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Sean A. Pager

Michigan State University College of Law, spager@law.msu.edu

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IS BUSING PREFERENTIAL? AN INTERPRETIVE ANALYSIS OF PROPOSITION 209

SEAN PAGER *

I. INTRODUCTION

Last November, California voters approved Proposition 209. Its approval, however, hardly has ended debate over what was provocatively called the California Civil Rights Initiative (CCRI). In the immediate aftermath of the election, attention focused on a challenge to the initiative's constitutionality. Within a month, a federal district court had issued a preliminary injunction preventing its implementation.¹ The Ninth Circuit promptly reversed on interlocutory appeal.² Further appeals ended when the United States Supreme Court denied a petition for certiorari later that year.³ As a result, CCRI has become law and the text of Proposition 209 now comprises section 31 of the California Constitution.⁴

Now, a new debate has begun as to CCRI's likely meaning. Clause (a), the core provision of section 31, prohibits state action that

* J.D. University of California at Berkeley, Boalt Hall School of Law (1998). Sean Pager is an associate at the Howard Rice Law Firm in San Francisco.

1. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), (enjoining the implementation of Proposition 209 on federal constitutional and statutory grounds), *opinion amended and superceded on denial of rehearing* by 122 F.3d 692 (9th Cir. 1997).

2. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 698 (9th Cir. 1997).

3. *Coalition for Econ. Equity v. Wilson*, 118 S. Ct. 397 (1997).

4. In referring to the legislative history of the initiative, this Article will generally use its ballot designation, i.e. Proposition 209, or its official title, abbreviated as CCRI. When discussing the text of the constitutional provision that resulted, section 31 will be used. In other contexts, the terms may be used interchangeably.

“discriminate[s] against, or grant[s] preferential treatment to any individual” in specified domains.⁵ Given this broad, highly abstract language, any number of government programs may be in jeopardy. Prior to the election, CCRI’s supporters and opponents aired widely conflicting claims as to the effect of Proposition 209.⁶ Yet, decisions by courts faced with claims brought under Proposition 209 have only begun to nibble at the edges of the interpretive questions that section 31(a) poses.⁷ None of court’s decisions thus far have defined the relevant terms, “discriminate” and “grant preferential treatment.”⁸ Moreover, scholarly analysis to date has focused on the constitutionality of CCRI⁹ or its socio-political implications;¹⁰ only a few commentators have addressed the legal meaning of the initiative’s controversial language.¹¹

Ironically, although doubts over the initiative’s validity under the Federal Constitution may have overshadowed consideration as to its practical effects as a matter of California law, in fact, a question of state law interpretation lies at the heart of that dispute. Proposition 209’s

5. The full text of clause (a) reads as follows: “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.” CAL. CONST. art. I, § 31, cl. (a) (West 1999).

6. See *infra* note 104 and accompanying text.

7. See *Hi-Voltage Wire Works, Inc. v. San Jose*, 84 Cal. Rptr. 2d 885 (Ct. App. 1998) (outreach requirement in municipal contracting); *Kidd v. People*, 72 Cal. Rptr. 2d 758 (1998) (affirmative action in state civil service); *Wilson v. State Personnel Bd.*, No. 96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (examining various state affirmative action statutes).

8. See, e.g., *Hi-Voltage*, 84 Cal. Rptr. 2d 885 (no definition given); *Wilson v. State Personnel Bd.*, No. 96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (noting only that “Proposition 209 appears to mirror federal and state equal protection guarantees”).

9. See, e.g., Vikram Amar & Evan Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996); Note, *The Constitutionality of Proposition 209*, 111 HARV. L. REV. 2081 (1998); Note, *Proposition 209 Does Not Impose Unconstitutional Burdens*, 39 B.C. L. REV. 476 (1998).

10. See, e.g., Comment, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action*, 38 SANTA CLARA L. REV. 235 (1997); Derrick A. Bell, Jr., *California’s Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447 (1997).

11. Most discussion of Proposition 209’s legal effects published prior to the election resembled partisan advocacy with little or no detailed analysis. The one exception was Neil Gotanda et al., *Legal Implications of Proposition 209—The California Civil Rights Initiative*, 24 CAL. W. L. REV. 1, 17 (1996). Since the election, only one law review article has tackled the interpretation of CCRI. See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1341 (1997). As will be made clear below, the present article adopts an interpretation that differs in important respects from both of these prior efforts.

constitutionality hinged, in part, on the ability of its defenders to distinguish two key Supreme Court precedents¹² on which the plaintiffs relied. CCRI's defenders argued that unlike these earlier cases, Proposition 209 only applies to "zero-sum" contexts, i.e. those in which preferences to minorities work as a direct disadvantage to nonminority interests.¹³ In issuing his preliminary injunction, Judge Henderson challenged this interpretation by observing that the facial language of "Proposition 209 prohibits all race and gender preferences, not merely those that operate in a 'zero-sum' fashion."¹⁴ Unsurprisingly, the appellate panel that reversed him reached the opposite conclusion.¹⁵

At root, the dispute between the district and circuit court thus concerned the meaning of "preferential treatment" in section 31(a). The Ninth Circuit read that phrase as encompassing a narrower scope than the district court. The opinions of federal judges hardly constitute dispositive authority as to the proper interpretation of a provision of state

12. *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

13. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1502 (N.D. Cal. 1996) ("On this theory, Proposition 209 is distinguishable from the initiatives in *Seattle* and *Hunter* because it only interferes with 'zero-sum' antidiscrimination efforts—those that help minorities, but do so at the expense of nonminorities."). The distinction at issue was elaborated in an earlier Ninth Circuit case, *Associated Gen. Contractors v. San Francisco Unif. Sch. Dist.*, 616 F.2d 1381 (9th Cir. 1980), using slightly different terminology. That court distinguished between two main types of government programs: (1) "'reshuffle programs' [i.e. non-zero-sum], in which the state neither gives to nor withholds from anyone any benefits because of that person's group status, but rather ensures that everyone in every group enjoys the same rights in the same place. The most common examples are school desegregation cases and programs . . . (2) 'stacked deck' [i.e. zero-sum] programs, in which the state specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all. This category includes affirmative action programs of both the quota and 'positive factor' variety (but not programs that merely encourage more minority persons to apply for state conferred benefits)." *Id.* at 1386 (internal footnotes omitted).

14. See *Coalition for Econ. Equity*, 946 F. Supp. at 1503 n.24.

15. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n.16 (9th Cir. 1997) (quoting *Associated Gen.*, 616 F.2d at 1381) ("The district court perceived no relevant difference between the [non-zero-sum] busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that '[zero-sum] programs . . . trench on Fourteenth Amendment values in ways that [non-zero-sum] programs . . . do not.'). The Ninth Circuit thus implicitly interpreted the preferences prohibited by Proposition 209 as confined to zero-sum contexts. Cf. *Coalition for Econ. Equity*, 946 F. Supp. at 702 ("When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender"). *Id.*

law.¹⁶ Yet, their disagreement highlights a profound ambiguity as to the reach of section 31(a)'s central provision. Although Proposition 209 was clearly intended to eliminate zero-sum programs such as affirmative action preferences,¹⁷ its ramifications in such non-zero-sum contexts as outreach, minority scholarships, voter districting, and voluntary school desegregation remain unclear.¹⁸ Until the California courts have passed on the legitimacy of such programs, a broad area of uncertainty thus remains concerning the effect of CCRI's constitutional prohibitions.

This article focuses on one part of this unresolved interpretive issue. It will examine whether, and to what extent, section 31 applies to voluntary school desegregation programs that use racial criteria to assign students to public schools, i.e. "busing."¹⁹ Busing represents the archetypal non-zero-sum program contemplated in the constitutional litigation.²⁰ Moreover, such programs remain in widespread use throughout the state. In the aftermath of Proposition 209, their constitutionality has been called into question in court filings,²¹ in public

16. *Cf.* Kopp v. Fair Political Practices Comm'n., 905 P.2d 1248 (1995) (citing both state and federal authorities for the proposition that state interpretations control for state statutes). Of course, to the extent that the constitutionality of Proposition 209 actually hinged on the narrower definition controlling, one would expect a state court to conform the meaning of the initiative to the demands of the federal constitution. *See* Rowe v. Superior Court, 19 Cal. Rptr. 2d 625 (Ct. App. 1993) (duty of court to interpret statute in way that minimizes potential for conflict with constitution). This article expresses no opinion as to the merits of such an argument. However, to the extent that it does apply, the following analysis will serve to provide a theoretical framework by which a California court could accommodate its interpretation of the initiative to such an external imperative.

17. *See infra* Section III for a discussion of the intent of CCRI.

18. Only two California courts to date have ruled on Proposition 209's application to non-zero-sum programs. Both cases addressed minority outreach requirements and reached opposing results. *Compare* Wilson v. State Personnel Bd., No. 96CS01082 (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (upholding outreach as non-preferential), *with* Hi-Voltage Wire Works, Inc. v. San Jose, 84 Cal. Rptr. 2d 885 (1998) (holding that outreach requirements violate section 31). *See also* Lungren v. Superior Court, 55 Cal. Rptr. 2d 690 (Ct. App. 1996) (pre-election decision assuming that Proposition 209 would not affect outreach).

19. As explained below, busing describes a range of programs involving race-based assignments and need not involve the physical transportation of students from one neighborhood to another. *See infra* Section IV.A. and accompanying text.

20. *See Coalition for Econ. Equity*, 122 F.3d at 707 n.16.

21. The legality of voluntary desegregation under section 31 was formally challenged by the plaintiffs in Board of Educ., San Diego Unif. Sch. Dist. v. Superior Court, 71 Cal. Rptr. 2d 562 (1998). This case considered the termination of a desegregation consent decree. The court sidestepped the issue, however, in its resolution of the case. *See id.* at 563. There are indications that this issue may surface again soon in the

statements by officials,²² and in scholarly commentary.²³ This article challenges such interpretations, arguing that CCRI's prohibitions do not extend to voluntary desegregation in the form of busing.

Although the analysis of section 31 presented below pertains to the specific context of busing, the article envisions a more general interpretive methodology. It explicitly considers the meaning of, and relationship between, section 31(a)'s twin prohibitions on discrimination and preferential treatment. Moreover, by expanding on the zero-sum/non-zero-sum distinction advanced in the constitutional litigation, the article's conclusions hold obvious implications for other state programs that fall on one side or the other of the zero-sum/non-zero-sum line.²⁴

Part I provides an overview of voluntary desegregation and discusses the legal basis under which such programs operate. Part II describes the methodology used to interpret voter initiatives in California. Then, Part III surveys the evidence of voter intent implicated by this interpretive methodology. Part IV addresses the threshold question of whether busing is discriminatory under section 31. Part V considers the more serious interpretive challenge issued by section 31's prohibition of preferential treatment. Next, Part VI applies the understanding of preferential treatment developed in Part V to the specific context of desegregative busing. In conclusion, Part VII connects voluntary desegregation with the more general zero-sum/non-zero-sum distinction that may be implicit in Proposition 209.

courts. In 1997, the Pacific Legal Foundation served the Berkeley Unified School District with a public record request. Given the foundation's long history of mounting legal challenges to race-based government programs, the request is seen as a prelude to possible litigation. *See* Interview with Celia Ruiz, of Ruiz & Sperow, an attorney specializing in education law (Nov. 4, 1998).

22. Joseph Symkowick, general counsel of the California Department of Education, before the election publicly stated his belief that race-based desegregation programs, including busing, would violate Proposition 209. *See* Bettina Boxall, *Proposition 209: A Blueprint for Court Fights*, L.A. TIMES, Oct. 31, 1996, at A3.

23. *See* Volokh, *supra* note 11, at 1344 & n.27 (concluding that CCRI forbids race-based school assignments).

24. In addition, the recent passage of Proposition 200 in Washington State, a voter initiative with virtually identical language to that of Proposition 209, means that the interpretation of these terms has significance outside of California as well. CCRI proponents hope to pass similar measures in other states. *See Affirmative Action Suffers Setback*, SAN FRANCISCO CHRON., Nov. 4, 1998, at A2.

II. AN OVERVIEW OF VOLUNTARY DESEGREGATION IN CALIFORNIA

A. TYPES OF DESEGREGATION PROGRAMS

Before embarking on the legal arguments pertaining to desegregation, it may prove helpful to offer some background information on the range of desegregation programs currently in place in California. Desegregation plans attempt to counteract racial imbalances in the distribution of students within the schools of a given district.²⁵ In general, there are two main types of desegregation plans: those carried out pursuant to a court order and those voluntarily adopted²⁶ by a school district. This article focuses exclusively on voluntary desegregation.²⁷

Due to the decentralized nature of these programs, the exact figures are difficult to obtain. It is estimated that roughly fifty school districts in California practice some form of voluntary desegregation.²⁸ Such plans typically involve a combination of approaches, which may include any of the following three main components of desegregation: busing, magnet schools, and special funding to "racially isolated schools."²⁹

Busing represents the oldest and most direct approach to desegregation. It involves assigning of students whose racial group predominates in a given school to other schools within the district where a dif-

25. Because such programs aim towards achieving racially integrated schools, the terms desegregation and integration tend to be used synonymously.

26. Voluntary here should be read to mean uncoerced by any judicial decree. As discussed below, the California Supreme Court has held that school districts have a constitutional obligation under state law to adopt "voluntary" integration plans to redress segregated conditions. *See infra* note 27 and accompanying text. *Cf. Tinsley v. Superior Court*, 197 Cal. Rptr. 643, 650 n.2 (Cal. App. Ct. 1983) (commenting on the tautological nature of a duty to volunteer).

27. The status of court-ordered desegregation plans, in any case, would appear largely unaffected by Proposition 209. Any such plans mandated by federal law, of course, would preempt section 31 under the Supremacy Clause. Court-ordered busing under state law grounds is already forbidden under the California Constitution. *See CAL. CONST. § 7, cl. (a)*. Finally, section 31 explicitly exempts existing court orders or consent decrees in effect prior to the initiative's passage. *See CAL. CONST. § 31, cl. (d)*.

28. *See* Interview with David Walrath, of Murdoch, Walrath & Holmes, education lobbyist in Sacramento, California (Nov. 12, 1998). Neither the State Superintendent of Public Schools nor the State Budget Comptrollers' office appear to keep tabs on how state funding for desegregation plans is used. Therefore, most of the information about current desegregation practices is anecdotal.

29. *See generally* CAL. EDUC. CODE § 42249 (West 1999) (listing the types of desegregation programs eligible for state funding).

ferent racial group comprises the majority and vice versa.³⁰ Busing proved controversial in the 1970s, leading many school districts to adopt less coercive integration strategies.³¹

Magnet schools represent one such approach. As the name suggests, magnet schools offer special enrichment programs designed to attract students from all across the district and, thereby, achieve a diverse student population. Such schools typically have competitive admission standards and often award preferences to underrepresented racial groups in order to ensure a balanced outcome. A second approach allocates special funding directly to schools with a disproportionate number of minority students to compensate for the educational burden of "racial isolation."³²

Because both magnet schools and funding to "racially isolated schools" typically confer special benefits only to certain racial groups, these approaches to desegregation appear more intrinsically preferential than busing, which equally affects students from all races. Such programs, however, present a more problematic case with respect to section 31's prohibition on preferential treatment.³³ This article will restrict its analysis to busing.³⁴

Busing, or related schemes for pupil reassignments, remains a mainstay of voluntary desegregation plans throughout the state.³⁵ None

30. The term busing serves as a convenient shorthand description for any desegregation plan that relies on reciprocal student reassignments. The term is something of a misnomer as "busing" need not entail the physical transportation of students across town. The term, however, is widely used in the literature, and accordingly, this article will adhere to such convention. *See generally* NAACP v. San Bernardino City Unif. Sch. Dist., 551 P.2d 48, 52 n.8 (Cal. App. Ct. 1976).

31. *See* Walrath, *supra*, note 28.

32. *See id.*; *see generally* CAL EDUC. CODE § 42247 et. seq. (West 1999) (surveying the types of voluntary desegregation plans eligible for state funding).

33. For this reason, the Legislative Analyst singled out these two types of programs and omitted busing as examples of desegregation programs that might be invalidated by Proposition 209. *See infra* note 121 and accompanying text. Many of these programs receive federal funding. To the extent that the continuance of race-conscious policies is an explicit precondition for such funding, some might qualify for the exception under section 31(e). *See infra* note 84. An examination of the factual and legal issues raised by such speculation, however, lies beyond the scope of this article.

34. No federal funding is currently available for busing. *See* Walrath, *supra* note 28. Therefore, the permissibility of such programs will likely stand or fall according to whether or not they are deemed preferential under section 31(a).

35. A spokesperson for the California Voluntary School Desegregation Association declined to comment as to the extent that race factors into public school assignments. Most school districts shun the political and legal difficulties, which would accompany public scrutiny of their policies. One knowledgeable observer, however, estimated that

of the school districts that practiced busing prior to CCRI appear to have abandoned their programs in its aftermath.³⁶ Moreover, the State Assembly continues to fund voluntary desegregation programs of all stripes.³⁷

B. THE SPECIAL STATUS OF VOLUNTARY DESEGREGATION UNDER
CALIFORNIA STATE LAW

Voluntary desegregation programs have a unique status under California law. They are both specifically sanctioned by the state constitution and constitutionally required under prevailing case law in certain circumstances. Section 7 of the California Constitution, which largely parallels the Fourteenth Amendment of the United States Constitution, explicitly declares that "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan"³⁸

This portion of section 7 was inserted via constitutional initiative, like section 31. Section 7's initiative arose in reaction to the California Supreme Court's decision in *Crawford v. Board. of Educ. of Los Angeles*,³⁹ which held that segregation in public schools, regardless of its cause, violated the equal protection clause of the state constitution.⁴⁰ In doing so, the court imposed a higher standard under state law than federal equal protection standards, which limited redress to instances of intentional *de jure* segregation.⁴¹ *Crawford* proved controversial be-

at least ten school districts use some form of racial criteria in determining student assignments for non-magnet schools. See Ruiz, *supra* note 21. In addition, the California Education Code permits school districts to block interdistrict transfer applications where such transfer "would negatively impact . . . the racial and ethnic balance of the district"—even without the existence of a formal voluntary desegregation plan in operation. See CAL. EDUC. CODE § 48209(b). It is unclear to what extent such discretion is exercised. If one assumes, however, that adjoining districts act reciprocally to maintain their respective racial balances, the following analysis based on intra-district busing would seem applicable to that scenario as well.

