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New Law Professor Study: Affirmative Action Remains Legal Under Prop. 209; Low Minority Selection Rates Leave Universities Open to Loss of Funding

LOS ANGELES, CA – Evidence suggests that elite California colleges have been discriminating against African American and Latino applicants since the passage of Proposition 209. According to a study recently published by Loyola Law School Los Angeles constitutional law professor Kimberly West-Faulcon, rejected minority students have grounds to charge UCLA and UC Berkeley with violating Title VI federal administrative regulations.

The new study, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, finds that since anti-affirmative action laws like Proposition 209 have been in effect, it is minority applicants, not white applicants, who have a legal basis for alleging their federal civil rights have been violated.

The study, which currently appears in the most recent edition of *The University of Pennsylvania Law Review*, concludes that universities that admit whites at substantially higher rates than minority applicants may have violated Title VI federal civil rights laws, and that the federal funding of elite state universities is in jeopardy because of it. A copy of the study can be found at <http://www.pennumbra.com/issues/pdfs/157-4/WestFaulcon.pdf> and <http://papers.ssrn.com/abstract=1393898>.

The study also asserts that publicly funded universities subject to laws banning racial preferences in admissions may use race-based affirmative action policies to comply with federal civil rights law. The legal portion of the study, the first in-depth analysis of anti-affirmative actions laws as a new genre of state laws, concludes that “race-based affirmative action may be permissible subsequent to the passage of a state anti-affirmative action law.”

West-Faulcon points out that “because nothing in the text of state anti-affirmative action laws actually prohibits affirmative action and because all four of the nation’s state anti-affirmative action laws include a ‘federal funding exception,’ these laws can be interpreted to mean that state universities can grant racial preferences to avoid discrimination against minority applicants.”

In the 85-page study, West-Faulcon used several federal tests for race discrimination and found adverse impact against African American and Latino students for nine of the first ten (9 of 10) UCLA post-Proposition 209 admissions cycles, for six of the first ten (6 of 10) UC Berkeley post-Proposition 209 admissions cycles studied, and for five of the first nine (5 of 9) University of Washington post-Initiative 200 admissions cycles.

“These findings are interesting for two reasons,” said West-Faulcon. “First, it suggests that universities accused of breaking state anti-affirmative action laws by improperly *favoring* minorities could actually be breaking federal anti-discrimination laws by *disfavoring* minorities.”

“Second, the publication of the study is particularly timely because of the high-profile *Ricci v. DeStefano* case argued last month before the U.S. Supreme Court,” says West-Faulcon. Her legal analysis in the study employs a rationale similar to the one used by the New Haven, Conn. fire department against the reverse discrimination claims of a white firefighter challenging the city’s decision not to use the results of a multiple-choice test it feared discriminated against minority firefighters.

West-Faulcon said, “Prop. 209 does not change the fact that UCLA and UC Berkeley, like the New Haven fire department, need to comply with federal laws prohibiting discrimination against minorities. So, when minority admission rates drop low enough to violate federal anti-discrimination law, these institutions may have a legal justification for re-adopting affirmative action.”

“Since the voters approved Prop. 209 in 1996, professors and even some members of the University of California Board of Regents have claimed that UC Berkeley and UCLA cheat on Prop. 209,” said West-Faulcon, a former civil rights attorney who directed the Western Regional Office of the NAACP Legal Defense Fund in Los Angeles and once sued UC Berkeley on behalf of rejected minority applicants. “I used the federal test for discrimination to see if there have been years since Prop. 209 and I-200 took effect where admission rates suggest that white applicants have been the victims of reverse discrimination,” she explained.

According to the statistical component of the study, the exact opposite could be true. “Even though many are suspicious that admissions officers are granting racial preferences to minorities, white students rejected from UCLA, UC Berkeley and the University of Washington could have a difficult time proving reverse discrimination based on raw admissions data,” said West-Faulcon.

“That is because, at all three institutions, for each year included in the study, white high school students were consistently admitted at higher rates than African Americans and Latinos,” the author noted.

As an example, West-Faulcon points to the admission rates for the year called into question by a political science professor who accused UCLA of illegally admitting too many African Americans. “We cannot conclude that UCLA violated Prop. 209 based simply on the fact that the number of African American students increased from 250 in 2006 to 374 in 2007,” said West-Faulcon. “The legal standard for proving discrimination requires comparing the admission *rates* of minorities and non-minorities.”

“When I calculated and compared the admission rates for African American and white applicants to UCLA in 2006 and 2007, it revealed a disparity *against*, not in favor of, African American students,” observed West-Faulcon. “In fact, African Americans were admitted at a rate that was 10 to 15% lower than whites in both years,” she found.

