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UNNATURAL SELECTION: A LEGAL ANALYSIS OF THE IMPACT OF STANDARDIZED TEST USE ON HIGHER EDUCATION RESOURCE ALLOCATION

I. INTRODUCTION

By the time we reach adulthood, most of us have taken numerous standardized objective tests.¹ In fact, we spend a great deal of time and nervous energy anticipating performance results which we know will significantly affect our academic and professional careers. Nevertheless, we tend to accept the examination process as an inevitability even though we may question whether it is appropriate for standardized test results to control our academic opportunities.

The principal appeal of standardized exams is their purported objectivity and absence of bias.² It is no doubt useful for educators to have one objective criterion, uniform for all students, which "allow[s] students regardless of race, religion or sex to 'run the same race.'"³ However, rather than serving as "objective" instruments, standardized tests often produce inaccurate and inconsistent results and render noticeable score differentials based on the race, gender, and socioeconomic status of the test-taker.⁴ The fact that female, minority, and low-income examinees systematically receive lower objective test scores than upper-income, white, and male examinees do,⁵ raises the question of whether the exams are objective at all. In addition, the gender and race differentials should encourage us to temper the influence of standardized exam results on the distribution of educational and economic opportunities in this country.

1. See Medina & Neill, *Fallout from the Testing Explosion: How 100 Million Standardized Exams Undermine Equity and Excellence in America's Public Schools*, NAT'L CENTER FOR FAIR & OPEN TESTING (FAIRTEST), Oct. 1988, at 5 (copies available from FairTest, Cambridge, Mass.). In 1986-87, between 94 and 105 million test batteries were administered to 39.8 million public school students. *Id.* In addition, every year 2.5 million students take college entrance exams. Rosser, *The SAT Gender Gap: Identifying the Causes*, CENTER FOR WOMEN POL'Y STUD. 3 (1989) [hereinafter *SAT Gender Gap*] (copies available from the Center for Women Policy Studies, Washington, D.C.).

2. Shapiro, Slutsky & Watt, *Minimizing Unnecessary Racial Differences in Occupational Testing*, 23 VAL. U.L. REV. 213, 215 (1989).

3. A. NAIRN & ASSOC., *THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS* 197 (1980) (remarks of former ETS director, Robert Moulthrop). This is the Ralph Nader Report on the Educational Testing Service.

4. Medina & Neill, *supra* note 1, at 3.

5. See *infra* text accompanying notes 27-58.

The purpose of this Comment is to assess whether the legal system is equipped to address the problematic aspects of standardized testing, either through litigation or legislation. This Comment evaluates how existing legal doctrine might be applied to challenge the use of standardized testing in higher education and examines whether it is legally defensible for educational institutions to predicate admission and scholarship distribution on tests which contain admitted culture and gender biases. In view of the difficulties involved in litigating test-use claims under available legal theories, this Comment proposes a possible legislative remedy and evaluates the viability of that remedy.

II. STATEMENT OF THE PROBLEM

A. Overview of the Uses and Effects of Standardized Testing

The 40 million public school students in this country take over 100 million standardized tests each year to determine proficiency and class placement.⁶ Schools traditionally use such exams to assess student achievement and to diagnose students' academic strengths and weaknesses.⁷ More recently, many schools have begun to use standardized test results as the primary criterion for student assignment to remedial education programs or to "gifted and talented" programs.⁸

When students reach the tenth or eleventh grades, approximately 1.1 million of them will take the Preliminary Scholastic Aptitude Test (PSAT).⁹ The PSAT is billed as a practice run for the Scholastic Aptitude Test (SAT), the test most commonly used by colleges in making admissions decisions.¹⁰ However, the PSAT score also serves as the sole criterion for distribution of more than 23 million dollars of National Merit Scholarship money for students who go on to college.¹¹

Most students who plan to attend college will take the SAT.¹² Some schools use the SAT score alone to determine which applicants to ad-

6. Medina & Neill, *supra* note 1, at 5 (reporting statistics for the 1986-87 school year).

7. *Id.* at 18.

8. *Id.*

9. Rosser, *Sex Bias in College Admissions Tests: Why Women Lose Out*, NAT'L CENTER FOR FAIR & OPEN TESTING (FAIRTEST), Aug. 1988, at 3 (copies available from FairTest, Cambridge, Mass.).

10. *SAT Gender Gap*, *supra* note 1, at 22.

11. *Id.*

12. There are several different types of standardized college entrance exams in addition to the SAT. The discussion in this Comment will focus on the SAT because the SAT is the exam most widely administered to college-bound students. Rosser, *supra* note 9, at 2. In addition, more information is available on the SAT, because it has been studied more frequently than other college entrance exams.

mit,¹³ and some combine the score with high school grades and class rank.¹⁴ Although colleges weigh the SAT score differently in their admissions processes, there is no doubt that a student's admission to college can be strongly affected by that student's SAT score.¹⁵

Students who go on to graduate or professional schools must confront another battery of tests: the Graduate Record Exam (GRE) for graduate school; the Law School Admission Test (LSAT) for law school; the Graduate Management Admission Test (GMAT) for business school; and, the Medical College Admission Test (MCAT) for medical school, to name a few.¹⁶

In addition to this array of educational testing, many employers now use standardized exams as part of hiring or promotion procedures.¹⁷ However, in contrast to educational testing, both employment testing and its impact on employment decisions are monitored and regulated by Title VII of the Civil Rights Act of 1964¹⁸ and the relevant regulations promulgated by the Equal Employment Opportunity Commission (EEOC).¹⁹

The short- and long-term effects that test results have on a test-taker's life reveal the importance of standardized testing in contemporary American society. In the employment testing context, standardized exams can account for an outright denial of employment opportunities.²⁰ At the elementary school level, where standardized test results determine the tracking of students into "ability groups,"²¹ students in the lower

13. J. CROUSE & D. TRUSHEIM, *THE CASE AGAINST THE SAT* 127 (1988).

14. *Id.*

15. Currently, only Bowdoin College has abandoned use of the SAT score for admission, and three others colleges—Bates, Union and Middlebury—provide students with other testing options in lieu of the SAT. See Allina, *Beyond Standardized Tests: Admissions Alternatives That Work*, NAT'L CENTER FOR FAIR & OPEN TESTING (FAIRTEST), Nov. 1987, at 3 (copies available from FairTest, Cambridge, Mass.).

16. *Id.* at 2-3.

17. See Shapiro, Slutsky & Watt, *supra* note 2, at 215.

18. 42 U.S.C. § 2000e-2(h) (1988). Section (h) states in part:

[I]t shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Id.

19. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-15 (1988).

20. See, e.g., *Golden Rule Life Ins. Co. v. Mathias*, 86 Ill. App. 3d 323, 408 N.E.2d 310 (1980) (insurance broker licensing exams); *Martin v. Educational Testing Serv.*, 179 N.J. Super. 317, 431 A.2d 868 (1981) (real estate licensing exam).

21. See Fiske, *Lessons: More and more educators agree that grouping students by ability is misguided*, N.Y. Times, Jan. 3, 1990, at B7, col. 1; see also Medina & Neill, *supra* note 1, at 20-22 for discussion of how standardized testing is used in student tracking.

tracks can suffer low self-esteem and low expectations that become self-fulfilling prophecies which inhibit their success later in life.²²

College admission tests may diminish a student's chances to attend a competitive college and may also result in less opportunity for scholarship money.²³ Attending a less competitive college can affect students later in life as they receive lower-level jobs and have fewer leadership opportunities.²⁴ Specifically, if college test results cause a student to attend a two-year junior college instead of a four-year college, that student's long-term career opportunities may be significantly restricted.²⁵ Graduates of vocational junior colleges often are unable to find work in the occupations for which they are trained and may be more likely to suffer from unemployment than those who hold bachelor's degrees.²⁶

B. Score Differentials Across Gender and Culture Groups

1. The debate about the value and meaning of test results

Officials of the Educational Testing Service (ETS) have defended objective testing in higher education as one means of transforming our society from an aristocracy to a meritocracy where social stratification and economic opportunities will be distributed according to achievement or merit rather than birthright.²⁷ Unfortunately, the use of standardized testing has had the effect of confirming—and even compounding—the social stratification it was designed to ameliorate because standardized test results tend to correlate more with gender, race and economic status than they do with the test-taker's achievement, ability or skill.²⁸

No one, not even those who write and administer the tests, disputes the fact that score differentials exist.²⁹ Dispute instead centers around the causes of the gaps and the question of who must assume responsibil-

22. Fiske, *supra* note 21, at col. 2; *see also* Medina & Neill, *supra* note 1, at 20-22; Leslie & Wingert, *Not as Easy as A, B or C*, NEWSWEEK, Jan. 8, 1990, at 56-57.

23. Rosser, *supra* note 9, at 17.

24. *Id.*

25. *See* S. BRINT & J. KARABEL, *THE DIVERTED DREAM: COMMUNITY COLLEGES AND THE PROMISE OF EDUCATIONAL OPPORTUNITY IN AMERICA, 1900-1985* 122-23 (1989).

26. *Id.* at 124.

27. *Id.* at 197-98.

28. *See* Medina & Neill, *supra* note 1, at 21.

29. The College Board's annual report expressly states that women receive lower mean SAT scores than men. COLLEGE ENTRANCE EXAMINATION BOARD, *COLLEGE BOUND SENIORS: 1988 PROFILE OF SAT AND ACHIEVEMENT TEST TAKERS* iii-iv (1988) [hereinafter *COLLEGE BOARD 1988 REPORT*]. The same report presents tables of SAT scores by racial and ethnic group. The tables clearly indicate that white students receive higher overall scores than students who are members of racial and ethnic minorities. *Id.* at v.

ity for correcting the score differentials.³⁰ Many researchers have argued that the gender, race, and economic biases revealed in test results are biases inherent in the style of the tests themselves.³¹ Objective exams require examinees to make discrete answer choices. However, when question contexts have different plausible meanings for individuals from different cultural backgrounds, the credited response will necessarily reflect the cultural perspective of the test-writer who can only belong to one gender, race, and socioeconomic group and is likely to be white, male and middle or upper-middle class.³²

ETS officials have countered that the differentials in test results across culture groups are a product of the unequal educational opportun-

30. The College Board attributes the gender differentials to the fact that women SAT takers tend to come from lower-income households, are more likely to be bilingual, and tend to be in the first generation of their family to attend college. *Id.* at iv. According to the Board, all of these characteristics are associated with lower than average SAT scores. *Id.*

Other researchers claim that the gender differentials result from the nature and format of the test and from bias in individual test items. *See* Rosser, *supra* note 9, at 16.

See also Hoover, *The Politics of Education: Illiteracy and Test Bias*, 10 NAT'L BLACK L.J. 64, 68-71 (1987) for discussion of issues in black education, including issues of competency testing in public schools.

31. *See, e.g.,* Wilder & Powell, *Sex Differences in Test Performance: A Survey of the Literature*, COLLEGE ENTRANCE EXAMINATION BOARD 25-28 (also referred to as *College Board Report No. 89-3* or *ETS RR No. 89-4*) (1989) (copies available from The College Board, New York, N.Y.) (discussion of gender bias in individual test items); *see also* Medina & Neill, *supra* note 1, at 7-12 (discussion of race and gender biases in individual test items and of bias inherent in structure of standardized tests).

32. Medina & Neill, *supra* note 1, at 8. For example, black students often associate the word "environment" with terms such as "home" or "people." *Id.* White students tend to associate "environment" with "air," "clean" or "earth." *Id.* Neither usage is wrong. But the "correct" answer on a standardized test question incorporating the concept of "environment" can only reflect one of these cultural perspectives.

Two SAT items which produced score differences based on ethnicity or gender are the following:

(**indicates the credited response)

DIVIDENDS: STOCKHOLDERS::

- (A) investments: corporations
- (B) purchases: customers
- (C) royalties: authors **
- (D) taxes: workers
- (E) mortgages: homeowners

This question, on its face, favored wealthier students. It favored boys over girls by 15%. Rosser, *supra* note 9, at app. I.

RUNNER: MARATHON::

- (A) envoy: embassy
- (B) martyr: massacre
- (C) oarsman: regatta **
- (D) referee: tournament
- (E) mortgages: homeowners

ties in this country.³³ They argue that standardized tests can play a positive role in solving this problem by focusing public attention on unequal opportunities and inducing public pressure to correct these inequities.³⁴ However, until score differentials are completely eliminated from standardized exams, we must address the issue of how and to what extent these exam results will be used in the allocation of educational and economic resources.

2. The gender gap

SAT scores for men and women have seldom been equivalent since the SAT was first administered in 1926.³⁵ Since 1972, women have scored an average of 10-11 points lower than men on the verbal section of the SAT and 40-50 points lower on the math section.³⁶ In spite of these score differentials, women tend to earn higher average grades than men in both high school and college.³⁷ Authors have suggested that women achieve higher grades because they tend to concentrate their studies in the humanities where higher average grades are the norm.³⁸ However, independent studies undertaken at several universities have found that women's performance equals, and sometimes exceeds, men's performance in math and science as well as humanities subjects,³⁹ and that parity

53% of whites answered this item correctly compared with 22% of blacks. *Id.*

33. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 9 (citing EDUCATIONAL TESTING SERVICE, TEST SCORES AND FAMILY INCOME: A RESPONSE TO CHARGES IN THE NADER/NAIRN REPORT ON ETS (1980)).

34. *Id.* (citing EDUCATIONAL TESTING SERVICE, TRUSTEES' 1984 PUBLIC ACCOUNTABILITY REPORT (1984)).

35. Wilder & Powell, *supra* note 31, at v.

36. *Id.*; see also Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 365 (S.D.N.Y. 1989) (appendix in opinion lists mean SAT scores for college-bound seniors). Before 1972, women earned slightly higher average verbal scores than men (2-3 points) and men earned math scores 40-50 points higher. *Id.* The 1989 statistics reported by the College Board reveal no change in the gender gap—women averaged a combined score of 875, compared with 934 for men. See Carmody, *Minority Students Gain on College Entrance Tests*, N.Y. Times, Sept. 12, 1989, at A16, col. 4.

37. Wilder & Powell, *supra* note 31, at vi.

38. *Id.*; see also Goldberg, *Numbers Don't Lie: Men Do Better Than Women*, N.Y. Times, July 5, 1989, at A21, col. 1 (sociologist argues that men earn lower college grades because they take more difficult courses than women do).

