a "critical mass" of underrepresented minorities—students from groups that make up a relatively small proportion of the student population—diversity-justified affirmative action policies typically admit such minorities at higher-than-average rates.

<sup>241</sup> 515 U.S. 200 (1995).

<sup>242</sup> 488 U.S. 469 (1989).

<sup>243</sup> *Id.* at 492; see also *Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); Lawrence, *supra* note 11, at 955 (using the example of the University of Michigan's proposed strategy in *Grutter* of admitting and documenting its

O'Connor's analysis in *Wygant v. Jackson Board of Education*,<sup>244</sup> the Court's *Adarand* and *Croson* analysis may grant public entities the authority under federal law to "facilitate a voluntary remedy" when necessary to counteract the effects of discrimination.<sup>245</sup>

The Supreme Court and Congress place substantial value on voluntary efforts to further the objectives of federal antidiscrimination laws.<sup>246</sup> In fact, the value is even greater when a *public* entity acts to remedy discrimination, "both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance."<sup>247</sup> In her concurring opinion in *Wygant*, Justice O'Connor set forth an explanation for permitting remedial race consciousness by public employers that seems equally applicable to public universities. Justice O'Connor interpreted the Fourteenth Amendment in a manner designed to solve the dilemma faced by public employers with some evidence that race-based affirmative action is necessary to avoid violating the civil rights of racial minorities. She rejected the notion that such employers could only adopt remedial affirmative action policies if they were willing to admit facts proving that the entities had, in fact, discriminated

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own historical and contemporary discrimination); Roithmayr, *supra* note 15, at 1498 (positing that critical history could be used to show that the current law school admission system is structurally discriminatory and that affirmative action is necessary to remedy it).

<sup>244</sup> 476 U.S. 267 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

<sup>245</sup> *Wessmann v. Gittens*, 160 F.3d 790, 820 (1st Cir. 1998) (Lipez, J., dissenting). In his dissent, Judge Lipez applied the *Adarand* and *Croson* analysis to the selective admissions context. However, he rejected the claims of the plaintiffs and the Boston School Committee that, absent proof of discriminatory intent, statistical disparities in admissions rates to the selective Boston Latin Examination High School constituted a compelling justification for use of race-based affirmative action. *Id.* at 817.

<sup>246</sup> *See Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment) (arguing that it should not be necessary for public employers to prove their own discriminatory behavior in order to take remedial action and that forcing public employers to make findings of past discrimination would be contrary to the expressed desire of the Supreme Court and Congress to encourage voluntary efforts); *see also* Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 140 (1999) ("Supreme Court doctrine allows the political branches of the local, state and federal government to adopt race-conscious measures without having to admit that they themselves discriminated in the past.")

<sup>247</sup> *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment).

against minorities.<sup>248</sup> Justice O'Connor was explicit in her observation that public employers should be encouraged to adopt voluntary, remedial, race-conscious policies to protect the civil rights of racial minorities when the employer deemed such policies necessary to afford equal protection to minorities.<sup>249</sup>

Justice O'Connor's rationale helps explain why the majority in *Adarand* and *Croson* adopted the strong-basis-in-evidence standard. The strong-basis-in-evidence standard permits employers to take remedial race-conscious action without making themselves easier targets for traditional discrimination lawsuits filed by rejected racial minorities or "reverse discrimination" lawsuits filed by rejected whites.<sup>250</sup> Thus, in the contracting context, the Supreme Court has established that the federal factual prerequisite for adopting a voluntary affirmative action policy is that a government entity that opts to consider race in the contracting process must have evidence sufficient to create a "strong basis" for the conclusion that the use of race-conscious measures is needed to remedy the effects of discrimination.<sup>251</sup> In *Croson*, the Court observed that "[t]here is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII."<sup>252</sup> If presented with the question, it is likely that the standard that the Court has articulated for assessing the federal constitutionality of voluntary, remedial affirmative action in noneducational contexts would also be applied to voluntary race-based affirmative action undertaken by a public university.

Although the Court has been generally disinclined over the last several decades to identify government interests as sufficiently compelling to justify the use of racial classifications,<sup>253</sup> it has been willing to

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<sup>248</sup> See *id.* at 291 (arguing that a public employer need not make findings of contemporaneous discrimination before taking affirmative action under the remedial rationale).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See *id.* at 277 (majority opinion) ("[T]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.").

