Briefing Report for the Committee on Educational Policy

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Race, Sex and Disparate Impact:

Legal and Policy Considerations Regarding
University of California Admissions and Scholarships

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Table of Contents

I. Executive Summary and Policy Context

This report is intended to assist the Board of Regents and the broader University community in understanding federal disparate impact law. Disparate impact discrimination refers to race and sex-based differences in outcomes that may result from application of "neutral" policies notwithstanding the absence of intentional discrimination. This paper focuses primarily on the disparate impact provisions in the federal regulations enforcing Title VI of the Civil Rights Act (prohibiting race, ethnicity and national origin discrimination against e.g., applicants, students, and employees) and Title IX (prohibiting sex discrimination).

There is a three-part test for assessing disparate impact complaints. A violation of law may occur if:

1) There a significant disparity in the provision of a benefit or service that is based on race, national origin or sex; and
2) The practice at issue does not serve a substantial legitimate justification (i.e., is not educationally necessary); or
3) There is an alternative practice that is equally effective in meeting the institution's goals and results in lower disparities.

A legal inquiry into disparate impact requires probing the educational justification of a particular practice and the degree of fit between the University's educational objectives and the means employed to achieve its goals. In other words, the University's educational policy, as established by its administration and the Board of Regents, is a fundamental element of the disparate impact analysis. Disparate impact inquiries are both complex and fact-sensitive, so this report provides two case studies that highlight key issues.

From the Regent-led **Study Group on University Diversity** (Sept. 2007)
"The Regents, UC Office of the President and the Academic Senate … have an affirmative duty to be self-scrutinizing about policies and practices that may have an unwarranted disparate impact, and to proactively evaluate whether there are equally effective but less discriminatory alternatives that the University has yet to adopt."   *-Report of the Undergraduate Work Team*
"Both [the Diversity Statement] and the laws support UC's commitment to identifying and eliminating the barriers preventing the full participation of underrepresented minority students and scholars in higher education."   *-Report of the Graduate and Professional School Work Team*

II.   What is Disparate Impact?

Traditional notions of discrimination focus on differential treatment of a person or group that is based on a prohibited motive, such as race, national origin or sex. In contrast, disparate impact discrimination refers to differences in outcome among racial or ethnic groups that may result from application of "neutral" policies (neutral in the sense that they include no explicit racial or ethnic criteria) and that need not result from any discriminatory intent. For example, a qualification test may violate disparate impact standards if the pass rate among applicants from a particular ethnic group is significantly lower than for other groups, even if all applicants are required to take the same test and there is no evidence that the test was adopted for the purpose of disadvantaging any group.

Because the Equal Protection Clauses of the U.S. Constitution have been held to prohibit only intentional discrimination,[1] disparate impact discrimination is unlawful only if made so by statutes or regulations. Statutes and regulations that prohibit disparate impact typically do so by banning practices that have the "effect of" discriminating on some prohibited basis, and there are several such provisions in federal law.[2] The broadest of them (at least as applied to the University) stems from Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin.[3] Although Title VI itself prohibits only intentional discrimination,[4] agency regulations adopted to implement Title VI prohibit recipients from engaging in practices that have the "effect of" discriminating on the basis of race or ethnicity.[5] These regulations protect applicants, students, and employees from disparate impact discrimination.[6]

Regarding sex discrimination, the U.S. Department of Education regulations implementing Title IX of the Education Amendments of 1972 contains the same "effects" standard found in the Title VI regulations.[7] In addition, the regulations implementing Section 504 of the Rehabilitation Act of 1973 and Title II of the of the Americans with Disabilities Act of 1990 prohibit policies or practices that have a disparate impact based on disability.[8] Disability discrimination tends to raise different issues and require a different legal analysis than discrimination claims based on race and sex, so disability discrimination is not discussed further in this report.

Individuals may not enforce disparate impact claims under either Title VI or Title IX through private lawsuits.[9] However, disparate impact obligations can be enforced administratively through the Department of Education's Office for Civil Rights (OCR),[10] one of the federal agencies charged with ensuring that recipients of federal funding do not engage in discrimination. OCR investigations, known as compliance reviews, are prompted when there is sufficient information to suggest potential non-compliance, including information from third parties (e.g., individuals, advocacy organizations) submitting complaint letters to OCR.[11]
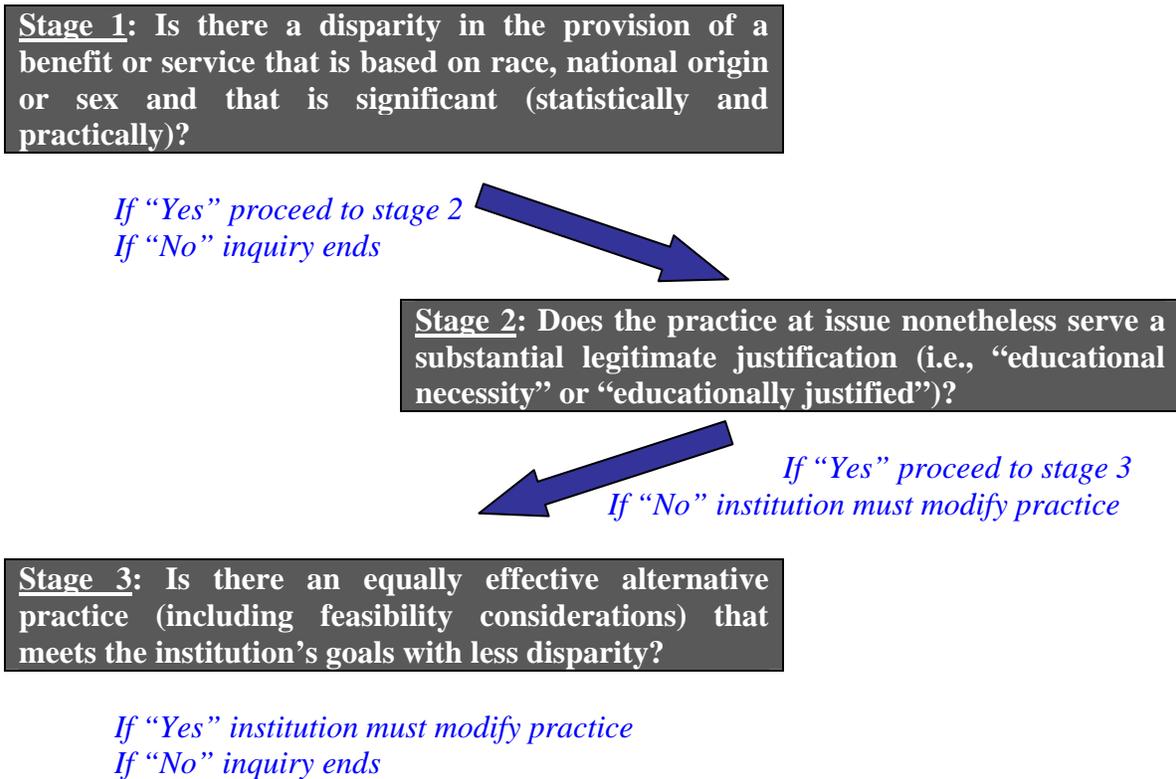
Title VII of the Civil Rights Act, which prohibits discrimination in employment, also prohibits disparate impact discrimination and, unlike Title VI and Title IX, may be

enforced through private lawsuits.[12]   As will be discussed below, somewhat different analysis applies to claims of disparate impact under these provisions.

III.   How Disparate Impact Analysis Works

It is important to understand that selection processes—be they for admitting students or hiring and promoting employees or faculty—do not violate disparate impact prohibitions merely because they result in a significant disparity in selection among different groups. Instead, establishing the existence of *prohibited* disparate impact requires application of a three-part analysis. The U.S. Supreme Court's most detailed treatment of this analysis occurred in the 1989 case, *Wards Cove Packing Co. v. Atonio.[13] Wards Cove* was seen as tightening the prevailing standards under which plaintiffs were required to prove disparate impact, and Congress legislatively modified some of those standards as applied to Title VII employment claims when it enacted the Civil Rights Act of 1991.

OCR applies a three-part test for assessing race, national origin and sex-based disparate impact complaints, and federal courts apply this same test in connection with Title VII. This burden-shifting framework is depicted below and each step is then described in greater detail.

