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PROPOSITION 209

**A Project
Presented to the
Faculty of
California State University,
San Bernardino**

**In Partial Fulfillment
of the Requirements for the Degree
Master of Public Administration**

**by
Joseph John Chavez**

December 1998

PROPOSITION 209

**A Project
Presented to the
Faculty of
California State University,
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December 1998

Approved by:


Dr. Clifford O. Young, Chair, Public Administration

10/27/98
Date


Audrey Mathews, Professor

ABSTRACT

Proposition 209: The California electorate passed a constitutional amendment by initiative, by a 54-46 % vote on November 5, 1996. It is now Article I, Section 31 of the California Constitution. Proposition 209 and "Yes on 209" campaign were projects of Californians Against Discrimination and Preferences (CADAP). CADAP was also an intervener in the recently concluded litigation over the constitutionality of measure (*Coalition for Economic Equity v. Pete Wilson et al.*).

This facial challenge to Article I, Section 31 of the California State Constitution failed. On November 3, 1997, the U. S. Supreme Court denied certiorari in the case, letting stand the Ninth U.S. Circuit Court of Appeals decision of April 1997 which strongly upholds the constitutionality of the measure.

The economic affects to the small minority or woman owned businesses are explored. The affect Proposition 209 has on education due to the California Constitution change is reviewed. The affect Proposition 209 has on affirmative action in California is assessed.

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CHAPTER ONE

The Inception

The California electorate passed a constitutional amendment by initiative, by a 54-46 % vote on November 5, 1996 which became, Article I, Section 31 of the California Constitution. This initiative was as the result of Proposition 209. Proposition 209 and the “Yes on 209” campaign were projects of Californians Against Discrimination and Preferences (CADAP). CADAP was also an intervenor in the recently concluded litigation over the constitutionality of the measure (*Coalition for Economic Equity v. Pete Wilson et al.*). (5-1)

The initial challenge to Article I, Section 31 of the California State Constitution failed. On November 3, 1997, the U.S. Supreme Court denied certiorari in the case, let stand the Ninth U.S. Circuit Court of Appeals decision of April 1997 which strongly upholds the constitutionality of the measure. CADAP was created in August 1994 by the California Civil Rights Initiatives (CCRI), co-authors Glynn Custred, Thomas Wood, and Larry Arn. The key operative provisions of this measure states: “The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (6-1)

White voters fueled the 54-46 % victory for the constitutional amendment ending race and gender based anti-discrimination programs in state, county, and city hiring, contracting, and school admissions. The vote rode a deep racial divide, according to an Examiner/Voter News Service exit poll. Whites voted for Proposition 209, blacks and

Latinos voted against, while Asian American voters were split (4-1). Only San Francisco and six other counties: Alameda, Marin, San Mateo, Santa Clara, Santa Cruz and Los Angeles voted against the proposition (2-2).

When it went into effect at 12:01 a.m., August 28, 1997, a coalition of civil rights attorneys planned to file at least one federal court lawsuit challenging the law as unconstitutional. The American Civil Liberties Union (ACLU), the Lawyers' Committee, the California Labor Federation, and others planned a morning press conference in San Francisco to talk about the suit, which would seek to keep the law from being enforced.

(13-1)

Proponents, opponents, and San Francisco City Attorney Louise Renne predicted an onslaught of lawsuits, both pro and con. Some would attempt to block the law; others would attempt to force cities, counties, school systems and colleges to comply with it. Much of the legal wrangling revolved around the question of what, precisely, constituted a "preference". (13-1)

With its burgeoning ethnic diversity, California has become the spawning ground for voter-driven responses to racial and economic insecurities and a trendsetter for the nation. As with Proposition 187, passage of Proposition 209 is expected to spark an explosion of similar legislation across the United States. Cities analogous to San Francisco believe all their affirmative action programs were legal under Proposition 209, even their minority and women-owned businesses. (13-2)

Cities were expected to be a party to lawsuits over Proposition 209 one way or another, whether their programs are sued by people who believe they discriminate or

whether they join the legal efforts to overturn Proposition 209. Proponents of the measure, which polls had consistently shown to be winners, were jubilant. Governor Pete Wilson, a leading supporter of Proposition 209 said the campaign against it exaggerated its impact. (13-2)

Wilson stated, "The civil rights protections that are federal and state law not only will stay in place, they will be vigorously enforced. We will move as early as we can to implement it, but I am not sure of lawsuits filed against it, because people who are opposed will seek to delay the implementation as long as they can."

Opponents tried to put the best face on their loss. Feminist Majority President and Stop Proposition 209 stalwart Ellie Smeal in Los Angeles stated, "they felt they put up one hell of a fight." Their position was, that was round one! They stated they were going to fight this in other states and in Congress. They assured that without a huge infusion of cash by the Republican Party, the forces of Proposition 209 would not have prevailed. They blamed what they called deceptive wording of the proposal, which did not include the words "affirmative action." (13-2)

Paterson, a leader of Defeat Proposition 209, stated that, "when he was walked into the voting booth that morning, and he read the language to Proposition 209, he couldn't believe anyone would be against it, it sounds like a combination of Malcolm X and Martin Luther King."

The use of King's words and image in a GOP TV ad for Proposition 209 sparked outrage among civil rights leaders and caused a nasty dust-up between the party and the Proposition 209 campaign, which had tried to sell the proposition as a nonpartisan issue.

It was heavily bankrolled by the Republican Party, which saw an opportunity to convert affirmative action into the kind of wedge issue that immigration was for its candidates in 1994.

Jennifer Nelson, spokeswoman for the Proposition 209 campaign, said the nation's eyes were on California's vote. "With the passage of Proposition 209, I think we've created momentum nationally to erase race and gender preferences in other states and in Congress," she said, "This sends a strong message to the White House". (13-2)

At this point, a better way to get an idea on the objection to Proposition 209 can best be understood by looking at information provided by the Feminist Majority Movement, as provided by Eleanor Smeal. The following are questions and answers provided by the Feminist Majority Movement. (9-2)

Questions and Answers about California's "No" Vote On Proposition 209

(1) What is affirmative action?

Affirmative action refers to programs that seek to remedy past discrimination against women, minorities, and others by increasing the recruitment, promotion, retention and on-the-job training opportunities in employment and by removing barriers to admission to educational institutions. Because of the long history of discrimination-based sex and race, most affirmative action programs have been directed towards improving employment and education opportunities for women and minorities. (8-1)

(2) What kind of strategies does affirmative action include?

Affirmative action strategies include expanding the pool of job or admission application through recruitment strategies which reach outside of usual or traditional

channels. This helps to ensure that a fairer representation of qualified women and minorities are available to apply for admissions or jobs. An example, are mailing admissions applications to female high school seniors and posting of job notices in places where women and minorities are more likely to see them. Strategies in employment include an increase in on-the-job training opportunities that increase occupational mobility within the workplace. These strategies may be instituted by law or court decree, or voluntarily to increase the pool of qualified applicants and to diversify the workplace.

(8-1)

(3) Doesn't affirmative action mean we take less qualified candidates? Isn't that wrong in education and training?

Public affirmative action programs specifically do not allow the acceptance of unqualified applicants or workers. There is a difference, however, between affirmative action instituted by law or court decree, following legal guidelines that we see in public situations and those programs that private businesses or institutions apply on a voluntary basis. (8-1)

We have traditionally accepted less qualified candidates in education because it "served a greater purpose" to do so. The prime example is the preferential acceptance of children and relatives of alumni—not women and minorities. These are overwhelming beneficiaries of preferential treatment at colleges and universities, greater than the number of minorities and women accepted through affirmative action programs. The slots reserved for children of alumni are call "legacy" seats. This legacy preference in admissions has, in many cases, resulted in the acceptance of less qualified candidates over

better-qualified candidates. The legacy preferences are believed to especially benefit whites, males, and the children of wealthy alumni. (8-1)

There are many examples of this preferential treatment. Children of alumni at Harvard University, in 1991 were three times more likely to be accepted than other prospective students. At Yale, children of alumni are two and half times more likely to be admitted. In 1992, Dartmouth gave admission to 57 % of its legacy applicants and only 27 % of other students. The University of Pennsylvania accepted 66% of alumnus' children. Twenty-five percent of Notre Dame's freshmen class is saved for the children of alumni.