<sup>252</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) (alteration in original) (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

<sup>253</sup> See *Wygant*, 476 U.S. at 282-84 (finding that employer failed to establish legal and factual predicate for race-conscious decision making in layoffs); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314-20 (1978) (finding that the consideration of race in medical school admissions violated the Equal Protection Clause despite the institution's asserted interest in diversity).

permit public employers to use race-conscious affirmative action policies to avoid Title VII employment discrimination liability. The logic should extend to public universities seeking to avoid Title VI liability. Accordingly, voluntary remedial efforts to achieve such compliance are arguably sufficiently compelling to justify the narrowly tailored consideration of race. A university seeking to use remedial affirmative action to insulate itself from Title VI liability and the loss of Title VI federal funds could invoke the Court's analysis in *Adarand* and *Croson*. However, in order for the Court to accept race-based admissions policies as remedial, the selective public university would have to be willing to argue that the remedial consideration of race in admissions is not a preference for minorities but rather a corrective measure to avoid federal civil rights claims.

Just as a university could argue that statistical evidence of Title VI effect discrimination may, in certain circumstances, be sufficient to justify remedial affirmative action under the Equal Protection Clause, an institution could take the position that such evidence of Title VI racial effect discrimination is sufficient to demonstrate that the consideration of race in admissions is not a preference under state anti-affirmative action laws. Using the same reasoning, the institution could also invoke the federal-funding exception to state anti-affirmative action laws on the ground that race-based affirmative action adopted for the remedial purpose of complying with Title VI federal regulations is legally permissible, even if it constitutes a racial preference under state law.<sup>254</sup> This is the framework under which public universities whose admissions cycles reveal statistically significant racial disparities in admissions might argue that they have the authority, consistent with state anti-affirmative action law, to put the brakes on an unjustified freefall in minority admissions.<sup>255</sup>

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<sup>254</sup> Because it is likely that more states will adopt anti-affirmative action laws and because it is possible that the current Supreme Court is prepared to reject the diversity rationale for affirmative action, the answers to both questions are salient.

<sup>255</sup> As a practical matter, educational institutions may, like employers and government entities, conduct disparity studies to justify remedial affirmative action. After conducting the studies, affirmative action-less universities like UC Berkeley and UCLA could readopt a limited form of race-conscious admissions without running afoul of anti-affirmative action law. The institutions may point to the studies as proof that the consideration of race does not confer a preference but instead ensures that college performance ability is assessed fairly and adequately.

C. *Permissibility of Remedial Affirmative Action Under  
State Anti-Affirmative Action Laws*

Because the text of state anti-affirmative action laws leaves key terms like “preference” and the meaning of the federal-funding exception open to substantial and varying interpretation, state courts will play a central role in shaping the real-world impact of anti-affirmative action laws. State courts that interpret the antipreference provision of the state’s anti-affirmative action laws as an absolute ban on the use of racial classifications, are, in essence, equating the term preference with any race-conscious action.<sup>256</sup> In contrast, a state court may conclude that prohibiting racial preferences “does not ban all government action that is cognizant of race.”<sup>257</sup> This Article has identified another important legal question that state courts may eventually consider—whether the use of race for the remedial purpose of correcting racial discrimination under the Title VI effect-discrimination theory violates a particular state’s anti-affirmative action law. Again, the analytic framework for determining the state law constitutionality of remedial race-based affirmative action hinges upon how individual state courts construe the central antipreference provision<sup>258</sup> and the federal-funding provisions permitting race-conscious action that “must be taken” by state government to “establish or maintain” federal funding.<sup>259</sup>

The permissibility of affirmative action to remedy *purposeful* discrimination has already been recognized by state courts.<sup>260</sup> Assuming

<sup>256</sup> See, e.g., *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Ct. App. 2001) (invalidating a state affirmative action statutory scheme applicable to the state lottery and the sale of government bonds based on equal protection concerns).

<sup>257</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 72 P.3d 151, 164 (Wash. 2003). The California Supreme Court has come close to doing the former while the Washington Supreme Court’s interpretation reflects the latter approach. See *id.* at 165 (“Given th[e] language [of the I-200 voters pamphlet], an average voter would have understood that I-200 does not ban all affirmative action programs, and would only prohibit the type of affirmative action we have described as ‘reverse discrimination’ or ‘stacked deck’ programs.”).