> **Stage 1: Is there a disparity in the provision of a benefit or service that is based on race, national origin or sex and that is significant (statistically and practically)?**

If "Yes" proceed to stage 2
If "No" inquiry ends

> **Stage 2: Does the practice at issue nonetheless serve a substantial legitimate justification (i.e., "educational necessity" or "educationally justified")?**

If "Yes" proceed to stage 3
If "No" institution must modify practice

> **Stage 3: Is there an equally effective alternative practice (including feasibility considerations) that meets the institution's goals with less disparity?**

If "Yes" institution must modify practice
If "No" inquiry ends

A. The Existence of a Significant Disparity

The first step of the analysis requires that members of a racial, ethnic, or gender group claiming disparate impact discrimination demonstrate that a challenged practice results in significant disparities in the selection rates of qualified applicants from that group compared to applicants from other groups.[14] This requirement raises several issues, some of which can be quite difficult to resolve. First is how to define the universe of "qualified" applicants. For example, is the universe of "qualified" undergraduate applicants to the Berkeley campus limited to UC-eligible applicants, to some top echelon of UC-eligible applicants, or does it include applicants who are not UC-eligible? Does the universe of "qualified" applicants for a faculty position include anyone with a Ph.D. in the subject-matter, Ph.D.s only from certain programs, or is a Ph.D. even necessary?[15]

Second, *Wards Cove* required that a plaintiff challenging a selection process that includes multiple selection criteria, isolate and identify the specific practices responsible for any observed disparity.[16] The 1991 Civil Rights Act created an exception to this requirement in employment cases where the employer's practices are not capable of separation for analysis.[17]

Third, a plaintiff must demonstrate that the disparity in selection rates is "substantial" or "significant." There is no hard-and-fast rule regarding what level of disparity is necessary to meet this test. Certain federal regulations have created a guidepost known as the "80 percent" or "Four-Fifths" rule under which a significant disparity exists if the selection rate for any racial, ethnic or gender group is less than 80 percent of the rate of the highest group.[18] The Four-Fifths rule has been criticized on statistical grounds, and where there are large numbers of applicants, a lower disparity can be "significant." Accordingly, courts also employ statistical tests to assess disparate impact.[19] As Justice O'Connor put it, "Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation."[20] A final caution with statistical testing is that minor differences, when dealing with large samples, can reach statistical significance (which measures the probability that a statistical difference is not due to chance, but not the "importance" of that difference). For example, in an admissions or hiring situation with 5,000 male candidates and 5,000 female candidates a sex difference in selection rates of a single percentage point will reach statistical significance, but for purposes of disparate impact analysis, such a result might not pass muster in terms of *practical* significance.[21] For this and other reasons, careful attention is required when interpreting the results of significance tests.[22]

B. Educational or Business Justification

As discussed above, the existence of a significant disparity only begins the analysis. A practice that causes a substantial disparity is not unlawful if the practice can be justified by a business or educational "necessity."[23] In other words, if the challenged practice helps the defendant achieve legitimate business or educational goals, it is lawful even if it results in disparities. The term "necessity," although used by the courts, is a misnomer to

the extent it implies that the challenged practice must be "essential" or "indispensable" to accomplish the University's business or educational objectives. Instead, the standard is whether the challenged practice "serves in some significant way" or "bears a manifest relationship" to the University's legitimate goals.[24] As an example, courts have approved qualifying employment tests where employers were able to show that the test was predictive or significantly correlated with positive work performance.[25] Courts are likely to be quite deferential to the University's definition of its educational goals; they will likely be more searching in evaluating whether challenged practices actually advance those goals.

C.   Is There an Equally Effective Alternative that Lessens Disparities?

Even if the defendant is able to demonstrate a business or employment justification for a challenged practice, the plaintiff may nevertheless prevail if he or she can demonstrate that there is some alternate practice that can meet the defendant's goals equally well but with less disparate impact.[26] Factors such as cost and administrative burdens are relevant in determining whether an alternate practice is "equally effective."[27] Furthermore, the Supreme Court has recognized that courts have limited competence to restructure business practices and that they should proceed with care before mandating alternate practices[28] — a caution that should carry even more weight in the academic context where courts generally defer to professional educators.[29] Conversely, courts will likely defer to the University's own determination that an alternative meet its goals.

IV.   Case Studies

Section IV focuses on two case studies which illustrate examples of how the fact-sensitive and context-dependent three-part disparate impact test has been applied in practice:

1. A case where consideration of disparate impact was intertwined with the other policy strands of a decision to reevaluate a University program (i.e., discontinuing UC's partnership with the National Merit Scholarship Program);

2. A case where changes were made amidst a real OCR investigation initiated pursuant to a disparate impact complaint by civil rights groups (i.e., compliance review of the UC Berkeley School of Law in the late-1990s).

One difference between these case studies and a real OCR compliance review or disparate impact lawsuit is the level of detail and confidential student/employee data involved. When OCR conducts a compliance review of admissions it requests that the institution provide individual-level data on applicants, admits and enrollees, most likely for more than one admission cycle. The same is true of the discovery process in disparate impact litigation, such as the 1999 suit brought against UC Berkeley by California civil rights groups.[41] Not surprisingly, that process can involve a substantial commitment of resources and staff time, including carefully developed protocols to protect student

privacy interests. The case studies in this paper are intentionally based on publicly available information and summary statistics rather than individual, confidential student records.

**A)   Undergraduate Scholarships: UC Sponsorship of the National
Merit Scholarship Program**

i)   Historical Context: Chancellors Decide to End NMSP Sponsorship in 2005

The National Merit Scholarship Program (NMSP) provides college scholarships on the basis of NMSP's criteria for academic merit. The Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT) is jointly sponsored by the College Board and the National Merit Scholarship Corporation, and contains questions designed to be similar to those on the SAT. While other criteria come into play at the final selection stages, over 98% of high school juniors who take the PSAT are excluded from consideration in the NMSP based on test score cutoffs.[42]

In 2005, six UC campuses -- Davis, Irvine, UCLA, San Diego, Santa Barbara and Santa Cruz -- participated as funding partners in the NMSP.[43] In 2004-05, over 900 UC undergraduates were National Merit Finalists, receiving a total of $1.4 million in NMSP awards. UC funded 68% of these awards (e.g., $500-$1000 renewable scholarships regardless of financial need). Equity and validity concerns about the NMSP were first raised by former UC Associate President Patrick Hayashi, who was a College Board trustee at the time.[44] UC's Board of Admissions and Relations with Schools (BOARS) conducted a review of the NMSP in 2004-05, and by March of that year Michael Brown, then-Chair of BOARS, recommended that the appropriate agencies of the Academic Senate reconsider benefits afforded to NMSP recipients in areas such as recruitment and scholarships; BOARS' action was followed by a review and recommendation by the Educational Finance Model (EFM) Steering Committee.[45]

In June 2005 the Academic Council, the faculty's executive body led by then-Chair George Blumenthal, passed a resolution that the NMSP did not meet UC's definition of merit based on three findings: (1) there was an absence of validity evidence about the use of the PSAT in the NMSP; (2) the use of sharp cutoff scores was inconsistent with fundamental principles; and (3) NMSP selection procedures had an adverse impact on underrepresented and disadvantaged students.[46] In July 2005 the Chancellors collectively agreed that the campuses would no longer use UC funds to sponsor new NMSP awards, nor would the campuses use NMSP status in making admissions decisions or awarding any UC scholarships.[47] Instead, these funds were redirected to the support Regents and Chancellor's Scholarships.