39. See, e.g., E.A. Kanarek, *Gender Differences in Freshman Performance and Their Relationship to Use of the SAT in Admissions* (unpublished report) (Rutgers University internal study reports that although women entered 1985-86 first-year class with combined SAT score of 50 points lower than men's, GPA differences in favor of women were observable by end of first year in math/science as well as humanities courses); MIT Committee on Undergraduate Admissions and Financial Aid, *Final Report 9-10* (May 1989) (unpublished report) (faculty committee at university offering predominantly science and technical courses reports that women admitted to MIT have lower average standardized math and science test scores than men

in men's and women's grade point averages is not the result of differences in course selection.⁴⁰

Comparing test scores with ultimate college performance reveals that the problem of bias in standardized exams is particularly acute where women are concerned. Here, the net effect of reliance on test scores is that those students who ultimately perform average or above in college—women—may be disproportionately excluded from educational opportunities and scholarship receipt.⁴¹ This adverse effect is especially likely to occur if colleges use test scores without adjusting for the fact that women with lower test scores will perform more successfully than their test scores indicate.⁴²

3. Race and culture gap

The aspect of standardized testing which has received the most public attention is the purported racial and ethnic bias in the SAT and similar aptitude tests.⁴³ In elementary and secondary schools, standardized test use tends to cluster white and upper-middle class students in advanced classes, and relegate minority and lower-income students to mid-level and remedial classes.⁴⁴ This occurs even in school districts where enrolled students are predominantly racial and ethnic minorities.⁴⁵

College-bound white and non-white students have dramatically different SAT scores, a difference which favors white students.⁴⁶ Statistics reported by the College Board in 1988 indicate that whites received the highest combined SAT score at 935, followed by Asians (930) (5 point gap), Native Americans (828) (107 point gap), Latin Americans (820)

but ultimately achieve GPAs statistically indistinguishable from men's); *see also*, Jaffe & Wrightman, *No Deficit on Campus*, N.Y. Times, July 21, 1989, at A28, col. 6. Jaffe and Wrightman are the respective chairmen of the departments of mathematics at Harvard and Princeton; they report that they have not seen any evidence on their campuses indicating that women are deficient in mathematical ability. *Id.*

40. *See SAT Gender Gap, supra* note 1, at 92-93. Comparative GPA studies which also control for course selection eliminate the possibility that higher GPAs result from a combination of courses composed primarily of courses in which the average grade in that course is higher than the average intra-course grades at the university in question.

41. *See id.* at 22-23.

42. *Id.* at 91-92 (discussion of how one admission formula used for men and women alike adversely affects women).

43. *See, e.g.*, Kroll, Manley, Springen, Pedersen, Wingert & Brailsford, *Race Becomes the Game*, NEWSWEEK, Jan. 30, 1989, at 56, 58, col. 1; Vaughan, *SATs harm: (A) women & (B) minorities?*, The Daily News, Nov. 29, 1987, at 4, col. 1; Vobejda, *A Debate Revived: Do College Board Tests Measure Potential?*, Wash. Post, Jan. 23, 1989, at A1, col. 1.

44. Medina & Neill, *supra* note 1, at 21.

45. *Id.*

46. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 90.

(115 point gap), Mexican Americans (810) (125 point gap), Puerto Ricans (757) (178 point gap), and Blacks (737) (198 point gap).⁴⁷

Since students with low test scores tend to have low college admission rates, many colleges have instituted affirmative action programs in an effort to remedy the effects that test bias has had on minority student admissions.⁴⁸ Even so, a search for minority students across college campuses reveals that a disproportionate number of them *are* in fact concentrated in the least selective colleges.⁴⁹ Because the university a student attends can have a significant effect on that student's future graduate school and professional opportunities,⁵⁰ the long-term effect of a racially lopsided enrollment pattern is that minority students will occupy fewer professional and managerial positions as wage-earning adults.⁵¹

Requiring minority students to have SAT scores equal to whites students' scores in order to be admitted to college will dramatically affect minority student college enrollment. For example, in 1984, 10.5% of the college-bound students who took the SAT were black.⁵² However, the number of black students who could qualify for college admission with SAT scores equal to those of whites does not reach 10.5% until score levels drop to 350 (out of 800) on each section of the test.⁵³ If colleges require black applicants to have SAT scores equal to whites' SAT scores in order to be admitted, black students will be crowded into the least selective colleges and underrepresented as a percentage of the total college-bound population in the more selective schools.⁵⁴

It may be the case, as ETS has argued,⁵⁵ that the racial biases in standardized exams merely reflect the educational and economic inequities in our society.⁵⁶ However, the fact is that unregulated use of exam results is hindering the educational progress of minority students at all levels of the educational spectrum, especially at the elementary school level.⁵⁷ This pattern suggests that standardized exams in fact *compound*

47. COLLEGE BOARD 1988 REPORT, *supra* note 29, at v.

48. See J. CROUSE & D. TRUSHEIM, *supra* note 13, at 90 (noting that many colleges discount or ignore SAT scores of black applicants).

49. See *infra* Appendices A, C and D.

50. See S. BRINT & J. KARABEL, *supra* note 25, at 130-31, 250 n.33 (discussion of correlation between education level and economic opportunity).

51. *Id.*

52. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 93.

53. *Id.*

54. *Id.*

55. See D. OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE 224-25 (1985).

56. *Id.*

57. See Medina & Neill, *supra* note 1, at 18-23 for discussion of the impact of test use in

the inequities that ETS claimed the exams would help alleviate.⁵⁸

C. The Legal Problem

In view of the immediate and far-reaching effects of standardized testing,⁵⁹ it is likely that gender and race differentials in test results are contributing to disproportionate exclusion of women and minorities from access to educational and economic opportunities. This disproportionate exclusion raises an inference of discrimination which is actionable in noneducational contexts.⁶⁰ The question examined here is whether the discriminatory effects of testing are actionable in the context of higher education. That is, can students who feel they have been deprived of admission or scholarship opportunities on account of test use sue university and scholarship distributors who have based their decisions on exam results?

Parties injured by test use may litigate their grievances, but under current legal doctrine, they are likely to achieve limited relief and mixed results.⁶¹ The following section discusses the limited attention that educational testing has received from the legal system. Next an analysis of the federal and statutory claims related to testing issues reveals that a plaintiff's success on the merits is not guaranteed⁶² and in fact may be

elementary and secondary public schools. See also *infra* Appendices A, C, and D for statistics on women and minority student enrollment patterns in selective and non-selective colleges.

58. Critics of the SAT have also charged that a ranking of students by SAT scores for the most part mirrors a ranking of students by family income. See A. NAIRN & ASSOC., *supra* note 3, at 199. 1988 statistics released by the College Board reveal the following pattern with respect to family income:

<u>Family Income per Annum</u>	<u>Average Combined SAT Score</u>
over \$70,000	992
\$60,000-\$70,000	961
\$50,000-\$60,000	946
\$40,000-\$50,000	928
\$30,000-\$40,000	902
\$20,000-\$30,000	876
\$10,000-\$20,000	833
under \$10,000	781

COLLEGE BOARD 1988 REPORT, *supra* note 29, at 7. As one might expect, researchers have found that the use of SAT scores reduces selective colleges' acceptances of low-income applicants. See J. CROUSE & D. TRUSHEIM, *supra* note 13, at 122.

59. See *supra* text accompanying notes 20-26 for discussion of long-term effects of testing.

60. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Albamarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also *infra* text accompanying notes 74-84 for discussion of employment testing and consequences of discriminatory test use in employment.

61. See *infra* text accompanying notes 87-244 for analysis of statutory and constitutional causes of action which apply to testing claims.

62. See *infra* text accompanying notes 124-209 for discussion of the difficulties of proving

precluded at the outset by procedural difficulties.⁶³ The difficulty of litigating testing claims⁶⁴ suggests that the problematic aspects of test use may be most effectively addressed through legislation.⁶⁵

III. BACKGROUND: THE LEGAL SYSTEM'S INVOLVEMENT IN TESTING

A. *Elementary and Secondary School Testing*

Congressional and judicial attention to testing issues was virtually nonexistent before the early 1960s. Since then, however, elementary and secondary school students have made statutory and constitutional challenges to standardized test use, alleging that test use contributed to denial of educational opportunities to minority and economically disadvantaged children.⁶⁶ Plaintiffs have specifically challenged test use which contributed to wrongful placement of minority students into classes for the Educable Mentally Retarded (EMR),⁶⁷ placement of a disproportionate number of minority students in the lowest class levels of a school district tracking system,⁶⁸ and denial of placement of minority students in classes for Talented and Gifted (TAG) students.⁶⁹

B. *Higher Education*

In contrast to elementary school testing, standardized test use in higher education has received minimal attention from the legal community. Plaintiffs have sued ETS challenging score cancellation⁷⁰ and state Bar examiners, challenging denial of admission to the Bar based on Multistate Exam results.⁷¹ These challenges have largely proved unsuccessful

statutory violations, and text accompanying notes 221-44 for discussion of the difficulties of proving constitutional violations.

63. See *infra* text accompanying notes 93-123 for discussion of statutory coverage and private rights of action.

64. See *infra* text accompanying notes 245-53 for a summary of the problematic aspects of litigation.

65. See *infra* text accompanying notes 254-59 for discussion of a proposed legislative remedy.

66. See, e.g., *Vaughns v. Board of Educ.*, 574 F. Supp. 1280 (D. Md. 1983), *aff'd*, 758 F.2d 983 (4th Cir. 1985); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd*, 793 F.2d 969 (9th Cir. 1984); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1968).

67. *Larry P.*, 495 F. Supp. at 931.

68. *Hobson*, 269 F. Supp. at 406-07.

69. *Vaughns*, 574 F. Supp. at 1295.

70. *Johnson v. Educational Testing Serv.*, 754 F.2d 20 (1st Cir.), *cert. denied*, 472 U.S. 1029 (1985).

71. See, e.g., *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940

ful. However, in the February 1989 case of *Sharif v. New York State Education Department*,⁷² the District Court for the Southern District of New York enjoined the use of SAT scores as the sole basis for distributing college scholarships after finding that doing so precluded women students from receiving their fair share of scholarship money.⁷³

C. Employment Testing

It is worth noting that employment testing, in contrast to educational testing, is heavily regulated by statute. During consideration of the Equal Employment Opportunity Act of 1972,⁷⁴ Congress debated the proper uses of testing in employment.⁷⁵ The result of the debates is codified at 42 U.S.C. § 2002e-2(h) which restricts test use to professionally developed ability tests not designed, intended, or used to discriminate.⁷⁶

In a series of cases beginning in the early 1970s, the United States Supreme Court developed standards for determining employer compliance with the statute and its corresponding regulations.⁷⁷ In the 1971 case of *Griggs v. Duke Power Co.*,⁷⁸ the Court formulated a disparate impact analysis whereby plaintiffs could make a prima facie showing of discrimination merely by proving that using a particular test had a disproportionate discriminatory impact on minority group members.⁷⁹ *Griggs* remained the hallmark decision for disparate impact claims for eighteen years until the decision in *Wards Cove Packing Co. v. Atonio*.⁸⁰ In *Wards Cove*, the Court stiffened plaintiffs' prima facie burden for raising an inference of discrimination⁸¹ and simultaneously relaxed the burden of proof for defendants who must establish the business necessity of

(1976); *Powell v. Nigro*, 601 F. Supp. 144 (D.D.C. 1985); *Delgado v. McTighe*, 522 F. Supp. 886 (E.D. Pa. 1981).

72. 709 F. Supp. 345 (S.D.N.Y. 1989).

73. *Id.* at 364. For a detailed discussion of this case, see *Recent Cases: Civil Rights—Disparate-Impact Doctrine—Court Prohibits Awarding Scholarships on the Basis of Standardized Tests That Discriminatorily Impact Women*, 103 HARV. L. REV. 806 (1990).

74. 42 U.S.C. § 2000e (1988).

75. C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION 197 (1988) (citing 110 CONG. REC. 5662, 13,492, 13,504 (1964)).

76. 42 U.S.C. § 2000e-2(h) (1988). The Equal Employment Opportunity Commission (EEOC) subsequently promulgated guidelines on testing procedures to clarify the statutory provisions. See *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1989).

77. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

78. 401 U.S. 424 (1971).

79. *Id.* at 431-32.

80. 109 S. Ct. 2115 (1989).

81. *Id.* at 2121-22, 2124-25.

the challenged practice in order to prevail in the suit.⁸² However, since *Wards Cove* involved a challenge to a subjective employment practice,⁸³ its effect on challenges to objective employment practices, such as employment testing, is unclear.⁸⁴

When confronted with educational testing cases, courts frequently reach for Title VII case law standards to assist them in evaluating the legality of the challenged test use.⁸⁵ At least one judge has expressed discomfort with applying employment discrimination standards to educational testing claims.⁸⁶ However, the lack of distinct authority pertaining to educational test use may ensure that employment testing case law will remain relevant to the adjudication of educational testing cases.

IV. ANALYSIS: CHALLENGING TEST USE IN ADMISSIONS AND SCHOLARSHIP DECISIONS

A. Introduction: Possible Causes of Action

Private litigants who wish to challenge test use in university admission and scholarship decisions may bring both state and federal statutory and constitutional claims.⁸⁷ The federal law claims most applicable to testing issues are Title VI of the Civil Rights Act of 1964,⁸⁸ Title IX of

82. *Id.* at 2125-26.

83. *Id.* at 2120 (challenged hiring and promotion practices included "nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, [and] a practice of not promoting from within . . .") (emphasis added).

84. Authors have expressed concern that *Wards Cove* may have a far-reaching effect on future disparate impact claims. See, e.g., Note, *The Death of Comparable Worth: A Critical Analysis of the United States Supreme Court's Decision in Wards Cove Packing Co. v. Atonio*, 23 LOY. L.A.L. REV. 1483 (1990). However, *Wards Cove* ultimately might not have a drastic effect on future disparate impact claims involving challenges to testing. First of all, the decision may be overruled by legislation. See S. 2104, 101st Cong., 2d Sess. (1990). See also Holmes, *Bill Would Overturn Court's Rights Decisions*, N.Y. Times, Feb. 8, 1990 (national edition), at A20, col. 4. Second, the standards for establishing prima facie discrimination in an employment testing case are specifically delineated in the Federal Regulations. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1989). The regulations should control the prima facie determination in testing cases.

