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Did the Sky Really Fall? Ten Years after California's Proposition 209

I. INTRODUCTION

Discrimination and preferential treatment based on immutable characteristics, such as race and sex, are hotly contested issues in the courts and among the general public.¹ On November 5, 1996, the people of California adopted Proposition 209, an initiative that promised an end to state discrimination and preferential treatment based on race, sex, color, and national origin in public employment, education, and contracting.² Proposition 209 was a widely debated and highly

1. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1070 (Cal. 2000) (“In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980))); Bob Berring, *Affirmative Action in Perspective*, 91 CAL. L. REV. 1125 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002); Tom McNamee, *Who Really Benefits from Colleges' Affirmative Action?: Studies Show Many are Immigrants, Biracial Students*, CHI. SUN TIMES, July 19, 2004, at 10; *Q & A with Ward Connerly: Erase Racial Preferences; They're No Solution in Schools, Society*, DETROIT FREE PRESS, Mar. 23, 2004, available at http://www.freep.com/voices/columnists/webconn23_20040323.htm (last accessed May 23, 2005).

2. CAL. CONST. art. I, § 31(a). . . The full text of the amendment reads:

- (a) 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.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting 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.
- (f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then existing California anti-discrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be

controversial citizens' initiative to amend the state constitution.³ The tenth anniversary of Proposition 209 is approaching and presents an opportunity to evaluate the effect of California's approach to eliminating discrimination and preferences based on race and sex.⁴

Californians were sharply divided over Proposition 209. A U.C. Berkeley poll surveying whites and minorities who lived in predominantly minority communities found that the majority of both these groups still felt that affirmative action was necessary.⁵ However, the majority of both whites and minorities also preferred that job advancement and college admissions be based solely on merit rather than on a system considering race and gender.⁶ Most of the Latinos, African-Americans, and Asians surveyed said they would oppose Prop. 209, while 54% of their white neighbors said they would support it.⁷ TV advertising during the final weeks of the Proposition 209 campaign increased dramatically and seemed to sway a significant number of women voters.⁸ A Field Poll taken two weeks before Election Day showed that 40 percent of women favored Proposition 209 and 42 percent opposed it.⁹ One week before Election Day, 49 percent of women

implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

3. See B. Drummond Ayres Jr., *Politics: The Initiatives; Affirmative Action Measure Nears a High-Profile Finish*, N.Y. TIMES, Nov. 4, 1996, at 6 ("In the last 10 days, both President Clinton, who opposes the measure, and Bob Dole, who supports it, have jumped into the debate, trying belatedly to affect the outcome after months of shying away out of fear that the issue has a double edge, politically."); Edward W. Lempinen, *Furor Over Latest Anti-209 Ad TV Spots Feature Cross-Burnings, Hooded Klansmen*, S.F. CHRON., Nov. 1, 1996, at A29 ("The leaders of the Proposition 209 campaign and the state Republican Party yesterday attacked new advertisements by 209 opponents that link the measure against affirmative action with cross-burnings, hooded Klansmen and the anti-abortion movement."); Seth Rosenfeld and Scott Winokur, *Prop. 209 Divisive, Poll Finds Results Show Depth, Complexity of California's Racial and Ethnic Makeup*, S.F. EXAMINER, Nov. 3, 1996, at C1 ("... Prop. 209, the strident debate it triggered and the possible loss of affirmative action programs will intensify racial issues in California").

4. While the language of the amendment bans discrimination and preferential treatment based on five immutable characteristics – race, sex, color, ethnicity, and national origin – this Note will often refer only to preferences and/or discrimination generally to avoid repeating this list. This Note also refers to race and sex, which should be interpreted as being equally inclusive of all five of the above-named attributes. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 n.1 (9th Cir. 1997).

5. Seth Rosenfeld and Scott Winokur, *Prop. 209 Divisive, Poll Finds Results Show Depth, Complexity of California's Racial and Ethnic Makeup*, S.F. EXAMINER, Nov. 3, 1996, at C1.

6. *Id.*

7. *Id.*

8. Edward W. Lempinen and Susan Yoachum, *Ad Blitz Boosts Support for Prop. 209 in Field Poll*, S.F. CHRON., Nov. 4, 1996 at A1 (reporting that during the home-stretch ad campaigns the 209 campaign and the state Republican Party had plans to spend roughly \$3 million and their opponents were spending about \$1.5 million).

9. *Id.*

avored Proposition 209 and 39 percent opposed it.¹⁰ Among white women, 55 percent were in favor of Proposition 209 and 33 percent were opposed.¹¹ On Election Day, a majority of whites cast their vote in favor of Proposition 209, while the majority of minorities were against the measure.¹² Thus, support for Proposition 209 came primarily from California's white population.

Before Proposition 209 was adopted, many of California's governmental agencies administered programs with goals or quotas as part of an effort to eliminate racial imbalance in areas such as public employment, education, and contracting.¹³ For example, the City of San Jose adopted a program requiring contractors to meet certain requirements that included participating in a minority and women business outreach program, or utilizing a specified percentage of minority and women businesses (the participation program).¹⁴ Bids were considered responsive if the contractors utilized a specified percentage of minority and women subcontractors in their contracts.¹⁵ Those contractors whose bid did not include the specified percentage of minority and women subcontractors could submit bids if they documented extensive outreach efforts to minority and women subcontractors.¹⁶ This entailed maintaining records of written notice to minority and woman subcontractors, making at least three attempts to contact those subcontractors, and specifying the reasons for rejecting any bids by minority or women subcontractors.¹⁷ The bids of contractors who did not complete either the participation or documentation components were rejected for noncompliance with the public contracting program's requirements.¹⁸ Before California voters adopted Proposition 209, these types of programs had the weight of state statutes and judicial precedent

10. *Id.*

11. *Id.*

12. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 n. 12 (N.D. Cal. 1996). Among white voters, 63% were for Proposition 209, while 37% opposed it. Among Black voters, 26% were in favor of Proposition 209 and 74% were opposed. Among Latino voters, 24% were in favor of Proposition 209 and 76% were opposed. Among Asian voters, 39% were in favor of Proposition 209 and 61% were opposed.

13. *Bras v. Cal. Pub. Util. Comm'n*, 59 F.3d 869, 871, 873 (9th Cir. 1995) (describing preferences given to minority and women owned businesses in awarding contracts); *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 97 (Cal. Ct. App. 4th 2002) (describing a high school district transfer policy designed to promote an appropriate racial and ethnic balance); *Kidd v. State Pers. Bd.*, 72 Cal. Rptr. 2d 758, 762 (Cal. Ct. App. 3d 1998) (describing preferences given to women and minorities in state employment decisions).

14. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1070-72 (Cal. 2000).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

behind them.¹⁹

During the highly intense and often contentious debate over Proposition 209 preceding its adoption, many scholars claimed that Proposition 209 would have a negative impact on women and minorities.²⁰ For example, Erwin Chemerinsky, then a professor at the University of Southern California Law Center, wrote the leading article in opposition to Proposition 209 and predicted that many important state and local affirmative action programs would be eliminated and more discrimination would be tolerated.²¹ Chemerinsky concluded, “[Proposition 209] would have a devastating effect on programs designed to remedy discrimination against women and minorities. The gains of past years would be erased, and additional progress would be unlikely.”²² Some critics claimed that the initiative would “ban ethnic studies majors, repeal existing bans on sex discrimination, or prohibit all ‘affirmative action’ programs.”²³ Others predicted that even if adopted, Proposition 209 would be ignored and go unenforced.²⁴ These dire forecasts did not stop the voters of California from adopting the measure in an attempt to end discrimination and preferential treatment based on race and sex.²⁵ Contrary to the predictions of its opponents, Proposition 209 has been effective in eliminating state-sponsored discrimination and preferential treatment based on race and sex without hindering the progress of minorities and women.

This article will address Proposition 209’s elimination of state-sponsored discrimination and preferential treatment based on race and

19. See, e.g., *Price v. Civil Serv. Comm’n* 604 P.2d 1365 (Cal. 1980) (Mosk, J. dissenting); *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96 (Cal. Ct. App. 4th 2003); CAL. EDUC. CODE § 35160.5 (2002); CAL. EDUC. CODE §§ 87101, 87102 (2001).

20. See Pamela Burdman, *Tien Explains Opposition to Prop. 209: 2 Chancellors Openly Contradict UC Regents*, S.F. CHRON., Oct. 21, 1996, at A13 (“Both chancellors said their experience building diverse campuses led to their firm belief that diversity is a key component of quality.”); Derrick Z. Jackson, *Facts Favor Affirmative Action*, BOSTON GLOBE, Oct. 30, 1996, at A17 (citing law professor David Oppenheimer and economist Martin Carnoy as predicting dire results for minorities if Proposition 209 were to pass).

21. Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999 (1996). Professor Chemerinsky’s article has been cited by at least five appellate briefs in Proposition 209-related litigation and at least 16 law review articles and treatises.

22. *Id.* at 1018.

23. Neil Gotanda, *Legal Implications of Proposition 209 – The California Civil Rights Initiative*, 24 W. ST. U. L. REV. 1, 23 (1996); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1339 (1997); See also Erwin Chemerinsky & Laurie Levanson, *Sex Discrimination Made Legal*, L.A. TIMES, Jan. 10, 1996, at B9.

24. See David Kline, *Voters Should Go After Government Officials Who Ignore Proposition 209*, METROPOLITAN NEWS ENTERPRISE, Dec. 6, 1996, at 7; *High Court Won’t Review Challenge to Proposition 209*, METROPOLITAN NEWS ENTERPRISE, November 4, 1997, at 1; Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 168-169 (2004).

25. See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1086-87 (Cal. 2000).

sex and its effect on women and minorities. Section II provides background on the adoption and provisions of Proposition 209. Section III examines the litigation finding Proposition 209 constitutional and defining its scope. Section IV compares the predictions of Proposition 209's opponents with the actual effect of Proposition 209 on women and minorities ten years later. Finally, Section V discusses adopting California's approach to eliminating discrimination and preferential treatment in other states.

II. CALIFORNIA VOTERS AMENDED THE CONSTITUTION TO ELIMINATE STATE DISCRIMINATION

By adopting Proposition 209, California voters amended the California State Constitution, the organic law that determines the state's governing principles, with a goal of eliminating race- and sex-based discrimination and preferences.²⁶ The language of Proposition 209 closely parallels Title VII of the Civil Rights Act of 1964.²⁷ The first United States Supreme Court decision to consider an alleged violation of Title VII concluded, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."²⁸ As California Supreme Court Justice Janice Brown explained,

voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated *Weber*, and *Bakke II*, as well as *Price*, an interpretation reflecting the philosophy that "[h]owever it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences, for any purpose, are anathema to the very process of democracy."²⁹

26. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) ("On November 5, 1996, the people of the State of California adopted the California Civil Rights Initiative as an amendment to their Constitution.").

27. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."); *see also* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION at 32 (Argument in Favor of Proposition 209) (Nov. 5, 1996) ("Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act . . .").

28. *Griggs v. Duke Power Co.*, 401 U.S. 424, 428, 431 (1971).