<sup>258</sup> See, e.g., CAL. CONST. art. I, § 31(a).

<sup>259</sup> This is the federal-funding exception. See, e.g., CAL. CONST. art. I, § 31(e); see also *supra* Section I.B. State anti-affirmative action laws also include an exception for bona fide qualifications based on gender and for existing court orders and consent decrees. See, e.g., CAL. CONST. art. I, § 31(c)–(d).

<sup>260</sup> See, e.g., *Coral Constr. Inc. v. City & County of San Francisco*, 57 Cal. Rptr. 3d 781, 803 (Ct. App. 2007), *appeal docketed*, No. S152934 (Cal. Aug. 22, 2007) (“If a city or other political subdivision were found to have engaged in intentional discrimination such that some type of race-based remedial program was *necessary* under the federal

that the Equal Protection Clause applies to remedial affirmative action by public universities under the standard set forth in *Adarand* and *Crosson*, state anti-affirmative action laws may permit remedial affirmative action to correct disparate impact discrimination. Either by excluding remedial affirmative action from the definition of preference or by making the remedial use of race an exception to the general prohibition against using racial classifications, universities could urge that state anti-affirmative action laws be interpreted to allow race-conscious measures when an institution needs to remedy Title VI effect discrimination. The state courts will likely find two questions central to this analysis: Does considering race in admissions to correct Title VI discriminatory effect constitute a preference under state anti-affirmative action law? If the remedial consideration of race does constitute a preference, is it a *legal* racial preference—made legally permissible by the federal-funding exception to state anti-affirmative action laws?

### 1. Applying the Antipreference Provision to Test Deficiency

Assuming the Fourteenth Amendment permits institutions to use race-conscious admissions policies for the remedial purpose of avoiding Title VI liability, in such a circumstance, remedial affirmative action is simply “taking race into account [as] equalizing treatment.”<sup>261</sup> Public universities seeking to readopt remedial affirmative action could argue that “rather than constituting a preference, affirmative action programs function as corrective non-discriminatory measures.”<sup>262</sup> In fact, decades before state anti-affirmative action laws were conceived, Justice Powell, in his decision in *Bakke*, considered whether race-based affirmative action to counteract limitations in the predictive ability of standardized tests like the SAT should be considered a preference. Significantly, Powell concluded that “[t]o the extent that race and ethnic background were considered [in selective university

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Constitution, the supremacy clause as well as section 31 [of the California Constitution (Proposition 209)] dictate that federal law prevails . . .”).

<sup>261</sup> Harris, *supra* note 46, at 711. Harris argues that, within the context of university admissions policies that rely on standardized tests of limited predictive ability, affirmative action is “a correction for the use of admissions criteria in which racial preferences are embedded.” *Id.*

<sup>262</sup> Kimberle Crenshaw, Essay, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196, 212 (1999). Crenshaw argues that educational officials are incorrect to assume that they must eliminate their affirmative action programs following the passage of Proposition 209.

admissions] only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."<sup>263</sup> Justice Powell's reasoning supports the argument that considering race to "cure" limitations in the SAT's ability to predict academic performance is not a racial preference.

Correcting or remedying test deficiency—established inaccuracies in a test's predictive capacity—may be conceptualized in two ways under state anti-affirmative action laws. First, assuming that the primary interest of a selective public university is to admit the best and brightest high-school students based on their academic merit without regard to race, test deficiency unfairly undermines that goal. Thus, admissions that rely on deficient tests may actually be prohibited by the antidiscrimination provision of state anti-affirmative action laws.<sup>264</sup> For instance, if a university like UC Berkeley has statistical evidence that its affirmative action-less admissions policies have a racially discriminatory effect on African American and Latino applicants with the requisite college performance ability to attend the institution,<sup>265</sup> such an institution may need to be race conscious in admissions to *comply* with Proposition 209 and other state antidiscrimination laws as well as to avoid charges, investigations, and the possible loss of federal funds for failure to comply with federal Title VI disparate impact regulations.

