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Becoming the Mainstream: Merit, Changing Demographics, and Higher Education in California

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Craig Haney‡‡
&
Eugene E. García†††

INTRODUCTION

In this essay, we discuss the nature of what one commentator has termed "savage inequalities" in educational opportunity that separate minority students from the rest of the population in the United States. Notwithstanding the political importance of widespread liberal education to the integrity of the democratic process, they are pressing practical reasons to be increasingly concerned about persistent educational inequity. Rapidly changing demographics will soon redefine "majority" and "minority" populations in states across the country and produce unprecedented shifts in the composition of the American workforce. Yet, the combined effects of race-based disparities in educational opportunity and rapidly changing demographics are on a collision course with an increasingly advanced technological economy that will require greater numbers of better trained, more highly educated, and more intellectually skilled workers, managers, and policymakers.

The dimensions of the coming educational crisis and its corresponding economic consequences are quite clear. Indeed, at perhaps no other time in history have the methods and data of social science allowed us to map the trends and trajectories created by this inequality so precisely. Thus, we argue that, absent significant changes in educational policy and concerted efforts to achieve more equitable distribution of educational opportunity, a new world order is in the making that will be beset by increasingly insurmountable employment barriers that growing numbers of minority workers will be unable to transcend. Indeed, if the powerful, opposing forces created by shifting demographics and shrinking opportunity proceed

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2. Scholars, educators, and politicians of most political persuasions agree that a liberal education is beneficial in producing an informed electorate. However, the content of a "liberal education" has become contentious. For an analysis of this debate see, THE POLITICS OF LIBERAL EDUCATION 1-11 (Darryl J. Gless & Barbara Hermstein Smith eds., 1992); Mary Louise Pratt, Humanities for the future: Reflections on the Western Culture Debate at Stanford, in THE POLITICS OF LIBERAL EDUCATION 13-31; Henry A. Giroux, Liberal Arts Education and the Struggle for Public Life: Dreaming about Democracy, in THE POLITICS OF LIBERAL EDUCATION 119-144; WILLIAM J. BENNETT, TO RECLAIM A LEGACY: REPORT ON THE HUMANITIES IN HIGHER EDUCATION (1984); ALLAN DAVID BLOOM, THE CLOSING OF THE AMERICAN MIND (1988).
unchecked along their current paths, they are destined to produce wrenching economic dislocations, widespread social dysfunction, and massive political fallout. Existing demographic projections indicate that the collision is likely to occur very early in the 21st century.\(^3\)

At the same time that the dimensions of the impending crisis have been fully documented, our educational policies are reverting to much less enlightened times when the influence of race/ethnicity, gender, and class on subsequent educational attainment was poorly grasped, and when their social and economic implications remained unclear. As the changing demographics march inexorably forward, a broad range of educational policy initiatives—ones designed to dismantle affirmative action and constrict rather than expand opportunity for our nation’s emerging majority—seem destined to move us backward. Why this paradox? In this article, we examine several possible explanations, including (1) the cultural and historical legacy of individual merit that obfuscates the role of structural and group variables in understanding academic and occupational achievement (2) naïveté about the nature and magnitude of the changing demographics and their long-term implications for the political and economic landscape of the country, and (3) a group-interest based struggle over whether, when, and how the reins of democratic power will be shared with emerging political majorities whose needs have traditionally been ignored or discounted.

To explore some of these issues we have chosen to juxtapose the status of the state’s largest and fastest growing educational constituency against the expected impact of newly enacted policies governing admission to the state’s premier public educational institution. Specifically, we examine the plight of Latino high school students in California in the context of the passage of the University of California Regent’s Resolutions SP1 and SP2.\(^4\) Our rationale for focusing on the University of California is straightforward: it is the educational institution upon which Californians depend to prepare future generations for positions of leadership in the state’s public and private sectors. Yet, we argue that at precisely the time when this institution should be at the forefront in proposing ways to avoid the coming educational crisis, it has been forced to fight a costly, paralyzing rearguard action. Instead of developing and implementing policy initiatives designed to redistribute educational opportunity intelligently and equitably in the wake of the coming demographic revolution, Regent’s Resolutions SP1 and SP2 have undone the admittedly limited policies that were once used to modestly expand educational opportunities in the state. Both Resolutions and the symbolic politics that surrounded them have impeded necessary reform and blocked the long-overdue expansion of equity-based admissions and hiring practices. These recently enacted anti-affirmative action policies have badly undercut the development of a new framework with which the impending crisis might have been averted.\(^5\)

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4. Robert Post has summarized the purpose of the Regents’ Resolution SP1 “The Regents resolved that ‘effective January 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.’” Robert Post, Race and Representation: Affirmative Action [Special Issue], 55 REPRESENTATIONS 1, 10 (1996). Regents’ Resolution SP2 applies the same criteria to the contracting and hiring by the University of California.

5. In the latest Orwellian turn of events, Regents considered requiring the “blacking out” of applicants’ names before review of the application for admission. This was suggested by UC Regent Ward Connerly, who feared that names would taint the process by indicating race/ethnicity and gender. Of course, this ignores apparent correlations between ethnicity and high school attended (e.g., Garfield in East Los Angeles versus Palo Alto High School), applicant address (e.g., the now infamous 90210 Beverly Hills zip code), parental income, participation in varsity sports (especially in gender-segregated sports like football), participation in gifted and advanced programs which are often limited or non-existent in poorer school districts with concentrations of minority students.
Because of its practical as well as historical significance, we draw heavily upon the transcripts of the contentious Regents meeting where SP1 and SP2 were passed. In particular, we examine the conflicting definitions of the nature of academic "merit" that were employed, the various perspectives that surfaced concerning the importance of educational equality, and the opposing solutions that emerged in this debate. But we begin by putting this debate in the context of the increasing ethnic/racial diversity that is occurring within the state's larger educational system.

I. DIVERSITY AND EDUCATION IN CALIFORNIA

A snapshot of the changing demographics and their implications for higher education and the economy of the state—what has been called the "educational pipeline" in California—provides a critical context for understanding and evaluating the nature and consequences of University of California admissions policies and practices. In this section we discuss the educational pipeline, some of the social and political choices that have helped to define its characteristics, and the policy options that might be employed to improve the pipeline's capacity to address the needs of the state's emerging majority population.

A. High School Graduation and U.C. Eligibility

In 1997, California reached a demographic turning point: the K-12 educational system changed from a majority White student population to a predominantly non-White student body. Latino students now represent a plurality of K-12 students (2,346,524), closely followed by White students (2,117,870), Blacks (470,628), Asians (470,574), Filipinos (136,008), American Indians (50,058), and Pacific Islanders (31,760). Unfortunately, the increasing percentages of people of Color in the state have occurred in a context of educational failure: only 58% of Latinos currently in 10th grade will graduate from high school, compared to 61% of Black students, 76% of Whites, and 88% of Asians.

In addition to their low graduation rates from high school, the occupational futures of Latino and Black students are compromised by their low eligibility rates to attend the University of California. Such eligibility is determined by three criteria: subject requirements consisting of a minimum of 15 units in so-called A-F courses, scholarship requirements with specified minimum grade point averages.


7. Included in the category of Asians are Chinese and Japanese. Other Asian groups are listed separately.


11. The following are the University of California's A-F requirements: The A requirement entails 2 years of history/social science; the B requirement 4 years of English; the C requirement 3 years (although 4 years are recommended) of Mathematics; the D requirement 2 years (although 3 years are recommended) of Laboratory Science; the E requirement 2 years (although 3 years are recommended) of language other than English; the F requirement 2 years of College Preparatory Elective.
and an examination requirement in which students have to take standardized tests (ACT or SATs). Although students who are not eligible for U.C. admissions can attend community colleges and transfer after meeting necessary requirements, 70% of freshmen to the University of California come directly from high school.\(^\text{13}\) Furthermore, despite the fact that the largest number Latino students in higher education in the state are in community colleges (over 200,000 Latino students), in 1993 only 1,082 Latinos from all 106 community colleges transferred to the U.C. system.\(^\text{14}\) Indeed, a substantial increase in the transfer rates of Latino students would have a significant impact on their representation at the University of California.\(^\text{15}\)

Figure 1. Percent of California High School Graduates Eligible to Attend the University of California.

<table>
<thead>
<tr>
<th>Ethnic Group</th>
<th>Eligibility Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statewide Average</td>
<td>11.10%</td>
</tr>
<tr>
<td>Latino</td>
<td>3.80%</td>
</tr>
<tr>
<td>Black</td>
<td>2.80%</td>
</tr>
<tr>
<td>White</td>
<td>12.70%</td>
</tr>
<tr>
<td>Asian</td>
<td>30.00%</td>
</tr>
</tbody>
</table>


U.C. eligibility criteria are determined by the large-scale studies conducted by the California Postsecondary Education Commission (CPEC). The eligibility rates for Latinos have changed very little across the four benchmark studies: 2.1% in 1983, 3% in 1986, 3.9% in 1990, and 3.8% in 1996.\(^\text{16}\) Figure 1 shows the different eligibility rates in 1995 for the major ethnic/racial groups in California.\(^\text{17}\) Among

12. A high school graduate needs to meet one of the following set of criteria to obtain eligibility to attend the University of California: 1) A grade-point average of 3.3 or better in the required A-F courses and taking the Scholastic Assessment Test (SAT I) or the ACT Assessment, and three College Board Achievement tests, although their performance on the SAT II tests has not bearing on the eligibility; or, 2) A grade point-average of 2.78 to 3.29 in the required A-F courses and a college admissions test score that qualifies on the university’s Eligibility Index, and taking three College Board Achievement tests, although their performance on the achievement tests has no bearing on their eligibility; or, 3) A total (Verbal and Math) SAT score of 1100 or better or an ACT composite score of 26 or better, and a combined score of at least 1650 on three College Board Achievement tests with a minimum of 500 on each. See J. S. Ludwig & J. Kowarsky, Eligibility of California’s 1990 High School Graduates for Admission to the State’s Public Universities, in THE EDUCATIONAL ACHIEVEMENT OF LATINOS: BARRIERS AND SUCCESSES 259-297 (Aida Hurtado & E.E. Garcia eds., 1994).


14. Like those of Latinos, African American transfer rates from community colleges are quite low. In 1993, only 230 African American students transferred from California community colleges into the UC system. See Judy Kowarsky, Preparation for Transfer: An Orange County Community College Case Study, in STRATEGIC INTERVENTIONS IN EDUCATION: EXPANDING THE LATINO/LATINA PIPELINE 214-267 (Aida Hurtado et al. eds., 1996). Kowarsky also indicated that although underrepresented transfer students are from all over the state, of the 106 community colleges, only 10 account for approximately one third of all the transfers to the University of California. Of those campuses that transfer Latino students, the average was 11 students and only 20 community colleges sent 20 or more Latino students to the University of California in the fall 1993. Id. at 215.

15. Eugene E. Garcia & Aida Hurtado, Latino Student Eligibility and Participation in the University of California. Report Number Two of the Latino Eligibility Task Force, LATINO ELIGIBILITY STUDY (1993); Kowarsky, supra note 14..

16. The 1996 data are the most recent. They are taken from a study conducted in 1996 and released in November 1997. See, supra note 10.

17. The eligibility studies conducted by CPEC show that indeed California’s public schools, using the existing eligibility criteria, produce 11.1% of high school graduates who are eligible to attend
other things it shows that Latinos—the largest ethnic/racial group in California—have the lowest U.C. eligibility rates, while Asians—the smallest ethnic/racial group in California—have the highest eligibility rates. Using the earlier 1990 eligibility figures, Geiser calculated the expected rates of educational achievement from each of these major ethnic/racial groups. He estimated that, on average, out of 100 Asian, White, Black, and Latino students currently in 10th grade: 81 Asian, 76 White, 61 Black, 58 Latino students will finish high school; 48 Asian, 27 White, 17 Black, and 12 Latino students will complete the A-F academic requirements; and 16 Asian, 4 White, 1 Black, and 1 Latino student will enroll at the University of California.

Not surprisingly given their graduation and eligibility rates, the Latino students who do graduate and are eligible to attend the University of California are extremely resilient students. Many of them have overcome a wide range of special challenges that more traditional, “mainstream” students typically have not confronted. These challenges often include exposure to communities pervaded by drugs and violence, substandard schooling characterized by poor facilities and poor instruction, poverty-related family problems, and language and cultural barriers. Such extremely talented and resilient students—whom we can think of as precious “gold nuggets” who have managed to shine despite the enormous odds against them—are very likely to continue to succeed in post-secondary education. Indeed, fully 84% of those who do apply to the University of California get accepted and, contrary to widespread misperceptions, a majority of these enter through regular admissions; only 14.2% of Chicanos and 10.2% of Latino students are admitted by exception.

About a third of Latino students admitted to the University of California are also admitted to other prestigious, mostly private, four-year universities. Of the Latino students who do enroll at the University of California, 65% graduate within six years, a graduation rate comparable to that of White students, and one that is especially impressive in light of the additional challenges that these students continue to face while enrolled at the University. Most of the Latino U.C. students are the first in their families to attend college, many come from backgrounds where English is not their first language, and most work while attending the university.

Unfortunately, the number of these talented, resilient Latino students who go on to post-graduate education dwindles even further compared to their White

the University of California. The 11.1% is close to the 12.5% targeted in the California Master Plan. Geiser, supra note 9, at 12.

18. Geiser, supra note 9.

19. The Asian groups included are: Chinese, Filipinos, Japanese, and Pacific Islanders.

20. The statewide average of enrollment at the University of California is 4 out of 100 students which is the rate of enrollment for White students. Geiser, supra note 9. Except for Black students whose numbers would be lower at every stage of the pipeline, the other groups will remain virtually the same according to the 1995 eligibility results.

21. “Admitted by exception” means that students have taken the A-F requirements and the required standardized tests but their grade point averages and/or their scores do not meet the University of California requirements. These students have to belong to underrepresented category to be admitted by exception. For example, a low-income, White student coming from household where she is the first one in her family to attend college would be considered for admission by exception. The Role of Affirmative Action in Admissions, UC FOCUS, June/July 1996, at 2.

22. About 62% of the universities mentioned by these students are private colleges. Aida Hurtado & Eugene E. Garcia, Students' Pathways to Higher Education: Lessons learned from the Latino Eligibility Study, in 1996 ETS INVITATIONAL CONFERENCE ON LATINO EDUCATION ISSUES, CONFERENCE PROCEEDINGS (Mario Yepes-Baraya ed., 1997).

counterparts. As figure 3 illustrates, although there is a modest decline of 2% for Latinos entering the University of California to those graduating (from 14% of U.C. freshman to 12% of U.C. Bachelor's degrees awarded), only 7% of U.C. graduate students are Latinos, and just 5% of University of California Ph.Ds are awarded to Latinos. In contrast, the overwhelming majority of doctorate degrees are awarded to White students (81%) followed by Asians (10%), while Black students receive the least number of doctorates (2%).