Racial/ethnic data regarding NMSP recipients (2003-04) at UC were as follows:
- American Indian 3 (0.3%)
- African American 11 (1.0%)
- Chicano/Latino 23 (2.0%)

7

- Asian American/Pacific Islander 522 (45.3%)
- White 459 (39.8%)
- Other 11 (1.0%)
- Decline to State 124 (10.8%)

In summary, underrepresented minorities comprised 3.2% of NMSP award recipients within the UC system in 2003-04, compared to 19.4% of UC undergraduate scholarship recipients, 27% of Chancellor's Scholarships and 4.9% of the prestigious Regents Scholarships. Though not germane to racial disparate impact per se, an important consideration for EFM and the Academic Council was that NMSP recipients were far more likely to come from affluent backgrounds compared to Regents, Chancellor's and other UC scholarship recipients.[48]
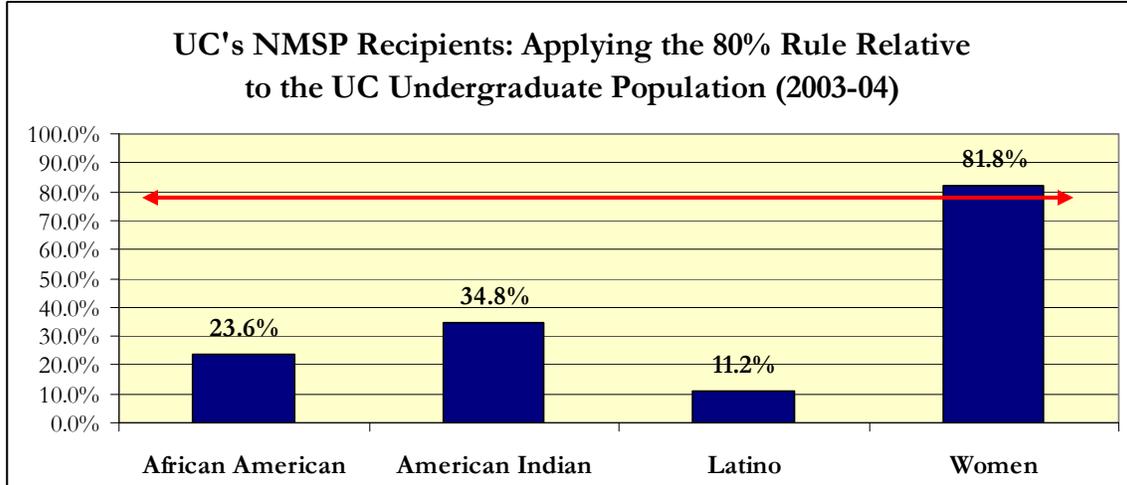
ii)   *Existence of a Significant Disparity?*

As noted in Section III, *Wards Cove* requires that a Title VII plaintiff isolate and identify the specific practices responsible for any observed disparity. The Title VI case law borrows heavily from the more-developed Title VII standards. This question is fairly straightforward in the instant case given the predominant role of the PSAT plays in selecting NMSP recipients.

The analysis of racial and sex disparities in this retrospective analysis is more formalized than what was considered by UC committees and decision makers.[49] Recall that among UC's NMSP recipients, American Indians were 0.3%, African Americans were 1.0%, and Chicanos/Latinos were 2.0%. In addition, there are some data limitations germane to the question of "qualified" recipients.[50] In *Ward's Cove*, the Court declared that in cases where the relevant "labor market statistics will be difficult if not impossible to ascertain" it is also probative to gauge the racial composition of "otherwise qualified applicants."[51]

Figure 1 displays disparity analysis using the Four-Fifths rule, with the overall undergraduate population as the baseline. In a real OCR investigation, the University would have justification for arguing that the undergraduate student body is too broad for purposes of determining "otherwise qualified" students.[52] Thus, Figure 1 is presented alongside Figures 2A and 2B, which display the percentage of underrepresented minorities, and women/men, respectively for the NMSP and two serviceable comparison pools for "otherwise qualified" students: (1) the pool of UC students receiving Regents and Chancellor's Scholarships; and (2) Californians ranking in the top 2% of their high school class in 2003.

Figure 1[53]

UC's NMSP Recipients: Applying the 80% Rule Relative to the UC Undergraduate Population (2003-04)

When the information in Figures 2A and 2B are analyzed using statistical tests (reported in the endnote), the greater adverse impact resulting on the NMSP in comparison to Regents/Chancellor's Scholarships reaches statistical significance for African Americans, Chicano/Latinos and women.[54]   Likewise, the greater adverse impact on the NMSP in comparison to ranking in the top two percent of one's high school class in California is statistically significant for Chicano/Latinos and women.
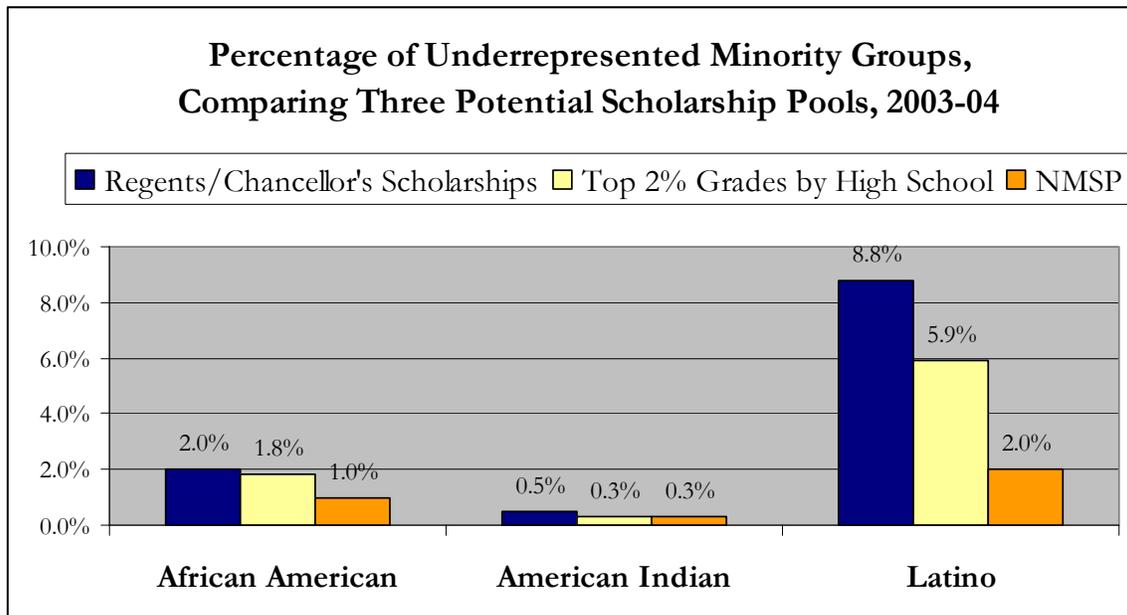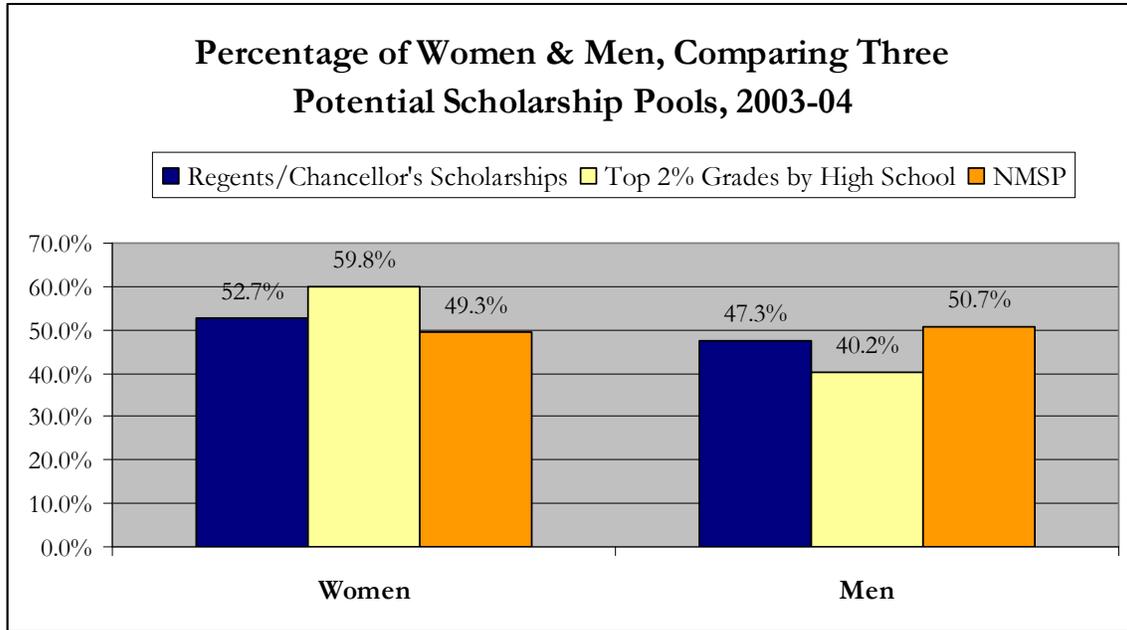
Figure 2A

Percentage of Underrepresented Minority Groups, Comparing Three Potential Scholarship Pools, 2003-04

9

Figure 2B

Percentage of Women & Men, Comparing Three Potential Scholarship Pools, 2003-04

■ Regents/Chancellor's Scholarships □ Top 2% Grades by High School ■ NMSP

Women: Regents/Chancellor's 52.7%, Top 2% Grades 59.8%, NMSP 49.3%
Men: Regents/Chancellor's 47.3%, Top 2% Grades 40.2%, NMSP 50.7%

(Y-axis: 0.0% to 70.0% in 10.0% increments; categories: Women, Men)

iii)   *Educational Justification*

As noted in Section III, OCR would likely be quite deferential to how the University defines its own legitimate educational goals. The EFM Steering Committee members generally agreed, for example, that the primary reason for continuing to participate in the NMSP is as an enrollment management or recruitment tool, including helping campuses to "boost their academic reputation."[56]   Yet UC policymakers (including EFM) determined that prestige was not the only institutional goal at stake. BOARS had requested that UC's continuing funding be reconsidered in light of the absence of educational validity evidence about how PSAT scores were being used, and this recommendation was embodied in the Academic Council's resolution.