Secondly, because anti-affirmative action laws explicitly prohibit discrimination on the basis of race, there are strong textual and normative arguments that state courts should construe the term "preference" to exclude the use of race to correct Title VI effect discrimination. Interpreting the antipreference provision of state anti-affirmative action in this manner advances both the antidiscrimination requirements of state anti-affirmative action laws and the federal antidiscrimination requirements embodied in laws like Title VI and its

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<sup>263</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978). In the context of the *Bakke* decision, Justice Powell's observation had very significant implications. Justice Powell's opinion suggests a willingness to apply something less stringent than strict scrutiny to the use of race to compensate for the predictive limitations of standardized tests like the SAT. *Cf.* Harris, *supra* note 46, at 710 (agreeing with Powell's opinion in *Bakke* and stating that "what we call a preference depends on where we mark a baseline").

<sup>264</sup> Professor Cheryl Harris has observed that "the consideration of race is only an unfair preference if the underlying system is fair and does not enact a set of preferences for particular groups." Harris, *supra* note 46, at 710; *see also* Crenshaw, *supra* note 262, at 212 ("Indeed, Prop. 209 explicitly prohibits discrimination, and institutions are obligated to take measures to eliminate that discrimination.").

<sup>265</sup> This might be true of African American and Latino applicants with HSGPAs of 4.0 and higher. *See supra* subpart III.C.1.

regulations. Moreover, even state courts that construe the antipreference provision of anti-affirmative action laws to be a per se ban on race-conscious state action may interpret the federal-funding exception in a manner that gives universities the legal authority to use race to correct for test deficiency. In other words, state courts may interpret the federal-funding exception to state anti-affirmative action laws in a manner that permits institutions to be race conscious to cure inadequacies in the SAT's capacity to make useful distinctions as to the relative college performance ability of racial minorities within a pool of highly qualified applicants.

## 2. Interpreting the Federal-Funding Exception

The federal-funding exception to state anti-affirmative action laws relaxes the laws' antipreference requirements if the state needs to be race conscious in order to remain eligible for federal funds. This exception, as included in current state anti-affirmative action laws, provides explicitly that the laws "do[] not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state."<sup>266</sup> On its face, this exception grants explicit textual permission to the state government to adopt racial preferences in order to establish or maintain federal funds. Accordingly, public universities seeking to adopt remedial affirmative action could urge state courts to interpret the "must be taken" language as imposing a strong-basis-in-evidence standard similar to the federal standard for remedial affirmative action set forth by the Court in *Adarand*.

Courts have held that the federal-funding exception eliminates any potential conflict between state anti-affirmative action laws and Title VI because the provision makes explicit that race-based policies, including racial preferences, are permissible if needed to establish or maintain compliance with federal legal mandates.<sup>267</sup> The rationale

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<sup>266</sup> MICH. CONST. art. I, § 26(4); WASH. REV. CODE ANN. § 49.60.400(6) (West 2008). The California law is worded slightly differently, without any substantive difference: "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." CAL. CONST. art. I, § 31(e).

<sup>267</sup> See, e.g., *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 251 (6th Cir. 2006) ("What Title VI requires, in other words, Proposal 2 expressly allows—eliminating any conflict between the two laws."). Proposal 2 by its terms eliminates any conflict between it and federal-funding statutes like Title VI. "This section," the proposal says, "does not prohibit action that must be taken to establish or maintain eligi-

that federal courts have adopted is that “what Title VI requires”—“prevent[ing] discrimination in federally assisted programs”—the anti-preference and federal-funding provisions of state anti-affirmative action laws “expressly allow[.]”<sup>268</sup>

The rationale upon which federal courts have relied to conclude that state anti-affirmative action laws are consistent with the Fourteenth Amendment should urge state courts to interpret anti-affirmative action laws in a manner that best reinforces the purpose of Title VI.<sup>269</sup> Permitting a public university with a strong basis in evidence that it needs to use race-conscious policies in order to comply with a federal antidiscrimination mandate would seem to be a logical application of the federal-funding exception and the interpretation most consistent with the goals of Title VI. A public university’s use of race to comply with the Title VI federal antidiscrimination mandate is an example of a circumstance in which a state might permissibly invoke the federal-funding exception.