In unions and certain occupations, preferential treatment has traditionally been given to the relatives and friends of employees and management, especially at the entry level where unskilled employees receive on the job training that qualifies them for advancement. (8-1)

(4) What would Proposition 209 do?

Because it is loosely written, no one knows how the courts will interpret Proposition 209. There are a few areas, however, where we do know what it is likely to do. According to the non-partisan California Legislative Analyst, Proposition 209 would "eliminate most affirmative action programs for women and minorities run by state or local governments". This means Proposition 209 will (8-2):

1. End affirmative action outreach programs for women and minorities in government jobs and contracts;
2. Prohibit courts from ordering affirmative action remedies even in cases of

proven race and sex discrimination;

3. Imperil workmen's centers and rape crisis centers on college campuses;
4. Scrap math and science programs for girls;
5. Eliminate magnet schools designed to desegregate school districts.

(5) Is preferential treatment wrong?

Preferential treatment is legal jargon. Proposition 209 would outlaw any affirmative action program including outreach, recruitment, training, hiring, contracting, and other programs which increase opportunities for women and minorities. It confuses the cure for discrimination with discrimination itself. A critical aspect of Proposition 209 is that it only prohibits actions based on gender or race. (9-3)

Other groups, such as veterans, relatives, legacies, or people over 65 years old are still allowed to have preferential treatment and to seek other types of preferential treatment through legal action. The issue that preferential treatment is undesirable seems to only interest the supporters of Proposition 209 when it doesn't apply to them. (8-2)

Since Proposition 209 prohibits legislation that benefits people based only on gender and race and not based on age, relations, veteran status, or where they went to school, women and minorities have to pass over a higher hurdle to have new legislation to benefit them as compared to other groups. This preferential treatment is unconstitutional.

(8-2)

(6) What about Clause "C"?

Clause "C" reads: "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of

public employment, public education, or public contracting.” According to some California law professors, Clause “C” creates a constitutional right to discriminate against women and girls. (4-1)

The phrase, “reasonably necessary” in Clause “C” is the critical issue here. In California, the standard against sex discrimination states that it is illegal to discriminate based on gender unless it is necessary to achieve a “compelling purpose”. California has the highest standard in the nation because it is the equivalent to the Equal Rights Amendment. The standard for gender discrimination is somewhat lower in federal law because the Equal Rights Amendment was never passed. The “reasonably necessary” standard is lower still. Proposition 209, Clause “C” will allow discrimination based on gender if it is “reasonably necessary to the normal operation of public employment, public education, or public contracting.” This is a lower standard that legal experts say is easy to prove in court and will result in women losing the equal opportunity that they currently have achieved. Arguments that won’t hold water today will be acceptable and women will not be hired or given opportunities because of perceived or possible gender issues, such as pregnancy interfering with night work. (8-2)

(7) Why are we opposed to Proposition 209?

The so-called California Civil Right’s Initiative, which is neither civil nor right, is really a deceptive attempt to constitutionalize gender discrimination and slam shut the doors of opportunity that both women and people of color have fought so hard to open. It places a hurdle to minorities and women that is not placed to others who seek legislation to benefit them. (8-2)

(8) What does the Supreme Court rejection of Proposition 209 mean?

On November 3, 1997, the US Supreme Court rejected a broad challenge to California's Proposition 209. This decision was to rule against hearing the appeal filed by the American Civil Liberties Union claiming that government sometimes has "an affirmative duty to employ race preferences" to make up for past or present discrimination against minorities. This sets the stage for full enforcement of Proposition 209. However, since Proposition 209 does not change federal laws and since many of California's local programs get federal funding, many situations exist where Proposition 209 can't be implemented. However, individual situations where past or present discrimination based on gender or race in public employment, education or contracting can still be litigated. These may wind their way up to the Supreme Court and provide a way to challenge Proposition 209 in the future. (8-2)

Following are arguments in favor of Proposition 209 by the Americans for America.

The Right Thing To Do

A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act and proclaims simply and clearly: "The state shall not discriminate against, or grant preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public

contracting.” (2-1)

“Reverse discrimination” based on race or gender is plain wrong, and two wrongs don’t make a right. Today, students are being rejected from public universities because of their race. Job applicants are turned away because their race does not meet some “goal” or “timetable.” Contracts are awarded to high bidders because they are of the preferred race. The government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination. Proposition 209 keeps in place all federal and state protections against discrimination. (2-1)

Government cannot work against discrimination if government itself discriminates. Proposition 209 will stop the terrible programs which are dividing our people and tearing us apart. People naturally feel resentment when the less qualified are preferred. We are all Americans. It’s time to bring us together under a single standard of equal treatment under the law. Discrimination is costly in other ways. Government agencies throughout California spend millions of your tax dollars for costly bureaucracies to administer racial and gender discrimination that masquerades as “affirmative action.” They waste much more of your money awarding high-bid contracts and sweetheart deals based not on the low bid, but on unfair set-asides and preferences. This money could be used for police and fire protection, better education, and other programs which would benefit everyone. (2-2)

The better choice, help only those who need help. We are individuals, not every white person is advantaged, and not every “minority” is disadvantaged. Real affirmative

action originally means no discrimination and seeks to provide opportunity to all. That's why Proposition 209 prohibits discrimination and preferences or allows preference because of race or sex, to continue. The only honest and effective way to address inequality of opportunity is by making sure that all California children are provided with the tools to compete in our society, and they let them succeed on a fair, color-blind and race blind basis. Let's not perpetuate the myth, that minorities and women cannot compete without special preferences. Let's instead move forward by returning to the fundamentals of our democracy; i.e., individual achievement, equal opportunity, and zero tolerance for discrimination against or for any individual. Pete Wilson, Governor, State of California, Ward Connerly, Chairmen California Civil Rights Initiative, and Pamela A. Lewis, co-Chair, California Civil Rights Initiative, signed this document. (2-2)

Rebuttal, "In Favor of Proposition 209"

A generation ago, Rosa Parks launched the civil rights movement which opened the door to equal opportunity for women and minorities in this country. Park is against this deceptive initiative. Proposition 209 highjacked civil rights language and used legal lingo to gut protections against discrimination. Proposition 209 says it eliminates quotas, but in fact, the U. S. Supreme Court already decided twice, that they are illegal. Proposition 209's purpose, is to eliminate affirmative action and equal opportunity programs for qualified women and minorities, including tutoring, outreach, and mentoring programs. (3-1)

Proposition 209 changes the California Constitution to permit state and local governments to discriminate against women, by excluding them from job categories.

Ward Connerly has already used his influence to get children of his rich and powerful friends into the University of California. Proposition 209 reinforces the, "who you know" system which favors cronies of the powerful opposition. "There are those who say, we can stop now, America is a color-blind society. But it isn't yet. There are those who say we have a level playing field, but we don't yet." Stated retired General Colin Powell, (5/25/96). (3-1)

Background

The federal, state, and local governments run many programs intended to increase opportunities for various groups--including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals which include that at least 15 % of the value of contract work should be done by minority-owned companies and at least 5 % should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals. (3-1)

Other examples of affirmative action programs include:

- Public college and university programs, such as scholarships, tutoring, and outreach that are targeted toward minority or women students.
- Goals and timetables to encourage the hiring of members of "under-represented" groups for state government jobs.
- State and local programs required by the federal government as a condition of

receiving federal funds (such as requirements for minority-owned business participation in state highway construction projects funded in part with federal money).

