

**BERKELEY VERSUS THE SAT:
A Regent, a Chancellor and a Debate on the Value of
Standardized Testing in Admissions**

February 2019

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ABSTRACT

The following essay details a debate between UC Berkeley and a Regent who made charges of discrimination against Asian-American students that are similar to the current legal challenges facing Harvard University. The crux of such charges: on average, that one racial or ethnic group is more “qualified” than other groups, often underrepresented minorities, yet they have lower admissions rates. In 2004, Regent John Moores, convinced of discriminatory practices toward Asian-American students in the admissions process at Berkeley, did his own analysis of UC admissions data focused on SAT scores and that he publicized in the *LA Times* and other venues. Moores claimed his investigation provided clear evidence of discrimination. In the aftermath of California’s Proposition 209 barring the use of race in admissions, Moores complained that Berkeley’s adoption of a “holistic” review of applications reduced the importance of test scores by elevating subjective “measurements” that served as possibly illegal proxies for race and ethnicity. Conjuring memories of charges of discrimination in the 1980s by the Asian-American community regarding Berkeley’s admissions processes, Moores asked, “How did the university get away with discriminating so blatantly against Asians?” For anti-affirmative action advocates, like Moores, standardized test scores were, and are, seen as the gold standard of academic ability since it is a “universal” measure unlike grades that are local assessments of abilities and subject to grade inflation. However, when compared to grades in high school, test scores have proven weak indicators of subsequent academic success at highly selective universities that must choose among a large pool of highly qualified students. Test scores also are not necessarily good measures for predicting the future engagement of students in the wide range of experiences and opportunities offered by major universities – including public service, undergraduate research, and co-curricular activities. Anti-affirmative action advocates largely see admissions as a reward based on test scores and are not terribly concerned with the predictive validity of other admissions criteria. This essay concludes with a brief discussion of the similarities of Moores’ analysis and charge of discrimination in admissions with that at Harvard, and the probable legal path toward a new Supreme Court decision on affirmative action.

Keywords: University Admissions, Standardized Tests, Equity, Racial Politics, Affirmative Action, Asian-Americans

Ever since the US Supreme Court’s 1978 *Bakke vs the UC Board of Regents* decision, the appropriate role of race and ethnicity as a factor in admissions to highly selective universities has been the focus of a succession of legal challenges. The list is long. Those that have since reached the Supreme Court include *Hopwood v Texas* (1996)¹, *Grutter v Bollinger* (2003), and most recently *Fisher v University of Texas* (2016). Currently, *Students for Fair Admission (SFFA) v. Harvard* has generated national

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headlines with the charge of systematic discrimination of Asian-American applicants, a case that many believe will wind its way to the Supreme Court.²

Adding to the fray, a UCLA professor recently sued the University of California's Board of Regents for a similar charge of discrimination against Asian-Americans applying to the University of California's (UC) most selective campuses, requesting access to data to run his own analysis.³ The Harvard case has a similar contour, with the lawsuit being filed by a conservative political action group (SFFA) and revolving around a similar and successful request for admissions data. A large portion of the trial, now recently completed and awaiting a decision, focused on a debate over the meaning of the data, and the analysis by the plaintiffs.

The crux of such charges: that on average, one racial or ethnic group is more "qualified" than other groups, often underrepresented minorities, yet they have lower admissions rates. For anti-affirmative action advocates, standardized test scores are seen as the gold standard of academic ability since they are a universal measure, unlike grades that are local assessments of abilities and subject to grade inflation. Anti-affirmative action advocates largely see admissions to a university with highly selective admissions as a reward based on test scores; they are not terribly concerned with the predictive validity of other admissions criteria.

However, test scores, and specifically the SAT, have historically proven only weak indicators of performance in tertiary institutions with highly selective admissions. Test scores may be considered "valid" indicators insofar as they do add a statistically significant increment to the prediction. The problem is that the increment is so small.

Test scores also are not necessarily good measures for predicting the future engagement of students in the wide range of experiences and opportunities offered by major universities – including public service, undergraduate research, and co-curricular activities. And research shows that tests like the SAT have a growing correlation with race, adding little to the large body of applicant data now employed in, for example, UC's holistic approach to admissions.⁴

Just as importantly, universities, particular public, have a responsibility to serve as paths for socioeconomic mobility and for shaping a more equitable society.⁵ This was the vision of the great land-grant universities created in the mid-1800s, and it remains salient and indeed more important than ever. Hence, the role of public universities is to balance the aspirational needs of the individual with its larger role in an America that is increasingly racially and ethnically diverse, and that has tragic levels of poverty and income inequality. The concept of a university admitting and enrolling a "class" reflective of society, and the variety of human talents and capabilities, provides an important counterpoint to the idea of access as simply a reward for achieving a high-test score.

The following essay briefly outlines the University of California's questioning of the validity of standardized test scores after the UC Regents and then state voters passed Proposition 209 in 1996, outlawing the use of racial preferences in admissions, hiring and contracting. It then details a debate between a UC campus, Berkeley, with a Regent who made similar charges of discrimination against Asian-American students that very much reflect the current legal challenges faced by Harvard – based largely on advocacy generated data analysis.