The purpose of the central provision of state anti-affirmative action laws is to establish a discrimination-free equilibrium in which minorities and nonminorities are treated fairly in public decision making. The overarching antidiscrimination purpose of anti-affirmative action laws supports interpreting such laws’ explicit textual exceptions in the manner most consistent with facilitating state compliance with federal antidiscrimination laws. The purpose of the federal-funding exception, according to the plain meaning of its text, is to identify one such limited circumstance in which racial preferences remain legally permissible—when failure to consider race would cause a state entity to violate a federal mandate with which (as a recipient of federal funds) the state is obligated to comply. In other words, the federal-

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bility for any federal program, if ineligibility would result in a loss of federal funds to the state.” MICH. CONST. art I, § 26(4). Title VI in turn says that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2006). State anti-affirmative action laws have withstood federal preemption challenges to their constitutionality based in large part on the text of the federal-funding exception. The federal constitutionality of current state anti-affirmative action laws is contingent upon holdings by federal courts that the provisions of state anti-affirmative action laws do not impede a state’s ability to comply with Title VI.

<sup>268</sup> *Granholm*, 473 F.3d at 251 (quoting Title VI, Pub. L. No. 88-352, 78 Stat. 241 (1964)) (first alteration in original).

<sup>269</sup> *See id.* at 251-52 (“Proposal 2 reinforces [the] goal [of Title VI] by prohibiting state universities from discriminating, or granting preferential treatment, on the basis of race.”)

funding exception to state anti-affirmative action laws operates as a safety valve that protects states that are subject to anti-affirmative action laws from losing federal funds for noncompliance with federal civil rights laws like Title VI.

Professor Eugene Volokh has suggested a much different interpretation of the “must be taken” language of the federal-funding exception—that the exception only applies if the state demonstrates that eligibility for the federal program is “genuinely necessary” because no race-neutral action would preserve federal funding.<sup>270</sup> Specifically, Volokh’s view is that

[t]he discriminatory conduct thus must be genuinely necessary for eligibility—it’s not enough that it be potentially helpful, or generally consistent with the spirit of the federal program. If it’s possible to be eligible without the discrimination, then the discrimination is prohibited, because it’s not true that the action “must be taken” for eligibility. Likewise, if the state can switch to a nondiscriminatory program that will still provide the federal funds, then the discriminatory conduct remains impermissible. In such a case, ineligibility for the discriminatory program would not result in a loss of federal money.<sup>271</sup>

State courts should reject this interpretation of the federal-funding exception—that public entities must demonstrate that no race-neutral action would satisfy the federal requirement. The primary reason that Professor Volokh’s interpretation of the federal-funding exception should be rejected is that the text of the exception, if so interpreted, would have no practical effect. If state courts were to adopt Professor Volokh’s interpretation of the federal-funding exception, it is likely that no public entity would be able to invoke the provision. If the federal-funding exception is interpreted to require that public univer-

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<sup>270</sup> See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1387 (1997). Professor Volokh did not consider any specific federal programs in interpreting the federal-funding exception:

I don’t know how many federal programs really require race or sex discrimination; the clause wasn’t added with any particular program in mind. It was simply meant to foreclose any possible campaign argument that “[t]he CCRI would cost California voters \$X million in federal money,” based on some program that opponents might have unearthed.

*Id.* (italics added) (alteration in original); see also Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California’s Proposition 209*, 44 SANTA CLARA L. REV. 457, 458 (2004) (“[T]he proper interpretation of [the federal-funding] exception will be the most heated battleground over the initiative’s enforcement.”).

<sup>271</sup> Volokh, *supra* note 270, at 1387.

sities demonstrate that it is literally impossible to conceive of a race-neutral means of complying with Title VI federal law, the provision becomes superfluous. Moreover, such an interpretation would make the exception inherently illogical. Like the other textual exceptions set forth in state anti-affirmative action laws,<sup>272</sup> the federal-funding exception makes legal what would otherwise constitute a “preference” under the central antipreference provision of the law.

#### V. RESPONSIBILITY FOR RACIAL DISPARITY

Setting forth the analytic framework by which universities may re-adopt a remedial form of affirmative action is important because it differentiates the legal constraints imposed on public universities by state anti-affirmative action laws from the powerful, but nonlegal, forces that “normalize” significantly lower minority admissions rates. This Article makes it clear that admitting African American and Latino applicants at significantly lower rates than applicants of other races is not mandated by state anti-affirmative action laws. The Article also identifies a circumstance when race-based affirmative action may be permissible subsequent to the passage of a state anti-affirmative action law—when a public university can viably argue that a race-based admissions policy is adopted for the purpose of remedying Title VI discriminatory effect.