Proposal

This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve "preferential treatment" based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as: (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs. (12-2)

The measure provides exceptions to the ban on preferential treatment, when necessary, for any of the following reasons:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

Fiscal Effect

If this measure is approved by the voters, it could affect a variety of state and local programs. These programs are discussed in detail:

Public Employment and Contracting

The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity is a preferential factor in hiring, training, promotion, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. Contracts affected by the measure would include contracts for construction projects, purchases of computer equipment, and the hiring of consultants. These prohibitions would not apply to those government agencies that receive money under federal programs that require such affirmative action. (12-2)

The elimination of these programs would result in savings to the state and local governments. These savings would occur for two reasons. First, government agencies no longer would incur costs to administer the programs. Second, the prices paid on some government contracts would decrease. This would happen because bidders on contracts no longer would need to show "good faith efforts" to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder--because the bidder did not make a "good faith effort"--and awarded the contract to a higher bidder. (12-2)

Based on available information, it is estimated that the measure would result in savings in employment and contracting programs that could total tens of millions of

dollars each year. (11-2)

Public Schools and Community Colleges

The measure also could affect funding for public schools (kindergarten through grade 12) and community college programs. For instance, the measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. (It would not, however, affect *court-ordered* desegregation programs.) Examples of desegregation spending that could be affected by the measure include the special funding given to: (1) “magnet” schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated “racially isolated minority schools” that are located in areas with high proportions of racial or ethnic minorities. It is estimated that up to \$60 million of state and local funds spent each year on voluntary desegregation programs may be affected by the measure. (12-2)

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, students financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin. Funds spent on these programs total at least \$15 million each year. (12-2)

Thus, the measure could affect up to \$75 million in state spending in public schools and community colleges. The State Constitution requires the state to spend a certain amount each year on public schools and community colleges. As a result, under most situations, the Constitution would require that funds which cannot be spent on programs because of this measure instead would have to be spent for other public schools and

community college programs. (12-3)

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admission decisions. If this initiative is passed by the voters, it could no longer do so. In 1995, the Regents of the University of California (UC) changed the UC's admissions policies. Effective for the 1997-98 academic year, UC eliminated all consideration of race or ethnicity. Passage of this initiative by the voters might require the UC to implement its admission policies somewhat sooner. (12-3)

Both university systems run a variety of assistance programs for students, faculty, and staff, which are targeted to individuals based on sex, race, or ethnicity. These include programs such as outreach, counseling, tutoring, and financial aid. The two systems spend over \$50 million each year on programs that probably would be affected by passage of this measure. (12-3)

Summary

As described above, this measure could affect state and local programs that currently cost well in excess of \$125 million annually. The actual amount of this spending that might be saved as a result of this measure could be considerably less, for various reasons (12-4):

- The amount of spending affected by this measure could be less depending on:
(1) court rulings on what types of activities are considered, "preferential treatment" and (2) whether federal law requires continuation of certain programs.

- In most cases, any funds that could not be spent for existing programs in public schools and community colleges would have to be spent on other programs in the schools and colleges.
- In addition, the amount effected as a result of this measure would be less if any existing affirmative action programs were declared unconstitutional under the United States Constitution. For example, “five” state affirmative action programs are currently the subject of a lawsuit. If any of these programs are found to be unlawful, then the state could no longer spend money on them--regardless of whether this measure is in effect. (6-1)
- Finally, some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could be changed to target high schools with low percentages of UC or CSU applications. (12-4)

Considering the pros and cons to Proposition 209, and the effect that this change has on the California Constitution, there is a need to take a look at the constitutionality of this proposition. Chapter two deal with this topic from the legal point of view.

CHAPTER TWO

The Constitutionality of Proposition 209

The longstanding clash between the principles of equal treatment and the reality of entrenched discrimination ensures affirmative action a place as one of the most contentious issues of the late twentieth century. Opponents of affirmative action argue that the Equal Protection Clause of the Fourteenth Amendment is premised on an individual's right not to be subject to any governmental race-based classification. Proponents respond that the goal of equality will be a hollow pledge unless race-conscious efforts can be used to remedy discrimination. Federal law stands somewhere between these extremes. It allows lawmakers to take race and gender into account in narrow instances to remedy identified discrimination. Federal courts and the Equal Employment Opportunity Commission (EEOC) have traditionally defined the limits on public sector affirmative action, and most states have not established substantially different standards under state law. However, in November 1996, California voters adopted Proposition 209 which amended the state constitution to bar public entities from granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin. (7-2081)

Before Proposition 209 was put to the voters, its opponents filed an unsuccessful lawsuit claiming that the initiative cloaked a categorical ban on affirmative action in traditional anti-discrimination language. Although a Ninth Circuit Court panel later held that Proposition 209 did not violate the equal protection clause on its face, that decision failed to end the litigation surrounding Proposition 209, and many issues remain unsettled. Several city and county governments have indicated that they will terminate all affirmative

action programs because they believe either that they are already in compliance with Proposition 209, or that Proposition 209 may be unconstitutional as applied in certain situations. At the same time Proposition 209 may be unconstitutional as applied in certain situations. Uncertainty over the scope of Proposition 209's prohibition may have led some governments to suspend programs that the amendment does not actually ban.

Just as California's Governor Pete Wilson has vowed that he will vigorously enforce the ban, civil rights groups are examining ways to blunt its impact. Because California encompasses 500 cities, 58 counties, and 5,000 special districts, the battle over implementing Proposition 209 is likely to be extensive. As many commentators note, the importance of this battle sweeps beyond California politics because the adoption of Proposition 209 has encouraged other states to reconsider their affirmative action programs. This paper examines some arguments that might be raised to challenge and limit Proposition 209 and similar future laws. The following asks, first, whether a state government may prevent courts from using race conscious measures to remedy violations of federal law. Then it examines whether a state has the authority to limit voluntary affirmative action available under Title VII to employers with workforces segregated by race or gender. (7-2082)

After providing the background to the legal skirmishes surrounding Proposition 209, subsection titled, "Interpreting Proposition 209" explores some possible interpretations of Proposition 209 to assess its scope. Subsection, "The Ninth Circuit's Ruling on Proposition 209", explains the Ninth Circuit Court's ruling in *Coalition for Economic Equity v. Wilson*. Subsection, "The Impact of Proposition 209 on Court-

Ordered and Approved Affirmative Action” argues that a state may not forbid courts that hear federal causes of action from ordering or approving in consent decrees, race or gender conscious relief in order to eradicate the effects of identified discrimination when such relief is necessary to remedy constitutional or federal statutory violations. In such instances, the Supremacy Clause requires state courts to follow federal law.

Subsection, “Voluntary Affirmative Action Under the Constitution and Title VII”, argues that Proposition 209 cannot be applied to prohibit government employers from using affirmative action when there is a “strong basis in evidence” that they may be subject to disparate impact liability because the prohibition would frustrate the federal policy underlying Title VII. The conclusion summarizes the permissible scope of Proposition 209's prohibition on affirmative action in light of conflicts with the Federal Constitution and Title VII. (7-2083)

Interpreting Proposition 209

In order to assess the circumstances in which race or gender conscious remedies might be allowed, notwithstanding Proposition 209, one must first have a general idea of the initiative's scope. Proposition 209's first clauses, “the state shall not discriminate against” --- simply restates existing anti-discrimination law and has not been challenged in court. The remainder of the prohibition does not require a categorical ban on affirmative action; its plain language prohibits only the more limited category of “preferential treatment.” (7-2083)

Affirmative action is a broad term that includes preferences, but also encompasses targeted training and recruiting efforts that fall short of an explicit preference in selection

based on race or gender. "Preference" is a narrower term, used only when a person would not have received a benefit except for his/her race or gender. Set asides, quotas, and selection processes in which race is used as a "plus" that provides a decisive advantage would qualify as preferences.