CHARGES OF CONSPIRACY

In the immediate post-Proposition 209 years, affirmative action opponents saw conspiracy and subversion in most if not all admissions reform proposals forwarded by University of California's academic leaders. To help compensate for the loss of race and ethnicity as a factor in freshman admissions, UC expanded its outreach programs to high schools and developed a new admissions path: Eligibility in the Local Context (ELC). ELC initially offered "UC eligibility" to any student in the top 4 percent of their high school graduating class, reflecting a similar policy adopted at the University of Texas.

Previous admissions criteria were only statewide: UC used a sliding scale of grades in required high school courses and standardized test scores (the Eligibility Index) to determine freshman eligibility, and calibrated to admit students who were in the top 12.5 percent of statewide high school graduates. Once UC eligible, students were guaranteed a place on one of UC's undergraduate campuses – although not necessarily the campus of their first choice. Campuses still retained authority to select students among those deemed eligible. And each campus also reserved about 2 percent of all freshman admissions as "special action" – providing exceptions to the statewide criteria and offering admission to students with special talents, from musicians to athletes.

While retaining statewide criteria, ELC was school-specific and based on grades and courses, with no requirement for SAT scores. Since schools were increasingly segregated according to socioeconomic background, including race, the objective was

to provide a new path for UC's undergraduate enrollment to "reflect" the demography of California – a mandate set by the UC Board of Regents in the 1970s.

UC also adopted a policy of "comprehensive review" for evaluating each application at the campus level. Comprehensive Review (also known as "holistic" review) expanded and refined earlier criteria that emphasized a host of talents, experiences and attributes a student could provide in their application, including their essay. Finally, by 2000 discussion emerged within the university of dropping the SAT. Each of these actions were viewed by critics of affirmative action as a concerted effort to lower academic qualifications with one goal: boosting underrepresented minority enrollments. Anti-affirmative action advocates would need to be vigilant.

What was the collective impact of these new UC outreach and admissions paths? In 1996, 2.8 percent of African American students were eligible for the University of California; in 2003, it was 6.2 percent. The corresponding figures for Latinos were 3.8 percent and 6.5 percent. Underrepresented minorities did grow in eligibility and in their actual enrollment in the UC system—particularly Chicano/Latinos who, in contrast to the African Americans—are a rapidly growing proportion of California's population. Today, underrepresented Minorities (or URMs) are about 28 percent, compared to 20 percent before Proposition 209. Almost all that growth, however, reflects underlying demographic changes in California's population.

The question remains whether these increases were reflective of changing admissions policies, outreach, improvements in the schools, or simply demographic changes. Disentangling the potential causes is the focus of continued study and debate. The California State University experienced similar increases in eligibility. African American eligibility to CSU increased from 13.2 percent in 1996 to 18.6 percent in 2003; Chicano/Latino eligibility increased from 13.4 percent to 16 percent. These increases indicate that outreach efforts, improvement in local schools, and ultimately better preparation of students for college and knowledge of admissions requirements, may have been the bigger factor. The ELC program may be the next most influential factor. At the margin, ELC appears to have increased minority admissions and the percentage of low-income, first-generation college students enrolled from specific high schools that had traditionally sent few students on to four-year colleges.⁶

Connerly and other opponents of affirmative action, while not averse to increased eligibility rates and enrollment of underrepresented minority groups, remained suspicious, particularly of the seeming black box of comprehensive review. How could the regents, for example, really be sure that race did not remain a factor in admissions decisions at the most competitive campuses? Whereas Connerly was once the leading figure in questioning university administrators and requesting data and analysis, in 2003 Regent John Moores emerged as the new advocate with similar media savvy.

A multi-millionaire, Moores found his fortune first in Houston where he started and then sold BMC Software Inc. He then moved to San Diego and started another software company, Peregrine Systems Inc. He was so successful that in 1994 he bought the San Diego Padres. By the late 1990s, he was selling off his shares in Peregrine. After contributing to his successful campaign for governor in 1998, Gray Davis appointed Moores to the University of California's Board of Regents. But Moores' political predilections were not entirely clear, counting among his friends Davis, former president Jimmy Carter and Ward Connerly. While contributing to Davis' 1998 campaign, he admitted in a *Los Angeles Times* article that he voted for Arnold Schwarzenegger in the 2003 recall election of Davis, and that he would probably vote for George Bush for reelection in 2004.⁷ But one thing appeared clear; he was a staunch believer in the value of the SAT for assessing intelligence and academic ability.

Upon becoming chairman of the regents in 2003—normally a two-year position appointed by sitting board members—Moores began to question the merits of comprehensive review and any plans to reduce the use of the SAT. And like Connerly, he deeply distrusted the assurances of university administrators that race was no longer a factor in admissions decisions. In the initial months of his elevation to the position of chairman, Moores not only asked university officials for specific analysis on Berkeley's admissions (the normal route of a regent), but more unusual, he also asked for access to raw data so he could pursue his own inquiry.

