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A CASE FOR PROPOSITION 209

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The California bishops' statement and the longer testimonies of Cardinal Mahony against Proposition 209 [hereinafter "Prop 209"] show that their authors are not exercising their teaching office, but speaking as church leaders to all persons of good will. The bishops "ask" "all people of good will" to reject Prop. 209 as "bad public policy"; affirmative action "can be", if "judiciously administered," an "expression[ ]" of the "drive for solidarity", and "one practical way" to work toward justice. In his 1995 statement, Cardinal Mahony sets forth "principles that should help shape the debate on affirmative action."[1] He recognizes, however, that "people of good will may disagree with the application of them", and aims to "assist[ ]" people to resolve the issue in a "thoughtful and prayerful way."[2] In 1996 Cardinal Mahony "announc[ed]" his "own opposition" to Prop 209 and "urg[ed]" voters to "carefully consider the impact of this measure" before voting.[3] Here, the bishops' statements are redolent of the 1986 Economics Pastoral, which distinguished between the moral principles which must govern debate and application of them, a matter which could not be treated authoritatively and which depended upon a range of debatable factual judgments, including speculations about the likely future effects of particular initiatives.[4]

The proposition that support of Prop 209 is wrong, immoral, or in any other sense *not* a permissible option for Catholics is nowhere asserted, nor is it implied, in the California episcopal

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1. Cardinal Roger Mahony, *Affirmative Action and Catholic Social Teaching*, 25 ORIGINS 89, 91 (1995).

2. *Id.*

3. Cardinal Roger Mahony, *Solidarity and the Common Good: A Pastoral Response to Proposition 209*, 26 ORIGINS 229 (1996).

4. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL (1986), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE at 572 (David J. O'Brien & Thomas A. Shannon eds., 1992).

statements. The authors steer entirely clear of language which would suggest that their conclusion is to be accorded any more weight than the force of their reasoning.

What of the "principles" identified by Cardinal Mahony in his 1995 statement? Are they moral norms? A close look at Cardinal Mahony's 1995 paper shows that his three "principles" are actually one assertion of *fact* — the effects of racism remain "deeply woven into the fabric of society"[5] — and two apparent norms which are not so much "principles" by which affirmative action might be critically evaluated as they are statements of support for affirmative action.[6] If there is a principle it is this: Cardinal Mahony may be saying that, as a background norm to be applied to the question of affirmative action, Californians have a moral responsibility to make progress towards the eradication of racial discrimination. Obviously, Prop 209 satisfies this responsibility.

Cardinal Mahony's own distillation of the three "principles" makes clear that, at most, he asserts two propositions, one descriptive and one a moral norm:

> Perhaps the clearest statement of the combined meaning of the three principles is this:
> First, it is essential to acknowledge that continued discrimination by race and gender sadly persists in our society. Second, any attempts to reform[7] affirmative action must retain the elimination of discrimination as their principal goal.[8]

I am entirely persuaded that this "combined meaning" of Cardinal Mahony's three "principles" is sound, true, valid. I shall argue nevertheless that conscientious and reasonable persons, including faithful Catholics, not only can, but probably should, support Prop 209. I shall argue, in other words, that there is a

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5. Mahony, *supra* note 1, at 91.

6. These two apparent norms are: "Proposition 209 would eliminate, not reform, affirmative action. In doing so, the initiative fails to institute any alternative policies to foster progress towards the eradication of discrimination and bias against women and minorities"; "Proposition 209 weakens society's commitment — and, in particular, the commitment of government to be an active player in the fights against discrimination suffered by women and minorities." *Id.* at 92.

7. I take here "reform" to include the possibility included in Prop 209: "reform" by abolition. Otherwise, the statement of "principles" by Cardinal Mahony assumes that which it purports to argue for. I do not take Cardinal Mahony to be simply asserting that, as a matter of moral principle no one may support *abolition* of affirmative action; if that *were* his view, he would very likely have said so clearly.

8. Mahony, *supra* note 1, at 92.

very strong case to be made, consistent with the episcopal teachings, for Prop 209.

My argument is about the central case of affirmative action, and past legal and non-legal societal discrimination: African-Americans. I assume that if my argument works for African-Americans, it works as well or better for other ethnic groups and for women as well.[9] Perhaps my assumption is unsound. Even if it is, my argument concerning Prop 209 as it pertains to African-Americans stands on its own.

I

A. *Is Prop 209 Racist?*

"Racism" is in one sense the conviction that some racially-defined group is inferior to another, often but not necessarily the racial group of the person holding the conviction. The tragic case of racism in American history is the conviction, once almost universal among whites, that blacks lack either the intellectual capacity or the capacity to control their passions, or both, of whites.

Though considered thus very narrowly racism may be simply a mistaken conviction, it cannot but obstruct community — solidarity — between the races and among individuals of different races. Racism will therefore invariably issue in acts that are unfair to members of the "inferior" group. These unfair acts need not be interpersonal in the simple sense; an individual voting or otherwise supporting laws discriminating against a racial group is guilty of unfairness, even if the individual has never met a single member of that group or, if he has, bears no ill-feeling towards those individuals and even considers them his friends. And besides, racist convictions are commonly the product of judgment distorted by unintegrated feelings (of repugnance, hostility) towards the "inferior" group. So, though *strictly* a matter of mistake about what is, Cardinal Mahony rightly (for all practical purposes) says, "[r]acism is a sin. . .that divides the human family, blots out the image of God among specific members of that family and violates the fundamental human dignity

9. The assimilation of racism to the whole structure of gender relations and the differentiation of the sexes' roles common in affirmative action programs, which generally treat race and gender as equally invidious bases for discrimination in not only the United States but everywhere until just yesterday, is entirely too easy. Critical discussion of this move is beyond the scope of this paper.

of those called to be children of the same Father."[10] The episcopal statements rightly emphasize, in addition, the present need for special efforts to effect *interracial* "solidarity."