36. See Interview with Celia Ruiz, *supra* note 21.

37. See Board of Educ., San Diego Unif. Sch. Dist. v. Superior Court, 71 Cal. Rptr. 2d 562, 567-68 (1998).

38. CAL. CONST. art. I, § 7, cl. (a).

39. 551 P.2d 28 (1976).

40. The Court made an important distinction between a mere imbalance in racial distribution and segregation, which is judged subjectively with respect to a number of variables. *Id.* at 43-44. Therefore, to the extent that subsequent arguments in this article rely on this decision, it will be necessary to assume that desegregation is aimed at alleviating conditions of segregation in the sense understood by the *Crawford* court.

41. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

cause it paved the way for court-ordered mandatory busing of students in the state.⁴²

California's electorate responded by approving Proposition I, which forbade California courts from ordering busing based on state law grounds.⁴³ The initiative, however, did not overturn the legal precedents on which such busing had been based. Thus, segregated schools remain in violation of California's Constitution.⁴⁴ The only thing the initiative did was limit the availability of a particular form of remedy for that violation—court-ordered busing.⁴⁵

Furthermore, the initiative specifically failed to disavow another aspect of the *Crawford* decision. In finding that *de facto* segregation denied equal protection, the California Supreme Court held that school districts have an affirmative duty to take independent action to remedy segregated conditions.⁴⁶ Other cases had suggested that busing may be specifically required as a remedy.⁴⁷ Although after Proposition I, courts could no longer order busing to enforce this duty, school districts retained the option to do so voluntarily. Indeed, as noted, the initiative inserted language into section 7 specifically preserving the ability of school boards to enact voluntary desegregation plans.

Accordingly, the legal status of voluntary desegregation, and busing specifically, rested on solid constitutional footing prior to the enactment of Proposition 209. The question addressed in this article is whether the constitutional amendments affected by CCRI override existing law in this area. To answer this question, it may prove helpful to review the California courts' methodology in interpreting initiatives.

42. See *Crawford v. Board of Educ.*, 458 U.S. 527, 531 (1982) (citing *Crawford v. Board of Educ.*, 551 P.2d 28, 48 (Cal. 1976)).

43. See *id.* at 531-32 & nn.5-6.

44. See *McKinny v. Oxnard Union High Sch. Dist. Bd. of Trustees*, 642 P.2d 460, 467-68 (Cal. 1982).

45. *Id.*

46. See *Crawford*, 551 P.2d at 43.

47. See *Santa Barbara Sch. Dist. v. Superior Court*, 530 P.2d 605, 618 (Cal. 1975) (holding a statute barring race-based student assignments in public schools unconstitutional). *San Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 683 (Cal. 1971) (race-based pupil assignments "will often be the only effective device to eliminate de facto segregation").

III. INTERPRETING INITIATIVES

Despite the increasing prominence of voter-enacted legislation as a national phenomenon⁴⁸ and a host of high-profile California initiatives of late,⁴⁹ the peculiar interpretive demands posed by this form of direct democracy have received comparatively little attention in scholarly literature.⁵⁰ California courts have likewise tended to downplay any special distinctions in their interpretation of ballot legislation, often drawing an explicit parallel between initiatives and conventional statutes.⁵¹

In California, interpretation of written law in California is grounded, at least formally, in an intentionalist model.⁵² “When construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration.”⁵³ In discerning voter intent, courts look first to the words of the initiative, considering extraneous sources only if the statute proves ambiguous on its face.⁵⁴ Words are given their ordinary and usual meanings,⁵⁵ and the standard rules of statutory construction apply.⁵⁶

One such principle of interpretation of particular relevance to Proposition 209 is the “almost irresistible” presumption that “when an

48. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 108-109 (1995) (noting that a majority of states now allow some version of direct democracy: initiatives, referenda, etc.).

49. See, e.g., California Civil Rights Initiative (1995).

50. See Schacter, *supra* note 48, at 108.

51. See *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 145 (Cal. 1992) (“These principles apply as much to initiative statutes as to those enacted by the Legislature.”). *Id.*; *People v. Callegri*, 202 Cal. Rptr. 109, 115 (Ct. App. 1984), *overruled by* *People v. Bouzas*, 807 P.2d 1076 (Cal. 1991) (“fundamental rule of statutory construction . . . [a]pplies with equal force to initiative measures”); *Winnett v. Roberts*, 225 Cal. Rptr. 82, 86 (Ct. App. 1986) (noting that a constitutional initiative should be read like any other constitutional provision).

52. See generally CAL. CIV. PROC. CODE § 1859 (West 1997).

53. *Davis v. City of Berkeley*, 794 P.2d 897, 900 (Cal. 1990); *Board of Supervisors v. Lonergan*, 616 P.2d 802, 824 (Cal. 1980).

54. See *Hill v. NCAA*, 865 P.2d 633, 668 (Cal. 1994); *Davis*, 794 P.2d at 900;

55. See *Up-Right*, 828 P.2d at 144.

56. See *Lungren v. Deukmejian*, 755 P.2d 299, 304 (Cal. 1988) (interpretation of individual words in a way that takes into account the context and structure of the entire text). See also *Consumers Union v. California Milk Producers Advisory Bd.*, 147 Cal. Rptr. 265, 272 n.7 (Ct. App. 1978); *Winnett*, 225 Cal. Rptr. at 86 (legislative intent gleaned from the whole can inform the reading of each part). These rules can sometimes justify extreme results. See, e.g., *People v. Skinner*, 704 P.2d 752, 758-59 (Cal. 1985) (construing the conjunction “and” as “or” based on perceived intent of the relevant section).

initiative contains terms that have been judicially construed . . . those terms have been used in the precise and technical sense in which they have been used by the courts.”⁵⁷ A related canon of construction states that language used within a single body of law is ordinarily assumed to have a consistent meaning.⁵⁸ As with any interpretive approach, such rules have natural limits.⁵⁹ Comparisons out of context may mislead. Some terms may appear in more than one place, leading to conflicting results.⁶⁰ As always, the touchstone must remain voter intent.⁶¹

Furthermore, even after applying these rules of construction, ambiguities may thus persist. To resolve them, courts have turned to three main categories of extrinsic sources: (1) arguments and summaries found in the ballot pamphlet, (2) historical context, and (3) contemporaneous construction by the legislature or relevant administrative agencies.⁶²

The ballot pamphlet materials accompanying initiatives represent the closest analogue to a conventional statute’s legislative history. As such, they are widely relied upon as indicia of voter intent.⁶³ The weight, however, accorded to their content varies.⁶⁴ In *Hill v. National Collegiate Athletics Ass’n*,⁶⁵ the California Supreme Court displayed

57. *Hill*, 865 P.2d at 646.

58. See *Rossi v. Brown*, 889 P.2d 557, 576-77 (Cal. 1995) (Mosk, J., dissenting); Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 957-58 (1994).

59. See *Rossi*, 889 P.2d at 575-76 (Mosk, J., dissenting) (accusing majority of inappropriate “hypertechnical” use of canons to override voter intent); cf. *Consumers Union*, 147 Cal. Rptr. at 273 n.7 (acknowledging that almost every principle of construction has a counterpart to the opposite effect).

60. Both of these concerns apply with respect to discrimination, a key concept in Proposition 209. See *infra* note 158 and accompanying text.

61. See *Creighton v. City of Santa Monica*, 207 Cal. Rptr. 78, 83 (1984) (“The words must be understood . . . as the words of the voters who adopted the amendment. They are to be understood in the common popular way, and in the absence of some strong and convincing reason to the contrary . . . they are not entitled to be considered in a technical sense inconsistent with their popular meaning.”).

62. See generally Kara Christenson, Note, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031, 1043 (1989).

63. See *Lungren v. Deukmejian*, 755 P.2d 299, 307 n.14 (Cal. 1988) (ballot pamphlet serves as legislative history); *Kidd v. State*, 72 Cal. Rptr. 2d 758, 770 n.7 (Ct. App. 1998); *Creighton*, 207 Cal. Rptr. at 82-83.

64. See J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 358 (1992) (discussing the selective weight given to ballot pamphlet by courts).

65. 865 P.2d 633, 645 n.5 (Cal. 1994).

three different approaches even within the same decision. When inquiring whether Proposition 11 covered private entities, the court pointed to various references in the ballot pamphlet in arguing that a "reasonable voter" would have answered affirmatively.⁶⁶ In a subsequent section of the opinion, however, the court brushed aside ballot language supporting an interpretation with which it disagreed, as mere "sound-bite rhetoric."⁶⁷ In still a later section of the opinion, the court returned to the ballot argument, citing references to the United States Constitution as a basis of implicating federal constitutional standards as an interpretive guide.⁶⁸ This approach has direct relevance to the interpretation of Proposition 209, whose ballot argument might also thereby incorporate by reference federal statutory standards.⁶⁹

As voter enactment of an initiative presumably reflects endorsement of the argument in its favor, courts tend to focus on the proponents' arguments.⁷⁰ As such, initiative sponsors' views become equated with the voters' intent.⁷¹ The interplay between the arguments and rebuttals on both sides, however, may prove insightful on a particular point.⁷²

The Ballot Pamphlet also includes a report from the Legislative Analyst offering a more objective analysis of the propositions before the voters. Courts look to this report as a source of guidance through the partisan arguments.⁷³

In addition to ballot pamphlet materials, the historical context in which an initiative came to be enacted can also shed light on voter in-

66. *Id.* at 649. *But see* Russel v. Superior Court, 230 Cal. Rptr. 102, 108 (1986) (passing reference in one ballot argument not sufficient to demonstrate intent).

67. *Hill*, 865 P.2d at 646 n.5.

68. *Id.* at 649.

69. *See infra* note 158 and accompanying text.

70. *See* California Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 733 (Cal. 1978).

71. *See* People v. Castro, 696 P.2d 111, 115 (Cal. 1985) (referring to intent of "framers" and "drafters" interchangeably with that of the voters). One court even considered statements made by an initiative sponsor outside of the ballot pamphlet. *See* Rossi v. Brown, 889 P.2d 557, 563 (Cal. 1995). The court ruled that as long as voters could be deemed aware of such statements, in the absence of contrary evidence, it could presume that "the drafter's intent and understanding of the measure was shared by the electorate." *Id.* at 563 n.7.

72. *See, e.g., Hill*, 865 P.2d at 645 (proponents narrowly characterize initiative's effect when pressed to rebut opponents' criticisms); *Lungren*, 755 P.2d at 307-08 ("The references to a public 'need to know' and to information 'legitimately need[ed]' by government serve to limit and narrow the prior reference to 'compelling public interest.'")

73. *See, e.g.,* People v. Vega-Hernandez, 225 Cal. Rptr. 209, 217 (Ct. App. 1986); Winnett v. Roberts, 225 Cal. Rptr. 82, 86 (Ct. App. 1986).

tent.⁷⁴ The idea is to situate the initiative within the “social and political milieu that [then] existed.”⁷⁵ The evidentiary basis behind such historicism, however, is often unclear.⁷⁶ Courts may cite legislation⁷⁷ or court decisions⁷⁸ that preceded the ballot measure. References in the ballot arguments often enable courts to place an initiative in context.⁷⁹ Yet, although courts largely restrict themselves to considering official materials,⁸⁰ sometimes contextual evidence may be supplied by less formal sources.⁸¹

The third major source of extrinsic guidance available to courts is the interpretations made by the legislature and/or appropriate administrative agencies.⁸² Courts will usually defer to such contemporaneous constructions.⁸³ Their reasons may include a desire to promote consistency and confidence in government institutions,⁸⁴ a concern that the public may have relied on existing interpretations,⁸⁵ and an awareness that agencies charged with implementing a particular initiative provision might possess specialized expertise unavailable to the courts.⁸⁶ The political branches are more attuned to the popular will, hence their views also offer some indication of voter intent.⁸⁷

74. See, e.g., *Rossi*, 889 P.2d at 563 n.7; *Davis v. City of Berkeley*, 794 P.2d 897, 901 (Cal. 1990).

75. *Creighton v. City of Santa Monica*, 207 Cal. Rptr. 78, 83 (Ct. App. 1984).

76. The court in *Creighton* describes “inflationary trends,” “continual rise in rental costs,” and “the growing phenomenon of condominium conversion” without citation to authority. *Id.*

77. See, e.g., *Consumers Union v. California Milk Producers Advisory Bd.*, 147 Cal. Rptr. 265, 269 (Ct. App. 1978).

78. See, e.g., *Davis*, 794 P.2d at 901-02.

79. See *Winnett v. Roberts*, 225 Cal. Rptr. 82, 86 (Ct. App. 1986).

80. See *Schachter*, *supra* note 48, at 121-22 (analyzing initiative cases according to the type of interpretive materials they examine).

81. See *California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 733 (Cal. 1978) (referring to messages contained in newspaper and campaign literature generally); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1291 (Cal. 1978) (taking judicial notice of publicity and public discussion of initiative’s effects); *Rossi v. Brown*, 889 P.2d 557, 564 (Cal. 1995) (citing account of Franklin Hichborn, a contemporary observer of the relevant period).

82. See *Davis*, 794 P.2d at 904-07 (considering interpretation by local public agencies, opinion of attorney general, and action by legislature).

83. See *id.*; see also *Rossi*, 889 P.2d at 563 n.6.

84. See *Davis*, 794 P.2d at 904.

85. *Id.* at 911 (Mosk, J., dissenting).

86. See *Christenson*, *supra* note 62, at 1049.

87. See *id.* But see *Rossi*, 889 P.2d at 563 n.6 (contemporary construction may be considered if it sheds light on legislative intent).

None of these considerations seem to hold much force in Proposition 209's case. Far from promoting consistency, a search for contemporaneous constructions would prove an exercise in futility. The initiative touches on so many government actors at so many levels that it would be impossible to elicit any authoritative guidance. Moreover, the broad, abstract language employed by section 31 does not seem amenable to the technical expertise of any government agency. Indeed, the only government institution whose expertise qualifies it to expound on constitutional provisions is the judiciary. The Legislative Analyst's report warned voters that a definitive analysis of Proposition 209 would require a court to rule on the meaning of "preferential treatment." Under such circumstances, it would seem appropriate that California courts retain unfettered discretion to do so. Nonetheless, because the contemporaneous construction of government officials connected with voluntary desegregation may be of marginal relevance, such evidence will be considered briefly below.

IV. EVIDENCE OF VOTER INTENT

Having explored the basic approach that courts use to interpret initiatives, this article will now apply that methodology to Proposition 209 to determine whether voluntary desegregation violates section 31. It seems clear that voluntary desegregation would be considered as "in the operation of public education" as required by section 31(a) and qualifies as state action under that section.⁸⁸ The only question is whether such programs "discriminate against, or grant preferential treatment to any individual or group on the basis of race"⁸⁹

The answer to this question unsurprisingly hinges on the meaning of the two terms "discriminate" and "preferential treatment." Determining the meaning of "discriminate" presents the easier challenge. As

88. CAL. CONST. art. I, § 31, cl. (a), (f). Clause (f) states that "[f]or the purposes of this section, 'state' shall include, but not necessarily be limited to, the state itself, any city, county . . . school district, special district, or any other political subdivision or governmental instrumentality of or within the state." *Id.* at cl. (f). (emphasis added).

89. CAL. CONST. art. I, § 31, cl. (a). Desegregation programs may also involve state action on the basis of ethnicity or national origin—also prohibited criteria under Proposition 209—but for simplicity only race will be considered here. In addition, Clause (e) creates a loophole for "action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." *Id.* at cl. (e). This article will not consider in detail the extent to which specific voluntary desegregation programs may qualify for an exemption under this provision; however, in general, the federal government does not offer funds for busing, so section 31(e) would seem not to apply. *See infra* note 139.

a term of art construed in countless judicial opinions, a court can assume the voters read the word in light of this backdrop of existing law. For reasons discussed below, 'discriminate' in section 31 most likely takes its meaning from the case law interpreting California's equal protection clause.⁹⁰

Construing 'preferential treatment' presents a greater interpretive challenge because it is a comparatively novel phrase. Dictionaries define preferential as "offering or constituting an advantage."⁹¹ An even more precise contextual use of such terminology, however, occurs in affirmative action case law. This article considers such contextual usage relevant because of the strong associations between Proposition 209 and affirmative action. Before elaborating on these connections, it is worth noting that the word preference also appears elsewhere in the California Constitution, most notably in Article I, section 4, which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."⁹² Although the context of these religious protections differs significantly from that of Proposition 209,⁹³ the meaning given to "preference" in cases construing section 4 helps confirm conclusions derived in the affirmative action context.

90. See *infra* note 158 and accompanying text.

91. WEBSTER'S THIRD NEW INT'L DICTIONARY 1787 (3d ed. 1976); See also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1428 (3d ed. 1996) ("giving advantage").

