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Abstract: In the shadow of the Supreme Court's decision to uphold race-conscious policies in *Fisher v. University of Texas* (2016), and midway to Justice O'Connor's 25-year sunset clause in *Grutter v. Bollinger* (2003), affirmative action remains contentious. This qualitative theoretical study posits that we need not speculate about O'Connor's aspirational deadline, suggesting that by 2028 race would presumably no longer be a necessary consideration in university admissions. California has been living O'Connor's post-affirmative action ideal for two decades and by all accounts the elimination of race-conscious affirmative action has left an indelible and as of yet irreparable mark on the Golden State.

Keywords: Proposition 209, affirmative action, University of California, race

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On June 23, 2016 the Supreme Court of the United States upheld the limited use of race in university admissions. By a 4-to-3 margin, a plurality of the Court led by Justice Anthony Kennedy—and joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor—affirmed that the University of Texas at Austin had done its due diligence to satisfy that its race-conscious holistic admissions program met the legal, strict scrutiny standard. The Supreme Court's decision to endorse *Fisher v. University of Texas at Austin et al.* (2016) (hereafter *Fisher II*), and by extension reaffirm *Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003), marked the end of an eight-year campaign by Abigail Fisher and her legal team to curtail race-conscious admissions policies at the University of Texas and to end affirmative action practices in higher education at large.

Initial observations suggest that Justice Kennedy's *Fisher II* majority opinion more firmly establishes legal precedent to continue supporting the limited use of race in university admissions. Still unclear, however, is whether the Court's most recent ruling will abide by Justice Sandra Day O'Connor's aspirational 25-year marker first established in *Grutter* (2003). A seven-bench court, minus Justice Elena Kagan who recused herself from both *Fisher I* and *Fisher II* deliberations, and absent the late Justice Antonin Scalia who passed away before final proceedings, remained silent concerning O'Connor's famous assertion uttered in *Grutter*:

> We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. (2003, p. 343)

While *Fisher II* offers new insight for postsecondary leaders, practitioners, and policy-makers concerning the future of race-conscious practices in higher education, affirmative action remains as volatile as ever. In the shadow of the *Fisher II* decision, Gallup reported "seven in ten Americans say merit should be the only basis for college admissions" (Newport, 2016). In addition, two new anti-affirmative action cases against Harvard University and the University of North Carolina, Chapel Hill have begun to make their way through the federal court system. For proponents of affirmative action, the policy remains an irreplaceable if imperfect tool in the quest for greater racial diversity and social justice (Bell, 1979, 2004; Delgado, 1991; Guinier, 2015; Kennedy, 2014; Zamani-Gallaher, Green, Brown, & Stovall, 2009). By contrast, for opponents of affirmative action, the policy has long worn out its utility and welcome, allegedly hurting more than helping its intended beneficiaries (Carter, 1991; Kahlenberg, 2014: McWhorter, 2000: Sander & Taylor, 2012; Steele, 1990; Thernstrom & Thernstrom, 1997). Mid-way to

Grutter's original 25-year sunset clause and in the midst of ongoing rancor concerning the practicality of race-conscious policies, O'Connor's post-affirmative action vision has come of age in California.

In this paper, I posit that California serves as a natural social experiment (Bowen, 2010) to test whether O'Connor's 25-year sunset clause remains illusory. A critical race analysis of the University of California two decades after the passage of Proposition 209 reveals both intended and unintended consequences of ending race-conscious affirmative action policies. And while many studies exist that address the aftermath of Proposition 209 across individual segments of the University of California (UC) system, this paper examines how the premature elimination of race-conscious affirmative action policies within the UC system affected the holistic academic environment beyond undergraduate admissions. To follow, I begin with reviewing the complicated and often forgotten history of affirmative action. I then address the passage of Proposition 209, which in 1996 terminated the use of race-conscious affirmative action policies across California's public institutions. I also introduce Critical Race Theory in order to provide analysis on how the elimination of race-conscious affirmative action policies restructured California's postsecondary landscape.

Affirmative Action and California's Proposition 209

Despite a vast body of research literature documenting the complicated origins of race-conscious affirmative action practices (Bowen, 2010; Brown et al., 2003; Chang, Witt, Jones, & Hakuta, 2003; Katznelson, 2005; Skrentny, 1996; Stulberg & Chen, 2013; White, 2003; Yosso, Parker, Solórzano, & Lynn, 2004), in both public and private debates, affirmative action is too often rendered ahistorical and acontextual (Crenshaw, 2007; Ledesma, 2013). Coupled with the Supreme Court's long-standing reluctance to support restorative justice arguments in defense of race-conscious policies, this fact has resulted in an increasingly narrow definition of allowable affirmative action practices in higher education. As researchers have noted (Berrey, 2011; Bowen, 2010; Karabel, 2006; Skrentny, 1996; White, 2003), the Supreme Court continues to heavily favor student body diversity arguments over remedial justice rationales. The historical basis for affirmative action as a measure to help correct historically discriminatory social structures, including the legacy of Jim Crow laws, has been largely abandoned. Many critical scholars (Bell, 1979, 1997, 2003, 2004; Bowen, 2010; Brest & Oshige, 1995; Karabel, 2006; Leong, 2013; Skrentny, 1996), have posited that Justice Lewis Powell's diversity rationale argument in *Bakke* (1978) effectively demoted the restorative justice argument as a relic of the past, even as racial disparities and discrimination have remained very real for historically minoritized people of color in the present

(Alexander, 2012; Bell, 2004; Bonilla-Silva, 2003; Bowen & Bok, 1998; Carnevale & Strohl, 2013; Coates, 2015; Feagin, 2002; Goldberg, 2015; Karabel, 2006; Omi & Winant, 2015).