Figure 2. California Population from High School to College, by Group

<table>
<thead>
<tr>
<th></th>
<th>Other</th>
<th>Black</th>
<th>Latino</th>
<th>Asian</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenth Graders</td>
<td>4%</td>
<td>9%</td>
<td>36%</td>
<td>9%</td>
<td>42%</td>
</tr>
<tr>
<td>High School Graduates</td>
<td>3%</td>
<td>8%</td>
<td>31%</td>
<td>11%</td>
<td>46%</td>
</tr>
<tr>
<td>U.C. Freshmen</td>
<td>9%</td>
<td>4%</td>
<td>14%</td>
<td>32%</td>
<td>42%</td>
</tr>
</tbody>
</table>


Figure 3. University of California Students and Graduates, by Group

<table>
<thead>
<tr>
<th></th>
<th>Other</th>
<th>Black</th>
<th>Latino</th>
<th>Asian</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.C. Freshmen</td>
<td>9%</td>
<td>4%</td>
<td>14%</td>
<td>32%</td>
<td>42%</td>
</tr>
<tr>
<td>U.C. Bachelor Degrees</td>
<td>7%</td>
<td>4%</td>
<td>12%</td>
<td>21%</td>
<td>56%</td>
</tr>
<tr>
<td>U.C. Graduate Students</td>
<td>5%</td>
<td>3%</td>
<td>7%</td>
<td>13%</td>
<td>71%</td>
</tr>
<tr>
<td>U.C. Doctorates</td>
<td>3%</td>
<td>2%</td>
<td>5%</td>
<td>10%</td>
<td>81%</td>
</tr>
</tbody>
</table>


Not surprisingly, this same kind of dramatic underrepresentation is reflected in the ethnic/racial composition of the University of California faculty: Whites comprise 83% of all tenured faculty and 87% of its full professor ranks (76% of which are White men). These disproportions are remarkably similar to the demographic make-up of California's K-12 educational system where 79.8% of all

24. See Geiser, supra note 9.
25. Id.
26. Id.
27. In stark terms: out of 6,940 ladder rank professors in the University of California system, there are only 16 Latina full professors. Id. See also OFFICE OF ACADEMIC ADVANCEMENT, COMPOSITION OF GRADUATE STUDENTS AND FACULTY AT THE UNIVERSITY OF CALIFORNIA BY RACE AND SEX, OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA (1996).
teachers are White and only 9.2% are Hispanic.\textsuperscript{28} Note that whether it is early in the K-12 system or much later in the state’s most elite post-secondary public institutions, classroom instruction is provided by an overwhelmingly White teaching staff. In California’s K-12 system, of course, this overwhelmingly White staff is now in charge of educating a largely non-White student population.

\textbf{B. Matching Demographics and U.C. Eligibility}

Various relatively straightforward, modest changes in policy are available to redress many of the educational inequalities detailed above.\textsuperscript{29} For example, the University of California eligibility criteria are currently defined in a manner that places significant burdens on Latino students. As Geiser has observed: “Eligibility, in short, is the fundamental obstacle to broader participation of those groups that are currently underrepresented at UC.”\textsuperscript{30} Thus, Latino parents, many of whom are not college educated, must grapple with the highly structured A-F requirements and are responsible for mapping their children’s educational futures by the age of 14 (when the children enter high school and must make all important course selections). Furthermore, those Latino students who have to take English as a second language courses (ESL) may never make up the lost time and complete the A-F curriculum.\textsuperscript{31}

Yet, these criteria are not immutable. Indeed, eligibility is perhaps at once the California educational pipeline’s greatest obstacle and its most malleable component. Thus, changes in the A-F eligibility requirements (such as reducing the number of math courses from 3 years to two or reducing the number of English courses from four years to three) would likely result in significant increases in Latino student representation at the University of California. Even if the highly structured nature of the A-F curriculum remained untouched, eligibility could be significantly improved by suspending the use of standardized testing. This modest and extremely feasible policy change alone would result in an estimated increase of Latino eligibility from 3.9% to 6.8%.\textsuperscript{32} In fact, this kind of modification in the


\textsuperscript{29} To be sure, this is more easily said than done. The Latino Eligibility Task Force recently recommended in their last report to the University of California Regents to make the SAT standardized test optional. The national uproar that ensued is a measure of how entrenched these eligibility requirements have become. Also, it is also ironic since SAT scores are not necessarily taken into account if a student graduates with a grade point average of 3.3 and has taken the A-F requirements.

\textsuperscript{30} Geiser, supra note 9, at 14.

\textsuperscript{31} As Macias has noted: “The number of Limited English Proficient (LEP) students in California public schools in the spring of 1996 was 1,323,787, an increase of 60,805 (4.8%) over spring of 1995... Spanish language background LEP students being the largest group (1,051,126; 79.4%), followed by Vietnamese (47,883; 3.6%), Hmong (31,156; 2.4%), Filipino (Tagalog) (20,950; 1.6%), and Kmer (Cambodian) (20,646; 1.6%) language backgrounds.” R. Macias, LEP Enrollments Increase Almost 5% in 1996, 6 UC LINGUISTIC MINORITY RESEARCH INSTITUTE 1 (Sept. 1996). By the end of this century, English will be a second language for the majority of the California population, with Latinos accounting for over half the population of high school graduates (Justiz, Wilson & Bjork, 1994).” (p. 1).

\textsuperscript{32} Ludwig & Kowarsky, supra note 12, at 282. This proposal seems increasingly feasible in light of the Educational Testing Service’s recent concession that their achievement tests are not intended to measure innate ability and cannot predict overall college success, but rather should be used \textit{only as} partial predictors of grade point average for the first year of college. In the midst of the recent controversy over whether to make SAT tests optional, Nancy Cole, President of the Educational Testing Service (ETS) publicly stated in an ad in the \textit{New York Times} that SAT tests are not meant to measure intelligence or overall success in college. Instead, they should be used in conjunction with grade point average and other measures of achievement to make admissions decisions. In her words, “The data are clear that no single definitive measure of accomplishment exists.” Louis Freedberg, Some Colleges Drop Requirement for SAT: Move to Attract Minority Students, S.F. CHRON., November 12, 1997, at A13.
eligibility requirements could be implemented first on a provisional, experimental basis in order to temporarily increase the number of underrepresented students and allow for their success rate in college to be tracked. If students admitted without standardized test scores fared as well as those admitted under the traditional criteria, there would be no justification to retain the prior eligibility rules.

In addition, the California Postsecondary Education Commission (CPEC) recently finished a study of a number of "intersegmental" programs that demonstrated excellent success in improving students' academic performance and doubling their chances of attending a college or university.33 During 1994-95, an estimated total of 85,000 students participated in these programs, which include participation in tutoring programs, visits to university campuses, and specific instruction on eligibility requirements to attend the university. These 85,000 students represent only about 9% of those who have had historically low eligibility rates. As a baseline against which to measure the success of these programs, note that only 42.6% of students with low eligibility rates enrolled in postsecondary education compared to 53.2% of general state graduates. The CPEC study summarized encouraging results:

Students from the six of the nine outreach programs enrolled in higher education at the following rates: 98% (AVID); 57.4% (ACCESS); 68.1% (EAOP), 53.4% (MESA); and 71.4% (MC). The nine programs studied by CPEC were deemed successful because they are expandable, replicable, fiscally efficient, and collaborative in nature. Two of the programs, MESA and EAOP, have been functioning for more than 20 years, and three of the programs, EAOP, MESA, and UCSCol, are coordinated through the UC Office of the President. The success of these programs is even more poignant given the fact that state funding has declined by almost 39% over the past three years, demonstrating institutional commitment to these programs.

Thus, if implemented on a massive scale, these programs could result in dramatic changes in eligibility and representation of traditionally underrepresented students at the University of California.

Simultaneously, longer term policy changes could address the quality of education received by underrepresented students in their K-12 schooling. Extensive research generated by many University of California faculty and others has established the elements of effective schooling.35 Elaborate evaluation techniques

Other colleges have followed the strategy of eliminating standardized tests as the basis for admission. Two hundred and eighty out of 1,600 colleges across the country no longer require standardized tests for admission. Most are small, liberal arts colleges like Colorado College, Bates College, and Hampshire College. Although no Ivy League schools have yet dropped the SAT as an admission requirement, the University of Texas, Austin, in a measure taken to offset the effects of the Hopwood decision which dismantled affirmative action programs in all university admissions, has ceased requiring standardized tests scores of applicants. Id.

33. Specifically the Commission highlighted the success of nine programs: Advancement Via Individual Determination (AVID), Alliance for Collaborative Change in Education in School Systems (ACCESS), California Academic Partnership Program (CAPP), California Student Opportunity and Access Program (Cal-SOAP), College Readiness Program (CRP), Early Academic Outreach Program (EAOP), Mathematics, Engineering Science Achievement (MESA), Middle College (MC), and the Urban Community-School Collaborative (UCSCOL).


and tracking systems are available to monitor the costs and effectiveness of innovative programs designed to improve educational quality. Indeed, a comprehensive program that documented educational problems in the state could substantially improve the equitable distribution of educational opportunity and achievement by assessing potential consequences for the state's economy, implementing solutions based on sound research, and requiring continuous evaluation and feedback to replace less successful ones.

The costs of implementing these successful intersegmental programs on a more widespread basis and of improving the quality of education received by underrepresented minorities in the K-12 system could be offset by corresponding reductions in the funding provided to the one sector of our society where minorities actually are overrepresented—the criminal justice system. As Harders (1996) points out:

...In ten years, prisons will more than double their share of the state's general fund revenues from 8% to 20%, jumping to twice that of higher education... schools and higher education will not claim any more funding, but will remain steady at 39% and 10% respectively.

By 2004-5, prisons will get twice as much funding as colleges and universities. At the same time, however, the demand for higher education is expected to grow by 35.5% in the next fifteen years, requiring a minimum of $5.2 billion more in funding. Unless some way is found to generate substantially higher state revenues, serving both masters—education and corrections—will prove an impossible task. One seemingly cost-effective solution to this dilemma is to make a significantly greater investment in crime prevention by enhancing educational programs and making them available to broader constituencies across the state.

We believe that the educational inequities faced by California's emerging majority are real and significant, yet capable of being addressed through relatively straightforward reforms. The nature of the state's educational pipeline could be significantly altered by relatively few thoughtful modifications, and larger scale educational change could be accomplished through a comprehensive plan that shifted political and economic priorities away from social control towards social welfare. Yet, recent events have moved us in a decidedly different direction, one that threatens to exacerbate rather than resolve the problems we have outlined above.

II.
BACKGROUND ON THE U. C. REGENT'S RESOLUTION TO END AFFIRMATIVE ACTION

There was a sense of violation, of course. At the bidding of a governor anxious to ride the race issue to the White House, the Board of Regents of the University of California, against the opposition of faculty, students, and administration, over the vigorous protests of chancellors and demonstrators, voted to end affirmative action at the premier public institution of the nation's most demographically diverse state. The first major public university to do so.38


37. See SHIRES, supra note 36.

38. Post, supra note 4, at 1.
On July 20, 1995, the University of California Regents passed SP1 and SP2 by a vote of 15 to 10. The vote effectively ended affirmative action in university admissions and hiring. It simultaneously dealt a seemingly fatal blow to the efforts of educational reformers within and outside the University hoping to solve some of the critical problems of educational inequality and minority underrepresentation. In essence, by passing SP1 and SP2, the Regents claimed to eradicate racial/ethnic educational inequalities by declaring them irrelevant to the mission of the University. They similarly proposed to eliminate the long-term, life-altering effects of these inequalities merely by mandating that they be ignored. With two historic votes, the Regents required that entrance into and employment at the state's premier publicly-supported University would be accomplished without reference to the persistent and pernicious race/ethnic-based disparities with which the state and larger society is still plagued. They also indirectly ensured that this prestigious University would no longer prepare its students to adequately understand and effectively analyze the social, economic, and political implications of race and gender with which the state's next generation of leaders, policymakers, and key decisionmakers would have to grapple.

There were several layers to the asserted rationale for this new policy. Put most simply (and perhaps most simple-mindedly), many of the Regents who voted in favor of the resolutions asserted that all people should be judged merely as "human beings." They declared that the very categorical memberships that have divided diverse groups of people throughout our nation’s history that have produced glaring educational and economic inequalities should play no part in assessing individual success, providing future opportunity, and shaping life outcomes. And, because these categories should play no part, mechanisms like affirmative action—needed to address the harm produced by virtue of the fact that they still do—were deemed unnecessary.

At another level, the Regents’ policy was justified in the venerable name of “meritocracy.” Many speakers at the Regents’ debate, simply asserted that individual merit could and should be independent of history, culture, language, and ethnic/racial, gender, and class group memberships. Many of the Regents aligned against affirmative action and many others who spoke on behalf of their position used an intellectual sleight of hand to dismiss the veritable mountain of data that demonstrate the continuing, profound effects of socio-demographic variables on educational and occupational achievement. On the other hand, opponents of affirmative action argued that these aggregate data mask an underlying, individualistic truth—that those who are truly deserving and meritorious will achieve independent of group memberships while those who are flawed and undeserving will not. On the other hand, they argued that the problems identified by the aggregate data—persistent educational inequalities and the like—were the fault of someone else (presumably the public school system) and, therefore, not something that the University could or should attempt to address. Either way, extensive data on persistent race-based inequalities in access to higher education and equally persistent race- and gender-based inequalities in employment opportunities


40. As Post summarized: “The Regents resolved that ‘effective January 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.’” See supra note 4, at 10.

41. All of the Regents who voted in favor of SP1 and SP2, in one form or another, made reference to merit based on individual rather than group characteristics. See Governor Pete Wilson, Remarks at the Opening of the Regents’ Meeting (July 20, 1995); Regent Meredith Khachigian, Remarks made as she cast her vote in favor of SP1 and SP2, UC Regents Meeting (July 20, 1995).
at the University—to the extent their existence was acknowledged at all—were deemed irrelevant to the discussion.

In the following sections we address several key issues that provide context to the irrational course of action to which the Regents' resolutions have apparently committed us. In particular, we discuss the underlying premise of affirmative action policy, the cultural and historical legacy of the ethos of individualism, and the socially constructed nature of the meritocracy that is often juxtaposed against affirmative action policies in these debates.

III. AFFIRMATIVE ACTION: A SOUND POLICY IN SEARCH OF A DESERVING THEORY

David Hollinger has reminded us that "[a]ffirmative action needs a coherent theory."42 It is a policy that has been implemented through a series of pragmatically-oriented programs rather than an overarching philosophical rationale or theoretical justification.43 Because affirmative action policies were generated in response to exigent circumstances, these disparate programs have not been systematically connected to a framework that would clearly and simply justify why they are necessary. Indeed, the role of affirmative action policies in insuring equal opportunity and institutional access to constituencies that have been systematically blocked—blocked by pre-existing structures, procedures, processes, and ways of thinking and acting that are infused into the unquestioned status quo—has only been sporadically and not always effectively outlined. Indeed, even vocal advocates of affirmative action have, at times, been hard pressed to give internally consistent and logical justifications for their support.44

Another reason for this lack of coherence stems from the fact that affirmative action addresses very complicated, and, to a certain extent shifting, patterns of intergroup relations. Affirmative action seeks to achieve a lofty and elusive goal—the fair allocation of economic and political power. Because the structural legacy of racism and its contemporary interpersonal manifestations have rendered initial allocations of resources and opportunities prima facie unfair, redressing this injustice requires an even more delicate operation—the restructuring of existing arrangements and the redistribution of existing resources. More complicated still, affirmative action programs must accomplish this elusive goal within a hegemonic definition of merit that works against egalitarian group goals. That is, the key term in the traditional calculation of fair allocations—merit or "deservingness"—has been defined as a quality that resides only within individuals. On the other hand, affirmative action programs define deservingness as something that can only be determined by reference to group memberships. Thus, the first issue of serious contention in the debate over affirmative action has become how we define merit.