MOORES' ANALYSIS

Normally, regents are not given direct access to data for two general reasons. One, the ability of the president to lead the institution is in part based on his or her ability to manage information and analysis provided to the board. Few board members have the expertise to conduct data analysis that, for instance, considers the numerous variables related to the predictive value of grades and test scores. For decades, the board was careful not to venture into a realm thought to be the authority of the president. But Connerly's demands for information in the early 1990s caused a change in policy: regents could request and receive data for their own analysis if the request was judged by the chair of the board to be meritorious. As chair, Moores could ask for any and receive all the data he desired.

Traditionally, members of governing boards are appointed to set policy, not to be analysts. Connerly partially broke this tradition, and now Moores took it to new heights. And like Connerly's 1995 campaign to have the UC Regents end the use of race as criteria in admissions, contracts and hiring at the UC (the prelude to Proposition 209), Moores' goal was not to simply promote an informed discussion within the university community but to shape policy. For Moores, an internal discussion was apparently not viewed as expedient, and perhaps would be fruitless. Moores thought the university administration intransigent in its defense of affirmative action and slow to provide detailed analysis on admissions. He believed they had something to hide. Instead of an internal discussion, Moores focused on engaging the media and a larger public.

How comprehensive review was being implemented was of increasing concern to Moores and veterans of the campaign for Proposition 209. UC's systemwide faculty led admissions board (the Board of Admissions and Relations with Schools or BOARS) proceeded to evaluate the new admissions process. The senate committee was in the midst of generating a second major report in the spring of 2004. Meanwhile, Moores was independently completing his own analysis, assisted by Tracy M. Davis, a UCLA graduate student in education and a former UC student regent, and focused on Berkeley—thought by critics of affirmative action to be the most egregious campus.

Moores submitted his first report to the regents in November 2003 and simultaneously "leaked" it to the *Los Angeles Times* and other media outlets. The leak was purported to have been done by a regent other than Moores—either as a lone agent, or perhaps in a coordinated plot that would give Moores an ability to say he had not done so. Considering Moores' subsequent disposition to announce his further findings and criticisms in the press, the latter seems likely. There was no prior discussion with the university president; Moores had, however, offered a glimpse of his data and conclusions to Berkeley Chancellor Berdahl and Vice Chancellor Paul Gray. Both traveled to Moores' palatial home on the fairway at Pebble Beach.

Berdahl and Gray claimed the data and his analysis was faulty. They asked Moores if they could work with him to correct missing information and to raise variables he had, perhaps, not thought of before the release of his conclusions to the regents or the public. They also asked that he not look only at Berkeley data as, in their view, it unnecessarily skewed the analysis of comprehensive review. "He agreed to the first point and we believed he had agreed to the second," stated Berdahl. Moores did neither. "He never acknowledged any of the errors in the data or acknowledged that he had agreed not to release it or to look at other campuses as well. We felt utterly betrayed and after that I never trusted Moores again."⁸

According to Moores, the SAT scores of recently admitted freshman told a worrisome story. In looking at data for 2001, some 3,200 students with SAT I scores above 1,400 were turned away by UC Berkeley, while 386 students scoring 1,000 or below were granted admission. Who were these students? Berkeley admitted 213 African American, Chicano/Latino, and Native American students who had SAT scores 400 points below a cohort of largely Euro-American and Asian-American students who had been rejected. In total, 1,421 Californians with SAT scores above 1,400 were not admitted to Berkeley—although they could enroll in other campuses of the University of California. How could Berkeley displace these students? Out of the total refused admission to Berkeley, some 662 (or 46%) were Asian-American—a point emphasized by Moores. Only 62 were from underrepresented minority groups.⁹

Conjuring memories of charges of discrimination in the 1980s by the Asian-American community in Berkeley's admissions processes, Moores asked, "How did the university get away with discriminating so blatantly against Asians?"¹⁰ Conspicuously missing was a similar charge of discrimination against Euro-Americans—but it was implied. Perhaps Moores hoped to rekindle the political activism of the Asian-American community.

Moores also looked at high school GPA in relationship to SAT I scores. Although most admitted students who scored poorly on the SAT I exam had high GPAs, such as an African American student with an 810 SAT score and a 4.09 GPA, there were some with low academic index scores (a combination of GPA and SAT scores). Of the nearly 400 students that Moores thought should not have been admitted to Berkeley, 73 (17.3 percent) had GPAs below 3.5. One African American student with a 940 SAT I score had a 2.65 GPA. An Asian-American student scored 670 on the exam and had a 3.0 GPA. One white student had an 860 SAT I and a 2.90 GPA. What was going on, Moores asked?

At Berkeley, complained Moores, comprehensive review was all about subjective "measurements" that served as proxies for race and ethnicity. While admitting others with relatively low scores, how else could one explain the rejection of such a large number of students with high SAT scores. Comprehensive review was a smokescreen, stated Moores, "an admissions system that is impossible to audit and that offers a cover for university administrators who don't want the media hounding them over declining minority enrollment."