In 1996, motivated by partisan political tensions that included virulent anti-immigrant rhetoric and racist nativism (Chavez, 1998), the California electorate adopted the *California Civil Rights Initiative* (CCRI) by a 54 percent margin. More popularly known as Proposition 209, the CCRI overrode *Bakke's* federal mandate and amended the California Constitution, pronouncing:

> The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[1]

Within the realm of higher education, the adoption of Proposition 209 meant that the state's public higher education systems could no longer utilize race-sensitive measures for admissions, financial aid, and "a vast array of University sponsored activities" (University of California Regents, 2007).[2] And while Prop 209 was not enacted until 1998, its passage had an immediate chilling effect on the application, admissions, and campus-based student services for historically under-represented students into the University of California system (Kidder & Gándara, 2015; Orfield & Miller, 1998; Post & Rogin, 1998).

Throughout the course of the last two decades, researchers have produced a rigorous body of literature analyzing the magnitude and impact of Prop 209 on the University of California system. Early studies reveal African American and Chicano/Latino students—whose numbers were already tenuous to begin with—faced a formidable challenge due to the passage of Proposition 209. Application and enrollment numbers for African American and Chicano/Latino students plummeted immediately following the elimination of race-conscious admissions practices (Contreras, 2005; Kidder, 2012, 2013; Kidder & Gándara, 2015; Orfield & Miller, 1998). Grodsky and Kurlaender (2010) explain, "restrictions on affirmative action in California had a much greater impact on the demography of higher education in the state than previous analysts [had] reported" (p. 56). Indeed, the passage of Prop 209 transformed California's higher education landscape. At UC Berkeley and

[1]Text for Proposition 209 retrieved from http://vote96.sos.ca.gov/html/BP/209text.htm. Ironically, the implementation of Proposition 209 has never been read to suggest that the state is mandated to offer equitable and quality educational opportunities across all PK–12 schools. Instead, the focus has intentionally been on legislating higher education policy.

[2]While Proposition 209 affects both the California State University System and the University of California (UC) System, for the purpose of this paper I will focus on the impact of Proposition 209 on the UC.

UCLA, two of the UC's most popular and competitive campuses, the effect was immediate. Following the passage of Prop 209 these campuses "admitted 40 percent fewer [underrepresented minority] freshmen and 25 percent fewer URM [under-represented minority] . . . transfer students" (Chang & Rose, 2010, p. 88). The precarious drop in application and enrollment figures for historically under-represented students of color confirmed scholars' initial predictions about the potential devastating effect of Prop 209 (Karabel, 1998; Orfield, 1998; Tien, 1998).

At the same time, many proposed that the elimination of race-conscious policies would usher in new welcome changes. Traub (1999) suggested that the abolition of race-conscious policies would result in better approaches to expand California's higher education eligibility pool by funneling students of color into UC's less impacted campuses. Traub's speculation echoes beliefs espoused by critics of race-conscious affirmative action (Sander, 2014; Sander & Taylor, 2012; Thernstrom & Thernstrom, 1997), who frame the elimination of race-conscious policies as an opportunity to "better match" underrepresented minority students with institutions that best serve their academic preparation, or perceived lack thereof (Sander, 2014, p. 109). Proponents of the "mis-match" hypothesis like Sander have even claimed that eliminating race-conscious policies has helped place "many more black [sic] and Hispanic graduates in more challenging majors" than pre-Proposition 209 (Sander, 2014, p. 109). However, counterarguments (Chambers, Clydesdale, Kidder, & Lempert, 2005; Kidder & Lempert, 2015) and institutional data suggest otherwise. For example, for the 2000–01 school year, the University of California (2018a) reported that a total of 47, or only 1 percent, African American undergraduates across the entire system earned engineering/computer science degrees. Sixteen years later, UC data reveals that African American undergraduates earned engineering/computer science degrees at a rate of approximately 2 percent, or 135 recipients system-wide. For Chicano/Latino students, the numbers appear to be more moderately successful. Whereas in 2000–01 Chicano/Latino students earned undergraduate engineering/computer science degrees at a rate of 5 percent, or 177 recipients system-wide; in 2016–17 they earned undergraduate engineering/computer science degrees at a rate of 18 percent, or 1,013 recipients across the UC (University of California, 2018a). On face value these figures appear to verify Sander's thesis, however, closer analysis reveals a more complicated story.

In the twenty years since the passage of Proposition 209, undergraduate enrollment figures for Chicano/Latino students across the UC system have improved to a limited extent. However, this increase is largely attributed to the overall growth of the Chicano/Latino K–12 population (Chapa & De La Rosa, 2004; Contreras & Gándara, 2006; Villalpando, 2009; Zarate & Burciaga, 2010) rather than any real alternative measures that have ameliorated the need for

affirmative action. Recent reports by the Campaign for College Opportunity (2015a, 2015b) detail that despite some marginal improvement in enrollment, Chicano/Latino students remain under-enrolled in the UC system as a whole. A companion study on African American students reports their condition as far worse. In 2014 "at least two-thirds of Black applicants were denied admission to six of UC's nine undergraduate campuses" (Campaign for College Opportunity, 2015a, p. 18). As a result, the bleak reality is that although some campuses have shown promise, overall "Black representation at the UC has not increased from where it was twenty years ago" (Campaign for College Opportunity, 2015b, p. 18).[3] Further complicating matters, unlike their Chicano/Latino counterparts, California's Black K–12 population is not projected to increase. Previous studies (Grodsky & Kurlaender, 2010) explain that the elimination of California's race-conscious affirmative action policies altered the demography of California's higher education landscape, including "resorting" African American and Chicano/Latino students across California's postsecondary institutions (Grodsky & Kurlaender, 2010).

At the professional and graduate school levels, enrollment figures for historically minoritized students are not much better. Even two decades after the enactment of Proposition 209, admissions and enrollment figures for historically underrepresented groups into UCs graduate and professional schools remain abysmal (Garces, 2012; Kidder, 2003, 2013; Kidder & Gándara, 2015; Tienda, 2001). These numbers attest to the magnitude and longevity of the effects of Proposition 209. After all, the end of race-conscious policies affected graduate and professional school enrollments just as much as it influenced the composition of undergraduate student bodies. In early analysis of Proposition 209's impact, Tienda (2001) predicted, "These dramatic changes in the composition of college freshmen at California's most selective institutions will reverberate on the pipeline into medical and professional schools" (p. 135). Garces and Mickey-Pabello's (2015) more recent study on affirmative action bans and the matriculation of underrepresented medical school students confirms Tienda's (2001) and Karabel's (1998) initial predictions—that the elimination of affirmative action policies would adversely impact medical school application and admissions patterns for historically under-represented minoritized students across the UC system.