Conceptions of merit are closely related to a second issue. Much of the popular rhetoric that surrounds our political system and many of the basic operating assumptions of our legal system reflect a model of individual rights in which


43. Hollinger quotes Steinberg to the effect that "[a]ffirmative action was never formulated as a coherent policy ... but evolved through a series of presidential executive orders, administrative policies, and court decisions." Hollinger, supra note 42, at 32.

44. Id. at 31.
autonomy is assumed and protections are granted to persons rather than groups. The emphasis on group rights implicit in affirmative action policies represents an anomaly in this context and appears inconsistent with otherwise venerable, cherished beliefs. Thus, the rationale for affirmative action must somehow thoughtfully challenge and partially replace the ideology of individualism that both permeates our popular discourse and is at the foundation of our legal system. And it must do so without offending the constitutional lenses through which it will be scrutinized.

Third, the well-established paradigm of benevolent majorities bestowing token protection upon oppressed minorities is increasingly undermined by the latter's sheer numerical growth. Especially during a transition period in which minority constituencies move to the status of an "emerging majority"—in a country where numerical superiority has traditionally translated into democratic power—mechanisms must be found to accomplish the peaceful sharing of economic and political power with previously disenfranchised groups who will soon have the capacity to seize such power at the ballot box. History provides few examples of established dominant groups relinquishing their hold on the societies absent significant conflict, turmoil, and even violence. We are on the verge of precisely such a transition. Alternative scenarios and strategies must be achieved by which the most extreme conflicts can be avoided and the inevitable social and economic upheaval minimized.

Lastly, important decisions loom concerning exactly who will guide the peaceful sharing of power and authority to come. The existing leadership at the University of California and the elected officials at most levels of the state government are glaringly unrepresentative of the constituencies they have been empowered to govern. The demographic disparities between the state's political leadership and California's dominant electoral constituencies will be an especially important and potentially contentious issue during the coming transition. Any rationale that is offered for affirmative action in the future will have to take these complexities into account.

IV.
THE CHALLENGE OF ETHNIC/RACIAL/CLASS DIVERSITY TO THE ETHOS OF INDIVIDUALISM

"You can't defend practices that are based on group preferences as opposed to individual opportunities," says Connecticut Senator Joseph Lieberman . . . . Affirmative Action "is un-American because . . . America is about individuals, not about averages or groups."46

Among other things, the passage of the Regent's resolutions profoundly disrupted the delicate legal balance that had been struck between individual and group rights in the historic Bakke decision.47 Justice Powell's majority opinion had addressed a pragmatic need—the necessity for social institutions to take race and ethnicity into account as a means to promote diversity and avoid social turmoil—but simultaneously rescued the sacred notion of individualism.48 Diversity was acknowledged as a legitimate concern, but it was given relative (not absolute) value.


48. Post, supra note 4, at 3.
Powell concluded that diversity could be properly pursued only through procedures that preserved individual rather than group-level comparisons. That is, race and ethnicity were recognized as among the many possible individual characteristics that made up an applicant's overall profile. It was important to Powell's formulation that individual, personal comparisons could be made across racial and ethnic groups. As Robert Post put it:

Powell found the Davis affirmative action program unconstitutional because it rendered race and ethnicity a determinative factor, rather than merely 'a plus' in a particular applicant's file,' a 'plus' that would 'not insulate the individual from comparison with all other candidates for the available seats.' The Davis program was unconstitutional because it recognized only the diversity of racial and ethnic groups, rather than the diversity of individuals.49

So long as only individuals were being compared, even though group membership was one of the characteristics upon which the comparison was based, Powell reasoned that the cherished principle of individual merit was preserved. Viewed as a property of persons, group membership could simply be factored into the comparative equation, and given its appropriate weight, like any other individual characteristic.

To be sure, the ethos of individualism has continued to impede any deeper understanding of the ways in which group membership can profoundly affect individual treatment and outcomes. Powell's creative rescue of both affirmative action and individualistic notions of fairness solved an immediate problem but did little to educate the public about group-based disadvantage. In retrospect, it may have simply delayed the inevitable point in time when the tension between affirmative action policies and the ideology of individualism would have to be resolved. That final resolution required an analysis that Powell was able to circumvent, and most legal decisionmakers since Bakke have followed his lead. This deft circumvention has come at a price: political and public ignorance and insensitivity to the ways in which individual talent and potential can be dwarfed by the powerful effects that group membership has on a vast array of life-altering social judgments.50

Of course, the effects of group membership can be beneficial as well as burdensome. The implications of both kinds of consequences are often vigorously resisted by those who benefit from existing distributions of power. Thus, members of dominant social groups often are unaware of (or refuse to acknowledge) the powerful positive effects—implicit and hidden in what they take to be the natural order of things—that group membership has in elevating their life outcomes. Acknowledging these implications would undermine the reassuring and affirming meritocratic meaning that dominant group members can infer from their own success. This has proven an especially difficult concession for members of nonstigmatized groups to make because it implies that their favorable evaluations—and the personal achievement and triumphs to which they lead—may stem less from individual characteristics than privileged group memberships.

Members of derogated or disfavored groups rarely have the luxury of ignoring these group effects or the opposite consequences they bring. Disfavored group members are thus more likely to be thwarted in the development of their

49. Id.

individual potential, to be systematically limited in their actual and perceived personal opportunities, and forced to confront greater obstacles in demonstrating genuine ability and being properly rewarded for it. Any pretense of a true meritocracy would erode under the recognition that race, gender, and inherited social capital (including wealth and physical characteristics like skin color) are often important and sometimes decisive determinants of privilege.

Under the prevailing meritocratic myth, systems like education that allocate opportunity and privilege depend upon procedures that are supposed to focus on individual rather than group characteristics. Supporters of affirmative action believe that these systems must be continuously improved by mechanisms that function to correct well-recognized race/ethnicity-based errors. Ironically, non-problematic standardized testing programs once served to partially “level the playing field” by extending opportunities to at least some persons outside the privileged classes. Those fortunate few who excelled on the tests were allowed to enter more elite educational and occupational circles. Despite the limited numbers of outsiders who were granted such access—in some contexts so few that they could be characterized as “tokens”—the practice helped reinforce the belief in an open system of privilege. As definitions of fairness and equity moved beyond mere tokenism, and aggregate data on the group disadvantaging effects of standardized testing began to mount, this seemingly “race neutral” system for allocating opportunity and reward could be viewed in a different light.

Of course, formal procedures like testing and credentialing did make privileged groups publicly accountable to some of the same standards by which the less privileged operated. That is, no matter how biased these mechanisms were in favor of White men from the highest socio-economic classes, access to at least certain competitive sectors of society was based on more or less publicly visible benchmarks. To be sure, there have always been privilege-based exceptions by which accountability to a commonly-applied standard was relaxed or even entirely ignored. For example, nepotism for the relatives of corporate CEOs that provides them employment regardless of their qualifications or the practice of admitting children of alumni to prestigious universities with little regard for their academic record have escaped attention in large part because the beneficiaries of these practices control the terms of the meritocracy. But, unlike the privileged classes in

51. E.g., FERNANDEZ, supra note 50.

52. Klor de Alva has quoted President Lyndon Johnson in 1965 to the effect that affirmative action programs were subverting the “American ideal.” Johnson apparently said, in the midst of the struggle over Civil Rights Act: “We have to press for [affirmative action] as a matter of right, but we also have to recognize that by doing so, we will destroy the Democratic Party.” Jorge Klor de Alva, Is Affirmative Action A Christian Heresy?, 55 REPRESENTATIONS 59 (1996).

53. “Tokens” in this context help maintain the appearance of equal access to resources and privileges if subordinate group members comply with the rules of merit. In actuality, the resources available to perform are unequally distributed by ethnic/racial, class, and gender group memberships and a priori limit the number of subordinate group members who can join the circles of privilege. See Erika Apfelbaum, Relations of Domination and Movements for Liberation: An Analysis of Power between Groups, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 188, 188-204 (William G. Austin & Stephen Worchel eds., 1979); Thomas Pettigrew & Joanne Martin, Shaping The Organizational Context For Black American Inclusion, 43 JOURNAL OF SOCIAL ISSUES 41 (1987).


monarchical or caste societies, the privileged in this country are at least supposed to abide by and receive benefits based on the same performance standards that are applied to everyone else. It is this widespread belief in the fair application of seemingly neutral procedures that supports the United States' self-image as an economic democracy deeply committed to social equality.\textsuperscript{77}

The imperfections in these supposedly merit-based systems of allocating opportunity and privilege and the ways in which they are heavily biased in favor of those already in power are masked by the operation of several interrelated, commonly-held beliefs. First of all, the ideology of implicit social Darwinism\textsuperscript{5} that is still prevalent in our society minimizes or ignores the significance of past history and existing power arrangements in explaining individual achievement. Those who have historically risen to the top are presumed superior—either biologically, socially, or culturally—to others. Rather than serving as a clear demonstration of the imperfection and residual unfairness in the systems by which our society allocates opportunity and privilege—and therefore something to be critically analyzed, challenged, and corrected—the fact that most of the wealth and positions of power in the country are held by White men is taken as de facto evidence that they are inherently more meritorious.

Moreover, under the rubric of prevailing individualism, White men simply are not perceived as a group. Rather, they are taken "merely" as individuals who happen to be White and happen to be male (and happen, as individuals, to overwhelmingly dominate virtually every important resource-allocating system in virtually every sector of our society). Indeed, they are the \textit{a priori} norm from which everybody else is measured. Because they are the normative standard, their performance, opportunities, and outcomes are not recognized as the product of "bias" of any kind. Everyone else's position in this hierarchy is characterized as deviation from the norm and, therefore, the object of explanatory attention.

This also ensures that White men in positions of power will have an inordinate amount of influence in establishing and preserving the procedural mechanisms by which our society allocates privilege. The fact that they intuitively reflect, protect, and pursue the interests of their own group—favoring those who look and act most like them—is not only natural but normative and perforce unbiased, as is the distribution of power and influence that results. Any challenge to this distribution of resources, or to the individualism that presumably produced it, and any proposal to apply a corrective (like affirmative action) to the way in which privileged-group membership powerfully influences individual outcomes is taken as an aberration, an affront to the natural order of things. Indeed, it is a challenge to the very basis for allocating all privilege.

Finally, another widely-held belief diverts attention from the imperfections and inequities that plague existing mechanisms to allocate opportunity and outcomes. It also obfuscates the lessons to be learned from data that illustrate the ways in which existing social arrangements are tainted by group affiliations. That belief advocates allegiance to a "public culture" in which persons are first and foremost citizens of the United States whose personal loyalties should run primarily to an impartial state. Because the public culture is democratically determined through regional, state, and national elections,\textsuperscript{59} the assertion of group-based claims

\textsuperscript{77} See e.g., Richard H. Fallon Jr., \textit{To Each According To His Ability From None According To His Race: The Concept Of Merit In The Law Of Antidiscrimination}, 60 B.U.L. REV. 815 (1980).


\textsuperscript{59} Post, \textit{supra} note 4.
that deviate from its mainstream vision are challenged as divisive and downright "un-American." The fact that this public culture reflects primarily the history, culture, and language of existing dominant groups and excludes others is ignored in this analysis. The underlying assumption of neutrality in the evolution of the public culture is akin to a biological Darwinism in which, through the "natural" laws of human evolution, we somehow arrived at a neutral politic that is miraculously untainted by the bias, unfairness, and self interest of politics itself.

V. INDIVIDUALISM, DEMOCRACY, AND DIVERSITY

In a compelling critique of the ideology of individualism that dominates political and legal thinking in the United States, Klor de Alva has analyzed its Christian underpinnings.60 The notion that human beings have inalienable rights derives from the Christian belief that people were created in the image of God. Because human beings, unlike all other creatures, could claim a part of God in each of them, they were granted fundamental rights that could not be violated.60

Thus, although "the shift from the religious recognition of persons as independent bearers of an individual, egalitarian moral status before God to the contractual idea of person being right-bearing with a civil status equal to all other fellow citizens," entailed a profound transformation that "took centuries of warfare and debate,"62 the core political assumption of American individualism has its roots in this Christian theology. Like other laws drawn from this common base, the U. S. Constitution also assumes that individual human beings are the children of God with certain inalienable rights. As Klor de Alva observed:

Still, what made the language of natural rights, citizenship, freedom, tolerance, and pluralism possible was the painstaking construction of grammars of canon law, natural law, and common and civil law, all of which gaining their legitimacy—then as today—from their congruence with the basic premises and valuation of Christianity.63

However, the institution of slavery put this cosmological vision to its most difficult test. In order to legitimize the existence of slavery in a Christian nation, slaves—as a group—had to be placed into the category of non-human. Regardless of any one member's individual characteristics, all were denied individual rights. This meant that a host of difficult questions about how any one individual slave might have ended up in the group of non-humans were necessarily bypassed. Indeed, individual differences were of no consequence; all African slaves found themselves in this derogated group, regardless of personal "merit."64

Indeed, there was a profound disregard—at spiritual as well as legal levels—for the "specific life circumstances of each enslaved African."65

60. Klor de Alva, supra note 52.

61. "Foremost among these theological premises is the belief that each person has a separate and autonomous soul, equal to any other soul in the eyes of God, which is capable of salvation only on an individual, personal basis—whether through the performance of good works, through faith, or through a personal "conversion" experience." Id. at 60.

62. Id.

63. Id.

64. Id. at 64-65.

65. Id. at 62.
Deindividuation was essential “to permit the slaving system to work,” and so the “focus on category and grid over particularity and cell” was established and implemented “with a vengeance.” Only then could the dehumanizing interpersonal interactions and negative stereotyping that were critical at an immediate, local level permit the “extensive scope, transnational fluidity, economic order, and social organization required at the intercontinental level” to develop and flourish. To be sure, the “physically distinct characteristics of the enslaved Africans” facilitated the process of bondage and likely “made this form of industrialized slavery possible altogether.”

This “horrendous contrivance” not only made slavery possible but also effected a more pernicious and long-term change in the psyches of the dominant class: it transformed enslaved Africans “in the eyes of the privileged into a mere category rather than a collection of aggrieved souls worth of compassion and restitution.” Once in place, this social psychological mechanism (viewing a collection of individuals as a mere category) also facilitated the conquest of other groups of Color—Asians, Native Americans, and Mexicans. Thus, it has been argued that the way in which Africans were treated is the “grid and bone” of racist beliefs in the United States. And, since non-Whites have been treated historically as little more than members of a derogated category rather than as individuals, group-based solutions to the pernicious problem of racism must precede any sudden declaration that the United States has become a “color-blind” nation comprised merely of individuals who stand or fall on the basis of their personal characteristics.