In fact, when the UC Chancellors decided to no longer fund NMSP it was because they determined that continued co-sponsorship of NMSP awards conflicted with other institutional goals. As then-Provost Greenwood explained at the time, "This is an issue of ensuring that when the University uses its own resources to fund merit-based scholarships, it does so in a manner that is consistent with our own policies and principles with respect to undergraduate admissions."[57]

Thus, in this case UC ultimately defined its own legitimate educational goals in a manner that would make it relatively more difficult to justify the "educational necessity" of maintaining funding support for the NMSP. The National Merit Scholarship Corporation's primary stated goal in promoting the NMSP program is to "identify and honor exceptionally able U.S. high school students and encourage them to pursue

rigorous college studies."[58]   While UC's Academic Council and senior administrators also emphasized academic merit, the issue was how merit should be defined. It is noteworthy that UC could have decided to lessen its disparate impact legal risk if it had adopted the National Merit Scholarship's educational goals as its own (i.e., arguably lowering the bar for purposes of educational validity evidence regarding test score cut-offs) but that is not what the University chose to do; achieving consistency with its own admissions policies and principles was deemed to reflect an important institutional value.

> "Colleges and universities should review their uses of test scores in the admissions process, and, if necessary, take steps to eliminate misuses of scores. Specifically, institutions should avoid treating scores as more precise and accurate measures than they are and should not rely on them for fine distinctions among applicants."
>
> -National Research Council, *Myths and Tradeoffs: The Role of Tests in Undergraduate Admissions* p.25 (1999)

iv)   *Effective Alternatives with Lesser Disparities?*

As the comparison pools in Figures 2A and 2B indicate, there are other alternatives to the NMSP for defining merit in the context of academic scholarships. One of these alternatives, redirecting NMSP funds to the pool of Regents and Chancellor's Scholarships on the UC campuses, was in fact the policy change that the Chancellors adopted. The data in Figures 2A and 2B also strongly suggest that Regents and Chancellor's Scholarships are likely to result in greater opportunities for African Americans, Latinos and women relative to the NMSP, though data limitations (e.g., were the NMSP students who chose to enroll at UC somehow less diverse than NMSP recipients generally?) make it difficult to reach this conclusion definitively.

Another consideration relevant to the third prong of the disparate impact test is that redirecting UC funds from the NMSP to the Regents and Chancellor's Scholarships also accords with the University's stated goal of aligning its scholarship policies with UC admission policies and principles, since the selection process for Regents and Chancellor's Scholarships involve a more robust consideration of multiple sources of information about student achievement.

B)   Professional School Admissions: OCR Review of the UC Berkeley School of Law in 1997

i)   *Historical Context*

At UC graduate and professional schools, the Regents SP-1 resolution prohibiting affirmative action took effect with the 1997 entering class, whereas Proposition 209 (and SP-1 at the undergraduate level) took effect in 1998. In March 1997, soon after UC released admission results from the first post-affirmative action classes at UC professional schools, civil rights groups led by the Mexican American Legal Defense and

Educational Fund (MALDEF) filed a complaint letter with OCR charging that UC professional schools, and in particular the law schools, were utilizing admission criteria that had an unwarranted disparate impact against minority and women applicants.[60] By July, OCR announced they had found "sufficient information" to begin a compliance review covering underrepresented minorities at the UC Berkeley, UC Davis and UCLA Law Schools.[61]

Then, as now, the admission policies at the UC Berkeley, UC Davis and UCLA Law Schools were not identical. This case study focuses more narrowly on the UC Berkeley School of Law. Berkeley garnered nationwide media attention when it was announced that its 1997 entering class of 268 students included only one African American student.[62] The 1997 class also included zero American Indians, zero Filipinos and 14 Latinos.[63] Like many graduate and professional school programs at the University of California, the Berkeley School of Law was and is highly selective. Only one in five applicants were offered admission in 1997 (today the figure is closer to one in nine).

As described by then-Dean Herma Hill Kay, in the aftermath of its 1997 admission cycle, the faculty at the UC Berkeley School of Law approved the following changes for the 1998 admissions cycle:

> 1. We discontinued the use of a formula used to weigh GPAs from undergraduate institutions…
> 2. We enlarged the pool of applicants considered by the Admissions Committee…
> 3. In order to minimize over-reliance on the LSAT, we began reporting LSAT scores in bands to the Committee, a practice adopted by the Law School Admissions Service in reporting applicants' scores to us.
> 4. In order to focus readers more closely on individual achievements, we stopped grouping applicants' files in ranges labeled "A," "B," "C," or "D" according to Index Scores.
> 5. We paid special attention to applicants whose standardized test scores, such as the SAT, did not accurately predict their academic potential in college as measured by their GPA. If such an applicant also had a weak LSAT, but a strong GPA, we treated the LSAT as a weaker predictor.[64]

This is not to suggest these changes at the UC Berkeley School of Law would not have been initiated but for the fact that OCR was conducting a compliance review, as there were other developments occurring at the same time both internally at the Law School (faculty interest in rethinking admissions) and externally (e.g., media and legislative interest).

ii) *Existence of a Significant Disparity?*

From left to right, Figure 3 displays applicant, admit, and enrollment outcomes for 1997 applicants to the UC Berkeley School of Law. The right side of the middle column displays the extent to which those admission rate disparities are statistically significant for underrepresented minority groups. The earlier cautions about what constitutes a

reasonable pool of minimally "qualified" candidates holds with Figure 3 as well; the entire applicant pool is perhaps over-inclusive but is a serviceable starting point in the absence of individual applicant data.[65]

Figure 3[66]

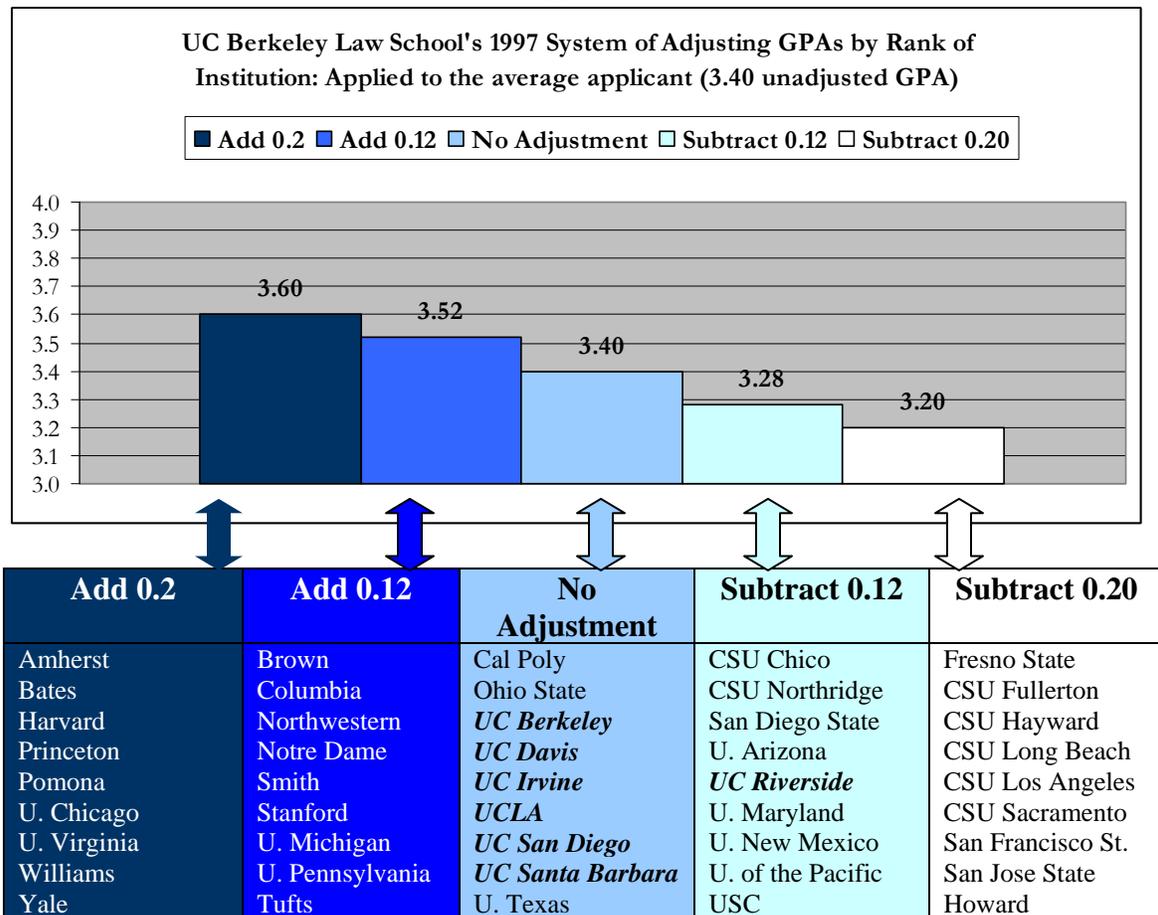| UC Berkeley School of Law, Fall 1997 Admission Outcomes				
	# Applicants	# Admission Offers (admission rate)	Z Score Statistics (relative to Whites)	# Enrolled (yield rate)
American Indian	28	2 (7%)	-1.836	0 (0%)
African American	252	15 (6%)	-5.870**	0 (0%)
Latino	307	38 (12%)	-3.729**	7 (18%)
Asian American/ Pacific Islander	489	113 (23%)	--	32 (28%)
White/Other	3,046	652 (21%)	--	204 (31%)
Total	4,122	860 (21%)	--	243 (28%)
*** Bright Yellow = Statistically Significant, p < 0.001* Note: Students admitted in 1996 and who **deferred entry to 1997 are excluded** because that was under the pre-SP-1 Admissions policy (i.e., including deferrals, the 1997 entering class had 268 students, including one African American and 14 Latinos). 1997 had an unusually high number of deferrals.				