As the work of critical postsecondary scholars makes clear, the significance of Proposition 209 cannot be overstated (Backes, 2012; Chan & Eyster, 2003; Contreras, 2005; Garces, 2012, 2013; Hinrichs, 2012; Long & Tienda, 2008). Not only did Proposition 209 fundamentally alter the culture and make-up of the University of California. For opponents of race-conscious practices,

[3]In the spring of 2016, the University of California, Los Angeles reported its largest African American entering class since the passage of Proposition 209.

Prop 209 served as a model for how state constitutional amendments and/or state ballot initiatives may be used to circumvent federal support for race-conscious policies. Thus far, voter driven state affirmative action bans have been successful in most states in which they have been attempted, including California (1996), Washington (1998), Michigan (2006), Nebraska (2008), and Arizona (2010). However, in the wake of the Supreme Court's *Schuette v. Coalition to Defend Affirmative Action* (2014) ruling, opponents of affirmative action are free to utilize voter-approved state measures to limit or end race-conscious practices. The Court's *Schuette* decision to support "abolition by referendum" (Glazer, 2003) may well accelerate the reliance upon ballot initiatives to override—for the moment—still legal affirmative action measures.

To follow, I employ Critical Race Theory to examine how the *amicus curiae* friend of the court briefs filed by students and administrative leaders within the University of California system in the last three Supreme Court affirmative action cases—*Fisher I* (2013), *Schuette* (2014), and *Fisher II* (2016)—not only testify to how Prop 209 has permanently altered the University of California's holistic academic environment beyond undergraduate admissions. I posit that these amicus briefs, coupled with a rich body of research literature detailing the legacy of Proposition 209, present convincing evidence that O'Connor's 25-year sunset clause remains illusory.

Methodology

In this exercise, I utilize Critical Race Theory (CRT) to undertake a critical content analysis of the *amicus curiae* friend of the court briefs filed by the University of California in the last three affirmative action cases heard before the Supreme Court. A total of four amicus briefs were reviewed for this paper, including briefs from the President and Chancellors of the University of California filed in *Fisher I* (2013), *Schuette* (2014), and *Fisher II* (2015), as well as the Brief of 39 Undergraduate and Graduate Student Organizations within the University of California in Support of Respondents (2015) filed in *Fisher II*. I also analyzed opinions in each of these cases. While a plethora of additional amicus briefs referenced and cited California's post-affirmative action history, I posit that the aforementioned four amicus briefs are revelatory because they provide distinctive insight into the many challenges the UC has experienced seeking to serve the state's increasingly diverse populous while constrained by Proposition 209. Indeed, the UC Briefs represent a critically important voice in the debate over the future of race-conscious affirmative action policies. As the UC Student Brief (2015) makes clear, these briefs are "uniquely positioned" (p. 2) to offer insight into the effect of prematurely terminating race-conscious affirmative action policies in that they speak to

the "California experience" (UC Student Brief, 2015, p. 2), as the state with the longest affirmative action ban in the nation.

There were three stages of data analysis in this project. To begin, all texts were collected and stored using the qualitative coding software ATLAS.ti. As public documents, both amicus briefs and Supreme Court opinions are accessible in PDF format. Second, utilizing a general inductive approach (Patton, 1999; Thomas, 2006) coupled with discourse analysis (Fairclough, 2013; Gee, 2014), texts were read multiple times. Third, content analysis (Krippendorff, 2004), both within and across documents and within and across cases, allowed for the identification and triangulation of recurring narrative themes concerning the aftermath of Proposition 209 on the University of California. At each step, research literature also helped anchor and inform findings.

The central question across all of the Supreme Court's postsecondary affirmative action cases has concerned the legality of using race and ethnicity in university admissions. Likewise, arguments in opposition to affirmative action policies, including those undergirding Justice O'Connor's 25-year sunset-clause and informing state affirmative action bans, hinge on the belief that the time will arrive in which race-conscious practices will no longer be necessary. In both cases, the centrality of race makes CRT particularly apropos in the examination of affirmative action. Critical race legal scholars (Bell 1979, 1980, 1997, 2004; Cho, 2002; Crenshaw, Gotanda, Peller, & Thomas, 1995; Harris, 1993; Lawrence, 2001) and critical race postsecondary scholars (Solórzano & Yosso, 2002; Yosso, Parker, Solórzano, & Lynn, 2004; Zamani-Gallaher et al., 2009) alike have produced extensive bodies of research literature examining and opining on the history and merits of affirmative action. Across this body of work researchers have utilized CRT to address the permanence of race and racism and the need to challenge dominant ideologies and ahistorical narratives which too often (mis)inform beliefs around the continued need and relevance of race-conscious policies. Critical race scholars have also called upon CRT to provide agency to communities too often dispossessed of their histories and voices. In the analysis of affirmative action, CRT recognizes that the study of race—and by extension race-conscious practices—is shaped both by transdisciplinary forces as well as intersectional experiences. Finally, while opponents of affirmative action may argue that the policy is the antithesis of social justice, critical race scholars generally regard race-conscious practices as a minor step in the march towards greater racial equity and social justice. To follow, I describe some of the many unintended consequences of prematurely ending race-conscious affirmative action practices in the University of California with the passage and adoption of Proposition 209.