Thus, the American institution of slavery and the racialized colonization of the Americas are at the core of unresolved tensions in debates over affirmative action. The modern state’s new-found enthusiasm for applying and enforcing individual definitions of merit to all groups is simply at odds with the daily, historically-based experience of many people of Color who are—and have long been—treated as a category rather than as individuals. In addition to the historical and experiential basis of this categorical treatment, social science research continues to document the ways in which stereotyping and racist beliefs and actions curtail the life chances of members of ethnic/racial groups as well as White women.

This invidious categorical treatment continues to be facilitated by the various physical characteristics that have become associated with derogated groups—ones defined on.

66. Id. at 68.
67. Id.
68. Id.
69. Id. (emphasis added).
70. Id. at 65. Klor de Alva refers to the use of skin color as justification for slavery as “the racialization of souls.”
the basis of gender, class, race, physical challenge, and sexual preference. Thus, against legal and political claims that rights are extended equally to all individuals, there is the unmistakable reality of a pervasive system of oppression based on group membership.

Contemporary debates over affirmative action feature persistent clashes between the ideology of individualism and alleged “merit-based” mechanism of allocating opportunity against the experience of categorical treatment and the perceived need to address structural and interpersonal inequalities through group-based remedies. These clashes were frequent and heated in the course of the 13-hour University of California Regents meeting in which SP-1 and SP-2 were passed. Governor Pete Wilson73 appropriately began the meeting by stating the traditional case for individualism and embracing what he argued were neutral, merit-based selection procedures.

Like most anti-affirmative action speakers, Wilson had the luxury of assuming that most of his mainstream audience shared his unproblematic, normative experience with the status quo. Thus, he characteristically assumed most of what should be placed at issue in the debate. For instance, the Governor invoked the concept of “fundamental fairness” in his attack on affirmative action without ever acknowledging any unfairness to persons of Color in California who are still relegated to the margins of academic opportunity in the state (despite the operation the very affirmative action policies Wilson argued were unfair to Whites). His ability to connect to the mainstream, seemingly “normative” experiences shared by his political constituency allowed him to emphasize the importance of banning affirmative action in order to uphold the University’s claim that it did not discriminate on the basis of race. More importantly, it allowed him to do so without ever acknowledging the massive race-based inequalities that characterize the University’s students and faculty. Indeed, the Governor could talk about “fundamental and cherished American principle[s]” without ever reflecting on what those principles would, or should, mean to minority students whose numbers in higher education would dwindle even further if the University were to implement them in the ways Wilson and his supporters were demanding.

The Governor went on to claim—quite incorrectly—that “race has played a central role in the admissions practices at many U.C. campuses”74 but failed to explain why these allegedly widespread race-based practices had resulted in only minuscule numbers of minority students and faculty at the University. He noted that “it takes all the state taxes paid by three working Californians to provide the public subsidy for a single undergraduate at the University of California,” but failed to acknowledge that, increasingly, those working Californians are Latino taxpayers whose children would have little or no hope of attending the very University that their dollars subsidized.75 He invoked the name of “people who work hard to pay those taxes and who play by the rules,” and noted that they deserved “a guarantee that their children will get an equal opportunity to compete for admission to this university regardless of their race or gender,”76 but never conceded that Latino and African-American parents who played by the rules were virtually guaranteed that

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73. Under the Charter of the University of California, the state’s governor is the President of the University’s Board of Regents. Governor Wilson had rarely attended the Regents’ meetings and his presence at the meeting on affirmative action was a dramatic exception. Many observers suggested that his presence was one of the reasons the resolutions were passed. See DALE MAHARIDGE, THE COMING WHITE MINORITY: CALIFORNIA’S ERUPTIONS AND AMERICA’S FUTURE (1996).

74. Governor Pete Wilson, Testimony to the Regents, UC Regents Transcript 3 (July 20, 1995).


76. Governor Wilson, supra note 74, at 3-4.
their children would never be accepted into the University under admissions policies whose underlying assumptions and institutional biases favored other groups.

Finally, merely asserting what should have been analyzed and debated, Wilson argued that "[s]imple fairness" required that "all eligible applicants go through the same process." To be sure, he never bothered to defend the underlying assumptions or validity of this process, or to acknowledge that operative affirmative action policies had never been more than very modest correctives to a procedure whose outcomes were still starkly racially discriminatory. Given the pernicious categorical, group-based discrimination that has plagued the United States throughout its history, the hurtful and persistent racial inequalities that still pervade most segments of our society and are particularly striking in elite institutions of higher learning, and the remarkably divisive, destructive legacy of this mistreatment, there was more than a touch of irony in the words with which he chose to end his denunciation of affirmative action policies:

The questions before us are simple and cannot be set aside. Are we going to treat all Californians equally and fairly, or are we going to continue to divide Californians by race? The answer we owe the people and the change we must make are clear. By doing so, we will keep faith with the principles on which the university and our nation were built. We must do no less. Thank you Mr. Chairman.  

VI. HOW DO DEMOGRAPHIC CHANGES AFFECT DEFINITIONS OF MERIT?

... I remember what it was like to live in a colorblind society, I was invisible.

As we suggested in the previous section, serious debates over affirmative action require a frank and painful confrontation with our nation's history of racial oppression and an attempt to disentangle the institutional arrangements and belief systems that have emerged from that history. Such a debate would also lay bare a series of underlying assumptions about the social and political construction of so-called "merit" and its use in the distribution of opportunity, privilege, and rewards in our society. This debate would also expose implicit beliefs about equal treatment and highlight some of the ways in which multiculturalism has been conflated with issues of ethnic/racial justice. In this section we discuss this last point about multiculturalism and racial justice in somewhat greater detail and examine its implications for the definitions of merit in affirmative action policies.

As David Hollinger has insightfully observed, the "effort to protect Americans from the effects of past and continuing ethn-roacial discrimination is centered primarily on the physical, not the cultural, properties of human beings." Hollinger asserts that the classification
of race in the United States is based largely on an individual's skin color and the shape of their faces. Thus, by this theory, every individual is assigned a space in what he terms a "five-part demographic structure." The spaces are unequally sized and unequally empowered, and one's assignment to a particular space is based on "the classic codes—black, brown, red, White, and yellow—that mark the lines of traditional prejudice."

The assignment to the ethno-racial pentagon is independent of biology and cultural practice. To be sure, the belief that essential biological differences exist between groups based on skin color and other phenotype characteristics has been thoroughly discredited. Moreover, assignment to a particular ethno-racial category is not always congruent with an individual's self-identification or with his/her cultural knowledge and practice. Nonetheless, the prejudicial treatment an individual receives is still largely determined by their assignment to one of the stigmatized ethno/racial categories. For example:

In some situations, the Anglophilic Chicano writer Richard Rodriguez is no less subject to abuse as a Latino than would be a member of the National Council of La Raza. Even so adamant a proponent of color blindness as Justice Clarence Thomas, were he incautious enough to run a red light in some neighborhoods, deserves protection against the likes of Mark Fuhrman.

That is, the "ethno-racial pentagon gets its architecture from neither culture nor biology, but from the dynamics of prejudice and oppression in American history and from the need for political tools to overcome the legacy of that victimization."

Hollinger argues that we have conflated the dynamics of racial prejudice and oppression with those of culture. This allows arguments to be advanced for cultural diversity rather than for group preferences based on categorical treatment. We prefer to substitute an amorphous concept of culture because it is seen as somehow residing in individuals. This, in turn, simultaneously salvages the notion of individual merit and denies the existence of widespread categorical treatment. However, the assignment to the ethno-racial pentagon gives groups of individuals particular life experiences and access to cultural knowledge that are relevant to how we define and measure merit. That is, personal morphology (i.e., an individual's physical attributes) largely influences the life experiences of groups of individuals by giving them access to cultural knowledge. Even though this life experience and access to cultural knowledge is not evenly distributed among group members, there is an overall group effect that is powerful and persistent, and relevant to how merit is defined and measured.

82. Even though there is a raging debate in the academy over the "social construction" of these ethnic/racial categories and a minority grassroots debate about increasing these labels to include "multicultural" individuals, the ethno-racial pentagon is still well-grounded in social practice. For example, a recent poll of 18,000 households commissioned by the U. S. Census, indicated that only a tiny minority (slightly more than 1 percent) chose the multiracial category. Steve Johnson, Little Support For "Multiracial," S.J. MERCURY NEWS, Dec. 6, 1996, at 10A.

83. Id. at 33.


85. Hollinger, supra note 42, at 33-34.

86. Id. at 33.
As we have noted, merit has traditionally been conceptualized as an individual characteristic rather than as something both individually-based and connected to a larger collectivity or group. The historically significant case of admission to medical school provides an instructive example of the multiple components of merit. Decisions about who is sufficiently "meritorious" to attend medical school is based on a series of largely individualistic measures of past accomplishments—grade point average, scores on standardized tests, recommendations based on individual performance, individual work experience and performance, a personal statement, and a few other factors (that may—under existing affirmative action programs—include race/ethnicity, class, and gender). The contribution of group factors to an individual's history of accomplishments, or the significance of one's group identification for the nature of likely future contributions or achievements plays little or no role in this kind of individualistic calculation. Thus, the way in which race and ethnicity have significantly influenced the long list of other individual measures of merit cannot easily be factored into the medical school admissions equation. Nor is it possible to weigh the value to be derived by non-minority medical students from increased contact with persons from diverse backgrounds who are likely to resemble at least some of their future patients, or the benefits to traditionally underserved minority populations that comes from having more physicians who share their race and ethnicity practice in their communities, and so on.

With respect to this latter point, a recent study shows that, regardless of income, communities with high proportions of Hispanic and Black residents are four times as likely as others to have a shortage of physicians and that Black and Hispanic physicians are more likely than other physicians to work in Black and Hispanic communities. Indeed, the differences were not trivial: "Black physicians practiced in areas where the percentage of black residents was nearly five times as high... Hispanic physicians practiced in areas where the percentage of Hispanic residents was twice as high as in areas where other physicians practiced." Black and Hispanic physicians also were more likely than others to care for indigent patients. These relationships were consistent regardless of the ranking of the medical school attended (i.e., the physicians' race/ethnicity predicted who they served independent of the type of medical school they attended). Of course, if merit were measured with these outcomes in mind—ones that are impossible to calculate from a purely individualistic perspective—there would be meritorious reasons to base medical school admissions in part on ethnic and racial group membership. The important purpose of ensuring that minority communities, ones that otherwise would not get medical care in the same proportion as others, would be better served in the future—a purpose arguably as important as some of those served by more traditional admissions policies—would be furthered thereby.


89. For purposes of accuracy, we use the same ethnic/racial labels used in the sources cited.

90. Komaromy, et al., supra note 88, at 1305. In addition, even when the ethnic/racial composition of the communities are controlled, "black physicians cared for significantly more black patients (absolute difference, 25 percentage points...) and Hispanic physicians for significantly more Hispanic patients (absolute difference, 21 percentage points...)." Id.

91. Affirmative Action Programs in medical schools have just begun to address this problem: "In 1990, blacks made up 12% of the U.S. population, but only 4% of physicians; Hispanics made up 9% of the population, but only 5 percent of physicians." Komaromy, et al., supra note 88, at 1309.
Similarly, Gloria Cuadraz studied the first generation of Chicanos to enter the doctoral programs at Berkeley between 1967 and 1979, all of whom were admitted under the auspices of affirmative action. Of the 40 persons in her sample, fully 38 continued to identify as “Chicanos” at the time of the study and were committed to politically active work and progressive social change. Further, 35 of them used their teaching, research, mentoring, community involvement, administrative posts, and other kinds of political activity to some ways advance Chicano causes. Her respondents unanimously acknowledged the positive role that affirmative action programs played in providing them access to higher education. The majority ascribed to the principle of affirmative action that “the betterment of the few would eventually result in the betterment of all.”

Affirmative action programs thus can function to increase group representation in arenas of social and political life to persons historically excluded from them. Such group representation helps to democratize our institutions and simultaneously gives previously excluded group members a voice (and a stake) in the society to which they belong. The recognized beneficiaries of affirmative action include minority communities that are now better served and whose interests are now more consistently advanced.

The fact that some affirmative action recipients do not wish to represent, be associated with, or work in predominantly ethnic and racial communities of Color does not compromise or negate this group-based benefit. Affirmative action programs are designed around the goal of increasing probabilities of group-based opportunities and benefits rather than diminishing individual choice. They provide a mechanism with which to remedy structural forces based on group membership regardless of individual identification. However, as Hollinger again reminds us, discrimination within the ethno-racial pentagon is based on physical characteristics, not individual cultural competence. Thus, the sheer presence of persons in previously segregated circles who may benefit from affirmative action but refuse group-based associations nonetheless helps remedy past discrimination.

The following passage by Anglophile Richard Rodriguez provides an illustration of this. Rodriguez confesses to taking advantage of affirmative action


94. Cuadraz, supra note 90, at 219-220.

95. Id. at 222-223.

96. Id. at 221.

97. Obviously, even these persons have had to identify enough with the group to have been included in the affirmative action pool. That is, most if not all affirmative action programs require self-identification and this practice prevents persons from being placed in affirmative action pools without their explicit consent.
programs to gain access to the English graduate program at Stanford University at the same time he was being flown around the country by conservative organizations to speak against the very programs that helped him gain the skills to speak to these audiences. Even though Rodriguez believes in complete cultural and linguistic assimilation, and by his own admission worked very hard to become just another "American," his phenotype did not allow him to gain complete and uncomplicated access to predominately White circles of privilege. In his words:

Dark-skinned. To be seen at a Belgravia dinner party. Or in New York. Exotic in a tuxedo. My face is drawn to severe Indian features which would pass notice on the page of a National Geographic, but at a cocktail party in Bel Air somebody wonders: 'Have you ever thought of doing any high-fashion modeling? Take this card.' (In Beverly Hills will this monster make a man.)

Richard Rodríguez’s sheer presence in these circles of privilege mobilized feelings about difference—his and those of his predominantly White acquaintances. Regardless of his lack of group identification, his polished mannerisms, and practiced ease in the world of the privileged, Rodríguez was identified as the "other." His presence represented a visual rupture that required awareness, acknowledgment (at some level), and accommodation.

Thus, the meaning attached to ethnic and racial, gender, sexuality, and physically challenged group memberships extends beyond an individual’s attachment to or identification with them, and the merit to be inferred or attributed by others from this meaning is not entirely an individual-level construct. The social and economic consequences of having members of derogated groups join privileged circles carries social significance and racial meaning, and teaches much the same kind of lesson, no matter the group member’s individual preference or individualizing characteristics.

VII.
MERIT AND THE U.C. REGENTS

Under the conventional terms of the prevailing meritocracy, the worth of an individual—his or her "merit"—is something that presumably can be measured in surprisingly unproblematic ways. Indeed, opponents of affirmative action talk glibly about who is "qualified" and who is not without ever grappling with the extraordinary limitations in the technology on which attempts to measure merit are based. Most psychometricians—even those who make their living providing estimates of "merit"—now concede the significant limitations of the enterprise and the imprecise, superficial, partial nature of the estimates it provides.