One practice that was discontinued after 1997 and that may have contributed to disparate impact for underrepresented minorities at the Berkeley School of Law was the grouping of applicants' files in ranges labeled "A," "B," "C," or "D" according to the applicant's LSAT/GPA index Scores. For the entire 1997 applicant pool, 53.1% of those in the A-C ranges were offered admission (794 of 1,496), whereas only 2.5% of applicants in the D range were offered admission (66 of 2,655).[68] Among the non-underrepresented minority applicants, 59% of the pool was categorized in the D Range, but the percentage was much higher for applicants who were African American (96%), Chicano/Latino (87%), American Indian (89%) or Filipino American (88%).

Relatively small differences in an applicant's LSAT score on GPA could make the difference in whether a candidate fell on one side or the other of the boundary line separating the C and D categories. This boundary line was important because the Law School's admissions procedures directed that "a large percentage of the C-range files" were to be forwarded from the Admissions Office to the faculty-led Admissions Committee for further review, compared to "a much smaller percentage of D-range files."[69]

Another practice identified in the OCR complaint letter filed by MALDEF as contributing to disparate impact -- and which generated attention in Sacramento -- was that the Berkeley School of Law recalculated or "adjusted" each applicant's undergraduate grade-point average (GPA) based on a formula intended to reflect differences in "the quality of the student body and the grading patterns" at each college or university.[70] As Figure 4 indicates, applying this adjustment system to the typical applicant with a 3.40 GPA would result in the following:

- Boost the GPA to 3.60 for graduates of schools like Amherst, Princeton and Yale;
- Boost the GPA to 3.52 for graduates of schools like Northwestern, Stanford and Michigan;
- Maintain the GPA at 3.40 for six UC campuses and other schools like Cal Poly;
- Lower the GPA to 3.28 for graduates of schools like San Diego State, UC Riverside and USC;
- Lower the GPA to 3.20 for graduates of most of the California State University campuses and Howard University.

Figure 4

UC Berkeley Law School's 1997 System of Adjusting GPAs by Rank of Institution: Applied to the average applicant (3.40 unadjusted GPA)

■ Add 0.2 ■ Add 0.12 □ No Adjustment □ Subtract 0.12 □ Subtract 0.20

| 3.60 | 3.52 | 3.40 | 3.28 | 3.20 |

Add 0.2	Add 0.12	No Adjustment	Subtract 0.12	Subtract 0.20
Amherst	Brown	Cal Poly	CSU Chico	Fresno State
Bates	Columbia	Ohio State	CSU Northridge	CSU Fullerton
Harvard	Northwestern	*UC Berkeley*	San Diego State	CSU Hayward
Princeton	Notre Dame	*UC Davis*	U. Arizona	CSU Long Beach
Pomona	Smith	*UC Irvine*	*UC Riverside*	CSU Los Angeles
U. Chicago	Stanford	*UCLA*	U. Maryland	CSU Sacramento
U. Virginia	U. Michigan	*UC San Diego*	U. New Mexico	San Francisco St.
Williams	U. Pennsylvania	*UC Santa Barbara*	U. of the Pacific	San Jose State
Yale	Tufts	U. Texas	USC	Howard

Given that many Black and Latino students graduate from Ivy League institutions and then apply to law schools like Berkeley, there is a question of whether GPA adjustments resulted in a net disparate impact on underrepresented minority groups. Even individual applicant data – which is not used here – might not resolve that question definitively if the effect of certain admission practices is to chill the applicant pool.

However, some indirect evidence suggests a connection between disparate impact and GPA adjustments. In the 1997 national applicant pool to U.S. law schools, the feeder institution sending the highest number of African American applicants was Howard University, a historically black institution (Howard produced over 3.5 times more

applicants than Harvard, the highest-volume elite private institution).[71]   At the UC Berkeley School of Law an applicant in the middle of the pool from Howard would have had her GPA reduced by .20. Other historically black colleges and universities (e.g., Spelman, Morehouse) were not on the Law School's GPA adjustment list due to small samples, though these schools may have been informally treated in a manner consistent with the GPA adjustment system. While number of applicants from historically black colleges and universities to Boalt Hall in 1997 was small, the admission rate was 0% (0 of 25).[72]

The other institutions producing the highest number of black applicants nationally in 1997 were large public universities (e.g., UC Berkeley, Maryland, Michigan, UCLA, Virginia, North Carolina). While these institutions were classified as receiving "no adjustment," bear in mind the functional equivalence between (1) boosting GPAs at Ivy League institutions and not adjusting them at UC campuses and other public universities; or (2) not adjusting GPAs at Ivy League schools but downgrading the GPAs at leading public universities.

Second, regarding the numerous California State University (CSU) campuses at the other end spectrum on the Berkeley School of Law's GPA adjustment system, graduates of the CSU system at that time included a higher proportion of African Americans and Latinos than the UC system.[74] Excluding Cal Poly, which did not receive a GPA penalty, in 1997 all other CSUs had a combined admission rate to Boalt of 5.4% (8 of 147).[75]

Third, in their study for the Law School Admission Council using a national applicant pool, Rock and Evans found that overall GPA adjustments were "particularly troublesome in the case of minority applicants" because the "adjustment[s] would more likely be in a negative direction."[76]

iii)   *Educational Justification*

As noted in Part III, courts are generally more deferential regarding a university's definition of its educational goals, and more stringent in evaluating whether challenged practices actually advance those goals. A touchstone for this step in disparate impact analysis is Berkeley School of Law's faculty admission policy (adopted in 1996), which included the following provisions:

- "As a public institution, Boalt hall has a responsibility to educate lawyers who will serve the legal needs of all members of society. In light of this responsibility, Boalt Hall seeks to enroll students whose quality of mind and character suggest that they have the capacity to make a contribution to the learning environment of the Law School and to distinguish themselves in serving the needs of the public…
- In making admission decisions, the School gives substantial weight to numerical indicators [GPA and LSATs]. Yet numbers alone are not dispositive. The Law School considers other factors as well for all applicants…

- Boalt Hall seeks a student body with a broad set of interests, backgrounds, life experiences, and perspectives. Such diversity is important in a law school, which must train its graduates not only to analyze and interpret the law, but also to reflect on competing viewpoints, advance arguments persuasively in a variety of forums, and develop policies affecting a broad range of people…[77]

It would be difficult to argue that the Berkeley School of Law's admissions policy does not reflect legitimate educational goals. Rather, the question would be whether its admission practices support these goals.

