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CALIFORNIA AFTER RACIAL PREFERENCES¹

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ABSTRACT

This paper provides comments on William Bowen and Derek Bok's book, *The Shape of the River*, and the issue of racial and ethnic preferences in California higher education.

Introduction

In his 1995 opinion in *Mill v. Johnson*, Supreme Court Justice Anthony Kennedy observed that "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." William G. Bowen and Derek Bok place themselves squarely against that principle, as they try, in their book, *The Shape of the River*, to justify admitting students to colleges and universities, both public and private, on the basis of their membership in a racial or national class.

The book, as I think the authors would agree, is as much a lawyer's brief aimed at future decisions on "affirmative action" as it is a piece of social-science research. That is a perfectly legitimate use of social science, especially since, as in the case of Bowen and Bok's book, the advocacy role is not hidden. But it does complicate the work of a critical reading because it does not make clear its assumptions nor draw attention to negative evidence. Therefore, in this article I can do no more than draw attention to some of the unexamined assumptions on which the analysis is built, and then consider some of the unintended and often undesired consequences of the patterns of race preference which it defends. In a sense, I will attempt to assess some of

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the (mostly non-money) costs of these policies, which might allow us to better assess race preferences as a public policy for higher education.

My first impression on reading the book was how parochial a volume it is, how clearly it reveals its origins east of the Hudson. There are problems associated with race in America, some of them linked to the academic preparation and performance of black Americans taken as a group, which affects their distribution among our 3700 colleges and universities. This book does not address that issue; it takes more or less as given the number of black high school graduates who are motivated and prepared for college at various levels, and then argues that elite institutions should be able to take their color into account in their admissions policies. But it slowly dawned on me that, apart from its Constitutional implications with their far-reaching consequences, this really is a tempest in a teapot. The book is elaborately concerned with the distribution of a small number of able and talented black students among a small number of very selective colleges and universities – and by no means all of them. The students it is concerned with are all going to a college or university somewhere, almost certainly to some pretty good college or university, with or without their help, and make their contribution to society in a variety of ways that will owe more to their own talents, energies and unique qualities than it does to the particular institution which they attended. This may be heretical to presidents and former presidents of elite eastern research universities, but perhaps not so heretical on the West Coast, where we are a shade less concerned with the marginal advantage of the status attached to being a graduate of Yale or Princeton, and rather more concerned with what efforts and energies a student is putting into his studies, and with what success she is discovering where her peculiar genius lies.

Indeed, I find the book mildly embarrassing in its intense focus on the ability of a small group of elite universities to cream off a disproportionate number of academically able black students, and then to demonstrate that the students thus preferred are advantaged thereby, that they make friends with people of other races, do not resent their having been preferred, and do very well occupationally and financially after graduation. One could stipulate all of this, in lawyerly language, and not be persuaded that those benefits to a handful of preferred students do not have large and costly consequences for higher education generally and for the society as a whole. Very briefly put, my sense is that the book has less concern for the stock of well educated black people in our population, or the welfare of the society in which those people take their place, than in their own institutional pride, and in the trophy minority students they can enroll in a fierce competition for the status attached in some circles to the numbers and percentages of students in preferred categories they can enroll. And in all of this, inevitably, whatever disclaimers they make, they must suggest that black students who do not go to their most selective institutions, or would not go under a race neutral regime, would be greatly disadvantaged thereby.

They do not make that case, and I don't believe it for a second. Nowhere can they demonstrate, in their piles of survey data, that a black student who is admitted on his/her own merits to UC Riverside, or indeed to CSU San Diego, is significantly disadvantaged in relation to an affirmative action admit to Princeton or Harvard. More important, it does not persuade me that black citizens generally or the country are injured thereby. The notion that you have to go to one of these most selective universities to fulfill your potential and become a leader in American life, is a survival of an elitist conception of American life that does not recognize how widely dispersed power and influence are, how diverse the origins of our institutional leaders. I accept that graduation from one of these selective institutions gives graduates advantages through their networking and their reputation as elite universities. That kind of advantage is built into the status system of the society and its universities, and minorities who are admitted to those institutions have as much right to that advantage as anybody else. But it is simply true that now

and for the future the overwhelming majority of blacks in leadership positions will come from other institutions which they enter without race preferences. And the costs to blacks and to American society as a whole of the racial/ethnic preferences defended by Bowen and Bok far outweigh the marginal advantage to the small number of highly qualified black students who are assured entry to any number of first rate colleges and universities without any preferenced advantage.

But in the course of making the case that this competition for preferred students, whatever its motivations, has happy results for the recipients of preference, the book simply finesses a whole set of questions that must attach to race and ethnic preference policies when looked at from beyond the Hudson and through the perspective of a wider range of colleges and universities.

This bears on the especially contentious issue of "cascading,"² of what would happen if the most selective universities were to practice a race neutral admissions policy. I confess some difficulty in understanding the discussion of this matter in the book, despite the assurances by Ronald Dworkin.³ What I cannot understand is how there can be any doubt that students not accepted to the most selective institutions would certainly be accepted somewhere, maybe to another slightly less selective Ivy institution, maybe to one a little less selective than that. Is there any question that they would go somewhere? And what evidence is there that they would not fare well in such places, or make useful and even important contributions to American life?