For a long time in American history public authority enforced laws which obstructed, if they did not forbid altogether, interracial solidarity. Regardless of the present extent of racist convictions and even if no law survives which necessarily proceeds from racist convictions, the effects of centuries of racial oppression remain. It is not extravagant to say that — indeed, I think it is true to say — that the effects of past racism are still "woven into the fabric of society."

Prop 209 does not necessarily proceed from racist convictions. Despite the episcopal statements' emphasis upon the theme of racial "solidarity," they nowhere say that support for Prop 209 *is* racist. If their opposition to Prop 209 could be deduced from racism itself, the bishops no doubt would have said so. The bishops and Cardinal Mahony may believe — there is some slight evidence in their statements that they do — that support for Prop 209 correlates, in some noteworthy way, with racist convictions. But they attempt no deduction and they offer the correlation as no more than a passing observation.

What kind of law needs racist convictions for its justification — or its rationalization? Logically, perhaps very few; even some systems of slavery, though immoral, were supported not by racist beliefs but by beliefs about the permissible treatment of captives. There is no doubt, however, that the institution of American slavery rested upon racist assumptions, as did Jim Crow.[11] The courageous bishops who spoke out against segregation rightly made it a matter of faith and morals, even to the point of excluding from communion segregationists who, after being clearly admonished, scandalously persisted in their actions.

The California bishops say nothing like what those bishops said about segregation. And it is clear that episcopal opposition to Prop 209 proceeds not straightaway from racism to Prop 209, but from beliefs about the instrumental value of affirmative action to precisely what Prop 209 decrees: a discrimination-free society.

There is no good reason to doubt that support for a law which outlaws all forms of racial discrimination proceeds from

10. Mahony, *supra* note 1, at 92 (citing NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BROTHERS AND SISTERS TO US 4 (1979)).

11. Perhaps a few apologists for the institution of slavery in the Old South defend slavery just as such (that is, they defend an institution that was not by definition racist). But only blacks could be held as slaves in the Old South.

the conviction either that all racial discrimination is wrong or, if not, government affirmative action programs are, all things considered, detrimental to the common good. Indeed, the bishops seem unaware of the significant extent to which affirmative action contributes to, yet does not stem from, racism. In Glenn Loury's words, "[m]easures billed as temporary have become permanent crutches for people who are implicitly assumed to be incapable of competing."[12]

B. *Is Prop 209 Sound Just Because it Prohibits "Reverse Discrimination"?*

Many, maybe most, supporters of Prop 209 hold that affirmative action is wrong simply because it involves "reverse" racial discrimination, and that racial discrimination is simply wrong. (Everyone seems to accept that remedies for specific acts of discrimination —say, requiring an employer who has systematically refused to hire blacks to prefer them henceforth, for a while — is a different case.) There is at least one very important distinction between the historical treatment of blacks in this country and affirmative action of the last few decades: Jim Crow was, notwithstanding *Plessy v. Ferguson*[13] (where the Supreme Court said that blacks imagined inferiority), entirely a product of the conviction that blacks were inferior, unfit to mix with whites save in well-defined (subordinate) roles. Affirmative action, even in the extreme form of, say, hiring quotas, does not proceed from the conviction that whites are inferior. This does not mean that quotas are appropriate. But they are not racist, in the ordinary sense of that term, and they are not symmetrical with the tradition of American racism, as the term "reverse discrimination" suggests.

Simply put, affirmative action is not wrong just because desegregation is right. Affirmative action, assuming it involves racial discrimination, is not wrong just for that reason, unless there is a moral norm like: "one may never consider race." There is no such true norm. Racial discrimination, in the simple sense of legal classification by race, is *almost* always wrong. That it is almost always wrong is conceded by Prop 209's opponents, not least by the bishops. The bishops defend "affirmative action" on grounds which distinguish it from "quotas" and "reverse discrimination." Were racial discrimination not almost always wrong, how could the effects of past discrimination be so central a "principle?" How could the goal of ending all discrimination be offered, as it is by the bishops, as self-evidently worthwhile?

12. Glenn Loury, *Absolute California*, NEW REPUBLIC, Nov. 18, 1996, at 17.
13. 163 U.S. 537 (1896).

Some racial classifications make good sense. Obviously, casting the local public high school's production of *Guess Who's Coming to Dinner* cannot be color-blind. Whenever a particular condition tracks a racial group, and where the condition is within the part of the common good committed to the care of government, laws which discriminate on racial grounds may be appropriate. Testing for sickle-cell anemia may be limited to races susceptible to the disease. For a certain period of time after the end of legally-imposed racially discriminatory disabilities, affirmative action is justifiable. Certainly it was for a long time after slavery was abolished, at least in the South: being African-American was then practically identical with being handicapped by past discrimination — slavery. Right now, it seems to me, job recruiting programs among certain segments of the African-American community — I am thinking of inner-city neighborhoods — can be justified as responding just to its residents' reasonable (if not correct) perception that they are not welcome in, say, the local fire or police departments. If Prop 209 outlaws *this* type of recruiting — and I doubt that it need be interpreted to do so — then that is an argument against Prop 209.