92. CAL. CONST. art. I, § 4. Furthermore, this is the only other place in which both discriminate and preference appear together in the California Constitution.

93. Differences in the underlying nature of the criteria being protected—religion activity vs. group status—would doubtless make a court hesitate to push any analogy between these two sections too far. Religion cases under section 4 raise issues that are analytically distinct from those raised by race. For example, not only must one compare treatment between religions, but one must also consider the treatment of nonreligions—a dimension not present with respect to racial groups. Moreover, free exercise cases run into an inherent tension with the establishment clause as government walks the narrow line separating church and state. No similar difficulty exists when dealing with racial discrimination. Because of these doctrinal complexities, the meaning of discrimination and preference could not readily be imported directly from section 4 to section 31. Nonetheless, given that Proposition 209 inserts section 31 into the same article as this existing provision, one could expect their common language to receive a parallel construction in some respects. Therefore, it may be plausible to posit some congruence in the scope of these terms, especially to the extent that it accords with other independent bases for reaching the same result.

The legislative history of Proposition 209 confirms that affirmative action was the primary target of the initiative.⁹⁴ The historical context of the campaign, in particular, reveals that CCRI was almost exclusively presented to the voters as a referendum on affirmative action.⁹⁵ In addition, a court could look at a number of potentially salient events, prior to or contemporaneous with the initiative campaign, that reinforce this association. The passage of SP-1 and SP-2 eliminated affirmative action preferences in University of California admissions and hiring, respectively, a year earlier.⁹⁶ Governor Wilson issued an executive order⁹⁷ and then filed lawsuits against his own government to end similar preferences in other state-run programs.⁹⁸ Affirmative action also emerged as a national issue during the Republican primary in the 1996 Presidential campaign.⁹⁹ This prompted President Clinton's "mend, don't end" slogan, accompanied by his order of a comprehensive review of federal affirmative action programs.¹⁰⁰

News coverage of Proposition 209 linked all of these events to the initiative's campaign.¹⁰¹ Many nationwide, including California, reflected growing doubts as to the continued necessity for and legitimacy of affirmative action as public policy.¹⁰² Each event can also be linked

94. Cf. *Kidd v. People*, 72 Cal. Rptr. 2d 758, 770 (Ct. App. 1998) (stating that the clear intent of the voters in favor of Proposition 209 was to end affirmative action preferences).

95. See *Messer v. Meno*, 130 F.3d 130, 142 n.6 (5th Cir. 1997) (characterizing Proposition 209 as an "anti-affirmative action referendum"); Charles Oliver, *Race and the Numbers Racket: Affirmative Action*, 27 REASON 32 (1995) ("The future of affirmative action may depend on a California ballot initiative"); see also Errol Smith, *An Initiative That Can Accomplish King's Dream: Civil Rights: Affirmative Action Has Come to Mean Double Standards and Color-Based Prejudice*, L.A. TIMES, Jan. 23, 1995, at B7 (if [CCRI] "passed . . . it would bring an abrupt end to affirmative action"). *Id.*

96. See SP-1: Resolution of the University of California Board of Regents Adopting a Policy "Ensuring Equal Treatment" of Admissions, July 20, 1995, in REPRESENTATIONS, issue 55 (Summer 1996).

97. Exec. Order No. W-124-95, Executive Order to End Preferential Treatment and to Promote Individual Opportunity Based on Merit, June 1, 1995.

98. See *Wilson Attacks Calif. Affirmative Action Programs*, SET-ASIDE ALERT, Vol. 3, No. 18, Aug. 28, 1995.

99. See Steven Holmes, *G.O.P. Lawmakers Offer a Ban on Federal Affirmative Action*, N.Y. TIMES, July 28, 1995, at A1.

100. See Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, at § 6, p. 36.

101. *Id.*; B. Drummond Ayres, Jr., *Fighting Affirmative Action, Leader's Race Looms Large*, N.Y. TIMES, April 18, 1996, at A11; Terry Eastland, *CCRI Struggles On Against Critic and G.O.P. Cowardice*, THE AM. SPECTATOR, Nov. 1996.

102. See Lemann, *supra* note 100.

to a concerted effort by Governor Wilson and others in the Republican Party to tap into opposition to affirmative action preferences as a basis for electoral support.¹⁰³ Governor Wilson's signature topped the list of sponsors of the principal ballot's Argument in Favor of CCRI, further reinforcing the association between Wilson's policies and the initiative in voters' minds.¹⁰⁴ For all of these reasons, any plausible interpretation of Proposition 209 must begin with the clear expression of voter intent to prohibit affirmative action, at least as currently practiced in California.

There is also a historical aspect to this debate that transcends recent developments. The ballot pamphlet's Argument in Favor speaks to this historical context by invoking the notion of "original meaning." This idea crops up twice in the Argument. "Real 'affirmative action'" is described as having "originally meant no discrimination."¹⁰⁵ Yet, the original meaning of the civil rights laws passed to prohibit discrimination is said to have been "hijacked" by "special interests [who] . . . imposed quotas, preferences, and set-asides."¹⁰⁶ The message imparted is that preferential affirmative action represents a betrayal of the ideals of the civil rights movement.¹⁰⁷

Similar themes resonate throughout the opinions of certain conservative justices in the United State Supreme Court's affirmative ac-

103. See Cathleen Decker & Maura Dolan, *Wilson Suit Affects State But Targets Nation*, L.A. TIMES, Aug. 11, 1995, at A3. Bill Stall & Virginia Ellis, *Wilson Takes Swipe at Affirmative Action*, L.A. TIMES, June 2, 1995, at A1.

104. See Secretary of State, California Ballot Pamphlet: General Election 30 (Nov. 5, 1996) (Argument in Favor) [hereinafter Ballot Pamphlet]. Similarly, Ward Connerly's signature appeared right below Wilson's. As a Regent of the University of California, Connerly engineered the passage of SP-1, abolishing affirmative action within the University of California system. *Id.* See also Ayres, *supra* note 101. Connerly then spearheaded the pro-CCRI campaign, "promising to do for the entire state what [he] ha[d] done for the University of California." *Id.*

105. See Ballot Pamphlet, *supra* note 104, at Argument in Favor.

106. *Id.*

107. The very title of Proposition 209—the California *Civil Rights Initiative*—reinforces its self-claimed connection to the struggle for civil rights. To reinforce this message, CCRI supporters aired controversial television advertisements during the campaign showing excerpts from Martin Luther King's famous "I Have a Dream" speech. See Dave Leshner, *Protest Greets New Assault on Preferential Politics: Connerly Launches National Campaign on Martin Luther King's Jr.'s Birthday, Touching off Fierce Complaints*, L.A. TIMES, Jan. 16, 1997, at A3 (describing commercials during CCRI campaign); see also Smith, *supra* note 95.

tion case law.¹⁰⁸ This ongoing jurisprudential debate provides the grist for a contextual interpretation in which CCRI's preference ban assumes the guise of a patch to restore the fabric of discrimination law to its putative "original meaning."¹⁰⁹

The arguments in the Ballot Pamphlet further underscore the centrality of affirmative action as the focus of the Proposition 209 campaign. All four of the Arguments and Rebuttals as well as the Legislative Analyst's report repeatedly refer to affirmative action.¹¹⁰ Proponents of CCRI emphasized that the initiative only banned *preferential* affirmative action, a set of policies that they characterized as departures from "real 'affirmative action.'"¹¹¹ Having so narrowed their rifle sights, CCRI's advocates gave no indication that the initiative had any other targets.

The decision in *Lungren v. Superior Court*¹¹² is not contrary to this understanding of Proposition 209's purpose. In *Lungren*, a California appellate court overturned a writ of mandamus that CCRI opponents had obtained in a court below. The mandamus had directed the Attorney General to revise both his ballot title and label for Proposition 209 to indicate that the purpose of the initiative was to prohibit affirmative action.¹¹³ The court of appeal decried this judicial intervention, holding that the Attorney General had adequately performed his statutory duty as it was.¹¹⁴ In doing so, the court of appeal avoided any discussion as to what the actual purpose of CCRI might be. Indeed, the court of appeal stated that its conclusion held true "[e]ven if we assume that . . . all of the impact of the prohibition will be borne by [affirmative action] programs."¹¹⁵

If affirmative action occupies center stage in the legal and electoral context of Proposition 209, voluntary desegregation belongs very

108. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631-32 (1990) *overruled by Adarand Constr. v. Pena*, 515 U.S. 200 (1995) (Kennedy, J., dissenting) (characterizing majority decision as a throwback to race-conscious jurisprudence of *Plessy v. Ferguson*); *Johnson v. Transportation Agency*, 480 U.S. 616, 676-77 (1986) (Scalia, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting) *overruled by Adarand*, 515 U.S. at 203. See also *United Steelworkers v. Weber*, 443 U.S. 193, 219-20 (1979) (Rehnquist, J., dissenting) (lambasting majority as departing from previous understanding of Title VII).

109. See *infra* notes 218-222, and accompanying text.

110. See Ballot Pamphlet, *supra* note 104, at Analysis by Legislative Analyst.

111. See Ballot Pamphlet, *supra* note 104, at Argument in Favor.

112. 55 Cal. Rptr. 2d 690 (Ct. App. 1996).

113. See *id.* at 691.

114. See *id.* at 693-95.

115. *Id.* at 694 (emphasis added).

much on the periphery. As will be argued below, the legal basis of voluntary desegregation may not rest on the loophole in discrimination law that Proposition 209 sought to close.¹¹⁶ Moreover, the legislative history of CCRI further suggests that busing was not among the initiative's intended targets.

Neither side had anything directly to say about voluntary desegregation in the ballot arguments.¹¹⁷ Although education is one of the three realms of state action to which CCRI applies, the Argument in Favor discussed only university admissions as being preferential.¹¹⁸ The Argument Against did address CCRI's impacts on lower education programs,¹¹⁹ yet desegregation went unmentioned.¹²⁰

The Legislative Analyst's report, by contrast, devoted a paragraph to the initiative's possible affects on voluntary desegregation. Yet, the examples it gave of programs which CCRI "could eliminate or cause fundamental changes to [included] . . . (1) magnet schools (in those cases where race or ethnicity are preferential factors in the admission of students to the school) and (2) designated "racially isolated minority schools."¹²¹ The Analyst's singling out of these specific programs arguably implies that only desegregation of these sorts would be affected.

These types of programs represent departures from the paradigmatic case of busing considered in this article. Indeed, preferential admissions in magnet schools more closely resemble the zero-sum context of affirmative action. And racially isolated schools receive special funding targeted to benefit specific minority student populations.¹²² Thus, they differ from busing plans, which operate district-wide and affect students of all races.

Note also that, in either case, the Legislative Analyst merely states that these programs "could" be affected.¹²³ By contrast, the same report predicted that affirmative action programs "would" be prohibited—a far more definite auxiliary verb.¹²⁴

116. See *infra* note 218.

117. See generally Ballot Pamphlet, *supra* note 104.

118. See *id.* at Argument in Favor.

119. See Ballot Pamphlet, *supra* note 104, at Argument Against (discussing possible effects of CCRI on outreach, mentoring, and tutoring programs).

120. *Id.*

121. See Ballot Pamphlet, *supra* note 104, at Analysis by the Legislative Analyst.

122. See generally CAL. EDUC. CODE § 42245-49 (West 1999).

123. See Ballot Pamphlet, *supra* note 104, at Analysis by the Legislative Analyst.

124. *Id.*

If one considers the broader context of the election debate, voluntary desegregation appears as a virtual non-issue. Indeed, a LEXIS search about the CCRI campaign turned up only a handful of news stories that connected the initiative with desegregation programs. One such account revealed that the pro-CCRI campaign staff itself was taken by surprise with suggestions that the initiative might have ramifications in this area.¹²⁵

The absence of desegregation as an issue during the Proposition 209 debate may be contrasted with an earlier initiative, Proposition I. It dealt exclusively with desegregation. The specific intent of the voters to preserve voluntary desegregation expressed in that initiative arguably should weigh heavily against the virtual silence on the topic in Proposition 209's legislative history.¹²⁶

Finally, for what it is worth, the contemporaneous construction of Proposition 209 by government officials also tends to support the view that CCRI does not apply to voluntary desegregation. To be sure, in the immediate aftermath of the election, the superintendent of California's public school system, relying on the Legislative Analyst's report, included voluntary integration on a list of programs that "could easily be invalidated" under Proposition 209.¹²⁷ Unlike the Legislative Analyst's report, the superintendent's list did not distinguish between types of desegregation programs.¹²⁸ Moreover, her use of the conditional tense hardly bespeaks a definitive construction of Proposition 209.

By contrast, California's Attorney General has taken the position that busing and race-based student assignments do not violate section

125. See Nanette Asimov, *Prop. 209 Gives Special-Funding Schools the Jitters: Money for Integration Could Be Lost*, S.F. CHRON., Oct. 29, 1996, at A11; cf. Jan Ferris, *Initiative Has Some Services in Limbo*, SACRAMENTO BEE, Nov. 28, 1996, at B1 ("Public elementary and high schools weren't the intended targets of Proposition 209"); Sandra Hernandez, *Collateral Damage: CCRI's Impact Will Reach a Lot More Than Affirmative Action*, L.A. WEEKLY, Nov. 1, 1996, at p.34.

126. See *infra* note 128.

127. See Letter to Gov. Wilson from Delaine Eastin, State Superintendent of Public Instruction, Nov. 26, 1996. The letter responded to the governor's Executive Order requesting all public agencies to identify programs likely to be affected by Proposition 209. As such, it might constitute an official finding by the relevant administrative agency to which the courts owe some degree of deference. But for reasons already stated, this fiction hardly seems worth indulging in the case of a constitutional amendment such as Proposition 209, and in any case, the letter contained a laundry list of likely suspects without any real substantive analysis. Similarly, little significance should be placed on the informal, pre-election comments by Joseph Symkowick, the Education Department's general counsel. See *supra* note 22.

128. See *id.*

31.¹²⁹ In any case, no action has been taken at the state or local level to curtail any of these programs in response to CCRI.¹³⁰ The State Assembly has also continued to appropriate funding for voluntary school desegregation, thereby implicitly validating the status quo.¹³¹

V. DOES BUSING DOE DISCRIMINATE?

Most textual analysis of Proposition 209 has focused on the phrase “grant preferential treatment” as presenting the principal interpretive challenge, with the preceding term “discriminate against” assumed merely to reaffirm existing law.¹³² Similarly, the debate before the election centered on the prospective ban on preferential treatment, with supporters and opponents both assuming that this phrase provided the cutting edge of CCRI’s assault on existing law.¹³³ The Legislative Analysts’s appraisal of Proposition 209 did not even discuss the anti-discrimination aspect of clause (a), and focused exclusively on possible interpretations of preferential treatment, the final determination of which, the Analyst cautioned, would require a judicial ruling.¹³⁴

Before investigating the latter term, it makes sense to pause for a moment and consider the meaning of “discriminate” as used in section 31. Some precision in this respect is necessary because, if nothing else,

129. See Volokh, *supra* note 11, at 1344 n.27 (during the litigation over Proposition 209’s constitutionality).

130. See Ruiz, *supra* note 21.

131. See Board of Educ. v. Superior Court, 71 Cal. Rptr. 2d 562, 567 (Ct. App. 1998). Indeed, the legislature has shown an active interest in voluntary desegregation by enacting several changes to statewide policies in this area. *Id.*; See Walrath, *supra* note 28.

132. See Gotanda, *supra* note 11, at 17 (stating that while discrimination has a substantial legal history, “preferential treatment” creates an apparently novel cause of action); see also Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996) (stating “much of this language simply reaffirms existing anti-discrimination protections . . .”).

133. See Ken Chavez, *Language Takes Central Role in Fight Over CCRI*, SACRAMENTO BEE, June 2, 1996, at A1. There was some muddying of the water on the part of the pro-209 forces by their campaign mantra that “preferences for some means discrimination against others.” Ballot Pamphlet, *supra* note 104 at Argument Against. This syllogism, if taken literally, would render the initiative meaningless since discrimination is, of course, already prohibited. As discussed below, the use of discrimination in this sense should be taken more as a rhetorical device, than legal definition. See *infra* note 181.

134. See Ballot Pamphlet, *supra* note 104 at Analysis by Legislative Analyst.

the meaning of preference explored below will be defined, in part, with respect to existing discrimination standards.¹³⁵

To be sure, discrimination has an established pedigree as a legal term. As such, a court could indulge its “irresistible presumption” that voters considered the term against a backdrop of existing legal meaning.¹³⁶ Nothing appeared in the campaign for Proposition 209 that would contradict this established presumption. Yet, this begs the question: which meaning? Discrimination is a protean term appearing in a wide array of legal contexts whose doctrinal contours are by no means homologous.¹³⁷ By specifying the bases according to which discrimination is prohibited—race, gender, ethnicity, etc.—section 31 clearly aims to prevent these categories from factoring into government policies. Yet, the enforcement of such a prohibition would vary according to the specific model of discrimination being implemented.¹³⁸ Which model did the voters intend?¹³⁹

Given that Proposition 209 represents an amendment to the California Constitution, the normal presumption would be to interpret discrimination by reference to its constitutional meaning.¹⁴⁰ Variants of the word “discriminate” that appear in the text of the California Con-

135. See *infra* Parts V-A, V-E, & VI-B.

136. See *Hill v. NCAA*, 865 P.2d 633, 646 (Cal. 1994).

137. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (Powell, J., opinion) (noting that “the concept of discrimination . . . is susceptible of varying interpretations.”). *Id.*

138. One might also ask at what level of meaning discrimination is to be policed. Depending on the context, discrimination can refer to a facial classification, a discriminatory purpose, or even a discriminatory effect. Some commentators have also suggested a fourth level on which discrimination can be assessed, which is social meaning. See, e.g., Charles Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350, 355-58 (1987).