29. *Hi-Voltage*, 12 P.3d at 1083 (quoting *Price v. Civil Serv. Comm'n*, 602 P.2d 1365, 1390-91 (Cal. 1980) (Mosk, J. dissenting)) (internal citations omitted).

When the government implements programs that discriminate or give preferential treatment based on race or sex, including programs such as participation goals or quotas, it is drawing a line based on race and sex.³⁰ Proposition 209 removes the lines drawn by government when they are based on race and sex.³¹

Proposition 209 is limited to programs administered by the state itself, cities, counties, political subdivisions, and governmental instrumentalities, and specifically those involving public employment, public education, and public contracting.³² Private enterprises are unaffected by the amendment.³³ There are three exceptions to state action which allow discriminatory and/or preferential programs to continue: (1) bona fide qualifications based on sex;³⁴ (2) court orders and consent decrees already in force;³⁵ and (3) actions necessary for receipt of federal funds.³⁶

Essentially, Proposition 209 eliminates “affirmative action” programs that discriminate or grant preferential treatment to individuals because of their race or sex.³⁷ Affirmative action is often a confusing term because it can be defined either as (1) a preference for certain persons where there is total equality of objectively ascertained qualifications, or (2) a preference for persons with lower objectively ascertained qualifications, to the corresponding exclusion of persons better qualified.³⁸ The latter is clearly prohibited by Proposition 209 and

30. *Hi-Voltage*, 12 P.3d at 1084.

31. *See Id.* (comparing participation goals to quotas and set asides and finding that they vary only in degree and thus remain “a line drawn on the basis of race and ethnic status as well as sex.”). *See also* *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 22 (Cal. Ct. App. 3d 2001) (“What is constitutionally significant is that the government has drawn a line on the basis of race or has engaged in a purposeful use of racial criteria.”).

32. CAL. CONST. art. I, § 31(a), (f).

33. *Id.* at § 31(a). *See also* *Volokh, supra* note 23, at 1339 (“[Proposition 209] applies only to actions by ‘[t]he state,’ including all the state’s subdivisions, agencies, and instrumentalities. Private enterprises are excluded.” (footnote omitted)).

34. *Id.* at § 31(c). No programs have been challenged under the bona fide qualifications based on sex exception. For further discussion of this exception, see *Volokh, supra* note 23, at 1364-86.

35. CAL. CONST. art. I, § 31(d).

36. *Id.* at § 31(e). For a more thorough treatment of the Federal Funding Exception see Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California’s Proposition 209*, 44 SANTA CLARA L. REV. 457 (2004).

37. *See* CAL. CONST. art. I, § 31(a).

38. *See* *Lungren v. Super. Ct.*, 55 Cal. Rptr. 2d 690, 694 (Cal. Ct. App. 3d 1996) (finding the term “affirmative action” amorphous and value-laden, and stating that “[m]ost definitions of the term would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs. Accordingly, any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence ‘false and misleading.’” (internal citation omitted)); CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION at 32 (Argument in Favor of Proposition 209) (Nov. 5, 1996) (“Real ‘affirmative action’ originally meant no discrimination and sought to provide opportunity.”).

the former is likely to be prohibited by Proposition 209, because it would be a preference based on race or sex.³⁹ Proposition 209 leaves intact any program, whether labeled affirmative action or outreach, that does not single out individuals because of their race or sex.⁴⁰ For example, an outreach program that compels contractors to target minority and women subcontractors would violate Proposition 209, while outreach programs providing information to all available subcontractors would not violate Proposition 209.⁴¹

A majority of Californians supported the initiative.⁴² Proposition 209 passed with an 8% margin.⁴³ Governor Pete Wilson and Attorney General Dan Lungren responded without delay by issuing an Executive Order and instructing state agencies to comply immediately with Proposition 209.⁴⁴ Today, Californians continue to enjoy the right to be free from the effects of state discrimination and preferential treatment by government entities based on race and sex, despite fierce, continued opposition.⁴⁵

39. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION at 32 (Argument in Favor of Proposition 209) (Nov. 5, 1996) (“Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue.”)

40. See CALIFORNIA BALLOT PAMPHLET at 32 (“Proposition 209 . . . allows any program that does not discriminate, or prefer, because of race or sex, to continue.”). See also Lungren, 55 Cal. Rptr. 2d at 694.

41. See, e.g., *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1084 (Cal. 2000). See also *Id.* at 1090 (Mosk, J., concurring) (“[The San Jose contracting program] skews the process in favor of subcontracting firms that are owned by women or members of minority groups. Not only does it invite those firms into the process, it also guarantees that they will be dealt with well during its course, and will not be ushered out without reason at its end. It does not do the same for others.”).

42. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *vacated as moot*, *Coal. for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

43. *Id.*

44. *Id.* at 1495. Pete Wilson’s Executive Order (Exec. Order No. W-136-96 (1996)) required “state agencies to promulgate implementing regulations and identify all state statutes and programs pertaining to employment, education or contracting that grant or encourage preferences based on race, sex, color, ethnicity or national origin.” *Id.*

45. See Bobby Caina Calvan, *States Eye Court’s Race-Based Admissions Ruling Some Calif. Leaders Seeking to Repeal Proposition 209*, BOSTON GLOBE, June 25, 2003, at A3 (“Advocates of affirmative action in California, particularly Latino and African-American leaders, expressed hope that the Supreme Court decision in a University of Michigan case on Monday would give them leverage to lift a statewide ban on considering race or ethnicity in college admissions.”); Jim Sanders, *Judge: Law violates Prop. 209*, SACRAMENTO BEE, May 13, 2005, at A1, available at 2005 WLNR 7602862 (reporting on a ruling by Superior Court Judge Thomas M. Cecil which held that legislation adopted two years earlier was unconstitutional and in violation of Proposition 209).

III. JUDICIAL INTERPRETATION HAS AFFIRMED VOTERS' INTENT TO ELIMINATE DISCRIMINATION AND PREFERENTIAL TREATMENT

The judicial opinions involving Proposition 209 upheld the measure and explained whether certain types of programs are allowed or are prohibited. In the initial challenge to Proposition 209's constitutionality, the Ninth Circuit Court of Appeals reversed the district court decision and found Proposition 209 constitutional.⁴⁶ Government programs that discriminate or grant preferences based on race or sex are in violation of Proposition 209.⁴⁷ Whether a government program discriminates or grants preferential treatment is determined in accordance with the natural and ordinary meaning of the words.⁴⁸ California's judiciary has narrowly interpreted the federal funding exception.⁴⁹ The decisions of the key cases and their interpretation of Proposition 209 are discussed in the following three sections.

A. *The Ninth Circuit Affirmed the Constitutionality of Proposition 209*

The day after California voters adopted Proposition 209 to end discrimination and preferences based on race and sex, its constitutionality was challenged in federal court.⁵⁰ Judge Thelton Henderson granted a temporary restraining order just over a month later, enjoining the state's enforcement of Proposition 209 based on the Equal Protection Clause and Title VII of the Civil Rights Act.⁵¹ He recognized that Californians meant to do more than restate existing law by passing Proposition 209 and that "the primary change Proposition 209 makes to existing law is to close that narrow but significant window that permits the governmental race- and gender-conscious affirmative action programs . . . that are still permissible under the United States Constitution."⁵² Opponents to the amendment feared that the elimination of the race- and gender-conscious affirmative action programs still

46. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

47. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1084 (Cal. 2000); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 30, 41-42 (Cal. Ct. App. 3d 2001).

48. *Hi-Voltage*, 12 P.3d at 1082. The dictionary definitions were used to determine the natural and ordinary meaning of the words of the constitutional amendment, in conformance with the court's precedent. *Id.* See *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization*, 583 P.2d 1281, 1300 (Cal. 1978) ("A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words.").

49. *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 723-24 (Cal. Ct. App. 3d 2004).

50. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996).

51. *Id.* at 1489.

52. *Id.* at 1489-90.

permissible under the United States Constitution, which were implemented to remediate past and present discrimination, would reduce opportunities for women and minorities in public contracting, employment, and education.⁵³ The plaintiffs argued that Proposition 209 restructured “the political process to disadvantage only those seeking to enact legislation intended to benefit minorities and women,” thus depriving minorities and women of their right to equal protection of the laws.⁵⁴

Judge Henderson agreed and concluded that Proposition 209 likely violated the Fourteenth Amendment’s equal protection guarantee to full participation in the political life of the community and that it would likely violate the Supremacy Clause because of a conflict with Title VII of the 1964 Civil Rights Act.⁵⁵ He reasoned that preferences unrelated to race and sex remained unaffected by Proposition 209, effectively singling out women and minorities for unfavorable political treatment.⁵⁶ The court found that despite Proposition 209’s facially neutral language, the initiative made distinctions based on race and sex because women and minorities have a special interest in preferential treatment.⁵⁷ Accordingly, he granted a restraining order prohibiting the enforcement of Proposition 209.⁵⁸

The Ninth Circuit vacated the restraining order, and found no constitutional violation in Proposition 209.⁵⁹ The appeals court explained, “The ultimate goal of the Equal Protection Clause is ‘to do away with all governmentally imposed discrimination based on race.’”⁶⁰ The court goes on to say “[t]he Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.”⁶¹

53. *See id.* at 1489, 1494-95. For example, the city of San Francisco “adopted a race- and gender-conscious affirmative action program after finding that it was necessary to counter established discriminatory practices, including ‘old boy networks,’ that prevented minority and women contractors from obtaining city contracts.” *Id.* at 1489 n.3 (citing *Associated Gen. Contractors of Cal. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1413-18 (9th Cir. 1991)). Webster’s dictionary defines “old boy” as “a man who is a member of a long-standing and usu[ally] influential clique esp[ecially] in a professional, business, or social sphere.” Webster’s Collegiate Dictionary (10th ed. 1995)).

54. *Coal. for Econ. Equity*, 946 F. Supp. at 1499.

55. *Id.* at 1520.

56. *Id.* at 1505 (“[T]he primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender.”).

57. *Id.* at 1502, 1504, 1508.

58. *Id.* at 1520.

59. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 701, 711 (9th Cir. 1997).

60. *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

61. *Wilson*, 122 F.3d at 709. The Ninth Circuit also pointed out that “[t]o the extent that Proposition 209 prohibits race and gender preferences to a greater degree than the Equal Protection

Because Proposition 209 prohibits any discrimination or preference based on race or sex, it addresses race- and sex-related matters in a neutral fashion and does not burden individual rights to equal treatment.⁶² Rather than classifying individuals by race or sex, the initiative prohibits the state from making classifications based on race or sex.⁶³ The challenge to Proposition 209 was based on the impediment it posed to receiving preferential treatment.⁶⁴ The Ninth Circuit concluded that women and minorities do not have a right to preferential treatment under the Equal Protection Clause and the court held that placing a burden on achieving race- or sex-based preferential treatment does not deny individuals equal protection of the law.⁶⁵

The district court's finding that Proposition 209 violates Title VII was also dismissed because of the express pre-emption provisions of the 1964 Civil Rights Act.⁶⁶ The pre-emption provisions indicate that state laws are only pre-empted by federal law if they actually conflict with the federal law.⁶⁷ Since Proposition 209 does not require any unlawful employment practice, it does not conflict with Title VII.⁶⁸ Accordingly, the Ninth Circuit concluded that Proposition 209 does not violate the United States Constitution.⁶⁹

Clause, it provides greater protection to members of the gender and races otherwise burdened by the preference." *Id.* at 709 n.18 (citing *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980)).

