

Affirmative Outreach and Data Collection:
Limits (Real and Imagined) on Public Contracting Since Proposition 209

Hearing Background Paper
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Introduction: What is Still Permitted under Proposition 209?

In November of 1996 California voters approved Proposition 209, a constitutional amendment providing that government entities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const. Article 1, Section 31.) The measure's language prohibiting "discrimination" was largely superfluous, given that state and federal law, as well as the equal protection clause of the 14th Amendment, already prohibit such discrimination. What was new about Proposition 209, therefore, was the prohibition on "preferential treatment." While the measure did not define "preferential treatment," the courts generally hold that a constitutional amendment "should be construed in accordance with the natural and ordinary meaning of its words." To give a preference, the courts reason, means to give "priority or advantage to one person . . . over others." [*Hi-Voltage Wire Works v. San Jose* (2000) 24 Cal. 4th 537, 559; quoting *Webster's New World Dictionary* (3d Ed. 1988).] While a dictionary is a good place to start, it often defers rather than settles the meaning of a word. To replace "preference" with "priority or advantage" eliminates only a few head scratches. Clearly, *awarding* public contracts *solely* on the basis of race or gender, according to "quotas," "set-asides," or fixed numerical formulas, violates Proposition 209 and, indeed, quite likely violates the equal protection clause of the 14th Amendment as interpreted by the United States Supreme Court over the past quarter century. But it was not the intent of Proposition 209, the courts have held, to eliminate *all* forms of "affirmative action." What is permitted, however, by Proposition 209, is less certain.

While the relative merits of Proposition 209 and affirmative action could be debated endlessly, the more modest purpose of this hearing is to offer a brief overview of key legal and constitutional issues and to identify what may or may not be permissible in public contracting under Proposition 209.

The background paper is divided into three parts. Part One discusses the constitutionality of affirmative action in public contracting before Proposition 209 so as to better understand how Proposition 209 imposed greater limits than those imposed by the Supreme Court's equal protection decisions. Part Two turns to the substance of Proposition 209, early constitutional challenges to Proposition 209, and Governor Pete Wilson's Executive Orders implementing Proposition 209. Part Three surveys cases that have challenged state or local public contracting programs on the grounds that they violate Proposition 209. The background paper concludes that while Proposition 209 imposes considerable limits on affirmative action in public contracting, it leaves considerable leeway for outreach efforts and almost certainly permits state and local agencies to engage in more aggressive data collection efforts in order to better ensure that public contracts are allocated in a fair, efficient, and non-discriminatory manner.

PART ONE

Affirmative Action in Public Contracting before Proposition 209

Prior to Proposition 209, affirmative action in the field of public contracting was governed primarily by federal statutes and the equal protection clause of the 14th Amendment. Most early federal statutes, such as Titles VI and VII of the Civil Rights Act of 1964, were "negative" in that they *prohibited* employers or entities receiving federal funds from discriminating on the basis of race, color, or national origin. Other federal statutes were "affirmative" (or "remedial"), however, in that they *required* government entities to take affirmative steps to ensure fair and equal opportunities for previously excluded groups. For example, the Public Works Employment Act of 1977 required any local entity that received federal funds for public works projects to ensure that a specified portion of those funds went to MBE (minority-owned business enterprise). The equal protection clause of the 14th Amendment, on other hand, is almost entirely prohibitive, although it sometimes permits racial and gender discrimination that meets the most exacting scrutiny. Specifically, the equal protection clause prohibits a state from denying any person "equal protection of the laws." Since at least *Brown v. the Board of Education* (1954) – and perhaps since *Korematsu v. United States* (1944) – this has generally meant that any racial classification used by a government entity is presumptively invalid unless it serves a compelling government interest and is narrowly tailored (using the least discriminatory means) to achieve

that compelling interest. In other words, the 14th Amendment is at best permissive: it *permits* governments to adopt narrowly tailored remedies that serve a compelling government interest; but it does not *require* a government actor to do anything, even where there is an indisputably compelling justification for remedial action.

Historically, equal protection analyses of racial classifications distinguished between "invidious" classifications that discriminate *against* minority groups or women, on the one hand, and "benign" classifications that seek to benefit minorities or women, on the other hand. (*See e.g.* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d Ed. 2006), Section 9.3.) While Proposition 209 ostensibly sought to prohibit both types of classifications, its primary targets were those classifications that sought to benefit minorities and women. The remainder of this part examines the major decisions on affirmative action prior to Proposition 209 in order to better understand the ways in which Proposition 209 asserted the state's prerogative to prohibit what the 14th Amendment otherwise allows.