Racial discrimination is generally wrong because it is almost always unfair. Why is it unfair? Because race (and skin color, genetic identity) is not a character trait. Race does not affect basic human dignity; what counts as human flourishing for one race is what counts as human flourishing for all other races. In sum, race just as such is almost never a *reason* upon which anyone ought to act.

Since no moral norm absolutely excludes considering race, how do we evaluate cases where an exception is urged? The morality of racial discrimination is a matter of fairness, a matter of applying the Golden Rule. One way of carrying out the thought experiment of applying the Golden Rule is to ask: if I (a black job candidate, or a white job candidate) were in the other's shoes, would I agree that considering race is all right? Would the black beneficiary of affirmative action agree that race "counts," if the beneficiary did not know his race going into the debate? Would a white candidate insist that public benefits be distributed in a "color-blind" way if he were unaware of his own race? This is something close to the Rawlsian "original position" — itself a thought experiment — in which each is ignorant of how his or her interests will be affected by the rule he or she assents to. This is precisely the point of the Golden Rule: to eliminate the arbitrariness that self-preference ordinarily produces. Note well: here is the terminal point of "solidarity" as a *reason*: eliminating ties of affection and the tug of self-interest as well as emotional

aversion to other races and their legitimate differences in style, culture, habits, and so on simply *is* solidarity. Put differently, conscientiously applying the Golden Rule is "solidarity."

Someone will object that this abstraction prescinds from the reality which gives rise to the problem: blacks, and not whites, were victims for centuries of racial oppression. Blacks still suffer the effects of it. Conceded. I maintain that the question raised by Prop 209 is a question of fairness, and no one seems to doubt — certainly not the bishops, not me, and probably not my objector — that racial discrimination is generally wrong. But let us put this objection even more strongly, in a way which resonates with portions of the episcopal statements: still suffering the effects of centuries of oppression, African-Americans are now victims, in an important sense, of a continuing injustice. They certainly consider affirmative action to be in their interest. They view white attitudes towards affirmative action (correctly or incorrectly) as transparent for whites' conviction about the legacy of white oppression and about whites' responsibility for it. One might say, in this construal, that affirmative action is the opposite of the Confederate battle flag; affirmative action is, understandably enough, counted by many African-Americans as a litmus test of white society's bona fides.

This is surely an argument for an exemption to a general rule prohibiting race discrimination. But the criterion for evaluating it — granting, not conceding, the accuracy of the claims — is still the Golden Rule.

Applying the Golden Rule is a matter of taking stock carefully of what one's own values, goals, and interests are. How does one wish to be treated? The results of applying the Golden Rule will vary from person to person applying it. For the Golden Rule does not produce a single right answer, at least not often it does. Given the track record of affirmative action, its continuing across-the-board preference for *all* members of a racial group regardless of individual histories, no matter what his or her *individual* history, speculation about a better future may seem to people who have a will toward the common good, unfair. This, it seems to me, is precisely *why* the California bishops and Cardinal Mahony depict their own statements as nonbinding recommendations. Their conclusions — self-styled personal opposition — constitute their personal answers to a matter of individual discernment.

To continue my response to the objector who says, in effect, affirmative action must be evaluated by the Golden Rule concretely, in *this* society, with *its* history, *now*. I agree. But let us add *all* the relevant facts — the history of past discrimination, the

effect upon the life plans of non-minority applicants, the various costs associated with public expenditures for "qualified" minority contractors who are not the low bidders, Glenn Loury's concern that affirmative action *fosters* the conviction that blacks are inferior, the apparent indifference of some inner-city residents to the pursuit of opportunities that are available to them — and much more — to the scales. It is all the more clear then that conscientious people can legitimately disagree on whether affirmative action does more harm than good; that affirmative action is, all things considered, unfair.

My own view is that we have reached the point in our society, partly due to past affirmative action, where the distribution of disadvantages traceable to legally enforced racism is unevenly distributed across the black population. Disadvantage due to structural injustice in our society has split off from race, and includes now many people of all races. If they stood in the shoes of a working-class young white man who, through sheer determination, excelled in school and who is convinced that his vocation is to be a college teacher of religion, I doubt that many people would consider it fair if, due to affirmative action, securing such employment was out of the question for him.

C. *Is Prop 209 Wrong for Other Reasons?*

1. Discrimination against any person with respect to basic human rights is always wrong. It is wrong to intentionally kill the innocent and, when a group of innocents is targeted due to their common racial or ethnic identity, it is genocide. Genocide is always wrong. Discrimination, including racial discrimination, in the provision of essentials like food, medicine, and clothing is invariably wrong. Prop 209 does not involve basic human rights or the necessities of life. Nowhere do the episcopal statements suggest otherwise. Prop 209 does *not* deny anyone any goods. It stipulates that the criteria for access to some of them shall not include race. So, the relevant principle is the falsity of racism, which we have discussed.

2. Cardinal Mahony rightly challenges us to "transcend this culture of individualism in order to be able to measure the implications of our policy decisions in terms that reach beyond the boundaries of narrow self-interest."[14] Again, it is entirely unclear whether the jobs, contracts, and admissions at stake on the Prop 209 debate exercise their tempting influence more upon supporters or opponents of that measure. Certainly, there is no necessary relationship involved.