139. See Volokh, *supra* note 11, at 1341. Volokh quotes Supreme Court language from a Title VII case that asks, “whether a program ‘treats a person in a manner which but for that person’s sex [, race, color, ethnicity, or national origin] would be different.’” *Id.* (quoting *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Prof. Volokh, however, does not explain why voters necessarily had Title VII in mind as the model for discrimination in CCRI. There are also reasons to suspect that his simple test may in fact be simplistic. For one thing, the test only focuses on disparate treatment, and ignores the issue of intent. To be liable for disparate treatment, one must specifically *intend* to treat people differently based on their group status. By contrast, under a theory of disparate impact, group status—e.g. sex or race—does not necessarily serve as but-for causes resulting in different treatment, but rather merely needs to show a statistical correlation with unequal outcomes. Volokh does not address these considerations.

140. As noted above, language used within a single body of law is ordinarily assumed to have a common meaning. See Sutro, *supra* note 58.

stitution in two places, neither of which is particularly relevant to CCRI.¹⁴¹ When one considers the term's usage in case law interpreting the California Constitution, however, discrimination has a much wider incident.¹⁴²

The constitutional usage of discrimination most apropos to CCRI would seem to be that associated with the California equal protection clause of article I, section 7. This is the most prominent constitutional provision governing discrimination based on the sort of immutable characteristics—race, gender, etc.—specified in Proposition 209.¹⁴³ Moreover, the latter inserts its new section 31 into the same article as section 7, reinforcing the presumption of a shared meaning.¹⁴⁴ Although the word discrimination appears nowhere in the text of section 7, the equal protection clause, which section 7 does contain, is commonly associated with discrimination case law.¹⁴⁵ Indeed, one might

141. CAL. CONST. art. I, § 8 (guarantying “free exercise and enjoyment of religion without discrimination or preference.”). *Id.*; CAL. CONST. art. XII, § 4 (authorizing a transport commission to “prohibit discrimination . . . or discriminatory charges.”) *Id.* These provisions apply to very different bases for discrimination (e.g., worship or tariffs) than the status categories governed by CCRI and thus would not seem likely candidates for an interpretive model. Section 4 of Article I, however, deserves additional attention because it combines the words “discrimination” and “preference” in an existing constitutional provision. This aspect of the section 4 will be considered later in the context of preferences. *See infra* note 163 and accompanying text.

142. A LEXIS search of the California Constitution turned up 30 different areas in which some variant of the word discriminate appeared in the annotations of a constitutional provision.

143. CAL. CONST. art. § 7. art. I, § 8 also addresses employment discrimination based on a similar list of specified protected categories. *See id.* at § 8. With the emergence of modern equal protection doctrine, however, section 8 has become a relatively little-used provision. The 1983 version of West's Annotated California Code devotes only three pages to section 8 cases—with none in the 1998 supplement. By contrast, the equal protection clause of section 7 accounts for 70 pages of casenotes, plus 24 pages of recent cases provided in the supplement. One might consider the former to be subsumed by the latter, and indeed some section 8 cases today explicitly refer to “equal protection.” *See, e.g.,* Hardy v. Stumpf, 576 P.2d 1342, 1344 (Cal. 1978).

144. *See* Rossi v. Brown, 889 P.2d 557, 576-77 (Cal. 1995) (Mosk, J., dissenting) (statutory language common to a single body of law is presumed to have identical meaning).

145. *See, e.g.,* Salazar v. Eastin, 890 P.2d 43, 46 (Cal. 1995) (plaintiff claimed that charge for transportation violated equal protection); Tobe v. City of Santa Ana, 892 P.2d 1145, 1176 (Cal. 1995) (Mosk, J., dissenting) (asserting that an ordinance that intentionally discriminates violates the equal protection clause).

say that the paradigmatic meaning of discrimination in constitutional contexts is the denial of equal protection.¹⁴⁶

The ballot pamphlet's Argument in Favor underscored this connection when it stated that approval of CCRI would "bring us together under a single standard of equal treatment of the law."¹⁴⁷ To the extent therefore that voters thought of Proposition 209 as reaffirming existing law based on the California Constitution, they would likely have thought of discrimination in equal protection terms.¹⁴⁸ As such, a court adopting a constitutional model would most likely read discrimination in section 31 as coextensive with California equal protection case law.

If so, that application to voluntary desegregation programs such as busing would be unambiguous. As noted, the California Constitution specifies that voluntary desegregation remains permitted under its amended state equal protection provisions.¹⁴⁹ This means that, by definition, such programs do not constitute discrimination.

It is possible, of course, that the discrimination ban in section 31 might incorporate standards taken from sources outside the California Constitution. The absence of debate over this provision seems to argue against an interpretive approach premised on such a fundamental revision to California law.¹⁵⁰ Nonetheless, a case could be made that discrimination in CCRI should be interpreted by reference to the 1964 Civil Rights Act. The ballot pamphlet Argument in Favor informed

146. See BLACK'S LAW DICTIONARY 467 (6th ed. 1990) (defining discrimination in constitutional law using equal protection terms). This association applies equally to state and federal equal protection jurisprudence, as California courts have construed the former as "substantially the equivalent" of the latter. See *Serrano v. Priest*, 487 P.2d 1241, 1249 n.11 (Cal. 1971).

147. See Ballot Pamphlet, *supra* note 104, at Argument in Favor.

148. The additional antidiscrimination language of section 31 would not be redundant, even if read as a reaffirmation of equal protection case law, because it codifies explicit bases for heightened scrutiny which section 7 does not.

149. CAL. CONST. art. I, § 7, cl. (a) (stating that "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan . . ."). *Id.* Although this language was inserted by a constitutional initiative, nothing on the face of the disclaimer is restricted to that specific amendment. Constitutional provisions are to be read as a seamless whole. According to its ordinary and usual meaning, "nothing herein" therefore encompasses the entire section.

150. Revising the applicable standards governing constitutional discrimination would have far wider implications than the repeal of affirmative action on which the CCRI campaign focused. Yet, as mentioned, the main debate during the campaign centered on the meaning of Proposition 209's prohibition of preferential treatment, with discrimination assumed to be merely duplicative of existing standards.

voters that Proposition 209 “restates this historic act,”¹⁵¹ and the Rebuttal to Argument Against further reinforced this association between the initiative and the 1964 Act.¹⁵² From this, one might infer that the key terms of section 31 derive their meaning from that federal statutory source.¹⁵³

Linking CCRI to the Civil Rights Act hardly resolves the ambiguities in the meaning of discrimination, however, because the interpretation given of term varies within the Act itself. Under Title VI, discrimination is read as coterminous with the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁴ Discrimination in Title VII, however, has been read as both narrower¹⁵⁵ and broader¹⁵⁶ than its meaning in the federal constitution. Meanwhile, the circuits are split as to which of these doctrinal models Title IX should follow.¹⁵⁷

Given this uncertainty, a court would likely think twice before continuing down this interpretive path.¹⁵⁸ In any case, there is no reason

151. See Ballot Pamphlet, *supra* note 104, at Argument in Favor.

152. The Rebuttal described the initiative as “us[ing] the legally-tested language of the original 1964 Civil Rights Act.” It added that “[a]nyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act.” See Ballot Pamphlet, *supra* note 104, at Rebuttal to Argument Against.

153. One might also consider additional hints dropped in the ballot arguments. The Argument in Favor makes the promise to voters that “Proposition 209 keeps in place all . . . state protections against discrimination.” See Ballot Pamphlet, *supra* note 104, at Argument in Favor. However, this only means that Proposition 209 does not overrule existing antidiscrimination provisions, not that it does not introduce additional, supplementary standards. See Ballot Argument, *supra* note 104, at Rebuttal to Argument Against. Proposition 209 appears to confirm that latter possibility when it states that “Proposition 209 adds NEW PROTECTION against sex discrimination on top of existing ones.” *Id.* The Rebuttal does not clarify whether these new protections inhere in the discrimination prong of section 31, however, as opposed to its concededly novel anti-preference language. *Id.*

154. See *United States v. Fordice*, 505 U.S. 717, 732 n.6 (1992).

155. See *Johnson v. Transportation Agency*, 480 U.S. 616, 628-29 (1987).

156. Compare *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (Equal Protection Clause does not reach effects alone), with *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII reaches disparate impacts).

157. Compare *Roberts v. Colorado State Bd.*, 998 F.2d 824, 832 (10th Cir. 1993) (Title IX follows Title VII’s model) with *Cannon v. University of Chicago*, 648 F.2d 1104, 1107-08 (7th Cir. 1981) (Title IX coextensive with constitution).

158. In essence, there are two models of discrimination represented in the 1965 Act: Title VII standards and those of federal equal protection. Choosing between these two variant models would present a dilemma. On the basis of textual evidence, Title VII would appear to be the statutory source, which, as the ballot argument promises, CCRI “restates.” See Ballot Pamphlet, *supra* note 104, at Argument in Favor. The language of section 31(a) generally appears to track Title VII more closely than other portions of

to suspect the outcome would be any different under a discrimination standard based on either Title VII or federal equal protection. Voluntary desegregation programs are already subject to federal constitutional standards, and yet have rarely been challenged in court, let alone overturned.¹⁵⁹ The statutory anti-discrimination language of Title VII is generally thought to be narrower than its equal protection equivalent in this regard;¹⁶⁰ therefore, busing would likely pass muster under a Title VII model as well.

the Act. Compare CAL. CONST. art. I, § 31, cl. (a) ("state shall not discriminate against"), with 42 U.S.C. § 2000e-2(a)(1) (1999) (Title VII) ("unlawful [to] . . . discriminate against"), with 42 U.S.C. § 1681(a) (1999) (Title IX) ("no person . . . shall . . . be subjected to discrimination"), and with 42 U.S.C. § 2000d (Title VI) (same). In addition, one can match the other term of prohibition in section 31(a), "grant preferential treatment" with identical language to Title VII. See *supra* notes 89 & 104 and accompanying text. Similarly, the wording of the exception for bona fide accommodations based on sex in section 31(c) almost certainly comes from Title VII. Compare CAL CONST. art. I, § 31, cl.(c) with 42 U.S.C. sect. 2000e-2(e)(1); See Volokh, *supra* note 11, at 1364. On the other hand, one would hesitate on prudential grounds before importing the statutory model of Title VII whose doctrinal tests are specific to the employment context into the far broader horizons of a constitutional context. Instead, adopting the federal constitutional model of Title VI would minimize the potential for far-reaching (and unintended) jurisprudential effects. As noted, the lack of debate over this aspect of CCRI represents evidence from the electoral context that no such changes were intended in the meaning of discrimination. Perhaps for this reason, the courts that have addressed CCRI thus far have analyzed its language in equal protection terms. See *Hi-Voltage Wire Works, Inc. v. San Jose*, 84 Cal. Rptr. 2d 885, 896 (Ct. App. 1998) (relying on federal equal protection precedents to resolve a claim under section 31); *Wilson v. State Personnel Bd.*, No.96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (noting that "Proposition 209 appears to mirror federal and state equal protection guarantees").

159. Although the Supreme Court has never ruled on voluntary desegregation directly, in *Swann v. Charlotte-Mecklenburg Bd. Educ.*, 402 U.S. 1 (1971), the Court stated that race-conscious school assignments designed to promote integration lie "within the broad discretionary powers of school authorities." *Id.* at 16. This dictum had the backing of an unanimous Supreme Court and has never been contradicted. *Cf. Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 472 n.15 (1982) (declining to pass on the issue and citing *Swann*). Most lower courts have accepted the goal of fostering integration as sufficient to pass equal protection scrutiny. See *Johnson v. Board of Educ.*, 604 F.2d 504, 518 (7th Cir. 1979), *vacating as moot* 449 U.S. 915 (1980); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979); *Bolin v. San Bernardino Unified Sch. Dist.*, 202 Cal. Rptr. 416, 420 (Ct. App. 1984) (faculty integration plan); *Olson v. Board of Educ.*, 250 F. Supp. 1000, 1010 (E.D.N.Y. 1966). *But see* *Equal Open Enrollment Ass'n v. Board of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996) (rejecting claim of remedial purpose as unsupported).

160. See *Johnson*, 480 U.S. at 628; *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 351 (D.C. Cir. 1998); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1568 (M.D. Ala. 1995) ("[S]trict scrutiny is more demanding than the Title VII standard . . ."). *Id.*

VI. THE MEANING OF PREFERENTIAL TREATMENT

Unlike discrimination, “preferential treatment” does not have much of a track record. Pre-election analysis of this untested phrase yielded widely varying interpretations of its likely meaning.¹⁶¹ In the Ballot Pamphlet, both the proponents of Proposition 209 and the Legislative Analyst used variants such as “preference” and “prefer” interchangeably with “preferential treatment.”¹⁶² Yet, even if one considers these closely related terms, the picture does not improve much. Although “preference” does appear elsewhere in the California Constitution, the contexts differ from that of CCRI.¹⁶³ A consistent pattern of similar terminology does not appear elsewhere in existing law that is relevant to a civil rights initiative.¹⁶⁴

161. Compare Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1147 (1996) (ethnic studies programs constitute preferential treatment), with *National Association of Women Business Owner: An Open Letter to Governor Pete Wilson* (preferences are already illegal).

162. See Ballot Pamphlet, *supra* note 104, at Argument in Favor & Analysis of Legislative Analyst, *passim*; cf. *Lucas Valley Homeowners Ass’n, v. County of Marin*, 284 Cal. Rptr. 427, 433-34 (Ct. App. 1991) (equating preferences with preferential treatment as used in another provision of the California Constitution).

163. Article VII of the California Constitution states that the “Legislature may provide preferences for veterans” CAL. CONST. art. VII, § 6, cl. (a). Article X(a) allows the courts to give docket preference to certain kinds of cases. *See id.* at art. X(a), § 6, cls. (c) & (d). Neither provision has been extensively interpreted in the courts. The only usage of preference relevant to civil rights appears in Article I, section 4, the same article, which contains section 31. Section 4 guarantees the “free exercise and enjoyment of religion without discrimination or preference.” *Id.* at art. I, § 4. As noted in Part III, the analogy between a preference with respect to “free exercise” (an activity) versus preferential treatment on the basis of an immutable characteristic (e.g., race) appears less than exact. *See supra* note 92. Therefore, one would hesitate assuming that preference in section 31 takes its meaning from section 4. Nor is there any indication that this correspondence of terminology was considered, or even known of, before the election. By contrast, the identification of CCRI’s preference ban with an end to affirmative action formed the crux of the 209 debate. Therefore, it makes sense to consider the meaning of preferential treatment in the context of affirmative action first, and look to the usage of similar language in section 4 only as a secondary source of guidance. Section 4 merits additional interest, though, because it contains both discrimination and preference in the same clause. The relationship between these terms suggested by section 4 in the context of remedies will be considered further in subpart E.

164. *See, e.g.*, BLACK’S LAW DICTIONARY 1197 (6th ed. 1990) (providing technical definitions for preferences in bankruptcy and securities context, but no civil rights and/or generic legal meaning for these terms). Prof. Volokh appears to contend otherwise. By offering a long list of statutory citations where the words “preference” or “preferential” appear—usually accompanying other related terms—he suggests prefer-

A. PREFERENCES OCCUPY A LOOPHOLE IN DISCRIMINATION LAW

One place where preferential treatment does appear to have somewhat of an established contextual meaning is in affirmative action case law.¹⁶⁵ As Professor Volokh has noted, various forms of the word "preference" crop up throughout the United States Supreme Court's decisions in this area.¹⁶⁶ Since Proposition 209 was presented as a referendum on affirmative action, the usage of such language in this context would seem highly pertinent.

In general, the United States Supreme Court uses the term "preference" in its affirmative action cases in accordance with its every day meaning of favoring or conferring advantage.¹⁶⁷ It, however, is instructive to analyze the precise nature of the preferences at stake in these cases. Without exception, the affirmative action preferences to which the Court referred involved formal, deliberate decision-making policies which *on their face* explicitly favored applicants from certain preferred racial or gender groups over others from non-preferred groups in a competition for a scarce resource.¹⁶⁸

ence has an established meaning in antidiscrimination law. *See* Volokh, *supra* note 11, at 1342 n.18. Yet, he does not cite any cases in which such language is given a distinct and authoritative construction. Thus, there is no reason to conclude that preferential treatment represents a term of art any of these contexts, let alone one that can be linked to Proposition 209.

165. This is not to say that "preferential treatment" is used as a term of art in these cases; the meaning of preference remains implicit. Nonetheless, there is evidence that the drafters of Proposition 209 considered the phrase as such, and pointed to these cases as the defining context. To the extent that their views were communicated to the voting public, a stronger case can be made that this context should control the interpretation that the initiative receives. *See* Volokh, *supra* note 11, at 1341.

166. *See* *City of Richmond v. Croson*, 488 U.S. 469, 499 (1989); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 301, 328 (1978); *DeFunis v. Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J., dissenting). *See also* Volokh, *supra* note 11, at 1342 n.19 & 1343 n.24 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 219 (1995)). A similar pattern of usage crops up in affirmative action cases brought under state law in California. *See, e.g.,* *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1383 (Cal. 1980); *Minnick v. California Dep't of Corrections*, 157 Cal. Rptr. 260, 266 n.5 (Ct. App. 1979); *Dawn v. State Personnel Bd.*, 154 Cal. Rptr. 186, 189 n.4 (Ct. App. 1979).