62. *Wilson*, 122 F.3d at 707-08.

63. *Id.* 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. . . . Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender.

Id.

64. *Id.* at 708.

65. *See id.* ("It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.")

66. *Id.* at 710 ("Because Title VII by its plain language does not pre-empt Proposition 209, the district court relied on an erroneous legal premise in concluding that plaintiffs are likely to succeed on the merits of their pre-emption claims.").

67. *Id.* Section 708 of Title VII provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 § 708.

68. *Wilson*, 122 F.3d at 710.

69. *Id.*

B. Government Programs that Discriminate or Give Preferential Treatment are in Violation of Proposition 209

The California Supreme Court granted review in *Hi-Voltage Wire Works, Inc. v. City of San Jose* in order “to settle [an] important question of state constitutional law.”⁷⁰ The California Supreme Court then delivered an “extended perspective” to “illuminate[] the meaning and purpose of Proposition 209 and guide[] its application.”⁷¹ Indeed, while a majority of the court conceded that “it may be possible to resolve the matter” on narrow considerations, the majority consciously decided instead to “discern and thereby effectuate the voters’ intention . . . by interpreting [Proposition 209’s] language in its historical context.”⁷²

In San Jose, the city adopted a program requiring contractors to either meet participation goals by utilizing a specified percentage of minority and women subcontractors, or to document targeted outreach efforts to include minority and women subcontractors in their bids.⁷³ The bids of those contractors who did not meet participation goals or document their targeted outreach efforts to minorities and women were not considered.⁷⁴ The court found that, at a minimum, the participation component of the contracting program encouraged discriminatory race and sex-conscious numerical goals.⁷⁵

San Jose defended its outreach documentation program by arguing that focused and targeted outreach did not fall within the scope of Proposition 209.⁷⁶ However, the California Supreme Court noted that voters had access to both the Legislative Analyst’s report and the arguments against Proposition 209, which specifically indicated that outreach would likely be eliminated to the extent it operated based on race or sex.⁷⁷ San Jose argued that its outreach requirement merely

70. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1072 (Cal. 2000).

71. *Id.*

72. *Id.* at 1070.

73. *Id.* at 1070-71.

74. *Id.* at 1071.

75. *Id.* at 1084 (“A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains ‘a line drawn on the basis of race and ethnic status’ as well as sex.” (quoting *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 289 (1978))).

76. *Hi-Voltage*, 12 P.3d at 1086.

77. *Id.* The analysis by the Legislative Analyst lists outreach programs as an example of affirmative action programs and states “[t]his measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve ‘preferential treatment’ based on race, sex, color, ethnicity, or national origin.” CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION at 30 (Argument in Favor of Proposition 209) (Nov. 5, 1996). The ballot pamphlet argument against Proposition 209 lists outreach as an affirmative action program that helps to ensure equal opportunity for women and minorities. *Id.* at 33. The argument against Proposition 209 warned,

expanded the applicant pool, but the court found this misleading and irrelevant because the program automatically eliminated bids that failed to document outreach to minority- and women-owned businesses; such documentation was not required for non-minority- and non-woman-owned businesses.⁷⁸

The city offered further support for its program by arguing that the equal protection clause does not preclude race- and sex-conscious programs.⁷⁹ However, the court maintained that the equal protection clause does not preclude a state from providing its citizens greater protection against race- and sex-conscious programs, as California voters did by passing Proposition 209.⁸⁰ The court construed the terms “discriminate” and “preferential treatment” in accordance with the natural and ordinary meaning of the words by turning to a dictionary.⁸¹ “‘Discriminate’ means ‘to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*).’”⁸² Preferential means “giving ‘preference,’ which is ‘a giving of priority or advantage to one person . . . over others.’”⁸³ San Jose’s outreach program was unconstitutional because it granted preferential treatment based on race and sex by compelling non-minority contractors to contact minority- and women-owned businesses and solicit their participation, thus giving these businesses an advantage over other businesses.⁸⁴

California courts have invalidated a number of discriminatory practices that were in violation of Proposition 209. For instance, in 1998, the State Personnel Board’s policy of using “supplemental certification” in hiring decisions was invalidated under Proposition 209.⁸⁵ Supplemental certification allowed minority and female applicants seeking positions in the state civil service to be considered for employment without meeting the usual requirement of placing in the top

“Proposition 209 will eliminate affirmative action programs like these that help achieve equal opportunity for women and minorities in public employment, education and contracting.” *Id.*

78. *Hi-Voltage*, 12 P.3d at 1084, 1087.

79. *Id.* at 1087.

80. *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 654 (1993) (“with respect to equal protection, ‘courts must bear in mind the difference between what the law permits and what it requires.’”)).

81. *Hi-Voltage*, 12 P.3d at 1082. The dictionary definitions were used to determine the natural and ordinary meaning of the words of the constitutional amendment, in conformance with the court’s precedent. *See Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* 583 P.2d 1281, 1300 (Cal. 1978) (“A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words.”).

82. *Hi-Voltage*, 12 P.3d at 1082 (citing WEBSTER’S NEW WORLD DICTIONARY 392 (3d college ed. 1988)).

83. *Hi-Voltage*, 12 P.3d at 1082 (citing WEBSTER’S NEW WORLD DICTIONARY 1062 (3d college ed. 1988)).

84. *Hi-Voltage*, 12 P.3d at 1084.

85. *Kidd v. State Pers. Bd.*, 72 Cal. Rptr. 2d 758, 760, 773 (Cal. Ct. App. 3d 1998).

three ranks of the list of eligible candidates.⁸⁶ The court determined that the practice of using supplemental certification violated Proposition 209 and was therefore unconstitutional because it disregarded merit and encouraged promotions based on race and sex.⁸⁷

Proposition 209 also prohibits legislative programs that discriminate against, or grant preferences to, individuals or groups based upon race or sex.⁸⁸ For example, California's Education Code previously promoted the adoption of an affirmative action employment program in community colleges "designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, including handicapped persons, women, and persons of minority racial and ethnic backgrounds."⁸⁹ The program required each community college district to have a plan with hiring goals and timetables as a condition for receipt of allowances.⁹⁰ Funds were made available for implementing the hiring plans with a goal that, by the year 2005, the race and sex composition of the community college system work force would be proportionate to that of the adult population of the state.⁹¹ The legislature's program was struck down by the California Appeals Court as unconstitutional because of the discriminatory nature of the hiring plan and the preferential treatment given to women and minorities in hiring decisions.⁹² Instead of making inclusive outreach efforts to assure equal opportunity, the program required colleges to single out minorities and women.⁹³ The court explained that when the legislature chooses to rely on race and sex distinctions, the scheme is presumptively invalid; the courts should not defer to legislative pronouncements. The legislature cannot rely on race and sex distinctions without meeting the heavy burden required to justify the use of the distinctions.⁹⁴

86. *Id.* at 762.

Supplemental certification allows those members of an underutilized class, for present purposes minorities and women, to have their names added to the list of eligible applicants even though the particular minority or female applicant did not score within the top three ranks [W]hile supplemental certification does not guarantee that a member of an underutilized class will be selected for employment, it does make minority and female applicants eligible for employment who otherwise could not be considered for employment.

Id.

87. *Id.* at 767, 772.

88. *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 30 (Cal. Ct. App. 3d 2001).

89. CAL. EDUC. CODE §§ 87101-87102 (2001).

90. *See Id.*

91. *Connerly*, 112 Cal. Rptr. 2d at 40-41.

92. *Id.* at 41-42.

93. *Id.* at 41.

94. *Id.* at 37 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989)).

In 2003, the California legislature passed Assembly Bill 703 to redefine the term “racial discrimination” for purposes of Proposition 209.⁹⁵ The new definition conflicted with the plain meaning of the term as construed by the California Supreme Court.⁹⁶ The legislature adopted the definition of discrimination used by the International Convention on the Elimination of All Forms of Racial Discrimination, which allows “[s]pecial measures [to be] taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups”⁹⁷ A California appellate court found that “Assembly Bill 703 amounted to an attempt by the Legislature and the Governor to amend the California Constitution without complying with the procedures for amendment.”⁹⁸ About eight months later, a state trial court prevented the Governor and Attorney General from enforcing the new law’s definition by imposing a permanent injunction against the new law.⁹⁹

C. The Federal Funding Exception is Interpreted Narrowly

The federal funding exception is a narrow exception to the prohibition on discrimination and preferential treatment based on race or sex.¹⁰⁰ In 1998, the Sacramento Municipal Utility District (SMUD) implemented an affirmative action program offering numerous advantages to bids from contractors submitted by minorities or contractors who subcontracted with minorities.¹⁰¹ The program also required contractors to make broad outreach efforts and to document

95. See CAL. GOV’T. CODE § 8315(a) (2005).

96. *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 726 (Cal. Ct. App. 3d 2004);

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1082 (Cal. 2000).

97. CAL. GOV’T. CODE § 8315(b)(2005).

98. *C&C Constr.*, 18 Cal. Rptr. 3d at 726.

99. *Connerly v. Davis*, Case No. 03AS05154, J. and Permanent Prohibitory Injunction (Superior Court of Cal., County of Sacramento May 12, 2005).

100. *C&C Constr.*, 18 Cal. Rptr. 3d at 723 (“[I]n order to discriminate based on race, the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination.”). See also Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California’s Proposition 209*, 44 SANTA CLARA L. REV. 493 (2004) (explaining that a broad interpretation of the federal funding exception would “undermine the intent of California’s voters to remove the State from the business of granting preferential treatment to some individuals and groups simply because of their race or sex.”).

101. *C&C Constr.*, 18 Cal. Rptr. 3d at 720. The benefits included a five percent price advantage for prime contractors, capped at \$50,000, in all proposals up to \$1,000,000 submitted by certified businesses owned by African-Americans or Hispanic-Americans. *Id.* The same price advantage was offered to all prime contractors who obtain the subcontractors’ goal of 8% each, on proposals over \$50,000 for subcontracts less than \$1,000,000 submitted by certified businesses owned by Asian Pacific-Americans or African-Americans. *Id.*

efforts sufficient to comply with the program's requirements.¹⁰² SMUD reasoned that to maintain federal funding, it had to comply with regulations that mandate implementation of affirmative action programs to remediate the effects of any past discrimination.¹⁰³

However, there was no evidence that a race-neutral program could not satisfy the requirements to maintain federal funding.¹⁰⁴ SMUD was unable to identify a federal law or regulation that required race-based remedies to maintain their federal funding and SMUD's affirmative action program was found unconstitutional.¹⁰⁵ Thus, although there is an exception to Proposition 209's ban on discrimination and preferences for programs required to maintain federal funding, the state is required to comply with *both* federal law and Proposition 209, if possible.¹⁰⁶

IV. THE DIRE CONSEQUENCES PREDICTED BY PROPOSITION 209'S OPONENTS HAVE FAILED TO MATERIALIZE

A. *Most of California's Public Agencies Voluntarily Brought Their Policies into Compliance with Proposition 209*

Prior to the passage of Proposition 209, some officials and scholars promised that if adopted, the amendment would be ignored.¹⁰⁷ For example, the current California Attorney General, Bill Lockyer, refused to enforce Proposition 209 and demanded that the California Supreme Court interpret the amendment to dilute the prohibitions against "granting preferences based on race or sex."¹⁰⁸ Then San Francisco Mayor, Willie Brown, stated that he would ignore the new amendment to the state constitution and provoked the amendment's enforcers by saying

102. *Id.* The program's requirements included attendance at a SMUD affirmative action program briefing, requesting "assistance from SMUD's affirmative action program office, identifying specified units of work that improve the likelihood of subcontracting," and contacting potential minority subcontractors no less than 10 days before the proposal due date. Contractors were then required to contact minority subcontractors a second time "to determine with certainty whether they were interested in performing the specific work on the project." *Id.*

103. *Id.* at 723. *See also* 49 C.F.R. § 21.7(a)(1) (2004) (requiring assurance of compliance with Department of Transportation regulations to apply for Federal financial assistance).