85. See, e.g., *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361-62 (S.D.N.Y. 1989) (Title VII case law standards applied where plaintiffs alleged gender discrimination in educational test use); *Larry P. v. Riles*, 495 F. Supp. 926, 969-74 (N.D. Cal. 1979), *aff'd*, 793 F.2d 969, 982-83 (9th Cir. 1984) (district court and court of appeals both applied Title VII standards to claim of race discrimination where discrimination allegedly resulted from test use). See *infra* text accompanying notes 143-54 for a discussion of *Sharif*, and *infra* text accompanying notes 135-42 for a discussion of *Larry P.*

86. See *Larry P.*, 495 F. Supp. at 969.

87. The discussion in this Comment focuses on federal statutory and constitutional claims.

88. 42 U.S.C. § 2000d (1988).

the Education Amendments of 1972,⁸⁹ and the Equal Protection Clause of the fourteenth amendment.⁹⁰ In addition, plaintiffs may bring state-law claims under state civil rights statutes⁹¹ or the equal protection provisions of applicable state constitutions.⁹²

B. *The Statutory Claims: Title VI and Title IX*

1. Establishing statutory coverage

Title VI of the Civil Rights Act prohibits discrimination on the grounds of race, color or national origin in "any program or activity receiving Federal financial assistance."⁹³ Similarly, Title IX of the Education Amendments prohibits gender discrimination in all federally assisted education programs.⁹⁴ Congress patterned Title IX after Title VI,⁹⁵ and courts strive to construe the statutes so that they will coincide in scope and effect.⁹⁶ Title IX expressly applies to public university admission programs.⁹⁷ Title VI applies to public universities as well since all public schools receive federal money from the Department of Education.⁹⁸ Both statutes also apply to private universities receiving federal funds.⁹⁹

89. 20 U.S.C. § 1681 (1988).

90. U.S. CONST. amend. XIV, § 1.

91. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-75 (West 1986) (statute requires that state funded educational programs be open to all persons regardless of race, color, gender or national origin); D.C. CODE ANN. § 1-2511 (1987) (statute provides that all persons shall have equal opportunity to participate in all aspects of life, including educational institutions); NEB. REV. STAT. § 20-148 (1987) (statute establishes civil liability against private parties for deprivation of any and all rights guaranteed under state and federal constitutions).

92. *See, e.g.*, GA. CONST. art. I, § 1; MASS. CONST. part I, art. I; PA. CONST. art. I, § 1. *See also infra* notes 210-11 for a brief discussion of state constitutional claims.

93. 42 U.S.C. § 2000d (1988). The statute states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

94. 20 U.S.C. § 1681 (1988). The statute states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"

95. *Grove City College v. Bell*, 465 U.S. 555, 566 (1984).

96. *See, e.g., id.* at 566-70 (citing congressional record on Title VI to determine whether private college students' receipt of federal financial aid funds triggers Title IX coverage); *Cannon v. University of Chicago*, 441 U.S. 677, 683-85 (1979) (citing Title VI decisions to determine whether private right of action exists under Title IX); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 360-61 (S.D.N.Y. 1989) (applying Title VI standards to determine whether plaintiffs must prove discriminatory intent to prevail in Title IX action).

97. 20 U.S.C. § 1681(a)(1) (1988).

98. *See* 34 C.F.R. § 100 app. B (1988).

99. *See Grove City College*, 465 U.S. at 558 (1984) (Title IX coverage); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (Title VI coverage).

To prevail in Title VI or Title IX actions, plaintiffs must first establish that the university practice at issue is subject to the statutory prescriptions.¹⁰⁰ Establishing coverage requires proof of two threshold issues: (1) that the university is a "recipient" of federal assistance when it receives federal money only "indirectly" through federal scholarships and grants paid to students who in turn pay tuition to the university;¹⁰¹ and, (2) that federal assistance to a single university program may trigger statutory coverage of other university programs and activities.¹⁰²

The Supreme Court answered the reciprocity question with respect to Title IX in *Grove City College v. Bell*.¹⁰³ Grove City College received no direct financial assistance but enrolled students who received federal tuition grants.¹⁰⁴ The Court held that Title IX coverage was not foreclosed merely because federal funds were granted to Grove City's students rather than directly to one of the college's educational programs.¹⁰⁵

Title VI coverage is also triggered where a private university receives indirect federal aid in the form of student education grants.¹⁰⁶ In addition, a university enrolling students with federal tuition grants is a "recipient" of federal assistance within the meaning of Title VI, even if the university consistently refuses direct government aid.¹⁰⁷

In order to clarify the scope of statutory coverage afforded by federal grants to one college program, Congress amended both Title IX¹⁰⁸ and Title VI¹⁰⁹ as part of the Civil Rights Restoration Act of 1987.¹¹⁰

100. See, e.g., *Grove City College*, 465 U.S. at 558-59 (Title IX coverage); *Bob Jones Univ.*, 396 F. Supp. at 602 (Title VI coverage).

101. *Grove City College*, 465 U.S. at 569-70; *Bob Jones Univ.*, 396 F. Supp. at 601-02.

102. *Grove City College*, 465 U.S. at 563-74; *Bob Jones Univ.*, 396 F. Supp. at 601-04.

103. 465 U.S. 555 (1984).

104. *Id.* at 558-59.

105. *Id.* at 569-70.

106. The lead case in this area is *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d. 514 (4th Cir. 1975). Bob Jones is a fundamentalist university which denies admission to unmarried non-whites and requires expulsion of all students who date members of a race different from their own. *Id.* at 600.

107. *Id.*

108. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988) (codified as amended at 20 U.S.C.A. § 1687 (West Supp. 1989)).

109. *Id.* § 6, 102 Stat. 31 (codified as amended at 42 U.S.C.A. § 2000d-4a (West Supp. 1989)).

110. The *Grove City College* decision also discussed the extent of statutory coverage afforded by government contribution to a single university program. 465 U.S. at 571-76. According to the Court, only the "program or activity" receiving federal assistance could be regulated under Title IX. *Id.* at 574. In response to that decision, Congress amended both Title VI and Title IX. Section 2 of Public Law 100-259 states:

The Congress finds that—

- (1) certain aspects of recent decisions and opinions of the Supreme Court have

The statutes as amended expand the definition of "program or activity" to include "all of the operations of" a college or university.¹¹¹ Now, plaintiffs who wish to bring Title VI or Title IX claims against university admissions or scholarship distribution practices may do so as long as the university receives federal funds in any of its programs, regardless of whether or not it receives funds specifically for its admissions or financial aid programs.¹¹²

2. Private rights of action

A university covered by Title VI and Title IX incurs a statutory duty to distribute its resources and administer its programs in a non-discriminatory manner. However, private parties who believe that a university has breached that duty may not sue for damages without an established private right of action to do so.¹¹³

Neither Title VI nor Title IX expressly authorizes private suits for enforcement. However, in *Cannon v. University of Chicago*,¹¹⁴ the Supreme Court inferred a private right of action to enforce Title IX.¹¹⁵

Four years after *Cannon*, the Court addressed the issue of whether

unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 . . . and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Pub. L. 100-259 § 2, 102 Stat. 28 (1988).

111. The amendments state: "For purposes of this chapter, the term 'program or activity' and the term 'program' mean all of the operations of—

. . . (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; . . ." See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988) (codified as amended at 20 U.S.C.A. § 1687 (West Supp. 1989)); *id.* § 6, 102 Stat. 31 (codified as amended at 42 U.S.C.A. § 2000d-4a (West Supp. 1989)).

112. It is worth noting that prior to the enactment of the Civil Rights Restoration Act of 1987, the Title VI regulations required all universities applying for federal assistance for any purpose to guarantee that their admission practices were in compliance with Title VI race discrimination prohibitions. See 45 C.F.R. § 80.4(d)(1) (1988). The regulations state:

(d) *Assurances from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for [a] special training project, for student loans, or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

45 C.F.R. § 80.4(d)(1) (1988).

113. See E. CHEMERINSKY, FEDERAL JURISDICTION 315-22 (1989).

114. 441 U.S. 677 (1979).

115. *Id.* at 693-94. The Court in *Cannon* noted that at the time Title IX was enacted, lower federal courts had interpreted Title VI as creating a private remedy. *Id.* at 694-98 (citations omitted). The Court concluded that since Congress patterned Title IX after Title VI, *id.* at 694, and Congress was aware of the lower courts' interpretation of Title VI, *id.* at 696-97, the interpretation of an implied private cause of action reflected congressional intent with respect to Title IX. *Id.* at 697-98.

private parties could state a cause of action under Title VI in *Guardians Association v. Civil Service Commission*,¹¹⁶ but failed to reach a unified result. The Justices differed sharply as to the nature of relief available to private plaintiffs and the basis for which such relief would be awarded.¹¹⁷ The resulting patchwork of opinions in *Guardians* prescribes the following parameters for private suits under Title VI: Victims of intentional discrimination may sue public recipients of federal assistance for compensatory as well as prospective relief,¹¹⁸ and victims of unintentional discrimination may sue public recipients for prospective relief only.¹¹⁹

The net effect of *Guardians* is that male minority plaintiffs who wish to challenge educational test use will have limited remedies available to them. They may be precluded from bringing private Title VI actions against private universities.¹²⁰ In addition, the extent of relief available in suits against public universities will depend on whether they allege and then prove that they are victims of intentional discrimination.¹²¹ By con-

116. 463 U.S. 582 (1983). In *Guardians*, black and Hispanic police officers challenged the New York City Police Department's use of written examinations which resulted in minority officers being hired later and fired sooner than their white counterparts. *Id.* at 585. Plaintiffs alleged that the lay-offs violated their rights under Title VI. *Id.* at 586.

117. Justice White, joined by Justice Rehnquist, found that where the statutory violations resulted from unintentional discrimination, Title VI allowed only prospective relief ordering compliance with the terms of the grant. *Id.* at 601-02 (opinion of White, J.). However, he found that victims of *intentional* discrimination were entitled to compensatory as well as prospective relief. *Id.* at 597, 602-03 (opinion of White, J.). In contrast, Justice Marshall found that private plaintiffs were entitled to compensatory relief for all violations involving programs with a racially discriminatory effect. *Id.* at 625 (Marshall, J., dissenting).

Justice Stevens, joined by Justice Brennan and Justice Marshall, found that the plaintiffs in *Guardians* were entitled to both prospective and retroactive compensatory relief because they sued under 42 U.S.C. § 1983 which provides for a remedy for deprivation of rights secured by all valid federal laws. *Id.* at 638 (Stevens, J., dissenting). Because Justice Stevens found that defendants' actions violated the Title VI regulations rather than Title VI itself, he justified awarding private relief to the plaintiffs via their section 1983 claim and did not squarely address the issue of whether such relief was warranted under Title VI alone. *Id.* at 645 (Stevens, J., dissenting). In addition, Justice Stevens' opinion left unanswered the question of whether a similar action would be available against a private party. *Id.* at 645 n.18 (Stevens, J., dissenting). In a footnote to his opinion, Justice Stevens stated that this case did not present the issue of whether a cause of action against private parties exists directly under the regulations. *Id.* (Stevens, J., dissenting). None of the Justices addressed whether private causes of action could be maintained against a private recipient, probably because the defendant in *Guardians* was a public municipal department.

118. *See id.* at 597, 602-03 (opinion of White, J.); *id.* at 625-27 (Marshall, J., dissenting); *id.* at 635, 638-39 (Stevens, J., dissenting).

119. *Id.* at 601-03 (opinion of White, J.); *id.* at 638-42 (Stevens, J., dissenting).

120. Whether private causes of action under Title VI can be maintained against private recipients of government funds was neither raised nor discussed in *Guardians*. *See supra* note 117 for further discussion.

121. *Guardians*, 463 U.S. at 601-02 (opinion of White, J.); *id.* at 625 (Marshall, J., dissenting); *id.* at 638, 645 (Stevens, J., dissenting).

trast, the *Cannon* decision does not expressly limit the nature of relief available to private Title IX plaintiffs.¹²² Although many courts, including the Supreme Court, have repeatedly noted that Congress intended Title VI and Title IX to be coextensive with one another,¹²³ the statutes as interpreted by the Supreme Court appear inconsonant with respect to the private cause of action issue.

3. Proving statutory violations

As a result of the Civil Rights Restoration Act amendments, universities may not engage in admission and financial aid practices which discriminate on the basis of race, color, national origin, or gender.¹²⁴ However, in order to prevail in a Title VI or Title IX challenge, plaintiffs must show that the university practices in question resulted in discrimination in violation of those statutes.

Of paramount importance to plaintiffs is the issue of whether proof of discriminatory intent is required to establish violations of Title VI and Title IX, or whether proof of discriminatory impact will suffice. The Supreme Court attempted to settle this issue for Title VI claims in *Guardians*.

In a deeply divided decision, a plurality of the Court found that violation of Title VI itself requires proof of discriminatory intent.¹²⁵ The

122. *Cannon*, 441 U.S. at 693-94 (establishing private cause of action without mention of specific limitations on available forms of relief). Subsequent to *Cannon*, courts have allowed private Title IX suits to proceed where plaintiffs alleged either disparate-impact discrimination or intentional discrimination. See *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989) (allegations of disparate-impact discrimination); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185 (S.D.N.Y. 1988) (allegations of disparate-impact discrimination); *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986) (allegations of intentional discrimination). Regarding the nature of relief available, courts have differed with respect to whether damages are available in Title IX actions. See *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (no damages granted); *Beehler*, 664 F. Supp. at 940 (money damages allowed).

123. See, e.g., *Grove City College*, 465 U.S. at 566-70 (citing congressional record on Title VI to determine whether private college students' receipt of federal financial aid funds triggers Title IX coverage); *Cannon*, 441 U.S. at 683-85 (citing Title VI decisions to determine whether private right of action exists under Title IX); *Sharif*, 709 F. Supp. at 360-61 (applying Title VI standards to determine whether plaintiffs must prove discriminatory intent to prevail in Title IX action).

124. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), § 6, 102 Stat. 28, 31 (1988) (codified respectively as amended at 20 U.S.C.A. § 1687; 42 U.S.C.A. § 2000d-4a (West Supp. 1989)). See also *supra* text accompanying notes 108-12.