167. WEBSTER'S THIRD NEW INT'L DICTIONARY 1787 (3d ed. 1976).

168. *See Adarand*, 515 U.S. at 217-21 (preference to minority contractors' bids); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 548 (1990) (preference for minority-ownership in broadcast licensing auction decisions); *Croson*, 488 U.S. at 493-94; *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 656 (1987) (gender preference for employment promotions); *Fullilove v. Klutznick*, 448 U.S. 448, 450 (1980); *Bakke*, 438 U.S. at 304 (preference in university admissions for minorities); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (quota for mi-

Normally, such facially discriminatory practices would violate the anti-discrimination provisions of existing law. The United States Supreme Court, however, has upheld the use of preferential racial classifications under certain narrow conditions in a series of equal protection and Title VII cases.¹⁶⁹ In the case of equal protection, the doctrinal mechanism defining the contours of these narrow conditions is strict scrutiny.¹⁷⁰ "Suspect classifications," such as the use of race in affirmative action, are subject to strict scrutiny and only survive if they can demonstrate a compelling purpose and a narrowly tailored scope.¹⁷¹ In the case of Title VII, there is no formal equivalent of strict scrutiny. The Court, however, has read the statutory definition of discrimination contained in Title VII to harbor a similar exception for "bona fide affirmative action plans."¹⁷²

Therefore, in both equal protection and Title VII, existing legal standards of discrimination fall short of an absolute bar on suspect classifications. Affirmative action preferences, while prima facie discriminatory, benefited from this loophole in existing law. Since the intent of Proposition 209 was to end such affirmative action practices, one can understand its ban on preferential treatment to create a new, absolute

nority hiring); *DeFunis v. Odegaard*, 416 U.S. at 332 (Douglas, J., dissenting) (preference in university admissions for minorities).

169. See, e.g., *Croson*, 488 U.S. at 509 (narrowly-tailored preference to remedy pattern of discrimination consistent with equal protection); *Bakke*, 438 U.S. at 318 (Powell, J., opinion) (finding admissions preference to promote diversity constitutional); *id.* at 326 n.1 (Powell, J., opinion joined by Justices Brennan, White, Marshall, & Blackmun who agreed with Justice Powell, subject to proviso of remedial purpose); *Weber*, 443 U.S. at 207 (bona fide affirmative action plan permitted under Title VII).

170. This methodology is common to both state and federal equal protection. See *People v. Applin*, 46 Cal. Rptr. 2d 862, 864 (Ct. App. 1995).

171. See, e.g., *Adarand*, 515 U.S. at 216. Equal protection scrutiny generally applies to classifications stated in rules, in which case the nature of the classification is apparent on the face of the rule. However, similar principles can be applied in the case of an action taken without a specific rule. To do so requires a determination of intent. Government actions are assumed to have reasons. Such reasons may be stated as general rules. If these rules involve a suspect classification, then strict scrutiny applies. Cf. *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (applying strict scrutiny to redistricting plan unduly influenced by racial considerations).

172. *Weber*, 443 U.S. at 202. The Court did not define what qualifies as "bona fide" under this loophole. However, the criteria that the Court pointed to bear a strong resemblance to the requirements of strict scrutiny applicable to affirmative action cases brought under the equal protection clause: i.e., remedial purpose, limited, flexible scope, lack of undue burden on non-preferred groups, and temporary duration. Cf. *United States v. Paradise*, 480 U.S. 149, 167, 177-82 (1987) (applying strict scrutiny to an affirmative action consent decree).

standard, which at minimum outlaws those types of preferential policies used in the affirmative action cases, regardless of their justification.¹⁷³ Suspect classifications based on such preferences would thus be ruled out preemptively before even reaching strict scrutiny or its Title VII equivalent.¹⁷⁴

B. BANNING PREFERENCES DOES NOT ELIMINATE ALL USES OF RACE

The question as-yet-unanswered is whether section 31 goes further than this. Instead of merely narrowing the gap between discrimination and classification sufficiently to eliminate preferences, does section 31 somehow also impose a per se prohibition on racial classifications of any kind? In other words, instead of precluding the use of race in a preferential manner, does it outlaw the use of race in and of itself?

In his interpretive analysis of Proposition 209, Professor Volokh comes close to making this claim. He begins by positing a "simple test" for discrimination as "treat[ing] a person in a manner which, but for that person's sex, race, color, ethnicity, or national origin," would be different.¹⁷⁵ He then observes that in *Weber*, the Supreme Court "carved out an exception [from this test] for certain preferential treatment programs."¹⁷⁶ In *Weber*, the Court upheld an affirmative action plan that involved preferential hiring of minorities against a challenge under Title VII.¹⁷⁷ Although Title VII's statutory prohibition on dis-

173. Cf. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996) ("[T]he primary change Proposition 209 makes to existing law is to close that narrow but significant window that permits [] governmental race- and gender-conscious affirmative action programs . . . under the United States Constitution . . ."). *Id.*

174. Cf. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 84 Cal. Rptr. 2d 885 (1999) (noting that parties in that case agreed that section 31 precludes programs that discriminate or give preference even if there is a compelling government interest).

175. Volokh, *supra* note 11, at 1342 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Volokh's test comes from language in a Supreme Court opinion examining gender discrimination under Title VII. See *Manhart*, 435 U.S. at 710. However, there are reasons to suspect that the "any difference" standard of discrimination suggested by this formulation is overbroad. In the context of gender, at least, there is a whole line of cases which differential treatment did not give rise to a Title VII claim. See *supra* note 158. A more careful reading of Title VII indicates that discrimination requires actual disadvantage, not mere differentiation. See *supra* note 158. Dicta aside, Volokh does not cite any cases with facts to the contrary.

176. Volokh, *supra* note 11, at 1342.

177. *Weber*, 443 U.S. at 209. *Weber* dealt with an affirmative action plan in the private sector. See *id.* at 197. The Supreme Court later offered a rehashing of the same arguments applied to the public sector in *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 626-27 (1987).

crimination by race appeared to make no exceptions for affirmative action plans, the Court managed to circumvent this literal reading of the statute. It did so, in part, by reference to an accompanying provision of the statute: Section 703(j) of Title VII states that “nothing contained in this subchapter shall . . . require any employer . . . to grant preferential treatment”¹⁷⁸ The Court reasoned that, by emphasizing that preferential treatment was not to be *required*, Congress thereby signaled its intent that preferential treatment would nonetheless remain *permitted* on a voluntary basis. Therefore, it ruled that affirmative action preferences need not be found discriminatory under Title VII.¹⁷⁹

Reading Proposition 209 against this context, Volokh argues that “CCRI explicitly says what the *Weber* Court thought Title VII didn’t say: Preferential treatment is not permitted.”¹⁸⁰

Volokh’s account convincingly demonstrates how section 31(a)’s language serves to close the particular loophole recognized in *Weber*. Professor Volokh, however, does not explain how the textual formulation adopted to make that change applies to racial classifications generally.¹⁸¹

178. 42 U.S.C. § 2000e-2(j) (1991).

179. *Weber*, 443 U.S. at 205.

180. Volokh, *supra* note 11, at 1343.

181. Prof. Volokh attempts to finesse this point by arguing that preferential treatment is understood to have the same scope of meaning as discrimination (which under his “any difference” standard would be coextensive with racial classification). *See id.* at 1341 (arguing that “‘preferential treatment’ is just the other side of the discrimination coin”). While Volokh, of course, is correct that the two terms have roughly reciprocal meanings, this hardly means they are mirror-images, as his argument requires. (Nor does he explain why the drafters of CCRI would create such an entirely redundant construction). To defend his premise, Volokh offers two long string cites purporting to demonstrate “the sense in which ‘preferential treatment’ is used in other antidiscrimination laws and in discrimination cases.” *Id.* at 1342 nn.18 & 19. The first footnote, covering “laws,” is mostly statutory; it merely reveals that discrimination and preferences often appear together amidst a list of prohibitory terms. *See id.* at 1342 n.18. This suggests the words have complementary or overlapping meanings, but not identical ones. In addition, the footnote cites article I, section 8 of the California Constitution, the only place in that document besides section 31 in which preference and discrimination appear together. Yet, far from endorsing Volokh’s posited symmetry of meaning, in fact the California Supreme Court has interpreted these terms as having an asymmetric relationship, noting that “[p]reference . . . is forbidden even when there is no discrimination.” *Fox v. City of Los Angeles*, 587 P.2d 663, 665 (Cal. 1978). The second footnote refers to the affirmative action cases already discussed above. *See Volokh, supra* note 11, at 1342 n.19 and accompanying text. The Court’s references to preferences there hardly support Volokh’s reading of the term as synonymous with race-consciousness generally.

This gap in Volokh's argument is troubling because his reading of preferences as embracing racial classifications of all kinds appears broader than its plain meaning will support. Webster's Dictionary defines preferential treatment as "offering or constituting an advantage,"¹⁸² while classifications include any "systematic division into classes or groups,"¹⁸³ whether advantageous or not. Of course, in certain circumstances, courts may presume that voters understood legal terms according to a specialized, technical meaning established in case law. However, there is little reason to believe that this rule would apply here.¹⁸⁴

Concededly, by forbidding the state to "grant preferential treatment," CCRI echoes the words of section 703(j) verbatim.¹⁸⁵ By choosing to insert that exact phrase as a term of prohibition in the initiative, the authors may well have considered that they were using it as a term of art established in Title VII case law.¹⁸⁶ Even if one is willing to impute this conceit of the drafters onto the voters who actually approved Proposition 209,¹⁸⁷ there is still little reason to conclude that the United States Supreme Court's "specialized" usage of the term in cases such as *Weber* justifies a broader construction of the term than its plain meaning. The *Weber* Court was confronted with a quota-hiring scheme that explicitly preferred black employees. In discussing the application of Title VII to those facts, the Court gave no indication that it understood the phrase "preferential treatment" to encompass anything beyond the facially preferential policies then at issue.¹⁸⁸ Throughout its analysis, the Court speaks of "race-conscious affirmative action," but

182. WEBSTER'S THIRD NEW INT'L DICTIONARY 1787.

183. *Id.* at 417.

184. *Cf. Creighton v. City of Santa Monica*, 207 Cal. Rptr. 78, 82-83 (Ct. App. 1984) ("[W]ords must be understood . . . as the words of the voters . . . in the common popular way, and in the absence of some strong and convincing reason . . . they are not entitled to be considered in a technical sense inconsistent with their popular meaning. . . .") *Id.*

185. The only other place in the United States Code this phrase appears is in Title IX of the same statute. *See* 42 U.S.C. § 1681(b) (stating that "preferential or disparate treatment" is not required).

186. The authors of Proposition 209 were familiar with the usage of preferences in the affirmative action cases and gave the specific example of the Court's manipulation of section 703(j)'s preferential treatment clause to support its required/permitted distinction. *See Chavez, supra* note 133 (referring obliquely to the Supreme Court's decision to *Johnson*—the companion case to *Weber*).

187. *Cf. Rossi v. Brown*, 889 P.2d 557, 564 n.7 (Cal. 1995) ("[T]he intent of the drafters may be considered by the court [only] if there is reason to believe that the electorate was aware of that intent.")

188. *See United Steelworkers of America v. Weber*, 443 U.S. 193, 205 (1979).

nowhere does it identify preferences with race-conscious policies of any other kind.¹⁸⁹

The idea that preferential treatment entails more than mere neutral classification is reinforced by the ballot Argument in Favor, the concluding lines of which exhorted readers to “vote for FAIRNESS . . . not favoritism! Reject preferences”¹⁹⁰ Indeed, throughout the campaign, CCRI proponents gained considerable rhetorical advantage by attacking preferences as synonymous with favoritism. Instead of arguing for the eradication of race-consciousness from government policies as a matter of abstract principle, the moral force of the pro-209 case thus rested on the far more emotive issue of fairness in the allocation of government benefits.¹⁹¹

Had the drafters of Proposition 209 really intended to raise a constitutional bar to all government action involving race, they could have done so in a far more straight-forward manner. Instead of prohibiting just *preferential* treatment based on race, they could have written the initiative explicitly to bar *all* racial classifications.¹⁹² Instead, they chose to restrict the wording of the ballot measure to a narrower formulation and waged a campaign focusing on racial favoritism, instead of race per se. One is left with the suspicion that a differently worded initiative with broader implications might not have attracted the votes to pass.

189. *See id.*

190. *See* Ballot Pamphlet, *supra* note 104, at Argument in Favor. Similarly, in the religious context, the California Supreme Court has interpreted an equivalent prohibition on preference as applying to any “benefit [granted] to a religion or religion in general that is not granted to society at large.” *See* *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 840 (Cal. 1991). However, where the state merely accords different, but equivalent treatment to religions and non-religions, this has not been deemed preferential. *See* *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 917-18 (Ct. App. 1989) (display of menorah and Christmas tree as cultural artifacts not unconstitutional preference).

191. *Cf.* Ballot Pamphlet, *supra* note 104, at Argument in Favor (“Government . . . must not give a job, a university admission, or a contract based on race or sex”).

192. Furthermore, if one accepts Volokh’s argument that the ban on preferential treatment actually covers all racial classifications, one might wonder why it was that the drafters included a parallel ban on discrimination, whose scope, by Volokh’s definition, would seem to be entirely subsumed within the meaning of this new preference ban. Volokh does not address this apparent redundancy. However, the pairing of this new term with an old one suggests that the new provision was intended to supersede only a portion of the old, namely that which involves *preferential* classifications.

C. PREFERENTIAL TREATMENT MAY BE LIMITED TO COMPETITIVE SETTINGS

Having concluded that preferential treatment in section 31 retains its literal meaning of conferring advantage, the contours of the advantage or favoritism remain to be clarified, which the prohibition on preferences addresses. As a starting point, it is useful to recall the nature of the preferences in the affirmative action cases, which were the primary target of CCRI. These involved policies explicitly favoring applicants from certain preferred racial or gender groups over others from non-preferred groups in a competition for a scarce resource.¹⁹³

There is some basis for concluding that preferential treatment should be construed only to encompass advantages conferred in similar competitive contexts. The dictionary definitions of preference have the connotation of favoring one party *over another*.¹⁹⁴ Legal contexts in which the terminology of preferences is used—e.g. preferential voting, preferential tariffs, preferences among creditors, preferred stock—similarly suggest favoritism in the allocation of a scarce resource.¹⁹⁵ If these connotations hold, it would push the meaning of preferential treatment in section 31 to something closer to the narrow zero-sum context to which the Ninth Circuit read it as being confined.¹⁹⁶

The rhetoric used in the Argument in Favor lends support to this gloss on preference. The Argument in Favor refers to restoring fairness in *competition*, by dismantling preferential policies.¹⁹⁷ It speaks of the

193. See *supra* note 181. See also *Minnick v. Department of Corrections*, 157 Cal. Rptr. 260, 266 n.5 (Ct. App. 1979) (“[P]references [in affirmative action plan] result in favor of certain ethnic groups . . . to the detriment of the other[s] . . .”). *Id.*

194. Webster’s definition of preference includes “choice or estimation above another.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1787 (3d ed. 1976). American Heritage’s definition has it as “the selecting of someone or something over another or others.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1033 (1996).

195. See, e.g., BLACK’S LAW DICTIONARY 467 (6th ed. 1990) (defining preference as “[p]riority of payment given to one or more creditors.”).

196. See *Associated Gen. Contractors v. San Francisco Unif. Sch. Dist.*, 616 F.2d 1381, 1388 (9th Cir. 1908). Of course, if one adopts a Social Darwinian view, ultimately every benefit or burden has competitive consequences at some level, and every resource is scarce in strict economic terms. For this same reason, the division between zero-sum and non-zero-sum is hard to sustain under any rigorous definition. These terms exist along a continuum of meaning. Any distinction must rest on a subjective evaluation of baseline norms and shared interests. Just because the boundaries are fuzzy, however, does not mean the underlying differences are rendered meaningless.

197. The Argument in Favor mentions the word ‘compete’ twice: speaking of “provid[ing] the tools to compete in our society” and removing “the myth that ‘minorities’ and women cannot compete without special preferences.” See Ballot Pamphlet, *supra* note 104, at Argument in Favor.

necessity to “judge all people equally,” instead of preferring the “less qualified.”¹⁹⁸ As noted, preferences administered in affirmative action programs—the focus of the Argument in Favor—clearly involve competitive settings. Moreover, throughout the campaign, Proposition 209 supporters drilled home the message that granting preferential treatment for one person meant discriminating against someone else.¹⁹⁹ Such zero-sum equations clearly presuppose a competitive context.

Furthermore, this limiting construction accords with that placed on similar anti-preference language elsewhere in the California Constitution. California courts have construed a ban on preferences to religion contained in article I, section 4 as only applying in the context of a scarce resource.²⁰⁰ A key example given by the California Supreme Court in *Fox v. City of Los Angeles*²⁰¹ contrasted a religious symbol displayed on the roof of city hall with the presence of religious books in a library. The former involved a scarce resource (space on the roof), and thus violated Article one, section 4.²⁰² By contrast, even though a library may not stock books on each and every religion, the court indicated that those religions favored by representation were nonetheless not illegally preferred since “[l]ibrarians quite easily can offset a potential for preference” by adding additional books to the shelves in the future.²⁰³ This scarcity rationale in section 4 dovetails nicely with the arguments for restricting preferential treatment in section 31 to zero-sum contexts, as in both cases the limiting factor is a scarce resource.