California, and especially UC, may be useful in clarifying these questions, suggesting the need for more and maybe different kinds of research, not quite so dismissive of life outside the most elite research universities. We have in UC a mini-laboratory of the cascading effect. In 1997 and 1998 Prop. 209 and the Regents' actions of July 1995 took effect throughout the University, in 1997 for graduate and professional schools, and in 1998 for undergraduates. If we compare the enrollments of California resident freshmen on all eight general campuses over those two transitional years,⁴ we find that the total number of those who registered as black fell from 917 to 739, a decline of 178, or about 19%. Of those who registered as Chicanos, the biggest preferred group of all before Prop. 209, we compare 2325 in 1997 with 2211 in 1998, a decline of 114 students, just under 5%. A look at the figures for the separate campuses show a certain redistribution of both groups within UC: a marked falling off in the numbers of both groups at the most selective campuses, Berkeley and UCLA, and a rise at the less selective campuses, a redistribution that left the apparent net loss to the University of 178 blacks and a smaller net change of 114 among Chicanos. The biggest drop in the numbers of Chicanos occurred at Berkeley, Los Angeles and San Diego, which together showed a decline of 383 Chicano freshmen enrolled, most of whom clearly just enrolled in Irvine, Davis, Riverside and Santa Barbara, where their numbers grew by 269.⁵ I do not believe that they will have any

² "Cascading" refers to the pattern of choices made by students who are refused entry to very highly selective institutions who are then admitted to somewhat less selective institutions. But in California we are also seeing "cascading" upwards, from UC campuses without race preferences to more selective private colleges and universities which offer race and ethnic preferences.

³ In *The New York Review*, November 5, 1998, pp. 56-60.

⁴ These figures are supplied by the University of California, Office of the President.

⁵ California's Master Plan guarantees admission to the University of California to the top twelve and a half percent of the graduates of California high schools, though not to any specific UC campus. Thus all of the minorities who were eligible for entry to the University in 1997 would also have been eligible in 1998. The effect of Prop. 209 was only on admission to those campuses which were admitting more selectively than required by the Master Plan as a result of the growth of UC eligible applicants to those campuses beyond the number of places available. That led to a planned cascading within the University from more to less impacted campuses, and to some unknown degree, from UC to other colleges and universities in California and elsewhere.

poorer undergraduate education on the campuses they went to than they would have had in the campuses they did not get into. And they will have the enormous advantage of knowing that they are where they are on their own merits, without the preference of their race or national origins. They are not "affirmative action" admits, but just new Cal students.⁶

But these figures showing a loss of black and Chicano enrollments in UC between 1997 and 1998 are subject to one important qualification – that is, that despite an increase between 1997 and 1998 of 1195 in total enrollments of freshmen on all campuses, there is an apparent decline in the numbers of most of the racial/ethnic groups listed, including a substantial decline of 1194 of those registering as white. How can that be? The answer, largely neglected in discussions of the impact of 209 on UC, lies in the very large increase between those two years in the numbers who refused to provide information about their ethnicity – from 774 in 1997 to 3441 students in 1998, the year when it would no longer help their chances for admission to their campus of choice.⁷ No one knows the ethnic or racial distribution among those 3441 students, many of whom were saying in effect that "now this information cannot legally be used in the admissions process it is none of the University's business what my "race" or "ethnicity" is." But whatever that distribution, it does mean that the published figures on enrollments of the formerly preferred groups are almost certainly lower than the "true" figure. For example, the "declared" Chicanos comprise 9% of the total enrollment in the University. If only 3% of the "refused to answer" were Chicanos, that would add 103 to their total, almost making up for the apparent loss of 114 Chicanos between 1997 and 1998. Similarly, some "blacks" of mixed race might have taken this costless opportunity to refuse to make the painful choice among their racial or ethnic origins, as Tiger Woods has done – and whatever number that might be would reduce the apparent effect of Prop. 209 on the decline in the numbers of declared blacks between 1997 and 1998.

There is no doubt that the abolition of racial/ethnic preferences led to a decline in the number and proportion of blacks and Chicanos admitted to the most selective UC campuses, Berkeley and UCLA. Regarding the blacks who did not get into Berkeley or UCLA, my guess is that they had a wider choice than Chicanos. Three of the UC campuses showed an increase in black enrollments in 1998 over 1997 – Irvine, Santa Cruz and Riverside, with little change at Davis and San Diego. So blacks were not fleeing the University, despite fearful (or hopeful?) predictions to the contrary, and indeed their "take rate" – the ratio of enrollments to admissions – is almost exactly the same as it was in 1996 throughout the University. But here one would like to see some research which gave us better data on the nature of "cascading" in different universities and for different groups. While some of the blacks not admitted to Berkeley or UCLA went to other UC campuses, like the Chicanos, I suspect that others went on to quite selective private universities and colleges, in California or elsewhere, which offered them attractive scholarship packages. I would be curious whether some went to one of the 22 campuses of the California State University (CSU) system, itself relatively selective, taking the top one third of California's high school graduates, but which Berkeley or UCLA rejects could enter almost automatically. If they did they might profit from the quality of the education one can get at those primarily teaching institutions, and discover how easily a graduate from CSU who has been a serious student can transfer to the University of California or another research university for graduate study if so inclined.

⁶ The parallel figures for blacks show a loss of 193 enrolled in 1998 at Berkeley and UCLA, a number only partly made up by increases of black enrollments at the Irvine, Riverside and Santa Cruz campuses.

⁷ This group who refused to answer the question about race or ethnicity comprised 14% of all new freshmen, making them the third largest group in the University, after whites, 33%, and Asians, 28%.

In any event, we have here a natural laboratory for the study of "cascading" which might lead to more modest notions of its effects on life chances. And indeed, contrary to the physical image of "cascading," we might discover that some students, rejected by their UC campus of choice, cascaded "upwards" to more rather than less selective institutions which are still applying race and ethnic preferences.

Some differences between public and private universities with respect to admissions

Beyond the issue of what would happen if highly selective institutions admitted race-blind, the book never really asks what groups should be preferred. What is justified as a methodological limitation to blacks distorts even that story when other groups are omitted. Race in America, despite many who believe otherwise, is not a two body problem, but a multi-body problem, and that greatly complicates the efforts to deal with any one group as if it alone were the objects of policy. Race preference policies have broader implications, not least political ones, when the "people of color" you are admitting make up not 5 % or 6% of the entry, but well over 50% in the University as a whole, as in the University of California, more than that on some of its campuses, with nearly a quarter made up of our formerly preferred groups, now no longer preferred.⁸ Proposition 209, which abolished the use of racial and ethnic criteria in California, expressly applies to public institutions, and does not touch the practices of Stanford or USC or Cal Tech or the many other private colleges and universities in California. While we can recognize that leading public and private universities have come to resemble one another more in recent decades, still public universities have a relationship of accountability to the public different from that of private universities. That means, among other things, that UC did not have the freedom to pick and choose which groups in society it would preference, even when it was allowed to use race as a criterion.