To be sure, the concept of merit was central to the debate that took place during the 13-hour U.C. Regent’s meeting in which SP1 and SP2 were passed. For supporters of SP1 and SP2, merit was characteristically unproblematic and a priori, possessed only by those individuals who were admitted to the University of California without affirmative action. The pro-SP1 and SP2 forces simply ignored the consequences of ethnic/racial, gender, and class memberships—whether these consequences conferred benefits or stigma. They advocated a "color-blind" admissions process where individuals would somehow be judged "by the content of their character and not by the color of their skin," but never bothered to examine


the quality of the procedures by which this is supposedly done. Opponents countered
with a broader definition of merit that took into account the negative consequences
of stigmatized group membership as one of the many obstacles that individuals had
to overcome to gain admission to the University. For them, the conventional
definition of merit was as narrow and limited as the conventional techniques used to
measure it were flawed and problematic.

Typical of the anti-affirmative action speakers at the Regents’ meeting,
State Senator Bill Leonard repeatedly inserted “merit” into the debate as if it were an
utterly unproblematic concept that did not require definition or explanation. Implicit
in his formulation was the equally unquestioned corollary that persons admitted
under affirmative action guidelines were somehow insufficiently meritorious. Thus,
after acknowledging the University’s reputation “for its commitment to excellence in
education and research and for its concerns with liberty and justice,” Senator
Leonard turned to the “crucial question of fair admissions policy.” Offering an
observation that no one at the meeting could refuse—that there was no Regent
present “who favors racial discrimination”—he encouraged them to show “moral
leadership” by sending a “message about liberty to California’s high school
students,” the constituency (as he correctly noted) “most affected by the policies that
you’re discussing today.”

What message should they send? Leonard was clear and direct:

UC should be courageous enough to promote racial equality by
admitting students without checking their skin color or racial
heritage. UC can lead society to the right direction by
demonstrating that people succeed based on their character and
determination not on their ethnicity . . . . I urge you to make the
just and proper decision and send a message to thousands of UC
applicants present and future, I urge you to tell them you share
their belief that they can achieve their goals because of merit and
perseverance and to remind them that they will be judged as
individuals as scholars and not as part of some genetically
determined category. Thank you very much for your
time.

For the thousands of students in past years admitted under affirmative action, and
the thousands more in future years who understood that these programs might be
their only hope to overcome the barriers that our society had placed before them,
Leonard’s message was also unmistakable: they were somehow lacking in
“character” and “determination.” Because he never bothered to define or discuss
what he meant by merit, he could sidestep an explanation of what, exactly,
admissions criteria like standardized test scores said about character and
determination. To be sure, under the Senator’s formulation of the issues, the socially
imposed correlation between the “genetically determined” categories and the amount
of “determination” and “perseverance” needed to overcome a vast array of barriers
to achieve in educational settings was easily ignored. So, too, was the relationship
between the narrowly defined concept of “merit” employed in University admissions

100. The anti-SP1 and SP2 forces failed to successfully attack the privileges that certain
groups garner to gain admissions to the University of California like the slots set aside for the discretion
of each of the nine chancellors to admit students, mostly children of wealthy alumni, or the fact that
certain students pay for expensive review courses to increase their scores on standardized tests, and
admissions based on the athletic needs of the school and not on the athlete’s academic record. Edward

101. Transcript From UC Regents Meeting 7-8 (July 20, 1995).

102. Id.

103. Id.
and the aforementioned "genetically determined" categories—a relationship that would help to explain why Latino and African American students were admitted in far fewer numbers than their percentages in the population. A more honest, thoughtful, and slightly more nuanced framing of the issues would have prompted a discussion of whether these disproportions were mere accidents, evidence of innate racial inferiority, or whether there other pernicious forces at work that explained them. But the assertion of some kind of seemingly natural and undefined quality of merit as the core but unproblematic component in the "courageous" path Leonard had staked out for the University, and his clarion call to the seemingly neutral and noble claim to be "judged as individuals," allowed him and his supporters to sidestep all of the difficult questions that should have been at the heart of this debate.

We do not believe that the "myth of merit" is best critiqued from a stance that some have characterized as the "nihilist claim" that "university admissions criteria are arbitrary, so that the refusal to extend preferences based upon racial or ethnic identity is merely discriminatory or unjust." On the contrary, the focus on earned merit as one measure of deservingness seems to us a just principle by which to allocate resources. However, any serious examination of the principle quickly reveals that virtually all broad-based measures of merit—ones used by the gatekeepers to real power and influence in any society—have been devised in such a way as to favor the particular kind of knowledge that is held disproportionately by one group (and mostly by the men in that group). Existing distributions of power and privilege are hopelessly confounded with definitions of individual merit in such a way that any attempt to use conventional definitions of the concept as the only or the overriding principle of fair or just allocation is doomed to replicate the status quo.

To this sometimes subtle skewing of the very measurement and definitions of merit must be added the direct effects of sheer wealth and power—the access to opportunity, resources, and rewards that has nothing to do with any objective measure of "merit" but comes instead from the concessions that all allegedly merit-based systems make to pre-existing privilege. Here we would include favoritism in admissions to prestigious universities extended to children of alumni and large donors, inherited positions in family-owned corporations, and the like. As two of us have noted elsewhere:

Former Vice President Quayle, a longtime opponent of affirmative action programs, was himself admitted to law school under a program designed to increase minority enrollment by excusing poor grades in favor of "other factors." Although it is not clear exactly what those factors were in Quayle's case, the former Vice President continued to assert that he "got into law school fair and square." 106

104. Post, supra note 4, at 7.
105. Fernandez, supra note 50; Haney & Hurtado supra note 54; Hurtado supra note 84.
106. Haney & Hurtado, supra note 54, at 243. In this context, Rendón has noted that Whites and Asians were usually outraged if one of their own was "displaced" by a student admitted under affirmative action but preferences of selective alumni or athletes were not protested. Furthermore: "In American higher education, far more Whites have entered the gates of the ten most elite institutions through 'alumni preference' than all the Blacks and Chicanos together have ever entered through Affirmative Action." LAURA I. RENDÓN, ACCESS IN A DEMOCRACY: NARROWING THE OPPORTUNITY GAP 9 (1997) (commissioned paper for the National Postsecondary Education Cooperative).
Even dominant group members who excel on seemingly objective measures of merit (like standardized tests) often have their access to opportunity and resources further enhanced by social networks based largely on wealth, race, and gender privilege.\textsuperscript{107}

By the logic of SP1 and SP2 and the testimony offered in its support, only an extremely narrow, arguably biased, and frequently compromised brand of merit—defined in such a way as to virtually always favor dominant group members—should serve as the exclusive criteria for access to educational opportunity and privilege. Filtered through this narrow brand of individual merit, persistent evidence of group disparities carries an unspoken yet unmistakable message: unequal performance is prima facie evidence of group inferiority and undeservingness, rather than the legacy of past and present structural and interpersonal discrimination.

Denying the legacy of past and present discrimination is precisely what is required to ensure that the existing distribution of power and privilege will remain unquestioned.

. . . To most White Americans what makes quotas unfair is that they imply the allocation of opportunity and rewards to persons who are otherwise undeserving (that is, insufficiently meritorious) but who nonetheless benefit simply because of their race. On the other hand, to grapple with the essential nature of merit would require members of the dominant culture to examine the nature of their own privilege. By assuming that the basis of privilege rests upon the principle of merit, White Americans can at once ignore the structural advantages that account for the privileges of dominant culture membership and condemn even modest departures (like affirmative action) as violations of an unassailable moral principle.\textsuperscript{108}

Indeed, the exclusive focus on individuals conveniently bypasses group-based discrimination and, perhaps more importantly, group-based privilege.

Individualistic definitions of merit also restrict us to individualistic solutions to the problem of inequality. Personal success turns on having the skill and determination to attain the “right” set of values, the “right” kind of family structure, the “right” kind of self-presentation. Those in power are indeed superior because they were naturally blessed with—or worked hard to obtain—all of those characteristics that lead to “merit.”\textsuperscript{109}

In an earlier discussion of some of these issues, two of us have analyzed the hearings that led to the Civil Rights Acts of 1990 and 1991. The following passage from the report of the minority of House members who opposed passage of the bill provides an excellent example of the way in which structural discrimination is commonly ignored as a barrier to equal employment. In its place are substituted “the

\textsuperscript{107} E.g., Graham, \textit{supra} note 55; Stanton-Salazar, \textit{supra} note 35.

\textsuperscript{108} Haney & Hurtado, \textit{supra} note 54, at 231.

\textsuperscript{109} Stanton-Salazar, \textit{supra} note 35, at 3. Advocating that all groups should have the same cultural values in order to succeed is the bedrock of the concept of assimilation. Newfield and Gordon have astutely observed that “. . . assimilationism continually militates against demands for enhanced equality. It declares these a threat to social harmony and peace, and requires instead the kind of individual upward mobility that, though individually beneficial, does not challenge unjust ground rules since it is contingent on obeying them. Assimilationism requires different groups to follow standards they had no share in making and that they may dislike, even as it presents these requirements as the bedrock of orderly freedom. These standards are very difficult to criticize because they seem inclusive, neutral, and unifying rather than racial and divisive.” Christopher Newfield & Avery F. Gordon, \textit{Multiculturalism's Unfinished Business}, \textit{in MAPPING MULTI-CULTURALISM} 81 (A.F. Gordon & C. Newfield eds., 1996).
many characteristics of inferiority—which translated into an overall lack of merit—with which minority workers were still plagued." As the House minority Report stated directly:

To our view, these statistics [documenting inequality] do not simply show that there are gaps in employment. They also provide concrete evidence of lack of educational advancement, the erosion of the family structure and of traditional family values, and increasing drug use, crime and violence in the groups targeted by this legislation. These alarming trends cannot be exclusively laid at the feet of employment discrimination and, in and of themselves, present significant barriers to full participation in the work force by minorities."

Thus, individual inferiority rather than structural discrimination is used to account for racial disparities in income and employment. These disparities are not the fault of those who failed to aggressively and effectively implement affirmative action policies or eradicate educational and economic barriers that continue to thwart minority achievement. Rather, they are the fault of minority parents who have simply allowed their families and values to somehow "erode," and the fault of individual minority group members who have freely chosen the paths of drug use, crime, and violence (when, presumably, more legitimate opportunities were equally available to them). There are few clearer recipes for governmental inaction that supports the status quo and protects existing distributions of opportunity and resources than this.

Although these issues escaped mention in the discussion that preceded the U.C. Regents' vote to end affirmative action and were ignored in the congressional debates over various civil rights acts in the early 1990s, there are alternatives to the narrowly-drawn and unproblematically-asserted concept of merit that confounds these debates. Many scholars have grappled with alternative methods of calculating deservingness that are racially fair and likely to reduce rather than exacerbate race-based inequalities. Some have proposed models of merit that do not virtually always restrict minority access to opportunity and resources and do so in such a way that the victims of these policies are blamed for their own demise. Indeed, several theoretical pathways for the radical reconstruction of merit—or, at least, a broader, fairer definition of merit—have already been mapped out. For example, within feminist studies there is a well-developed critique of the derogation of "women's ways of knowing" and a series of proposals for reversing this prejudice by acknowledging and valuing non-traditional pathways to knowledge; in ethnic studies a radical critique has been developed on the ways in which institutionalized knowledge ignores cultural variation and devalues experience as praxis for learning; progressive scholarship in the social sciences now emphasizes multiple


111. COMMITTEE ON EDUCATION AND LABOR, as quoted in Haney & Hurtado, supra note 54, at 232.


113. See KNOWLEDGE, DIFFERENCE AND POWER: ESSAYS INSPIRED BY WOMEN'S WAYS OF KNOWING (N. Goldberger et al. eds., 1996).

ways of learning and the essential component of "instructional conversations" to build intellectual scaffolding for problem solving,"115 new approaches to knowledge in the humanities seek to deconstruct essentialist notions of culture that do not take into account power relations between groups in our society, and so on.116 Cognitive scientists have even offered devastating critiques of single-component models of measured intelligence or "IQ" (commonly referred to as the "g factor") and have issued a call for definitions of intelligence that are multiple, context specific, and sensitive to creative, alternative approaches to problem solving.117

The challenge lies in developing ways to operationalize and implement these new conceptualizations of merit and readying them for widespread application. This is the discussion and dialogue that the U.C. Regents could have initiated but did not. However, in more progressive quarters debates over the fairness of traditional measures of merit and the need for alternative approaches to college admissions has resulted in a reexamination of the use of predominantly quantified indices like those derived from standardized tests. Indeed, even at the University of California the use of a personal "portfolio" in evaluating applicants' academic potential has been under discussion as well as a more systematic examination of the background contextual factors that may have influenced a student's educational achievement.118

In any event, because prevailing definitions of "merit" are systematically rather than arbitrarily or accidentally constructed to privilege the skills and knowledge possessed by particular groups of people who happen to be in power, truly fair systems of allocating opportunity must acknowledge and somehow correct for this bias. One solution to such structural bias would be to rely on multiple measures of merit that are more directly related to the goals of public education. To do this, of course, would require a long overdue discussion of those goals that includes the voices of increasingly important, diverse constituencies.

VIII. CAN UNPRECEDENTED SOCIAL CHANGE THAT AFFECTS THE INTERESTS OF THE RULING CLASS OCCUR PEACEFULLY?

It's unnerving to some of them. I can see that as more progress is made by minorities, the greater the resistance is going to be. Inclusion in many cases means a loss of power to the people who are in power, particularly white males. And correct me if I'm wrong, but I can't remember a time in history when power has

115. Stanton-Salazar, Vásquez, & Mehan, supra note 35.
116. See ANN DUCILLE, SKIN TRADE (1996); Newfield & Gordon, supra note 109.
118. Personal communication with Manuel Gómez, Vice-Chancellor of Student Affairs, University of California, Irvine and Francisco Hernandez, Vice-Chancellor of Student Affairs, University of California, Santa Cruz.
been given away or shared without a war or without battle. It's going to take a lot of rearranging in this society for it to work.  

Until recently, modest group-based preferences implemented through affirmative action programs could be accommodated and tolerated within the overall context of individualism, in large part because their effects were so minimal. There were few sectors in society where a critical number of "minorities," including White women, occupied decision-making positions. Under these conditions, affirmative action posed little or no threat to the cultural hegemony of the dominant group in the United States; it forced few if any real concessions in the wielding of political and economic power. However, affirmative action has been perceived as increasingly threatening now that White women and "minorities" have begun to enter positions of power in sufficient numbers to want to "redecorate the house," especially in light of projections about dramatic changes in the demographic makeup of American society suggesting that these trends will only continue and intensify. In this section, we argue that the immediate threat to dominant group interests may be less a function of the actual redistribution of wealth and power (we are still decades away from that) but rather in how minorities and women engage in the exercise of power and the possibility that they may begin to transform the very nature of power relationships themselves.