Findings

The driving force behind Proposition 209, as well as its predecessor SP–1[4], was the goal of abolishing allegedly unmeritorious, and therefore purportedly undemocratic, racial preferences in university admissions (Carbado & Harris, 2008). Unsurprisingly then, one of the major consequences of doing away with race-conscious admissions policies was the immediate drop in both application and admissions numbers for historically disenfranchised students of color at both the undergraduate and graduate/professional school levels. More alarming is the fact that even two decades later, overall admissions numbers have yet to rebound to pre-209 figures for historically minoritized students (Kidder & Gándara, 2015; Kurlaender, Friedman, & Chang, 2015). All four UC amicus briefs are emphatic about this point. For instance, in their *Fisher II* amicus brief the President and Chancellors of the University of California note, "UC has struggled to achieve sufficient diversity in its student populations, even as it has added thousands of new undergraduate seats" (p. 28). Through the passage of Proposition 209, the premature elimination of race-conscious affirmative action policy altered the culture and climate of the University of California, resulting in heightened racialization for both students and faculty.

Students and Campus Racial Climate

Opponents of affirmative action policies have historically relied on a set of consistent tropes to lobby for the end of race-conscious policies in higher education. Chief among these devices have been arguments that frame the end of race-conscious practices as a prerequisite for a more harmonious and equitable campus culture and climate (e.g., Sidanius, Levin, Laar, & Sears, 2008). The assumption being that in the absence of race-conscious policies and practices, students, faculty, and campus community members at large can bypass the contentious and divisive issue of race and instead focus on the business of education. However, as critical race theorists (Bell, 1992, 1980, 2004; Crenshaw et al., 1995; Delgado & Stefancic, 2012; Ladson-Billings & Tate, 1995; Solórzano, 1997) have long recognized, race and racism are a permanent fixture of daily life, including within post-affirmative action institutions of higher education.

Across the University of California, campus racial climate has become an even more highly combustible issue, even without affirmative action.

[4]SP1 and SP2 preceded Proposition 209. The policies, drafted and adopted by the Regents of the University of California on July 20, 1995, effectively brought an end to race-conscious practices across the entire UC System by prohibiting the consideration of race, religion, sex, color, ethnicity or national origin for admission, employment, and contracting purposes. On May 16, 2001, the Regents rescinded SP-1 and SP-2, see http://regents.universityofcalifornia.edu/governance/policies/4401.html

The absence of a critical mass of students of color has functioned to actually make the issue of race even more volatile and pronounced (Garces & Jayakumar, 2014; Sidanius et al., 2008; Ward & Zarate, 2015). Early studies (Guerrero, 2002; Solórzano, Allen, & Carroll, 2002) uncovered how the passage of Proposition 209 affected students' psyches. Responding to the implementation of Proposition 209, Guerrero (2002) spoke to the burdens of being a student of color at UC Berkeley's Boalt Law School.[5] She explained that in the wake of Proposition 209, students of color endured what they perceived to be a heightened sense of scrutiny on campus. Guerrero (2002) recounted, "If they speak, their voices are scrutinized and their contributions sometimes ignored;" she added, "If they choose not to speak, their silence is scrutinized and sometimes used by conservative students and faculty to assert that minority students add nothing to the classroom and that diversity is a 'hoax'" (p. 165).

In another study of Boalt Law post-Proposition 209, Solórzano et al. (2002) uncovered the "mundane [extreme environmental] stress of being [a student of color] on a white campus" (p. 26) by showcasing how historically minoritized students confronted racial microaggressions within an unhealthy campus climate (Ledesma, 2016). More specifically, the authors help voice students' frustrations by exposing what it means to be a student of color in a postsecondary institution lacking critical race-conscious policies. As one Black female student recounted, "I think there's a lot of pressure. You're constantly not just proving to yourself, but trying to disprove the stereotypes. I was trying to prove that I do deserve to be here" (Solórzano et al., 2002, p. 43). The racial experiences these students detail suggest that despite what anti-affirmative action pundits (McWhorter, 2000; Thernstrom & Thernstrom, 1997) have argued, the absence of race-conscious policies does not alleviate the stress and stigma students of color endure within predominantly White campuses. To the contrary, within institutions of higher education that have abandoned affirmative action practices, diminished numbers of students of color result in unhealthy at best, and unsafe at worst, campus climates (Garces & Jayakumar, 2014; Hurtado & Ruiz, 2012, 2015; Kidder, 2012; Ward & Zarate, 2015). Furthermore, the elimination of race-conscious practices has resulted in increasing incidents of racial isolation for students of color attending schools with affirmative action bans (Bowen, 2010; Kidder, 2012; Ward & Zarate, 2015).

Despite their Utopian rhetoric, the termination of race-conscious policies has not ended racism nor racial microaggressions across California's college campuses (Bowen, 2010). A series of high profile incidents helps underscore this point. In 2010 the University of California, San Diego (UCSD) gained

[5]As of 2008, UC Berkeley's Boalt Law School was renamed the University of California, Berkeley, School of Law, or Berkeley Law for short.

national notoriety for its racially offensive "Compton Cookout" fraternity party. Intended to mock Black History Month, the off-campus event encouraged partygoers to wear stereotypic garb, including gold teeth and baggy attire. Students objected to both the initial party and to the fact that the event was broadcast on a campus television station, wherein hosts used racial epithets to criticize African Americans. The campus administration's initial sluggish response did not help. Fury at UCSD quickly escalated upon the discovery of a noose hanging from a bookcase in the campus's main library just days after the Compton Cookout debacle. While all of these occurrences were reprehensible, they became all the more egregious in the context that they occurred at UCSD, which had and continues to have among the lowest enrollments of African American students across the entire UC system. In another case, in 2011 UCLA undergraduate Alexandra Wallace, a white female, gained widespread media attention when she filmed a three-minute rant wherein she critiqued and mocked the "hordes" of Asian students on campus. Wallace objected to the students' presence in the campus library. In the viral Youtube.com video, Wallace racially parodied "Asian speech," while also alleging that Asian students lacked manners (Lovett, 2011). In this instance, campus officials acted swiftly, condemning Wallace's actions, ultimately leading to her withdrawal from UCLA.