One example of an area of potential vulnerability with respect to educational necessity was the Law School's system for adjusting undergraduate GPAs. Did GPA adjustments, which made it more difficult for graduates of CSU and Howard University to gain admission, improve the ability of the Law School to select an entering class with the "capacity to make a contribution?" Courts and OCR generally look at the relevant validity evidence and accepted professional norms when addressing such questions.

It would be relevant that over a span of many years, the Berkeley School of Law did not validate its particular GPA adjustment system as improving e.g., the prediction of first-year law school grades beyond the level already obtained with unadjusted grades and LSAT scores.[78] The Law School Admissions Council's published national studies of GPA adjustments in law school admissions would not have been particularly helpful in establishing the Law School's educational necessity because these studies were 15-20 years old in 1997, and generally reached discouraging results with respect to predictive validity.[79] Adjusting grades based on a LSAT scores constitutes a type of "test use," so the Law School's absence of validity studies also runs counter to the current *Joint Standards for Educational and Psychological Testing*, which recommends that test users "verify periodically that their interpretations of test data continue to be appropriate."[80]

Another example was the Law School's practice of grouping of applicants' files in "A," "B," "C," or "D" ranges and using these categories in ways that influence admissions outcomes, and there too the analysis of professional standards and validity evidence would be relevant. The Law School Admissions Council's source book on the LSAT specifically warned admissions personnel about not over-relying on index scores:

> [A]ny index formula, no matter how derived, is at best only a very rough way to order law school applicants and that extreme caution should be exercised so that those who evaluate applicants do not place undue emphasis on these estimates. This caution is especially relevant at those points on the index scales that are used to separate applicants into groups that will be treated differently in the admission process.[81]
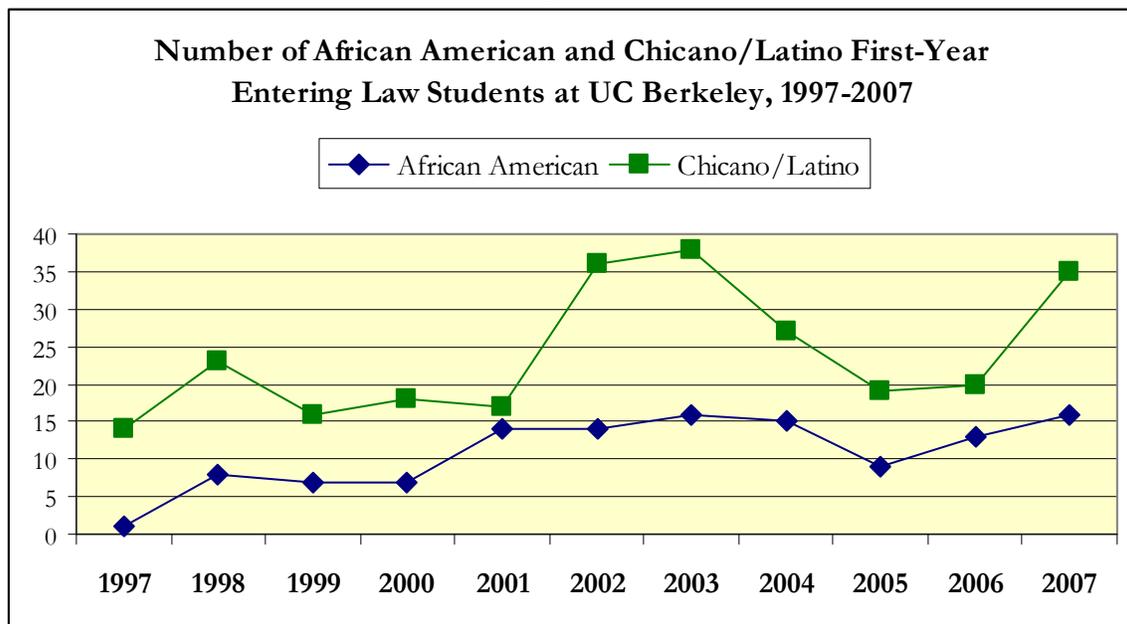
iv)   *Effective Alternatives with Lesser Disparities?*

While the analysis of less discriminatory alternatives can involve complicated issues such as cost and the fit with an institution's goals, in this particular case it is more important to emphasize the big picture with Figure 5. The fact that admission outcomes in years subsequent to 1997 yielded entering classes with a higher proportion of underrepresented minorities at the UC Berkeley School of Law is persuasive evidence that, in retrospect, there were less discriminatory alternatives in admissions capable of meeting the legitimate educational goals of the Law School.

Figure 5

Number of African American and Chicano/Latino First-Year Entering Law Students at UC Berkeley, 1997-2007

Endnotes

[1] *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

[2] California statutes and regulations include analogous disparate impact provisions. California Government Code section 11135 prohibits discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability in any program or activity that is conducted, operated, or administered by the state or a state agency. Regulations adopted under section 11135 prohibit use of "criteria or methods of administration that have the . . . effect of" discriminating on any prohibited basis—typical disparate impact language. 22 Code Cal. Regs. § 98101. In contrast to

federal Title VI regulations, the Government Code expressly provides that section 11135 and its implementing regulations may be enforced by a civil action for equitable relief. Cal Gov Code § 11139. There is little authority addressing the scope and applicability of these provisions, but it is likely that California Courts would rely heavily on federal precedents in evaluating disparate impact claims under section 11135.

[3] 42 U.S.C. § 2000d.

[4] *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

[5] E.g., 34 C.F.R. § 100.3(b)(2) (Dept. of Education).

[6] See *Alexander v. Choate*, 469 U.S. 287, 293 (U.S. 1985); *Alexander v. Sandoval, supra.*

[7] 34 C.F.R. §§ 106.21(b)(2), 106.36(b), 106.52.

[8] 34 C.F.R. § 104.4(b)(4)(i); 28 C.F.R. § 35.130(b)(3)(i).

[9] Sandoval, 532 U.S. at 275 (no private right of action to enforce Title VI disparate impact regulations); Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003) (Title VI disparate impact regulations do not create a private right of action that can be enforced indirectly via Section 1983); Barrett v. West Chester Univ., 2003 U.S. Dist. LEXIS 21095 (E.D. Pa. 2003) (no private right of action for Title IX disparate impact regulations).

[10] Memorandum from the Attorney General for Heads of Departments and Agencies that Provide Federal Financial Assistance, Use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964 (July 14, 1994).

[11] By one former OCR employee's estimate, in the Clinton-Bush era (1993-2003) about one-quarter of OCR's overall caseload involves post-secondary institutions, including one-quarter of its Title VI complaints. Mica Pollock, *Keeping On Keeping On: OCR and Complaints of Racial Discrimination 50 Years After* Brown, 107 TEACHERS COLLEGE RECORD, 2106, 2135 n.3 (2005).

[12] See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[13] 490 U.S. 642 (1989).

[14]*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Wards Cove*, 490 U.S. at 651-52; *Association of Mexican-American Educators v. California*, 231 F.3d 572, 584 (9th Cir. 2000). For simplicity, this report refers to "applicants," but the same analysis would apply to disparate impact challenges to other types of selection procedures, including, for example, promotion, graduation, or grade distribution.

[15] Because resolving the question of the appropriate universe of "qualified" candidates/recipients is complicated and can consume substantial administrative and legal resources in the course of litigation or an OCR investigation, it is not realistic (or responsible) for the case studies in Section IV of this briefing report to be thought of as providing definitive answers about the relevant comparison pools in the areas of scholarships and admissions. Rather, the approach of this report is to provide Regents with relevant information and some realistic parameters about disparate impact considerations.

[16] *Wards Cove*, 490 U.S. at 656-57.

[17] 42 U.S.C. § 2000e-2(k)(B)(i).

[18] For example, if the admission rate for group A was 20% and the admission rate for group B was 50%, there would be a significant disparity under this rule of thumb since $20/50 = 40\%$ (less than 80%). 29 C.F.R. § 1607.4(D).

[19] *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 n.3 (1988) (O'Connor, J., plurality opinion).

[20] *Watson*, 487 U.S. at 994-95.

[21] David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FEDERAL JUDICIAL COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 123 (2nd ed., 2000), *available at* http://www.fjc.gov/library/fjc_catalog.nsf ("This difference might not be enough to make a case of disparate impact, but by including enough men and women in the sample, the data could be made to have an impressively small *p*-value. This *p*-value would confirm that the 5,000 men and 5,000 women have different pass rates, but it would not show the difference is substantial. In short, the *p*-value does not measure the strength or importance of an association.").