Some uses of race and gender, however, may not constitute preferences per se. For instance, one could regard a notification program that targets under represented races as an allocation of public funds based on race, and thus a "preference." However, assuming that information about a government program is publicly available and that obtaining information does not ensure one's acceptance into the program, no real benefit has been distributed or denied on the basis of race. Notification programs seek to equalize information among individuals by focusing on those groups that are not receiving information available to others. The non minority or male who does not benefit from the targeted recruiting does not suffer if there were other avenues through which the information was accessible to him. (7-2084)

The best way to understand the distinction between affirmative action and preferences is that in order for a person to receive a preference, another person, whether identifiable or not, must suffer discrimination. For example, the use of busing to achieve school integration is not a preference. The goal of busing is to provide children with an education in an integrated setting, a benefit that accrues to all races. Further, busing does not deny any child the opportunity to go to school and the burden of being sent to a different school is generally borne by children of all races. (7-2084)

In interpreting Proposition 209, the California Supreme Court should acknowledge

the difference between preferences and affirmative action. When it interprets a voter initiative, the court looks first to the initiative's plain language. Although its drafters could have chosen to use affirmative action, Proposition 209 speaks only of "preferences." Indeed, Proposition 209 proponents want the court to prevent opponents from changing the initiative's language which demonstrates that both sides recognized the significance of Proposition 209's terminology. Second, the California Supreme Court looks to voter intent. When an initiative's language is ambiguous, California courts may turn to extrinsic materials to deduce the intent of voters, such as the official ballot pamphlet distributed to all registered voters. The Proposition 209 ballot pamphlet included two lengthy polemics articulating the opposing sides of the issue. The arguments in favor of Proposition 209, which were signed by Governor Wilson and California Attorney General Daniel Lundren, asserted that Proposition 209 bans discrimination and preferential treatment "period" and stressed that programs designed to ensure that all persons regardless of race or gender are informed of opportunities ... will continue as before. Further, proponents argued, affirmative action programs that don't discriminate or grant preferential treatment will be unchanged. Thus, the proponents of Proposition 209 recognized a distinction between affirmative action and preferences. Although Proposition 209 opponents suggested in the pamphlet that Proposition 209 would ban all affirmative action, the proponent's interpretation, which was endorsed by the Governor and Attorney General, was probably perceived as the more authoritative interpretation. (7-2085)

In addition, voter exit polls, will of the voter's intent, indicate that California voters did not intend to eradicate all affirmative action. An exit poll revealed that 27% of

those who voted for Proposition 209 stated that they supported affirmative action. At least these voters did not think they were banning all affirmative action by voting for proposition 209. Another poll taken shortly before the election revealed that, "large majorities of Californians said, they favored at least some of the equal opportunity efforts that fall under the affirmative action label." Although a majority of those polled opposed "preferences", approximately 75% favored minority recruiting. (7-2085)

Moreover, a California appellate court has determined that affirmative action and preferences are different, and that only the latter are banned by Proposition. 209. In refusing to change the wording of Proposition 209 prior to the November 1996 vote, the court in *Lungren v. Superior Court* declared that "any statement to the affect that proposition 209 repeals affirmative action programs would be over inclusive and hence, false and misleading." For instance, the court noted, affirmative action would include outreach programs. Therefore, a broad interpretation that read Proposition 209 to ban all forms of affirmative action would conflict with the plain language of the initiative as well as voter intent. The California Supreme Court should adopt the approach taken in *Lungren* and limit Proposition 209 to prohibit only programs requiring preferences. (7-2086)

The Ninth Circuit Court Ruling on Proposition 209

Soon after voters passed Proposition 209, a coalition of civil rights groups filed a § 1983 action to enjoin Governor Wilson from enforcing it. Chief Judge Thelton E. Henderson granted both a temporary restraining order and a preliminary injunction because he determined that the plaintiffs were likely to prevail on their claims that

Proposition 209 violated the Equal Protection Clause and was preempted by Title VII.

However, in April 1997, the Ninth Circuit Court ruled in *Coalition for Economic Equity v. Wilson* that Proposition 209 does not violate the Equal Protection Clause on its face and is not preempted by Title VII. In a caustic opinion, the panel lamented that a “system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.” The court stated that the plaintiffs failed to present a viable equal protection challenge based on “conventional” equal protection precedents because Proposition 209, which prohibits racial classifications, did not itself create a racial classification. Second, the court turned to what it deemed “political structure” analysis, the purportedly unconventional approach to equal protection elucidated by the Supreme Court in *Hunter v. Erickson* 53 and *Washington v. Seattle School District No. 1*.⁵⁴ *Hunter and Seattle* suggested that states cannot pass laws preventing minorities from seeking anti-discrimination protections, such as business programs, through the same political structure as all other citizens. The Ninth Circuit Court implied that *Hunter and Seattle* were irreconcilable with more recent Supreme Court cases stating that the right to equal protection inheres in individuals rather than groups. (7-2086)

The Ninth Circuit Court reasoned that Proposition 209 was distinguishable from the measures at issue in *Hunter and Seattle* because it treats all issues in a neutral-fashion rather than singling out issues that affect a particular race or gender. Further, the panel argued, that the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them all together. Thus, the court concluded that

the Equal Protection Clause does not require affirmative action. The Supreme Court declined to hear the appeal from the Ninth Circuit Court decision. (7-2085)

The Impact of Proposition 209 On Court-Ordered and Approved Affirmative Action

Court-Ordered Affirmative Action: A key question posed by Proposition 209 is whether state law can stand as a barrier to the implementation of race and gender conscious remedies that are designed to address constitutional or statutory violations. State and local governments implement affirmative action in three ways. First, in rare situations, a court that identifies a violation of the Constitution or federal law has the authority to order race or gender-based measures as a remedy. Second, courts may approve privately negotiated consent decrees to remedy past discrimination. Third, and most commonly, affirmative action is implemented by voluntary government action.

The Supreme Court approved a court-ordered preference as a remedy for a constitutional violation in *United States v. Paradise*. *Paradise* involved egregious resistance to integration by the Alabama Department of Public Safety. The Supreme Court concluded that there was a “profound need and a firm justification” for the court-imposed quota and that “the government unquestionably had a compelling interest in remedying past and present discrimination by a state actor.” The court was satisfied that the district court, which had attempted other sanctions to no avail, reasonably concluded that the quota was necessary to eradicate discriminations. Therefore, the remedy survived strict scrutiny and did not violate the Equal Protection Clause. (7-2088)

In cases such as *Paradise*, the court has established that courts possess the

equitable power necessary to use federal rights. The court has gone so far as to authorize a court to order a school district to raise taxes to fund a desegregation plan. Remedies for constitutional violations are essential both to compensate victims and to ensure that government remains within the bounds of the law. Consequently, when “it has been found that a particular remedy is required, the state cannot hinder the process by preventing a local government from implementing that remedy.” (7-2098)

Therefore, a critical issue is whether courts will interpret Proposition 209 to restrict the remedies they can order. Proposition 209 declares that the state shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state. This language seems to encompass state and local courts. (7-2098)

In addition, section 3-I (d) of the California Constitution provides that “nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.” This provision may imply that proposition 209 was intended to affect prospective court orders and consent decrees. In any event, even if state courts are not covered as government instrumentalities, a government that granted preferential treatment pursuant to a court order or a consent decree would seem to be covered. (7-2089)

At least one commentator suggests that Proposition 209 may affect relief ordered by federal courts. However, the canon of constitutional avoidance, which requires that

statutes be interpreted to avoid constitutional conflicts, justifies interpreting Proposition 209 to exclude remedies ordered by federal courts. (7-2090)

If a court interpreted Proposition 209 as attempting to obstruct federal court remedies, Proposition 209 would be unconstitutional as applied. *North Carolina State Board of Education v. Swann* established that states cannot block court-ordered remedies for constitutional violations. North Carolina passed an anti-busing law to prohibit courts from assigning students to particular schools on the basis of race. A unanimous Supreme Court brushed the statute aside, declaring that state policy must give way when it operates to hinder vindication of federal constitutional guarantees. Reaching its result, despite the statute's purportedly neutral ban on all race-based assignments, the court noted that the statute "would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." (7-2090)

Similarly, Proposition 209, if applied to federal courts, would threaten to hamper the ability of local authorities to effectively remedy constitutional violations. Admittedly, the North Carolina Act was a direct attempt to defy the Supreme Court's desegregation rulings in a way that Proposition 209 is not. Nevertheless, the Supreme Court's analysis of the Anti-Busing Act demonstrates that the focus of the analysis should be the effect of the legislation on efforts to remedy discrimination, rather than an inquiry into invidious intent by the legislatures. Under this rationale, any attempt to apply Proposition 209 to obstruct federal court remedies would be unconstitutional. (7-2091)

State courts are also bound by the obligation to remedy constitutional violations, even when the remedies conflict with state law. The Supreme Court has held that state

courts must hear federal claims in cases for which Congress provides concurrent jurisdiction. State courts generally may apply neutral state procedural rules to federal claims as long as they would apply the rules to analogous state claims. However, in *Felder v. Casey*, the court struck down the application of a state procedural rule that would have denied a remedy for a constitutional violation. Commentators have understood *Felder* to suggest that rules that impose a "substantive condition" on, and thereby abridge federal rights are invalid. Under federal law, courts can order preferential relief only when it is truly necessary. The application of Proposition 209 to a federal claim would eviscerate necessary relief and thus impose a substantive condition on federal rights. (7-2091)