104. *C&C Constr.*, 18 Cal. Rptr. 3d at 732.

105. *Id.* at 733.

106. *Id.* at 733 n.10 ("SMUD's compliance with [Proposition 209] is not preempted by the federal regulations if SMUD can comply with *both* [Proposition 209] *and* the federal regulations.").

107. Gail Heriot, *supra* note 24, at 168-169.

108. *See* Kevin Yamamura, *Group: Lockyer 'shirked duty' on 209*, SACRAMENTO BEE, Nov. 6, 2001, at A3; Adam Sparks, *California's War on Prop. 209 View from the Right*, S.F. GATE, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2002/12/02/asparks.DTL&hw=sparks+209&sn=003&sc=714> (Dec. 2, 2002) (last accessed Oct. 3, 2005).

“so sue me.”¹⁰⁹

In 1998, two years after the passage of Proposition 209, Pacific Legal Foundation (PLF), a conservative think tank, examined compliance with the new constitutional amendment.¹¹⁰ Despite the threats and promises of some public officials vowing to ignore Proposition 209, the majority of local governments, municipalities, and special districts throughout California complied with Proposition 209 soon after its adoption.¹¹¹

The employment policies of eighty-five of California’s state and local government agencies were examined by the 1998 study.¹¹² After PLF’s study began, a California appellate court struck down “aspirational goals” because of the pressure they put on government officials to hire based on race and sex.¹¹³ Compliance with Proposition 209 was 79%, assuming agencies surveyed changed their policies to comply with the court’s decision.¹¹⁴ If none of those agencies changed their policies then compliance may be as low as 32%.¹¹⁵ The study identified “41 state agencies that had goals and timetables for the hiring and promotion of minorities and women prior to the decision in *Connerly*.”¹¹⁶ Among the eleven clearly identified violators were the City of Berkeley and the County of Los Angeles.¹¹⁷ After the decision in *Connerly*, most agencies replied that they would no longer maintain goals and timetables due to the decision.¹¹⁸ Thus, the majority of California’s state employers complied with Proposition 209 a short time after it was adopted.

In the same study, approximately 88% of public school districts were found in compliance with Proposition 209.¹¹⁹ Of the 112 school districts

109. Sparks, *supra* note 108.

110. TRAVIS J. LINDSEY, PACIFIC LEGAL FOUNDATION’S OPERATION END BIAS PROGRAM: SUMMARY REPORT (2001) (unpublished manuscript, on file with Pacific Legal Foundation and copy on file with author). Pacific Legal Foundation did a random sampling of more than 100 California cities, counties and special districts to determine compliance with Proposition 209. *Id.* at 1. Public Records Act requests were sent requesting information concerning programs that take into account the race or sex of an individual. *See id.* at 3.

111. *See id.* at 19.

112. *Id.*

113. *Id.* at 13.

114. *Id.* at 19.

115. *Id.*

116. *Id.* The *Connerly* decision found that hiring and promotion goals and timetables that made classifications based on race and sex were unconstitutional, 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 3d 2001). If state and local government agencies changed their policies after the decision in *Connerly*, then compliance is around 79%. However, if none of those agencies changed their policies then compliance may be as low as 32%.

117. Lindsey, *supra* note 110, at 14-16. There are twenty-seven agencies that appear to comply with Proposition 209, including the City of Los Angeles. *Id.* at 18.

118. *Id.* at 18.

119. *Id.* at 19.

examined in a study conducted by the PLF, only nine were found in violation of Proposition 209 and four school districts had policies that potentially violated Proposition 209.¹²⁰ While ninety-nine school districts were found in compliance, only fifteen of those districts were closely examined; the others were surveyed “only by the information found on their websites.”¹²¹ Although only nine districts were found in violation of Proposition 209, some of the largest districts in the state, such as Los Angeles Unified School District, had programs or policies that were likely in violation of Proposition 209.¹²²

The PLF study also found that 71% of the forty-five government entities examined for their participation in public contracting complied with Proposition 209.¹²³ Five of the government entities were identified as violators and seven were identified as potential violators of Proposition 209.¹²⁴ Again, the County of Los Angeles is among the identified violators of Proposition 209.¹²⁵ However, thirty-two of the forty-five agencies examined appear to comply with Proposition 209.¹²⁶

For those agencies and districts that chose not to voluntarily comply with Proposition 209, California citizens are able to enforce the requirements of the amendment in the courts. As discussed in Section II, *supra*, Proposition 209 has been enforced in the courts through lawsuits challenging the agencies that put discriminatory or preferential programs into place.¹²⁷

120. *Id.* Identified violators are those government entities that implement policies which violate Proposition 209 on their face. Potential violators are those government entities that have generated complaints from concerned citizens regarding possible violations of Proposition 209, but that have race- and sex-neutral policies. There are over 350 school districts in the state of California. California School Districts with Web Servers, *available at*, <http://www.slocoe.org/resource/calpage1.htm> (last accessed October 19, 2005).

121. Lindsey, *supra* note 110, at 19.

122. *Id.* Some of the policies implemented by school districts in violation of Proposition 209 have been effectively challenged and enjoined by court action. *See, e.g.*, Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96 (Cal. Ct. App. 4th 2003).

123. Lindsey, *supra* note 110, at 19.

124. *Id.* at 4-8.

125. *Id.* at 4. The County of Los Angeles has goals and timetables for minority and female participation in contracting and also a “county-wide aspirational goal of 25% minority, women, disadvantaged and disabled veteran-owned firm participation.” *Id.*

126. *Id.* at 8.

127. *See, e.g.*, Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000); C&C Constr., Inc. v. Sacramento Mun. Util. Dist., 18 Cal. Rptr. 3d 715 (Cal. Ct. App. 3d 2004); Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 3d 2001); Crawford, 121 Cal. Rptr. 2d 96.

B. Proposition 209 Has Not Adversely Affected the Public Employment or Labor Market Position of Women and Minorities

Before Proposition 209 was passed, some scholars believed it would lead to a “deterioration in the labor market position of the African-American and Hispanic communities and on the labor market position of women generally.”¹²⁸ Professor Chemerinsky pointed to the success of affirmative action programs in increasing the employment of women and minorities, especially in more senior or higher paying positions.¹²⁹ Chemerinsky also feared that Proposition 209 would eliminate outreach programs with increased advertising for job openings in places frequented by women and minorities.¹³⁰ However, the fears that the position of women and minorities would deteriorate did not materialize. Women and minorities have maintained their levels in the public work force, including those with jobs at higher salary levels.¹³¹ There has been no increase in the overall unemployment rate of women and minorities and their labor market position has remained relatively unchanged compared to pre-Proposition 209 levels.¹³²

Proposition 209 did not cause the number of women and minorities in more senior or higher paying positions to decline, and women have been able to maintain their levels in the public work force. According to Professor Chemerinsky, “[t]he composition of the public work force at higher salary levels” consisted of more than 90% white employees in 1975, and because of programs involving preferential treatment of minorities, less than 70% of employees at higher salary levels were white in 1993.¹³³ In 1975, the year after Governor Reagan designated the

128. Chemerinsky, *supra* note 21, at 1008.

129. *Id.* See also CALIFORNIA SENATE OFFICE OF RESEARCH, THE STATUS OF AFFIRMATIVE ACTION IN CALIFORNIA 35 (Mar. 1995) (reporting that the composition Asians, African-Americans and Hispanics in the public work force at the higher salary levels went from 3% or less per group in 1975 to 9.3% or greater per group in 1993).

130. Chemerinsky, *supra* note 21, at 1008.

131. See ELIAS S. LOPEZ, CALIFORNIA RESEARCH BUREAU, THE COMPOSITION OF STAFF IN CALIFORNIA’S COMMUNITY COLLEGES, 1994 TO 2002 13 (2004) (reporting data provided by the California Community Colleges Chancellor’s Office); ELIAS S. LOPEZ & REFUGIO I. ROCHIN, CALIFORNIA RESEARCH BUREAU, CALIFORNIA STATE UNIVERSITY FACULTY: 1985 TO 2001 20-23, 32-37 (2003); ELIAS S. LOPEZ & BELINDA REYES, CALIFORNIA RESEARCH BUREAU, FACULTY, MANAGERS, AND ADMINISTRATORS IN THE UNIVERSITY OF CALIFORNIA, 1996 TO 2002 87 (2004) (analyzing data provided by the University of California Office of the President obtained by legislative request).

132. See Data obtained from the U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS BY AGE, GENDER, RACE, AND HISPANIC ORIGIN, 1981-2003 ANNUAL AVERAGES; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2003 EEO-1 AGGREGATE REPORT CA, available at, <http://www.eeoc.gov/stats/jobpat/2003/state/6.html> (last accessed July 12, 2005).

133. See Chemerinsky, *supra*, note 21, at 1007 (citing CAL. SENATE OFFICE OF RESEARCH,

implementation of California's affirmative action program, the percentage of Asian-Americans, African-Americans, and Hispanics at higher salary levels was 3% or less per group, compared to 9.9%, 9.3%, and 11.7% respectively in 1993.¹³⁴ These numbers suggest that more minorities were able to find jobs at higher salary levels after California implemented its affirmative action plan.

Since Proposition 209, minorities have maintained their levels of employment in jobs at higher salary levels. The Equal Employment Opportunity Commission reports that in 2003, 61.4% of those employed as professionals were white, compared to 38.6% who were minorities.¹³⁵ Of those employed as officials and managers, 71.3% were white and 28.7% were minorities.¹³⁶ Although there is still some disparity between whites and minorities in public employment, it does not appear that minorities have lost any ground since 1993, before Proposition 209 was adopted. The overall percentages of minority employees in the higher salary levels have not changed significantly since the adoption of Proposition 209.¹³⁷

Opponents of the amendment also believed that women and minorities were more dependent upon public employers because of their preferential hiring policies.¹³⁸ Because of this dependence, Barbara Bergman predicted that the "loss of affirmative action programs in the public sector could be expected to increase" the overall unemployment rate of African-Americans by more than one percentage point and that "[u]nemployment rates for Hispanics and women of all races would also rise."¹³⁹ Rather than the increase in unemployment predicted by Proposition 209's critics, California's unemployment statistics show a decrease in unemployment rates for women and minorities, even immediately after the adoption of Proposition 209.¹⁴⁰ While Proposition 209 is not likely the cause of the decrease in unemployment for

THE STATUS OF AFFIRMATIVE ACTION IN CALIFORNIA 25 (Mar. 1995)).