Second, even if you decide what groups are to be preferred, or have decided for you by public law or regulation, how do you know what individuals are actually members of those groups? This may not be a problem at Princeton; it is a problem at Berkeley or in UC generally. In smaller private institutions you may believe there is no problem about identifying blacks; you can just ask them, and then eyeball them, applying the same criterion of "one drop" evidenced by skin color and correlated features of hair, eyes and physiognomy used by the old racist society that we ought to have put behind us. Even that is not so easy in UC, and in many other large public universities where applicants are not interviewed, and we can't use the "one drop" criterion to check the accuracy of the claim on the application form.

Matters are further complicated when a growing number of applicants are of mixed race origins. The policy of group preferences forces impossible choices on the rapidly growing number of Americans from multi-racial backgrounds. Before racial preferences in public institutions were abolished in California, the University in effect said to applicants of mixed race: "You must choose between your father and your mother in marking the race/ethnicity box on the University's admissions form. If you choose the preferred race in your origins you are likely to be admitted to Berkeley and get additional financial support. If you choose the other race or ethnicity, your chances of admission are simply poorer. If you choose to check the box labeled "Other" or refuse to choose at all we will treat you as if you were white, ie., negatively preferred." It cannot be right for any public institution to force a student whose parents are, say, Asian and Hispanic to choose between their father and mother in asserting their own ethnic identity. We hear again and again such students (and also people who are not students)

⁸ Neglecting the "refused to answer," the proportions in 1998 of Chicanos, Latinos, blacks, American Indians, East Indian/Pakistani, and Filipino Americans add up to 24% of the newly enrolled freshmen in UC as a whole.

resisting those pressures, and asserting with pride the dual or multiple nature of their ethnic roots. But the policy of group preferences rewards one identity and punishes the other. It is indefensible for public policy to force that choice.

To reward a check in a box is to invite fraud, especially when such action by a high school senior filling out a form seems to be a victimless crime (the person with the wrong skin color who will be excluded thereby is a very dim figure indeed.) In addition, in the University of California, again by contrast with conditions where students are selected rather than admitted by formula, there is no way such fraud could be uncovered.⁹ On the campuses of the University of California, when race preferences were being applied, no efforts were ever made to verify the "truth" of a claim to a preferred race/ethnicity. Indeed, when I asked about this, an official in an admissions office drew himself up and said somewhat angrily, "We are not in the business of enforcing Nuremberg Laws." Precisely. The Nuremberg Laws were employed by the Nazis to define exactly what fraction of "impure" blood would deprive a "non-Aryan" of citizenship, and eventually of life. In California, however different the motives and consequences, any efforts to establish the "truth" of claims to some preferred category would a) require that the University or some other agency set forth what fraction of a blood line would qualify, and b) then define the procedures for testing those claims. In some smaller universities the names of students claiming a preferred origin might be given to a student group on campus to informally check out. But in UC, if not in Princeton, students were and are ethnically anonymous if that is their choice. Moreover, on the slight chance that a "fraudulent" claim to a preference was uncovered, there were no penalties available or imposed for false claims to preferred status. Indeed, penalties would have required a formal statement of the conditions of blood and origin that would qualify for the preference, and that would get the University back to a Nuremberg dilemma. And wisely it chose not to do that.

But inevitably, as it became known that a check in a box would distinctly improve a student's chances of being admitted to Berkeley or other UC campus of first choice, without any check on the "truth" of that claim or penalty if discovered, it would be surprising if the amount of fraud did not grow as these facts became better known. Indeed, they did become known to teachers and guidance advisors in the high schools. By the nature of the case the frequency of this kind of fraud cannot be known with any accuracy, but to illustrate the form it takes, one university officer, visiting a local high school, observed a student filling out his application form and checking the box labeled "Hispanic." Oh, you're Hispanic," said the official by way of making friendly conversation. "No," came the reply, "Actually I'm Iranian, but my teacher told me to check Hispanic if I wanted to get into Berkeley." That was a rather straightforward claim to a fraudulent preference; the manipulation of Spanish surnames was more widespread. Here the confusion about what Hispanic means, whether it includes Portuguese and Brazilians and European Spaniards, was an invitation to a very broad interpretation which included the many part-Hispanics who did not have Hispanic surnames. Who is a Chicano or Hispanic, and how do you know? How much "blood" is required to qualify: both parents, one parent, one grandparent, or simple residence in a country that we call Hispanic? How about European Hispanics? How about Portuguese, who have recently successfully argued their way onto a government preference list? Stories of questionable claims to a preferred status are known and retailed with a cynical chuckle in universities; before the change of policy in California they were leading to a general cynicism about the fairness of all the admissions procedures, and beyond that, to a sense that the whole enterprise was a racket.

⁹ On problems of fraudulent claims to preferred status outside of higher education, see "Now tell the truth, are you minority?" by Tom Brune, Seattle Times staff reporter, at see http://www.seattletimes.com/news/local/html98/race_052698.html

These are not details, but insoluble issues in a country that has a deep reluctance to probe into ethnic/racial origins, and yet still in some places rests policy precisely on racial/ethnic origins.