More recently, in the Fall of 2013, members of the UCLA Afrikan Student Union, led by then undergraduate Sy Stokes, produced a video entitled "Black Bruins" (Stokes, 2013) to critique the ongoing under-representation of Black men at UCLA. In the video Stokes, flanked on either side by Black male students wearing UCLA gear, performs a spoken word poem to callout and challenge university officials to answer how a campus, like UCLA, can justify having more national sports championships than Black male freshmen.[6] With more than two million views, Stokes' video proved provocative, problematizing the under-representation of Black males students within a backdrop that purportedly celebrates—and benefits from—their athletic prowess. A semester later, Black UCLA Law School students produced their own equally compelling video in the Spring of 2014; albeit with only a fraction of the views of the "Black Bruins" video. The YouTube video, entitled "33" (RecordtoCapture, 2014), showcases raw personal testimonies of Black

[6]Stokes cites Fall 2012 enrollment figures, in which he reports that Black male enrollment at UCLA numbered 660 students total—including both undergraduate and graduate students—out of a total male student population of 19,838 campus-wide. Admission woes for African American students have been constant post-209. In the fall of 2006, UCLA gained unwanted attention and sparked internal and national conversations when the it enrolled fewer than 100 Black freshmen. Since that time, and after dedicated time and effort, UCLA reported its largest incoming class of African American students for the Fall of 2016.

students speaking about the lived realities of being one of just 33 African American students out of a total of 1,100 students at UCLA Law. In addition to documenting personal narratives, the video responded to and critiqued an earlier campus incident in which law students wore t-shirts emblazoned with "Team Sander" as a reference to one of UCLA Law's most racially divisive professors, whose work explicitly questions the need for race-conscious affirmative action practices.

Upon the release of "33," the African American students featured in the video confronted a racially charged backlash, culminating in a particularly ugly incident in which at least one student featured in the video received an anonymous note in their mailbox accusing them of being a sensitive "n*****" (Mystal, 2014). UCLA Law School Dean Rachel Moran condemned this incident, offering the following commentary:

> We recognize that racial issues exist across the campus, not just in the law school. In fact, just today Chancellor [Gene] Block issued a special announcement about the need to redouble our diversity efforts in the wake of Proposition 209, which prohibited affirmative action in admissions at any public college or university in California. (Mystal, 2014)

Alone or in concert, all of these incidents suggest, the toll of being a student of color within the halls of the nation's most competitive postsecondary institutions can be heavy; however, the task is made more demanding when like-type peers are few and far between.

Faculty and Campus Racial Climate

While the impact and aftermath of the implementation of Proposition 209 on UC's student constituencies has become a critical part of the public record, much less is known about the faculty culture concerning issues of campus racial climate.

The elimination of race-conscious affirmative action policies has exacerbated an already critical problem in higher education—namely, the recruitment, hiring, and campus climate experiences for faculty of color (Campaign for College Opportunity, 2018; Jayakumar, Howard, Allen, & Han, 2009; Stanley, 2006a, 2006b; Turner, González, & Wood, 2008). Indeed, the recruitment and hiring of faculty of color is a challenge for postsecondary institutions at large, however the elimination of race-conscious policies and practices has made the problem even more acute for institutions within states with affirmative action bans, such as California (Muñiz, 2012). According to the *Report of the UC President's Task Force on Faculty Diversity* released by the UC Office of the President in 2006, "The hiring of underrepresented minority faculty began to rise in the early 1990s but dropped after 1995 with the passage of the Regents' Resolution SP–2 and Proposition 209" (iii).

In the two decades since the elimination of race-conscious policies, the UC has made modest progress towards stabilizing its underrepresented minority faculty hiring to pre-209 numbers, yet even these figures remain flat. Citing the 2013 UC Office of the President (UCOP) Accountability Report, Kidder and Gándara (2015) observe, "In 2012 only 2.6 percent of *all* UC faculty [emphasis added], across all disciplines, were African American, only 5.7 percent of all faculty were Latino" (p. 42). By 2017, African American faculty continued to represent just 2.4 percent of UC faculty overall, reflecting miniscule change in their faculty composition since 2000 (UC Office of the President, 2018b). Latino faculty representation has improved modestly during the 15-year span, increasing from 3 percent in 2000 to 6 percent in 2017 (UC Office of the President, 2018b). Detailed data shows that the University of California confronts difficulties in hiring new assistant professors compared with their availability in the national pool of minority doctorates (UC Office of the President, 2015). As the UC itself has recognized, "If the UC does not make the institutional change necessary to address current disparities in the hiring and retention of minority faculty, the faculty will become less diverse in the future, while the state becomes more diverse" (UC President's Task Force Report, 2006, iv). Most recently, these findings were affirmed by the Campaign for College Opportunity's (2018) *Left Out* report, which presents compelling evidence to suggest that there is much work to do to improve equity in faculty hiring practices across *all* of California's public postsecondary institutions, including the UC system.

The abolition of race-conscious policies, while not directly targeting faculty diversity hiring in the UC, has had a palpable impact on the system. As Muñiz (2012) describes, "Despite the lack of legal challenges to faculty affirmative action, the emergence of anti-affirmative action state mandates coupled with legal challenges in the admission arena have become a part of the legal climate in which universities operate" (p. 8). It may be argued that the state affirmative action bans—coupled with the constant threat of litigation by anti-affirmative action watchdog groups (Cokorinos, 2003)—have contributed to a dwindling pipeline of graduates of color moving into the professoriate (Kidder & Gándara, 2015). Taken together these realities have contributed to the perceptions of UCs as unwelcoming for faculty of color.

Research literature on the experiences of faculty of color in higher education has consistently uncovered unpleasant truths (Delgado Bernal & Villalpando, 2002; Feagin, 2002; Jayakumar et al., 2009; Patton & Catching, 2009; Scheurich & Young, 1997; Smith, 2015; Stanley, 2006a, 2006b; Turner, González, & Wood, 2008). Notions of feeling like an outsider, belief that one's scholarship is under-valued, and questioning one's expertise, are just some of the many challenges faculty of color regularly endure. All of which only intensify when faculty of color operate within predominantly White institutions and/or within institutions that lack sincere commitments to racial equity and social justice.