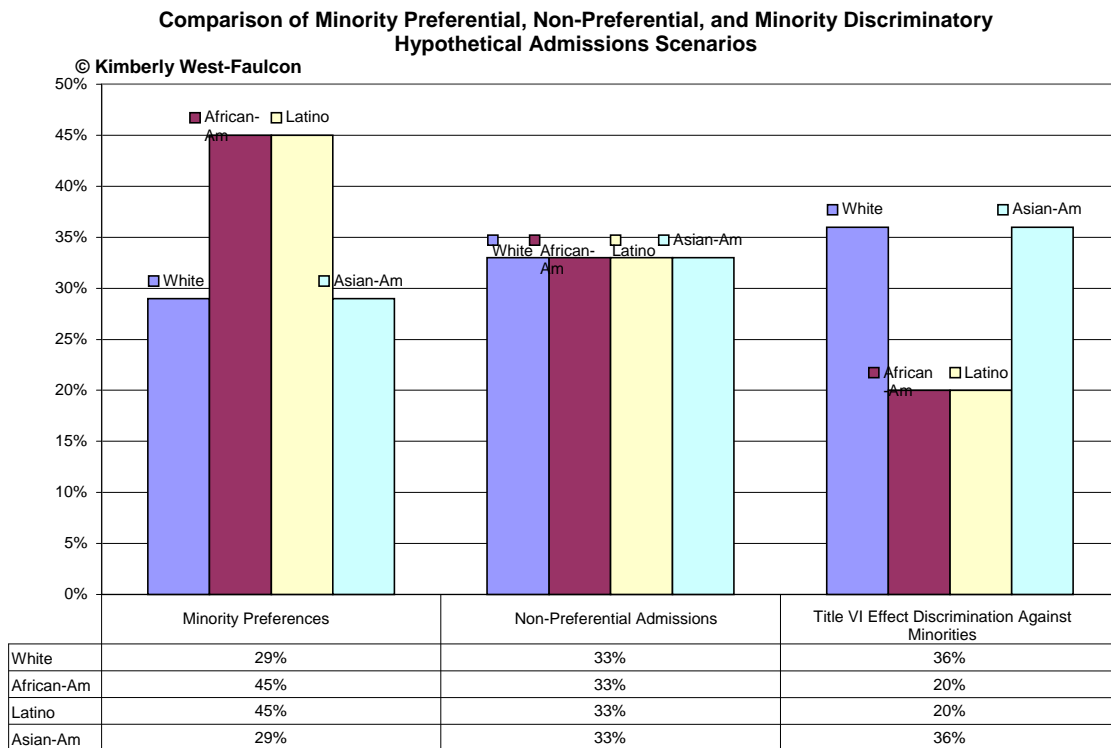
“The next question to ask is whether such large racial differences in admission rates are justified,” noted West-Faulcon. She thinks her study’s finding of Title VI racially “discriminatory effect” against African American applicants who applied to UC Berkeley in 1998 with high school grades point average of 4.0 and higher shows it is not always easy for the most selective universities to defend large racial disparities in admission rates.

“To keep their federal funding, schools like UCLA and UC Berkeley would be in the uncomfortable position of trying to convince Obama appointees at the U.S. Department of Education and the U.S. Department of Justice that they are entitled to federal money despite evidence their institutions consistently admit whites at substantially higher rates than minorities,” explained West-Faulcon.

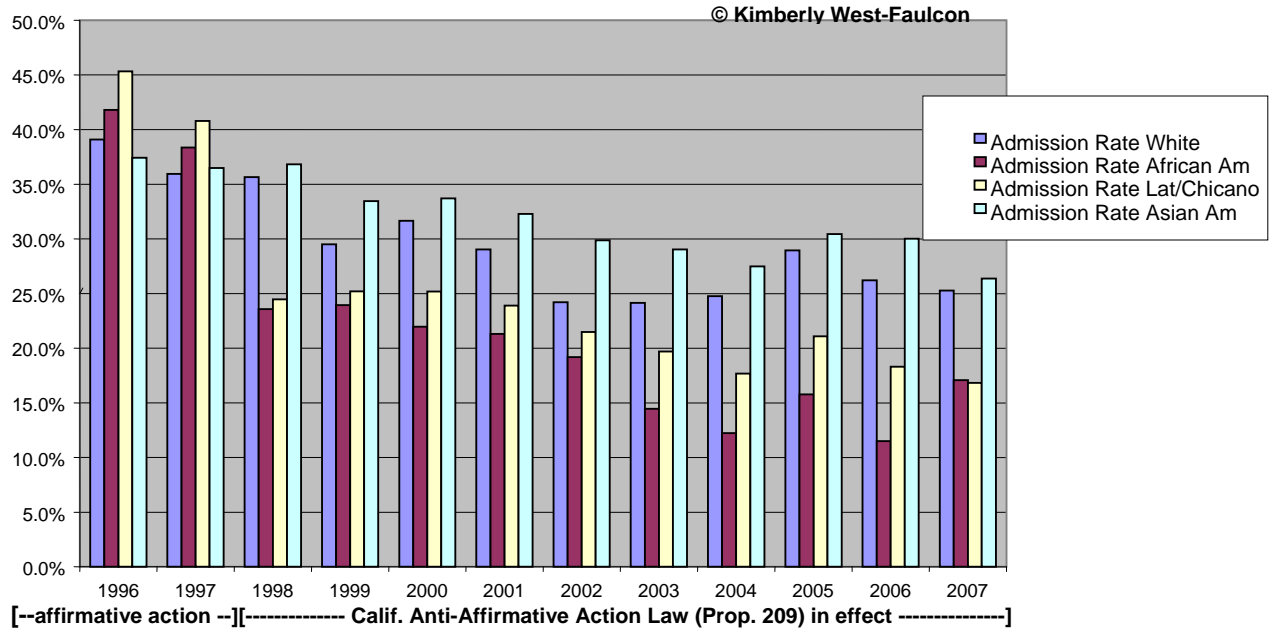
“Because of their wording and the federal funding exception, universities subject to anti-affirmative action laws like Prop. 209 can argue it is legally permissible to consider race in admissions to the extent necessary to avoid Title VI adverse impact against African American and Latino applicants,” said West-Faulcon.