Asians and Jews

One consequence of "affirmative action," largely neglected in the literature justifying racial preferences, is the exclusion of people from some groups that inevitably must accompany what is called "positive discrimination." In the East, where most of the private elite research universities are located, the excluded are mostly white, and thus gain little sympathy as the symbolic representatives of the advantaged and repressive groups in American history. And the private universities may choose to preference only blacks, and thus make those excluded not only white but apparently few in number. In California we did not have that dubious privilege; before Proposition 209 we were required by federal law and regulation to include a variety of other racial/ethnic groups among those preferred, and chief among them Chicanos and Hispanics. Moreover, in California those who are disadvantaged by their racial and national origins are more likely to be Asians, who outnumber whites on the most selective UC campuses, Berkeley and UCLA, and currently comprise 37% (as compared with about 28% white) of the new Berkeley freshmen.¹⁰ These "Asians" of course include a very wide variety of backgrounds – old and new Chinese, Japanese, Thai, Vietnamese of various kinds, Indonesians, Koreans, and more. (The Filipinos and East Indian/Pakistanis are counted separately. They were formerly preferred.)

Of course the enormous range of diversity among them gains no recognition among supporters of "diversity." On the contrary, the preference policies in California were a way of controlling the numbers of "Asians" in UC. No one actually said that, except occasional visitors like President Clinton, who came to Sacramento in April 1995 campaigning against the ending of racial preferences then under consideration by the Board of Regents, and warned his listeners about the dangers of its possible passing. Beware, he said, "there are universities in California that could fill their entire freshman classes with nothing but Asian Americans."¹¹ The Yellow Peril again. We are reminded of similar concerns about the Jewish peril to elite Eastern private colleges and universities throughout the first half of this century, and the quotas to control their numbers that were only dismantled after World War II, quotas which persisted in some universities into the 1950s. Too many smart Jews then, too many smart Asians today; not enough room for anybody else.

Those racist exclusionary policies of the leading private research universities are not the proudest moments in their history, and few of their leaders would defend them today. But these same leaders have no difficulty in defending similar policies which exclude other people, with other skin color and eye configurations. Presumably the difference lies in the malign motives in the earlier racial exclusions, while the current ones are benign, at least in motive. But their consequences are remarkably similar. Students who are otherwise fully qualified for entry to a university are excluded because of their skin color or national origins. And a further irony is that some of the "Asians" who suffer this "benign" discrimination are the grandsons and daughters of

¹⁰ These of course are without the unknown proportions of Asians who "refused to answer."

¹¹ Quoted by Leo Rennert, Washington Bee Bureau Chief, under the headline "President Embraces Minority Programs," *The Sacramento Bee*, (Metro Final). April 7, 1995, p. A1. One might have imagined that the University would protest publicly that there was no such danger, and moreover that that kind of overt racism was not welcomed by the University. But there was no response by the University, whose leadership and offices of public relations were inclined to overlook remarks that were at least on the right side of the controversy.

people who were confined to relocation camps during World War II in another and now widely regretted expression of public racism in America. We should be beyond this now, beyond limiting the numbers of a given ethnic group because of the talents and aspirations of its members.

For all these and other reasons the race and ethnic preference policy at UC was not only intrinsically unfair, but was increasingly seen to be unfair by faculty and students alike, occasioning growing resentment over race and ethnicity among all groups, and becoming a significant factor in dividing the academic community rather than bringing it together. The more differentiated ethnic and racial groups have become, the more transparent are the injustices and inequities of policies based on those group memberships. Public policies based on race and ethnicity have a powerful and inherent tendency to reduce people in all their variety and complexity to their membership in those categories. But higher education aims to further differentiate us, to encourage and educate our qualities of mind and character, to give more varied aspects to our individuality and to teach us to learn and nurture our unique qualities. Intelligence and creativity burst through the constraints of social origins, whether they be class, race or ethnicity; nurtured by our origins, we transcend them through a higher education in the disciplines and freedoms of scholarship and science. In our private lives we may honor and celebrate our origins and their cultures – or we may not. People differ, and must be allowed to differ, in whether and how much they choose to find their identities in their ethnic origins – but that is no business of public policy.

The book does not address the fundamental differences between private elite universities and the selective public universities which have quite different kinds of accountability to state and federal governments, and to the wider public. Private universities have an extraordinary autonomy in their private lives; they admit whom they please on whatever grounds they please. That is broadly accepted in this country, despite the inroads on their autonomy by OSHA and other regulatory agencies which still mostly do not intrude on their admissions policies. Public universities are in this respect quite different; state governments ordinarily have very strong views about the terms of access of their citizens to "their" universities. Even when, as in the case of UC, the state has granted a high measure of autonomy to the state university in part through a provision in the state constitution, still it requires, formally and normatively, that public universities make transparent the criteria for admission, and that these criteria be fair and be seen to be "fair." While notions of what is "fair" are contested and change, nevertheless a response by public universities to this expectation, certainly in California, is that on the whole and with exceptions, undergraduate students were not selected for entry on an individual basis, but were admitted on the basis of broad and known criteria, formulaic and categorical. It is only now, after race and ethnic preferences have been outlawed, that the University can move to selecting students through a reading of their whole file, adding other relevant considerations, but not race or ethnicity, to a decision based initially on test scores and high school grade point average. And this is a clear improvement, welcomed by everyone on all sides of the 209 debate.

On the issue of how long the preferences should stay in place, the authors of *Shape of the River* are more forthcoming: simply "for the foreseeable future." There may be goals for the application of preferences; there are no goals visible for the ending of preferences. The notion suggested is that one racial group, or more than one, must "for the foreseeable future" be set apart from the broad American assumption that individuals are judged, assessed and rewarded for their own achievements. These are big issues of policy and implementation which the book simply avoids in the course of telling us about the mostly successful careers of black students who went to a few prestigious universities and then on to successful careers.

How much preference is enough? The story of Boalt.

The authors also do not tell us how much preference they would defend, beyond defending whatever level was being applied in the institutions over the period they were discussing. How much is enough? Here again some evidence from UC may be enlightening, this time from a professional school.