14. Mahony, *supra* note 3, at 231.

3. The bishops state clearly enough that they aim for an end to racial discrimination, that affirmative action is a worthwhile means. Affirmative action is "one practical way" to "overcome" past and present discrimination;[15] it is an "interim measure[ ] needed to ensure that certain social ills are contained";[16] "wholesale elimination" of affirmative action would be a "major setback to our nation's tenuous commitment to creating a discrimination-free society."[17]

These comments suggest an eventual color-blind society. But these comments also sit uneasily alongside signals that a multiracial society in which "diversity" is prized for its own sake is the bishops' desideratum. Are we invited to approve affirmative action just for its own sake, as what it means to have and maintain a significant, if not proportional, representation of, say, African-American sectors in all sectors and at all levels of society?

4. Perhaps the bishops' primary point is that Prop 209 is a wholesale response to a retail problem, that "reform," not abolition, is the proper response to what they may implicitly be conceding has been a crude or an excessive affirmative action. "Excessive" affirmative action might include informal but real quotas, other forms of racial discrimination that block access to opportunity for disadvantaged whites, like our working class religion student.

But in whom would the reformers place authority to implement needed reforms? What kind of people, with what biases, loyalties, political debts, and according to what enforceable criteria, would do this job? What are the reasons — based in experience and logic — to believe that a properly reformed affirmative action *could* be strictly limited to the types of programs the bishops approve, the types of recruitment efforts that, for example, Glenn Loury mentions — outreach to young African-Americans who reasonably but incorrectly believe certain opportunities are not available to them? Upon what reasonable basis could — do — the bishops suppose that race-based "affirmative action" should be retained even if "merit-based or class/income based" programs are available? These questions may reduce to one: is it prudent to continue to accord government the authority to discriminate on the basis of race? Despite some benefits forgone, is it more prudent to take away that authority?

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15. Statement Opposing California's Proposition 209 by the California Catholic Conference of Bishops 2 (Oct. 25, 1996) [hereinafter Statement] (on file with author).

16. Mahony, *supra* note 3, at 231.

17. *Id.*

Maybe the bishops think that solidarity suggests, even requires, that compensation to victims of past discrimination continue, not least because those victims consider it their due. But, if genuine disadvantage no longer closely tracks race and if for many blacks the effects of past racism have all but disappeared (again, partly due to affirmative action) then the indiscriminate use of "victims" is question-begging.

II

The bishops present affirmative action as basically a matter of equal opportunity, and they say that equal opportunity is what the common good is all about. So, affirmative action *as the bishops describe it* fits the end of public authority — the common good — *as they describe it* pretty tightly.

Is affirmative action as the bishops describe it? Is the common good as they describe it?

The answer to each question is "No."

The bishops criticize "quotas," and insist that affirmative action involves only, or at least principally, opening up the doors of equal opportunity slammed shut by racism to qualified minority applicants.[18] The bishops explicitly call upon "legislative and judicial remedies" to "exclude bias or reverse discrimination" in affirmative action.[19]

On this account, affirmative action "open[s] opportunities in the work place, in educational institutions, and in public contracting to qualified women and minority candidates";[20] affirmative action "has sought to remove some of the institutional obstacles which have hindered opportunities", a matter of "equal access to opportunity";[21] "affirmative action is about creating access to education and employment";[22] "these programs . . . have played an instrumental role in opening opportunities previously unavailable. . . ."[23]

In his extraordinarily sensitive and persuasive analysis of Prop 209, Glenn Loury mentions *some* examples of the kind of "affirmative action" the bishops likely have in mind: "aggressive recruitment" of black candidates to a manifestly racially imbalanced police force.[24] There are certainly some police

18. Statement, *supra* note 15, at 1-2.
19. *Id.* at 1.
20. Mahony, *supra* note 3, at 229.
21. *Id.* at 231.
22. *Id.* at 232.
23. *Id.* at 231.
24. Loury, *supra* note 12, at 19.

departments that young black men view, with good reason, as little different than a giant KKK convention. The bishops mention recruitment, as well as job-training programs, flexible hiring goals, and timetables for promotion. All this makes for a worthwhile project.

The bishops seem to think, that is, that affirmative action does not necessarily involve racial discrimination. If affirmative action did not involve racial discrimination, the bishops would perhaps have an unanswerable case for affirmative action. But "quotas" are not the problem; rarely does "affirmative action" take the form of, say, "fifty black freshmen no matter what." "Qualified" they shall be, but anyone with experience in these matters knows that "qualified" is often determined *by* the credentials of minority candidates. And "qualified" is not to say "competitive," or "best qualified".

Public jobs, public contracts and university admissions *are* highly competitive. Any "plus" for minority status is a benefit conferred solely due to race. Being a competitive situation, this "plus" negatively affects non-minority candidates' chances solely due to their race. This is racial discrimination. Call it "benign" if you like, or argue for it. But it is still racial discrimination, and no matter what you call it, the Golden Rule is the relevant moral norm.

Now, if the bishops' statements are interpreted as favoring *only* that affirmative action which avoids racial discrimination they would (as I said) have a strong case — for Prop 209, at least on the view that one cannot prefer people on the basis of race in competitive situations without disfavoring some other people on the bases of race.

In my view, affirmative action is *not* as the bishops depict it.

Is the common good as the bishops depict it?