D. PREFERENTIAL TREATMENT MUST BE INTENTIONAL

A further point of uncertainty as to the scope of section 31(a)'s prohibition concerns the degree to which the preferential treatment contemplated need be intentional. In the case of the affirmative action preferences, the advantage conferred was both deliberate and manifest

198. *See id.*

199. *See Ward Connerly, An Ugly Campaign to Preserve Quotas*, WALL ST. J., Sept. 25, 1996, at A22 (“A preference for some is an injustice for others.”). *Id.*; Linda Seebach, *California Focus: The Subterfuges Behind the Anti-CCRI Effort*, ORANGE COUNTY REG., Apr. 3, 1996, at B06 (“preferences for one group equal discrimination against anyone not in it....”). *Id.* The Ballot Argument also echoed such sentiments with its slogan, “[T]wo wrongs don’t make a right” under a heading of “reverse discrimination.” *See* Ballot Pamphlet, *supra* note 104, at Argument in Favor.

200. *Fox v. City of Los Angeles*, 587 P.2d 663, 665-66 (Cal. 1978).

201. *Fox*, 587 P.2d at 663.

202. *See id.* at 665-66.

203. *Id.*

on their face. While one need not restrict section 31 solely to *facial* preferences, a preferential treatment standard does appear to contain an implied intent requirement.²⁰⁴

In part, this conclusion derives from the plain meaning of the words. First, the word "treatment" focuses on something being done, rather than its end result.²⁰⁵ The distinction between treatment and effect generally turns on one's intent.²⁰⁶ For example, in Title VII, disparate *treatment* is distinguished from disparate impact by the presence of a discriminatory intent.²⁰⁷ Second, this sense of deliberate action conveyed by treatment is arguably reinforced by the use of the verb "grant" in the phrase "to grant preferential treatment."²⁰⁸

Furthermore, support for an intent requirement can be gleaned from the ballot argument, in that a contrary view, linking preferential

204. Gotanda et al., suggest that preferential treatment might inhere in effects alone. See Gotanda, *supra* note 11, at 30. They raise this possibility by analogy to Title VII's disparate impact theory. However, they offer no persuasive reason why such an interpretation *should* be adopted, nor do they take into consideration the drastic implications entailed in transplanting impact theory from a narrowly defined employment context to a much broader constitutional sphere. Cf. *Washington v. Davis*, 426 U.S. 229 (1976) (declining to construe equal protection to reach impacts because this would place an unacceptable burden on the courts and interfere with legislative prerogative). These arguments become multiplied a thousandfold with respect to a preference ban which, by hypothesis, is absolute and unmitigated by any scope for exceptions.

205. For example, a doctor might administer a certain treatment, but whether it achieves the desired outcome is a separate question.

206. *Davis*, 426 U.S. 241. Thus far this article has discussed discrimination and preferential treatment in terms of facial classifications, which represent the dominant methodology in equal protection analysis. However, even a facially neutral statute may nonetheless discriminate (i.e. deny equal protection) if it has discriminatory intent and effect. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979). One would construe preferential treatment, by analogy, to extend to facially neutral statutes that deliberately engender preferential outcomes. Similarly, in Title VII, which deals primarily with actions where no stated rules apply, intent provides the touchstone of a violation. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-02 (1973) (discussing the requirements for intentional racial discrimination in the employment context).

207. See *Davis*, 426 U.S. at 241. Discrimination law (both in Title VII and equal protection) generally requires a strict standard of intent. See *McDonnell Douglas*, 411 U.S. at 800-02. By analogy to that standard, preferential intent would mean that the state actor chooses a specific policy *because* it will prefer some racial or other status-defined group, not merely *in spite* of that probable effect. Cf. *Feeney*, 442 U.S. at 279.

208. To say I *grant* preferential treatment suggests more deliberateness than if I merely act in a way that prefers. Similarly, the connotation of favoritism supplied by the ballot argument suggests the influence of some bias in decision-making, which differentiates preferential treatment from impartial conduct that merely *results* in preferential effects. See Ballot Pamphlet, *supra* note 104, and accompanying text.

treatment to outcomes alone, would defeat the expressed intention of Proposition 209's proponents. Their pro-209 ballot argument emphasized that "[t]he state must remain free to help the economically disadvantaged."²⁰⁹ Given the economically skewed nature of current racial demographics, giving aid to the poor cannot help but yield disparate benefits according to race.²¹⁰ If such skewed outcomes were outlawed as preferential treatment under section 31, the state would be forbidden to do that which CCRI's supporters advertised to voters that it must.²¹¹

E. *REMEDIAL MEASURES TO RESTORE EQUALITY CANNOT BE PREFERENTIAL*

In part, the scenarios addressed in this subsection embody nothing more than the common sense notion that section 31(a)'s preference ban should not prevent that which its antidiscrimination clause requires. To hold otherwise would place the two provisions of section 31 in conflict. Under established equal protection doctrine, remedies of proven discrimination have always occupied a special status to which the normal prohibitions on race-conscious measures do not apply.²¹² Therefore,

209. See Ballot Pamphlet, *supra* note 104, at Rebuttal to Argument Against.

210. *Id.*

211. An objection could also be made that without an intent requirement, a ban on preferential effects would be overbroad and unworkable in practice. See Ballot Pamphlet, *supra* note 104. Almost all race conscious policies will, by their very nature, generate *some* inequality in outcome that reflects the differing positions occupied by various racial groups in society. For example, consider the United States census, a seemingly innocuous exercise of race conscious classification that no one would normally consider as granting preferential treatment. Yet, if one looks to effects, disparities nonetheless emerge. Indeed, the heated controversy over the Census Bureau's proposed shift to a statistical sampling method that would arguably augment the count of certain minority groups underscores the political ramifications at stake. See generally *Census Sensibility*, THE ECONOMIST, July 25, 1998, at 31. Without some method of discriminating between types of effects, imposing a prohibition on any race conscious measure that yields discernible disparities in impact would, for all intents and purposes, amount to a ban on race consciousness per se—something this article has already argued that the term, by its plain meaning and context, does not do. See *supra* notes 190-93 and accompanying text.

212. Cf. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) (stating that where a "constitutional violation has occurred . . . race must be considered in formulating a remedy"); *United States v. Paradise*, 480 U.S. 149, 190 (1987) (Stevens, J., concurring) (strict scrutiny does not apply to equitable remedies).

one would not expect such remedies of discrimination to be affected under CCRI's new preferential treatment standard.²¹³

The more difficult question is the extent to which this understanding of remedy as non-preferential extends to affirmative measures voluntarily undertaken to restore equality. There is some support for this proposition in equal protection law, at least where such remedies are limited to non-zero-sum scenarios.²¹⁴ Moreover, cases examining the relationship between preference and discrimination in the context of religion under article I, section 4 of the California Constitution also suggest that the notion of remedy as non-preferential extends to prophylactic measures.²¹⁵

VII. DOES BUSING GRANT PREFERENTIAL TREATMENT?

Having read the preferential treatment ban of clause (a) to rule out certain "suspect" racial classifications which facially or intentionally confer advantage, it remains now to determine the extent to which busing falls within this definition. This article argues that it does not apply for two reasons. First, the availability of busing as a remedial option in fact may be required under existing California equal protection precedents. If so, it is doubtful that section 31 alters this constitutional requirement. Second, even if busing were not strictly required under these precedents, it still does not fall into the "loophole" in equal protection law that Proposition 209 was designed to close.

The second argument has two components. First, voluntary desegregation plans such as busing may not give rise to a "suspect" classification in a legal sense. As such, voluntary desegregation may not be

213. *Cf. City of Richmond v. Croson*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring) (approving of race-conscious remedies for constitutional violation even while rejecting racial preferences).

214. *See Wilson v. State Personnel Bd.*, No.96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (arguing that "equal protection guarantees may not be implicated by, and strict scrutiny review may not apply to, affirmative government actions which seek to expand employment and other economic opportunities for minorities and women without disadvantaging or burdening persons of other racial groups or men"); *id.* at 13-14 (affirmative action to remedy identified underutilization of minorities in non-zero-sum fashion is not preferential). This argument will be explored in further detail in Part VI-B1. *See infra* notes 236-47 and accompanying text.

215. *See Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 840 n.4 (Cal. 1991) (stating that when "the denial of religious expression . . . would raise the specter of discrimination . . . [a contrary course of action] does not constitute an unconstitutional preference."); *Lucas Valley Homeowners Ass'n v. County of Marin*, 284 Cal. Rptr. 427, 436 (Ct. App. 1991) (zone of preference does not include action "necessary to avert discrimination").

subject to strict scrutiny under equal protection doctrine.²¹⁶ Since strict scrutiny provided the loophole in equal protection law that section 31's preference ban is supposed to close, if desegregation does not trigger strict scrutiny, it would follow, *a fortiori*, that such plans fall outside that prohibition. Second, even if race-conscious desegregation does constitute a suspect classification to which strict scrutiny applies, this article argues that the reciprocal student assignments involved in busing still do not involve the sort of *preferential* classification to which CCRI's prohibition was addressed. This last portion of the argument further divides into two parts. First, busing is distinguished from preferential, zero-sum uses of race because, on its face, it does not confer an advantage to any racial group. Second, to the extent that busing has preferential effects, these effects are justified by its remedial purpose.

A. THE OPTION OF BUSING MAY BE REQUIRED BY THE CALIFORNIA
CONSTITUTION

As explained in Part I-B, segregated conditions in public schools constitute a violation of equal protection under the California Constitution. Moreover, district authorities have an affirmative duty to implement desegregation plans to alleviate such conditions.²¹⁷ Reading section 31 to forbid voluntary desegregation would hamstring the ability of school districts to discharge their constitutional duty under these precedents, denying them a crucial remedial tool that the text of the California equal protection clause explicitly preserves to them²¹⁸ and which

216. Under a Title VII model, the equivalent proposition would be that voluntary desegregation does not give rise to even a *prima facie* case of discrimination to which the "bona fide affirmative action exception" would be invoked. *See supra* notes 158, 171-72 and accompanying text.

217. *See supra* notes 46 and accompanying text.

218. *See* CAL. CONST. art. I, § 7, cl. (a) ("[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan"). As noted, it is not without significance that this provision was itself inserted into the California Constitution via initiative. *See Crawford v. Board of Educ.*, 458 U.S. 527, 531 (1982). That initiative was designed to override one portion of the California Supreme Court's holding in *Crawford*, which had permitted mandatory court-ordered busing. *See id.* at 531 n.3. Yet, in doing so, voters did not alter the constitutional duty to remedy *de facto* segregation, which that case established, and indeed they simultaneously approved the language quoted above specifically preserving the option of voluntary desegregation. This suggests that the electorate agreed that desegregation should be carried out, and that busing could be a legitimate part of that process, so long as the plan in question was drafted by the local school board and not in a judge's chambers. Now comes CCRI with its prohibition on preferential treatment, a term whose outermost limits might impinge on desegregation, but whose wording

case law may require.²¹⁹ Such an interpretation arguably would amount to an implied repeal of this aspect of California equal protection law.²²⁰ Repeals by implication are strongly disfavored in California law.²²¹ Furthermore, CCRI proponents promised voters in the ballot argument that Proposition 209 “does NOTHING to any existing constitutional provisions.”²²² Such an implied repeal would seem to violate that pledge.

Nothing in CCRI’s legislative history suggests an intentional repeal of existing state equal protection law. Voluntary desegregation was conspicuously absent from the list of programs discussed in the Ballot Pamphlet Arguments. Although the Legislative Analyst did address voluntary desegregation, her analysis focused on magnet schools and funding for “racially isolated” schools, two specific types of desegregation programs, which differ from the paradigmatic case of busing,

pertains to much more obvious targets. Moreover, this new initiative arrived amidst a debate in which desegregation appeared nowhere on the radar screens. Under these circumstances, one would not expect this newer, but far more general provision to override the earlier consensus voiced by the California electorate on that one specific issue.

219. Race-neutral methods of achieving voluntary integration would, of course, remain a permissible option. However, the California Courts have already indicated that race-neutral methods may not suffice for a school district to fulfill its affirmative duty to desegregate. *See* *San Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 682-83 (Cal. 1971) (race-based pupil assignments “will often be the only effective device to eliminate de facto segregation”). Furthermore, even if the use of busing is not strictly required in any particular case, its availability as a remedial option may be constitutionally guaranteed as the cases cited in the following note indicate.

220. The California Supreme Court has previously struck down legislation designed to bar race-based student assignments as inconsistent with state equal protection guarantees. *See* *Santa Barbara Sch. Dist. v. Superior Court*, 530 P.2d 605, 614 (Cal. 1975) (holding CAL. EDUC. CODE § 3535 unconstitutional). *Id.*; *see also Johnson*, 479 P.2d at 681-84 (interpretation of statute to forbid race-based pupil assignments would violate state equal protection). Reading section 31 to achieve what these statutes were forbidden to do would effectively override the constitutional basis for these holdings.

221. *See, e.g., Western Oil & Gas Ass’n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 163 (Cal. 1989) (“The presumption against implied repeal is so strong that, [t]o overcome the presumption, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.”). *Id.*

222. *See* Ballot Pamphlet, *supra* 104, at Rebuttal to Argument Against. This assurance came in a section of the Rebuttal that discussed gender discrimination. The preceding sentence noted that “Proposition 209 adds NEW PROTECTION against sex discrimination on top of existing ones, which remain in full force and effect.” *Id.* However, there is no reason to suspect that section 31 effects a repeal of existing protections against racial discrimination any differently than its effect with respect to gender.

examined in this article.²²³ The omission of busing from the Legislative Analyst's report arguably suggested to voters that desegregation of that sort would not be affected by Proposition 209's passage.²²⁴

Furthermore, while the context of the CCRI's campaign reveals inescapable links between Proposition 209 and the affirmative action debate, no similar contextual links to desegregation emerge. Indeed, as noted, the suggestion that voluntary desegregation plans might be affected by the initiative's passage seemed to surprise even the CCRI's proponents.²²⁵

If one considers the perspective of the hypothetical "reasonable voter" discussed in *Hill*,²²⁶ perusing the ballot materials and following the campaign debate in order to decide how to vote, one strongly suspects that such a voter—had she troubled to frame the issue—would have received the impression that Proposition 209 would affect busing. To be sure, section 31, as a constitutional provision, embodies general principles as to which the ballot discussion can be taken as only illustrative. Yet, the sum of these materials creates the distinct impression that, whatever else preferential treatment might mean, its scope would not extend to busing.

B. BUSING FALLS OUTSIDE OF THE LOOPHOLE THAT CCRI AIMED TO CLOSE

As explained in Part V-A, the ban on preferential treatment that section 31 imposes was designed to close a loophole in antidiscrimination law. Before the enactment of CCRI, certain preferential classifications—paradigmatically those identified with affirmative action case law—had evaded the constitutional prohibitions on such "suspect" uses of race via the narrow window afforded by strict scrutiny.²²⁷ Section 31's preference bar, therefore, can be understood as now precluding such preferential uses of race without exception. The question to be addressed here is whether busing falls into the category of "suspect" classifications, which this new standard targets.

223. See Ballot Pamphlet, *supra* note 104, at Analysis by Legislative Analyst.

224. See *infra* notes 271-72 and accompanying text.

225. See Asimov, *supra* note 125; cf. Jan Ferris, *Public Schools Concerned About Prop. 209's Reach: Some Fear that Elementary and Secondary Programs May be at Risk*, ORANGE COUNTY REG., Nov. 28, 1996, at A4 ("Public elementary and high schools weren't the intended targets of Proposition 209"). *Id.*

226. *Hill v. NCAA*, 865 P.2d 633, 644 (Cal. 1994).

227. As noted, Title VII case law offers an equivalent exception for bona fide affirmative action plans. See *supra* notes 158, 171-74 and accompanying text.

1. *Busing May Not Constitute a Suspect Classification*

The first question to ask is whether voluntary desegregation programs that explicitly use racial criteria in determining district-wide pupil assignments constitute a "suspect" classification. In essence, we must determine whether these programs would be put to the test of strict scrutiny under current equal protection standards. If not, they fall outside the loophole in antidiscrimination law that Proposition 209 was designed to end.

Since CCRI amends the California Constitution, the particular loophole that section 31 addresses presumably exists within California law, specifically California equal protection case law.²²⁸ Would busing be "suspect" under California's equal protection clause? Recall that the language appended to that clause states explicitly that "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan"²²⁹ This categorical exclusion strongly suggests that voluntary desegregation is not the sort of suspect use of race to which California equal protection scrutiny applies. If so, logically it would not constitute preferential treatment under section 31 either.

One might argue that although this specific exclusion overrides the normal operation of state equal protection doctrine, nonetheless race-conscious desegregation programs are the kind of thing to which strict scrutiny generally applies, and thus fall within the purview of CCRI. Even without the exclusion, it is far from clear that busing would trigger strict scrutiny under California law. Recall that segregated schools themselves constitute a violation of California equal protection standards that school districts have an affirmative duty to remedy.²³⁰ If so, a desegregation plan adopted to remedy that constitutional violation arguably should not itself be deemed suspect under the

228. This article has already argued that discrimination in section 31(a) similarly tracks the equal protection California Constitution standards. *See supra* notes 5 & 40 and accompanying text.

229. CAL. CONST. art. I, § 7 cl. (a). As will be elaborated below, this language was inserted via a previous constitutional initiative that limited the power of state courts to order busing. *See supra* note 218. However, nothing on the face of the disclaimer is restricted to that specific amendment. Constitutional provisions are to be read as a seamless whole. According to its ordinary and usual meaning, "nothing herein" thus encompasses the entire section.