The *Wall Street Journal* praised Moores: "liberals who run Berkeley, and their enablers on the Board of Regents, all worship at the altar of diversity . . . Racial bean counters are using taxpayer dollars to circumvent the law and the will of the voters. And in the name of political correctness, they're also doing a disservice to many college-bound minorities."¹¹ "It all reinforces the suspicions of people who have wondered all along if comprehensive review doesn't amount to quotas in camouflage," said Harold Johnson of the Pacific Legal Foundation.¹²

Ward Connerly offered a similar positive response. "I am withholding final judgment until I see the 'smoking gun, but it certainly looks as if the university is acting inappropriately," he told a reporter. "And it also appears to me that a lot of people have been in on the act. This can only happen when there is somewhat of a conspiracy in the design and the execution of that design."¹³

In a later article in *Forbes Magazine*, Moores argued that Berkeley admissions decisions displaced some 400 academically meritorious students. He opined that the less qualified students were admitted would likely fail to complete their degrees, or at a minimum not perform as well academically as students with higher SAT scores.¹⁴ The university's outreach efforts, he exclaimed, encouraged students to apply that, in all probability, were not suitable to attend a four-year college. "I'm fairly indifferent about college for a lot of kids. I don't think it's all that important," he told a Los Angeles Times reporter. For those who do extend the education beyond high school, more should go to community colleges, and more should not even think about college.¹⁵

Ultimately, Moores stated that he was concerned about fairness. Shortly after the release of his study to reporters, the Board of Regents met. Many regents chastised Moores for what they viewed as a narrow analysis. Most complained that, at the least, he should have brought his latest analysis and findings to the board, and certainly before publishing his *Forbes* article. Moores also had placed the seal of the University of California on his independently developed report. This gave it the feel of an official document generated by the university and approved by its president. One regent angrily stated that Moores had caused "significant amount of confusion in the public mind." "We may not be legal, we may not be fair and I promise you, we're not transparent," retorted Moores. The admissions process was "so opaque that even we don't know what's going on."¹⁶ The controversy generated by Moores, however, was not the only problem faced by the regents.

BUDGETS and ACCESS

California entered a significant economic recession in 2002, compounded by an energy crisis and corporate manipulation of energy prices that drove California state government close to bankruptcy. The spiral downwards contributed to the recall of Governor Gray Davis and the election of Arnold Schwarzenegger in October 2003. In turn, the new governor quickly proposed drastic budget cuts for most government programs and agencies, including the near elimination of all state funds for UC outreach efforts.

University officials claimed that outreach was a work in progress, but with indicators of success. Students in school-centered outreach programs completed college entrance requirements at a rate of more than four times that of their non-participating peers. Some 50.7 percent of the participants in UC outreach programs enrolled in a California public college compared with 25.9 percent of their nonparticipating classmates. An estimated 44 percent (nearly 2,000 students) of African American, Latino and Native American freshmen in the UC system in 2002 were prepared for college by UC outreach programs. Arguably, the state and the university had thrown a lot of money at outreach, and not all these activities were meritorious. But it was a drastic proposal to virtually eliminate funding. The governor's budget plan would eliminate not only programs established in the post-Proposition 209 era such as the new school partnerships initiative, but many that had been in existence since the 1970s.

None of the university's efforts to prove the worth of outreach programs made a difference to the governor and to doubters such as Moores. Democratic legislators might protest cuts to outreach, but power had solidified clearly in the governor's office. The overriding political problem was a huge imbalance between state revenues and expenses, worsened by a souring economy and scandals related to a short-lived energy crisis in the state. California government faced a \$28 billion deficit in 2004.

In a frenzy to reduce operating costs, Schwarzenegger's new administration demanded that freshman enrollment be cut at the University of California and the California State University for the Fall of 2004. Despite a growing demand for access to high education by a burgeoning state population, some 8,000 UC eligible students were rejected. Under the governor's plan, these students were told they could instead enroll at community colleges with a subsidy to cover their fees and with a promise that they could later transfer to a UC campus. Another 20,000 CSU eligible students were deferred under the same program. At the same time, the governor proposed capping fee increases to ten percent for undergraduates, while substantially raising graduate student fees.

Schwarzenegger also requested that both the University of California and the California State University system reduce their funding for financial aid generated through fees. Since the early 1990s, for each dollar of new fees, both UC and CSU devoted

33 percent to financial aid primarily for low-income students. This had proven an extremely important method to mitigate the effect of fee increases for lower income students. The governor's staff proposed reducing that to 20 percent. They also proposed severely cutting the Cal Grant program, which offered grants to low income students for use in either public or private institutions in California.

The net effect of these proposals was to substantially reduce state funding for California's two four-year higher education systems, while placing new restrictions on their ability to generate new revenue and to mitigate the effects on low-income students. The governor's proposal essentially took funds from UC and CSU, and gave it to community colleges. But it was arguably a penny-wise but pound-foolish proposal.