Cardinal Mahony states that the "whole raison d'etre" for the state is "the realization of the common good in the temporal order."[25] "The Catholic tradition envisions the common good as those social conditions which *enable persons to maximize their gifts and talents through equal access to opportunity.*"[26] So, the bishops present an unanswerable argument: affirmative action is equal

25. *See* Mahony, *supra* note 1, at 92 (citing JOHN XXIII, MATER ET MAGISTRA para. 20 (1961), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 4, at 87.

26. *See* Mahony, *supra* note 3, at 231 (emphasis added). My argument in the text supposes that, in Cardinal Mahony's formulation, "through equal access to opportunity" restricts "maximize their gifts and talents."

access to opportunity and the common good — the justifying aim of the state — just is equal access to opportunity.

Here is the "Catholic tradition," as stated in *Dignitatis Humanae* (and, I should add, stated indistinguishably in *Gaudium et Spes*[27]) concerning the "common good":

> Since the common welfare of society consists in the entirety of those conditions of social life under which men enjoy the possibility of achieving their own perfection in a certain fulness of measure and also with some relative ease, it chiefly consists in the protection of the rights, and in the performance of the duties, of the human person.[28]

The phrase "equal access to opportunity"[29] does not appear in the relevant passages of the Council documents, nor does it in the new universal Catechism. It seems to be a homemade term, being given a prominence by the bishops that, even if all equivalent expressions of the same concepts are considered, it simply does not have in the Catholic tradition.

The bishops' account of the common good and their naive view of affirmative action do not, by themselves, inexorably lead one to opposition to Prop 209. For the bishops do not seem to take into account that the common good is *not* coterminous with the scope of public authority: they seem to move without additional premises *from* the cultural roots of the effects of racism to a state remedy. But even if Jim Crow is partly responsible for present racial disparities in the distribution of goods and resources, it does not follow that state affirmative action is justified. If the effects of Jim Crow are "deeply woven into the fabric of society,"[30] it does not follow that the state is obliged to try to extirpate them by state law, much less by state hiring, contracting, and school admission policies. To what extent the common good is to be committed to government is not itself deducible from the idea or definition of the common good.

Prop 209 leaves civil society free to pursue affirmative action, and it is consistent with the bishops' notion of the common good to conclude that the state maintains proper "social conditions"[31] *by* protecting private liberty to engage in affirmative action, or not. One could, in addition, reason that given the history of

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27. Second Vatican Council, GAUDIUM ET SPES (1965), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 4, at 166.

28. DIGNITATIS HUMANAE, para. 6. The Catechism, para. 1906, adopts the equivalent formulation of GAUDIUM ET SPES, *supra* note 26.

29. *See* Mahony, *supra* note 3, at 231.

30. *See* Mahony, *supra* note 1, at 91.

31. *See* Mahony, *supra* note 3, at 231.

abuse, the types of people (bureaucrats, college faculty, politicians) who administer public affirmative action, the misinformation campaigns that distort their active operation where silence does not obscure it, and the mixed results of thirty years of affirmative action that the power to discriminate on the basis of race, albeit for assertedly "remedial" purposes, is one that it is no longer safe to give to government. When the immediate beneficiaries of affirmative action are, moreover, middle- and upper-class minorities whose access to equal opportunity has not been abridged—at least not demonstrably, compared to the unfavorable opportunities of other identifiable population groups—reasonable people could conclude that affirmative action for impoverished individuals, or for persons who can demonstrate a genuine lack of opportunity due to social conditions, is preferable to race-based affirmative action. Where such categories are not transparent for race, even if they are predominantly populated by minorities, Prop 209 presents no barrier.

III

Federal District Judge Thelton Henderson temporarily restrained enforcement of Prop 209 on November 27, 1996.[32] He entered a permanent injunction on December 23, 1996, finding that the plaintiff was likely to succeed on two grounds at a trial seeking to invalidate Prop 209: Prop 209 is pre-empted by Title VII, and it violates the Fourteenth Amendment's guarantee of "full participation in the political life of the community."[33] I leave aside the statutory basis for Judge Henderson's order. I shall argue that the constitutional holding is unsound and briefly describe how its unsoundness stems from a central flaw in contemporary constitutional jurisprudence.[34]

Judge Henderson said that he could not "overemphasize[ ]" that the court did not adjudicate "whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women."[35] Judge Hender-

32. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal.).

33. *Id.* at 1489 (citing Washington v. Seattle School District No. 1, 458 U.S. 457, 467 (1982)).

34. In an opinion filed April 8, 1997, a panel of the Ninth Circuit Court of Appeals vacated the preliminary injunction and remanded the case to the District Court. This ruling will undoubtedly be subject to an appeal to the United States Supreme Court, where the arguments of Judge Henderson, criticized in the text above, will undoubtedly be pressed.

35. *Id.* at 1490.

son did not, in other words, engage Prop 209 as policy, as the California bishops did.

Judge Henderson's opinion pivoted upon the constitutional permissibility of a relatively narrow band of affirmative action, that affirmative action which could pass muster under the Supreme Court's demanding precedents for state-sponsored programs. Note well: nowhere did Judge Henderson say that these possibilities were mandatory, and they clearly are not. Repeat: *no* state is required by the Constitution to engage in the affirmative action prohibited by Prop 209.