[22] Joseph L. Gastwirth, *Employment Discrimination: A Statistician's Look at Analysis of Disparate Impact Claims*, 11 LAW & INEQUALITY 151, 154 (1992).

[23] Another distinction between the analysis required by the Supreme Court in *Wards Cove* and the analysis applicable in the employment arena under the 1991 Civil Rights Act has to do with who has the burden of proof on the issue of educational or business justification. The *Wards Cove* court held that while the

defendant has the initial burden to come forward with evidence of justification, the ultimate burden of proving a lack of justification is on the plaintiff. The 1991 Act placed the burden of proof on the employer. See, e.g., *Wards Cove*, 490 U.S. at 659; *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984)

[24] See *Wards Cove*, 490 U.S. at 659; *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1427 (9th Cir. 1985), *cert denied* 475 U.S. 1109 (1986); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1278-79 (9th Cir. 1981).

[25] Association of Mexican-American Educators, 231 F.3d at 585; Clady, 770 F.2d at 1430.

[26] *Wards Cove*, 490 U.S. at 661.

[27] *Id.*

[28] *Id.*

[29] See, e.g., *Regents of Univ. of Michigan v. Ewing* (1985) 474 U.S. 214, 225 ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.")

[41] *Rios v. Regents of the Univ. of California* (Feb. 1999, N.D. Cal., Compl. No. 99-0525); *See also* Evelyn Nieves, *Civil Rights Groups Suing Berkeley Over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A11.

[42] The NMSP selection process begins with a nationwide PSAT score cutoff typically set at about the 96th percentile, reducing a national pool of 1.3 million juniors taking PSAT down to 50,000 students (and 6,400 Californians) that qualified for recognition in the NMSP. A second PSAT cutoff, which varies by state, is used to reduce the pool to 16,000 who qualify as Semifinalists (including about 1,900 Californians). Of the Semifinalists, about 15,000 of 16,000 advance to finalist standing based upon the students' scholarship application, SAT cutoff scores (to confirm their PSAT scores), high school grades, and other criteria. Finally, about 8,200 of the 15,000 Finalists are given Merit Scholarship awards based upon the strength of their academic records and information in their recommendation letter and essay. National Merit Scholarship Corporation, Guide to the National Merit Scholarship Program pp.11-12 (Sept. 2003); National Merit Scholarship Corporation, Annual Report for 2003-04 (Oct. 2004). The second PSAT/NMSQT cutoff score that varies by state, and is based on a population formula (e.g., California cutoff of 216, Michigan 209, Nevada 204).

[43] Berkeley discontinued new NMSP awards in 2002-03 and was winding down its ongoing commitment to NMSP recipients who entered prior to that year. Merced did not participate and Riverside might best be described as a quasi-sponsor of NMSP. UC Riverside provided scholarship awards to its students who were NMSP recipients but because this number had been low in recent years (e.g., 1 or 2), it was below NMSC's threshold number required for a contractual partnership, paying NMSC overhead, etc.
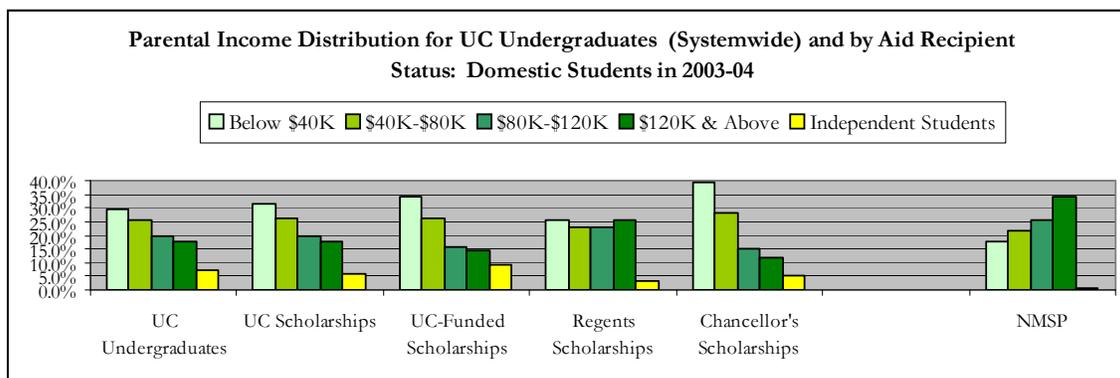
[44] Open Letter from Patrick Hayashi to Trustees of the College Board, Oct. 27, 2004 (detailing a number of unresolved policy and transparency concerns, including the low representation of African Americans, American Indians, and Latinos among NMSP recipients).

[45] The EFM Steering Committee was ultimately split on issuing a recommendation, with about half wanting to strongly recommend against participation. The other half of the Committee, while sharing these concerns to some degree, expressing reluctance against such a recommendation in light of the purview of EFM and the principle of campus autonomy over recruitment-focused scholarship programs. University of California, Participation in the National Merit Scholarship Program: A Report from the Education Financing Model Steering Committee (May 2005).

[46] UC Academic Council, Resolution of the Failure of the National Merit Scholarship Program to Meet the Requirements of UC's Definition of Merit (June 2005), *available at* http://www.universityofcalifornia.edu/senate/reports/nmsp.resolution.0605.pdf.

[47] University of California, Press Release: Six UC Campuses to Redirect National Merit Funding to Other Merit-based Scholarships, July 13, 2005.

[48] As summarized in the chart below, 59.7% of NMSP recipients came from families with parental income in either the $80,000-$120,000 or $120,000+ categories, compared to 48.4% of those receiving Regents Scholarships, 30.5% of all UC-funded undergraduate scholarships and 26.7% of those receiving Chancellor's Scholarships.

Parental Income Distribution for UC Undergraduates (Systemwide) and by Aid Recipient Status: Domestic Students in 2003-04

Below $40K | $40K-$80K | $80K-$120K | $120K & Above | Independent Students

UC Undergraduates · UC Scholarships · UC-Funded Scholarships · Regents Scholarships · Chancellor's Scholarships · NMSP

[49] For example, UC did not conduct a formal analysis of sex impact, though BOARS included within its review an OCR expert report addressing claims of sex discrimination and BOARS was aware that prior to the College Board reaching a settlement in 1996 that instituted changes to the PSAT the next year (adding a multiple choice writing section), nationwide about 60% of NMSP recipients were young men and 40% were young women. *See* Memorandum from Walter M. Haney to Office for Civil Rights Regional Counsel Steven Pereira Regarding the Validity of the PSAT/NMSQT, Case No. 02-94-2048 (Oct. 1996); Michael Winerip, *Merit Scholarship Program Faces Sex Bias Complaint,* NEW YORK TIMES, Feb. 16, 1994; Karen W. Arenson, *College Board Revises Test to Improve Chances for Girls*, NEW YORK TIMES, Oct. 2, 1996.

[50] First, as noted by former Associate President Hayashi, BOARS and EFM, neither the National Merit Scholarship Corporation nor the College Board would (or could) provide data on the racial/ethnic distribution of NSMP recipients (nationally or for California) notwithstanding the fact that racial/ethnic information is collected when students take the PSAT. *See* Patrick Hayashi, The Merits of the National Merit Scholars Program: Questions and Concerns (March 2005), UC Berkeley Center for Studies in Higher Education Working Paper 6-05, http://cshe.berkeley.edu/publications/papers/papers/ROP.Hayashi.6.05.pdf; Letter from Michael Brown to Eric J. Smith, Nov. 16, 2004.

Second, missing data is noteworthy because of the potential confounder effect stemming from the fact that some competitor institutions (e.g., USC) offer larger financial packages to NMSP recipients. Though we believe it is unlikely, if it were the case that the proportion of underrepresented minorities among California NMSPs were somehow significantly higher than among the NMSP pool enrolled at UC, and if URM students are more likely to be enticed by a larger financial aid offer due to lower average socioeconomic status, then looking at UC's NMSP pool in isolation could overstate adverse impact.

Third, a related point is that UC decision makers looked at data on the composition of recipients of Regents Scholarships, Chancellor's Scholarships, etc., but these pools could be either over- or under-inclusive relative to those *offered* such scholarships by UC if there were significant racial differences in yield rates for admitted students offered scholarships. Data was not kept by many UC campuses on scholarships offered, preventing a more refined analysis. On this point, underrepresented minority admitted freshmen (particularly African Americans) are less likely to matriculate in the UC system, including among those in the top 1/3 of the applicant pool. *See* Susan Wilbur, College Destinations for University of California Fall 2005 Freshman Admits at tbls. 1-3 (Oct. 2006), paper presented at the UC Berkeley School of Law conference on Proposition 209; Saul Geiser & Kyra Caspary, *"No Show" Study: College Destinations of University of California Applicants and Admits Who Do Not Enroll, 1997-2002*, 19 EDUCATIONAL POLICY 396 (2005).