134. Chemerinsky, *supra* note 21, at 1007.

135. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2003 EEO-1 AGGREGATE REPORT CA, available at, <http://www.eeoc.gov/stats/jobpat/2003/state/6.html> (last accessed July 12, 2005) (reporting that in 2003, there were 800,139 workers employed as professional and 308,455 of them were minorities).

136. *Id.* (reporting 492,269 employees working as officials and managers, and 141,220 of their employees were minorities).

137. *Id.*; CAL. SENATE OFFICE OF RESEARCH, THE STATUS OF AFFIRMATIVE ACTION IN CALIFORNIA 25 (Mar. 1995).

138. Chemerinsky, *supra* note 21, at 1008.

139. *Id.*

140. Data obtained from the U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS BY AGE, GENDER, RACE, AND HISPANIC ORIGIN, 1981-2003 ANNUAL AVERAGES. Between 1995 and 1997 the unemployment rate for blacks and Hispanics fell by 1.3% and 1.8%, respectively. See Figure 1.

minorities (whites have also experienced a slight decrease in unemployment during the same time period), Proposition 209 did not cause an increase in unemployment rates for minorities as predicted by those opposed to the amendment.

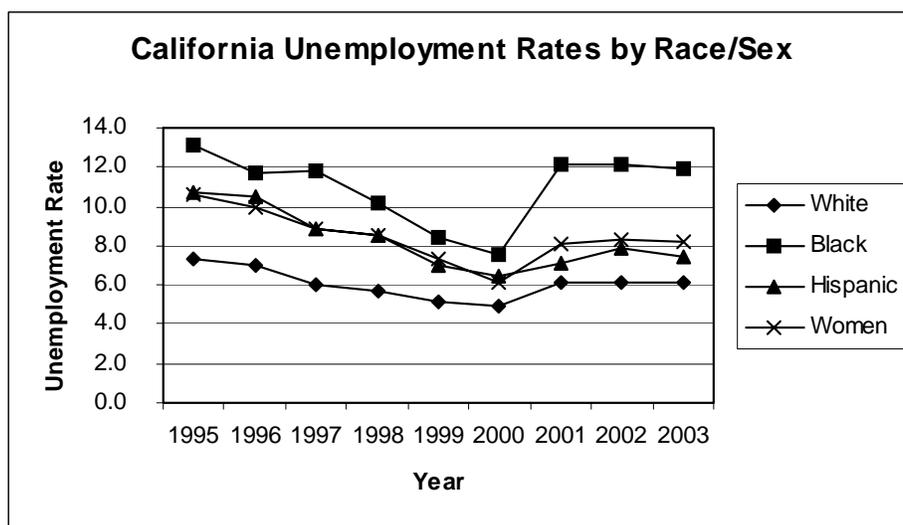


Figure 1. Data obtained from the U.S. Department of Labor, Bureau of Labor Statistics

Between 1995 and 2003, the unemployment rate of blacks in California decreased by 1.2%, the same percentage decrease in unemployment rate experienced by whites in California.¹⁴¹ For Hispanics, the unemployment rate fell by an even greater percentage, dropping 3.3% between 1995 and 2003.¹⁴² During the same time period, the unemployment rate for white, black, and Hispanic women decreased by 1.3%, 2.7%, and 3.3%, respectively.¹⁴³ According to the U.S. Equal Employment Opportunity Commission, in 2003, 45.7% of all employees in the state of California were women.¹⁴⁴ In 2003, more minority workers

141. *Id.*

142. *Id.*

143. *Id.*

144. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2003 EEO-1 AGGREGATE

than white workers were employed in the state of California, reflecting the diverse racial demographics of the state.¹⁴⁵ These figures are hardly consistent with the suggestion that Proposition 209 would be devastating, or even detrimental, to the labor market position of women and minorities.

The ominous predictions of the deterioration in labor market position for women and minorities are unfounded. Some of the largest employers in the public sector are state universities and colleges, which employed 36.5% of all state employees during the 2002-03 fiscal year.¹⁴⁶ In 2004, the California Research Bureau study on the composition of staff in California Community Colleges showed no deterioration of the labor market position of minorities or women in California Community Colleges compared to 1994 (pre-Proposition 209).¹⁴⁷ In fact, the percentage of Latino educational administrators increased from 11% in 1994 to 14% in 2002.¹⁴⁸ The percentage of African-Americans working as educational administrators has remained somewhat constant, decreasing slightly by 0.8% from 1994 to 2002.¹⁴⁹ As shown in Figure 2, the total number of Latinos, Asians, and African-Americans promoted or newly hired as educational administrators increased for each group between 1995 and 2002; however, the total number of whites promoted or newly hired increased by more than two-fold.¹⁵⁰ In 1995 there were twenty-six newly hired or promoted Latinos compared to thirty-nine in 2002.¹⁵¹ The numbers are similar for African-Americans, with twenty promotions and new hires in 1995 compared to thirty-five promotions and new hires in 2002.¹⁵² Although it is encouraging that the community college system continues to hire and promote members of minority

REPORT CA, *available at*, <http://www.eeoc.gov/stats/jobpat/2003/state/6.html> (last accessed July 12, 2005).

145. *See id.* In 2003, there were 2,077,483 white employees and 2,145,273 minority employees.

146. Department of Finance, Economic Research Unit, Employees in California State Government 1975-76 to 2002-03, *available at* <http://www.dof.ca.gov/html/fs%5Fdata/stat%2Dabs/tables/c5.xls> (last accessed July 13, 2005). Out of 321,394 total people employed by the state of California in 2002-03, 118,289 of them were employed either by state colleges or the University of California system. *Id.*

147. ELIAS S. LOPEZ, CALIFORNIA RESEARCH BUREAU, THE COMPOSITION OF STAFF IN CALIFORNIA'S COMMUNITY COLLEGES, 1994 TO 2002 13 (2004) (reporting data provided by the California Community Colleges Chancellor's Office).

148. *Id.*

149. *Id.* In 1994, 11% of educational administrators were African-American. The year Proposition 209 was passed, 10% of educational administrators were African-American. In 1999, three years after Proposition 209 went into effect, the number rose to 12%. In 2002, 10% of educational administrators were African-American.

150. *Id.* at 15.

151. *Id.* *See* Figure 2.

152. LOPEZ, *supra* note 145, at 15.

groups as educational administrators, the community college system apparently hired and promoted primarily white educational administrators between the years 1995 and 2002.¹⁵³ The hiring of educational administrators by the community college system is one area where the percentages of minorities have significantly declined. The elimination of race- and sex-based affirmative action programs is likely a factor in this decline.

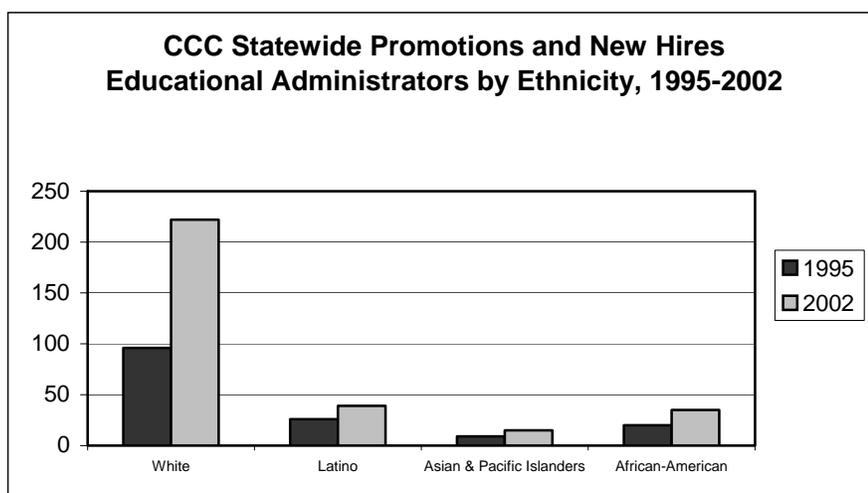


Figure 2. Data compiled by California Research Bureau

The numbers are encouraging for female educational administrators. The hiring and promotion of women at community colleges increased by 2% from 1995 to 2002, and currently 51% of newly hired or promoted educational administrators are female.¹⁵⁴ There are still significant wage gaps between males and females; however, the differences are minimal between ethnic groups.¹⁵⁵ The difference between men and women likely reflects an age difference rather than a difference based on discrimination.¹⁵⁶

This success is not only true for educational administrators at California Community Colleges, but for tenured faculty as well. Figure 3 demonstrates that between 1994 and 2002, the percentage of tenured faculty who were Latino, Asian, African-American, or Native American

153. *Id.*

154. *Id.* at 14.

155. *Id.* at 18. The median annual salary for educational administrators in 2002 was \$99,807 for females and \$103,302 for males.

156. *Id.* (“This gender difference may reflect the age difference between males and females.”)

increased by 4.3%.¹⁵⁷ During the same period the percentage of tenured female faculty members increased by 5.4%.¹⁵⁸ Although the California Research Bureau points out that the composition of tenured faculty is changing “not so much through the promotion and hiring process,” but because “[a]s White males retire, the overall percentages for all the other groups increase,” women and minorities are certainly not losing any ground.¹⁵⁹ The increased percentage of minority and women educators is encouraging.

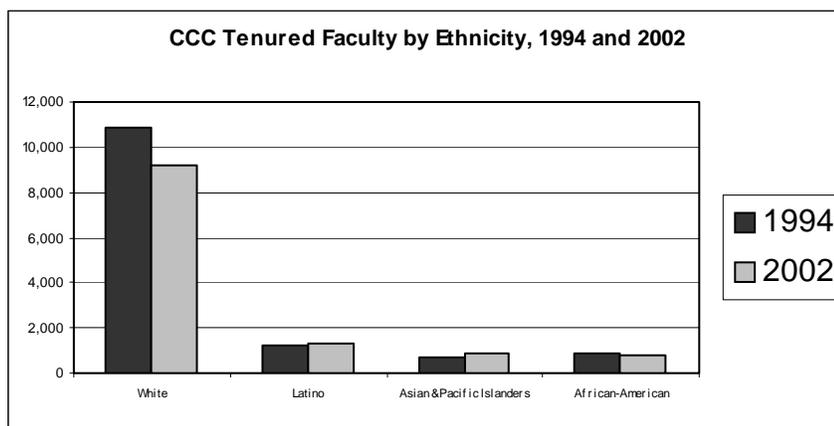


Figure 3. Data compiled by California Research Bureau

Similarly, the employment of women and minorities is increasing in the California State University system.¹⁶⁰ The percentage of female CSU faculty increased from 31% in 1985 to 44% in 2001.¹⁶¹ From 1985 to 2001, the percentage of Latino faculty members rose from 4.0% to 6.7%.¹⁶² African-American faculty members also saw an increase, from 2.8% to 4.0%.¹⁶³ Although these increases are quite modest, they reflect a positive trend, rather than “the deterioration in the labor market position of the African-American and Hispanic communities,” or on the labor market position of women in general, predicted by Proposition 209’s opponents.¹⁶⁴

157. *Id.* at 19.