125. *Guardians*, 463 U.S. at 610-11 (Powell, J., concurring). In Part II of his opinion, Justice Powell, citing his prior opinion in *Regents of the University of California v. Bakke*, stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause . . .". 438 U.S. 265, 287 (1978). *Id.* (Powell, J., concurring) (citing *Regents of the Univ. of Calif. v. Bakke*). Chief Justice Burger and Justice Rehnquist joined in

remaining five Justices stated that proof of discriminatory impact would suffice,¹²⁶ but they took different paths to this result. Only two of the Justices, Justice White and Justice Marshall agreed that Title VI itself proscribes unintentional, disparate-impact discrimination.¹²⁷

Justice Stevens, joined by Justice Brennan and Justice Blackmun, stated that although petitioners had to prove invidious intent to prove a violation of the statute, they only had to prove discriminatory effect in order to prove a violation of valid federal law embodied in the Title VI regulations.¹²⁸ Thus, to avoid proving intent, plaintiffs must allege that a defendant has violated Title VI implementing regulations which specifically prohibit practices having a discriminatory effect.¹²⁹

At first glance, the *Guardians* decision does not appear to clarify the standard of proof required of Title VI plaintiffs. In the wake of *Guardians*, most courts which have been called upon to do so have interpreted the decision as requiring proof of discriminatory intent to establish violation of the statute.¹³⁰ However, where plaintiffs sue to enforce regulations incorporating an effects standard, proof of discriminatory effect will suffice for proof of a prima facie case of discrimination.¹³¹ Under the effects analysis, once plaintiffs establish a prima facie case based on disproportionate impact, the burden then shifts to the defendant to demonstrate that the practice which caused the impact was required by

Part II of Justice Powell's *Guardians* opinion. *Guardians*, 463 U.S. at 607. See also *id.* at 615 (O'Connor, J., concurring).

126. *Guardians*, 463 U.S. at 593 (opinion of White, J.); *id.* at 615 (Marshall, J., dissenting) ("I agree with Justice White that proof of discriminatory animus should not be required [to establish a violation of Title VI]."); *id.* at 644-45 (Stevens, J., dissenting).

127. *Id.* at 593 (opinion of White, J.); *id.* at 615 (Marshall, J., dissenting).

128. *Id.* at 644-45 (Stevens, J., dissenting). The split in *Guardians* results from a discrepancy in Title VI interpretation created by prior decisions in *Bakke* and *Lau v. Nichols*, 414 U.S. 563 (1974). In *Lau*, the Court adopted an "effects test" to determine violation of Title VI, holding that the statute prohibited use of federal funds in any program or practice which had the effect of discriminating on the basis of race. *Lau*, 414 U.S. at 568. Four years later in *Bakke*, five Justices agreed that Title VI would proscribe only those racial classifications that would violate constitutional equal protection standards, that is, those classifications which were intentionally motivated. *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); *id.* at 325 (Brennan, J., concurring). Since *Bakke* did not expressly overrule *Lau*, the Court chose to address the intent issue in *Guardians*, 463 U.S. at 589, but failed to reach a consensus regarding the required standard of proof.

129. See *infra* text accompanying notes 155-58 for discussion of Title VI and Title IX regulations incorporating an effects standard.

130. See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir. 1984) ("[V]iolation of Title VI require[s] proof of discriminatory intent."); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 360 (S.D.N.Y. 1989) ("[V]iolation of Title VI itself requires proof of discriminatory intent."); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1193 (S.D.N.Y. 1988) ("Title VI requires proof of actual intentional discrimination . . .").

131. *Larry P.*, 793 F.2d at 981-82; *Sharif*, 709 F. Supp. at 360-61.

educational necessity.¹³²

The Title IX decisions subsequent to *Guardians* are in accord.¹³³ By analogizing to Title VI, courts have consistently required plaintiffs to prove intent in order to establish violation of Title IX, but have applied an effects analysis where plaintiffs brought suit under Title IX regulations incorporating an effects standard.¹³⁴

Two post-*Guardians* testing cases illustrate how courts have used an effects analysis to resolve wrongful test-use claims. In *Larry P. v. Riles*,¹³⁵ the Court of Appeals for the Ninth Circuit upheld an injunction prohibiting California schools from using IQ tests for class placement where the use of the tests resulted in a disproportionate number of black children being placed in classes for the educable mentally retarded (EMR).¹³⁶ Because the plaintiffs brought suit under Title VI effects-standard regulations, the court applied a discriminatory-effect analysis.¹³⁷ The court found that the discriminatory impact of the challenged tests was undisputed¹³⁸ because black children generally scored fifteen points lower than white children,¹³⁹ and as a result, black children constituted 27% of the EMR classes even though they were only 9% of the total state school population.¹⁴⁰ The court rejected the defendants' argument that IQ tests were necessary to determine EMR placement because defendants failed to prove that the tests accurately predicted that black elementary schoolchildren with scores at or below 70 were mentally retarded and incapable of learning the regular school curriculum¹⁴¹ and because the tests were never validated for the class placement of black children.¹⁴²

In *Sharif v. New York State Education Department*,¹⁴³ the plaintiffs alleged that state college scholarship distribution based exclusively on

132. *Larry P.*, 793 F.2d at 982.

133. See *Sharif*, 709 F. Supp. at 360; *Fulani*, 684 F. Supp. at 1193; *Nagel v. Avon Bd. of Educ.*, 575 F. Supp. 105, 109-10 (D. Conn. 1983).

134. *Sharif*, 709 F. Supp. at 360; *Fulani*, 684 F. Supp. at 1193.

135. 793 F.2d 969 (9th Cir. 1984).

136. *Id.* at 972.

137. *Id.* at 981-82.

138. *Id.* at 982-83.

139. *Id.* at 975.

140. *Id.* at 973.

141. *Id.* at 980.

142. *Id.* The IQ tests would be "valid for placement" only if they could specifically predict that schoolchildren who score below 70 are mentally retarded and incapable of learning the regular school curriculum. *Id.* In addition, studies examining the IQ tests found that although the tests were valid for placement of white schoolchildren, such validation for blacks had only been assumed and not established. *Id.* at 980-81.

143. 709 F. Supp. 345 (S.D.N.Y. 1989).

SAT scores violated the gender discrimination prohibitions of Title IX.¹⁴⁴ Analogizing first to Title VI,¹⁴⁵ the court proceeded under a discriminatory-effect analysis because the plaintiffs sued under Title IX regulations proscribing the use of any test "which has a disproportionately adverse effect on persons on the basis of sex"¹⁴⁶ Because the state based scholarship award eligibility solely on SAT scores, men consistently received substantially more scholarships than women.¹⁴⁷ In 1987, the year immediately preceding the *Sharif* litigation, men comprised 47% of the scholarship competitors but received 72% of the Empire State Scholarships and 57% of the Regent Scholarships.¹⁴⁸ The court found that the disparity in scholarship distribution between men and women established a prima facie showing of discriminatory impact.¹⁴⁹

Next, the court found that because the plaintiffs showed that a facially neutral practice had had a disproportionate effect on women, the burden must shift to the defendants to prove a manifest relationship between use of the SAT and recognition of high school achievement.¹⁵⁰ The court then stated that because the SAT was not designed or validated for measuring high school achievement,¹⁵¹ the defendants failed to show a reasonable relationship between their practice of predicating scholarship distribution solely on SAT scores and their purpose of rewarding high school achievement.¹⁵² Finally, the plaintiffs presented a feasible alternative to sole reliance on the SAT by proposing that scholarships could be distributed based on a combination of grade point averages and SAT scores.¹⁵³ As a result of the foregoing analysis, the court found that the plaintiffs were likely to succeed on their Title IX claim and, therefore, enjoined the state from predicating scholarship distribution on SAT scores.¹⁵⁴

a. the prima facie case: proving disproportionate impact

What do *Guardians* and its progeny forecast for plaintiffs who wish to challenge a university's admissions decision? First, plaintiffs must sue

144. *Id.* at 348. The plaintiffs also alleged that this practice violated their fourteenth amendment right to equal protection. *Id.* at 348.

145. *Id.* at 360-61 (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

146. *Id.* at 361 (quoting 34 C.F.R. § 106.21(b)(2) (1988)).

147. *Id.* at 355.

148. *Id.*

149. *Id.* at 362.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 362-64.

154. *Id.* at 364.

under the regulations in order to avoid proving intentional discrimination.¹⁵⁵ Title IX regulations specifically prohibit the use of any test in the admissions process which has a disproportionate, adverse *effect* on students on the basis of gender.¹⁵⁶ Title VI regulations state that funding recipients may not utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin.¹⁵⁷ In addition, Title VI regulations require all institutions of higher education applying for federal grants to refrain from discrimination in admission practices and all other practices relating to the treatment of students.¹⁵⁸

When plaintiffs sue under regulations incorporating an effects standard, the first question they must confront is *how much* impact suffices for the prima facie case. Title VII regulations provide mathematical formulae to help courts determine whether an apparent impact is statistically significant.¹⁵⁹ However, neither Title VI nor Title IX regulations provide such statistical guidance. In the absence of Title VI and Title IX regulations to guide a prima facie determination, the *Larry P.* and *Sharif* cases may guide future plaintiffs in estimating the sufficiency of their own prima facie case. In *Larry P.*, the plaintiffs established a prima facie case where test use resulted in black schoolchildren being placed in classes for the mentally retarded in numbers that constituted three times their proportion in the state school population.¹⁶⁰ In *Sharif*, plaintiffs established a prima facie case where women constituted over half of scholarship applicants but were awarded less than a third of the scholarships.¹⁶¹

The problem with proving the disproportionate impact of college admission test use is that the impact may not be severe enough to establish a prima facie case of discrimination. For example, women account for 52% of the SAT test-taking population.¹⁶² However, at the nation's

155. See *Guardians*, 463 U.S. at 593 (opinion of White, J.); *id.* at 615 (Marshall, J., dissenting); *id.* at 644-45 (Stevens, J., dissenting). See also *Larry P.*, 793 F.2d at 981; *Sharif*, 709 F. Supp. at 365.

156. 34 C.F.R. § 106.21(b)(2) (1988).

157. *Id.* § 100.3(b)(2).

158. 45 C.F.R. § 80.4(d)(1) (1989).

159. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-.18 (1989). Section 1607.4D provides that a selection rate for any race, sex, or ethnic group which is less than four-fifths of the rate for the group with the highest selection rate will generally be regarded as evidence of adverse impact. *Id.* § 1607.4D.

160. *Larry P.*, 793 F.2d at 973. Black children constituted 9% of the state's school population but 27% of the EMR classes. *Id.*

161. *Sharif*, 709 F. Supp. at 355. Although men represented only 47% of the scholarship competitors, they received 72% of the Empire State Scholarships and 57% of the Regents Scholarships. *Id.*

162. COLLEGE BOARD 1988 REPORT, *supra* note 29, at iv, 1.

“most competitive” coeducational colleges¹⁶³ which use SAT results in their admissions processes, the percentage of women in the enrolled population ranges from 16% to 51% with an average of 41.3%.¹⁶⁴ By comparison to *Sharif*—which is the only Title IX case invoking a disparate impact analysis—this disparity may not be enough to prove prima facie discrimination in a Title IX suit against one of these universities.

Even if a court found these statistics sufficient to establish prima facie discrimination, colleges might contest the manner in which the statistics were computed. Rather than comparing the percentage of women who take the SAT with the percentage of women enrolled at competitive universities, colleges might urge the court to compare the percentage of women *who apply* to the competitive universities with the percentage of women enrolled. Statistics on application and admission rates indicate that the admission rates for women are generally equal to or greater than the admission rates of men at all the competitive universities.¹⁶⁵ Comparing admission rates at these colleges indicates no disparate impact on women by virtue of SAT use in college admissions. What the admission rates do indicate is the influence of the SAT on self-selection. That is, women who may be qualified to attend these universities decide not to apply because they perceive themselves to be inadmissible and unqualified on the basis of their SAT scores.¹⁶⁶ However, detrimental self-selection engendered by SAT results is not actionable under Title IX.¹⁶⁷

Proving disparate impact for minority students in a Title VI action involves similar issues as in Title IX. Two sample situations illustrate the problematic aspects of pressing Title VI claims with respect to test use in higher education. The first situation involves analysis of minority stu-

163. See *ARCO, THE RIGHT COLLEGE* 1989 xxviii (1989). The list of the “most competitive” coeducational colleges includes: Amherst, Bowdoin, Brown, California Institute of Technology, Carleton, Columbia, Cooper Union, Cornell, Dartmouth, Duke, Georgetown, Harvard, Johns Hopkins, MIT, University of Michigan, Middlebury, Northwestern, Notre Dame, Princeton, Rice, Stanford, Swarthmore, Union, The Air Force Academy, The Naval Academy, University of Virginia, Webb Institute, Wesleyan, Williams, and Yale. *Id.*

164. See *infra* Appendix A. These figures do not include statistics for Wellesley College, The Air Force Academy, or The Naval Academy.

165. See *infra* Appendix B for statistics on admission rates.

166. *SAT Gender Gap*, *supra* note 1, at 41-45.

[W]hen estimating their math and English abilities, both men and women perceived their abilities to be more in line with their test scores than with their grades. Unfortunately, this meant that girls believed themselves to be less able than their grades would indicate, and less able than boys. And girls were less likely to aspire to “super-elite” colleges.

Id. at 45.

167. Title IX addresses itself only to the decisions and practices of educational institutions. See 20 U.S.C. § 1681 (1988). Consequently, a high school student’s decision not to apply to a university cannot serve as the basis for a Title IX action.

dent enrollment in selective private colleges; the second situation involves analysis of minority student enrollment patterns in a state public college system.

Using black and Hispanic students as an example, College Board statistics indicate that these students account for 14% of the SAT taking population.¹⁶⁸ However, on average, the same students account for only 8.86% of the "most competitive" private college population, with populations on individual campuses ranging from 1% to 18%.¹⁶⁹ As the competitive level of the college shifts downward, the percentage of black and Hispanic students in the college population increases.¹⁷⁰ In California, for example, the black and Hispanic student population at first-tier state schools—University of California schools—is 12%, but at second-tier state schools—the Cal State system—the population rises to 18.72%.¹⁷¹ In the two-year junior colleges which have open admission policies and do not require SAT scores, the black and Hispanic student population averages 23.31%.¹⁷²

These statistics present a muddy picture with respect to possible Title VI claims. Under *Larry P.*, an 8.67% average minority student population in selective private colleges compared with 14% population at large may suffice for prima facie proof of disproportionate impact. However, admission rates at individual colleges may prove that limited minority student enrollment is a function of low application rates among minority candidates more than low SAT scores. The College Board advises students to use their PSAT and SAT results to refine their college application choices by comparing their own test scores to the score ranges for admitted students at each college.¹⁷³ Consequently, it is likely that self-selection is having a dramatic effect on black and Hispanic students' application rates to competitive colleges and universities. As stated with respect to Title IX claims, student self-selection which results in disproportionate enrollments is not actionable under Title VI.