While California has provided relatively high levels of access to higher education, largely through the ubiquitous community colleges, by 2000 it was nevertheless among the bottom ten states in the production of bachelor's degrees. In part, this was because no other state pushed such a higher percent of its incoming college students into two-year community colleges—which constituted approximately 70 percent of all public postsecondary enrollment. Yet attrition rates among California community college students were exceedingly high, and national studies had shown that, controlling for other factors, students who entered two-year colleges had a much lower percentage chance of completing their B.A. degrees.¹⁷

California had established its contemporary structural approach to placing the majority of students in two-year colleges as early as 1960. Arguably, this needs to be re-evaluated in light of the education and skills needs of for California's current and future economy. Greater access to four-year colleges, and reforms in curriculum related to technology, are essential for future economic prosperity and socioeconomic mobility.¹⁸ But in 2003, long-range planning such as that accomplished in the 1950s and 1960s was a political tradition that was no longer salient to policymakers. The monstrous size of the budget problems facing California in 2003 and in future years made it impossible.

Donna Arduin, Schwarzenegger's finance director, accurately noted that per-student costs are lower in the state's community colleges. But what would be the effect of pushing even more students to an already beleaguered and under-funded community college sector? Arduin inaccurately stated that California's local colleges were "underutilized." The reality was that they had physical capacity, but most colleges had been forced to cut faculty and the number of courses they could offer. How could they adequately serve an additional bump in enrollment?

Governors in the past have faced similar budget problems. In such times, the precedent has been to force large reductions on funding of higher education while still demanding that UC and CSU keep their doors open to all eligible students. Apparently concerned with eventually striking a better funding deal with the new governor and his finance director, university officials made no concerted effort to change the governor's mind. Concerns with maintaining or preserving the institution's quality trumped the issue of access.

State cuts in 2004 were projected to total \$372 million for UC and \$240 million for CSU—this on top of two earlier years of significant reductions in funding from Sacramento. Arduin also convinced the governor that the state should eliminate all funding for outreach, with the exception of the teacher professional development programs largely operated by CSU. UC's outreach program received some \$17.9 million from state coffers in 1997-98, and had increased to a high of \$85 million in 2000-01. Davis reduced that allocation by 50 percent prior to his recall election, making the total around \$43 million. Schwarzenegger and his staff now wanted to make the allocation zero, at least for that fiscal year. It was better to cut outreach than further reduce student enrollment at UC and CSU, he and Arduin reasoned.

MOORES VIEW

On the governor's plan to cease funding outreach, Moores quipped, "I can't imagine a better program for him to eliminate." It was not that the new wave of outreach efforts by UC and CSU had been ineffective. The problem, according to Moores, was that they unreasonably raised the expectation of mediocre students to attend a campus like UCLA or UC San Diego. "Hundreds of millions of dollars," he noted, "have been spent on encouraging poor, often minority, high school students to apply to UC even if they have very low SAT scores."¹⁹ Pushing some 8,000 students into community colleges, added Moores, was probably a good idea, particularly if they had relatively low SAT scores. The disjuncture between the efforts of the university president and his administration, and the Academic Senate, and the chair of the Board of Regents were cavernous.

Moores was espousing a version of the "mismatch" theory long held by affirmative action foes that many minority students are harmed by their admission to highly selective universities and colleges in which they cannot succeed academically.²⁰ Even though a substantial body of research indicates this to be untrue, the *mismatch* theory re-emerged as a mantra. Both Chief

Justices Anthony Scalia and Clarence Thomas cited it in their briefs and comments in the *Fisher v. University of Texas* and other affirmative action related cases.²¹

As noted, pivotal to Moores' world-view was his belief in the SAT I as the ultimate indicator of intelligence and academic prowess. Moores used the test to help him choose employees at his software company. All the analysis and arguments presented by Richard Atkinson seemed inconsequential. "Nobody believes that the SAT is a perfect predictor of academic success," stated Moores, "but it's silly to pretend that very low scoring applicants should be admitted to one of America's premier universities with the expectation that somehow these students will learn material that they missed in K-12."²²

For affirmative action foes, Moores' candid comments were refreshing, his analysis proof of a university leadership and administration hopelessly corrupt. For university officials, and particularly Berkeley's chancellor, Robert Berdahl, Moores' attacks launched largely through surprise statements and articles in the mass media were aggravating. Moores' timing was interesting. He began his quest during the waning days of President Atkinson's tenure, and stepped up his advocacy when Robert Dynes became the new university president in early October 2003. A nationally respected physicist, Dynes was previously the chancellor at UC San Diego. Like Atkinson, Dynes had previously known Moores among a circle of San Diego businessmen who supported the campus.

On the second day of Dynes' new job as president of the University of California, Moores was featured in a story in the *Los Angeles Times* attacking admissions at Berkeley. The next day, Republican Schwarzenegger replaced Democrat Gray Davis. Less than month later, Moores' issued his report on SAT scores and Berkeley admissions.

In the midst of a change in administrative leadership and dramatic financial cuts, an unprecedented proposal by a new governor to cut enrollment, limit fee increases, and drive up student-to-faculty ratios, Moores regularly demanded data and analysis from the Office of the President staff. Each round generated additional questions for Moores. Besides his ongoing doubts regarding comprehensive review and outreach, he did not trust the veracity of the analysis generated by university staff. Was Berkeley an outlier in its apparent biases, or representative of the other seven undergraduate campuses of the UC system? When university officials responded to his requests for analysis, did they purposely exclude information?