Before racial/ethnic preferences were abolished in the University of California in 1995 and in other state agencies in 1996 the ruling law was the Supreme Court's decision in the Bakke case of 1978, which while outlawing racial quotas permitted institutions to consider race as "one factor in admissions." But the question of how much of a factor in admissions was left uncertain.¹² Some institutions interpreted this as saying that "other things being equal" race could be a preference at the margin, and acted on that principle Others went much further, and gave whatever weight to race and ethnicity in admissions that they needed to achieve the racial mix they were seeking.

An example of this is the recent history of admissions to Berkeley's Law School, Boalt Hall. The figures on the numbers of minority students who would enroll in Boalt in the first year after SP 1 applied to graduate and professional schools was widely reported in the summer of 1997. It was a dramatic number – essentially zero, though one black student did appear who had previously been accepted but had delayed entry for a year. The figures for Boalt were reported before any other figures for other professional and graduate programs, and were taken as representative of the effects of SP 1 on the graduate programs in the University. They were not; when those figures were released many months later, it appeared that there had been very slight changes in the proportions of Blacks and Hispanics entering Berkeley's graduate programs apart from Boalt. When we look at the effect of Prop. 209 on new registrants in UC graduate schools (excluding the professional schools) we see that it had little or no effect. Between 1996 and 1997 – that is, when SP 1 applied to UC's graduate schools – "the number of African Americans increased by 2%, while the "other" and "declined to state" categories increased by 25%."¹³ Those figures occasioned very little comment in the press. One might have imagined that the University would want to spread the good news that the abolition of race and ethnic preferences at the graduate level was having very little negative effect on the numbers of black and Hispanic students in its graduate programs, but there were no press conferences or statements by senior administrative officers calling attention to these surprising figures, as they had in connection with the Boalt story. In this case, as in others in recent years, good news, that is news that the abolition of preferences had little or no effect on minority enrollments in some programs and on some campuses, was treated by the University and its public relations offices as bad news, whereas what looked like bad news, especially the Boalt story, was given the prominence and emphasis by the University that might have been given to good news. It was good news only in the sense that it confirmed the prior predictions of the large effects of the ending of the preferences on minority enrollments. Indeed, there was some tendency in the University to encourage even worse news to show how bad the new race blind policies were. Bowen and Bok quote a director of a black recruitment program at Berkeley as saying, "We told [prospective students] that [Boalt] is a very hostile environment and that we're not welcome here ... we weren't pushing them to come to Cal."¹⁴

¹² See Allan P. Sindler, *Bakke, DeFunis and Minority Admissions*, New York, Longman, 1978.

¹³ University of California Graduate School Applicants, Admits and New Registrants by Race/Ethnicity. Fall 1995 through Fall 1997 Classes, Office of the President, University of California, January 9, 1998.

¹⁴ *The Shape of the River*, p.38.

Boalt was different from most other graduate and professional programs in one important respect: it was highly competitive for the ablest minority applicants with other leading law schools, especially those in the top research universities, but unfortunately it was almost always unsuccessful in that competition. Long before SP 1 or 209, Boalt was consistently losing all or almost all of its highly qualified minority candidates to law schools that were both more prestigious and could offer those candidates more financial support and perhaps also even more attractive positions on graduation. The fact that Boalt could not hold its best applicants against the Ivy league law schools is no criticism of Boalt; other law schools are more richly endowed, and even more prestigious, even better launching pads for highly successful careers. But in the Fall of 1997 when no minority students enrolled in Boalt's entering class, the public statements by administrators inside and outside the School pointed the finger of blame at SP 1 and 209 – they were responsible for the loss of "diversity" at Boalt.

But the Boalt story before the end of preferences was a story of the radical application of preferences, surely beyond what was envisioned in Bakke. The degree of preference in admissions to Boalt was not "race sensitive," but heavily "race determined."¹⁵ We can see this now because, unlike most other graduate departments and professional schools, admissions to Boalt had been organized around a formula placing applicants into one of four Ability Ranges, A through D, from the highest scores to the lowest, defined by a combination of the student's undergraduate grade point average and scores on the LSAT.¹⁶ And that allowed us to see what actually had been done. In 1996 only 855 students were admitted to Boalt out of 4684 who applied.¹⁷ But the proportions admitted were very different among the different ethnic and racial groups and in the different ranges.

For example, 18 applicants from the preferred groups – chiefly blacks, Hispanics and Native Americans – fell into the top two Ability Ranges, and all but 1 of them were accepted. And that is true for the other two big groups, whites and Asians: almost all applicants from Range A were admitted. However, substantial differences in admission rates begin to appear among applicants from Range B (69% and 62% for Asians and Whites respectively, versus 94% for racially preferred groups), and are very large in the lower two Ability Ranges C and D. Of the 124 Asian applicants in Range C, only 24, or 19%, were admitted; and of the 607 whites in that range, 101, or 17%, were admitted. But of the 35 members of Affirmative Action groups in that Range, 27 or fully 77% were admitted. And in the lowest Ability Range D, only 2 out of 492 Asian applicants were admitted (.4%), as compared with 100 out of 696 (14%) Affirmative Action applicants. The proportion of Whites admitted from that ability Range, 19 out of 1223, or 1.5%, was almost as low as among the Asians.

When we look at specific ethnic groups the differences are even more striking. Of applicants in Ability Range C, 10 were students of Japanese origins ; an equal number of Blacks applicants were in that same Ability Range. All 10 Black applicants in that Range were accepted, but not one of those of Japanese origins. Of the 384 Black applicants in Ability Range D, 62 were admitted. By contrast, of the 174 applicants of Chinese origins in that same Ability Range, not one was admitted to Boalt Hall.

¹⁵ These data were obtained by Mr. Dan Guhr, a graduate student at Oxford University doing his dissertation on comparative patterns of access to higher education in several advanced societies. We want to thank the Office of Admissions at Boalt Hall for making these data available to us.

¹⁶ For example, the chart for California residents defines Range A as including stepped combinations of GPAs from 4.00 to 3.80 and LSATs from 167 to 178. So a GPA of 4.00 and LSATs of 167 to 171 are included, as are a GPA of 3.80 and a LSAT score of 178.