230. *See Crawford v. Board of Educ.*, 551 P.2d 28, 43-44 (Cal. 1976).

same standard.²³¹ One might question whether such remedial measures even represent classifications *on the basis of race*.²³²

Furthermore, even without this special remedial duty imposed by California case law, it remains an open question whether voluntary desegregation would be subject to strict scrutiny under federal equal protection standards, to which California law otherwise generally conforms.²³³ As noted previously, in *Swann* the Supreme Court stated that race-conscious school assignments designed to promote integration lie “within the broad discretionary powers of school authorities.”²³⁴ One might argue that the *Swann* Court merely was signaling that public school integration represented a compelling purpose that would therefore survive strict scrutiny. Yet, in the same passage, the Court indicated that a school board was free to pursue this purpose by means of rigid quotas aimed at proportionate representation—a practice seemingly incompatible with strict scrutiny.²³⁵

Swann was decided in 1971, roughly a decade before the Court took up its principal affirmative action cases. At this stage, it remained an open question whether race-conscious policies undertaken for “benign” motives such as desegregation would be subject to the same strict

231. *Cf. McDaniel v. Barresi*, 402 U.S. 39, 40-41 (1971) (school district’s affirmative duty to disestablish segregated schools permits voluntary use of race-conscious measures).

232. *Cf. City of Richmond v. Croson*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (remedies to identified victims of past discrimination involve classifications on the basis of a violation, and thus do not involve classifications by race). Although Justice Scalia focused on individual victims of discrimination, his rationale could apply equally to a class action where plaintiffs of a given racial group assert discrimination in an identified context. In California, minority students in segregated schools constitute just such a class. *Cf. id.* at 524-25 (Scalia, J., concurring) (failure of school district to fulfill its affirmative duty to desegregate represents a continuing equal protection violation).

233. *See Serrano v. Priest*, 487 P.2d 1241, 1249 n.11 (Cal. 1971) (noting that California’s equal protection standards are “substantially the equivalent” of their federal analogue).

234. *McDaniel*, 402 U.S. at 16. Because the facts at issue in *Swann* involved court-ordered busing, this portion of the opinion represented dicta. *See id.* at 6-7. Yet, coming from a unanimous Court, it remains highly persuasive.

235. *Compare id.* at 16 (“[I]n order to prepare students to live in a pluralistic society . . . [school authorities may] prescribe ratio of Negro to white students reflecting the proportion for the district as a whole”), with *Croson*, 488 U.S. at 507 (rigid numerical quota fails narrow tailoring requirement of strict scrutiny; goal of racial balancing impermissible).

scrutiny as other racial classifications.²³⁶ One might therefore think *Swann* can be explained as a benign motive case to which the Court had prematurely presumed the applicability of a more lenient standard. Yet, in the first opinion to reject that premise, applying strict scrutiny to affirmative action, and holding motive irrelevant to the standard of review, Justice Powell, writing in *Bakke*, maintained that school desegregation differed from affirmative action for reasons that had nothing to do with motive.²³⁷

Justice Powell sought to distinguish a pair of lower court opinions that had upheld voluntary school desegregation without applying strict scrutiny. Rather than rejecting their holdings as erroneous, Justice Powell argued the rationale of the lower courts did not apply in zero-sum contexts such as affirmative action where racial criteria were applied to favor one applicant at another's expense.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood. . . . Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.²³⁸

Justice Powell thus distinguished what he called "preferential classifications" from the use of race in a non-zero-sum context such as school desegregation.²³⁹ In doing so, Powell implied that only preferential classifications—such as those used in affirmative action—de-

236. This asymmetry in the standard of review was deemed justified under the rationale of Justice Stone's famous footnote in *Carolene Products*, which provided the original intellectual underpinnings for strict scrutiny itself. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Since heightened scrutiny was designed to protect discrete and insular minorities from majoritarian abuses, the logic went, measures aimed at *helping* such minorities need not be regarded as presumptively suspect and thus merited a less stringent standard of review. However, a decade later, the Court explicitly rejected this rationale in its affirmative action cases, holding the applicability of strict scrutiny to be determined by the *type* of classification, not the identity of the specific groups being classified. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-28 (1995); see also *Croson*, 488 U.S. at 493.

237. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298-306 (1978) (Powell, J., opinion). Although Justice Powell wrote for himself, his was the deciding vote among an evenly divided Court. As such his opinion remains widely accepted as the law of the land. See Robert Post *Introduction: After Bakke*, in *RACE AND REPRESENTATIONS/AFFIRMATIVE ACTION 2* (Summer 1996).

238. *Bakke*, 438 U.S. at 300 n.39.

239. *Id.* at 300-02.

manded strict scrutiny.²⁴⁰ Desegregation, being non-preferential, would thus be reviewed under a less stringent standard.²⁴¹

Justice Powell's distinction went unnoticed in later affirmative action cases that continued to push (at least rhetorically) towards establishing strict scrutiny as the standard applicable to *all* racial classifications.²⁴² As noted, voluntary school desegregation never came before the Court, so the specific issue never arose.²⁴³ Yet, as strict scrutiny became entrenched as the dominant methodology for reviewing affirmative action cases, its influence inevitably bled into the desegregation decisions reached in the lower courts. Where earlier courts had applied more lenient standards of review to voluntary desegregation programs,²⁴⁴ most decisions in recent years have gravitated towards strict scrutiny as the applicable standard.²⁴⁵ Such decisions, however, are few and far between.²⁴⁶ Courts have declined to apply strict scrutiny

240. *See id.* at 300-05. The California Supreme Court in its decision below had made a similar "distinction between a classification which grants a benefit to one race at the expense of another and one which does not have that effect," with only the former requiring strict scrutiny. *See Bakke v. Regents of Univ. of California*, 553 P.2d 1152, 1168 n.25 (Cal. 1976).

241. *Cf. Bolin v. San Bernardino City Unified Sch. Dist.*, 202 Cal. Rptr. 416 (Cal. App. 1984) (relying on the same zero-sum/non-zero-sum distinction suggested by Powell in declining to apply strict scrutiny to a faculty integration plan).

242. *See, e.g., Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 226-28 (1995); *Croson*, 488 U.S. at 493.

243. Powell continued to recognize that school desegregation cases "differ significantly from the Court's subsequent affirmative-action decisions" in equal protection terms. *United States v. Paradise*, 480 U.S. 149, 186, 188 n.2 (1987) (Powell, J., concurring). In a dissenting opinion in a totally different context, Powell suggested that desegregation *should* be subject to strict scrutiny. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 491 n.6 (1982) (Powell, J., dissenting).

244. *See Olson v. Board of Educ.*, 250 F. Supp. 1000, 1009 n.30 (C.D.N.Y. 1966) (applying a reasonableness standard).

245. *See Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (9th Cir. 1998) (applying strict scrutiny to a consent decree); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 717 (2d Cir. 1979) (applying strict scrutiny to voluntary desegregation plan); *Johnson v. Board of Educ.*, 604 F.2d 504, 515 (7th Cir. 1979) (same); *Equal Open Enrollment Ass'n v. Board of Educ.*, 937 F. Supp. 700, 705-06 (N.D. Ohio 1996) (same). *But see Bolin v. San Bernardino City Unified Sch. Dist.*, 202 Cal. Rptr. 416 (Ct. App. 1984) (declining to apply strict scrutiny to a faculty integration plan).

246. Moreover, most of these cases involved special facts in which the burden of the particular desegregation plan was not equitably distributed among all races equally. *See Ho*, 147 F.3d at 858 (magnet schools with preferential admission standards favoring minorities); *Parent Ass'n*, 598 F.2d at 710 (enrollment cap on minority children to prevent "white flight"); *Johnson*, 604 F.2d at 508 (same). A close reading of the fourth

to race-conscious policies in other cases where the classifications at issue did not involve zero-sum preferences.²⁴⁷

The bottom line is that the level of scrutiny applicable to voluntary desegregation under federal equal protection remains an open question until the United States Supreme Court clarifies this area of law. Its recent decisions on voter districting indicate that federal equal protection jurisprudence remains in flux.²⁴⁸ Although in general, the outcome of these cases support a broader application of strict scrutiny to racial questions,²⁴⁹ they came down as 5-4 decisions. Moreover, the facts of the districting cases are distinguishable from voluntary desegregation.²⁵⁰ Therefore, it remains uncertain whether a busing plan

case, *Open Enrollment*, reveals a more even-handed policy was in place in that whites were prevented from transferring out, while minority transfers were not allowed in. However, the court analyzed the case throughout as if the no-transfer policy applied only to whites. *See* 937 F. Supp. at 704, 705-09. None of these cases involved the paradigmatic, reciprocal intra-district student assignments, which busing plans normally establish.

247. Most recent cases of this kind have involved minority outreach policies. *See, e.g.,* NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (characterizing race-specific outreach as "race-neutral" for purposes of equal protection scrutiny); Raso v. Lago, 958 F. Supp. 686, 701-03 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1st Cir. 1998) (race-specific outreach is not suspect classification); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1551-56 (M.D. Ala. 1995) ("inclusive" affirmative action to expand the applicant pool does not require strict scrutiny); Domar Elec., Inc. v. City of Los Angeles, 48 Cal. Rptr. 2d 822, 831-33 (Ct. App. 1995) (outreach race neutral). *But see* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998) (applying strict scrutiny to outreach); Monterey Mechanical Co. v. Wilson, 125 F.3d 703 (9th Cir. 1997) (same). *See also* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156, 158 (E.D. Va. 1964) (keeping of racial statistics does not present equal protection issue).

248. *See generally* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

249. Unlike affirmative action where racial classifications unmistakably disadvantaged the nonpreferred class, these voting rights cases addressed the permissibility of race conscious government action that did not burden any identifiable group. Indeed, the *Miller* Court explicitly distinguished earlier vote dilution cases where state action "disadvantag[ed] voters of a particular race." 515 U.S. at 911. Instead, it stated "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters in districts." *Id.* *See also* Bush, 517 U.S. at 1008-10 (Stevens, J., dissenting) (making this even more explicit).

250. The voting cases addressed the use of race in districting to separate voters into racially-defined blocks. As such, their holdings finding such racial segregation unconstitutional seem distinguishable from the desegregation context in which race is used to integrate. The *Miller* Court, for example, cited a long string of racial segregation cases, from *Brown* onward, as support for the proposition that government-enforced racial separation violates equal protection. *See Miller*, 515 U.S. at 911. In addition, there is language in *Miller* that focuses on the particular dangers of segregation in the context

would face strict scrutiny under a federal equal protection analysis. In any case, as noted, section 31 would most likely apply a California equal protection standard in which special allowances for desegregation make strict scrutiny less warranted.²⁵¹

of electoral districting; the opinion bemoaned “demeaning . . . stereotypes” and noted that “[r]acial gerrymander[s] . . . balkanize us.” *Id.* at 912. Yet, the *Miller* Court also put a new spin on the *Brown* segregation cases, describing equal protection as embodying the “simple command that the Government must treat citizens as individuals, not as simply components of a racial . . . class.” *Id.* at 911. By this account, racial classifications become suspect by their very act of making group-based distinctions. In doing so, *Miller* appears to refashion *Brown* from a sociological proposition about American Apartheid to a far more abstract statement of principle against race consciousness per se. Through this logic, the conservative wing of current Court seems intent on driving equal protection to advance its vision of color-blind absolutism. In any case, as noted, the votes on these cases were close, and the underlying equal protection issues present deep jurisprudential questions that are not necessary to resolve here.

251. This article (and the California courts thus far) have analyzed section 31 in terms of equal protection principles. In the event, however, that section 31’s prohibition on preferential treatment were construed based on a Title VII model, the outcome would arguably not change as Title VII discrimination has been read as narrower than that of equal protection. *See Johnson v. Transportation Agency*, 480 U.S. 616, 628 (1986). It may be worth elaborating briefly why:

Unlike the equal protection models in which discrimination turns on the application of strict scrutiny to suspect classifications, Title VII has statutory language that bans discrimination directly. In particular, Title VII may impose a higher threshold requirement than merely identifying a classification. Whereas to classify suggests merely the making of distinctions, without any implication of inequality, the use of discrimination in Title VII appears to contemplate more than mere distinctions. At least implicitly, its wording evokes expectations of unequal treatment. To incur a violation, an employer must “discriminate *against* [an] individual with respect to his compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1)(1996) (emphasis added). The inclusion of the preposition “against” suggests action contrary to the recipient’s interests. The language of Title VII thus requires “some meaningful distinction that either burdens or benefits an [individual’s] employment privilege.” MACK PLAYER, EMPLOYMENT DISCRIMINATION LAW 423 (West 1988); *cf. Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1271-72 (9th Cir. 1998) (reversing a lower court that had dismissed a Title VII claim on the grounds that plaintiffs suffered no adverse effects—but in doing so implicitly confirming that adverse effects are a requirement).

In addition, Title VII case law supports the proposition that differential treatment need not give rise to discrimination. Certain cases have allowed employers to make distinctions in treatment based on gender without giving rise to a Title VII claim. *See generally Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (grooming codes); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979) (uniforms). Note these cases did *not* invoke Title VII’s exception for bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1); they held that the conduct did not amount to even a prima facie violation of Title VII. Although no precisely analo-

2. *Busing Does Not Confer an Advantage to Any Group*

Even if busing were subject to strict scrutiny, this would not mean it was preferential. On some readings of equal protection doctrine, all race-conscious government action is "suspect" in this way. This article, however, has already argued that section 31(a)'s prohibition does not preclude racial classifications unless they are "preferential." In essence, this means determining whether busing confers an identifiable race-based advantage, either facially or intentionally.

Busing might do this in two ways. First, within a given neighborhood, children from one race might be assigned out to more distant schools while those of another race would be permitted to attend schools locally. One could argue that avoiding the burden of being bused across town represents a preference to those who stay. Second, as between neighborhoods, one could argue that busing prefers those local schools that are of an inferior quality to those whose schools are of a higher caliber.

a. The Burden of Being Bused

Addressing only the first objection (and thus assuming for the present that all schools are of equal quality), one must determine whether avoiding the burden of being bused amounts to preferential treatment on the basis of race. On one level, this argument has some force. After all, equality is an individual right.²⁵² It is hardly a consolation that other children of a different race are being bused into your neighborhood school, if you have leave to go elsewhere because your race is overrepresented.²⁵³ Indeed, Justice Powell hinted in *Bakke* that

gous cases have been reported involving race, the principles at stake may be generalized in other circumstances. *Cf. Norman*, 135 F.3d at 1272 n.20 ("a case involving two different but equivalent tests administered to men and women" would not give rise to a Title VII claim). *Id.* If men and women can receive different tests without prompting charges of discrimination, what would be the objection if, for example, Jewish employees were tested for Tay-Sachs disease, while their African-Americans colleagues received screening for sickle cell anemia?

Because the reciprocal student assignments involved in busing provide students of each race with different, but equivalent treatment, arguably no Title VII violation would lie. Although there are obvious objections to these premises, they will be dealt with in the discussion of preferential treatment below.

252. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (Powell, J., opinion).

253. *Cf. Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 717 (2d Cir. 1979) (calling for strict scrutiny where desegregation plan burdens individual members of a given race even if it benefits other members of the same group).

“extensive pupil transportation . . . might threaten liberty or privacy interests” of students, thus undermining the logic of fungibility (one school as good as the next), which he saw as distinguishing desegregation from affirmative action.²⁵⁴

The flaw in this mode of analysis, however, is that it assumes that neighborhood schooling represents a preexisting norm. All students have the right to a place in school, but there is no right to go a particular school.²⁵⁵ Students who are bused are not “denied admission” by local schools because school desegregation plans determine placements on a district-wide basis.²⁵⁶ Shifting the analysis from particular schools in particular neighborhoods, to the district as a whole, changes the bases of comparison. Judged at the district level, busing does not disadvantage anybody on the basis of race because all races—from all neighborhoods—suffer an equal burden.²⁵⁷

A desegregation plan based on such neutral, redistributive principles thus appears non-preferential on its face. To be sure, certain individuals may feel relatively disadvantaged by its effects.²⁵⁸ Yet, to grant preferential treatment connotes favoritism.²⁵⁹ A desegregation plan that spreads its burden equally on all races hardly exhibits favoritism.²⁶⁰

254. See *Bakke*, 438 U.S. at 301 n.39.

255. See *Johnson v. Board of Educ.*, 604 F.2d 504, 515 (7th Cir. 1979).

256. As noted, the situations presented by *Parent Ass'n* and *Johnson* may be distinguishable in this respect, because these cases dealt with restrictions solely on minority students' attendance at particular schools so as to prevent “white flight.” See *Parent Ass'n*, 598 F.2d at 718-20; *Johnson*, 604 F.2d at 507-09.

257. To illustrate why this is so, consider the following hypothetical: In theory, a school district could assign all of its students to be bused to schools elsewhere in the district. Assume that it did so according to some random algorithm. Now consider the case in which these random assignments were adjusted to balance out the racial distributions. Who would be disadvantaged under these circumstances?

Yet, if such a system were not preferential, why should it be preferential treatment to implement a modified system that allowed some portion of the student body at each school to be drawn from the immediate neighborhood so as to minimize the inconvenience of busing while still respecting the primary goal of racial balancing? Surely, it would be perverse to condemn this modified system under section 31 when students of all races benefit by reduced school commutes.

258. One might question, however, whether the relative disadvantage on these students is allocated on the basis of race, as section 31's terms require, as opposed to advantage/disadvantage on the basis of geography and demographics.