BERDAHL RESPONDS

Chancellor Berdahl earlier announced his intention to retire in the early summer of 2004. He had been the president of the University of Texas at Austin and had experienced the controversy surrounding the *Hopwood* case before coming to head Berkeley. Now he blasted Moores for what he condemned as an amateurish and "flawed" analysis of Berkeley admissions. "You have done the university a great disservice and shown open contempt for reasoned discourse about complex issues," the Berkeley chancellor wrote in a letter addressed to Moores and that, like Moores' report on Berkeley admissions, was simultaneously "leaked" to the press.

Who were these 400 or so students who had low SAT I scores—a test that university analysis showed offered little predictive value of collegiate success? Some 241 were African American and Chicano/Latino students admitted as "special action" students. Some had athletic scholarships; others came from low-income communities and had high grades in required UC courses. The rest were Euro-Americans and Asian-Americans. All demonstrated excellence in their applications in other ways, claimed Berdahl, either academically or personally, and all were doing well at Berkeley academically. "Because SAT I scores, in particular, are very highly correlated with family income and parental education level, it is likely that some students with otherwise strong academic and personal qualifications will present relatively low SAT I scores," he wrote. "Most importantly, first-year performance data for these (low-scoring) students indicates they are doing well at Berkeley: not one has left due to academic deficiency," Berdahl said in his letter.²³

Berdahl also insisted that academically the students at Berkeley were the best in the university's history. Overall, the average GPA for those admitted was 4.23 and the average SAT I score was 1337. He explained that a small number of lower-scoring students are admitted at every selective campus across the country. Who were the students rejected who had high SAT I scores? Berkeley received some 35,000 applications for the freshman year, and accepted approximately 8,000 to enroll a class of nearly 4,800. Given these numbers, a significant group of students with high test scores will be turned down under any admissions policy—although if they are UC eligible that are given an opportunity to enroll at another UC campus.

Berkeley needed to choose among a highly qualified pool of applicants to create a student body with varied talents and backgrounds. Inversely, what would it mean to rely, for example, simply or mostly on test scores to create Berkeley's undergraduate student body? What was the possible merit of such a singular approach to admissions at a state university? What

would it mean for the university's social contract? In effect, Moores was proposing a paradigm shift in the purpose of the university.

In his response to Moores, Chancellor Berdahl stated that many of the high-scoring students identified by Moores had either low grade-point averages, or had withdrawn their applications, or had applied in one of three very competitive majors, or were residents of other states, for whom standards are higher. Applicants do not *all* compete against one another, Berdahl stated. They are separated into different pools according to the college or major to which they have applied. So, a high scoring student applying to the major in the College of Engineering may be denied while another with the same score would be accepted into another major.

Berdahl claimed that Moores unnecessarily degraded the public's confidence in Berkeley's admissions process and in comprehensive review. Further, he had demeaned those students who he implied should not have been admitted to Berkeley. "They deserve more than derision from the chair of the Board of Regents," wrote Berdahl. Connerly called the Berkeley chancellor "impertinent and Moores "the most caring, most honest, most diligent regent I've ever met," he said. "He didn't behave irresponsibly; he behaved admirably."

At a meeting of the regents, Moores stated that he was motivated by one thing—to make sure admissions at the University of California is "legal and fair."²⁴ To the press, he derisively placed the chancellor's complicated explanation under "the blah, blah, blah, category . . . I think something is very screwy, so I want somebody to come back and tell me exactly what is going on."²⁵

In an editorial some seven months later, Moores offered yet another attack on the university's admissions practices." I am not against Comprehensive Review, *per se*," he wrote in the *San Diego Union-Tribune*. "I do not wish to deny admission to applicants with genuine academic potential who, for any number of reasons, did not reach that potential in high school. I am deeply troubled, however, if significant numbers of low-achieving students from "under-represented minorities" are admitted, at the expense of higher-achieving applicants who happen to be Asian or Caucasian, by using Comprehensive Review to circumvent state law prohibiting racial preferences."²⁶

FOREST FOR THE TREES

Moores' complaints point to a very important problem for selective public universities attempting to balance the interests of individuals with the larger needs of society. Despite generating a significant body of data on the relatively low predictive value of the SAT I, and attempting to articulate the philosophical reasons why universities should pursue holistic admissions, Moores and other critics simply distrusted the motivations of university officials. They were contemptuous of the deliberative process required for forming the post- Proposition 209 and post-*Hopwood* admissions practices, and specifically the role of university faculty to "set the conditions for admission" -- the historical charge given to the senate by the Board of Regents.

The politicization of admissions is not a terribly new phenomenon. Indeed, it is an inevitable outcome of the increasing demand for a scarce public good. And universities, such as California's land-grant university, have in the past made strategic mistakes highlighted by an over-dependence on race as a factor in admissions. As a result, affirmative action became less politically viable, harder to defend, and more open to attack.

But the polarizing nature of the debates over affirmative action, past and future, is not the singular fault of good policy aims implemented badly. And such debates are not fueled simply by philosophical differences over how to address complex social problems. There are also the behaviors and interests of individuals and political action groups who hold or seek significant levels of political power—whether it be a coordinated group of lawmakers, racial interest groups, or a regent. Public universities, and in particular highly selective institutions, not only must distribute an increasingly scarce resource; they must also deal with a wider group of real and perceived stakeholders.