The stated constitutional basis for his injunction was entirely what Judge Henderson called "the *Seattle-Hunter* doctrine."[36] In *Hunter v. Erickson*,[37] the Supreme Court invalidated, as violative of the Equal Protection Clause, an Akron city charter amendment which subjected any fair housing ordinance to popular approval before it could become effective. The affected ordinances were defined as those regulating real estate transactions on the basis of "race, color, religion, national origin, or ancestry."[38] Other ordinances, including ordinances regulating real estate transactions on other bases, became effective thirty days after the City Council passed them, subject to a referendum if ten percent of the voters requested it via a timely petition.[39]

The United States Supreme Court concluded that, although facially neutral, "the reality is that the law's impact falls on the minority."[40] This "special burden[ ] on racial minorities within the governmental process" was invalid, because "the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[41] Just so far stated, *Hunter* would invalidate the Prohibition amendment to the Constitution, if not almost any constitutional provision. For one *effect* of constitutionalizing a norm affecting people's primary conduct is to make it impossible for an affected group to secure its interests through normal political processes. It may well be that the *Hunter* court meant to limit its statement to particular minority groups. But such a limitation would be inconsistent with the justifying principle cited: no person's vote may be deemed by a legislative major-

36. *Id.* at 1499.
37. 393 U.S. 385 (1969).
38. *Id.* at 390.
39. *Id.* at 391, 393.
40. *Id.* at 391.
41. *Id.* at 393 (emphasis added).

ity to count as, say, one-half of someone else's. It is one person, one vote, period.

If *Hunter* was rightly decided, its rule must be understood as interested not in the *effect* of laws but in the motives or aims or reasons of the people who brought it into being. The *Hunter* court must be understood as treating the Akron ordinance as transparent for a racially motivated attack upon the legitimate legislative objectives of African-Americans.

Washington v. Seattle School District No. 1[42] relied upon *Hunter*'s dilution passage to strike down a state initiative which, in relevant part, forbade mandatory busing of public school pupils for purposes of racial integration. The occasion for this exercise of the popular, state-wide lawmaking provided by the Washington Constitution was an extensive program of mandatory busing in Seattle, designed to alleviate racial "isolation" due to segregated housing patterns.[43]

A bare majority of the Court in *Seattle* said that busing for desegregation, "like the Akron open housing ordinance" "inures primarily to the benefit of the minority".[44] "As in *Hunter*," the majority continued, "the community's political mechanisms are modified to place effective decision-making authority over a racial issue at a different level of government."[45] The majority construed a state law absolutely forbidding mandatory busing for racial purposes as *effectively* vote diluting, citing *Hunter*: "the reallocation of decisionmaking authority *worked by Initiative 350*";[46] "the comparative structural burden placed on the political achievement of minority interests";[47] "the selective allocation of decisionmaking authority *worked by Initiative 350*. . . .";[48] "Initiative 350 worked a major reordering of the State's educational decisionmaking process."[49] In fact, and notwithstanding the Supreme Court majority's suggestions to the contrary, Initiative 350 was not even challenged as an unauthorized use of the Initiative power under the state constitution. That is, nothing in the Washington state constitution excluded, expressly or impliedly, busing or school matters generally from resolution by Initiative. Nor did the Supreme Court suggest that, in the *Seattle* circumstance, busing was mandatory.

42. 458 U.S. 457 (1982).
43. *Id.* at 460.
44. *Id.* at 472.
45. *Id.* at 474.
46. *Id.* at 474, n.17 (emphasis added).
47. *Id.* at 475, n.17.
48. *Id.* (emphasis added).
49. *Id.* at 479.

The state defendants as well as the dissenting Justices challenged the *Seattle* majority's reliance upon *Hunter*, arguing that the Initiative "worked a simple change in policy rather than a forbidden reallocation of power."[50] This argument invited the Court into the enactors' perspective, to view Initiative 350 as a determination that mandatory busing for racial balancing was detrimental to the common good. On this internal view the lawmakers said: busing is bad public policy; it is not permitted. Of course, being a positive law, Initiative 350 could be repealed by the same means it was created. But nothing in the Initiative suggested that its promoters held the *Hunter*-ish view that busing was a good thing, but that it was the type of thing that ought to be treated, as a procedural matter, different from other issues, including other racial issues.

The *Seattle* Court stuck to its external or third person view, refusing this invitation to adopt the internal perspective. "As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government."[51] "As the Court noted in *Hunter*. . . 'the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote.'"[52]

Now, there is an appealing simplicity to the *Seattle-Hunter* doctrine: if it violates the Constitution to count, say, a black's vote as one-half a vote, then it violates the Constitution to make it twice as difficult for blacks and their supporters to enact blacks' (asserted) interests into law. The *Seattle* court concluded that requiring desegregation laws, and only such laws, to be passed by unanimous vote of the legislature would be constitutionally suspect.[53] Indeed it would, on the assumption — which I have argued is essential to make sense of *Hunter* — that such laws are transparently for a racially discriminatory purpose.