Affirmative Action under the Equal Protection Clause Generally

Regents of the University of California v. Bakke: "Quotas" vs. "Factors:" Although it dealt with affirmative action in education rather than public contracting, *Regents of the University of California v. Bakke* (1978) remains the starting point for evaluating the constitutionality of affirmative action under the equal protection clause. (438 U.S. 265.) Bakke, a white medical school applicant who was denied admission to the U.C. Davis medical school, sued the Regents. He alleged that the university's policy of setting aside sixteen seats for minority students (out of a total of 100 seats for the incoming class) violated federal anti-discrimination laws, as well as the equal protection clause. Bakke's scores failed to meet the cut-off for general admission, but his scores were higher than some of the students who were admitted to one of the sixteen set-aside seats. When the case eventually reached the U.S. Supreme Court, the issues were narrowed to two separate questions: First, did the "quota" or "set-aside" of sixteen seats violate the equal protection clause? Second, would consideration of race as one "factor" among many violate the equal protection clause? A divided court held that while fixed "quotas" or "set-asides" were unconstitutional, considering race as just one "factor" among many did not contravene the equal protection clause. However, the distribution of the vote showed a more

divided Court than this two-part conclusion might suggest. The four "liberal" justices (Brennan, White, Marshall, and Blackmun) would have upheld both quotas and consideration of race as a factor. The four "conservative" justices (Stevens, Burger, Stewart, and Rehnquist) would have struck down both quotas and consideration of race as a factor. A single justice, Lewis Powell, sided with the liberals in upholding the use of race as a factor, but sided with the conservatives in striking down quotas.

Despite the tenuous voting alignment, the *Bakke* framework has largely remained intact for the past 35 years. The Supreme Court's 2003 University of Michigan rulings continued the *Bakke* dichotomy, albeit in slightly modified and more constraining form. In two companion cases, the Court upheld the University of Michigan law school's consideration of race as a "factor," but it struck down the University of Michigan policy of assigning a fixed number of points to undergraduate applicants. Whereas *Bakke* distinguished between constitutionally acceptable "factors," on the one hand, and constitutionally unacceptable "quotas," on the other, the Michigan cases distinguished between acceptable "factors" and unacceptable "formulas," because the latter failed to give individual consideration to each candidate's qualifications. [*Grutter v. Bollinger* (2003) 539 U.S. 306; *Gratz v. Bollinger* (2003) 539 U.S. 244.] These distinctions, and especially the rejection of "rigid" formulas, also inform the public contracting cases. [*See e.g. Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469.] The Michigan decisions differed from *Bakke* in terms of the *justification* for affirmative action: while *Bakke* held that consideration of a race could be justified to remedy past discrimination, the Michigan case justified limited affirmative action programs in order to serve the state's compelling interest in creating a more "diverse" student body, the educational benefits of which accrue to all students, majority and minority alike. (*Grutter, supra*, at 343.)

Public Contracting Cases under the 14th Amendment: From *Fullilove* to *Adarand*

Although the U.S. Supreme Court eventually concluded that *any* racial classification, whether invidious or benign, must pass a "strict scrutiny" test – serving a "compelling" interest by "narrowly tailored" means – the path to this position was neither straight, nor inevitable. As noted below, many of the early opinions of the Court left the level-of-scrutiny question unsettled. Similarly, while the Court generally agreed that affirmative

action could be justified as a remedy for past discrimination, it did not always agree on whether past discrimination could be of a generalized, societal nature, or whether it had to be specific to a particular contracting agency which had, as demonstrated by “direct evidence,” actively and purposefully engaged in discriminatory practices. Before the late 1980s, the Supreme Court generally looked favorably on affirmative action in public contracting. In *Fullilove v. Klutznick* (1980) 448 U.S. 448, the Court upheld the federal Public Works Employment Act of 1977, which required that at least ten percent of all federal funds granted to local entities for public works projects be used to procure services or supplies from MBE. Because the legislation was remedial in nature, the Court concluded that Congress was not required to act in "a wholly 'color-blind' fashion." The Court upheld this limited use of racial classification because it served a compelling government interest in countering prior discrimination.