Both Moores' complaints and those of the plaintiffs in the current *Student for Fair Admission (SFFA) v. Harvard* case reflect a larger problem: skepticism about the honesty, integrity, and legality of higher education institutions setting their own admission policies. Historically, court cases regarding access to higher education, including anti-affirmative action advocacy groups but also the NAACP, focused their efforts on public institutions that are subject to public accountability.

In the past, private institutions have been largely exempted from debates over the rightful use of affirmative action, and race-based admissions. Legally, they are private corporations, granted charters by their state government and not subject to the same public purview and control faced by public universities. Hence, whether it was Stanford or Harvard or smaller selective private colleges, they have been largely left alone to set their admissions policies and practices. And their admission processes have been a black box that includes favoritism towards legacy admissions -- that are largely unacceptable at selective public

institutions. But perhaps no more? *SFFA v. Harvard* is unprecedented in that Harvard, a private corporation, is being viewed as a private club that racially-discriminates, and it is illegal for private clubs to discriminate on race. As a result, its admissions processes are being exposed.

If the courts follow precedent, they will defer to public and private universities in their consideration of race as long as it is one among a number of criteria for admission – a precedent set by *Bakke*. The courts have also consistently deferred to universities on how they make their admission decisions, unless there is clear evidence of overt discrimination.²⁷

Writing the majority opinion in the 2003 *Grutter v. Bollinger* case, Justice Sandra Day O'Connor supported two justifications similar to those offered twenty-six years earlier by Justice Lewis F. Powell in the 1978 *Bakke* case. First, O'Connor recognized the "principle of student body diversity as a compelling state interest" and that universities "can justify using race in university admissions" largely for their role in creating a more equitable society. Second, O'Connor focused on the "constitutional dimension" of institutional autonomy and, specifically, the proper authority of universities in the realm of admissions. In her written opinion, she cited Powell: "The freedom of a university to make its own judgments as to education includes the selection of its student body."²⁸ O'Connor also cited Justice Felix Frankfurter's 1957 opinion identifying the selection of students as one of four freedoms essential for the academic enterprise, the others being "who may teach, what may be taught, how it should be taught."²⁹

Yet we may be entering a different political and legal era. In the Harvard case, SFFA, an organization founded by anti-affirmative action advocate and financier Edward Blum, filed a suit in a federal district court against Harvard charging a pattern of discrimination against high-achieving Asian-American applicants. A court order then required Harvard to provide an unprecedented level of admissions data to the plaintiffs. Like Moores, SFFA generated analysis, via a contracted study by Duke economist Peter S. Arcidiacono, charges systematic discrimination against Asian-American students – who act as a surrogate group to attack affirmative action.³⁰ Harvard then commissioned an analysis provided by David Card at UC Berkeley stating that the SFFA analysis was deeply flawed in part because it did not include "personal information" (including educational background of parents, co-curricular participation, special talents, and legacy and donor recommendations). Adding to the fray is an implicit endorsement of SFFA's charge by the current White House.

Like Moores, the SFFA lawyers claim that Harvard should rely solely on "objective" criteria in making admissions decisions -- specifically SAT scores and GPAs. Arcidiacono's pre-trial report stated that, "by controlling for test scores, one can show that Asian-Americans applicants were being held to a higher standard than [other applicants], all else equal."³¹ As is the case at Berkeley, Harvard must choose among many qualified students, most with very high test scores. Harvard claims it needs multiple sources of information to make its admissions decisions; the SFFA claims that the addition of "personal information" builds in biases to purposefully discriminate against Asian-Americans. There are differences in how Harvard case is being argued with that of the Berkeley case told here, with an increased focus on the use of personal information in the application process. But the similarities are striking.

Will the federal district court defer to legal precedent set out by O'Connor and others? No matter what the decision is, it will be appealed and will likely make its way to the Supreme Court. Blum has provided financial support previously for a long list of legal suits challenging affirmative action, including the 2016 *Fisher v University of Texas* case. The goal: that a now more conservative court than in O'Connor's day will render a final blow.

ENDNOTES

- ¹ Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), was the first successful legal challenge to a university's affirmative action policy in student admissions since Regents of the University of California v. Bakke. In Hopwood, four white plaintiffs who had been rejected from University of Texas at Austin's School of Law challenged the institution's admissions policy on equal protection grounds and prevailed. After seven years as a precedent in the U.S. Court of Appeals for the Fifth Circuit, the Hopwood decision was abrogated by the U.S. Supreme Court in 2003.
- ² Challenges to affirmative action in admissions are based largely on the contention that they violate the Equal Protection Clause of the 14th Amendment of the US Constitution, and Executive Order 11246 signed by President Lyndon B. Johnson on September 24, 1965, prohibiting employment discrimination based on race, color, religion, and national origin by those organizations receiving federal contracts and subcontracts.
- ³ Anti-affirmative action advocate and UCLA law professor Richard Sander recently sued the University of California's Office of the President for admissions data. Sander's is the co-author with Stuart Taylor of the "Mismatch" theory that beneficiaries of race-conscious admissions fare worse academically at selective law schools than those who are not, and extrapolating this idea to undergraduate admissions at other selective universities.