Within the University of California, the study and analysis of campus racial climate for both students and faculty reveal that Proposition 209 resulted in a still lingering and perceptible impact on faculty's sense of belonging. Across climate studies at all UC campuses, faculty of color consistently reported higher feelings of being under-valued compared to their White faculty peers (Rankin & Associates, 2014, p. 105). And as evidenced by the 2013 *Independent Investigative Report on Acts of Bias and Discrimination Involving Faculty at the University of California, Los Angeles* (hereafter The Moreno Report) (Moreno, Jackson-Triche, Nash, Rice, & Suzuki, 2013), the implementation of Proposition 209 has done nothing to end perceived incidents of racial bias, discrimination, and intolerance for students *and* faculty alike. To the contrary, The Moreno Report (2013) is a product of formal pleas from a critical mass of faculty of color requesting an independent investigation to examine faculty claims of racial bias and to review the efficacy and appropriateness of university policies and procedures meant to address such claims.

Two decades after the elimination of affirmative action and in spite of an institutional code of conduct which prohibits "discrimination by a faculty member against any university employee or another faculty member for reasons of race, color, ethnic origin, or ancestry" (p. 5), the Moreno Report explains that *every* faculty member of color in their study "described incidents of perceived bias, discrimination or intolerance that they had personally experienced while at UCLA" (p. 12). The Report's findings illuminate how even in the face of the prohibition of race-conscious practices across UC campuses, racism continues unabated—a fact conveniently overlooked by anti-affirmative action pundits. The Moreno Report provides detail on how faculty in their investigation described the "recent high-profile racial incidents at UCLA [as] merely the 'tip of the iceberg' of a campus racial climate that has deteriorated markedly for students and faculty of color" (p. 18). One participant, a faculty member of more than 25 years at UCLA, opined:

> It is as if I have stepped into a time machine and been propelled backward 40 years to 1971 when Blacks, Latinos—and yes even Asians—were just beginning to enter prestigious, predominantly White institutions like UCLA in any serious numbers. (p. 18)

In *Fisher II* (2016) Justice Kennedy declared that postsecondary institutions must continue to use data to "scrutinize the fairness" (p. 19) of their race-conscious admissions programs. However, as evidenced by the University of California's post-affirmative action reality, postsecondary leaders, practitioners, and policymakers would do well to understand that the ramifications of eliminating race-conscious policies extend well beyond undergraduate admissions. The experiences of faculty within UC's post-209 context reveal that prematurely abandoning race-conscious practices intensifies histori-

cally inhospitable surroundings for faculty and students, alike, concerned with issues of racial equity and social justice. Researchers have consistently noted the symbiotic relationship between faculty diversity and student body diversity (Gurin, Dey, Hurtado, & Gurin, 2002; Hurtado, 2001; Jayakumar et al., 2009; Smith, 2015). The presence of faculty of color not only helps affirm the presence of students of color in postsecondary spaces; the presence of faculty of color influences institutional norms and practices, including diversifying academic canons and (re)shaping curricula. However, as evidenced by the Moreno Report, prematurely dispensing of race-conscious policies and practices without dismantling white supremacist institutional structures only aggravates an already tenuous condition for minoritized bodies within predominantly White postsecondary institutions.

California's Post-Affirmative Action Reality in Context: A Discussion

Attention to the passage and aftermath of Proposition 209 has largely focused on undergraduate admissions. Higher education policy makers, practitioners, and researchers have produced an immense body of research literature on this topic. Yet often overshadowed in the discussion has been how the elimination of race-conscious practices affected critical segments of campus life beyond undergraduate admissions. Looking to the UC amicus briefs filed in *Fisher I* (2013), *Schuette* (2014), and *Fisher II* (2016), in this section I posit that the "California experience" demonstrates that the termination of race-conscious affirmative action produced unintended consequences for campus constituencies across the entire UC system, and beyond. Citing the UC Presidents and Chancellors amicus brief in *Schuette* (2014), Justice Sotomayor herself acknowledged that, "Proposition 209 . . . 'completely changed the character' of the university" (Sotomayor dissenting in *Schuette,* 2014, p. 54).

In this exercise, I draw attention to the UC *amicus curiae*, or friend of the court, briefs filed on behalf of the President and Chancellors of the University of California in support of race-conscious policies in *Fisher I, Schuette,* and *Fisher II,* as well as the amicus brief filed on behalf of 39 UC undergraduate and graduate student organizations filed in *Fisher II.* By offering a distinctively informed perspective, these briefs offer critically important information in the debate over the future of anti-affirmative action arguments. As the system of higher education with the longest post-affirmative action history, the UC is "uniquely positioned" (UC Student Brief in *Fisher II,* 2015, p. 2) to offer some of the most compelling evidence in support of race-conscious policies. Part of the power of the UC Briefs is that they attest to how the prohibition of race-conscious policies has compounded the challenges encountered by public research universities in meeting their mission.