Although the *Fullilove* majority upheld the program under strict scrutiny, three justices wrote a concurring opinion arguing that "benign" discrimination – racial classifications purposefully designed to benefit minorities – should be subject to *intermediate*, rather than *strict*, scrutiny. Laws that seek to disadvantage and exclude a particular group, after all, are far different than laws that seek to benefit and include a group that has suffered from past discrimination. By the Court's own later reckoning, this and other divided decisions of the 1980s failed to clarify the proper level of scrutiny which should be applied to remedial classifications.¹

After wavering through the 1980s, in *Richmond v. J.A. Croson Co.* (1989) the Supreme Court settled these related questions of level of scrutiny and the significance of past discrimination in a manner generally hostile to affirmative action in public contracting. In 1983, the city of Richmond, Virginia, adopted regulations that required prime contractors who were awarded city contracts to subcontract at least thirty percent of the dollar amount

¹ See e.g. Justice Brennan's plurality opinion in *United States v. Paradise* (1987) 480 U.S. at 166, observing that although "this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis." See also *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, noting that the Court was "in agreement that . . . remedying past or present discrimination. . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."]

of each contract to minority firms. The Supreme Court held that this mandatory set-aside violated the equal protection clause of the 14th Amendment because there was no "direct evidence" of past discrimination on the part of the city. The Court held that "generalized assertions" of past racial discrimination did not suffice to justify a "rigid" quota system. While invalidating the affirmative action program in this particular case, however, the *Croson* majority nonetheless concluded that some forms of "narrowly tailored racial preference" might be necessary to remedy past actions of "deliberate exclusion" by the contracting entity. Indeed, it was "beyond dispute," the majority added, that governments have a "compelling interest" in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." Although the majority did not directly overturn *Fullilove*, it departed from that decision by expressly requiring strict scrutiny for even benign classifications.

The following year the Court seemed to move back, temporarily, to the position that remedial legislation could be held to a standard of review that was something less than strict scrutiny. In *Metro Broadcasting v. FCC* (1990) 497 U.S. 547, the Court, by a 5-4 vote, upheld FCC rules that gave preferences to MBE in radio broadcast licensing. The majority applied only intermediate scrutiny, holding that "benign race-conscious measures mandated by Congress" were constitutional so long as they served "important" (not "compelling") government interests and were "substantially related" (not "narrowly tailored") to that important interest. The rationale for different levels of scrutiny reflected the Court's recognition of vast practical and moral differences between discrimination enacted by a majority in order to *exclude* a minority, on the one hand, and discrimination enacted by a majority in order to *include* the formerly excluded minority, on the other hand. But this reasoning would not last long.

In *Adarand Constructors, Inc. v. Peña* (1995) 515 U.S. 200, the Court returned (for good it seems) to the *Croson* position that all racial classifications, whether they seek to disadvantage or benefit a minority group, are subject to strict scrutiny. *Adarand* involved a highway construction program administered by the U.S. Department of Transportation. Under that program, prime contractors were given additional compensation if they used

subcontractors who were certified as small businesses controlled by “socially and economically disadvantaged individuals.” If the program had stopped there, it almost certainly would have been subject to rational basis review and upheld. However, the program rules allowed a prime contractor to presume that “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities” fell into the category of “socially and economically disadvantaged individuals.” A non-minority business owner could conceivably be a “socially and economically disadvantaged individual,” but the prime contractor was not allowed to make that presumption, as was the case with MBE.

Not only did *Adarand* strike down the program, it also expressly overturned *Metro Broadcasting* in holding that strict scrutiny applied to invidious and benign classifications alike. Justice Scalia agreed that strict scrutiny was the appropriate test, but wrote separately to opine that such laws can never survive strict scrutiny because a government never has a compelling interest in discriminating on the basis of race, no matter what the purpose. Justice Stevens concurred in the opinion, as least as to the specific program before the Court, but wrote separately to express his rejection of the Court’s “untenable” insistence that there is no difference between a majority imposing a burden on a minority and a majority providing a remedial benefit to certain members of the minority. As to Justice O’Conner’s claim in the majority opinion that “consistency” required treating both types the same, Stevens argued that one does not achieve “consistency” by treating differences as though they were similarities. The Court’s rulings since *Adarand* have followed O’Connor’s lead and subjected all racial classification to strict scrutiny, a standard that is generally (but not always) fatal to affirmative action programs.