Judge Henderson said that the racial preferences that Prop 209 prohibited were constitutionally suspect after *Croson*.[54] He nowhere questioned the freedom of Californians as an initial matter to decide the matter, including a decision against affirmative action, and to do so at the state level. But prior to passage of Prop 209, Judge Henderson stated, minorities and women seeking preference in public contracts, employment and education

50. *Id.* at 476.
51. *Id.* at 474.
52. *Id.* at 476 (quoting *Hunter*, 393 U.S. at 393).
53. *Id.* at 486-87.
54. *City of Richmond v. Croson Co.*, 488 U.S. 469 (1989).

could secure those preferences the way other preference-seekers — the disabled and veterans — still can: by petitioning, lobbying, and otherwise influencing the relevant policymaker, administrator, bureaucrat. *After* Prop 209, women and minorities "face a considerably more daunting burden": they must amend the California Constitution to repeal Prop 209 or to permit the particular preference they seek.[55]

Judge Henderson adopted what I am calling the third-person observer view of Prop 209: the *effect* of Prop 209 was to restructure the political process to make it more difficult for certain groups to enact their interests into law. That is true. In Judge Henderson's view, this *was* Prop 209. Quoting *Seattle* quoting *Hunter*, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote."[56] But what justifies this point of view, the view which treats *effects*, or at least some of them, as what the law *is*?

Could it be clearer that Prop 209 meant to prohibit a certain class of government action, insofar as possible to do so by positive law? And that they were not trying to restructure the political process? The internal point of view means just that: looking through a law for its reasons, understanding a law by uncovering its aim, its purpose, its reasons.

Consider how much is lost by flipping into the third person view. Is it fair to say that the promoters of the First Amendment meant to make it more difficult for religious groups to get government money, rather than to prohibit that practice insofar as they could do so? Did the people who voted Prohibition into the Constitution mean to place bootleggers and drinkers at a "comparative disadvantage" in the political process? Even though it was obvious that Prohibition could be — and eventually was — repealed according to the same rules by which it was instituted? One wonders, from Judge Henderson's point of view, whether the Thirteenth Amendment serves the common good, or whether it just happens to be a hard-won stipulation in favor of minority interests?

It is worth considering at this juncture *whether* Judge Henderson could have justified his injunction from the internal point of view. He could not, save on the assumption, which he expressly denied, that "permissible" affirmative action was really mandatory. But the assumption is entirely unsound. So, it seems, the only basis upon which an injunction might be predi-

55. *Coalition for Economic Equity*, 946 F. Supp. at 1498.
56. *Id.* at 1499.

cated is the *Seattle* misinterpretation of *Hunter*, the third person view.

IV

The people of the State of California decided in November 1996 that *no* discrimination — malign or benign, if you like — was permissible. They said that it shall not be done, and their saying so under those circumstances made it the fundamental positive law of their state. Judge Henderson simply could not — at least he did not — see this possibility. He treated the unconditional decision by the people that certain acts are contrary to the common good as an attempt to handicap a particular group's chances of enacting its legislative agenda.

What is the source of this opacity of authoritative pronouncements for the common good? Why is not legislation to be treated as transparent for reasoned determinations about how to structure our common life?

There is a certain proper opacity in judicial reasoning. One would expect a court to treat Prop 209 as binding upon its (the court's) deliberations *because* it was enacted. After all, in October 1996 no court was bound to treat all affirmative action by the California state government as illegal. Once enacted, however, courts would have (but for the injunction) treated Prop 209 as binding upon them, and so would have invalidated all affirmative action. In one important sense, Prop 209 *is* authoritative just because a majority of voters voted for it. Their aggregated preferences, in an important sense, made it law.

But that does not mean that their aim, intent, motive was to impose their preferences. Such a view is absurd: no one adopts a view (or votes a certain way) *because* it is his view or preference. One adopts a view (or votes a certain way) because one accords a certain validity (soundness, truth) to the reasons *for* the view. Indeed, laws must be treated as transparent for their reasons if we are to make sense of them at all. Nothing in the preceding paragraph implies or entails, however, the prepolitical legitimacy of everything someone might want to do, much less does anything there imply or entail that majority approval be treated as preponderant aggregated preferences, as if there were no common good — a good that transcends all interests — available for choice.

Judge Henderson's flip into the third person is a recurring problem in contemporary constitutional law. Consider this example of the opacity of legislation for the reasons of those responsible for enacting it. The writer is Robert Bork:

> The central problem for constitutional courts is the resolution of the "Madisonian dilemma." The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority.[57]

The Hawaii trial court which in late 1996 held that state's marriage laws unconstitutional turned to a "useful and informative" analysis of a District Court judge in a similar case. It, too, is a pretty good example of the opacity of law for its reasons:

> [I]f the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages. . .then the public majority will not have a sound basis for claiming a compelling, or even a substantial, state interest in withholding the marriage statute from same-sex couples; a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class—as the history of constitutional rulings against racially discriminatory legislation makes clear.
>
> Suppose, on the other hand, that scientifically credible deterrence evidence were forthcoming at trial, so that either the heterosexual majority or the homosexual minority would be prejudiced in some concrete way, depending on whether the marriage statute was, or was not, available to homosexual couples. In that case, the ultimate question of whose values should be enforced, framed in terms of what a substantial or compelling state interest really is,

57. ROBERT BORK, THE TEMPTING OF AMERICA 139-40 (1990).

> would pose the hardest possible question for the court as majority and minority interests resoundingly clash.[58]

Perhaps the absurd reach of this opacity is the Supreme Court opinion in the Colorado Amendment 2 case, *Evans v. Romer*.[59] There the court treated a law which (rightly or wrongly, though in my view the former) obviously proceeded from the conviction that the common good was not served by laws which extended benefits to people identified just as homosexual or bisexual as activated by an "animus," a desire simply to "harm" a certain group.