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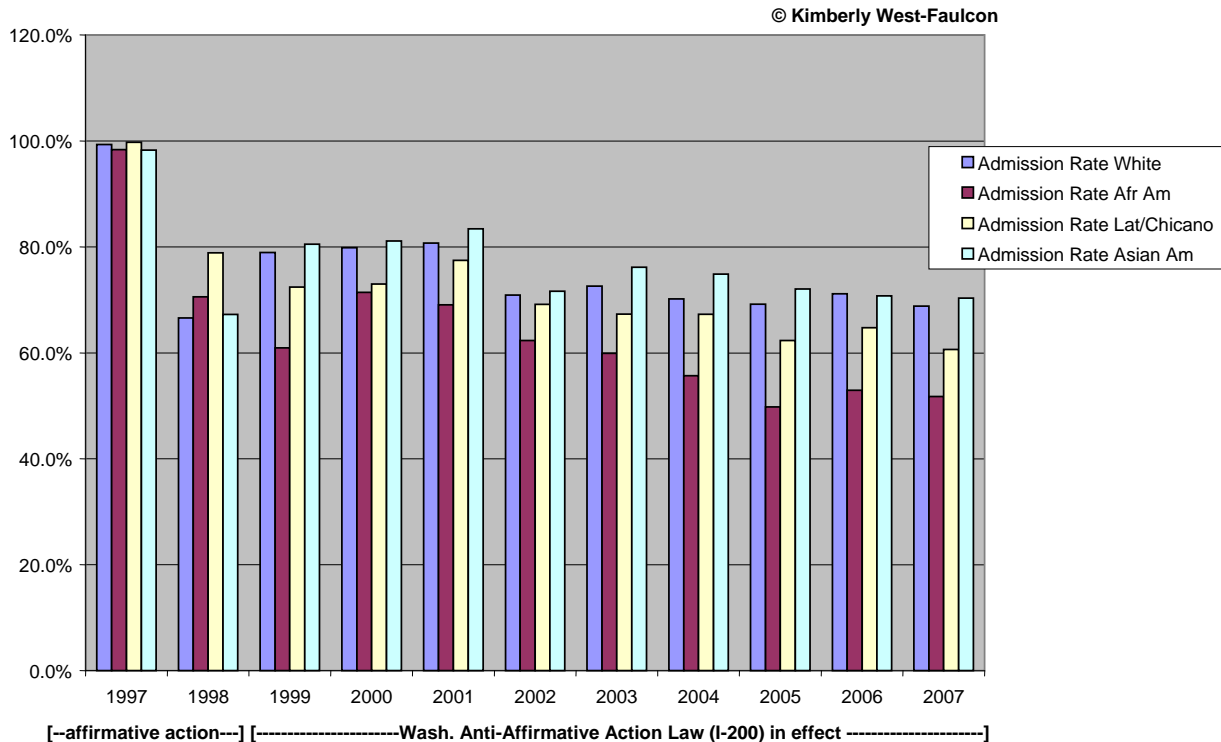
Charts to Publish (original and unpublished as of 6/09):



UCLA Undergraduate Admission Rates (1996-2007)



University of Washington Admission Rates (1997-2007)



About Professor West-Faulcon

Professor West-Faulcon is a graduate of Yale Law School who, prior to becoming a full-time academic at Loyola Law School, was the Western Regional Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. Her research in the areas of intelligence theory, antidiscrimination, and constitutional

law explores the legal implications of theories human intelligence as well as the legal implications of the psychometric properties of standardized tests. In a lawsuit filed in 1998, Professor West-Faulcon represented African American, Latino and Filipino students who sued UC Berkeley for violating their civil rights under the 14th Amendment and Title VI of the Civil Rights Act of 1964 and its implementing regulations.

About Loyola Law School Los Angeles

Located in downtown Los Angeles—a legal, financial and media capital—Loyola Law School is home to prominent faculty, dedicated students and cutting-edge programs, Loyola is committed to legal ethics and the public interest, it has produced top attorneys for nearly a century. Please visit www.lls.edu for more information or contact Brian Costello, deputy director of communications, at 213.736.1444 or brian.costello@lls.edu.

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