In sum, even before California voters approved Proposition 209, the U.S. Supreme Court had already interpreted the equal protection clause to make all but the most moderate forms of affirmative action constitutionally suspect.² Whether affirmative action contracting programs in California could have withstood the strict *Adarand* test is uncertain, but after

² Today at least four justices (Scalia, Thomas, Roberts, and Alito) appear to believe that racial classification almost never pass the "compelling interest" prong of the strict scrutiny test.

Proposition 209 it hardly matters. While neither the history nor the language of Proposition 209 leads to a conclusion that the measure was intended to prohibit *all* forms of affirmative action, it certainly aimed to be more restrictive than the 14th Amendment.

PART TWO

Toward California's Proposition 209

Just as the 1995 *Adarand* decision signaled Supreme Court's growing distrust of affirmative action, a conservative turn in California politics took the skepticism about affirmative action even further. On June 1, 1995, more than a year before voters approved Proposition 209, Governor Pete Wilson issued Executive Order W-124-95, which eliminated affirmative action programs under the Governor's authority. Because the Governor could not unilaterally dismantle programs required by state or federal law, the impact of the order was more limited than its sweeping language suggested. Nonetheless, the executive order terminated consultant contracts, disbanded advisory committees, and abolished performance recognition awards for those contracts, committees, or awards which sought to "foster or encourage preferential treatment." About the same time, Governor Wilson issued an open letter urging Californians to support a recently proposed constitutional amendment (the so-called Civil Rights Initiative) that eventually became Proposition 209. In response to the 1995 Executive Order, the University of California announced that it would no longer use race as a factor in any of its admissions decisions. (UC Regents, Resolution SP-1, "Ensuring Equal Treatment of Admissions," July 20, 1995.) These actions set the stage for Proposition 209 and two additional executive orders by Governor Wilson.

Proposition 209: The "California Civil Rights Initiative"

The California Civil Rights Initiative reached the November 5, 1996, general election ballot as Proposition 209. The measure added Section 31 to Article I of the California Constitution. The substantive subdivision reads as follows:

"(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."

Other subdivisions listed exemptions, most notably providing that nothing in the measure prohibited any action necessary to maintain eligibility for federal funding, and if any part of the measure was found to conflict with federal law or the U.S. Constitution, it was severable from the other parts. The Proposition also exempted "bona fide" qualifications based upon sex in public employment, public education, and public contracting. (For example, a women's prison could favor female prison guards if gender was deemed to be a "reasonably necessary" qualification.)

Although the text of the measure never mentioned the words "affirmative action," the campaign for and against Proposition 209 made it clear that its intent was to eliminate affirmative action programs. A voter's guide suggested that the measure's ban on "preferential treatment" was nearly interchangeable with a ban on affirmative action:

This measure, also known as the "California Civil Rights Initiative" (CCRI for short), would eliminate state and local government programs that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin - in effect, affirmative action programs in the areas of education, public employment and contracting. This initiative represents one of the most significant attempts to undo affirmative action ever made, and is being closely watched throughout the country. Leading proponents include UC Regent Ward Connerly, Governor Pete Wilson, and Stanford University professor Glynn Custred. Opponents include women, minority and civil rights groups, and individuals such as Rosa Parks and Colin Powell. (*Available at* <http://www.calvoter.org/voter/elections/archive/96gen/props/209.html>)

The official California Ballot Pamphlet explained that "A YES vote . . . means: the elimination of those affirmative action programs for women and minorities run by the state or local governments in areas of public employment, contracting, and education that give 'preferential treatment' on the basis of sex, race, color, ethnicity, or national origin." The pamphlet then explained that "A NO vote on this measure means State and local government affirmative action programs would remain in effect to the extent that they are permitted under the United States Constitution." Similarly, the sections of the ballot pamphlet that contained brief arguments for and against the measure suggested that *both* proponents and opponents believed that Proposition 209 would eliminate affirmative action. The measure was approved by a 54% to 46% margin.