The enrollment pattern exhibited in the California state college system¹⁷⁴ also calls for Title VI scrutiny. Here, the minority students are clustered at the bottom of the educational tracks at the least selective and

168. COLLEGE BOARD 1988 REPORT, *supra* note 29, at 6.

169. *See infra* Appendix A. Webb Institute reports Hispanic enrollment of 1%. Stanford University reports black enrollment of 8% and Hispanic enrollment of 10%. *Id.*

170. *See infra* Appendices A, C, and D.

171. *See infra* Appendix C.

172. *See infra* Appendix D.

173. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 74-75 (quoting COLLEGE ENTRANCE EXAMINATION BOARD, ABOUT YOUR 1983 PSAT/NMSQT SCORES 14 (1984)).

174. *See infra* Appendices C and D for enrollment statistics.

least rigorous schools.¹⁷⁵ National statistics indicate that minority students are generally overrepresented in the junior college population as compared to their representation in the college population as a whole.¹⁷⁶ The California college enrollment pattern parallels the elementary school EMR placement patterns at issue in *Larry P.* But there is one big difference between these two cases. In *Larry P.*, the disproportionate class placement was directly linked to IQ test use.¹⁷⁷ In the California college system, it is likely that other non-testing factors, such as cost and location, are influencing college enrollment patterns. Hence it may be difficult, if not impossible, to isolate the SAT requirement as the main determinant of college level placement for minority students.¹⁷⁸

b. *the "educational necessity" issue and alternative non-discriminatory uses of the SAT*

If a plaintiff can establish a prima facie case of disproportionate impact, a defendant college may rebut the inference of discrimination by showing that use of the SAT is an "educational necessity" in the student selection process.¹⁷⁹ To do this, a defendant must show a rational relationship between the practice of using the SAT and the purpose for using it, that is, to admit the students who are most likely to succeed in college.¹⁸⁰ If a defendant succeeds in proving educational necessity, plaintiffs can still prevail if they can demonstrate that an alternative practice to reliance on the SAT will reduce the disparate impact at issue.¹⁸¹

175. See *infra* Appendices C and D.

176. S. BRINT & J. KARABEL, *supra* note 25, at 137. Minority students are overrepresented not only in the community colleges themselves, but also in the vocational tracks within those colleges. *Id.*

177. See *Larry P.*, 495 F. Supp. at 948-50.

178. For example, state colleges and community colleges are less expensive than universities, and more local, thereby enabling students to live at home and commute rather than incur dormitory or off-campus housing expenses which are endemic to university life. S. BRINT & J. KARABEL, *supra* note 25, at 154-55. Cost and location are factors known to be more important to community college students than university students in the decision process. See *id.* Therefore, it is likely that cost and location are also important to minority community college students and may contribute to a minority student's decision to attend a community college.

179. *Larry P.*, 793 F.2d at 983 ("[D]efendants [had] to demonstrate that the IQ tests which resulted in the disproportionate placement of black children were required by educational necessity.").

180. *Sharif*, 709 F. Supp. at 362 ("[D]efendants must show a manifest relationship between use of the SAT and recognition and award of academic achievement in high school.").

181. *Id.*

i. women applicants

For women, the educational necessity issue is fairly straightforward. In *Sharif*, the defendants' conceded purpose in awarding state scholarship money was to reward students who had excelled in high school.¹⁸² However, the court noted that the SAT was designed to predict *college* performance and not designed to measure achievement in high school.¹⁸³ Therefore, the court rejected the defendants' claim that use of SAT scores to distribute scholarship money was reasonably related to the purpose of rewarding high school achievement.¹⁸⁴

Plaintiffs who challenge college admission or scholarship distribution decisions predicated on SAT results will have to prove that, in fact, the SAT does not predict college success for women reliably enough to constitute an educational necessity in the admission or scholarship distribution process. In order to rebut plaintiffs' claim, defendant colleges would present studies demonstrating the relationship between students' SAT scores and freshman grade point averages.¹⁸⁵ Most of these studies show that, in general, using SAT results improves the prediction of freshman grades.¹⁸⁶ However, researchers at the College Board and at independent institutions have discovered that women generally achieve higher first-year college grade point averages than men do, even though the men receive higher SAT scores.¹⁸⁷ Consequently, a single prediction formula for both men and women will indicate that women applicants are likely to be less successful in college than they actually prove to be once they enroll.¹⁸⁸ This suggests that, for women, the SAT is not fulfilling its primary purpose of predicting first-year college grades.¹⁸⁹ As a result, SAT use in admissions may cause fewer women to be admitted to the college than are actually qualified to attend.¹⁹⁰ If the purpose of a college's student selection process is to select applicants who are most

182. *Id.* at 354.

183. *Id.* at 362.

184. *Id.*

185. The College Board has its own Validity Study Service, run by ETS, which aids colleges in developing formulae to predict freshman grades based on SAT scores. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 41. Colleges then use the predicted performance estimates generated by these formulae to assess applicant eligibility. *Id.* The Validity Study Service also encourages colleges to study the effectiveness of the predictive formulae that they use, by comparing predicted grade point averages with actual grade point averages achieved. *Id.* at 42.

186. *Id.* at 43.

187. Wilder & Powell, *supra* note 31, at 4; *SAT Gender Gap*, *supra* note 1, at 23.

188. Wilder & Powell, *supra* note 31, at 4.

189. *SAT Gender Gap*, *supra* note 1, at 23.

190. See *supra* note 185 for an explanation of how prediction formulae based on SAT scores affect student selection.

likely to succeed academically in that college, using the SAT in the above described manner cannot be defended as "reasonably related" to that purpose. Therefore, defendant colleges and universities to whom this grade versus test score discrepancy applies cannot validly demonstrate the educational necessity of gender-neutral use of SAT scores in their admissions processes.

Even if defendants prevail on the educational necessity issue, plaintiffs may prevail on the third element of the disparate impact claim by establishing that alternative selection procedures exist which do not adversely affect women applicants. Without eliminating the SAT from the admission process altogether, colleges can avoid disparate impact by using gender-specific prediction formulae. Researchers have demonstrated that separate prediction equations for women and men more closely predict their college performance than a prediction equation developed without regard to gender.¹⁹¹ A gender-specific prediction process will, therefore, enable a college to increase the accuracy of its admission decisions. In addition, this type of process will increase the number of women admitted to competitive colleges, thereby decreasing the adverse impact on women which results from gender-neutral use of test scores.¹⁹²

ii. minority applicants

The educational necessity issue for minority plaintiffs is more of a hurdle. As in the case of women, the SAT is not a very accurate predictor of minority student college achievement.¹⁹³ Using black students as an example, researchers have found that prediction equations based on combined samples of blacks and whites typically overpredict first year college grades for blacks.¹⁹⁴ That is, for black students, SAT scores tend to predict that they will receive higher grades than they actually do.¹⁹⁵ Colleges may use these statistics to establish that SAT use is reasonably related to their purpose of selecting students who will be academically successful because the overprediction not only causes them to admit students who in fact prove to be academically successful, it also allows them to admit students who eventually prove to be unsuccessful.¹⁹⁶ Therefore, defendants will argue, SAT use in college admission is not harming black

191. Wilder & Powell, *supra* note 31, at 4; *SAT Gender Gap*, *supra* note 1, at 92.

192. The College Board itself cautions colleges about the possible effects of gender-neutral use of test scores. *See infra* text accompanying note 243.

193. J. CROUSE & D. TRUSHEIM, *supra* note 13, at 96-106.

194. *See id.* at 96-106 for a discussion of the effects of overprediction. "Overpredict" is a statistical term for "overestimate." *See id.* at 96.

195. *Id.* at 96.

196. This rebuttal raises the issue of whether plaintiffs would even have standing to sue.

applicants, and in fact *is* an educational necessity in the admission process.

However, minority plaintiffs may still attempt to defeat educational necessity claims by proposing alternative practices which avoid discriminatory impact and still achieve a defendant's desired result. Two alternatives exist which would achieve this goal. The first involves eliminating the SAT from the admission process entirely. A recent study reveals that eliminating SAT use in college admissions and relying on high school grades and class rank instead would increase the number of black students admitted to college.¹⁹⁷ However, this increase results from the fact that high school grades overpredict black student college performance more than the SAT does.¹⁹⁸ Consequently, adding the SAT to class rank improves the predictive validity of the admissions process as a whole, even though it also causes more black students to be denied admission.¹⁹⁹ Therefore, eliminating the SAT is not an alternative which would achieve a defendant's goal of admitting those students most likely to succeed. In fact, evidence of the probable effects of eliminating the SAT would strengthen a defendant's claim that the SAT is an educational necessity in their selection process.

The second proposed alternative requires consideration of whether students who were rejected for admission might have succeeded academically if they instead had been admitted. This is the problem of false negatives.²⁰⁰ A single admissions decision can produce four possible results, two of which are "correct" results, and two of which are "incorrect."²⁰¹ Correct results occur when an admitted student proves to be academically successful, and when the rejected student is one who in fact would not have been successful.²⁰² Incorrect results occur when an admitted student later proves to be unsuccessful or when a rejected student would in fact have been successful.²⁰³ The last of these four possibilities—the rejected student who would have been academically successful—is labeled a "false negative."²⁰⁴

However, plaintiffs denied admission or scholarship money may present that denial as the requisite injury-in-fact to satisfy standing requirements.

197. J. CROUSE & D. TRUSHEIM *supra* note 13, at 99.

198. *Id.* at 98-99.

199. *Id.* at 98-102.

200. *Id.* at 103.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* A college attempts to minimize false positives by using statistical regression equations which predict likely college performance based on indices such as SAT scores and high school grades. *Id.* at 40-42 (discussion of predicted performance equations). The college seeks

If one ethnic group receives more than its proportional share of low SAT scores, a greater proportion of that group is more likely to be rejected by colleges and also more likely to be rejected erroneously as false negatives.²⁰⁵ Recent research on this issue demonstrates that a color-blind admissions practice utilizing SAT results increases false negative decisions for black students.²⁰⁶ That is, SAT use in these cases results in denial of admission to black students who would in fact have been successful if admitted. However, the same research demonstrates that SAT use also decreases false positive decisions for black students—erroneous decisions in which an admitted student proves unsuccessful.²⁰⁷ Therefore, SAT use is simultaneously producing two outcomes, one of which—the reduction of false positives—is as desirable from a college's point of view as the other—the increase in false negatives—is undesirable from a black student's point of view.

The challenge for plaintiffs is to convince a court that a selection procedure designed to minimize false positives is less rational than one which accounts for false negatives as well. A plaintiff should argue that a selection procedure is rational if it results in the same proportion of false negatives for all identifiable culture groups in the applicant pool. That is, a selection procedure is only rational if it "erroneously" denies admission to equal proportions of white students and black students.

Redistribution of false negatives begins with redistribution of denials of admission.²⁰⁸ This type of redistribution would require colleges to raise the SAT requirements for white students and lower the SAT requirements for nonwhites so that slightly fewer whites are admitted and slightly fewer nonwhites are rejected. Therefore, generating a pro rata distribution of false negatives requires utilization of race-specific admissions criteria. While colleges might undertake such a practice voluntarily, it is unlikely that a court would order a college defending a Title VI claim to institute this system involuntarily.²⁰⁹

to maximize the number of successful students admitted by admitting the students for whom the regression equation indicates likely academic success. *Id.* As a result, selection procedures designed to minimize false positive decisions give no weight to the resulting number of false negative decisions.

205. *Id.* at 99, 105.

206. *Id.* at 106.

207. *Id.*

208. See *supra* text accompanying notes 200-07 for a discussion of false negatives.

209. For a discussion of the difference between court-ordered affirmative action remedies and judicial deference to voluntary affirmative action programs in the Title VII context, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1539-42 (2d ed. 1988). Court-ordered affirmative action is generally limited in scope and is reserved as a remedy for past intentional discrimination. *Id.* at 1539-41 (citing *United States v. Paradise*, 480 U.S. 149 (1987) (Court plurality

C. *The Constitutional Claims*

In addition to statutory claims, plaintiffs may challenge test use under federal and state constitutions. The discussion in this section focuses on federal constitutional claims. However, litigants should not hesitate to bring suit under applicable state constitutional provisions because state constitution claims may afford them broader relief.²¹⁰ State courts may construe state constitution counterparts of the federal Bill of Rights more liberally than the federal provisions, thereby guaranteeing citizens of their own state additional protection.²¹¹

1. Establishing coverage: the state action problem

The most probable constitutional claims for plaintiffs alleging discrimination based on test use are federal fourteenth amendment equal protection claims,²¹² or analogous state constitution provisions.²¹³ However, private conduct is not actionable under the fourteenth amendment unless the challenged conduct involves some element of state action.²¹⁴ Under current doctrine, establishing state action under the federal constitution is extremely difficult.²¹⁵ However, some state courts have found state action for state constitutional purposes where defendants engaged

delineates guidelines for determining whether race-conscious remedies may be judicially imposed); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (court-ordered affirmative action remedy upheld where union had persistently refused to admit minority workers). See also *id.* at 1541 n.104 (quoting Justice Brennan's opinion for the Court in *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) ("[T]he general point remains that voluntary affirmative action plans should not be inhibited by the separation-of-powers concerns that limit the judiciary from fashioning affirmative action plans justified by forward-looking rather than narrower remedial concerns.")).

210. See, e.g., Comment, "No Pass, No Play": *Equal Protection Analysis Under the Federal and State Constitutions*, 63 IND. L.J. 161, 168-79 (1987) (discussion of equal protection analysis under state constitutions).

211. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). In this article, Justice Brennan encourages lawyers to pursue state constitution claims in civil rights cases. *Id.* at 502. He also encourages state judges to develop independent standards of review for state constitutional claims rather than adopt standards set forth by the Supreme Court for analogous federal constitutional claims. *Id.* at 501-02. See also DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (B. McGraw ed. 1985) (collection of essays and articles submitted at 1984 Williamsburg conference on state constitutional law); Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985).