This also helps to explain the previously described tendency to conflate debates about affirmative action with those that involve multiculturalism generally. California alone provides a string of recent illustrations: the passage of Proposition 187, which restricts immigrant rights; the passage of Proposition 209, which dismantles affirmative action in education and employment; the passage of Proposition 63, which declares English as the official language of the state; and most recently, Proposition 227, which essentially dismantles bilingual education (requiring instead a one-year, all-age, all-grade, all-language, English immersion program for all non-English speaking students). These initiatives attack...

119. Maharidge, supra note 73, at 116, (Quoting one of his respondents, Donald Northcross, a policeman who created a tutoring program in Sacramento, California for African American young men to emphasize academic success and discourage them from gang violence).


121. Faculty hiring at the University of California is a case in point. Between the years 1984-85 and 1995-96, a period that could be considered the height of faculty affirmative action hiring, there were a total of 4,991 new ladder-rank faculty appointments in all fields. In these eleven years, only 278 Chicano/Latinos were hired in a state where they represent the largest, and fastest growing, ethnic group. DEPARTMENT OF ACADEMIC ADVANCEMENT, UNIVERSITY OF CALIFORNIA (1996). Of course, these 278 Latinos/Chicanos were not a net gain because others left or were denied tenure. The latest figures (October 1995) indicate that there are a total of 308 (4% of the total faculty) Latino Chicano ladder-rank faculty in comparison to 178 (1% of the total faculty) in October 1979. Thus, however small the increments, affirmative action has made no more than a modest but not insignificant difference. OFFICE OF ACADEMIC ADVANCEMENT, COMPOSITION OF GRADUATE STUDENTS AND FACULTY AT THE UNIVERSITY OF CALIFORNIA BY RACE AND SEX (1996).

122. Proposition 227 violates almost every principle derived from research on how children learn two languages as well as what educational experts know about effective pedagogical practices. For example, it could result in placing children of different ages in one classroom—which in some schools may mean that elementary school children will be placed with teenagers. This practice was discontinued years ago, as soon as educational psychologists learned that children have different cognitive abilities at different ages. Similarly, placing students who speak different languages in one classroom with a teacher who does not speak any other language except English means that children will not be able to communicate with the teacher or with fellow students. Many researchers agree that one year is insufficient to learn English as a second language, and these students may never recover from the experience. Indeed, this "method" was in use before bilingual education was implemented and was known as the "swim or sink" approach to language learning. Interview with MALDEF (Sept. 19, 1997).
disenfranchise, and marginalize citizens with culturally diverse backgrounds. It is difficult to ignore the possibility that they are motivated by common goals—to restore White cultural hegemony and reaffirm White social and economic power at a time when it appears to some to be threatened by the forces of diversity and redistribution. 123

Indeed, the fact that these apparently interrelated attacks have occurred at precisely the point at which a substantial non-White constituency is emerging in the state seems more than coincidental. The connection did not escape State Senator Diane Watson, herself an African American woman and UCLA alumnus, when she testified before the Regents in affirmative action debate:

Last year it was illegal aliens, this year it’s Affirmative Action. Why now? California’s rapid changing demographic profile heightens the necessity for outreach and for Affirmative Action taken to promote diversity. By the beginning of next century, there will be no single ethnic group constituting a majority. The White and Latino populations are expected to be equal by the year 2020. Educating the citizens and the workforce of the future means educating people from all population groups. How is this done Regents? How is it done without acknowledging, Mr. Connerly, race, ethnicity, and sex, among the many factors used in selecting students and recruiting faculty and staff?... And I as a member of the budget committee, feel that much rides on the decisions that you make. Because if this University reverts to an all White male and Asian male University, closing the doors on the people who are California, why should we, as taxpayers, want to support. . .why should we want to support a university that has a person who wants to stand in the door reminiscent of George Wallace and say to Diane Watson, “you no longer can enter.” 124

As the sheer weight of the number of persons who are culturally distinct but by no means culturally separate from the White majority increases and begins to force the transfer of institutional and cultural power, we return to the question with which we began this section: Can power be shared in a multicultural society where demographic shifts (rather than warfare or revolution) are forcing a redistribution of privilege and influence? Many scholars believe that the so-called “cultural wars” are not about culture at all, but about the transfer of political and economic (and only by

Because it will contribute to the educational marginalization of students of Color, Proposition 227 seems likely to contribute to a growing delinquency problem in the state.

123. A recent newspaper article analyzed propositions 187 and 209 as being driven by the White electorate, responding to their fears about cultural diversity and the potential displacement of Whites in California:

The large-scale philosophical differences between California’s racial and ethnic groups have been most clearly defined by the state’s recent ballot initiatives. Both Proposition 187 and Proposition 209, last year’s anti-affirmative action measure, found their greatest level of support among white voters, who constitute as much as 80 percent of the state electorate. The balloting, according to [associate director of UC Berkeley’s Institute of Governmental Studies] Cain and other political scientists, reflects the electorate’s struggle with issues that are not only tied to race, but socio-economic class, high immigration levels and cultural assimilation. At least as it relates to race, the state’s initiative process has been used recently “to allow the white majority electorate to continue to dominate,” said Stanford University political scientist Luis Fraga.


124. UC REGENTS, MEETING TRANSCRIPT 5 (July 20, 1995).
implication, cultural) power. Indeed, as Gordon and Newfield have argued, just as race has begun to take center stage in the analysis of oppression and as people of Color are about to become sufficiently strong in numbers to remedy past wrongs through growing electoral power, the dwindling dominant group has begun to declare race and ethnicity irrelevant and to ban their recognition as a violation of the democratic ideal of color-blindness.

Absolute adherence to the ethic of color-blindness precludes the righting of past wrongs that were based on ethnic and racial oppression. The proactive sharing of power by the previously dominant group will be undermined—indeed, it may be deemed unnecessary—if the very reason for promoting diversity—that is, the significance of ethnic and racial group membership—is considered invalid. As Gordon and Newfield put it:

Postpluralism defines the most basic racism as the appeal to race. It says, in effect, that if you believe in a society beyond racism (meaning, it believes, beyond race), you must expose cultural difference as racialist pathos. This rejection would not appear to reflect your racialized political agenda but simply your enlightened, postessentialist philosophy. Postpluralism, shorn of pluralism's more obvious supremacist outbursts, would take over its role as racial management. It would never need to say, It doesn't matter who you are, I don't care who you are, or I don't like who you are. It would only ask, whenever racial hierarchy comes up, "But why does it matter who we are?"

In this context, Newfield and Gordon have traced the historical background of multiculturalism in the United States by focusing on Horace Kallen, the "official source" for the term "cultural pluralism," a term he proposed in The Nation in 1915. Through him they highlight the important features of a "working multiculturalism"—one that is not devoid of the reality of an individual's group memberships. Gordon and Newfield argue that, in contrast, the current multicultural debates reject the notion of biological inferiority based on race while simultaneously claiming the superiority of "American" institutions that are constituted by one group's culture—Anglo Saxons. Pluralism becomes at best passé under the contemporary rubric; what matters (in most contexts, at least) is a shared allegiance to American institutions.

Yet, there is the sometimes not-so-subtle implication that most of what is admirable about American institutions and norms comes from the "stock" of Anglo-Saxons who presumably created them. Kallen attempted to avoid this pitfall by explicitly rejecting the biological claim that Anglo-Saxon stock had much to do with anything characteristically American. Indeed, his "major complaint" was with "the

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125. RENDÓN, supra note 106, at 3. As Robert Post observed: "Ironically, the University of California had itself helped create the very legal framework that presently governs affirmative action within higher education. That framework was established in reaction to the University's defense of one of its own affirmative action programs to assist minority-groups." Post, supra note 4, at 1. The University, like other state agencies and organizations, likely created affirmative action programs without ever anticipating that Whites would become a minority group in the state.


127. Id. at 682. Indeed: "Around race, the artificial separation of cultural processes from politics enables such containment, intended or not." Id. at 756.

128. Newfield, & Gordon, supra note 109, at 83.

129. Id.
identification of the American Way with one particular group." Kallen argued that identifying the "real" national culture with one particular group was a form of "cultural racism" that was no less dangerous than its biological counterpart because it assumed that only "institutions pervaded by Anglo-Saxon persons or ideas can stand for the American idea." Kallen took the notion a step further. In Gordon and Newfield's words:

For Kallen, an institution can be 'American' only when it is not Anglo-Saxon. The American always includes the plurality of America's actual groups...The grounding of the American in an Anglo-Saxon or other core is not only monoculturalism; it is cultural racism or what we might call cultural supremacism.

Many of the specific debates taking place recently in California focusing on immigration, affirmative action, or bilingual education seem to connect to a larger albeit implicit debate over what constitutes a true "American citizen." Speaking a "foreign" language or engaging in cultural practices that are not "American" (read, not Anglo-Saxon) represents for some and can be characterized by others as a violation of the American ideal. The fear that motivates these hostile initiatives can be summarized succinctly: if we allowed every group's culture to have equal status in or even to make significant contributions to the "American" ideal—essentially what Kallen was proposing—we would become a "nation disunited."

In this context it is not surprising that the nature of the procedures by which the next generation gains entrance into elite institutions of higher education has become a battleground in these "culture wars." The most prestigious educational institutions are not only the training grounds for the next generation of leaders in government, industry, arts, and education, but can also be used as the gatekeepers against increasing cultural and social diversity in political thought, informed opinion, and scholarly knowledge and expertise itself. The role we choose for the university—as either a battleground where the war to preserve the status quo is waged or a laboratory in which mechanisms for the peaceful sharing of power are explored—will have implications that extend far beyond the walls of academia.

In the current political climate there has been little reason for optimism. Hopeful speculation about creating an atmosphere in which the peaceful sharing of political, economic, and social power is possible seems naive and unrealistic. Of course, the university does not exist in a social and political vacuum and has unwittingly become a battleground for these larger struggles. Moreover, universities exercise little direct power over the ways in which social and political conflicts are resolved in the society at large. Although more sustained scholarly analyses of the underlying issues is clearly warranted, this also seems an appropriate time for more systematic, action-oriented initiatives that translate research into policy. In addition, contemporary intellectuals can begin to discharge an oft-neglected public function. That is, they can help to educate broader groups of citizens about the paradigm shift away from the antiquated ideology of individualism and towards a greater understanding of the role of structural and contextual variables in shaping the life course of groups and individuals. But the move to a more radical democratic vision of a society that supports difference and gives it political and economic legitimacy and voice will require more than intellectual change. We see these issues as part of a

130. Id. at 84.
131. Id.
132. Id.
larger agenda of transformation that will include the mobilization of increasingly potent electoral constituencies, a heightening of public awareness about the nature and importance of diversity in representation through peaceful protest, strikes and boycotts, and the beginning of a host of legislative and judicial initiatives that press for progressive redefinition of statutory and constitutional categories and principles. Although the university can play only a limited role in this process, its future is inextricably bound with the political future of the state. We address this common fate in the next section.

IX. CAN LEADERS UNPREPARED FOR THE CHANGING DEMOGRAPHICS GOVERN THE DIVERSE CONSTITUENCY?

... Affirmative Action has made us all aware of the very positive value of diverse ideas and background, and more important, it's made us uncomfortable with governing boards, CEO's or tenured professors that are of one race, or one gender. We now understand and affirm that leadership without diversity is of a lower quality, that leaders who are of a different gender, skin color and background may have a different view of the world ... . However on the no side, I think that like many things, Affirmative Action in my opinion was doing just fine until the government got into the act and screwed things up. I firmly believe ... that Affirmative Action has gone a long way from its original intent ... because its implementation has caused the unintended consequence of increased divisiveness and racism ... . Although I deplore the politicizing of today's discussion, I will cast my vote today in favor of SP 1 and 2.134

By all accounts, the nation's economy will continue to demand unprecedented levels of education, training, and intellectual skill. In the year 2004—at a time when about one third of the U.S. workforce will be comprised of ethnic/racial minority group members—the majority of all new jobs will require post-secondary education.135 In California, these issues will be joined sooner and more dramatically than in other places: by the year 2000, three out of every five California workers will be Latino.136 There can be little question that the economic well-being of the state will be tied directly to the education of California's Latino population. Moreover, in comparison to the aging White population, Latinos in California are extremely young. This means that, as David Hayes-Bautista and his colleagues have observed, by approximately 2010 the social security payments for a predominantly White retired population will be dependent on a productive, educated—and predominately Latino—workforce.137

134. Transcript from UC Regents' Meeting 5-7 (July 20, 1995) (Quoting Regent Meredith Khachigian).


136. Id.

137. HAYES-BAUTISTA, SCHINK, & CHAPA, THE BURDEN OF SUPPORT: YOUNG LATINOS IN AN AGING SOCIETY (1988). Ironically, in the year 2003 when Governor Pete Wilson who is perhaps most responsible for closing the doors of higher education for underrepresented students by sponsoring SP1, SP2, and Proposition 209, turns 70, the usual retirement age, White men will only be 15% of the entering workforce in California. By 2010, White men will only be 36% of the national workforce. MAHARIDGE, supra note 73, at 47.
Although we have argued that the specter of dramatically changing demographics has played an important role in attempts to end affirmative action, it is a role that has curiously escaped much commentary. Indeed, the debates themselves have been conducted as if no such changes loomed on the not-too-distant horizon promising to profoundly alter the political context in which the fate of affirmative is definitively resolved. That is, on the surface of the affirmative action discourse and debate one is led to believe that the emerging majorities in California and other states will remain content to be governed by the “collective will” of the few. This seems unlikely to us. Instead, constituencies that have traditionally decided questions of political and social policy—predominantly White, older, more educated, higher income voters who have determined the economic, educational, and cultural destiny of the state—are being gradually displaced and marginalized by an increasingly multicultural society.138

Historically, political leadership in a democracy reflects the racial and ethnic characteristics of the dominant electoral group within the state.139 The effects of this electoral power extends to non-elective offices including, in California, the University administration. For example, the composition of U.C. Regents—who are political appointees by the governor for twelve-year terms—reflects this social and political fact. The Republican reign in the California governor’s mansion for the last 15 years accounts in large part for the homogeneity in the composition of the University’s Board of Regents.140 They mirror the governors who have appointed them, not only in terms of ethnicity and gender but also political ideology. It surprises no one to learn that Republican governors, for the most part, appoint Republican Regents.141

But the lack of ethnic diversity in Republican political party membership—very few Latinos, in particular, are Republicans—has compromised the Regents’ willingness and ability to address the needs of the state’s emerging majority. It also has denied Latinos an effective voice in University governance.142

138. Take as an example the demographic analysis of the state vote on proposition 209. A total of 74% of the voters were White, 5% Asian, 7% Black, 10% Latino, and 4% other. A total of 41% of the voters had incomes of $60,000 or more, 23% had incomes between $40,000-$59,999, 24% had incomes between $20,000-$39,999 and only 12% of the voters had incomes less than $20,000. GENERAL ELECTION RESULTS OF THE PROPOSITION 209 BATTLE IN SOUTH LOS ANGELES (1996). Nationwide, in 1994, only 20.2% of Hispanics 21 years of age or older voted for any office or issue; 47.3% of Whites and 37.1% of Blacks did so. Only 31.3% of voting age Hispanics registered to vote in comparison to 64.6% of Whites and 58.5% of Blacks. U.S. BUREAU OF THE CENSUS (1996). As these numbers begin to shift—reflecting the changing demographics as well as inevitable political mobilization among Latinos—the center of democratic power in the state will shift as well.