Rejection of Constitutional Challenges to Proposition 209 and Governor Wilson's Executive Orders

Two events occurred the day after Proposition 209 was approved. First, Governor Wilson issued a second executive order on affirmative action (the first being the 1995 order that prompted the UC Regents to stop considering race in applications.) Among other things, Executive Order W-136-96 required all state agencies, departments, boards, and commissions to (1) identify all statutes and programs that provide preferential treatment and (2) promulgate regulations that prohibit discrimination or preference on the basis of sex, race, color, ethnicity, or national origin. The second event involved several individuals and groups representing the interests of women and minorities filing a complaint in federal district court alleging (1) that Proposition 209 denied woman and minorities the equal protection of the laws guaranteed by the 14th Amendment; and (2) that Proposition 209 was preempted under the Supremacy Clause because it conflicted with Titles VI and VII of the Civil Rights Act of 1964, as well as Title IX of the Educational Amendments of 1972. The trial court judge granted a preliminary injunction against implementation of Proposition 209 pending trial, finding that the plaintiffs had a strong probability of prevailing on the merits, would be irreparably harmed if the injunction were not granted, and harm to the state in delaying implementation would be minimal. (*Coalition of Economic Equity v. Wilson* (1997) 122 F.3d 692.)

Both the plaintiffs and the trial court in *Coalition of Economic Equity* relied in large part on the "political structure," or *Hunter/Seattle* doctrine, set forth in two earlier U.S. Supreme Court cases: *Hunter v. Erickson* (1969) 393 U.S. 385 and *Washington v. Seattle School District* (1982) 458 U.S. 457. The *Hunter/Seattle* doctrine states that any "political structure that treats all individuals as equals . . . yet more subtly distorts governmental processes in such a way as to place a special burden on the ability of minority groups to achieve beneficial legislation" violates the equal protection clause. In *Hunter*, a realtor refused to show homes to a prospective African-American buyer. The prospective buyer sued under the city's fair housing ordinance. In response to publicity over the case, Akron voters repealed the fair housing ordinance and amended the city charter to require that any future anti-discrimination ordinance require a referendum. The U.S. Supreme Court held that the charter amendment contained an unconstitutional racial classification (it only applied to anti-discrimination ordinances that

prohibited housing discrimination on racial grounds). The Court further held that by requiring a referendum to reenact an anti-discrimination ordinance, the new law placed a special burden on minority voters' ability to enact legislation beneficial to their interests. The later *Seattle* decision, citing *Hunter*, struck down a constitutional amendment that prohibited busing for purposes of achieving racial desegregation in schools.

The plaintiffs challenging Proposition 209 argued that the initiative was essentially the same as the charter Amendment in *Hunter* or the constitutional amendment in *Seattle*, and the federal district court agreed. In short, Proposition 209 placed an obstacle in the way of a minority group's ability to obtain beneficial affirmative action legislation, given that a constitutional amendment can only be modified or removed by another initiative process. In addition, the plaintiffs claimed that because Title VI and Title VII required remedial action in some instances, the Civil Rights Act preempted Proposition 209. On appeal, the Ninth Circuit rejected the analogy to *Hunter* and *Seattle* and upheld Proposition 209. Every court that has considered a "political structure" challenge to Proposition 209 since then has done the same. First, courts note that the mere fact that the 14th Amendment *permits* affirmative action (so long as it is narrowly tailored to serve a compelling government interest) does not mean that affirmative action is *required*, or that minority voters have a right to enact affirmative action legislation contrary to a voter-adopted constitutional amendment. To be sure, a constitutional amendment creates an additional burden in that any legislation altering the constitutional provision would require either approval by two-thirds of the legislature, or another initiative campaign. But that is true of any constitutional amendment and is not unique to one like Proposition 209 that prohibits "discrimination or preferential treatment." Courts have also distinguished the charter amendment in Akron from Proposition 209. While the charter amendment placed an added political burden on any ordinance that banned racial discrimination, Proposition 209 does not place a burden on the enactment of anti-discrimination laws (indeed it *is* an anti-discrimination law); it only places a burden on the enactment of laws that provide "preferential treatment." Proposition 209 would mirror the charter amendment in *Hunter* if it invalidated the state's Fair Employment and Housing Act and said that it could only be re-enacted by referendum. But Proposition 209, which prohibits discrimination, obviously did not invalidate anti-discrimination laws; it

invalidated laws granting preferential treatment.³ This reasoning may obliterate an important difference between invidious and benign legislation, but, according to the courts, it does not violate the equal protection clause.⁴