While decrying the use of race-conscious practices, affirmative action critics have been quick to offer supposed race-neutral initiatives as viable alternatives; chief among these has been a call to focus on class-based rather than race-based models (Cashin, 2014; Kahlenberg, 1997, 2014). However, here again the UCs' experience offers "invaluable empirical tests" to challenge the viability of race-neutral programs (*Fisher I* UC Brief, 2013, p. 14). For instance, the *Fisher I* UC Brief clarifies, ". . . policies that increase the enrollment of low-income students do not serve as an effective "proxy" for race and ethnicity" (2012, p. 22). In the wake of the passage of Proposition 209 ". . . the University has spent more than half a *billion* dollars [emphasis added] since 1998 to build and expand race-neutral programs aimed at educationally disadvantaged K–12 students, and it has substantially increased the percentage of the applicant pool who participate in such programs" (*Schuette* UC Brief, 2013, pp. 15–16). However, even as the University has worked to increase access to historically underrepresented communities through expanded outreach programs, including adopting more comprehensive admissions criteria, requiring systemwide holistic application reviews, decreasing its reliance on standardized tests, and adopting "Eligibility in Local Context,"[7] UC leadership candidly concede that these measures have garnered only limited success (*Fisher* UC Brief, 2012; *Schuette* UC Brief, 2013). The UC Students Brief in *Fisher II* (2015) also hints at these shortcomings, declaring, "Racially neutral admissions policies have failed to achieve the diversity on University campuses critical for California's future. Moreover, such policies have in many instances fostered an environment of racial isolation inconsistent with the State's compelling interest in diversity" (UC Students Amicus Brief in *Fisher II,* 2015, p. 25). The Brief of President and Chancellors of the University of California in *Fisher I* (2012) confirms that the UC's experience supports the conclusion that "in a highly selective institution, implementing race-neutral policies leads to a substantial decline in the proportion of entering students who are African American, American Indian, and Latino" (p. 29), which in turn, can produce ramifications that extend well beyond admissions, and well beyond higher education.

In *Grutter* (2003), Justice Clarence Thomas insinuated that race-conscious programs, such as those practiced by the University of Michigan's Law School, " . . . [do] nothing for those too poor or uneducated to participate in elite higher education" (p. 354). He further reasoned that such programs present " . . . only an illusory solution to the challenges facing our Nation" (Justice

[7]Similar to other percentage programs, the University of California's Eligibility in Local Context (ELC) program admits a specified percentage of the state's top graduates into the UC. However, unlike other percentage plans, students are not always admitted to the top campus of their choice.

Thomas dissenting in *Grutter* 2003, p. 254). However, research confirms that doing away with race-conscious admissions practices can result in serious collateral damage beyond admissions, especially in states where the population is majority minority. For example, the premature elimination of race-conscious policies in states like California and Texas, two of the nation's most populous and diverse states, presents formidable challenges in meeting public health needs. Multiple studies (Bowen & Bok, 1998; Garces & Mickey-Pabello, 2015, Tienda, 2001; Zambrana, Molnar, Munoz, & Lopez, 2004) have noted the importance of racial diversity in medical education by confirming that a disproportionate percentage of historically under-represented physicians consistently choose to practice in historically minoritized and disenfranchised communities. Minority doctors are also more likely to treat Medicaid and/or uninsured patients. Yet, according to the Association of American Medical Colleges *Diversity in the Physician Workforce: Facts & Figures 2014* report, in California Chicano/Latino and African American physicians make-up only a fraction of the state's total 85,542 medical doctor population. Chicano/Latino doctors represent just fewer than five percent, or 4,006, of California's total physician population; while African Americans number just three percent, or 2,577 of doctors statewide. In Texas the figures are equally bleak with Chicano/Latino and African American physicians comprising just eight percent (3,937) and four percent (2,029), respectively, out of a grand total of 47,588 physicians.

According to Kidder (2013), critics of affirmative action often label California as a post-affirmative action exemplar, or as noted by the UC Brief in *Schuette,* 2013 an "unqualified success" (p. 23). Justice Thomas' dissent in *Grutter* (2003) famously opined that "the sky ha[d] not fallen at Boalt Hall" (p. 367). However, the UC experience as outlined across the research literature and within UC's *Fisher I, Schuette,* and *Fisher II* amicus briefs provides "sobering evidence" (UC Brief in *Fisher II,* 2015, p. 34) of a very different reality.

Enrollment figures for under-represented students of color into business and law schools in states with affirmative action bans remain dire. As self-reported in the UC President and Chancellors Brief in *Fisher I* (2012) and reiterated in *Fisher II,* "during the last ten of eleven academic years, two or more of UC's six business schools enrolled *zero* [emphasis in original] African Americans" (p. 34). This fact coupled with data reported by the UC Brief in *Schuette* (2013) describing that, "In certain years during the ten years ending in 2011, the medical schools at UC Irvine, UCLA, and UC San Diego, and the law school at UC Irvine have not had a single African-American student" (p. 27), suggest that tales of California's post-affirmative action glory have been greatly exaggerated.

Gallup's recent poll (Newport, 2016) may embody the notion that, "what most people think they know about affirmative action isn't right, and what

is right about affirmative action most people don't know" (Crenshaw, 2007, p. 131). Based on UC's social experiment (Bowen, 2010), O'Connor's hope to reach a point when race-conscious programs are no longer necessary is an exercise in wishful and magical thinking (Chang, Chang, & Ledesma, 2005). Indeed, whether aspirational or not, Justice O'Connor's sunset clause neither ends racism nor the need for race-conscious policies. To the contrary the premature abolition of race-conscious affirmative action policies, cloaked in the guise of colorblindness, aggravates racial isolation, imposter syndrome, and stigma (Bowen, 2010; Kidder, 2012) for minoritized students and faculty alike.

As acknowledged by Justice Sotomayor dissenting in *Schuette* (2014), the persistence of race and racism, which has historically necessitated the need for race-conscious practices, cannot simply be willed or "wished" away (*Schuette* 2014, Sotomayor dissenting opinion, p. 45). Rather, tackling the politics and controversies surrounding policies like affirmative action requires honestly confronting "the racial inequality that exists in our society" (*Scbuette* 2014, Sotomayor dissenting opinion, p. 46). Unfortunately, the Supreme Court's tentativeness in endorsing restorative and/or remedial measures to justify the use of affirmative action has helped obscure the fact that even in the twenty-first century racial inequity continues to shape and frame disparate educational opportunities and outcomes.