158. *Id.*

159. *Id.* at 9.

160. See ELIAS S. LOPEZ & REFUGIO I. ROCHIN, CALIFORNIA RESEARCH BUREAU, CALIFORNIA STATE UNIVERSITY FACULTY: 1985 TO 2001, at 20-23, 32-37 (2003).

161. *Id.* at 20.

162. *Id.* at 22. See Figure 4.

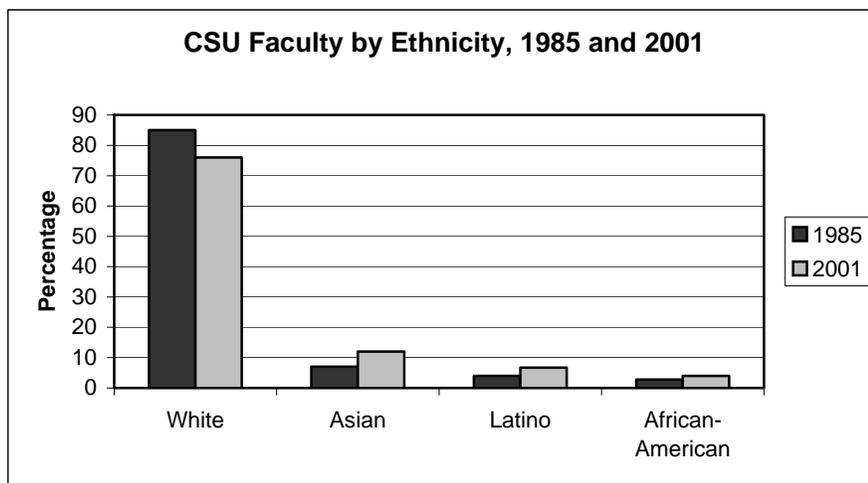


Figure 4. Data compiled by the California State Research Bureau

Compared to the California State University and the California Community Colleges, the employees at the University of California are the least diverse as measured by number of females, Latinos, and African-Americans. Still, a few campuses in the University of California system increased the number of females among their tenured and tenure track faculties by over 30% between 1996 and 2002 – without race- or sex-conscious affirmative action or outreach programs.¹⁶⁵ Minorities have also continued to improve their positions as tenured and tenure track faculty members despite the adoption of Proposition 209.¹⁶⁶

It could be argued that the absence of any negative effect on hiring in some universities may be due to the failure of some universities to

163. LOPEZ & ROCHIN, *supra* note 131, at 22.

164. Chemerinsky, *supra* at note 21, at 1008.

165. ELIAS S. LOPEZ & BELINDA REYES, CALIFORNIA RESEARCH BUREAU, FACULTY, MANAGERS, AND ADMINISTRATORS IN THE UNIVERSITY OF CALIFORNIA, 1996 TO 2002 87 (2004) (analyzing data provided by the University of California Office of the President obtained by legislative request).

166. *Id.* at 87-88. The number of Latino tenured and tenure track professors grew by at least 33% between 1996 and 2002 at UC Santa Barbara and UC Santa Cruz. At UC Davis, UC Irvine and UC Riverside, the number of Asian tenured and tenure track faculty increased by over 45% between 1996 and 2002. UC Managers and Administrators “have also become more diverse. *Id.* at 88. The number of female high-level managers increased by 40[%] from 1996 to 2002. In 2002, females comprised 40[%] of all Managers and Administrators.” *Id.* Only 2.4% of tenured and tenure track faculty at UC schools were African-American in 2002, compared to 2.8% in 1996, showing a slight decrease overall. *Id.* at 13. The total number of African-American tenured and tenure track faculty remained essentially the same, increasing from 164 in 1996 to 167 in 2002. *Id.*

comply with Proposition 209 in hiring and promotion decisions.¹⁶⁷ Schools such as UCLA and UC Davis continue to have affirmative action policies; however their policies are focused on the increased advertisement of job openings to a broader range of potential women and minority candidates, which is not overtly in violation of Proposition 209.¹⁶⁸ UCLA and UC Davis temper their affirmative action policies by explicitly prohibiting the use of discrimination or preferences in hiring decisions, which *would* be in clear violation of Proposition 209.¹⁶⁹ Outreach programs are permissible under Proposition 209 as long as they do not discriminate or give preference based on race or sex. Thus, women and minorities have maintained their ability to obtain public employment at colleges and universities without hiring policies that violate the law.

C. The Overall Impact of Proposition 209 on Women and Minorities in Higher Education Has Been Minimal

Proposition 209's opponents had dire predictions for the higher education of women and minorities if the amendment was adopted to eliminate discrimination and preferential treatment.¹⁷⁰ Some feared that Proposition 209 would abolish programs such as women's resource centers that provide workshops on self-defense, rape prevention, and sexual harassment.¹⁷¹ However, this particular fear is unfounded for most women's resource centers because Proposition 209 is not triggered so

167. See, e.g., UCLA ACADEMIC AFFIRMATIVE ACTION PLAN, available at http://faculty.diversity.ucla.edu/affirmative_action/docs/2004-2005%20AAP.pdf (last accessed July 6, 2005); UC DAVIS POLICY AND PROCEDURE MANUAL, SECTION 380-10 AFFIRMATIVE ACTION IN EMPLOYMENT, available at <http://manuals.ucdavis.edu/ppm/380/380-10.htm> (last accessed July 6, 2005).

168. *Id.*

169. *Id.* See UCLA Affirmative Action Plan, *supra* note 165 at 39; See also UC Davis Policy, *supra* note 165 at VI. For example, UC Davis "commits itself to apply every good faith effort to achieve prompt and full utilization of minorities and women in all segments of its workforce where deficiencies exist." *Id.* at 380-10 § III (A). Part of this commitment includes goal setting, special outreach efforts, and reporting reasons for not interviewing or selecting those candidates who are not hired. *Id.* at § VI (A)(2). These policies are not clearly in violation of Proposition 209, but may be in violation if they result in preferences for women and minorities in hiring and promotions. See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1084-85 (Cal. 2000); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 40 (Cal. Ct. App. 3d 2001) ("[T]he requirement to create timetables to seek, hire, and promote minorities and women and to make reasonable progress in doing so-with financial incentives for success and financial detriment for failure-establishes impermissible racial and gender preferences.").

170. See *Chemerinsky*, *supra* note 21, at 1009 (explaining that Proposition 209 would have a "devastating effect" on college admissions and outreach programs for minorities).

171. See *Chemerinsky*, *supra* note 21, at 1011.

long as the program is open to men and women alike.¹⁷² Because Proposition 209 eliminated the use of preferences based on race and sex, the University of California changed the focus of many of its outreach programs. The UC system has “taken action to strengthen K-12 education, enhance student preparation for higher education, and implement race-neutral initiatives designed to strengthen its ability to attract, admit, and enroll an undergraduate student body that is both academically well prepared and reflective of the broad diversity of California.”¹⁷³ All students, regardless of race or sex, will benefit from policies designed to prepare them for college.

In 1995, Cynthia Lee predicted that the percentage of Latino college students would drop from 18.4% to 5%-6.6% and the percentage of African-American students would fall from 6.9% to 1.5%-1.8% without race based outreach programs at the University of California Los Angeles.¹⁷⁴ Although the number of minority students in the University of California system did decrease after Proposition 209, it was not nearly as drastic as predicted by Proposition 209’s opponents. As shown in Figure 5, the overall percent change in admissions of underrepresented minority students at the University of California decreased by only 1% between the years 1995 and 2000.¹⁷⁵

Although the more prestigious schools saw a significant decrease in admissions of underrepresented minorities similar to that predicted by Proposition 209’s opponents, UC Santa Cruz and UC Riverside saw a drastic increase in admissions of underrepresented minorities.¹⁷⁶ Students are being admitted on the strength of their credentials. UC Santa Cruz and UC Riverside continue to enroll a strong percentage of underrepresented minority students.¹⁷⁷

172. See Volokh, *supra* note 23, at 1385.

173. NINA ROBINSON, UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT STUDENT ACADEMIC SERVICES, UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES 8 (Mar. 2003), available at http://www.ucop.edu/sas/publish/aa_finalcx.pdf (last accessed May 23, 2005).

174. Cynthia Lee, *Scholars, Foes of Affirmative Action Face Off on Issues*, UCLA TODAY, June, 9 1995, at 3.

175. JOSE ATILIO HERNANDEZ, SELECT COMMITTEE ON COLLEGE AND UNIVERSITY ADMISSIONS AND OUTREACH, ADMISSIONS GRANTED: THE FUTURE OF UC ADMISSIONS POLICIES 3 (2001), available at http://www.sen.ca.gov/ftp/SEN/COMMITTEE/SELECT/COLLEGE/_home/PUBLICATON/BACKGROUND7-12-01.pdf (last accessed May 24, 2005) (analyzing admissions data from the University of California, Office of the President, Nov. 2000). Underrepresented students were defined as those of Chicano/Latino and African-American descent.

176. *Id.* Admissions of underrepresented minorities at UCLA and UC Berkeley fell 45% and 42%, respectively. Admissions of underrepresented minorities at UC Santa Cruz and UC Riverside increased 27% and 87% respectively.

177. Enrollment statistics for UC Santa Cruz are available at <http://www.ucsc.edu/about/statistics.asp>. Enrollment figures for UC Riverside are available at http://ucrapb.ucr.edu/m/institutional_planning/institutional_planning.htm. In 2004, 18% of undergraduate students at UC Santa Cruz were underrepresented minorities and nearly 31% of the undergraduate students at UC

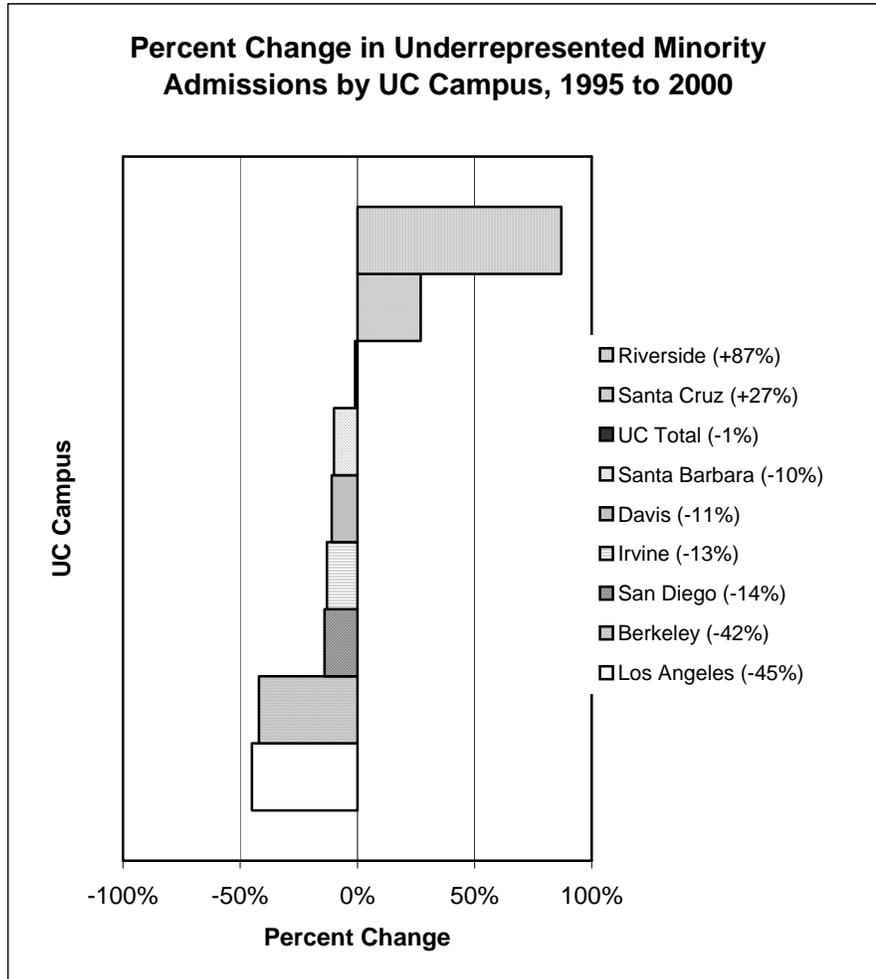


Figure 5. Source: University of California, Office of the President, November 2000