¹⁷ In both 1996 and 1997 fewer than 1 applicant out of every 5 were admitted by Boalt, (18.2% in 1996 and 19.9% in 1997).

When a university starts counting by eye shape or skin color, all notions of "how much" race preference is justifiable collapse; there are no criteria or numbers on which people can agree. And when merely being "race sensitive" is not sufficient to recruit what is thought to be the necessary number of qualified minority students to achieve a desired level of "diversity," as it was not at Boalt, then the temptation is to apply racial criteria as far as necessary to get the numbers right. The end of race preferences in UC had dramatically large effects on Boalt because of how much Boalt previously had to do to compensate for its weakness in competition with the prestigious Ivy League law schools for the most able minority applicants. When race preferences were abolished in UC, Boalt could no longer admit large numbers of poorly qualified minority students in preference to white and Asian students with higher qualifications. And those less well qualified minority students that had been admitted under the preference system could no longer mask Boalt's inability to compete successfully against Yale and Harvard and Columbia for the ablest minority students. By contrast, the graduate programs in Arts and Letters and the sciences did not experience declines in their minority enrollments because they had not had to change their admissions criteria and practice very much after preferences were abolished.

On diversity – and its absence

Much is made in this book of the importance of diversity in a student body; of the value of exposing students to differing perspectives, values, and orientations for education. But oddly enough the AAU, along with its sisters on Dupont Circle, is the only group or body in the country which exhibits no diversity on the issue of race and ethnic preferences in higher education. I don't mean a near consensus, but rather a perfect consensus, as reflected by the signatures of every one of the members of the AAU in a full-page advertisement in the *NY Times* in April 1997 expressing opposition to laws like Prop. 209 prohibiting race blind policies.¹⁸

Even if you think that support for such policies is wrong-headed, is it not strange that no one among university leaders is wrong-headed, whereas we see people who are wrong-headed on every other disputed issue in the world. It is not as if they are reflecting a broad consensus on this issue in the country; on the contrary, every other group in the society is divided on the wisdom of using race and ethnicity for these decisions, and usually divided pretty evenly: Congress and state legislatures, judges high and low, business leaders and the press, ordinary academics in UC as throughout the country, students, and above all, the larger society and its voters. Everywhere people debate these issues among themselves – except in the organizations of college and university leadership. No arguments there, at least that anyone can hear. It cannot be that your special knowledge of the workings of colleges and universities bring you to this perfect agreement; university teachers also have a pretty fair sense of the nature of the institutions in which they work, perhaps even as clear a one as that seen from above. But we know through two well crafted surveys, one in UC, all nine campuses, and the other a national survey of college and university teachers, both done by the Roper Center of the University of Connecticut, that a majority of academics everywhere oppose preferences, and while different wordings get different distributions, everywhere there are substantial numbers on both sides.¹⁹ You may not have heard of the Roper Polls on attitudes toward racial and ethnic preferences among academics, or may have heard that they were biased; that is part of the

¹⁸ *The New York Times*, 24 April, 1997. The consensus is so strong that for the chancellors of the UC campuses in the AAU it overrode the clearly stated policy of the University of California on this issue, as determined by its governing body, the Board of Regents. But in those cases, it was not clear for whom the chancellors who signed the advertisement in the names of their campuses were speaking.

¹⁹ See below, fn. 18.

problem of sustaining and legitimating a debate on these issues within the university and not just within the larger society or in the courts.

The consensus among academic leaders is itself an interesting phenomenon, and certainly can be seen as one of the byproducts of the race preference policy, indeed one of the costs of the policy, and not a negligible one. The differences on UC campuses between those who support ethnic/racial preferences and those who do not have not generated discussions and debates seeking to clarify, or to persuade, or to compromise those differences. On the contrary, university leadership has created a false illusion or myth of a broad consensus around one of those views, and the near absence of expression of the other. And this is largely because in all our institutions, and most certainly in the University of California, the professional affirmative action community is large, broad, and strongly committed to the policies of group preference. This, and the passion they bring to the issue, helps explain why the opposition, however well represented in the faculty, is nearly voiceless. On these issues administrators and their staffs are the voice of the university; reading their newsletters, campus journals, alumni magazines and the like one would never guess that there are considered grounds for opposing group preferences, and substantial opposition to them in the academic community.

Among university presidents, this peculiar consensus arises out of a mixture of principle and a keen sense of who on or around campus can make trouble for them. People opposed to preferences do not make any significant trouble for senior university officers; groups which profit from and administer preference policies can and do. In all leading colleges and universities, and most certainly in the University of California, the affirmative action community is large, broad, and strongly committed to the older policies of group preference. This, and the passion they bring to the issue, helps explain why the opposition to preferences, however well represented in the faculty, is nearly voiceless. These large affirmative action communities are led and created by senior administrators who themselves have been appointed on the understanding that they support the preference system, or at least will not oppose it.²⁰ I cannot think of a single senior administrator in the past two decades, either in Berkeley or in the Office of the President, who has been openly opposed to preferences in admissions; if they had been they would not have been appointed to those jobs – and that includes appointments during the three years since race preferences have been abolished in UC. One result is a consensus on this issue among academic administrators which in no way reflects the diversity of views among the faculty or students.

One further result of this pattern of recruitment and retention of senior administrative staff is that university presidents do not commonly talk about admissions policies with people who oppose the preference system. The people they talk to – their own administrative staffs and senior academic administrators – share their views or keep quiet, as do most academics. One aspect of academic life which no one is inclined to discuss openly is the quiet intimidation of dissenters on this issue. Very few academics wish to offend both the senior administrators who govern their careers and budgets, and the well organized affirmative action pressure groups who are not slow to stereotype faculty members as racists, or at very least, right-wingers.