All of these developments, coupled with a pronounced rise in racially charged incidents nationwide (Alexander, 2012; Bonilla-Silva, 2003; Haney López, 2014)—including on college campuses (Jayakumar et al., 2009; Museus, Ledesma, & Parker, 2015; Troung & Museus, 2012)—suggests that for the time being, Justice O'Connor's post-affirmative action Shangri-La remains a distant illusion. Still, the persistent call for terminating all race-conscious policies continues, emboldened by a conservative bloc of Supreme Court and Circuit Court Justices, a motivated and well-funded anti-affirmative action coalition (Cokorinos, 2003), and the increasingly widespread embrace of what Robbins (2004) has termed "the colorblind logic of neoliberalism" (Brown et al., 2003; Doane & Bonilla-Silva, 2003; Haney López, 2014; Jayakumar & Adamian, 2015; Robbins, 2004). For now, *Fisher II's* finale signals affirmative action's reprieve. However, with additional pending litigation on the horizon, affirmative action remains a perennial hot topic.

As the clock continues to tick on *Grutter's* sunset clause, in California educational leaders, policy makers, and practitioners have already determined that there are *no* adequate substitutes for affirmative action and that "the limited and judicious application of race-conscious admissions measures remains necessary" (UC Brief in *Fisher I,* 2012, p. 36).

Implications and Conclusion

In all three of the most recent affirmative action cases to appear before the Supreme Court—*Fisher v. University of Texas at Austin, et al.* (2013), *Schuette v. Coalition to Defend Affirmative Action* (2014), and *Fisher v. University of Texas at Austin, et al.* (2016)—the amicus curiae friend of the court briefs filed on behalf of the President and Chancellors of the University of California, as well as the UC Student Brief filed in *Fisher II,* directly address the reality of what it means to exist in a post-affirmative action state. As the briefs make clear, the premature elimination of race-conscious policies with the passage and adoption of Proposition 209 twenty years ago has left the University of California "uniquely situated" (UC President and Chancellors Brief, *Fisher II,* 2015, p. 3) and "uniquely burdened" (UC President and Chancellors Brief, *Schuette,* 2013, p. 5). A review of the research literature and the UC amicus briefs in *Fisher I, Schuette,* and *Fisher II,* reveal incontrovertible evidence that the premature elimination of race-conscious policies produced unintended consequences; consequences that continue to shape and frame the experiences of students and faculty within and across the University of California, and beyond, to this day.

Ironically, despite reams of evidence, the Supreme Court has only cursorily acknowledged that California embodies a " . . . close to an optimal 'natural experiment to test . . . '" (UC Student Brief in *Fisher II,* 2015, p. 26) whether O'Connor's race-neutral ideal is truly attainable. In the University of Michigan cases, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), while Justice Ginsburg and former Justice David Souter both questioned the applicability of percentage plans such as those practiced in Texas and California, to Michigan; only Justice Thomas explicitly cited UC's experience post-Proposition 209. Although, his citation erroneously claimed that the "sky had not fallen at Boalt Hall" (*Grutter,* 2003, p. 367). Ironically, not a single Supreme Court Justice explicitly referenced the UC experience in *Fisher I* (2013) or its more recent iteration *Fisher II* (2016). By contrast, the Justices put California's post-affirmative action experience squarely at the center of their *Schuette* (2014) decision. Indeed, Justice Sotomayor's 58-page dissent directly rebukes any claims that the prohibition of "race-sensitive admissions policies" (p. 2) have been an unmitigated success. Justice Sotomayor's dissent, framed as a historical lesson, proclaims that not only does race and racism continue to matter, so too do the aftereffects of prematurely terminating race-conscious affirmative action policies.

In the Supreme Court's *Fisher II* (2016) majority decision upholding the limited use of race in university admissions, Justice Kennedy instructs the University of Texas to "continue to use data to scrutinize the fairness of its admissions programs" (*Fisher II* slip opinion, 2016, p. 19). Justice Kennedy maintains that it is the "University's ongoing obligation to engage in constant

deliberation and continued reflection regarding its admissions policies" (*Fisher II* slip opinion, 2016, pp. 19–20).

For two decades the University of California has been a laboratory of experimentation, dedicated to studying and understanding the passage and aftermath of Proposition 209. In that time postsecondary leaders, practitioners and policy makers have deliberated and reflected over the cessation of race-conscious affirmative action practices. They have concluded that there are *no* adequate substitutes for race-conscious policies. Equally as important, they have determined that the termination of race-conscious affirmative action has not ended or decelerated acts of racism across UC's campuses. To the contrary, the end of affirmative action produced unintended consequences, which continue to reverberate to the present day.

Since Californians adopted Proposition 209, the Supreme Court of the United States has heard five cases wherein they have deliberated over the future of race-conscious policies in higher education.[8] While we are left to speculate as to why California's post-affirmative action experience has garnered only limited attention by the Court. California's experience remains relevant.

In *The Miner's Canary: Enlisting Race, Resisting Power, and Transforming Democracy*, Guinier and Torres (2002) alert us to be conscious and mindful of the plight of the miner's canary:

> Even though the canary is in a cage, it continues to have agency and voice. If the miners were watching the canary, they would notice that it is talking to them. "I can't breathe, but you know what? You are being poisoned too. If you save me, you will save yourself." (p. 259)

As recognized by the President and Chancellors of the UC system, "The University of California's experience establishes that in California, and likely elsewhere, at present the compelling government interest in student body diversity *cannot be fully realized* [emphasis added] at selective institutions without taking race into account in undergraduate admissions" (UC President and Chancellors Brief in *Fisher I,* 2013, p. 4). By their own admission, the University of California is the nation's post-affirmative action canary. Furthermore, per the Brief of 39 UC Undergraduate and Graduate Student Organizations in *Fisher II*, there is no need to "speculate as to what a state university system might look like where the values attendant with considering diversity in a race-neutral fashions are eliminated" (UC Student Brief in *Fisher II,* 2015, p. 37). O'Connor's post-affirmative action future has come of age in California, and by all accounts the elimination of race-conscious

[8] *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003), *Fisher v. University of Texas at Austin* (2013), *Schuette v. Coalition to Defend Affirmative Action* (2014), and *Fisher v. University of Texas at Austin* (2016).

affirmative action has left an indelible and as of yet irreparable mark on the Golden State.

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