140. MAHARIDGE, supra note 73, at 37.

141. Although there are 26 regents, 17 out of the 18 core members were appointed by Governor Wilson and his Republican predecessors. The average worth of the 18 core Regents is estimated at $1.3 million and some of these members made substantial contributions to Governor Wilson’s campaigns. MAHARIDGE, supra note 73, at 37.

142. For example, the Republican Party recently acknowledged that they will no longer be able to win gubernatorial races (or any other statewide elections) without seriously courting the Latino vote. Robert B. Gunnison & Greg Lucas, State GOP Struggles to Regain Latino Support, S.F. CHRON., Dec. 15, 1997, at A1. Although Latinos have often voted for the GOP in statewide elections, Governor Wilson’s support for Propositions 187 and 209, according to political analyst Tony Quinn, has cost Republicans “part of their base.” Id. at A11. Currently this base is 28% of the California electorate, and will jump to 41% in the year 2020. Id. The virtual absence of high ranking Latinos in the Republican Party significantly contributes to the problem. A recent newspaper report indicates that “One of the nation’s top Republican political strategists [Stuart Spencer, strategist for Ronald Reagan and most of the GOP’s presidential nominees] has issued a ringing and unprecedented endorsement of San Mateo County Supervisor Ruben Barrales’ campaign for state treasurer.” This endorsement came in a memo
Among numerous other things, the Regents are instrumental in selecting each of the nine chancellors as well as the President of the U.C. system. The affirmative action views of prospective Chancellors have served as litmus tests of their acceptability to a majority of the Regents.\textsuperscript{143} Political homogeneity in University governance has also brought a high degree of ethnic/racial homogeneity. Of the nine chancellors, seven are White (only two of whom are women), one is an African American male, and one is an Asian American male. Since the founding of the University of California in 1868, there has been only one Latino chancellor—Professor Tomás Rivera of the University of California, Riverside.\textsuperscript{144}

Similarly, the day-to-day implementation of the broad policies voted on by the Regents is entrusted to the highest ranking faculty members on each campus. The faculty who serve on the most powerful University committees\textsuperscript{145} are drawn primarily from the pool of full professors. Out of a total of 6,940 professors at all ranks at the University of California, there are 4,131 full professors. However, within the pool of full professors, there are eight ranks. The persons most likely to be tapped as members of the most powerful committees in the University are found among the highest ranking full professor ranks (steps five through eight).\textsuperscript{146} There are a total of 2,194 of these elite professors at the University of California, of whom 1,966 (90\%) are men, 228 (10\%) are women, 1,936 (88.2\%) are White, 155 (7.1\%) are Asian, 61 (2.7\%) are Hispanic, 37 (1.6\%) are Black, and 5 (0.2\%) are Native American.\textsuperscript{147}

These persistent skewed patterns of leadership imply several important things about the University’s ability to face the coming challenge of a multicultural state. First, they speak to the narrowness of experience within the University’s leadership ranks, a narrowness that can only compromise its capacity to deal with the diversity of the state’s broad constituencies. A public university led almost exclusively by White men will find it increasingly difficult to respond adequately to constituencies whose experiences, life circumstances, and educational perspectives are so radically different. To be sure, most of the University’s highest ranking full

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\textsuperscript{143} Chancellors Charles Young (UCLA) and Chang-Lin Tien (UCB) resigned shortly after SP1 and SP2 were passed. Both chancellors were very vocal opponents of the Regents’ decision. In fact, they held a press conference on October 20, 1996 to make a statement that Proposition 209 would have a “devastating effect on the university, as well as the state” and that “The passage of Proposition 209 will unquestionably alter the quality of the educational experience provided by our respective campuses by radically reducing the extraordinary diversity that we have managed to achieve.” Pamela Burdman, Tien Hopes to Bring Cal $1.1 Billion: Drive Is Biggest Ever for a Public University, S.F. CHRON., Sept. 20,1996, at A1. The press conference was held in a Pasadena hotel to avoid reprimands for violating the University of California’s official policies and to make it clear that the Chancellors were speaking as “citizen Young and citizen Tien,” as Governor Wilson’s spokesman Sean Walsh characterized it. The chancellors could not officially speak for the university. \textit{Id.}

\textsuperscript{144} Professor Rivera was Chancellor from 1979 to 1984 and died of a heart attack in Riverside, California at the age of 48.

\textsuperscript{145} Such committees include the Committee on Academic Personnel (CAP), that oversees all promotions and hires, and the Committee on Planning and Budget (CPB), that engages in campus planning for capital investments and suggests major academic initiatives. In addition to these standing committees, there are a wide variety of ad hoc committees that perform extremely important functions (e.g., chairing the searches for new chancellors, planning the direction of the university, and deciding large-scale allocation of resources for new programs and professional schools. \textit{THE MANUAL OF THE ACADEMIC SENATE, UNIVERSITY OF CALIFORNIA (1996).}

\textsuperscript{146} \textit{THE MANUAL OF THE ACADEMIC SENATE, UNIVERSITY OF CALIFORNIA (1996).}

\textsuperscript{147} \textit{OFFICE OF ACADEMIC ADVANCEMENT (1996).}
professors did not have the benefits of a multicultural education, one that would have prepared them to manage or easily respond the imminent demographic transformations that they will soon face. Regrettably, many (but certainly not all) of them have been slow to react to the challenges ahead. Instead of frankly (and painfully) examining the University’s narrow perspective on its role in a multicultural society, formulating curricular changes to address the demographic revolution about to occur, and vigorously promoting diversification within the professorial ranks that would ensure a fairer representation of the constituencies to which they will soon answer, they too have often simply denied the relevancy of California’s changing cultural landscape and refused to connect it to the mission of the university.

Second, the hierarchical nature of the governance of the University suppresses the voices below and minimizes the likelihood that decisions made at the very top can be effectively questioned. At the pinnacle of this hierarchy, of course, is the governor, who not only makes Regents’ appointments but can—if he so chooses—demand compliance with particular policies as quid pro quo for the privilege of sitting on the Board. Remarkably, the majority of the University of California faculty, all of the chancellors and vice-chancellors, and the University President opposed SP1 and SP2. But all of them have been called upon to implement the changes that these resolutions brought about. Those who refuse risk being fired.

The fate of Chancellor Chang-Lin Tien underscores the mandate to comply. Even as the highest ranking administrator from University’s flagship campus, Chancellor Tien was required to implement a policy that, by all accounts, he

148. A recent example for this lack of concern is the participation of only “55 UC Berkeley instructors—about 5 percent of the teaching staff” in the walkout held on October 22, 1998 to “focus attention on the declining enrollment of minority students in the wake of Proposition 209.” Protest at UC Over Decline in Racial Minorities, S.F. EXAMINER, Oct. 22, 1998, at A18.

149. Even though a substantial number of faculty have been very vocal about the negative effects of banning affirmative action in University admissions and hires, it is by no means an overwhelming majority who have been supportive and there is a substantial minority who are adamant about rescinding affirmative action. For a review of this controversy see Affirmative Action at Berkeley, THE AMERICAN PROSPECT (NO. 12), Winter 1993. Ironically, the private sector and both political parties have been more proactive in addressing the changing demographics in the state. For example, 1998 Democratic gubernatorial candidate Al Checchi bought ads on Spanish language television stations statewide. His wife, Kathy Checchi who took Spanish classes at Harvard, "was all over Spanish-language television" urging Latino voters to support her husband: "Hay alguien que se ha lanzado para gobernador, con un gran compromiso a la educacion... Su nombre ise Al Checchi." In English, the message is "There is someone who is running for governor, with a big commitment to education... His name is Al Checchi." Gunson & Lucas, supra note 142, at A11.

150. MAHARIDGE, supra note 73.

151. Rachel Moran summarizes this point: “In adopting the resolutions, the Regents disregarded the opposition of the President of the University, the Council of Chancellors, the Academic Council, and the Student Association. Despite calls by faculty, students, and staff to reconsider the abolition of affirmative action policies, the Regents to date have steadfastly refused to revisit the issues.” Rachel F. Moran, Unrepresented, 55 REPRESENTATIONS 139 (1996).

152. A top UC official, who requested anonymity, is quoted in a newspaper as saying that: “It doesn’t take a brain surgeon to realize that if you went out on a big limb, you’d get fired over it.” The official continued: “It’s a myth that you can truly speak out on your own behalf on something like this [affirmative action].” Pamela Burdman, Berkeley Chancellor to Oppose Prop 209; Tien, UCLA Chief Fear Harm to Schools, S.F. CHRON., Oct. 19, 1996, at A1. The threat of being fired was more direct in the case of University President Richard Atkinson who wanted to postpone the implementation of SP1 and SP2 until fall 1998, one year later than expected. As one newspaper reported, “Atkinson, who was appointed president in a unanimous vote by the board of regents only five months [earlier], could face a vote to fire him—although it is more likely the board will use the meeting to force Atkinson to change the implementing the changes.” Alex Barnum, UC President in Hot Water with Regents, S.F. CHRON., Jan. 27, 1996, at A15. They were successful.
It would have been easy to accept the end of affirmative action at the University of California as a bad decision by the board of regents and leave it at that, but UC Berkeley Chancellor Chang-Lin Tien is not one to acquiesce quietly. The public got a taste of the popular chancellor’s polite but fierce determination at the July 20 meeting in which the regents voted 14-10 to abolish university hiring and admissions policies that consider race. Firmly but respectfully, Tien, a strong advocate of affirmative action, addressed Governor Wilson directly, challenging the chief executive’s stance against policies that take ethnicity into account. That confrontation may have hurt Tien’s chances to be named the new UC president, but it held intact his well-earned reputation for valuing principle over expediency.156

Chancellor Tien announced his resignation on July 9, 1996, a year almost to the day after the passage of SP1 and SP2.157

The absence of diversity at the highest echelons of the University of California helps to make its current policies more palatable to those who set them. It seems unlikely that many of the Regents’ children (or the children of the highest ranking faculty, for that matter) have been educationally disadvantaged by the passage of SP1 and SP2. This distance may help to account for the passage of the measures themselves. The inability of decision makers to connect directly with the social and economic realities that make affirmative action so important and the absence of any sense of personal consequences that will flow from its elimination—indeed, the probable absence of deep personal or intimate relationships with anyone likely to be adversely affected by this turn of events—is part of what made the
process of dismantling it and ignoring the concepts on which it was founded so unproblematic and uncomplicated. In fact, Tom Sayles, one of only two African American U.C. Regents, was one of the very few who could make these direct connections when he voted against SP-1 and SP-2:

Today when I was preparing for this meeting, I was tempted to bring with me the two men in this world that I love the most, my 12 year old son and my 80 year old father. And that’s because thinking about the two of them solidified my decision to oppose the proposals put forth by my friend and colleague, Ward Connerly. Simply put, our current Affirmative Action Program gives me reason to believe that the life experiences of my son and other minority children like him, although undoubtedly touched by racism will involve opportunities for inclusion. On the other hand the current proposal, particularly SP-1, gives me great fear that [the experience of] my son and others like him will...[be] much or more akin [to that of] my father, where exclusion was the order of the day. In summary, I wish that I had the faith that some of my fellow Regents do, that we have come further. But we haven’t, and for those reasons I must oppose both proposals.\(^\text{158}\)

Thus, the lack of diversity among those who govern leads to a corresponding lack of appreciation for the day-to-day realities that their increasingly diverse constituencies must confront. Nowhere is this experiential ignorance greater than with respect to debates about the persistence of racism in contemporary American society. The Regents’ meeting on SP1 and SP2 contained a number of powerful statements about the continuing significance of race in the daily lives of those who testified, but those statements had little impact on persons whose life experiences had taught them little about prejudice. Again, Tom Sayles addressed precisely this point:

It seems to me though, that if you boil it right down to its essence the question that each of us, each Regent must now ask ourselves is, do we honestly and realistically believe that society and our university has progressed to the point that considering race and gender is no longer necessary? From my perspective, the answer is a resounding no. Despite a lot of the efforts of many, including many at this university, we have not progressed to the point where we can declare victory over racial exclusion. In fact, in my humble opinion, race and gender relations in our society are getting worse.\(^\text{159}\)

However, Sayles also knew that each regent’s views on so fundamental an issue would be based largely on personal experience:

I think how each of us answers this question is not going to be influenced by the reams of studies we’ve gotten from the university, not from the letters we’ve received from uh...disgruntled students, and not even from the wonderful

\(^\text{158. Transcript from UC Regents Meeting 1 (July 20, 1995) (Quoting Tom Sayles’ testimony to the Regents).}\)

\(^\text{159. Id.}\)
remarks we’ve heard today. Rather, it’s going to be based upon our experience, our life experience.160

And Sayles knew finally that others would regard his own apparent success—he acknowledged that although he’d been raised in South Central Los Angeles, he had been able to receive an education at Harvard and Stanford, become a successful lawyer who served in high levels of state government, and was a business executive in addition to being a U.C. Regent—as clear evidence of the fact that truly talented minorities would be untouched by racial stigma and could achieve on their own, without a policy that is premised on the putative existence of structural discrimination and inequality that transcends individual “merit.” So he dispelled the myth in the only effective way possible, through recounting personal experiences that the other Regents could only understand abstractly, at best:

... I can only tell you that despite the relative modest success I’ve had in my life, it does not insulate even me from racial insult and prejudices ... [T]his is a personal moment for me. I will tell you that a couple of weeks ago, I and my wife, and two children, and we were looking for a new home, and I was in a neighborhood that would be described as upscale, and I had my upscale car and my upscale clothes on. And I saw that the salesman approached me she was helping another couple she walked away and said, “I’ll be right with you Sir,” but she clearly ... we were clearly within earshot and what she said to the other Caucasian couple is: “This is a great neighborhood, whites and a few Asians live here.” It was so that I could hear that. So let me say to you that while these kind of experiences are on going in my life, and they are extraordinarily hurtful, I can handle myself. I am battle-hard and well-equipped to defend myself, but we cannot say the same thing for the young men and women seeking to gain entrance to our universities. They simply do not have sufficient armor to protect them from the haunting specter of exclusion.161

Political leaders with diverse experiences that match those of their constituencies are positioned to understand, reflect, and pursue the interests of those whom they serve, and to educate their colleagues about these issues in the process. The implementation of responsive, innovative policy is enhanced when political leaders have dealt with their constituents across class, gender, race and ethnic lines. And the impact of their diversity ripples through the political decisionmaking process and into the schools and universities as well.

A recent example comes to mind. Assembly Speaker Cruz Bustamante162 came to the small coastal town of Santa Cruz, California. He visited prominent, traditional, Democratic organizations, but also engaged in bipartisan efforts to

160. Id.

161. Id. Similarly, Reverend Jesse Jackson’s eloquent testimonial in front of the Regents highlighted the source of his race/ethnic, class, and gender consciousness as a direct product of his family background and the knowledge that there was still not a “level playing field.” His parents came from a working class background: “My father a janitor, third grade, veteran of World War II; my mother a maid, a cook, former ‘beautician, hard working, church-going people.” Id. at 14-15. But once he was allowed to get an education, or “level the playing field” he was able to compete in a presidential race against current Vice President Al Gore who attended Harvard and was the son of a former senator. Reverend Jackson felt this was the promise of affirmative action—to let former unequals compete once they were given the same opportunities.