By ensuring that minority students would be admitted only to those schools at which their entering credentials match those of white and Asian students, Proposition 209 facilitated the improvement of minority students' performance in the colleges/universities they are attending. For example, at UC Berkeley, the six-year or less graduation rate of African-American and Hispanic freshmen entering in the fall of 1998, increased

Riverside were underrepresented minorities.

by 6.5% and 4.9%, respectively, compared to the graduation rates of their peers just two years earlier, before Proposition 209 was in effect.¹⁷⁸ At UC San Diego, the average freshman GPAs for minorities all but converged with the GPAs of white and Asian students, just one year after Proposition 209 was implemented.¹⁷⁹ Although other factors may play a role in this trend, the data shows that minority students are capable of high academic achievement equal to that of their white and Asian peers when admission is based on academic credentials rather than racial preferences.

The CSU system experienced a similar effect on admissions after the adoption of Proposition 209.¹⁸⁰ From 1995 to 2004, the enrollment of white, non-Latino students decreased significantly by 4.0%.¹⁸¹ African-American and Asian-American enrollment decreased slightly by 0.7% and 0.9% respectively.¹⁸² The enrollment of Hispanic students increased significantly by 4.7%.¹⁸³

Proposition 209 recognizes the importance of allowing students to succeed on their own credentials. When students are competing with those who have equal qualifications, their grades improve and attrition rates decrease.¹⁸⁴ In addition, elimination of race and sex preferences removes the stigma that minority and female students were admitted to prestigious schools for reasons other than the strength of their academic achievements.¹⁸⁵ Although fewer minority students may be admitted into

178. OFFICE OF STUDENT RESEARCH, UNIVERSITY OF CALIFORNIA, BERKELEY, FRESHMAN SIX-YEAR GRADUATION RATES BY ALL ETHNIC CATEGORIES, FALL COHORTS, *available at* <https://osr2.berkeley.edu/cgi-bin/Access/DB/Programs/handlesql2.pl> (last accessed October 19, 2005).

179. Heriot, *supra* note 2416, at 171-72 n. 163. Heriot cites the Univ. of Cal. San Diego, Academic Performance Report, which announced that “underrepresented students admitted to UC San Diego in 1998 substantially outperformed their 1997 counterparts” and the “majority/minority performance gap observed in past studies was narrowed considerably.” There were “no substantial GPA differences based on race-ethnicity” in the 1998-99 school year.

180. CALIFORNIA STATE UNIVERSITY, STATISTICAL REPORTS, CSU NEW STUDENT ENROLLMENTS, *available at* http://www.calstate.edu/as/stat_reports/2004-2005/feth01.htm (last accessed July 6, 2005).

181. *Id.*

182. *Id.*

183. *Id.* California State University divides statistics for Hispanic students into two categories, Mexican American and Other Latino. The enrollment of Mexican-Americans increased by 4.9% and the enrollment of other Latino students increased by 2%. These categories were combined to produce the figure of 6.9% represented in the text above.

184. Heriot, *supra* at 24, at 172; OFFICE OF STUDENT RESEARCH, UNIVERSITY OF CALIFORNIA, BERKELEY, CURRENT SIX-YEAR GRADUATION RATES, NEW FRESHMEN, FALL 1998 COHORT, *available at* http://osr.berkeley.edu/Public/STUDENT.DATA/current_grad_rate.html (last accessed May 19, 2005).

185. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”) (citing Univ. of Cal. Regents v. Bakke, 438 U.S. at 298 (opinion of Powell, J.)); *see also*

the most prestigious schools in the short-term, the long-term benefits of Proposition 209 may prove to outweigh the short-term costs of temporarily decreased minority admissions in the state's more competitive schools.

D. K-12 Education has Gained Greater Significance

One of the goals of Proposition 209 was to “address the inequality of opportunity . . . by making sure that *all* California children are provided with the tools to compete in our society.”¹⁸⁶ The League of California Cities suggested that government agencies ensure equal opportunity in public education by expanding their outreach programs to all children.¹⁸⁷ Some of the recommendations included developing “academic support programs and financial aid services for students from low-income backgrounds, who are first generation college students, who attend high schools with a low eligibility rate for post-secondary institutions, and/or whose high schools have a low college and university participation rate.”¹⁸⁸ The UC Links program at UC Berkeley prepares K-12 students for college life and focuses on children from lower-income families.¹⁸⁹ The University of California system now offers many race-neutral programs for individual “students who are disadvantaged or attend low performing schools,” including Early Academic Outreach Programs; Mathematics, Engineering, and Science Achievement; Puente; and Fast Forward to the University of California at Berkeley.¹⁹⁰ San Diego school districts are emphasizing advanced course work for all students and placing a greater emphasis on “aligning community college degree requirements with entrance requirements to four-year institutions” in an effort to “increase educational opportunities for students or members of groups historically underrepresented at four-year colleges and universities.”¹⁹¹ These types of race- and sex-neutral programs are in

L. Darnell Weeden, *After Grutter v. Bollinger Higher Education Must Keep its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. PUB. L. 161, 161-62 (2004) (“Because race-based diversity policy promotes notions of racial superiority and racial inferiority, a race-based diversity program is inherently flawed.”).

186. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION at 32 (Argument in Favor of Proposition 209) (Nov. 5, 1996).

187. LEAGUE OF CALIFORNIA CITIES, ANALYSIS OF STEPS THAT GOVERNMENT AGENCIES CAN TAKE TO ENSURE EQUAL OPPORTUNITY IN PUBLIC CONTRACTING, EDUCATION AND EMPLOYMENT 4-5, available at, http://www.cacities.org/resource_files/newCybrary/2002/legal_resource/11449_LR.Young—mofa%20letter.doc (last accessed July 15, 2005).

188. *Id.* at 5.

189. See www.uclinks.org.

190. U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, Washington, D.C., 2004, available at, www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (last accessed Aug. 27, 2005).

191. *Id.*

harmony with the requirements of Proposition 209 because they do not consider the race or sex of the students.¹⁹²

The graduation rates of California's high school students steadily increased after the passage of Proposition 209, as shown in Figure 6. According to the California Department of Education, the California High School completion rate reached a low point of 64% during the 1994-95 year (the year before Proposition 209 was adopted), after dropping from 68.6% in 1991-92.¹⁹³ In the following years, the high school graduation rate crept back up to 69.6% in 2001-02.¹⁹⁴ A report based on data from the California Department of Education shows that the graduation rate of all minority students increased in each ethnic group between the years 1995-96 and 2001-02.¹⁹⁵ The low percentage of students that graduate with a high school diploma is discouraging, but it requires providing *all* students with the tools they need, regardless of race or sex.

192. See CAL. CONST. art. I, § 31 (a)(2005).

193. CALIFORNIA'S GRADUATION RATE: THE HIDDEN CRISIS 4 (WestEd 2004), *available at*, <http://www.wested.org/cs/we/view/rs/752> (last accessed July 15, 2005) (using the California Department of Education's annual basic completion ratio to calculate the completion rate). This report notes that calculating graduation rates is complicated because students do not have individual identifiers so they are not accurately tracked from grade to grade or school to school. *Id.* at 1. Thus, different methods of calculating graduation rates yield different results. *Id.*

194. *Id.* at 4.

195. *Id.* at 6 (graduation rates determined using the California Department of Education's basic completion ratio). The graduation rate of Asians increased from 88.4% to 88.8%, Hispanics and African-American students both increased from 54.0% to 58.4%.

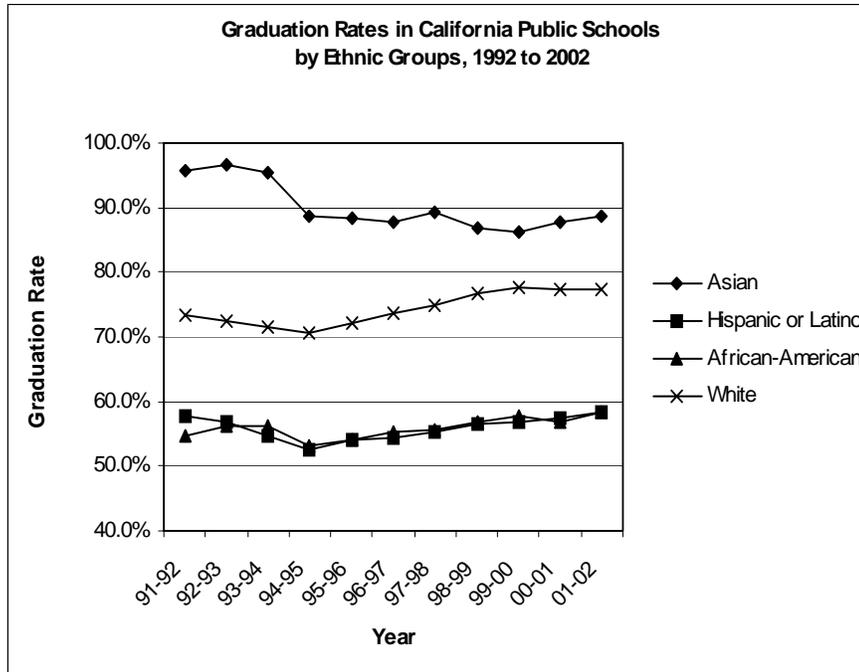


Figure 6. Based on California Department of Education data using basic completion ratio

The graduation rates of California's minority students were above the national average in 2001.¹⁹⁶ In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally.¹⁹⁷ Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally.¹⁹⁸ California's black students beat the national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.¹⁹⁹ Although the average graduation rates of Hispanic and black students are not yet as high as those of white students, California's minority students are obtaining their high school diplomas at a greater rate than minority students nationally.

196. *Id.* at 5 (reporting data from the Urban Institute on California's 2001 Overall Graduation Rates (%) by Race/Ethnicity Compared to National Average, and calculating graduation rates using the Cumulative Promotion Index).

197. *Id.*

198. *Id.*

199. *Id.* The graduation rate of California's American Indian students is also included in this data. California's American Indian students rank slightly below the national average of 51.1%, with a graduation rate of 49.7%.