212. See *infra* text accompanying notes 221-44 for substantive discussion of equal protection claims.

213. See, e.g., GA. CONST. art. I, § 1; MASS. CONST., part I, art. I; PA. CONST. art. I, § 1.

214. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

215. See, e.g., *National Collegiate Athletic Ass'n v. Tarkanian*, 109 S. Ct. 454 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

in conduct which would be unlikely to suffice for state action under the federal constitution.²¹⁶

A state college or university, being a public institution which is fully administered and financially supported by the state, is by definition a "state actor," and therefore owes the full scope of constitutional protections to its students and applicants.²¹⁷ By comparison, private universities are likely to owe their students no constitutional duties because courts are reluctant to find that a private university has engaged in state action.²¹⁸ The United States Supreme Court has not developed a uniform test for determining when state action exists, but has adopted a number of separate approaches in which the facts and circumstances at issue must be assessed on a case-by-case basis in order to determine whether state action is present.²¹⁹ However, none of these approaches is likely to result in a finding that a private university is sufficiently tied to the state so that its actions may be subjected to constitutional scrutiny.²²⁰

216. Compare *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (state regulation and grant of exclusive franchise to telephone service company held sufficient to impose state constitutional duty on telephone company) with *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (privately owned utility, licensed by state agency and subject to extensive state regulation is not state actor under federal constitution). See also Friesen, *supra* note 211, at 1276-80 for general discussion of state action under California, New Jersey, Florida, Pennsylvania, Massachusetts and Illinois constitutions.

217. See *Powe v. Miles*, 407 F.2d 73, 82-83 (2d Cir. 1968).

218. See, e.g., *Rendell-Baker*, 457 U.S. at 837; *Cohen v. President & Fellows of Harvard College*, 729 F.2d 59 (1st Cir.), *cert. denied*, 469 U.S. 874 (1984); *Russell v. Salve Regina College*, 649 F. Supp. 391 (D.R.I. 1986). See also *infra* note 220.

219. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

220. When the state insinuates itself into a position of interdependence with the private actor, it may be recognized as a joint participant in the challenged activity. *Id.* at 725. Plaintiffs have litigated the state action status of private universities under the interdependence standard in various contexts. A university will not be deemed a state actor by virtue of the fact that it holds a government granted charter, *Greeny v. George Washington Univ.*, 512 F.2d 556, 559-61 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975), or because one of its educational programs is moderately regulated by the state. *Russell*, 649 F. Supp. at 397 (fact that college's nursing program was subject to state approval in certain respects was insufficient to establish state action on part of college which dismissed nursing student). State regulation of university activities will not result in a state action finding unless the challenged action is directly compelled by state regulation. See e.g., *Rendell-Baker*, 457 U.S. at 841 ("Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation."); *Blum*, 457 U.S. at 1010 (state and federal regulations regarding treatment of nursing home patients encouraged patient transfers but did not expressly dictate challenged transfer decisions); *Albert v. Carovano*, 851 F.2d 561, 570-71 (2d Cir. 1988) (state law requiring university to adopt disciplinary rules does not render as state action university action pursuant to those rules). But see also *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) (state action found where statutory scheme involved state in all levels of university administration).

Courts which have addressed government funding issues have generally held that government funding of a private university alone is not sufficient to establish state action. See *Cohen*, 729 F.2d at 60 (suit by former professor alleging dismissal violated first and fifth amendment

2. Equal protection analysis

a. *fundamental rights*

Plaintiffs alleging discrimination based on test use may assert federal

rights); *Greenya*, 512 F.2d at 556 (suit by former professor alleging dismissal violated first and fifth amendment rights); *Spark v. Catholic Univ. of Am.*, 510 F.2d 1277 (D.C. Cir. 1975) (law professor sued university alleging salary increase was denied in violation of first amendment rights); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir.) (associate professor sued university alleging removal from research project violated first and fifth amendment rights), *cert. denied*, 419 U.S. 874 (1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973) (students alleged expulsion from law school violated first and sixth amendment rights and fourteenth amendment due process rights); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) (students challenged suspension from university alleging violation of first amendment and fourteenth amendment due process rights). See also *Wahba*, 492 F.2d at 102 (requirement that university comply with anti-discrimination statutes in order to receive federal funds does not impose constitutional duties on university not included in that statute). State actor status does not ensue from government funding even where virtually all of a school's income is derived from government sources. See *Rendell-Baker*, 457 U.S. at 837 (privately run school for maladjusted high school students not state actor even though state tuition funding comprised over 90% of school operating budget). Where plaintiffs have sought to establish state action based on a university's tax-exempt status, courts have generally held that tax-exempt status does not constitute sufficient government involvement in a university to establish state action because it does not involve the government in the management of the organization. *Greenya*, 512 F.2d at 559-60; see also *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969). However, it should be noted that even though state actor status is not likely to flow from the tax-exempt status of a private school, courts have not hesitated to revoke the tax-exempt status of racially discriminatory schools or organizations. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). However, revocation of tax-exempt status has been reserved for severe situations, such as where schools maintain express policies restricting admission for whites only. See, e.g., *Bob Jones Univ.*, 461 U.S. at 574.

Another context in which private conduct may constitute state action is where the private actor performs a public function. See *Marsh v. Alabama*, 326 U.S. 501 (1946) (company-owned town which maintained privately supported police services, privately owned roads and sidewalks, and which was accessible to and freely used by the public in general was required to guarantee constitutional liberties to its residents just as if it were publicly owned municipality). But see *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (owners of private shopping mall not required to guarantee first amendment rights of anti-war protestors wishing to distribute leaflets at the mall). Under the public function analysis, the function at issue must be one which is normally an exclusive state function in order for private administration of it to be subject to constitutional scrutiny. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)) (Court declined to deem private school state actor on basis of public function analysis; even though education of maladjusted high school students was in fact public function, it was not exclusive province of State, and therefore was insufficient basis for state action to attach). It is unlikely that a plaintiff would succeed in establishing state action based on the fact that a private university provides a public function. Several courts have rejected the public function argument on the basis that education has never been a state monopoly in this country, even at the primary and secondary school level. See, e.g., *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968). The Supreme Court itself has contrasted an educational institution with other facilities which traditionally serve the community, remarking that a school might engage in certain discriminatory practices and not be subject to constitutional scrutiny so long as it does not involve the state in its management or

equal protection claims against public universities. They may also assert equal protection claims against private universities in the event that state action can be established. In addition, plaintiffs may be able to assert a parallel state constitutional claim.²²¹ Equal protection violations may arise in two contexts. The "fundamental rights" context involves situations where an official action denies one group of citizens equal access to a fundamental right.²²² In *San Antonio Independent School District v. Rodriguez*,²²³ the Supreme Court concluded that education is not a fundamental right.²²⁴ Consequently, the Court held that official action which creates a disparity in access to educational opportunities will not trigger strict equal protection scrutiny.²²⁵ The Court hinted that an outright denial of educational opportunities may violate equal protection standards.²²⁶ However, state practices affecting relative levels of available opportunity will not violate equal protection prescriptions so long as those practices bear some rational relationship to legitimate state purposes.²²⁷

The *Rodriguez* decision effectively precludes successful fundamental rights challenges to higher education test use. If public elementary and secondary school education is not a fundamental right, it is unlikely that college education is a fundamental right.²²⁸ In addition, standardized

control. See *Evans v. Newton*, 382 U.S. 296, 300 (1966) ("If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."). Therefore, although a private university serves the public by providing education, that public service is not sufficiently tied to the state in order to bring the protections of the Constitution along with it.

221. Few state constitutions contain an equal protection clause. However, several states have adopted equal rights amendments prohibiting some forms of gender discrimination. See Williams, *Equality and State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 71, 80-81 (B. McGraw ed. 1985). Although many state courts analyze state equal protection claims according to the suspect class/fundamental right models developed by the United States Supreme Court, some of them have reached different results from those of the Supreme Court. *Id.* For a detailed discussion regarding similarities and differences in state and federal equal protection analyses, see Comment, *supra* note 210.

222. L. TRIBE, *supra* note 209, at 1458.

223. 411 U.S. 1 (1973).

224. *Id.* at 35. But see Comment, *supra* note 210, at 169-73 for discussion of fundamental rights analysis under state constitutions.

225. *Rodriguez*, 411 U.S. at 37.

226. *Id.* at 37 ("Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved . . .").

227. *Id.* at 40.

228. But see Comment, *supra* note 210, at 169-73 for examples of states which have held education to be a fundamental right under their state constitutions.

test use in higher education is not precluding access to higher education altogether. At most, test use affects only the relative levels of college education available to college-bound students.²²⁹ Under *Rodriguez*, a practice which generates disparities in the quality of education available to students will not violate equal protection so long as that practice is rationally related to a legitimate purpose.²³⁰

b. suspect classes and the problem of proving intent

Equal protection violations may also occur where a state law or practice disproportionately burdens a specific class of persons.²³¹ Government actions which operate to the detriment of racial and ancestral groups are subject to strict judicial scrutiny.²³² Similar actions which affect persons differently based on their gender are also subject to judicial scrutiny, but the grounds for invalidating such practices are more stringent than the grounds with respect to race.²³³

Plaintiffs alleging that a practice violates equal protection standards must first show that the practice in question was motivated by a discriminatory purpose in order to subject the practice to strict scrutiny review.²³⁴ The Supreme Court formulated the discriminatory purpose requirement in *Washington v. Davis*,²³⁵ a case involving claims of discrimination based on test use. The plaintiffs in *Davis* alleged that the Washington, D.C. Police Department's recruiting practices discriminated against them on the basis of their race.²³⁶ The Department's recruiting procedure included a verbal skills exam.²³⁷ The plaintiffs' evidence established that four times as many blacks failed the test than did whites,²³⁸ and hence the recruitment process screened out a dispropor-

229. See *infra* Appendices A-D for statistics on women and minority student enrollments at various levels of colleges.

230. *Rodriguez*, 411 U.S. at 37, 40-41.

231. L. TRIBE, *supra* note 209, at 1465-66.

232. *Id.* (citations omitted).

233. *Id.* at 1561-65 (citations omitted).

234. *Washington v. Davis*, 426 U.S. 229, 242 (1976). The *Davis* case involved race discrimination claims. *Id.* at 233. Plaintiffs alleging gender discrimination must also prove discriminatory purpose as the first step in establishing an equal protection violation. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

235. 426 U.S. 229 (1976).

236. *Id.* at 233. This case involved an employment discrimination claim. However, the plaintiffs in *Davis* were unable to bring a Title VII action against the defendant police department because Title VII did not apply to federal government employers when this case was first filed. *Id.* at 236 n.6. Therefore, the plaintiffs sued under 42 U.S.C. § 1981 and the fifth amendment. *Id.* at 233.

237. *Id.* at 234-35.

238. *Id.* at 237.

tionate number of black applicants.²³⁹ However, the Court required the plaintiffs to show that the defendants instituted the challenged recruiting practices with a discriminatory purpose, and held that disproportionate impact alone could not serve as the basis for inferring a discriminatory purpose.²⁴⁰

The Court has discussed guidelines for determining discriminatory purpose, but has not developed a definitive test. As a result, establishing discriminatory purpose proved difficult for many plaintiffs who litigated test use claims subsequent to the *Davis* case.²⁴¹ The question most relevant to educational testing cases is whether foreseeability of the disproportionate impact of a test-use practice renders a decision to institute that practice purposely discriminatory. The Court has held that a showing of discriminatory purpose requires proof that the decision-makers selected or reaffirmed a particular course of action in part *because of*, not merely *in spite of*, its adverse effect upon a particular group.²⁴²

Both the College Board and the professional admissions counselors' association have notified colleges of the possible effects of race and gender neutral test use.²⁴³ However, foreseeability alone has never supported an unconstitutional test use finding because plaintiffs have been unable to prove that the decision-makers in question used a particular test in their selection process *because of* its discriminatory effect on women or minority applicants.²⁴⁴

239. *Id.* at 235.

240. *Id.* at 242.

241. *See, e.g., Jones v. Board of Comm'rs of the Alabama State Bar*, 737 F.2d 996, 1004 (11th Cir. 1984) (proof that Bar Examiners practices resulted in adverse disproportionate impact on passage rates of black applicants was insufficient to support equal protection violation); *Larry P. v. Riles*, 793 F.2d 969, 984 (9th Cir. 1984) (equal protection findings of district court reversed because plaintiffs' showing of pervasive disproportionate impact insufficient to establish discriminatory intent); *Lora v. Board of Educ.*, 623 F.2d 248, 250 (2d Cir. 1980) (case remanded for further findings to show discriminatory intent on part of school board); *Delgado v. McTighe*, 522 F. Supp. 886, 896 (E.D. Pa. 1981) (minority plaintiffs failed to carry burden of proof with respect to equal protection claim where evidence showed Bar Examiners' practice disproportionately burdened minority applicants but no evidence showed practice was motivated by discriminatory purpose).

242. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

243. *See COLLEGE BOARD 1988 REPORT*, *supra* note 29 at iii (College Board advises against exclusive reliance upon SAT to predict college performance); *see also Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 354 (S.D.N.Y. 1989) (court notes that The National Association of College Admission Counselors' Code of Ethics requires member institutions to refrain from using minimum test scores as sole criterion for admission, and to refrain from using tests in any manner that may discriminate against students).

244. *See, e.g., Jones*, 737 F.2d at 1004 (rule limiting number of times applicant may sit for Bar exam does not violate equal protection in absence of showing that defendant instituted rule because of rule's ultimate adverse effect on minority applicants); *Larry P.*, 793 F.2d at 984

V. RECOMMENDATIONS FOR LEGISLATIVE ACTION

A. *A Summary of The Difficulties of Litigation*

In view of the obstacles discussed above, plaintiffs who bring federal statutory and constitutional challenges to test use in higher education face an unlikely chance for success. With respect to the statutory claims, plaintiffs may only bring Title VI and Title IX claims if a school receives federal funding.²⁴⁵ Although most schools—even private schools—do receive government funding, schools receiving no government aid will remain unreachable by the statute.²⁴⁶ Even if schools receive funding sufficient to establish statutory coverage, the nature of relief available to Title VI plaintiffs bringing private suits may be restricted.²⁴⁷ However, their Title IX counterparts are not expressly restricted in the manner of relief they may seek.²⁴⁸

Plaintiffs who succeed in establishing statutory coverage and who establish their private right to sue may still have difficulties proving a statutory violation. In order to avoid the requirement of proving intentional discrimination, plaintiffs must bring suit under regulations incorporating an “effects” standard.²⁴⁹

If plaintiffs do bring suit under effects-standard regulations, they will have to prevail on the basis of a disparate impact analysis. Women might prevail by presenting alternative selection procedures which minimize the disparate impact on women applicants.²⁵⁰ However, minority plaintiffs are less likely to prevail because of the difficulties of establishing that an alternative use of SAT results would alleviate the disproportionate impact on minority applicants and still serve the defendant’s purpose of admitting the students who are most likely to be academically successful.²⁵¹

Constitutional challenges to test use are more difficult for plaintiffs to win than statutory claims. First, it is unlikely that a private college will be sufficiently involved with the state so that its actions may be scru-

(appeals court reverses district court’s equal protection finding which was partially based on foreseeability argument).