162. Cruz Bustamante is the first Chicano to be elected Speaker of the Assembly in California history.
increase the number of registered Latino voters in the county. In turn, together with
the Democratic Central Committee, the local Latino Chamber of Commerce
sponsored 20 students from U.C. Santa Cruz, Cabrillo College and area high schools
to attend the fundraising event. As Francisco Serna, director of the Beach Flats
Community Center and a member of the Latino chamber stated: "'It's a good
opportunity for role-modeling... It's a space for youth to come in an area where
Latinos do not traditionally have a presence.'" Several of the students in
attendance echoed Francisco Serna's observation that the fact that Assembly
Speaker Bustamante is Latino gave them a connection that they otherwise would not
feel:

It was David Guzman's fist time to attend a political event. A
student at the Cesar Chavez School of Social Change, an
alternative high school with about 14 students, Guzman said he
knew little about politics or Bustamante. But he was eager to learn
. . . . The philosophy of the alternative school is to develop
community leaders instead of gang leaders. Guzman hoped
Bustamante's visit would help him get more involved with
community politics." 6

Bustamante's effectiveness as a political leader does not derive simply from
the fact that he is Latino or that he grew up in and represents the predominantly
Chicano area of Fresno. Instead, these experiences provide a reservoir of practical
knowledge on which to draw in recognizing the importance of involving previously
excluded communities in the mainstream political process, as well providing
creative insights about how to best go about it. Furthermore, his personal experience
with race-based exclusion provides him with credibility and a platform in the
community from which to preach the merits of inclusion. At the same time,
Bustamante's political success depends in large part on his ability to work
effectively with Democrats, Republicans, and many other constituencies that had to
coalesce around his election as speaker for the state assembly. 6
There are still far
too few examples in California of the existing political leadership having cultivated,
mentored or otherwise encouraged persons of diverse backgrounds to enter the
political arena to help address the implications of the state's changing demographics.
In addition, as Rachel Moran has correctly observed, despite the fact that
the sheer numbers of Latinos in the state ensures that they will be the group most
affected by SP1 and SP2, the debate over affirmative action is still framed largely in
terms of Black/White race relations. 6
Ironically, Latinos have been largely
marginalized and virtually silent in the SP1 and SP2 and Proposition 209 debates.
Although a full 70% of Latinos voted against Proposition 209, this was hardly

163. Robin Musitelli, Assembly Speaker Stops By, SANTA CRUZ SENTINEL, Dec. 12, 1997,
at A1.

164. Id.

165. The inclusionary approach the Democratic party has taken to win the Latino vote has not
been matched by Republicans. For example, consider, faux pas committed by Michael Schroeder, then
chairman of the California Republican Party and lawyer for Robert Doman, the Orange County
representative who insists he lost his re-election bid because of voting by illegal immigrants. A
newspaper quoted Schroeder at a political event in Napa as saying "immigrants who voted illegally in
Orange Country Congressional race last years [sic] were 'dumb.'" Gunnison & Lucas, supra note 142, at
A11. In fairness to Schroeder, he claimed he didn't say "immigrants" but individuals who voted
illegally were dumb.

166. Moran, supra note 151.
addressed in the media. The silencing of Latino voices in these public debates and the persistent exclusion of Latinos from positions of leadership will compromise California's smooth transition from a "multicultural state to a multicultural society"—that is, as we move from merely differences in numbers to cultural transformations.

CONCLUSION:
TWO SCENARIOS OF SOCIAL TRANSFORMATION—RACIAL/ETHNIC APARTHEID OR MULTICULTURALISM?

We conclude with two possible scenarios of social change—one optimistic and successful, the other grim and catastrophic—and consider their implications for higher education in California. We have relied on the approach taken by David Hayes-Bautista and his colleagues who, a decade ago, both began and ended their book, Burden of Support, with projections for worst and best case scenarios for California in the year 1995. Hayes-Bautista and his colleagues examined then-current trends across several sectors of California society, including employment and income, health, political participation, immigration, and culture. We focus more narrowly on their projections for education.

Under their worst case scenario, funding for public education in the state dwindled as the number of school-age White children declined dramatically and their parents opted to provide them with private school educations. At the same time, although Latino children became the majority of students in the K-12 system, speaking a language other than English was outlawed. Indeed, Spanish language radio and television stations were banned and all "non-American" holidays deemed "illegal." Government funding priorities shifted from education to programs that would provide more effectively for the predominantly White elderly. Unfortunately, the task of maintaining the White middle class lifestyle became increasingly difficult as greater numbers of them entered retirement age at the same time the dwindling numbers of productive workers in California were shrinking the available tax base. Indeed, in the face of these shifting funding priorities, several University of California campuses were closed for lack of public monies. There was an increased climate of hostility between Whites and citizens of Color, and White flight from the cities to the suburbs and rural areas intensified. Governing largely through referendum resulted in decreased opportunities for most non-white California residents and many predominantly Latino neighborhoods no longer had public utilities like paved roads, garbage pickups, and electricity.

Of course, their best case scenario reversed these harsh and disheartening trends and, under its terms, the state's economy blossomed. This more optimistic future was based on an inter-ethnic and inter-generational coalition of committed
leaders who had been prepared by a system of public education that proceeded mindful of the challenges that would be faced in the next century. In Hayes-Bautista and his colleagues’ words:

Thanks to the Affirmative Action programs of the 1970’s and 1980’s, there was a group of educators, physicians, dentists, attorneys, administrators, artists, scientists, clinical workers, researchers, planners, and businesspeople to give the state something that had been nearly totally lacking during the heyday of the Chicano movement in the 1960’s—a critical mass of well-educated Latinos with a good understanding of their relation to their communities and their state. Drawing upon the experience of the veterans and the bases of community organization laid down in the 1960’s and the 1970’s, these new Latino leaders were able to tap into a wellspring of symbolism and emotion that lurked just beneath the surface of many Latino communities. These leaders inspired Latino parents and youth to reach into themselves to strive for excellence and the highest levels of performance.75

The advantages extended to Latinos under this scenario produced corresponding opportunities for new generations of other groups to become involved in the creation of an equitable and prosperous society:

Meanwhile, the Anglo Baby Boomers found their political voice in leaders who were able to rekindle the generational enthusiasm that, 30 years earlier, had led to a decade of selfless public service in such organizations as the Peace Corps and VISTA… These two currents of interest—of the young Latinos and the aging Baby Boomers—converged in the development of a policy framework aimed at preserving the intergenerational compact through the development of an inter ethnic compact.76

Remarkably similar, modestly updated scenarios can be envisioned for public education in California in the wake of SP1 and SP2 and Proposition 209. Unfortunately, both scenarios seem equally plausible at this point in our history, and there are critical policy choices to be made. Indeed, there is an urgency to these choices, as two of the nation’s most prestigious public university systems—in California and Texas—have been drawn into the political firestorm surrounding these issues. At the University of Texas observers call the swift dismantling of affirmative action and its consequences the “Hopwood Effect,” named after a 1996 anti-affirmative action federal court decision.77 For the entering class of 1997 at the University of Texas law school, only “four blacks and 21 Mexican-Americans… said they plan[ned] to enroll . . . . [1996’s] entering class of 475 students included 31 blacks and 42 Hispanics.”78

75. Id. at 147-148.
76. Id.
77. On March 18, 1996 the Fifth Circuit Court of Appeals struck down an admissions policy at the University of Texas law school that gave preferences to Blacks and Hispanics. Hopwood v. Texas 78 F.3d 932 (5th Cir. 1996). The court ruled more broadly that public universities may not justify affirmative action programs based on the benefits of diversity.” See also Ken Chávez, California’s racial issues increasingly political ones, too, SACRAMENTO BEE, Oct. 26, 1997, at 265.
California has experienced a similar but as yet unnamed effect in professional school admissions. For example, at Boalt Hall Law School all 14 of its 1997 African American admittees declined to enroll there and the number of entering Latinos dropped from 28 in 1996 to 14; UCLA planned to enroll only 10 African-American and 41 Hispanic students (down from 19 and 45 in 1996). Many universities outside of the University of California system are setting their recruitment sights on the state's newly created "surplus" of minority talent. Out-of-state universities like Spelman College, Moorehouse College, and Xavier University and in-state private universities like Santa Clara and the University of Southern California are taking advantage of the dismantling of affirmative action policies and the corresponding fear of a hostile climate within the University of California by offering more hospitable and welcoming intellectual environments.

As the University of California's anti-affirmative action policies threaten to block increasing numbers of students from higher education, the California Department of Corrections appears prepared to take up the slack. As Jesse Jackson noted in his testimony against SP1 and SP2 to the Board of Regents:

The number one growth industry in America is jails. Half of all public housing built in the last ten years have been jails, a jail scholarship costs more than an academic scholarship. [Of] 1.3 million Americans in jails, six hundred thousand are Black. What is going on here? Eighty-five percent of all rural arrestees are white... 74% of all urban arrests are white, 55% of those in jail are Black. What is going on here?

True to Hayes-Bautista and his colleagues' predictions about increasing ethnic/racial frictions, there are new signs of open conflict and strife.
November 21, 1997, the Klu Klux Klan protested "exercising their First Amendment rights to protest immigrants, affirmative action and the lack of whites on the student council at California State University at Fresno." On November 29, 1997, five skinheads in Denver shouted racial epithets and beat up a Black woman shopping at a 7-11 convenience store. This attack came after three weeks of skinhead violence that, at its end, left a police officer dead, a skinhead dead by suicide, an African immigrant dead, and a Black woman paralyzed by a shot in the back. One of the attackers in this last incident said in television interviews that he shot the immigrant "because he was Black." On November 24, 1997 in Grand Junction, western Colorado's largest city, three White men shouted racial insults at a Black man and then attacked him with a baseball bat and a steel pipe. Professor Carl Raschke, a University of Denver faculty member who studies skinheads and other White supremacist groups believes that some of them are using Denver as a "test bed" for an urban guerrilla war because "[s]ome skinheads believe that white people are now a minority in the nation, that white people are oppressed and they have to fight for their own country."

The spread of ethnic and racial tensions is likely to increase as other states also begin to consider similar bans on affirmative action. In the most recent election held on November 4, 1998, the state of Washington passed Proposition 200 which parallels the ban on affirmative action as passed in Proposition 209 in California. The University of Michigan is currently fighting a legal challenge to their affirmative action policies in admissions and university hiring.

On the other hand, more hopeful trends and counteractive proposals that appear to have been generated by the contentious attack on affirmative action in California. For example, University of California Berkeley Professor Ron Takaki is sponsoring the California Equality Initiative to counteract the negative effects of Proposition 209. His initiative statement aptly summarizes the benefits that would stem from the kind of continued debate his proposition is likely to spark. These include increased minority voter registration and participation and the initiation of a


185. 5 Skinheads Arrested in Denver Hate Beating, S.F. CHRON., Nov. 29, 1997, at A3.

186. Id.

187. Id.

188. Id.

189. Id.

190. U.C. Regent Ward Connerly was instrumental in getting Proposition 200 passed in Washington state. He provided both "financial support and strategic assistance." Regent Connerly attended the "victory celebration in Seattle" and was reported to be "jubilant" when he declared that there were "two down [states] and 48 to go." He also predicted that the passage of 200 "sends a message to both the Democratic and Republican parties that this movement has legs." Reportedly, Regent Connerly's next anti-affirmative action target is Nebraska. Louis Freedberg, Connerly Exults at New Affirmative Action Ban. Initiative Wins in Washington state, S.F. CHRON., Nov. 6, 1998, at A3.

191. The same organization that spearheaded the Hopwood suit against the University of Michigan is suing the University of California. Peggy Walsh-Sarnecki, Peggy, Affirmative Action Lawsuits Similar in Texas, Michigan, DETROIT FREE PRESS, Oct. 31, 1997, at 2A.

192. The initiative reads: "In order to act affirmatively in promoting equality of opportunity, it shall be lawful for the state to consider race, gender, and (socioeconomic) class as one of the criteria in the selection of qualified individuals for university admissions, public employment, and public contracting." Pamela Burdman, UC professor Drafts Initiative to Kill Prop. 209, S.F. CHRON., Nov. 19, 1997, at A24.
debate over the nature and consequences of structural discrimination. Such a proposition could launch a thoughtful and probing inquiry into the meaning of merit and an analysis both of how current definitions of the concept privilege certain groups as well as how newer, fairer versions can be created and implemented. It also recognizes the connection between the principles of equality upon which the nation was founded and the practice of affirmative action on behalf of those groups from whom equality has been withheld. It would elevate the issue of affirmative action to the national political platform that presidential candidates and others would need to respond to directly in their campaigns.  

Attacks on affirmative action have also prompted an in-depth examination of the concept of "race" itself. In questioning the definition of race, "whiteness"—as a racial category and distinct concept—has been carefully and thoughtfully scrutinized for the first time in our nation's history. The value that the "property" of whiteness holds is beginning to be explicitly articulated. And, instead of setting whiteness as the unspoken standard to which all other ethnic/racial groups are compared, it is now being examined in much the same way as other ethnic/racial categories. The privileges to which whiteness provides entrée can now be named, questioned, and addressed.

However, perhaps the most important positive outgrowth of these debates has been the sensitization, mobilization, and active protest against the abolition of affirmative action, a movement joined by persons from diverse backgrounds and racial and ethnic groups. The attacks on affirmative action have begun to provoke a reformulation of key, inter-related issues and policies and to prompt many progressive scholars to question previously unexamined assumptions. It has provided many of providing them with an opportunity to openly affirm their commitment to social justice. Many administrative units in the university below the Board of Regents, including the council of chancellors, the council of vice-chancellors, and staff associations, have denounced the passage of SP1 and SP2. In fact, although we have discussed them as if they spoke with a single voice, it is
important to note that fully 10 of the 25 Regents have also denounced the
Resolutions that a narrow majority of their colleagues passed.

In the Jesse Jackson’s remarks to the Regents he expressed hope that the
diverse constituencies fighting over these issues could be made “better and never
bitter.” In an optimistic refrain that we share, he asked a higher power to:

... Lift us from racial battle ground, to common ground, and on to
higher ground. Soften hard hearts and dry up tear stain eyes, and
give us the strength to reason it through. That we might spare our
children, we might stabilize our families, we might make a great
nation greater. ...  

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His words remind us that the battle for affirmative action has been fiercely fought
because its principles are long-cherished by many who still believe in the promise of
a society built on inclusion and mutual respect. Yet, there are two dramatically
divergent scenarios laid out before us, separated largely by the depth of our nation’s
commitment to social justice and racial equality. We stand in a unique moment in
history, one in which a choice soon will have to be made.

198. Transcript from UC Regents Meeting 5 (July 20, 1995) (Testimony of Jesse Jackson).