In a case, not involving preferential relief, the Supreme Court held that a district court must determine that the relief is "necessary" or "essential" if that relief would order action that would violate state law. However, this general requirement imposes no additional hurdle for a court considering whether to require race-conscious relief. Strict scrutiny, narrowly tailored requirements, already demands a finding that the race conscious relief is necessary in light of race-neutral alternatives. (7-2091)

Consent Decrees: Consent decrees are hybrids that possess "attributes both of contracts and of judicial decrees." In *Local 93, International Association of Firefighters v. City of Cleveland*, the court aligned consent decrees ordering preferential relief with the lenient standard applicable to voluntary affirmative action instead of that applicable to court ordered relief under Title VII. Thus, the Supreme Court established those district courts hearing Title VII cases may approve consent decrees that provide broader relief

than the district court could independently order. (7-2091)

An important issue that the court has not addressed is whether a court approving a consent decree that violates Proposition 209 must find an actual constitutional or statutory violation before approving the decree. In *Firefighters*, the court did not require such a finding. Some circuit courts, however, relying on *Missouri v. Jenkins*, have held that a finding of an actual violation is necessary before a court approves a decree authorizing the parties to disregard state law. However, *Jenkins* involved taxation, a function historically reserved to the states. Similarly, circuit court cases imposing such a requirement before a court may approve a consent decree, have involved proposed agreements that required the parties to diverge from long-standing laws in areas in which states have heightened interests in local control. Such relief intrudes on the sovereignty of local governments by restricting their authority to manage their own affairs. Yet the principles of federalism underlying those decisions do not apply to Proposition 209. Approving a consent decree that incorporates preferences that are authorized under federal law creates no comparable intrusion on state sovereignty. If anything, Proposition 209's novel attempts to ban practices authorized by federal law approaches an intrusion on federal authority. Moreover, the Ninth Circuit Court, whose law governs California employers, has suggested that courts need not find an actual violation. (7-2092)

In sum, Proposition 209 does not create a greater obstacle to court ordered or approved preferences than does strict scrutiny. Because of the Supremacy Clause, state courts bear an equal obligation to provide federally authorized remedies, whether those remedies arise from voluntary decrees or designed by a court. (7-2093)

Voluntary Affirmative Action Under The Constitution and Title VII

Affirmative action plans instituted by public sector employers must satisfy both the Constitution and Title VII. In *City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc. v. Peña*, the Supreme Court established that all state and federal government racial classifications are subject to strict scrutiny. However, when assessing whether affirmative action plans violate Title VII, the court has adopted a more lenient “manifest imbalance” standard, which does not explicitly require a finding of intentional discrimination. In *United Steelworkers v. Weber*, the court signaled its willingness to permit affirmative action under Title VII to eliminate manifest racial imbalances in traditionally segregated job categories. The court concluded that it was “clear that [interpretive Title VII to bar affirmative action] would bring about an end completely at variance with the purpose of the statute.” Although the court restricted its inquiry to what action Title VII forbids, the *Weber* majority suggested that Congress intended affirmative action to be an available tool to compensate for past discrimination. (7-2093)

In 1987, the court in *Johnson v. Transportation Agency* reaffirmed *Weber’s* holding as well as the standard that it set forth. Although the transportation agency was subject to the Equal Protection Clause, the court addressed only the Title VII issue. Justice Brennan, writing for the Johnson majority, emphasized that an “employer adopting a plan need not point to its own prior discriminatory practices nor even to evidence of arguable violation on its part.” (7-2093)

In contrast to *Johnson*, *Wygant v. Jackson Board of Education* addressed only the equal protection standard for public employer affirmative action. The court held that

before a public employer implements an affirmative action plan, the employer must have "convincing evidence" that it has discriminated in the past. A public employer can independently assess the need to remedy discrimination and a violation need not be adjudicated prior to the implementation of an affirmative action plan. If non-minority employees challenge such a program, the district court must determine whether there is a "strong basis in evidence" that a remedial plan is warranted. Further, the program must be narrowly tailored, which requires the government to consider the efficacy of race-neutral alternatives. (7-2094)

Justice O'Connor concurred in *Wygant* to emphasize that the court's opinion left significant latitude for public employers to use affirmative action to remedy past discrimination. Justice O'Connor noted that neither the Constitution nor Title VII requires race conscious remedies to "be accompanied by contemporaneous findings of actual discrimination as long as the public actor has a firm basis for believing that remedial action is required, such as a statistical imbalance sufficient to support a prima facie case of discrimination." (7-2094)

According to the court, "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." Moreover, in both *Johnson and Wygant*, Justice O'Connor stressed, "the Court's and Congress", consistent emphasis on the value of voluntary efforts to further the anti-discrimination purposes of Title VII.

Because Congress intended employers to be able to comply voluntarily with Title VII, Proposition 209 must be preempted when it prevents employers from achieving compliance. However, Proposition 209 would be preempted only when employers need

to use preferences to avoid liability. Employers who have virtually exclusively white or male workers in traditionally segregated positions can expect to be sued for using job criteria that disproportionately impact a protected class. In some situations, employers who arguably violate Title VII may avoid lawsuits merely by revising selection criteria that have the effect of excluding minorities or women. Additionally, employers may institute race-conscious measures that fall short of a preference, such as minority notification. In many instances, however, an employer's notoriety as a discriminatory, may deter under represented classes from applying, even after the employer changes its hiring criteria. Thus, a temporary preferential policy may be the most effective, and indeed an essential means of complying with Title VII. The court recognized this fact in both *Paradise and Local 28, Sheet Metal Workers' International Association v. EEOC*, in which it upheld the use of a race conscious hiring goal because, in some cases, affirmative action may be necessary in order to effectively enforce Title VII. Commentators note that "employers faced with a potential disparate impact claim (if they could not show business necessity) would be sure to protect themselves only if they engaged in some form of affirmative action; even scrupulously race-neutral employment practices would not always be enough." In fact, Justice Blackmun stated in his *Weber* concurrence that a prohibition on affirmative action would create irreconcilable tension with Title VII's disparate impact framework.(7-2096)

Although the Supreme Court's interpretations of Title VII and the EEOC guidelines provided California employers the breathing room to consider race when necessary to remedy their own discrimination. Proposition 209 threatens to eliminate this

breathing room by exposing employers to lawsuits for violating the state constitution. These countervailing forces take the risk of disparate impact claims if an employer's workforce remains conspicuously devoid of minorities or women. In exposure to "reverse discrimination" the law claims, when preferences to enact remedy discriminates, placing some employers on a high tightrope without a net beneath them. Unless Proposition 209 is preempted in these situations, it would create a sharp conflict between state law and the Constitution. As Justice O'Connor argued in *Wygant*, public employers who have a constitutional duty to take affirmative steps to eliminate the continuing effects of discrimination, should not be rendered less capable of eradicating discrimination than their private sector counterparts who have no corresponding duty. Nonetheless, in *Coalition for Economic Equity v. Wilson*, the Ninth Circuit Court concluded that Title VII does not preempt Proposition 209. In determining whether state law conflicts with federal policy, a court must ask whether state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." The general preemption clause governing Title VII states that no "provision of this Act shall be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act." The district court in *Coalition for Economic Equity v. Wilson* concluded that the plaintiffs were likely to prevail on their Title VII preemption claim based primarily on the EEOC guidelines and, to a lesser extent, on the Supreme Court cases construing Title VII's purposes. The Ninth Circuit Court rejected the district court's holding, citing Title VII's provision, that nothing in this sub-chapter shall be interpreted to require any [entity]to grant preferential treatment to any individual or to any group because of race,

color, religion, sex, or national origin, that language the court contended, settled the matter definitively. (7-2097)