The second pillar of affirmative action is patronage, the jobs associated with the development and implementation of affirmative action policies. And jobs are the source of interests, linked in this area no differently than are jobs and interests in other areas of life. The third pillar of affirmative action, the passion that lies behind the defense of race and ethnic

²⁰ These "affirmative action" communities have survived the abolition of race and ethnic preferences in UC. They survive to deal with the more challenging task of finding ways to increase diversity of all kinds in the University that do not violate the law prohibiting race preferences.

preferences, has two components: interest is one, but equally important are the feelings of moral superiority that attach to the doctrine of affirmative action, a moral superiority that justifies demonizing those who do not share those views. The combination of material interest and the claims to moral superiority makes for a passion that is often intolerant and denies dissenters a voice. While our colleges and universities proclaim their endorsement of diversity, the cultures of many of them simply do not permit open dissent on this issue of the nature and desirability of affirmative action. A distinguished federal judge who knows academia well has recently observed that "...groups holding considerable power in the university loathe speech with the wrong content about topics important to them, and those who say the wrong things will have little peer or institutional protection.... [M]any ideas may not be expressed, many subjects may not be discussed, and any discussion on matters of political salience has to avoid defending groups powerful in the university."²¹ Why are these issues not discussed and debated more widely on American college and university campuses? How is it that there has been no strong challenge to the affirmative action community, its assumptions and its dominance, though we know that a majority of academics everywhere do not share those views, and make their own known only in the anonymity of opinion polls and mail ballots?

In the disputes over affirmative action in the University of California that question presented itself as a peculiar contrast between the asserted consensus within our Academic Senate in opposition to the policies of the Regents' decision to abolish group preferences, and the sharply divided sentiments of the academics themselves under the cover of anonymity. Put differently, how is it that open meetings of campus Senates on all nine campuses can have passed resolutions by lop-sided votes condemning the Regents' actions, while mail ballots at UC San Diego, Los Angeles and Santa Barbara and a system-wide survey by the Roper Center based at the University of Connecticut showed the UC faculty pretty evenly divided on the issues?²²

²¹ A.J. Kleinfeld, "Politicization: From the Law Schools to the Courts," *Academic Questions*, Vol. 7, No. 1 (Winter 1993-94), p.17.

²² The Roper Poll of UC faculty on all nine campuses was designed in consultation with members of the UC faculty, including the writer, and had a response rate of 80%. It survived searching criticism on methodological grounds. Very briefly, the Roper Poll asked voting members of the Academic Senate whether they favored granting preferences to women and certain racial and ethnic groups, or whether they favored promoting equal opportunities in these areas without regard to an individual's race, sex, or ethnicity. A wide plurality (48 percent) favored the latter policy; only 31 percent favored the granting of race and ethnic preferences. These findings are consistent with polls on this issue over the past twenty years, both among academics and in the general population. When the question was put differently, in the form "Do you favor or oppose using race, religion, sex, color, ethnicity, or national origin as a criterion for admission to the University of California," the findings show a bare majority (52%) for retaining those as "criteria," and fell below 50% when asked about these preferences for appointments to the faculty. When asked in yet another question about their own understanding of the term "affirmative action," given the choice between "granting preferences to women and certain racial and ethnic groups," or "promoting equal opportunities for all individuals without regard to their race, sex, or ethnicity," the faculty sample voted for the second definition over the first, by 43% to 37%. Another 15% accepted neither statement as their own meaning of the term. Indeed, one might note that over the years supporters of race and ethnic preferences have hijacked the term "affirmative action" to refer to their policies, contrary to the views of a plurality of UC faculty who still think it means "promoting equal opportunities." For a full report on this survey, see *The Roper Center Survey of Faculty Opinion about Affirmative Action at The University of California*, October 1996, sponsored by the California Association of Scholars, at <http://www.calscholars.org/roper.html>

The Roper Center also conducted a similar survey in October 1996 of academics in colleges and universities all over the country. This found even higher proportions of respondents opposed to race/ethnic preferences in admissions and appointments than was found in the UC survey. See <http://www.nas.org/roper/exsum.htm>

See also "UC Faculty have mixed feelings on admissions. About half support special criteria, favor equal opportunity." Rachanee Srisavadi, *Daily Bruin*, Jan. 30, 1996, at <http://www.dailybruin.ucla.edu/DB/Issues/96/1.30/n>

There are several reasons. For one thing, the University of California, like other colleges and universities, recruits scholars and teachers, not fearless Green Berets. This university, like others over the years, developed a strong climate and organizational structure in support of a policy of racial and ethnic preferences in admissions:²³ from the President's Office down, every campus, every college had administrative offices and Academic Senate committees to plan and enforce preferential policies; every department had and has an "affirmative action" officer to monitor its behavior. All the chancellors, with varying degrees of enthusiasm, have supported the policies of group preference, as also the provosts and deans on every campus, who almost certainly would not have become provosts and deans unless they did. Indeed, for many years no chancellor, no provost or dean was appointed in the University of California who shared the views of the current majority of Regents on racial preferences. But there was and is no equivalent organization of people and energy inside the University devoted to criticizing the preference policies, or trying to reform them. Even professors with tenure do not like to run afoul of their deans and provosts, much less their chancellors, all of whom can on occasion be very clear about their own preferences, though not always on paper. I must confess that if I were still Director of Berkeley's Center for Studies in Higher Education I might not be writing in this way. I wonder if senior administrators anywhere have any idea of the chilling effect on dissent of their strong commitments on these issues, commitments which give voice to only one side of the issue?

In addition, and apart from the weight of this "affirmative action" community and its real power in the University, there is always the danger for critics of racial and ethnic preferences of calling down on themselves the charge of "racist." No matter how unwarranted and unfair, it is an awful epithet, and can damage or destroy one's relations with one's colleagues and students – indeed, one's whole life and career. Can anyone be surprised if most University of California faculty members who did not share the official doctrines on admissions and appointments have preferred to keep their views to themselves, at least until they had the protection of anonymity in a survey being conducted from Connecticut or a mail ballot?²⁴

We are talking about what might be called "consensual coercion," a pattern of attitude and action that removes the protection of legitimacy from some sets of views and policies, and sets them apart as no longer meriting that protection. The process is progressive: first is stereotyping those who hold differing views, as in labeling them "highly partisan" or "right-wingers" or unwitting racists; the enormous advantage of that part of the process is that you no longer have to listen or read or attend to what those others have to say; you know what they have to say, and it can be dismissed. The next step is to discredit the opponent, attacking their authority to say what they do. The next step is to demonize those others; they are no longer mistaken, but evil, and that leads to late night calls and hate mail.