245. See 42 U.S.C. § 2000d (1988); 20 U.S.C. § 1681 (1988).

246. See 42 U.S.C. § 2000d (1988); 20 U.S.C. § 1681 (1988).

247. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983). See also *supra* text accompanying notes 116-23.

248. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

249. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983); see also *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *Sharif v. New York State Educ. Dep’t*, 709 F. Supp. 345 (S.D.N.Y. 1989). See also *supra* text accompanying notes 125-32 and 155-58.

250. See *supra* text accompanying notes 182-92.

251. See *supra* text accompanying notes 193-209.

tinized as state actions.²⁵² Therefore, private colleges' activities will not be within the purview of the fourteenth amendment, and not subject to constitutional challenge. Although public colleges' activities will be subject to fourteenth amendment constraints, plaintiffs must prove that the college used standardized tests in its admission process with the purpose of discriminating against the plaintiff-class in order to get strict scrutiny review of that process.²⁵³ For plaintiffs challenging test use, proving discriminatory purpose will be extremely difficult—and probably impossible—to do.

B. *Equal Protection Implications of a Legislative Affirmative Action Remedy*

1. A proposed remedy

Litigation is generally an unfavorable option for parties injured by test use. In addition to the specific obstacles involved in statutory and constitutional claims, litigation is costly, time consuming, and may produce inconsistent results. Furthermore, the problematic effects of testing are most evident on a national level.²⁵⁴ That is, test use in higher education contributes to tracking students into different college levels, with women and minority students concentrated at the lower educational levels.²⁵⁵

An affirmative legislative remedy would effectively address the detrimental effects of standardized test use.²⁵⁶ The goal of the legislation would be to ensure that test use does not result in disproportionate distribution of educational opportunity to the detriment of one gender or race group.

In order to accomplish this goal, legislatures could require all colleges who use test scores in admissions to "take race into account"²⁵⁷ in their decision making process. They could require colleges to implement an admissions program analogous to the Harvard College program specifically endorsed by Justice Powell in *Regents of the University of Cali-*

252. See *supra* text accompanying notes 212-20.

253. See *supra* text accompanying notes 231-44. Because education is not a fundamental right, plaintiffs will only be able to get strict scrutiny review of the challenged test-use practice under the Equal Protection Clause suspect-class doctrine. See *supra* text accompanying notes 221-30 for discussion of fundamental rights analysis.

254. See, e.g., Appendix A, C and D for statistics.

255. See Appendices A-D.

256. See *infra* text accompanying note 308.

257. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (opinion of Powell, J.) (describing a permissible alternative to strict racial quotas in admissions).

*fornia v. Bakke*²⁵⁸ as a permissible means of administering a race-conscious admissions process.²⁵⁹ By requiring colleges to consider the race or gender of an applicant in evaluating that applicant's objective qualifications, legislatures could prevent colleges from using exam results blindly without regard to the fact that score differentials may distort indicia of an applicant's true ability to succeed in college.

The proposed legislation should apply to all colleges and universities who use SAT results as a factor in their admissions and scholarship decisions and should include the following provisions:

(1) A college or university must not establish strict cut-off scores for admission or scholarship decisions;

(2) When evaluating the exam scores of an applicant, administrators must consider the race and gender of that applicant and the national score differentials reported by the College Board; and,

(3) Administrators must compensate for the score differentials by taking race and gender into account as positive factors in admission and scholarship decisions.

2. Assessing the constitutionality of a legislative affirmative action remedy

a. *the affirmative action case law tangle: present standards of review*

The Supreme Court has struggled with the constitutionality of government sponsored affirmative action programs four times in the last twelve years.²⁶⁰ Those cases have produced twenty-three separate opinions, some of which do not reach the constitutional issue.²⁶¹ The Court first considered the constitutionality of affirmative action in *Regents of the University of California v. Bakke*.²⁶² Writing the lead opinion in *Bakke*, Justice Powell found that racial quotas in medical school admissions were impermissible,²⁶³ but that a university could take race into

258. 438 U.S. 265 (1978).

259. *Id.* at 316-17 (opinion of Powell, J.) ("In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.")

260. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Ltd. Partnership v. Shurberg*, 110 S. Ct. 715 (1990). The four decisions are: *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

261. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

262. 438 U.S. 265 (1978).

263. *Id.* at 307 (opinion of Powell, J.).

account as one factor in a multi-factor admissions decision without violating the strictures of equal protection.²⁶⁴ Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, concurred in the judgment but decided that the admissions quota was impermissible on statutory grounds.²⁶⁵ Justice Brennan, joined by Justices White, Marshall and Blackmun, found that the quota system and taking race into account were both constitutionally permissible practices.²⁶⁶ Consequently, racial quotas in admission were expressly denounced by five justices as violative of equal protection principles while considering race in admissions was simultaneously endorsed by five justices.

Although *Bakke* indicates that educational affirmative action programs are permissible under certain circumstances, more recent decisions indicate an increasing reluctance on the part of the Court to tolerate affirmative remedies which burden non-minority groups.²⁶⁷ In light of this trend, Congress itself has become reluctant to institute new affirmative action programs for fear that such programs would be overturned upon Supreme Court review.²⁶⁸

Much of the dispute among the justices regarding affirmative action programs concerns the appropriate standard of review for determining a particular program's constitutionality.²⁶⁹ In its most recent affirmative action decision, *City of Richmond v. J.A. Croson Co.*,²⁷⁰ a Court majority

264. *Id.* at 315-18 (opinion of Powell, J.).

265. *Id.* at 421 (Stevens, J., joined by Burger, C.J., Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part). Justice Stevens stated that whether race could be used as a factor in admissions was not an issue in the case, and he, therefore, declined to rule on that issue. *Id.* at 411 (Stevens, J., concurring and dissenting).

266. *Id.* at 378-79 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

267. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

268. See, e.g., Holmes, *Bill Would Overturn Court's Rights Decisions*, N.Y. Times (nat'l ed.), Feb. 8, 1990, at A20, col. 4 (legislation introduced to expand Civil Rights Act in response to several 1989 Court decisions omits mention of affirmative action in order to enhance its prospect for passage). See S. 2104, 101st Cong., 2d Sess. (1990) for the actual text of the legislation.

269. See, e.g., *Bakke*, 438 U.S. at 294-99 (opinion of Powell, J.) (arguing for strict scrutiny of affirmative action programs: "When [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."); *id.* at 359 (Brennan, J. concurring in the judgment in part and dissenting in part) (arguing for intermediate scrutiny: "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'"); see also *Croson*, 109 S. Ct. at 722 (opinion of O'Connor, J.) ("[H]eightedened scrutiny [is] appropriate in the circumstances of this case.").

270. 109 S. Ct. 706 (1989). Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I (facts and procedural history), III-B

agreed that strict scrutiny should be applied to legislation incorporating race-based classifications, including affirmative action legislation which is designed to remedy the effects of race discrimination.²⁷¹

The plaintiff in *Croson* challenged the constitutionality of a city construction plan requiring all prime contractors on city projects to subcontract at least 30% of the contract amount to minority subcontractors.²⁷² Applying strict scrutiny analysis to the Richmond plan, the Court stated that a general claim of past discrimination in a particular industry could not justify the use of an unyielding racial quota.²⁷³ The only "compelling governmental interest" sufficient to pass strict scrutiny would be an interest in rectifying the effects of *identified* discrimination within the industry and legislative jurisdiction in question.²⁷⁴ Even if the city managed to demonstrate the requisite discrimination, the Court indicated that the 30% set-aside plan would not pass strict scrutiny because it was not narrowly tailored to remedy past discrimination.²⁷⁵ The Court drew this conclusion for two reasons. First, the city had adopted the set-aside without first considering race-neutral alternatives.²⁷⁶ And second, the set-aside figure represented an unrealistic assumption that minorities would choose a particular trade in lockstep proportion to their representation in the total population.²⁷⁷

Croson is unique because it is the first decision in which a majority of the Justices agreed on a standard of review for affirmative action legis-

(discussion of permissible government interest in enacting race-conscious remedial legislation), and IV (discussion of requirements for "narrowly tailored" remedy), in which Chief Justice Rehnquist, Justice White, Justice Stevens and Justice Kennedy joined. Chief Justice Rehnquist and Justice White also joined in Part II of Justice O'Connor's opinion (discussion of federal versus state authority to enact remedial legislation). Chief Justice Rehnquist, Justice White and Justice Kennedy joined in Parts III-A (discussion of strict scrutiny as appropriate standard of review) and V (findings necessary to establish identified discrimination) of Justice O'Connor's opinion. Justice Stevens and Justice Kennedy filed opinions concurring in part and concurring in the judgment. Justice Scalia filed an opinion concurring in part and concurring in the judgment. Justice Marshall filed a dissenting opinion, in which Justice Brennan and Justice Blackmun joined. Justice Blackmun filed a dissenting opinion in which Justice Brennan joined.

271. *Croson*, 109 S. Ct. at 721-22 (opinion of O'Connor, J.) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. . . . [H]eightedened scrutiny [is] appropriate in the circumstances of this case."); *id.* at 735 (Scalia, J., concurring in the judgment) ("I agree . . . that strict scrutiny must be applied to all government classification by race . . .").

272. *Id.* at 712-13.

273. *Id.* at 724.

274. *Id.* at 729.

275. *Id.* at 728.

276. *Id.*

277. *Id.*

lation.²⁷⁸ However, the scope of *Croson*'s applicability to subsequent affirmative action challenges is still the subject of debate among scholars²⁷⁹ and federal judges.²⁸⁰

b. state government implementation of an affirmative remedy

In the wake of *Croson*, state government power to enact affirmative educational legislation depends on the effect that that decision has on *Bakke*. None of the Justices in *Croson* disavowed Justice Powell's assertion in *Bakke* that racial diversity is a constitutionally permissible goal, independent of any attempt to remedy past discrimination.²⁸¹ Although the Court has rejected diversity arguments in other contexts,²⁸² arguably in the narrow context of *Bakke*—university admissions—diversity is still a constitutionally permissible goal.²⁸³ In addition, federal courts which have adjudicated affirmative action challenges subsequent to *Croson* have continued to regard diversity as a constitutionally acceptable goal.²⁸⁴ Therefore, state legislatures should be allowed to regulate test use in higher education in an effort to increase the racial diversity of educational institutions and to prevent the lack of diversity that might result from untempered use of test scores.

Once a state legislature seeks to regulate testing in order to further a compelling state purpose, the specific regulation at issue will only be

278. See Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1748 (1989).

279. See generally *Joint Statement: Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989); Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163 (1989).

280. Compare *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989) (distinguishing *Croson* and upholding an FCC minority-preference policy), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990) with *Shurberg*, 876 F.2d at 912-19 (relying on *Croson* and invalidating an FCC minority-preference policy different from the policy at issue in *Winter Park Communications*).

281. See, e.g., *Winter Park Communications*, 873 F.2d at 354 (court relies on the diversity issue discussed in *Bakke* for its finding that diversity is a legitimate goal of FCC policy granting licensing preference to minority-owned television stations).

282. See *Wygant*, 476 U.S. at 274-76 (holding that desire to provide role-models for students is not a valid goal permitting granting hiring preference to minority teachers).

283. See *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 913 (D.C. Cir. 1989) ("Aside from remedying past discrimination, the only other state interest heretofore identified in a Supreme Court opinion and upheld as sufficiently compelling to support race-conscious policies is the promotion of diversity in a school's student body.") (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)), *cert. granted sub nom. Astroline Communications Co. v. Shurberg*, 110 S. Ct. 715 (1990).

284. See, e.g., *Winter Park Communications*, 873 F.2d at 354.

valid so long as it is then "narrowly tailored" to achieve that purpose.²⁸⁵ The proposed legislation which requires consideration of an applicant's race but does not establish a rigid quota is tailored to the purpose of fostering diversity on the college campus. This legislation would further the goal of diversity by ensuring that testing does not serve to screen out a greater proportion of minority applicants than white applicants by virtue of the fact that white applicants, on average, receive higher scores.

One race-neutral remedy which might alleviate the disparate impact of test use is a disallowance of testing altogether. Two researchers have argued that dispensing with the SAT would increase admission of black students at colleges currently using color-blind admissions criteria.²⁸⁶ However, the long-term effects of dropping the SAT are uncertain and could possibly have a detrimental effect on minority students.²⁸⁷

c. federal implementation of an affirmative remedy

Croson clarifies the standard of review likely to be applied in future challenges to state and local legislative affirmative action plans. However, since the *Croson* decision involved a local government initiative, it is arguably of limited relevance to federal affirmative action challenges.²⁸⁸

Several of the Justices in *Croson* drew distinctions between the respective powers of state and federal governments to legislate remedies for past discrimination,²⁸⁹ noting that section five of the fourteenth amendment specifically authorizes Congress to enforce the prescriptions of that amendment.²⁹⁰ The Court in *Croson* implied that because state and local governments do not have similar express authority,²⁹¹ state and local government ability to legislate race-based remedial legislation must be limited and subject to strict judicial scrutiny.²⁹²

285. See *Croson*, 109 S. Ct. at 728-29 (opinion of O'Connor, J.).

286. See J. CROUSE & D. TRUSHEIM, *supra* note 13, at 149.

287. See *id.* at 148-155. The authors report on the controversy surrounding the possible impact of dropping the SAT.

288. See *Winter Park Communications*, 873 F.2d at 354-55; see also *Shurberg*, 876 F.2d at 941 (Wald, C.J., dissenting).

289. See *Croson*, 109 S. Ct. at 719 (opinion of O'Connor, J.); *id.* at 734 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 736 (Scalia, J., concurring in the judgment).

290. U.S. CONST. amend. XIV, § 5.

291. See, e.g., *Croson*, 109 S. Ct. at 719 ("What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.") (opinion of O'Connor, J., joined by Rehnquist, C.J. & White, J.).

292. *Id.* at 736 (Scalia, J., concurring).