However, in reaching its conclusion that Title VII and Proposition 209 are “entirely consistent,” the Ninth Circuit Court panel misconstrued the central question. The question was not whether Title VII requires affirmative action, because Title VII’s plain language demonstrates that it does not. Rather, the proper inquiry is whether Title VII requires that employers have discretion to use preferences to compensate for their past discrimination. The plain language of Title VII does not answer this question. By raising a specious argument and then easily dismissing it, the Ninth Circuit Court avoided the only issue genuinely in dispute. This evasion allowed the Ninth Circuit Court to sidestep the Supreme Court cases construing Title VII’s purposes, as well as the EEOC guidelines which strongly support voluntary affirmative action. Thus, the court’s cursory preemption analysis failed to grapple with the Supreme Court’s emphasis on the importance of voluntary affirmative action efforts to achieve Title VII’s purpose. Proposition 209 should not be allowed to lock in the vestiges of past discrimination by disabling violators from complying with the Constitution and Title VII. (7-2098)

Conclusion

Proposition 209’s plain language and Supreme Court precedent prevent the initiative from constituting a comprehensive ban of all consideration of race and gender in public sector employment. First, government actors in California may be able to use race and gender in certain limited instances, such as busing and notification programs, without violating Proposition 209. Second, the Supreme Court’s precedents dictate that

Proposition 209 cannot be applied constitutionally in certain situations. Proposition 209 does not restrict federal courts from granting preferential relief when authorized to do so by the Constitution or Title VII. Additionally, state courts hearing federal causes of action cannot impose limits on necessary federal remedies.

The question most crucial to the survival of affirmative action in California is whether public employers must wait for plaintiffs to sue them for violations of Title VII before implementing race or gender-based preferences. When a public employer has a history of employment discrimination, the answer should be no because Proposition 209 cannot be applied to obstruct compliance with federal law. However, Title VII can only preempt Proposition 209 when affirmative action programs comport with Title VII's purpose. Thus, if affirmative action for diversity purposes is not consistent with Title VII, it may legitimately fall within Proposition 209's prohibitions. Although Proposition 209 may significantly narrow the scope of affirmative action, it cannot foreclose necessary relief for violations of federal law (7-2098).

How Proposition 209 deals with diversity and affect it may have on opportunity for all in the economy is yet to be seen. Chapter three deals with the issues of the economy and the programs in place to help the less advantage to compete. The effect that Proposition 209 has on education for minorities and women is analyzed and concludes with a prediction on the effects Proposition 209 will have on the Black population.

CHAPTER THREE

The Economy, Is This Economic Apartheid?

If the U.S. is indeed becoming more global in its approach to business opportunities and economics, then perhaps it's picking up the former apartheid policies of South Africa.

Theoretically, Proposition 209 attempts to put everyone on equal footing. However, since most minority businesses are newer and smaller, they're often unable to compete with larger companies. An example of how a large business is able to compete better is as follows: Large company "A" has many projects for the same type of service. Company "A" draws up agreements with suppliers to obtain supplies in large quantities, thus reducing its unit cost on supplies and consequently making the company more competitive by its sheer ability to obtain its supplies at lower cost. Most often, projects by government are awarded to large contractors because they can afford to offer the lowest bid. Without specific designations for using smaller firms, such as those addressed by minority business enterprise (MBE) programs that were the targets of Proposition 209 legislation, those firms will fail to win contracts--let alone compete--with large companies.(10-1)

"I think Proposition 209 is really about contracting," says John Hill, Affirmative Action Compliance Officer for Los Angeles County. "A significant impediment to greater community business enterprise (CBE) participation is the county's practice of using agreement vendors," he said in a report to county supervisors on the utilization status of CBE's. "This precludes small businesses that tend to be primarily minority and women-

owned from competing," he adds. (1-2)

Although Los Angeles has the largest number of African Americans in the state, Blacks rank third in population both in Los Angeles and in the state--behind whites and Hispanics. In a review of Los Angeles County's contracting efforts, of the \$1.4 billion in contracts paid in fiscal year 1996-97, only 6.3% (or \$93 million) went to CBE firms. The county's four largest departments; Health services, public social services, public works, and the sheriff's department--spent only 3% of their \$100 million in contracts with CBE firms. The county's official goal is to award 25% of construction commodities and service contracts to CBE companies. Prior to Proposition 209, the state had an official goal of 15% specifically for minorities. (1-2)

"The difficulty is that there is less detailed information kept, and it varies by town and county, what is actually going on with these programs," says Conrad. "What comes out is that there have been goals set which are almost never reached, particularly for minority-owned firms," she adds.

It's this kind of atmosphere that Craig Jackson, President and CEO of Saunders Engineering, a 28-year-old Yorba Linda, California-based company, fears. "We have not gotten a state job since Proposition 209 was passed. Although we can bid any job we want, the number of contracts has virtually dried up," says Jackson of his \$40 million concern. He's not sure for which the tragedy is greater--a 28-year-old firm or a new one. "We could not have continued the growth pattern the company has had without it, Minority Business Enterprises(MBE) and Disadvantaged Business Enterprises (DBE) goals. DBE allowed us to be introduced to clients. It was this vehicle that got us in the

door in the first place. Now the pendulum has swung the other way," states Jackson.

That's precisely what affirmative action goal programs were designed to create-- opportunity. "So little of business is set-asides," says Harriet Michel, President of the National Minority Supplier Development Council in New York. "Set-asides suggest that there are special dollars put away for blacks, whether they're qualified or not. But that's not true. They still have to meet the qualifications. There's still competition even though it may be targeted to minority suppliers," she explains. (1-2)

Jackson, a 1997 graduate of the Small Business Administration's 8(a) program, says only 45% of his business at any time was 8(a), but the balance was DBE. With the Supreme Court also upholding the "Adarand decision," President Clinton and the SBA have dispensed with the DBE category, a move to "mend, not end" affirmative action efforts. But that doesn't mean all small businesses will be able to compete, even firms the size of Jackson's. (10-2)

"Since there is no SDBE (Small Disadvantaged Business Enterprises) category, you're either 8(a) or small business. But the kind of companies I'm competing against are \$500 million and above, so what's \$40 million?" Jackson says, "We don't have the same kind of resources. If I were a larger firm, I could afford to absorb the loss and go on to something else--that's the difference," explains Jackson, whose company now encompasses general contracting. (1-2)

With offices in California, Virginia, Hawaii, and Georgia, most of Jackson's business is with the federal government on major municipal contracts. State or local-sponsored projects make up only a small portion of his contracts. The firm currently

has a \$300,000 subcontract with the UC system to rehabilitate a building on its San Bernardino campus. (1-3)

Boston says Jackson's experience is very consistent with that of other large, minority-owned firms doing substantial business with government entities. "It's really, the bigger firms which are generating the most jobs and the most revenue, so these are the firms that have this kind of dependency, particularly on the public sector, because the private sector continues to lock them out. It's also going to be more concentrated in particular areas, construction firms are going to be hit particularly hard," notes Boston.

In November, voters in Houston took the first step in heeding Boston's call to action by voting 54% to 46% to let affirmative action practices remain by voting down Proposition "A", says Congresswoman Sheila Jackson-Lee (D-Texas): "It gave us a chance to explain what affirmative action actually meant." (1-2)

Jackson-Lee says the key in Houston was the wording of the actual ballot measure. Rather than being asked whether they wanted to ban "preferential treatment," as was the case in California, Houston voters were asked specifically if they wished to ban affirmative action in city contracting and hiring. "We worked very hard on the wording to minimize confusion," she says. "It was clear that this measure would end affirmative action, and we were not going to stand for that in Houston."

Indeed, Houston has gone against the tide of anti-affirmative action rhetoric in recent years. Mayor Bob Lanier signed an executive order in 1995 that increased the city's affirmative action goals dramatically. Yet, one of the concerns was the apparent lack of a national effort or movement to stem the tide against affirmative action measures. "My

impression is that the organizational activity is not happening in the black community,” says Conrad. (14-1)

Beyond California, if affirmative action is eliminated, it would likely have multiple effects on public employment, suggests Conrad. “We know from studies on a national level that for black women in particular, public employment has been a forum for upward mobility. If you look at the share of management and professional workers among black women who are employed in the public arena, it's very high.” “We don't really know how many black businesses are dependent upon local government contracts and how many have obtained them as a direct result of affirmative action,” says Swinton. “But if (federal legislation passes) it is a significant share, then we're going to see a significant impact.”