CONCLUSION

Whence the derailment of a proper reliance upon authority onto the track sketched by Robert Bork? To some extent the derailment owes to an honest misreading of our tradition. Madison certainly worried about factions — majority *and* minority — *precisely* because there was a genuine common good transcending interests which factions endangered. To some extent, the relativism in our constitutional law tracks relativism in our popular culture and, of course, it is characteristic of liberal political theory to exclude the truth about the good from public space. I wish to add, as a concluding note, another explanation, the secularism which entered our constitutional law in 1947.

Let me explain.

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." With this pronouncement, the Supreme Court in *Planned Parenthood v. Casey*[60] endorsed a radical subjectivism, which is relativism individualized: everyone gets to make up his own moral universe. And, as the Court made clear in *Casey*, public authority's task is precisely to protect individuals in their autonomous acts of creation. The political common good, in other words, consists not in helping people to choose to lead genuinely (truly, really) worthwhile lives, but to protect their opportunity to live whatever life, however elevated or degraded, they happen to choose.

This subjectivism explains, and in the eyes of some, justifies, the most arresting episodes in constitutional law of the last gen-

58. Baehr v. Mike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. 1996) (quoting Dean v. District of Columbia, 653 A.2d 307, 355-56 (D.C. 1995)).

59. 116 S. Ct. 1620 (1996).

60. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

eration or so — pornography, abortion, the emerging rights to assisted suicide and to "gay marriage." Given the importance of constitutional decisions in our society, these episodes have much to do with defining individual rights, individual responsibility and the common good.

Where does this subjectivism come from? From the courts, yes, and from contemporary elite culture, probably. The Justices have also claimed deep historical roots. But at least as to claims about the period prior to World War II, these claims are false. One important reason why this subjectivism cannot reach too far back is because, it seems to me, it is possible only where *secularism* has *already* taken hold. Why is secularism so related to subjectivism? All too briefly, divine revelation received by Jews, Christians, and Muslims showed them the unreality of sources of meaning besides God and human persons posited by other world views — spirits, demi-gods, etc. Apart from God the creator, there was only created world, and in that world, only God and persons could give meaning and value. Secularism accepts the destruction of false gods, but denies God the creator as well. Secularism leaves nothing but human thoughts and desires as sources of the meaning and value.

Now, in a secularized regime we should expect that the question of who or what counts as a subject to whom moral duties, like the duty not to kill, are owed is resolved according to the interests of those who already count as persons. In our polity, we see that the (alleged) instrumental necessity of abortion to women's lifestyles is the major premise of the argument for abortion.

In a secularized society, a genuine common good that transcends people's de facto interests and desires is, strictly, inconceivable. In place of a common good, including inalienable human rights, we should expect a discourse about ordering our life together that is, in reality if not confessedly, a more or less stable consensus of persons able to articulate their interests on an agenda. What this leads to in constitutional matters involving family law, for example, is this: groups defending heterosexual marriage as, simply, the truth about marriage are viewed by courts as just another group pushing its agenda in the public square. And this is what we see in the judicial opinions.

So, at least provisionally, we are warranted in thinking that the root, or at least an essential precondition, of the subjectivism that inhabits our constitutional law is secularism. Where did this *secularism* come from? Since Americans are today overwhelmingly a believing people (the percentage of Americans identifying themselves as Christians is on the order of 85%), it has not

come primarily from popular desires or, for that matter, from legislators. It is a commonplace observation about American history that religion has played a critical role in maintaining our political system. The Founders, Madison said in Federalist Ten that republican institutions presuppose a virtuous citizenry. How would the citizens maintain their virtue? The answer was pretty simple: religion, and religiously-grounded morality.

This belief was virtually unchallenged until the twentieth century. Even after Protestant cultural hegemony in public life waned, as late as 1952 in *Zorach v. Clauson*[61] the Supreme Court said that "[w]e are a religious people whose institutions presuppose a Supreme Being." In 1963 the Court said that the "Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."[62]

So, where did the secularism that we are, provisionally, assuming is a precondition of subjectivism come from? The lodestar of constitutional law pertaining to religion and the exercise of public authority is the First Amendment's Establishment Clause. What was the general understanding of the principle of nonestablishment before the beginning of the modern jurisprudential era in the *Everson*[63] case of 1947?

Nonestablishment meant for a very, very long time in American history no preference for one religion over another. The Founders' insight, at the end of the eighteenth century, was this: the common good of their society did not depend upon the truth of the matters that distinguished the Protestant sects. What distinguished Methodists from Presbyterians — finer points of doctrine, modes of worship, church disciplinary practices and governing structure — could be safely declared beyond the competence of public authority. The law knew no heresy, no dogma, and established no sect. And a glance at the historical record from the Founders up to *Everson* reveals public support, promotion, encouragement of religion.

This was rendered by the Supreme Court in *Everson* as, no support of religion at all, even if there is not a trace of bias for or against any particular religion. The *Everson* court said that the government must protect the religious liberty equally of believers and nonbelievers alike. The Justices have said that no govern-

61. 343 U.S. 306, 313 (1952).

62. School District of Abington Township v. Curlett, 374 U.S. 203, 213 (1963).

63. Everson v. Board of Education, 330 U.S. 1 (1947).

mental entity has care of the common good, if any there be, in religion. Religion is a private matter and therefore not a legitimate perspective on *public* matters. In other words, the public realm is a secular realm. To put it all simply, and in sum: in a secular public realm there is going to be, characteristically, the type of opacity evident in Judge Henderson's opinion.