Governor Wilson's Third Executive Order: At about the same time the Ninth Circuit upheld Proposition 209, it issued another ruling striking down affirmative action provisions in the California Public Contracts Code. (*Monterrey Mechanical Co. v. Wilson* (1997) 125 F.3d 702.) Governor Wilson responded to these cases by issuing his third executive order on affirmative action. Executive Order W-172-98 required every state agency to cease enforcement of participation goals and ordered the termination of all actions, programs, and regulations that "seek to monitor, promote, or comply with" MBE or WBE (woman-owned business enterprise) participation goals. The executive order expressly exempted programs that gave contracting preferences to disabled veterans. Neither Proposition 209 nor the Governor's order affected contracts for projects that relied in whole or in part on federal funding, as such projects were expressly exempt from Proposition 209. The executive order also prohibited any program that sought to "monitor" participation goals. This provision is sometimes seen as preventing agencies from collecting information from public contractors about their racial or gender status. For reasons discussed below, it is not clear that the executive order was intended to prohibit data collection, and even if that was its intent, whether it went beyond the limitations of Proposition 209.

In short, the rejection of the constitutional challenges to Proposition 209 suggests two things: First, it is highly unlikely that either the California Supreme Court or the Ninth Circuit will find Proposition 209 unconstitutional. While the *Hunter/Seattle* "political structure" doctrine has considerable force, no appellate court has applied it to Proposition 209 challenges. A recent U.S. Supreme Court ruling upholding a Michigan constitutional amendment that is quite similar to

³ Similarly, the Ninth Circuit noted that the Charter Amendment in Akron was more like Colorado's "Amendment 2," which was found unconstitutional in *Romer v. Evans* (1996) 517 U.S. 620, a similar "political structure" case. Amendment 2 placed special burdens (effectively requiring another ballot initiative) for gays and lesbians who might seek anti-discrimination legislation and was therefore unconstitutional. To be analogous to Proposition 209, Colorado's Article 2 would have to have prohibited laws that granted *preferential treatment* to gays and lesbians.

⁴ *Coalition for Economic Equity v. Wilson, supra*. "Political structure" challenges were also rejected in *Hi-Voltage Wire Works v. San Jose* (9th Cir. 2000); *Connerly v. State Bd. of Personnel* (Cal. App. 2001); *Coral Const. v. San Francisco* (Cal. Supreme, 2010); and most recently in *Coalition to Defend Affirmative Action v. Brown* (9th Cir. 2012)

Proposition 209 further diminishes the prospects of a constitutional challenge.⁵ Second, while the case law makes clear that Proposition 209 is more restrictive than the 14th Amendment, just how much more restrictive is less clear. Voters, both for and against, assumed Proposition 209 would dismantle "affirmative action," but there is no reason to believe that voters' understanding of that term was any more uniform than those of litigants, lawyers, and judges. Quotas, set-asides, "rigid" formulas are not permitted under the 14th Amendment, but a consideration of race as one "factor" is usually constitutionally acceptable. Under Proposition 209 any consideration of race in granting public benefits, even where race is only one factor among many, is apparently not permitted. But "affirmative action" can mean more than preferences in the awarding of public jobs, public contracts, or seats in a public university. It may also include targeted outreach, recruitment, and other means of increasing the pool of MBE and WBE bidders. Increasing the pool increases the probability that WBE or MBE will be selected, even under a constitutionally acceptable race-neutral and gender-neutral selection process.

PART THREE

Case Law on Public Contracting Since Proposition 209: Outreach and Data Collection

At least three important public contracting cases have established the parameters of what the government can and cannot do in the way of targeted outreach and the data collection in public contracting.

The California Supreme Court first considered the impact of Proposition 209 in public contracting in *Hi-Voltage Wire Works v. San Jose*. In order to encourage greater MBE and WBE participation, the City of San Jose required any prime contractor making a bid for a city contract to show that it *either* (1) used a prescribed percentage of MBE and WBE subcontractors, *or* (2) made reasonable efforts to obtain the prescribed percentage. Failure to do one or the other meant that the bid was non-responsive. "Reasonable efforts" meant that the prime contractor was