(1-3)

One of the early and unexpected consequences of Proposition 209 has been its impact on institutions of higher learning in California. While the effects on employment and contracting remain to be seen, it doesn't appear well for the future.

The Future: A Dream Deferred

For nearly as long as he could remember, it had been Eric Burton's dream to attend law school at UC-Berkeley. And until recently, he had been at pace to do just that. With an LSAT score of 160 out of a possible 180, Burton was accepted to Berkeley's Boalt Law School last March. It seemed as if years of hard work and preparation were about to pay off. That's when the controversy surrounding Proposition 209 fell squarely in Burton's path. “That was the school I wanted to get into for such a long time,” says the native of Oxnard, California. “It was my top choice and my dream school. I went to

undergraduate school at Stanford and with the expense of that, I not only wanted to go to a state school because I thought it would be less expensive, but also because I thought Berkeley was a great school.” (1-1)

But Burton’s timing was seriously off. In a foretelling of Proposition 209, the California Board of Regents had recently passed Resolution SP-1, which ended affirmative action in admissions in the UC system. Proposition 209 reinforces the affirmative action ban on the entire UC system as well as other educational outlets such as community colleges. “What SP-1 does, is say that you can no longer use race as criteria,” says Conrad. “You still have this two fold admissions process, one part based on numerical criteria and the other based on broader criteria, but race can no longer be a part of that equation. The question is, what will the implications be? (1-3)

The answer was not long in coming. Burton turned out to be one of just 18, African American students accepted to Berkeley's Law School in 1997. This was down from 77 blacks accepted in 1996. Burton says his decision was further complicated after visiting the campus during “admit day,” when all the potential registrants are invited to tour the campus. I was the only black there and had really strange vibes. There were signs and placards saying, “Welcome to Jim Crow Law School” and pinata looking like Pete Wilson. Burton said, “most of the students and faculty he spoke with were supportive and concerned about the impact Proposition 209 would have on diversity at Boalt.” The dean said, “he was also concerned about the numbers but, was quick to add that in this era of conservatism they had to comply with the regents decision and Proposition 209.” (1-3)

Burton, who had also been accepted to UCLA, Stanford, Georgetown, The University of Pennsylvania, and New York University, says he “agonized over the decision for a couple of months.” There exists a lot of pressure and stress anyway, the first semester of law school is difficult enough and then to have all this media attention. I just don’t think it would have been good for me and I wasn’t up to the fight. Ultimately, Burton registered at UCLA where he’s studying public interest law and policy. (1-3)

Just how many African American students will ultimately be affected by Proposition 209 in California is difficult to determine. While it’s apparent, the number of blacks being accepted to Berkeley has declined dramatically. Blacks find this difficult to grasp and thus state, “We don’t think California is a friendly environment anymore, so we may have to relocate,”(1-3). The table on page 53 reflects the Black and Latino student drop.

Twisting Back The Clock

California employs 191,425 state workers. Whites account for 110,066 (or 57.5% of the total) and African Americans represent 22,025 (or 11.5%). For the moment, employment policies and practices have not been impacted by the anti-affirmative action movement. Based on 1990 U.S. Census data, African Americans age 25 and over represented 5.7% of the state labor force and 11 % of UC’s workforce. (1-3)

The UC system is one of the largest employers in the state. Its nine campuses and other sites account for 72,637 staff employees and 14,700 academic employees, of which 6,900 are faculty. Carmen Estrada, Director of Equal Opportunity and Employee Support Programs for the UC Office of the President, cites the yearly payroll at \$3 billion. The

1997-98 annual budget is \$8.7 billion, of which \$2.1 billion are state funds. (1-3)

Employment of African Americans, as a whole, decreased slightly by 0.5% statewide. Each campus sets affirmative action goals based on qualified persons in the labor force and not on the general population at large. Among the 319 UC senior managers earning over \$100,000, 14% are minority. Blacks represent 5%, Asians represent 4.4% and Hispanics represent 4.7%. Estrada says this tally does not include other job categories with similar salary scales, such as faculty, deans, physicians, and coaches. (1-3)

La Rhonda Loeb, Manager of Recruitment and Employee Relations for L.A. Care Health Plan, agrees with Estrada. "Diversity is the only approach for good business. It means recognizing and understanding that differences among people exist, and it's all right," she says. "By creating an environment of acceptance, company employees can work toward a common goal." Loeb, whose concern is a nonprofit overseer of managed care health plans to Medi-Cal beneficiaries, says the organization is "dynamically diverse." She estimates African Americans and other ethnic minorities represent 40% of top managerial positions. "We have a way to go, but our goal is to mirror the population that we serve from top to bottom." (1-3)

In the long run, Loeb predicts Proposition 209 will affect the diversity of the workforce and how people apply for jobs. Other potential problems that could arise are a reduction in workplace productivity, low morale, increased discrimination, and poor decision-making by supervisors and managers. (1-4)

Prior to entering the private sector in 1996, Loeb worked as a civilian employee

for the federal government for 12 years. She recalls getting her first job in 1984 as a result of affirmative action. The U.S. Navy recruited top honor students at Lincoln High School in San Diego, for a special summer work program. "By eliminating affirmative action," she says, "it only sends a negative message that we're turning back the clock." (1-3)

Modest Income Gains

Brimmer, President of Brimmer & Co., an economic analysis firm in Washington, D.C., predicts black income to top \$450 billion in '98. The growth rate for the American economy will slow noticeably through the year ahead, and the unemployment rate will remain level. "When we look at 1998, the growth rate of the economy will moderate somewhat," says Brimmer, a former member of the Federal Reserve Board. "It will converge more toward its long-run potential growth rate, which I estimate will be between 2% and 2.75%. I don't see any major shocks on the horizon and anything to disturb the forecast. So the real economy is likely to expand moderately, inflation to remain subdued and employment to increase." (1-3)

The housing sector was a significant source of strength for the economy in 1996. The quickened pace of activity was supported by lower mortgage interest rates and again last year in disposable income. Despite somewhat higher mortgage rates in 1998, the level of housing starts will most likely continue to rise. The slight easing of rates in 1996 gave a boost to housing starts last year. Brimmer forecasts that mortgage rate on new homes may rise this year from 7.79% to 8.01 %. (1-3)

He also projected that the 1997 black labor force would expand to 15.6 million, or 11 % of the total workforce. Black employment would rise to 14.1 million, or 10.9% of

the total 130 million employed. Black unemployment, he predicted, would average 9.3%, or 1.4 million, vs. 4.4% for whites and 5.1 % for the total civilian labor force. The economist does note some disturbing trends that will impact African American status in the years ahead. In the short run, he predicts no major changes in the labor force. The continued expansion of the U.S. economy in 1998 will enable blacks to make further moderate gains in their economic position. But, he cautions, blacks have shared less in the economic expansion of the country than other races because of the growing segment of incarcerated blacks. "That has a substantial impact on the potential labor supply. Increasingly, blacks whom you expect to show up in the labor force don't get there," notes Brimmer. "That results in a loss of jobs and income, which is going to be a very big area of conflict and cost to society." (1-3)

As other ethnic populations grow, Brimmer predicts that blacks may end up on the short end. "We see whites losing shares, but the gains are being enjoyed primarily by Asians and to a lesser extent Hispanics, warn Brimmer. Down the road, as competition increases, it will not be Blacks versus Whites, its going to be Blacks versus everybody else, unless conditions change dramatically we risk dropping out at the bottom." This is further demonstrated by the depiction on table, "Money Income by Race", on page 52. (1-3)

Conclusion

Today, after a generation of progress, Americans' commitment to equal opportunity, not only for African Americans, but for other minority groups, and for women are at a crossroads. A well financed, politically powerful movement dedicated to

ending affirmative action has made significant gains. Although its leaders claim they support equal opportunity, they have, in fact, launched an, all out attack on one of the fairest, most effective tools for ending discrimination. Their attack is based on two demonstrably false premises: that affirmative action is no longer needed, and that it is in all its forms unfair.