²³ And also in respect to appointments, both academic and staff. This paper does not discuss the rather different issues involved in staff and academic appointments.

²⁴ Twenty-five years ago Professor John Searle, reflecting on the campus wars of the '60s, commented on the behavior of the Academic Senate and its meetings in a penetrating analysis of those events. His remarks may help us understand the wide discrepancy between the public votes of poorly attended Senate meetings, and the votes on exactly the same issues on mail ballots cast anonymously:

"The striking thing [about faculty meetings around contentious issues] is the extent to which a small group of really determined left-wing faculty who know exactly what they want and are prepared to seize the rhetorical initiative and fight for what they want, can exert an influence wildly disproportionate either to their own numbers or the size of their constituency in the faculty. The moderates not only tend to be unclear and indecisive about what they want, but they are also anxious to avoid a fight. They don't like being in adversary relationships, and they would like to keep peace in the faculty family as long as they can. At these meetings everyone is anxious to avoid a 'divided faculty'." John Searle, *The Campus War*, New York: the World Publishing Company, 1971, pp. 147-148.

This kind of coercion need not go that far to be effective; that is the meaning of the term of art in constitutional law when jurists and others speak of the "chilling effect" of some practice or policy. University presidents may not have noticed that the consensus on this issue, not only among university presidents but also among their senior staffs, has something of a chilling effect on debate within the university. They must ask themselves whether they often or ever speak seriously with people in their own universities who differ with them on this important issue on which the rest of society is divided, and take seriously what they say. Aside from all the other unhappy effects on the constraints on freedom of speech, this one also has negative consequences for the wisdom of policy, and for the effectiveness of implementation.

Gains of a race-blind policy in California

In some important respects the passage of SP 1 and Proposition 209 are slowly liberating the intellectual communities on UC campuses from these chilling effects. While I believe that the President and chancellors and their senior staffs have not changed their views of the wisdom of race and ethnic preferences, it is now possible, indeed even necessary for people in this University to talk about how to admit students in ways that might preserve and enhance the diversity among them of various kinds without specific attention to their skin color or eye shape. And oddly enough, the affirmative action communities that I spoke of have not only survived, but are probably more central than they were, though now with a somewhat different charge: to find alternatives to race as supplementary criteria to academic aptitude and performance for admission. And Proposition 209 together with the Regents' actions have forced at least two important reforms on the University, reforms I do not believe would have occurred without the change of policy on race and ethnicity. First, it has forced the university to abandon its categorical formulas, and move from admitting students to selecting them by inspection of folders rather than simply of scores and race. Some students have always been "selected" on the basis of their individual qualities and promise – musicians, athletes, students from abroad – but now this must be done more broadly. To actually make a decision about an individual on the basis of that person's own qualities and not of their group membership is an important step forward.

To support race blind or race neutral policies does not mean that one does not take into account the actual nature of American society and its effects on academic performance and life chances. For example, our admissions officers will in the course of looking at folders be able to take into account not skin color but an individual's response to disadvantaged circumstances – as for example, performing well and taking college preparatory courses in a school where few go on to college. That kind of initiative and motivation bodes well for that student for the future, and we should encourage and reward it. Similarly, it seems to me sensible to take into account the handicaps on academic performance implicit in growing up in a household where English is the second language. But that is a characteristic of an individual and her situation, and not of an ethnic group, many members of whom come from homes in no way disadvantaged. These suggestions, which are the kinds of ideas that committees and admissions officers in UC are currently struggling with, now always direct our attention to individual qualities, and do not assume the homogeneity of race and ethnic categories – do not therefore negatively stereotype nor throw into question the personal qualifications of the student admitted.

Another one of the clear gains of 209 is that all students admitted to UC now can justifiably feel that they are here on their own individual merits, and are not "affirmative action" admits. The problem for members of groups who are preferenced is that no one can be sure whether they are there on their own merits, or have been admitted in response to a university policy concerned with competitive numbers. Equally troubling, neither can their family or friends

or classmates. The book asserts from its survey that recipients of these preferences did not resent those privileges. I suspect the authors looking at social science writing on some other issue would themselves doubt the capacity of a survey to adequately assess the deep and inevitable ambivalence of recipients of these privileges. That requires different research methodologies indeed; apart from participant observation, only long intensive interviewing might uncover the complex feelings that the authors of this book dismiss in so cavalier a way.

I have mentioned two clear gains from the passage of 209: one is the removal of personal doubts –one might say inner stigma – about whether one is there on one's own merits; a second is the reform of the University's admissions procedures to focus on individuals. The third, perhaps most important, is the stimulus provided by 209 to attack the basic problem of minority under-representation in higher education where universities might actually have some effect, that is, on the quality of instruction in the schools. The University of California has begun to do that in a serious way, with the help of a recent grant of \$40 million from the California Legislature. Each campus has a chance and challenge to develop a program for aiding the quality of K-12 schooling in the state. That is exactly where our energies ought to be going, to improve the quality of education for all California youth, and inevitably in the course of that helping most those who most need help, who are disproportionately but not exclusively black and Hispanic. The aim is not the distribution of a small minority of qualified blacks among a very small number of elite universities, but the increase of the whole population of qualified youth, among them many more black and Hispanic youth, prepared and motivated to continue their education in the best institutions that they aspire to and that will accept them for what they are and not for their skin color or national origin. Race and ethnic preferences simply distract us from that overriding obligation.