²⁰⁰ Minority students will most likely continue to improve as they are provided with the tools they need to overcome circumstances such as poverty and succeed in our society.

E. Women and Minority Businesses Continue to be Competitive in Public Contracting

Opponents of Proposition 209 feared that removing goals and targets set for increasing contracts with businesses owned by minorities and women would stifle any future advances for these businesses. For example, Chemerinsky stated, “[T]he goals and targets set to cure discrimination in public contracting are not quotas. . . . However, statistics show that goals and targets have made an enormous difference. These benefits and future advances would be lost if the CCRI [Proposition 209] is adopted.”²⁰¹ California’s target was for 15% of the contracts to be given to minority business enterprises, and not less than 5% to be given to business enterprises owned by women.²⁰²

Cities and counties spend a large portion of their funds awarding contracts to private businesses. For example, the City of San Francisco, which grants preferences in contracting to minority- and women-owned businesses,²⁰³ awards an average of 41,065 contracts each year, worth approximately \$568,859,634.²⁰⁴ If just 1% of that goes to administering affirmative action programs, then over \$5,000,000 is being spent on programs that promote discrimination and preferential treatment based on race and sex. Recently, the Civil Grand Jury for the City and County of San Francisco investigated San Francisco’s contracting policies.²⁰⁵ The Grand Jury found that San Francisco’s procedures for determining eligibility in contracting contained race and sex preferences in violation of the law and may very well expose San Francisco to legal and financial

200. *Id.* The graduation rate for California’s white students is 75.7%, just barely above the national average of 74.9%.

201. Chemerinsky, *supra* note 21, at 1013 (citing statistics showing that after the implementation of goals and timetables at the California Department of General Services in 1992-93, the number of contracts given to minority businesses rose to 10.1%, up from 0.52% in 1989-90).

202. CAL. PUB. CONT. CODE § 10115 (West 1996).

203. Petitioner’s Dec. of Virginia Harmon in support of Request for Discretionary Stay of Injunction or, in the alternative, Order Shortening Time at 2, *Coral Constr., Inc. v. Martin*, Nos. 319-549 (Cal. Super. Ct., County of S.F. Aug. 12, 2004); REPORT OF THE 2004-2005 CIVIL GRAND JURY FOR THE CITY AND COUNTY OF SAN FRANCISCO, CITY CONTRACTING AND AFFIRMATIVE ACTION 2, available at, http://www.sfgov.org/site/uploaded_files/courts/HRC.pdf (last accessed July 14, 2005).

204. Petitioner’s Dec. of Virginia Harmon in support of Request for Discretionary Stay of Injunction or, in the alternative, Order Shortening Time at 2, *Coral Constr., Inc. v. Martin*, Nos. 319-549 (Cal. Super. Ct., County of S.F. Aug. 12, 2004).

205. REPORT OF 2004-2005 CIVIL GRAND JURY FOR THE CITY AND COUNTY OF SAN FRANCISCO, CITY CONTRACTING AND AFFIRMATIVE ACTION 2, *supra* note 203.

risks.²⁰⁶ San Francisco is spending millions of dollars to violate the state constitution by creating incentives to grant preferences to minority- and women-owned businesses and then spending additional public funds to defend its policies.²⁰⁷

In contrast to cities like San Francisco, some state agencies have implemented new policies to help businesses succeed without relying on race or sex based criteria. For instance, the California Department of General Services offers a 5% bid preference on solicitations from small businesses.²⁰⁸ Additionally, outreach programs that require contractors to provide Minority Business Enterprises, Women Business Enterprises, and other business enterprises an equal opportunity to compete for and participate in the performance of city contracts also conform to the requirements of Proposition 209.²⁰⁹ Any potential ground perceived as lost by minorities and women can be recovered by implementing programs which do not use race- and sex-based criteria.

V. CALIFORNIA'S APPROACH COULD BE ADOPTED BY OTHER STATES TO ELIMINATE DISCRIMINATION AND PREFERENCES NATIONWIDE

California is the only state that has amended its constitution to eliminate discrimination and preferences based on race and sex. A handful of states have considered bills and initiatives similar to California's Proposition 209.²¹⁰

The state of Washington was the second state to eliminate state discrimination and preferential treatment based on race and sex, by adopting a state statute rather than by constitutional amendment. In

206. *Id.* at 8.

207. See Petitioner's Dec. of Virginia Harmon in support of Request for Discretionary Stay of Injunction or, in the alternative, Order Shortening Time at 2, *Coral Constr., Inc. v. Martin*, Nos. 319-549 (Cal. Super. Ct., County of S.F. Aug. 12, 2004) (stating that San Francisco awards an average of 41,065 contracts each year, worth approximately \$568,859,634); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1084 (Cal. 2000). ("The relevant constitutional consideration is that they are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31."); REPORT OF 2004-2005 CIVIL GRAND JURY FOR THE CITY AND COUNTY OF SAN FRANCISCO, *supra* note 203, at 7 (finding that the city of San Francisco paid outside counsel \$288,998 for its participation in the *Coral* case, the time of the City Attorney's Office, and likely attorneys' fees for Coral's attorneys).

208. CAL. GOV'T CODE §§ 14835 - 14836 (2005); see also SMALL BUSINESS CERTIFICATION BENEFITS AND ELIGIBILITY REQUIREMENTS, CAL. DEPT. GENERAL SERVICES, available at <http://www.pd.dgs.ca.gov/smbus/sbcert.htm> (last accessed Oct. 20, 2005).

209. *Domar Elec., Inc. v. City of Los Angeles*, 885 P.2d 934 (1994) (cited approvingly by *Hi-Voltage*, 12 P.3d at 1085).

210. WASH. REV. CODE § 49.60.400 (1999); Michigan Civil Rights Initiative, available at <http://www.michigancivilrights.org>; Op. to Att'y. Gen. re. Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 896 (July 13, 2000); TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 261 (Oxford University Press 2004).

November 1998, the Washington voters passed Initiative 200 by 58% to eliminate discrimination and preferences.²¹¹ The state statute contains language nearly identical to Proposition 209.²¹² The Washington Supreme Court interpreted the scope of the Washington state statute slightly more narrowly than Proposition 209 is interpreted in California,²¹³ and a state statute does not change the organic state law like a constitutional amendment such as Proposition 209.²¹⁴

Shortly after the passage of Proposition 209 in California, the Houston City Council voted on Proposition A, an initiative proposing to ban “affirmative action for minorities and women” in contracting and hiring.²¹⁵ The original language of Proposition A was patterned after Proposition 209, to eliminate discrimination and preferential treatment.²¹⁶ However, framing the question put to the voters with the more politically-charged term “affirmative action” led to the defeat of the proposition “by ten percentage points, with the highest proportion of blacks showing up at the polls in Houston’s history.”²¹⁷

Attempts were also made in Florida to include an initiative similar to Proposition 209 on the November 2000 ballot, but there was little political support for such an initiative in Florida.²¹⁸ After the initiative gained enough pre-ballot signatures and qualified for the ballot, the Florida Supreme Court did a pre-ballot review and found that the initiative violated the single subject rule.²¹⁹ However, Governor Jeb Bush

211. *Id.*

212. WASH. REV. CODE § 49.60.400 (1999). Rather than “bona fide qualifications based on sex” the statute lists specific examples of conduct that is characterized as permissible qualifications based on sex.

213. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151, 165 (Wash. 2003) (“the average informed voter would have believed that I-200 only prohibited reverse discrimination where a less qualified person or applicant is given an advantage over a more qualified applicant. An average informed voter would understand that racially neutral programs designed to foster and promote diversity to provide educationally enriched environments would be permitted by the initiative.”).

214. See James C. Rehnquist, *Note: The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 BOSTON U. L. REV. 345 (1986) (comparing court decisions on the Constitution to those on statutes and stating, “[w]hen the Supreme Court construes statutes, on the other hand, it does not act as the sole and ultimate arbiter of deliberately ambiguous language. It is not final. Congress can respond to the Court’s construction of statutes; a model of judicial-legislative partnership is at work”).

215. Anderson, *supra* note 210, at 260.

216. *Id.*

217. *Id.*

218. *Id.* at 261-62.

219. *Op. to Att’y. Gen. re. Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ.*, 778 So.2d 888, 896 (Fla. 2000) (“[T]he proposed amendments’ substantial effect on local government entities, coupled with its curtailment of the powers of the legislative and judicial branches, renders it fatally defective and violative of the single-subject requirement. It is precisely this sort of ‘cataclysmic change’ that the drafters of the single-subject rule labored to prevent”).

did issue an executive order eliminating the state set-aside programs and guaranteeing admission to one of the state's universities for the "top 20 percent of high school graduates, provided they had completed the college prep curriculum." This plan was called the "One Florida" plan, and was approved by the regents in the spring of 2000, eliminating the consideration of race and sex in Florida's college admissions criteria.²²⁰

Currently, citizens in Michigan are appealing a decision by the Michigan Board of Canvassers not to certify the signatures collected in support of a vote on the Michigan Civil Rights Initiative, patterned after California's Proposition 209.²²¹ The Initiative has been placed on Michigan's November 2006, ballot.²²²

The U.S. Supreme Court has refused to dilute state and federal policies that discriminate or give preferences based on race or sex, believing the policies to be consistent with the Equal Protection Clause and the Civil Rights Acts.²²³ States are free to adopt laws that address race and sex issues in employment, education and contracting, similar to the constitutional amendment implemented by Proposition 209.

VI. CONCLUSION

It is undeniable that minorities and women continue to face challenges and barriers to employment, education, and contracting. Proposition 209 eliminates race- and sex-based affirmative action programs that were implemented to help minorities and women overcome those challenges and barriers. While discrimination and preferential treatment based on a variety of characteristics may be inevitable in a free-market system, supporters of Proposition 209 believe that allowing discrimination and preferential treatment based on race and sex is undesirable, unfair, and inefficient. Comparing the pre- and post-Proposition 209 statistics by race and gender demonstrates that women and minorities have not lost any ground in employment, education, or public contracting because of Proposition 209's prohibition of discrimination and preferential treatment. Although minorities and women have not lost any ground due to Proposition 209, they have not made substantial progress either. Programs that do not violate Proposition 209, such as those based on socioeconomic status or geography, are better suited to the needs of all citizens that face

220. Anderson, *supra* note 210, at 262.

221. See generally Michigan Civil Rights Initiative, *available at*, <http://www.michigancivilrights.org> (last accessed Aug. 12, 2005).

222. Michigan Civil Rights Initiative, Mission Statement, *available at*, <http://www.michigancivilrights.org/mission.htm> (last accessed Oct. 19, 2005).

223. Grutter v. Bollinger, 539 U.S. 306 (2003); Johnson v. Transp. Agency, 480 U.S. 616 (1987); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

challenges and barriers to their upward mobility. In the future, California and other states that adopt measures similar to Proposition 209 should continue to help minorities, women, *and* others with race- and sex-neutral solutions.

*Eryn Hadley**

* JD Candidate, 2006. With special thanks to Sharon Brown and R.S. Radford of the Pacific Legal Foundation for their insight, and with gratitude to Paul H. Rogers for his love and support.