Affirmative action opponents say that it's no longer needed because discrimination is a thing of the past. But while it is true that much progress has been made since the enactment of the Civil Rights Act of 1964 and other civil rights legislation, it is also true that these laws have not been self executing, nor did they change centuries of discriminatory habits, customs and attitudes. As a result many avenues of opportunity have remained narrow and constricted, available only to the relatively few. The evidence clearly proves that the playing field isn't level yet:

1. A majority of white Americans still believe that African and Latino Americans, are less intelligent, working less, and are less patriotic than whites.
2. Government public education spending is clearly linked to race. Schools serving mostly minority, inner city children receive about one-half the money per student that schools in surrounding white suburbs receive.
3. In 1990, the average black male worker earned \$731 for every \$1000 earned by a white male worker. Latino men earned \$810 for every \$1,000 earned by similarly educated white men.
4. Although white males make up only 43% of the workforce, they occupy 97% of the top executive positions at America's 1,500 largest corporations.

The largest group of Americans to benefit from affirmative action thus far is women. Before 1964, women were excluded from many higher paying occupations and professions based on stereotype, custom and law. There are no women's police officers, truck drivers, or pilots, and women's lawyers and doctors were rare. But despite progress, many barriers to full equality remain:

1. Men are still 99% of all auto mechanics and carpenters; 98% of all firefighters; 97% of all pilots, and 95% of all welders.
2. Overall, American women earn only 72% of what men make for comparable work.
3. Women hold only 3-5% of senior positions in the private sector.

Opponents claim affirmative action forces employers to "give preference" to less qualified minorities. Equating affirmative action with quotas, they argue that color-blind laws are fairer than those that take race into account. But affirmative action is not a quota system or a form of reverse discrimination. Nor does it give preferential treatment to unqualified minorities and women.

Quotas have always been used as a method of exclusion, not inclusion. Before the Civil Rights Act, quotas were used to keep out qualified members of unpopular racial or religious groups. That is why they are intensely disliked by the public and have been strongly disfavored by the Supreme Court.

Goals and time tables found in affirmative action plans are not the same thing as quotas. They are a nondiscriminatory way of making sure that those who were previously excluded are finally brought into the workplace, and a way of measuring whether

discrimination is being reduced. Without them, employers with a history of discriminatory practices would continue “business as usual.” With them, employers must make efforts to recruit and hire qualified women and/or minorities for vacant positions from which they were previously excluded. This is the opposite of discrimination.

Employers and universities have always engaged in forms of “preferential treatment.” It was only when race and gender became a factor in the effort to end discrimination that preferences became a problem. Yet there are many examples of long accepted preferential treatment. University preference of veterans over non-veterans, or children of alumni over other youths is one example; employers hiring the sons and daughters of their economic and social equals is another.

Requiring that qualified minorities and women be actively recruited and, whenever appropriate, hired. That is the only way previously excluded minorities and women can gain a toehold in companies, occupations, and schools that were previously reserved for white men. It’s fairness itself.

Although anti-civil rights advocates complain of “reverse discrimination,” in fact only 1.7% of all race-based charges filed with the equal Employment Opportunity Commission have been filed by white males. This is because the Supreme Court has already ruled that the interests of white incumbents must be protected. When a company with a history of past discrimination passes over a white man and hires a qualified minority or women instead, that isn’t “reverse discrimination.”

The most dishonest claim made by affirmative action’s opponents is that since the U.S. should be a color blind society, civil rights remedies that take race into account are

perpetuating discrimination. Reaching a color blind society requires being conscious about color. There is, unfortunately, abundant proof that the U.S. is not yet a color blind society. Attitudinal studies show that stereotypes are pervasive. In one, 53% of the white surveyed respondents judged Blacks less intelligent than Whites, and 62% thought Blacks were "less hard working." These sometimes, unconscious stereotypes have an impact on Black opportunities in the real world. Studies show that negative stereotypes about women persist as well. They are still believed to have less leadership ability than men.

The law of affirmative action has been evolving since the Civil Rights Act was passed in 1964. Affirmative action plans are sometimes court imposed and other times they are adopted on a voluntary basis. To be legal, these plans should:

- Be flexible, preferably using amendable goals and timetables to increase minority and female participation, rather than rigid numerical quotas.
- Generally not interfere with the legitimate seniority expectations of current employees.
- Be temporary, lasting no longer than necessary to remedy the discrimination.

Some American businesses have had affirmative action programs imposed upon them by courts, but many more have adopted them voluntarily for two main reasons. First, white males make up a minority of the American workforce, so firms that favor white men will find themselves fishing in a shirking pool of potential employees. Second, a diverse workforce creates a competitive corporate edge with consumers of different races and backgrounds. It isn't surprising that among the many organizations that

opposed the 1996 public referendum to end affirmative action in California were the California Business Roundtables, the San Francisco Chamber of Commerce and the Los Angeles Business Alliance.

In 1964, the year the Civil Rights Act was passed, only 4% of African Americans 25 years or older had completed four years of college, compared to 10% of whites in the same age group. By 1993, the figure for blacks had gone up to 12%. This is because during that 29-year period, the university community had taken affirmative steps to recruit and admit more minorities.

Although affirmative action in education came under early legal attack, its constitutionality was upheld by the Supreme Court in 1974 in the case of *University of California v. Bakke*. In *Bakke*, the court ruled that while, "racial and ethnic distinctions of any sort are inherently suspect," a university could take race explicitly into account under appropriate circumstances.

Anti-civil rights pundits argue against affirmative action on the grounds that it "stigmatizes" African Americans and other minority student who are assumed to be incompetent because they were admitted based on color, not on merit. This argument is absurd and distorts the way affirmative action works.

Harvard College, an affirmative action pioneer, whose policy has been emulated throughout the country works this way: after admitting the most qualified applicants, the admissions committee looks at that large middle group of applicants who are admissible and believed to be capable of doing good work. In evaluating each applicant, race may tip the balance in his or her favor, just as coming from a particular geographic region might.

Race can be a plus, but only if the applicant possesses the qualifications for admission.

Although the percentage of African-American college graduates has increased from 4% to 12% since 1964, the percentage of white college graduates has gone from 10% to 23%. This persistent gap tells us that affirmative action in higher education is still needed. See UC chart on page 53.

Ultimately, we have a long way to go before we see a complete color blind society. In order to achieve this goal, the Nation as a whole will have to see the need and the importance to treat all races equally. If we fail in this effort, the Nation will be the greater looser and it will go the way that other Nations have gone who have not considered the need to provide equal opportunity for all with the same merits. A good example of this is what happened in South Africa. The uprising which took place was the only way left for the Black Africans in that country to be noticed and given an opportunity. Is this what we want to happen in this Nation?

Money Income by Race (in billions of dollars)

Category	1995		1996	
	Amount	% of Total	Amount	% of Total
All households	\$4,477.8	100.00	\$4,760.3	100.00
White	3,949.1	88.21	4,167.4	87.54
Black	351.9	7.86	393.1	8.26
Other races	176.0	3.93	199.8	4.20

Category	1997		1998	
	Amount	% of Total	Amount	% of Total
All households	\$5,030.7	100.00	\$5,272.2	100.00
White	4,381.7	87.10	572.6	86.73
Black	25.1	8.45	454.4	8.62
Other races	223.9	4.45	245.2	4.65

Calculations by Brimmer & Co. Inc. Data for 1995 from the U.S. Census Bureau.
 Estimates for 1996 through 1998 by Brimmer & Co.

UC's Disturbing Drop in Black Graduate Students

Using actual enrollment figures from 1994, the University of California's office of the President ran a simulation on how many graduate students would have entered in 1994 using the mandate of proposition 209.

Category	Actual Enrollment Fall 1994	Simulated Enrollment	Change
African American	309	178	-131
American Indian	89	51	-39
Asian	2,289	2,740	451
Chicano/Latino	1,146	999	-14
Filipino	261	272	11
White/other	3,876	3,991	115
TOTAL	7,970	8,229	

Category	Change in %	% of Total Freshman Enrollment	Simulated % of Freshman Enrollment
African American	-42.4	3.9	2.2
American Indian	-43.3	1.1	0.6
Asian	19.7	28.7	33.3
Chicano/Latino	-12.9	14.4	12.1
Filipino	4.0	3.3	3.3
White/Other	3.0	48.6	48.5

Source: University of California, Office of the President.

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