- 4 See Saul Geiser, "The Growing Correlation Between Race and SAT Scores." Center for Studies in Higher Education. Research and Occasional Paper Series (ROPS). CSHE.10.15 (October 2015); Saul Geiser, "Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California." Center for Studies in Higher Education. Research and Occasional Paper Series (ROPS). CSHE.15.17 (December 2017).
- 5 See John Aubrey Douglass, *The Conditions for Admission: Access, Equity and the Social Contract of Universities*, Stanford University Press, 2007.
- 6 University of California, Board of Admissions and Relations with Schools, "Comprehensive Review in Freshman Admissions–Fall 2003: A Report from the Board of Admissions and Relations with Schools," University of California Office of the President, September 2003.
- 7 Alan Zarembo, "Putting Them to the Test," *Los Angeles Times*, January 27, 2004. A later study by Zach Bleemer indicates the relative low impact of efforts such as ELC and outreach programs to expand access to underrepresented minorities. He notes that ELC brought about 500 Black and Hispanic students into UC in the 2000s decade, which is a 0.3 percentage point increase in URM enrollment by 2005. See Bleemer, *The Effects of Selective Public Research University Enrollment: Evidence from California*, Center for Studies in Higher Education. Research and Occasional Paper Series (ROPS). CSHE.11.18 (September 2018).
- 8 Correspondence between author and former Berkeley Chancellor Robert Berdahl, May 17, 2006.
- 9 John Moores, "Defying Voters, UC, Berkeley is Admitting Kids with Low SAT Scores and Rejecting High Achievers," *Forbes Magazine*, March 29, 2004.
- 10 *Ibid.*
- 11 "On Regents and Reality," *Wall Street Journal* (Eastern edition), March 23, 2004.
- 12 Michelle Locke, "SAT Stats Spark Debate: Do UC Admissions Pass Fairness Test? Associated Press, Saturday, November 8, 2003
- 13 Tanya Schevitz, "UC Admissions Under Fire Again," *San Francisco Chronicle*, October 10, 2003.
- 14 Moores, "Defying Voters."
- 15 Rebecca Trounson, "UC Regents Assail Chairman Over Admissions Report," *Los Angeles Times*, November 21, 2003.
- 16 *Ibid.*
- 17 John Aubrey Douglass, "Investment Patterns in California Higher Education and Policy Options for a Possible Future." Center for Studies in Higher Education. Research and Occasion Papers Series (ROPS). CSHE.5.02 (April 2002)
- 18 John Aubrey Douglass, "A Reflection and Prospectus on California Higher Education: The Beginning of a New History," California Policy Issues Annual, 2002, pp. 80-156.
- 19 Moores, "Defying Voters."
- 20 For a recent version of the theory, see Richard Sander and Stuart Talyor Jr. *Mismatch: How Affirmative Action Hurts Students its Intended to Help, and Why Universities Won't Admit It* (Basic Books, 2012). Generally, the "mismatch" theory is not supported by research. See Bowen, William G., Bok, Derek. 1998. *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ: Princeton University Press; Sigal Alon and Marta Tienda, "Assessing the Mismatch Hypothesis: Differences in College Graduation Rates by Institutional Selectivity," *Sociology of Education*, October 2005.
- 21 Conor Friedersdorf, "Does Affirmative Action Create Mismatches Between Students and Universities? The debate over 'mismatch theory' is needlessly polarized—and further research will help students, whatever the answers it generates," *The Atlantic*, December 15, 2015.
- 22 *Ibid.*
- 23 Robert Berdahl to Robert Dynes, October 10, 2003.
- 24 Rebecca Trounson, "UC Berkeley Admissions Dispute Becomes Heated," *Los Angeles Times*, October 17, 2003.
- 25 Schevitz, "UC Admissions Under Fire Again."
- 26 John Moores, "Mis-admission to the UC system," *San Diego Union-Tribune*, June 11, 2004
- 27 John Aubrey Douglass, "Affirmative Action, The Fisher Case, and the Supreme Court: What the Justices and the Public Need to Know." Center for Studies in Higher Education. Research and Occasional Papers Series (ROPS). CSHE.2.13 (February 2013)
- 28 *Ibid.* Court cases cited by O'Connor include *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U. S., at 603.
- 29 *Sweezy v. New Hampshire*.
- 30 [Expert Report of Peter S. Arcidiacono: Student for Fair Admissions, Inc v. Harvard](#), June 15, 2018.
- 31 Asian-Americans saw [the lowest acceptance rate](#) of any racial group, according to a Crimson analysis of the same dataset. White applicants saw the second-lowest acceptance rate and African-American applicants saw the highest acceptance rate. Between 2000 and 2017, Asian-American applicants to Harvard earned an average SAT score of 726. White applicants earned an average score of 713, Native-American and Native-Hawaiian applicants an average score of 658, Hispanic-American applicants a score of 650, and African-American applicants a score of 622.