259. See *supra* note 158 and accompanying text.

260. Although the dislocation caused by a busing plan may cause some inconvenience to individual students, such plans are carried out in spite of, and not because of, these adverse effects. Cf. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Accordingly, although individual students may feel disadvantaged by busing, one cannot say that the effects of the plan as a whole represent preferential *treatment*.²⁶¹

This conclusion may hold even if one focuses on an individual neighborhood in which local assignments represent a baseline norm. Bused students may bear a commuting burden not shared by their neighbors; yet, one would not normally speak of the district as having “granted preferential treatment” to those who remain enrolled in neighborhood schools for two reasons. First, the students who stay local are no better off than they would have been in the absence of a desegregation plan. From their standpoint, although their classmates suffer a burden, they are not preferred. Second, the fact that school assignments do not occur in a competitive setting makes any ready assessment of its impact problematic.²⁶² No one applies for admission to a particular school; they are assigned places by administrative fiat. Who is to say that it is not the bused students who are preferred? Although the dislocation and additional travel entailed may be unwelcome to some, they might reap benefits from studying in a more diverse setting. Because nobody is actually competing for placements, keeping score as to winners and losers thus remains contingent upon extrinsic value judgments.²⁶³

For all of these reasons, it would take a stretch of language to say that the burden of being bused alone constitutes preferential treatment. At this juncture, it may help to revisit the distinction made by Justice Powell in *Bakke* between the race-conscious assignments made in desegregation plans and the far more problematic zero-sum use of race in affirmative action. In his terminology, “preferential classifications” referred only to the latter. Justice Powell’s choice of words is hardly idiosyncratic.²⁶⁴ Affirmative action has become synonymous with pref-

261. Note that a different question is presented if the burdens of desegregation fall disproportionately on a single race. Cf. *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 596 (9th Cir. 1988) (considering such a claim); *Higgins v. Board of Educ.*, 508 F.2d 779, 794 (6th Cir. 1974) (same).

262. As noted earlier, there is reason, in any case, semantically to construe preferential treatment as being limited to competitive settings. See *supra* note 158 and accompanying text.

263. By contrast, if preferential treatment were to apply only to competitive settings as suggested above, then the need to engage in such speculation would be unnecessary; preferential effects could be assessed by reference to the common objective(s) being contested.

264. Indeed, as noted above, the plain meaning of preference in and of itself suggests a zero-sum context such as affirmative action.

erential treatment in case law and in practice.²⁶⁵ Yet, voluntary desegregation is rarely thought of as preferential.²⁶⁶

Such semantic contrasts rest on genuine substantive differences. A comparison of the racial balancing involved in school desegregation versus university admissions, for example, shows why only the latter should be properly deemed preferential treatment. Whereas everybody has the right to a lower school education and school assignments operate on a district-wide level, university admissions are selective, and each university makes its own decisions independently. As a result, in the lower school context, an “underrepresented” race at one school will, by definition, be “overrepresented” somewhere else, and desegregative busing merely trades students from one school to another. By contrast, affirmative action for the benefit of underrepresented races in university admissions offer no such guarantee of offsetting reciprocities elsewhere. Instead, racial balancing in a university context entails allocating a greater share of admission slots to one race at the expense of other nonpreferred races, leaving otherwise qualified candidates out in the cold.²⁶⁷

Moreover, as noted, neighborhood schooling is purely a matter of administrative tradition and convenience. A policy decision to reassign students to other schools for desegregation purposes thus violates no a priori norms. By contrast, university admissions are supposed to operate on merit. For example, the University of California, by law, reserves slots for the top 12.5% of California high school graduates. Granting admissions preferences to certain students derogates from this preexisting principle of meritocracy. For all of these reasons, a “zero sum” context such as university admissions seems intrinsically preferential where busing does not.

As noted, the legislative history of CCRI supports this intuitive understanding of preference as pertaining to a zero-sum context. The

265. Affirmative action plans make no secret of their preferential nature and openly use the term “preference” to describe their policies. *See, e.g.*, Minority/Women/Local Business Utilization Ordinance, San Francisco Administrative Code, Chapter 12D (Ord. 175-89) (describing a bidding preference conferred to women and minority contractors as part of the city’s affirmative action program for public contracting); CAL. EDUC. CODE REGS, tit. 5, § 53006(c) (preference in state community college hiring).

266. The desegregation cases cite above refer to the student assignment policies at issue as being racial classifications, but never as “preferences” or “preferential.”

267. In terms of the religion cases paradigm, this makes universities like the roof of city hall (i.e. a scarce resource), while desegregation resembles a library collection (with potential for equalizing offsets).

pro-209 campaign was waged primarily as a referendum on affirmative action.²⁶⁸ The examples given in the Argument in Favor, of preferential evils that CCRI was designed to proscribe were drawn exclusively from zero sum contexts.²⁶⁹ And throughout the campaign, Proposition 209's supporters emphasized that granting preferential treatment to one person means discriminating against someone else.²⁷⁰ Desegregation simply does not fit within this model because, at the end of the day, every student still gets a place in school, which is all they were entitled to going in.

b. Disparities in School Quality

A second potential objection remains to be addressed. So far, the analysis has assumed that all schools are equal in quality and, thus, school placements are fungible. Yet, unfortunately, public schools may not all be equal. Schools in affluent, predominantly white neighborhoods may be more desirable than those in poorer minority areas for any number of reasons.²⁷¹ Assuming that school quality does correlate to some extent with race and income, then busing would disproportionately favor those students whose racial groups predominate in poorer neighborhoods.

Even so, this does not necessarily constitute preferential treatment. Desegregation plans operate solely with respect to racial distributions, and, on their face, take no account of school quality.²⁷² Thus,

268. Or rather, to be precise, against the preferential incarnation into which affirmative action had devolved.

269. The Ballot Argument in Favor states that Government "must not give a job, a university admission, or a contract based on race or sex." See Ballot Pamphlet, *supra* note 104, at Argument in Favor. It says nothing about lower school placements.

270. See *supra* note 117.

271. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56-58 (1973) (discussing correlation between financial and racial demographics and educational quality). For the sake of simplicity, much of the following discussion will be framed in terms of the dominant majority/minority paradigm traditionally associated with desegregation. To be sure, California's increasingly diverse communities—and especially its multi-ethnic public school populations—make such generalizations suspect. Moreover, the educational achievements of certain Asian ethnic groups have turned the notion disadvantaged minorities on its head. See generally Selena Dong, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995). However, these realities only further obscure the preferential effects of desegregation and correspondingly enhance its benign diversity-value.

272. Presumably, the correlation between school quality and race would be statistical and, as such, identifiable mainly in the aggregate. It strains credulity (and enters the realm of bigotry) to assume that every predominantly white school, for example, is

any such disparity in outcomes might be described as a preferential effect. One, however, should not readily equate preferential effects with preferential *treatment*. As noted above, preferential treatment almost certainly has an intent requirement.²⁷³

Still, an objector may persist, desegregation does not result in preferential outcomes by happenstance. Arguably, the whole point of such programs is to benefit minority children by getting them out of inner city schools. There is certainly room for debate over the intent behind desegregation. Authorities differ as to whether the goal is to benefit minorities in particular or merely to ensure that students of *all* races profit from a diverse learning experience.²⁷⁴ Doubtless each view has some basis in fact—intent is rarely an unidimensional phenomenon.²⁷⁵

Even if one accepts the premise that desegregation is designed to favor minorities, one would still hesitate to call such programs to *preferential* treatment,²⁷⁶ when all they seek to do is ensure that minority

superior to *every* school in which minority students predominate. In fact, if student quality provides any indicator, the educational achievement of certain minority groups in California exceeds that of whites. *Cf.* *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1318 n.2 (N.D. Ca. 1997) (showing Chinese-American students outperform other ethnic groups on standardized tests). As such, one cannot elide treatment with effects by arguing that the two are intrinsically and unalterably linked.

273. *See supra* notes 204-11 and accompanying text.

274. *Compare* *Washington v. Seattle Sch. Dist.*, 458 U.S. 472 (1982) (“[D]esegregation . . . inures primarily to the benefit of the minority and is designed for that purpose.”) *with id.* at 495 (Powell, J., dissenting) (“[C]hildren of all races benefit from exposure to ‘ethnic and racial diversity in the classroom.’”) *Id.* at 497 n.12 (Powell, J., dissenting) (“It is far from clear that . . . mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities.”) *Id.*

275. Furthermore, the legal methodologies for divining intent leave much to be desired. From here, one could proceed to squabble over the extent to which ulterior motives should control over ostensible purpose. One could also dispute whether the newer *Miller* standard requiring that race be the “predominant factor” in the design of voter districts should apply to school assignments as well, in lieu of the established *Arlington Heights* “motivating factor” test. *Compare* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 271 & n.21 (1977) *with* *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

276. And here one would need to be precise about exactly how it favors them. Most accounts suggest that the “benefit” conferred inheres in the removal of segregated school conditions, as opposed to any change in the caliber of instruction offered. *Cf.* *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878, 880-81 (Ct. App. 1963) (“The segregation of school children into separate schools because of their race, *even though the physical facilities and the methods and quality of instruction . . . may be equal*, deprives the children of the minority group of equal opportunities for education”) (emphasis added). *Id.* The fact that certain minority students bused to the suburbs may receive

children have access to the same opportunities as everyone else. To condemn busing as preferential treatment would assume that white children have some preexisting right to the "good" schools, when their claim is based, at best, on some arbitrary confluence of geography, economics, and racial demographics.²⁷⁷ Again, nobody has a right to go to a particular school in a district funded by all. Desegregation may even out the distribution of races attending schools in the district, but it certainly does not give minority students a disproportionate share of the places at any given school.²⁷⁸ A policy of ensuring that students of all races enjoy equal educational opportunities seems the very antithesis of granting preferential treatment.²⁷⁹

This common sense conclusion is backed by a wealth of legal precedent. The California Supreme Court has held that education is a fundamental right ensured by the California Constitution.²⁸⁰ Inequality of funding between school districts constitutes an abridgment of that right.²⁸¹ Presumably, inequalities in the caliber of education provided by individual schools within a district would do so also. Moreover, segregated conditions themselves violate equal protection, and district authorities have an affirmative duty to implement programs to alleviate such conditions.²⁸²

a bonus in the form of attending better quality schools would therefore, on this account, be an unintended preferential effect.

277. The argument is sometimes made that by choosing to live in wealthier school districts, parents "pay" for better schools through higher property taxes (and the better schools, in turn, raise property values leading to even higher tax assessments). This argument is misplaced in the present context for two reasons. First, busing is an *intra*-district remedy. All the schools in a district that employ busing are funded from the same revenue pool that is supposed to be allocated evenly. Moreover, even if one accepted that government services should somehow be allocated on a pro rata basis according to contributions paid in, the California Supreme Court has explicitly held that such classifications on the basis of wealth violate state equal protection guarantees in the context of public education. *See Serrano v. Priest*, 557 P.2d 929, 950-53 (Cal. 1976) (holding a system of school financing based on local tax revenues unconstitutional).

278. With the possible exception of the (putatively inferior) schools located in neighborhoods in which such minorities already predominated.

279. *Cf. San Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 677 (Cal. 1971) ("[T]he racial classification involved in the effective integration of public schools, does not deny, but secures, the equal protection of the laws"). Note that the Ballot Argument in Favor argued that "[t]he 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." *See* Ballot Pamphlet, *supra* note 104, at Argument in Favor. What better way to do this than by ensuring equal access to quality schools?

280. *See Serrano*, 557 P.2d at 951.

281. *See id.*

282. *See supra* note 46 and accompanying text.

Even if busing is not strictly mandated as a remedy, the fact remains that it does serve a remedial function by removing conditions that deny equal treatment in public schools. As suggested above in Part V-E, such efforts to prevent discrimination arguably lie outside the meaning of preferential treatment.²⁸³ Adopting such a construction would insulate the two prongs of section 31 from internal conflict and would be in accord with the California Supreme Court's approach has taken with respect to religion in cases under Article I, section 4.²⁸⁴

One might object that allowing race-conscious measures in the guise of remedies to escape section 31's prohibitions would open the door to the very affirmative action preferences that Proposition 209 sought to eliminate. While it is true that much of affirmative action is justified in remedial terms,²⁸⁵ there are important differences. Voluntary desegregation has a remedial footing based on actual, identified discrimination, which affirmative action preferences lack.²⁸⁶ Although university admissions criteria are sometimes attacked as "discriminating" against certain minority groups, California courts have never found that racial imbalances in higher education to constitute an equal protection violation.

This jurisprudential distinction reflects important differences between the two contexts. Whereas access to lower education represents a fundamental right in California, university applicants have no right to higher education, and spaces are limited. Applicants qualify for admis-

283. *Cf. Wilson v. State Personnel Bd.*, No. 96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (holding that affirmative action to remedy identified underutilization of minorities in non-zero-sum fashion is not preferential under section 31).

284. *See supra* note 16 and accompanying text.

285. University admissions preferences have traditionally relied on the diversity rationale enunciated in *Bakke*, without any remedial premise. *See generally* Post, *supra* note 237, at 48. However, in areas such as contracting and employment, the United States Supreme Court has indicated that preferences can only be justified as a remedy for past discrimination. *See City of Richmond v. Croson*, 488 U.S. 469, 498-99 (1989).

286. To justify affirmative action preferences as remedial merely requires a *prima facie* showing of discrimination based on statistical presumptions. *See id.* at 499-509. By contrast, the California Supreme Court has held that segregated school conditions constitute an *actual* violation of state equal protection principles which school districts have an affirmative duty to alleviate. *See Crawford v. Board of Educ.*, 551 P.2d 28, 43-44 (Cal. 1976) (en banc); *Cf. Croson*, 488 U.S. at 524-25 (Scalia, J., concurring) (approving of race-conscious desegregation measures adopted *voluntarily* to fulfill a school district's "affirmative duty to disestablish the dual school systems even while rejecting affirmative action preferences under his reading of federal equal protection standards."). *Id.*

sion to specific institutions on the basis of objective criteria²⁸⁷ and, thus, to this extent have an *a priori* entitlement to their places, which affirmative action policies jeopardize. The consequences for non-preferred students are not just a relative disadvantage; they are totally excluded from participation. Because of such considerations, the constitutional footing of remedial action is fundamentally different in zero-sum contexts.²⁸⁸ The allowance for proactive remedies is correspondingly diminished.²⁸⁹

Furthermore, while the remedial justification for affirmative action is typically weaker than for desegregation, the preferential nature of the former is all the more manifest. While desegregation may or may not engender preferential outcomes, affirmative action unabashedly confers preferential *treatment* that is explicit on the face of the policies being applied. Facial preferences—as opposed to indirect effects—fall within the unambiguous plain meaning of section 31, and are proscribed accordingly. There should be no doubt, therefore, that the two cases are distinguishable; excluding desegregation from the scope of section 31 in no way legitimizes preferential affirmative action.

287. To be sure, the validity of such objective criteria—"merit"—has come under considerable attack in recent years. See Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CON. L.Q. 1073 (1996) (citing many such critiques). Yet, there remains a qualitative difference between awarding university admissions on the basis of scholastic achievement and standardized test scores and assigning access to schools based solely on the happenstance of one's parents' address. Some may argue that this same parents' address—and thus socio-economic status—correlates so closely with test scores as to make the latter a proxy for the former. However, it takes an exceptionally strong critique of merit to insist that the two criteria are indistinguishable.

288. See *Bazemore v. Friday*, 478 U.S. 385, 414, 416 (1986) (contrasting university admissions with lower school desegregation with respect to remedial requirements); cf. *Associated Gen. Contractors v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1388 (9th Cir. 1980) (no duty to engage in remedial action in "stacked deck" (zero sum) contexts).

289. Cf. *Wilson v. State Personnel Bd.*, No.96CS01082, (Cal. Supp. Ct., Dept. 33, Nov. 30, 1998) (describing proactive measures to restore equality as constitutionally permissible only in non-zero-sum contexts). The *Wilson* court later appeared to undercut its own distinction by arguing that governments have a duty to use preferential (i.e. zero-sum) remedies proactively given a statistical indication of discrimination. See *id.* at 18 (citing *Associated Gen. Contractors v. San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987)). However, the authority for this proposition appears highly tenuous. It derives from a concurring opinion in a United States Supreme Court case. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284-95 (1986) (O'Connor, J., concurring). That case considered whether government *may* use preferential remedies, not whether it must. The only language there referring to an actual *duty* to undertake affirmative remedies is taken from a desegregation case (i.e. a non-zero-sum context). See *id.* at 291 (citing *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971)).

VIII. CONCLUSION

This article has argued that desegregative busing programs do not violate Proposition 209. That initiative targeted only a narrow range of preferential classifications. Busing falls outside the scope of CCRI's prohibition for two main reasons. First, provisions of the California Constitution and case law specific to voluntary desegregation argue for its continued legality. Second, a more general distinction exists between zero-sum programs such as affirmative action and non-zero-sum contexts such as busing. A strong argument exists that Proposition 209 only proscribes the former.

Furthermore, to the extent that the arguments set out above rely on authorities specific to busing, one should not assume that the interpretation of section 31 offered here is *sui generis*.²⁹⁰ Instead of carving out a narrow exception for voluntary desegregation, one could just as easily take the constitutionality of such programs as evidence of overall voter intent endorsing a narrow construction of preferential treatment across the board. On such an account, voluntary desegregation becomes a case study to validate the more general distinction between zero-sum and non-zero-sum programs. If so, the analysis presented in this article would seem to legitimize many other non-zero-sum programs that have similar remedial intent, including minority outreach and recruitment, "ethnic" scholarships, and racial gerrymanders to increase minority representation in elected office.

290. "Of its own kind or class. The only one of its kind." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