⁵ For a brief time rulings elsewhere held out hope that the "political structure" doctrine might pose a challenge to Proposition 209. After Michigan adopted a constitutional amendment very similar to Proposition 209, the Sixth Circuit Court of Appeal expressly rejected the reasoning of the Ninth Circuit and held that the Michigan amendment violated the equal protection clause, relying primarily on the *Hunter/Seattle* doctrine. (*Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 2012 WL 5519918 (6th Cir. Nov. 15, 2012). However, this decision was appealed to the U.S. Supreme Court, which reversed the Sixth Circuit on this point and upheld the Michigan amendment. (*Schuette v. Coalition to Defend Affirmative Action*, 2014 WL 1577512 (2014).

required to document that it provided written notice and solicitation to at least four MBE and WBE and then follow up with each to determine if the WBE or MBE was still interested in bidding. A general contractor filed an action against the city, alleging that the program violated Article I, Section 31 of the California Constitution, the section added by Proposition 209. The trial court granted summary judgment to the contractor and the district appellate court affirmed. (*Hi-Voltage Wire Works v. San Jose* (2000) 24 Cal. 4th 537.) The California Supreme Court also affirmed, finding that the program violated Proposition 209 because the city rejected any bid that failed to comply with one of the two options, "both of which are race and sex based. . . [and discriminate] on an impermissible basis against prime contractors that neither engage in the outreach nor meet the evidentiary presumption, and it grants preferential treatment to those that do." ⁶ Even the outreach program, insofar as it required outreach *only* to MBE and WBE, violated Proposition 209. The majority stressed, however, that while "we find the City's outreach program unconstitutional under section 31, we acknowledge that *outreach may assume many forms, not all of which would be unlawful.*" (*Id.* at 565; emphasis added.)

Chief Justice Ron George concurred in most parts of the *Hi-Voltage* ruling, but wrote separately, in part, to stress that some forms of affirmative action, including targeted outreach, could still be permitted under Proposition 209. While the Chief Justice believed that the particulars of the San Jose outreach program violated Proposition 209 (because it required special outreach efforts to MBE and WBE and no one else), he believed that an outreach program that undertook "reasonable good faith outreach to all types of contractors" would pass muster under Proposition 209. In other words, beyond its normal bid listings, a city could send direct notice and invitation to MBE and WBE – or require a prime contractor do to so – so long as direct notice and invitation were sent to non-MBE and non-WBE, as well. In this way, MBE and WBE would learn of more opportunities, but they would not be the only enterprises to receive direct invitations. More generally, George stressed that Proposition 209 "does not prohibit *all* affirmative action programs or preclude governmental entities in this state from initiating a great variety of proactive steps in an effort to address the continuing effects of past discrimination or

⁶ *Hi-Voltage* at 562. One could argue that the program did not discriminate against or show preferential treatment to prime contractors on the basis of the *prime contractor's* race or gender, but rather on whether the prime contractor provided or failed to provide the requested information. The Court reasoned, however, that the program in its entirety compelled prime contractors to grant preferential treatment to MBE or WBE if they wanted to obtain the contract. In other words, the state cannot do through others what it is prohibited from doing itself.

exclusion, and to extend opportunities in public employment, public education, and public contracting to all members of the community." (*Id.* at 597.)

Two subsequent cases by the California courts reaffirmed the limits set forth in *Hi-Voltage*. In *Connerly v. State Bd. of Personnel* (2001) 92 Cal. App. 4th 16, a California appellate court struck several different programs on the grounds that they clearly gave preferential treatment to women and minorities. Some were found to violate the equal protection clause, while others that may have passed equal protection scrutiny were found to violate Proposition 209. However, as with *Hi-Voltage*, the Court made it clear that outreach efforts did not violate Proposition 209, so long as they were independent of the final selection process. In addition, *Connerly* held that most data collection and reporting requirements in the statutes under review could be severed from the other parts and upheld. More recently, in *Coral Construction v. San Francisco*, the California Supreme Court affirmed the constitutionality of Proposition 209 and found that San Francisco's participation goals and targeted outreach violated Article 1 Section 31. The Court also once again refused to apply the "political structure" doctrine to Proposition 209; it did, however, remand the case to the trial court to consider the narrow question of whether the program could be construed as a required remedial action for past discrimination under federal laws. (*Coral Construction v. San Francisco* (2010) 50 Cal. 4th 315.)