An affirmative action policy adopted to limit Title VI liability to minorities would no doubt differ in degree from a diversity-justified affirmative action policy. The scope of a remedial race-based affirmative action policy would be necessarily limited to race-consciousness that would eliminate unjustified disparities in admissions rates that federal courts deem evidence of a Title VI disparate impact violation against qualified African American and Latino applicants. This reasoning does not apply to race-conscious action taken to achieve the broader goal of racial diversity in higher education.

The empirical research in this Article establishes that racial disparities in admissions rates subsequent to the passage of state anti-affirmative action laws have, in many instances, been of sufficient magnitude to expose affirmative action-less universities to potential Title VI liability. Institutions with a strong basis in evidence that their reliance on the SAT would be difficult to justify as educationally necessary may be able to adopt a remedial affirmative action policy with-

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<sup>272</sup> See *supra* note 48.

out violating state anti-affirmative action law. Specifically, universities could justify the explicit consideration of race in admissions as a non-preferential corrective use of race or as a legally permissible racial preference under the federal-funding exception.

Thus, it may be that, before and after the passage of a state anti-affirmative action laws, institutions retain the option to justify or to remedy racial disparities in admissions that constitute a Title VI discriminatory effect. A university's own normative assessment of whether the racial gap in SAT scores is a product of minority deficiency or test deficiency will likely be the determinant factor in whether state courts find a particular race-conscious policy remedial and legally permissible. The analysis in this Article explains why institutions in states with anti-affirmative action laws retain the discretion to evaluate their compliance with federal civil rights laws such as Title VI. In so doing, universities may assess whether racial disparities in admissions are the product of minority deficiency—deficiencies in the college performance ability of certain racial groups—or the product of test deficiency—limitations in the predictive capacity of a particular admissions criterion such as the SAT. Thus, a selective public university's view of the college performance ability of its state's most qualified African American and Latino applicants will, in effect, determine the permissibility of remedial race-based affirmative action under state anti-affirmative action law.

#### CONCLUSION

In response to low African American admissions rates, one UCLA professor asked the provocative question whether the number of new African American students attending his institution had “to get to zero before we become outraged.”<sup>273</sup> When admissions of African Americans later increased, a different UCLA professor made headlines when he relied on that increase to support his charge that “UCLA is cheating on admissions.”<sup>274</sup> By considering whether an extremely low admissions rate for certain racial groups justifies the use of race-based

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<sup>273</sup> Franklin D. Gilliam Jr., *Pride and Shame at the School of a Black Hero*, L.A. TIMES, May 22, 2004, at B19. Gilliam wondered, in light of the steady post-Proposition 209 decline in the number of African American—and particularly African American male—students, “How long will it be before [a bust of deceased UCLA alumnus] Ralph Bunche is the last black person at UCLA?” *Id.*

<sup>274</sup> TIM GROSECLOSE, REPORT ON SUSPECTED MALFEASANCE IN UCLA ADMISSIONS AND THE ACCOMPANYING COVER-UP 1 (2008).

affirmative action for the remedial purpose of avoiding Title VI liability, this Article provides an empirical and legal framework for evaluating which professor's outrage is justified.

Affirmative action-less admissions policies adopted by several selective public universities to comply with anti-affirmative action laws have resulted in racial disparities in admissions rates that could, if not justified by "educational necessity," satisfy the federal standard for a prima facie case of Title VI disparate impact. This Article sets forth the legal framework for evaluating a university's assertion that its race-based affirmative action may not violate state anti-affirmative action laws if the race-consciousness is remedial in nature. The Article also asserts the normative claim that state anti-affirmative action laws should be interpreted in the manner most likely to ensure that the state's most prestigious higher-education opportunities are fairly and equally available to the state's most qualified students of all races. Viewing race-based affirmative action as a river of educational opportunity through which minority students gain access to premier public universities, this Article demonstrates that state anti-affirmative action laws need not necessarily act as dams. For universities that deem minority applicants sufficiently qualified, these laws may leave an open channel to use race-conscious policies to remedy potential violations of Title VI federal antidiscrimination law.