[51] Wards Cove, 490 U.S. at 651.

[52] It is not uncommon in higher education test score cutoff disparate impact cases for courts to find flaws in both the plaintiff's preferred pool (i.e., over-inclusive) as well as the defendant's preferred pool (i.e., under-inclusive) and then rule that the correct pool lay somewhere in between. *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1526-29 (M.D. Ala. 1991) (use of ACT cutoff scores in admission to teacher training program); *Cureton v. NCAA*, 37 F.Supp. 2d 687, 697-700 (E.D. Pa. 1999) (use of SAT/GPA index score requirements in establishing athletic eligibility at NCAA Division I institutions) *rev'd on other grounds*, 198 F.3d 107, 118 (3d Cir. 1999) (the NCAA is not subject to Title VI).

[53] The UC undergraduate population in 2003-04 included 5,024 African Americans, 973 American Indians, 22,261 Chicanos/Latinos, 58,583 Asian Americans/Pacific Islanders and 59,401 Whites. Asian Americans

are the comparison group here because they had the highest rate of receiving NMSPs relative to UC's undergraduate population. The number of NMSP recipients for these groups were 11, 3, 23, 522 and 459, respectively. As an example of how the Four-Fifths Rule cells were calculated, 0.21% of African American students at UC received NMSPs (11/5024), while 0.89% of AAPIs received NMSPs (522/58,583), so dividing the rate for African Americans by that of the group with the highest rate (.21/.89) = 23.6%.

[54] Figures 2A and 2B, when translated into statistical significance testing, yield the following results:

Statistical Disparity Analysis of UC's NMSP Recipients in Relation to Two Comparison Pools (2003-04)		
	Sample of Top 2% (by GPA within CA High School) Graduates in 2003	Regents' and Chancellor's Scholarship Programs (combined)
African American	7/388 (1.8% of total)	60/3045 (2.0% of total)
Z Score Test	-1.348	-2.280*
American Indian	1/388 (0.3% of total)	14/3045 (0.5% of total)
Z Score Test	0.008	-0.908
Chicano-Latino	23/388 (5.9% of total)	268/3045 (8.8% of total)
Z Score Test	-3.938**	-7.750**
Women	232/388 (59.8% of total)	1,632/3095 (52.7% of total)
Z Score Test	-3.577**	-1.987*
Light Yellow = Statistically Significant, p < 0.05		
** Bright Yellow = Statistically Significant, p < 0.001		
Domestic students only. In the right column race and sex totals (3045 v. 3095) are not identical due to slight differences in missing data.		

The number in the column for the top 2% of high school graduates are small because they are derived from a representative sample of California public high school graduates in 2003 (i.e., 18,660 of 335,658 public high school graduates).

[56] Report from the Education Financing Model Steering Committee, *supra* note 45, at 9.

[57] UCOP Press Release, Six UC Campuses to Redirect National Merit Funding to Other Merit-Based Scholarships, July 13, 2005.

[58] Guide to the National Merit Scholarship Program, *supra* note 42, at 1.

[60] Peter Schmidt, *New Graduate-Admissions Policy at U. of Cal. Is Called Biased,* CHRONICLE OF HIGHER EDUCATION, March 28, 1997.

[61] Douglas Lederman, *Education Dept. Investigates Admissions at U. of Cal. Law Schools*, CHRONICLE OF HIGHER EDUCATION, July 25, 1997.

[62] See e.g., Peter Applebaum, *Minority Law School Enrollment Plunges in California and Texas*, New York Times, June 28, 1997; *Berkeley Law School to Enroll Only 1 Black First-Year Student*, CHRONICLE OF HIGHER EDUCATION, July 11, 1997; John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AMERICAN LAWYER, November 1997, at 4.

[63] The University of California at Berkeley School of Law (Boalt Hall), 1997 Annual Admissions Report (1997).

[64] Herma Hill Kay, *The Challenge to Diversity in Legal Education,* 34 INDIANA LAW REV. 55, 74-75 (2000).

[65] *See e.g.*, Preston Green, III, *Can Title VI Prevent Law Schools from Adopting Admissions Practices that Discriminate Against African-Americans*?, 24 SOUTHERN U. LAW REV. 237, 251-55 (1997) (discussing law school pool issues).

[66] Boalt 1997 Annual Admissions Report, *supra* note 63, at 4. The Z-score statistics in Figure 3 are reported relative to Whites because of the larger sample and because the White and Asian American/Pacific Islander admission rates were similar (21%, 23%). If Asian Americans/Pacific Islanders are used as the comparison group, the results for African Americans and Latinos remain significant and the results for American Indians would then reach statistical significance.

[68] Boalt 1997 Annual Admissions Report, *supra* note 63, at Table II.

[69] *Id*. at Appendix B, page 2.

[70] *Id*. (explaining that the Law School's GPA adjustments were derived by averaging the percentiles of the average LSAT for all test-takers from each school and that of a student from that school with a 3.6 GPA); *see also* Melanie Havens, *'Adjusting' for Fairness in Admissions Practices -- Measure Passed by State Legislature Requires UC, CSU Campuses to Disclose How Grade Point Averages are Figured in the Process*, LOS ANGELES TIMES, Sept. 20, 1998 (describing SB 1752, legislation responding to concerns about GPA adjustments at UC professional schools).

[71] *The Leading Undergraduate "Feeder Schools" for Black and White Law School Applicants*. 41 JOURNAL OF BLACKS IN HIGHER EDUCATION 85 (Winter 1999/2000). Howard had 208 Black applicants, Harvard had 58.

[72] Boalt 1997 Annual Admissions Report, *supra* note 63, at Table V.

[74] Among 1997 bachelor degree recipients (i.e., a broadly defined pool of potential law school applicants,) African Americans were 3.3% in the UC system and 4.8% in the CSU system; Latinos were 12.3% at UC and 15.4% at CSU California Postsecondary Education Commission, Custom Data Report (March 2008), *available at* http://www.cpec.ca.gov/OnLineData/GenerateReport.ASP.

[75] Boalt 1997 Annual Admissions Report, *supra* note 63, at Table V.

[76] Donald A. Rock & Franklin R. Evans, *The Effectiveness of Several Grade Adjustment Methods for Predicting Law School Performance*, in LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME IV, 1978-1983, pp. 363, 444 (1984).

[77] Boalt 1997 Annual Admissions Report, *supra* note 63, at Appendix B.

[78] *See e.g.,* Robert Cole et al., Report of an Ad Hoc Task Force on Diversity in Admissions: a Report to the Dean and the Admissions Committee 31 (Oct. 14, 1997) (unpublished report, on file with UC Berkeley Boalt Hall Law Library) (discussing predictive validity evidence); Malcolm M. Feeley et al., Report of the Boalt Hall Redefining Merit Committee 11 (Unpublished Faculty Report, 1998). The annual validity studies from the Law School Admission Council reported results from combining unadjusted GPAs and LSATs, and Boalt Hall did not conduct its own homegrown study of the incremental validity gains associated with GPA adjustments.

[79] *See* Rock & Evans, *supra* note 76, at 444 ("The relatively modest and unstable validity gains observed here, as well as the desirability to treat all law school applicants fairly and equitably, argue against the use of these types of grade adjustment techniques in the calculation of prediction indices."); Robert F. Boldt, *Efficacy of Undergraduate Grade Adjustment for Improving the Prediction of Law School Grades,* in LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME III, 1975-1977 (1978) (GPA adjustments were about as effective as not using them, and were often worse than no adjustments); W.B. Schrader & Barbara Pitcher, *Effect of Differences in College Grading Standards on the Prediction of Law School Grades,* in LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME II, 1970-1974 433 (1976). Rock and Evans' study was the most recent national study on GPA adjustments; this line of research was abandoned by LSAC.

[80] AM. EDUC. RESEARCH ASS'N ET AL., JOINT STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 117 (1999) (Standard 11.16). The 1985 version of the *Joint Standards* also mentions periodic validation.

[81] LAW SCHOOL ADMISSION COUNCIL, THE LAW SCHOOL ADMISSION TEST: SOURCES, CONTENTS, USES, 18 (1991).