In the process of distinguishing state and federal affirmative action initiatives, Justices O'Connor, Rehnquist, and White suggested that Congress may employ a broader purpose than state governments when it acts pursuant to its fourteenth amendment enforcement power to address the effects of discrimination.²⁹³ Justice Scalia also distinguished between the permissibility of race-based action at the federal versus state level.²⁹⁴ This implies that the Court would grant more deference to federal affirmative action legislation than it granted the local legislation in *Croson*.²⁹⁵

Although *Croson* suggests that a different level of scrutiny would apply to federal legislation, the precise type of scrutiny to be applied is still unclear. In *Katzenbach v. Morgan*,²⁹⁶ the Court set forth a rational basis test as the appropriate standard of review for legislation enacted pursuant to Congress' fourteenth amendment enforcement power.²⁹⁷ Arguably then, a rational basis standard should apply to federal affirmative action legislation enacted pursuant to section five of the fourteenth amendment.²⁹⁸

In addition, in evaluating the constitutionality of federal testing legislation, the Court may rely on its decision in *Fullilove v. Klutznick*,²⁹⁹ the only case in which the Court adjudicated a challenge to federal affirmative action legislation.³⁰⁰ Without settling on a standard of re-

293. See *id.* at 718-19 (opinion of O'Connor, J., joined by Rehnquist, C.J. & White, J.); *id.* at 736 (Scalia, J., concurring).

294. *Id.* at 736 (Scalia, J., concurring). Justice Scalia stated that "it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . . and quite another to permit it by the [states]." *Id.* (Scalia, J., concurring).

295. For example, in Part II of her opinion in *Croson*, Justice O'Connor—joined by Chief Justice Rehnquist and Justice White—remarked that just because "Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States . . . are free to decide that such remedies are appropriate." *Id.* at 719 (opinion of O'Connor, J.).

296. 384 U.S. 641 (1966).

297. *Id.* at 653.

298. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, cited *Katzenbach* in support of her argument that Congress might be permitted to enact the type of race-based legislation which the Court disallowed in *Croson*. *Croson*, 109 S. Ct. at 719 (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). In view of their reliance on *Katzenbach*, it is possible that these three Justices would endorse rational basis review of congressional affirmative action legislation.

299. 448 U.S. 448 (1980).

300. The reader should note that before this Comment went to press, the Court heard argument in the combined cases of *Astroline Communications Co. v. Shurberg*, *cert. granted*, 110 S. Ct. 715, and *Metro Broadcasting, Inc. v. FCC*, *cert. granted*, 110 S. Ct. 715, but had not yet handed down an opinion in those cases. Each of these cases presents a challenge to Federal Communications Commission minority preference policies.

view,³⁰¹ the Court in *Fullilove* upheld the legislation at issue,³⁰² and a majority of the current Justices continue to regard *Fullilove* as good law.³⁰³

In the process of adjudicating the *Fullilove* decision, Chief Justice Burger recognized that Congress was competent both to discover and address the effects of society-wide discrimination.³⁰⁴ In *Croson*, Chief Justice Rehnquist and Justice White joined in part II of Justice O'Connor's opinion in which she extensively discussed Chief Justice Burger's rationale for *Fullilove*'s approval of a congressional affirmative action set-aside plan.³⁰⁵ Rather than repudiate *Fullilove*, Justice O'Connor relied on that decision in order to distinguish and then disallow the local plan adopted by the City of Richmond.³⁰⁶ In addition, the three dissenting Justices explicitly relied on *Fullilove* as precedent supporting their argument that the Richmond plan was constitutional and should be upheld.³⁰⁷

Assuming that, under *Fullilove*, Congress is empowered to enact legislation in order to remedy the effects of society-wide discrimination, the proposed testing legislation will be constitutional because it addresses the effects of discrimination which manifest themselves in an educational context. To the extent that score differentials result from bias in test items or test construction,³⁰⁸ requiring administrators to consider the race of the test-taker will prevent distortion of the admission decision into one based on irrational racial classifications rather than on merit. In addition, the legislation is flexible because it does not require decision-makers to admit a specified number of minority students but instead grants them freedom to admit the students of their choice once testing discrepancies are taken into account.

301. *Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J., joined by Powell & White, JJ.) (advocating deferential approach in reviewing congressional legislation); *id.* at 496 (Powell, J., concurring) (advocating "compelling governmental interest" standard); *id.* at 519 (Marshall, J., concurring in the judgment, joined by Brennan & Blackmun, JJ.) (advocating intermediate scrutiny as appropriate standard of review).

302. *Id.* at 492 (opinion of Burger, C.J., joined by White & Powell, JJ.); *id.* at 519 (Marshall, J., concurring in the judgment, joined by Brennan & Blackmun, JJ.).

303. *Croson*, 109 S. Ct. at 718-20 (opinion of O'Connor, J.); *id.* at 739-45 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting).

304. *Fullilove*, 448 U.S. at 483-84.

305. *Croson*, 109 S. Ct. at 718-20.

306. *Id.*

307. *Id.* at 739-45 (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.).

308. See *supra* text accompanying notes 31-32.

VI. CONCLUSION

In an 1861 message to Congress, President Lincoln expressed his commitment to equality of opportunity when he stated that "a leading object of the government for whose existence we contend [is to] afford all an unfettered start, and a fair chance in the race of life."³⁰⁹ In its present format, standardized testing is compromising this goal. Sociologists and psychometricians continue to debate the causes of disparities in test results across gender and race groups. However, regardless of the causes, the legal system may provide a forum for regulating the effects of gender- and race-based disparities in test results, either through litigation or legislation.

The fact that women and minority test-takers generally receive lower exam scores than their non-minority, male counterparts raises an inference of discrimination which is actionable in non-educational contexts. However, the problematic effects of higher education testing are not fully redressable by the current legal system. The complexities involved in litigating testing claims suggests that regulation of test use may be preferable to litigation. Federal or state legislation may alleviate the detrimental effects of test use and may prevent testing from exacerbating existing inequities in the distribution of educational resources in this country.

*Lora Silverman**

309. S. BRINT & J. KARABEL, *supra* note 25, at 3 (quoting Abraham Lincoln, July 4, 1861).

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APPENDIX A: SAT AVERAGES AND ENROLLMENT STATISTICS FOR
"MOST COMPETITIVE" COLLEGES

College	SAT-V	SAT-M	%Women	%Black	%Hispanic
Amherst	642	680	43	(not given)	
Brown	630	670	47	8	3
Bowdoin	(SAT not required)		46	3	1
Cal Tech	650	760	16	2	3
Carleton	625	660	51	3	3
Columbia	628	660	44	8	6
Columbia (Eng.)	570	710	33	4	5
Cooper Union	560	710	31	3	5
Cornell	595*	680*	45	5	4
Dartmouth	620	680	39	7	2
Duke	624	682	46	5	2
Georgetown	626	665	51	(not given)	
GMI Eng. Mgmt.	535	645	26	5	2
Harvard	670	700	42	8	5
Johns Hopkins	620	680	35	4	1
U. Michigan	560	640	48	5	3
Middlebury	610	640	50	2	1
MIT	635*	735*	32	5	4
Northwestern	590	650	49	8	2
Notre Dame	570	640	31	3	4
Princeton	643	696	38	6	4
Rice	630	690	39	5	4
Stanford	650*	700*	43	8	10
Swarthmore	633	667	49	8	3
Union College	(ACT required)		40	3	2
Air Force Acad.	579	665	13	7	4
Naval Acad.	583	664	9	5	6
U. Virginia	586	646	50	8	1
Wellesley	610	640	100	6	2
Wesleyan	626	665	48	10	3
Williams	650	682	44	5	2
Yale	660*	695*	44	7	3

Total average enrollment of women = 41.3%**

Total average minority enrollment = 8.86%

The statistics in the table are reported in ARCO, *THE RIGHT COLLEGE* 1989 (1988).

* For these colleges, SAT scores were not reported in ARCO. Therefore, the SAT scores listed were computed from ranges reported in *THE COLLEGE BOARD, THE COLLEGE HANDBOOK* (1989-90) (1988).

** The following colleges were eliminated from the calculation of average enrollment of women students:

Wellesley College (all women's college)
Naval Academy
Air Force Academy

APPENDIX B: ADMISSION RATES OF MEN AND WOMEN APPLICANTS
AT COMPETITIVE COLLEGES

Source: THE COLLEGE BOARD, THE COLLEGE HANDBOOK (1989-90)
(1988)

<u>College</u>	<u>Admit Rate of Men*</u>	<u>Admit Rate of Women*</u>
Amherst	20	18
Bowdoin	23	21
Brown	21	21
Cal Tech	29	39
Carelton	39	44
Columbia	25	27
Columbia (Eng.)		(not given)
Cooper Union	23	12
Cornell	27	28
Dartmouth	18	23
Duke	23	22
Georgetown	23	21
GMI Eng. Mgmt.		(not given)
Harvard	15	16
Johns Hopkins	45	40
U. Michigan		(not given)
Middlebury	27	28
MIT	21	39
Northwestern	44	42
Notre Dame	35	32
Princeton	17	16
Rice	31	32
Stanford	15	17
Swarthmore	34	33
Union	33	51
U. Virginia	27	28
Wesleyan	35	30
Williams	25	24
Yale	19	18

* Admission rate means the percentage of those admitted out of the total that applied

APPENDIX C: SAT AVERAGES AND ENROLLMENT STATISTICS FOR
UNIVERSITY OF CALIFORNIA SCHOOLS AND CALIFORNIA
STATE SCHOOLS

Source: ARCO, THE RIGHT COLLEGE 1989 (1988)

UNIVERSITY OF CALIFORNIA

<u>Campus</u>	<u>SAT-V</u>	<u>SAT-M</u>	<u>%Women</u>	<u>%Black</u>	<u>%Hispanic</u>
Berkeley	532	607	47	6	8
Davis	490	564	52	3	3
Irvine	465	569	52	3	7
Los Angeles	518	599	52	7	14
Riverside	497	567	51	5	10
San Diego	502	586	46	3	9
Santa Barbara	494	570	50	3	7
Santa Cruz	521	562	51	2	6

Total average enrollment of women = 50.1%

Total average black/hispanic enrollment = 12.0%

* * * * *

CALIFORNIA STATE

<u>Campus</u>	<u>SAT-V</u>	<u>SAT-M</u>	<u>%Women</u>	<u>%Black</u>	<u>%Hispanic</u>
Bakersfield	425	469	64	5	12
Chico	435	490	49	2	5
Dominguez Hills	(not given)		56	35	11
Fresno	416	464	50	4	16
Fullerton	414	482	52	2	9
Hayward	(not given)		59	9	7
Long Beach	407	472	55	5	9
Los Angeles	(not given)		55	12	25
Northridge	(not given)		54	5	11
Sacramento	428	484	52	5	6
San Bernardino	450*	400*	23	(not given)	
Stanislaus	411	462	56	2	9

Total average enrollment of women = 54.7%*

Total average black/hispanic enrollment = 18.72%*

* Enrollment averages exclude California State University at San Bernardino because enrollment statistics for minority students were not available.

APPENDIX D: CALIFORNIA TWO-YEAR PUBLIC COMMUNITY
COLLEGES: BLACK & HISPANIC STUDENT ENROLLMENTS 1989

Source: PETERSON'S TWO-YEAR COLLEGES 1990 172-686 (1989)

College	% Black	% Hispanic
Allan Hancock College	8	12
American River College	N/A	N/A
Antelope Valley College	6	8
Bakersfield College	5	16
Barstow College	10	15
Butte College	1	5
Cabrillo College	1	7
Canada College	5	13
Cerritos College	5	20
Cerro Coso Community College	N/A	N/A
Chabot College	7	9
Chaffey Community College	7	18
Citrus College	6	20
City College of San Francisco	9	11
Coastline Community College	1	4
College of Alameda	37	7
College of the Canyons	1	5
College of the Desert	4	13
College of Marin: Kentfield	N/A	N/A
College of San Mateo	3	7
College of the Sequoias	2	22
College of Siskiyous	3	2
Columbia College	N/A	N/A
Compton Community College	60	27
Contra Costa College	23	9
Cosumnes River College	13	8
Crafton Hills College	3	10
Cuesta College	1	5
Cuyamaca College	2	10
Cypress College	3	8
De Anza College	3	7
Diablo Valley College	2	4
East Los Angeles College	N/A	N/A
El Camino College	19	14
Evergreen Valley College	6	18
Feather River College	1	3
Foothill College	4	5
Fresno City College	6	21
Fullerton College	2	11
Gavilan College	1	26
Golden West College	1	7
Grossmont Community College	3	8
Hartnell College	3	24
Imperial Valley College	1	63
Irvine Valley College	1	5
Kings River Community College	2	31
Lake Tahoe Community College	1	4
Laney College	39	5
Lassen College	2	5
Long Beach City College	11	20

Los Angeles City College	24	26
Los Angeles Harbor College	14	15
Los Angeles Mission College	10	36
Los Angeles Pierce College	4	9
Los Angeles Southwest College	72	23
Los Angeles Trade and Tech.	35	17
Los Angeles Valley College	7	18
Los Medanos College	8	11
Mendocino College	1	4
Merced College	7	15
Merritt College	34	6
Mira Costa College	5	21
Mission College	4	11
Modesto College	1	12
Monterey Peninsula College	8	4
Moorpark College	1	7
Mount San Antonio College	7	25
Mount San Jacinto College	3	12
Napa Valley College	2	6
Ohlone College	4	10
Orange Coast College	1	7
Oxnard College	6	28
Pacific Coast College	N/A	N/A
Palo Verde College	10	30
Palomar College	2	10
Pasadena City College	9	20
Porterville College	3	19
Rancho Santiago Community College	3	15
Rio Hondo College	4	43
Riverside Community College	9	12
Sacramento City College	12	12
Saddleback College	1	5
San Bernardino Valley College	11	17
San Diego City College	19	15
San Diego Mesa College	14	6
San Diego Miramar College	7	4
San Joaquin Delta College	5	15
San Jose City College	6	18
Santa Barbara City College	2	17
Santa Monica College	11	11
Santa Rosa Junior College	2	5
Shasta College	10	26
Sierra College	N/A	N/A
Skyline College	6	17
Solano Community College	12	8
Southwestern College	6	32
Taft College	9	3
Ventura College	2	15
Victor Valley College	9	6
Vista College	15	5
West Hills College	5	21
West Los Angeles College	N/A	N/A
West Valley College	2	7
Yuba College	4	10

Total average Black/Hispanic enrollment = 23.31%