In sum, while *Hi-Voltage*, *Connerly*, and *Coral Construction* struck down preferential contracting laws, ordinances, or practices, they all nonetheless agree that Article I Section 31 does not eliminate all forms of affirmative action. Collectively, they suggest that outreach efforts are permissible so long as efforts are not directed *solely to* MBE and WBE contractors and remain independent of the final decision to award the contract. In addition, the case law strongly suggests that outreach efforts targeting subcontractors on some other basis, such as small business status or geographic location, would comply with Proposition 209 despite the fact that they are intended to reach a disproportionate number of MBE and WBE.

Finally there is nothing in the language or history of Proposition 209 or the case law to suggest that Article 1 Section 31 prohibits race- and gender-related data collection, either by the contracting entity or the prime contractor. The *Connerly* ruling, even while taking an otherwise

expansive view of Proposition 209, upheld provisions of existing laws requiring data collection and reporting on the minority or gender status of contractors and subcontractors. In addition to the case law, the constitutionality of data collection on the race and gender of contractors is supported by the history of Proposition 54. Sponsored by the same groups and individuals that campaigned for Proposition 209, Proposition 54, which appeared on the ballot in 2003, would have prevented state and local governments from classifying, collecting, and using information about a person's race, ethnicity, color, or national origin, except where required by federal law. If Proposition 209 prevented data collection, then Proposition 54 would not have been necessary. More importantly, Proposition 54 was soundly defeated. If California voters had wanted to prohibit race- and gender-based data collection, they had a chance to say so with Proposition 54 but chose not to. Indeed they rejected the idea by a far greater margin than they supported Proposition 209.⁷

Conclusion: What is Still Permitted under Proposition 209?

Although Proposition 209 imposes greater limits on affirmative action in public contracting than does the equal protection clause, it does not eliminate *all* forms of affirmative action. (*Hivoltage, supra*, George, C.J., concurring.) Quotas, set-asides, and “rigid” numerical formulas giving preference on the basis of race and gender are prohibited under Proposition 209, and only rarely permitted under the equal protection clause. Proposition 209 appears to prohibit “targeted” outreach efforts to WBE and MBE unless other business enterprises are included in those outreach efforts. But these are not the only things that contracting agencies can do to create greater opportunity and diversity. For example, a 2012 Report by the Insight Center for Community Economic Development detailed a number of options for promoting diversity within the constraints of Proposition 209.⁸ The legal analysis above strongly suggests that most if not all of the recommendations highlighted in the report would be permitted under Proposition 209. Affirmative steps could be taken in three areas in particular: race- neutral and gender-neutral preferences that may disproportionately benefit MBE and WBE; outreach efforts that target WBE and MBE, along with other business enterprises; and data collection to aide contracting agencies in determining if contracts are awarded in an inclusive and non-discriminatory manner.

⁷ Ballot guide and voting results on Proposition 54.

⁸ Insight Center for Community Economic Development. *Public Contracting in the Proposition 209 Era: Options for Preventing Discrimination and Supporting Minority- and Women-Owned Businesses*. (2012)

Race-Neutral and Gender-Neutral Contracting Preferences: Because Proposition 209 only prevents discrimination or preference on the basis of sex, race, color, or national origin, it does not prohibit other classifications which could be used to grant preferences in the form of set-asides, bid preference discounts or formulas, and targeted outreach. Programs granting preferential treatment or engaging in targeted outreach on the basis of business size, geographic location, or socio-economic factors would be acceptable classifications while still disproportionately favoring historically excluded MBE and WBE. For example, a contracting agency could grant preferences and provide targeted outreach to businesses locating or operating in neighborhoods with high unemployment or below-average income. Such programs exist, and in fact, are required in projects receiving funding from the U.S. Department of Housing and Urban Development (HUD), so clearly such an approach is feasible. The contracting agency could either engage in outreach directly, or require prime contractors to engage in targeted outreach based on any of these non-race and non-gender categories. The agency could similarly develop programs that favor prime contractors and subcontractors that have not previously obtained public contracts; this would not only benefit historically excluded MBE and WBE, but would also benefit businesses that are not part of the privileged group of established public contractors.

Good Faith Outreach Efforts Targeting MBE, WBE, and other Business Enterprises: While Proposition 209 appears to prohibit “targeted” outreach (that is only directed to MBE and WBE), other outreach programs that require contracting agencies or prime contractors to provide direct notice and invitation to WBE and MBE, as well as other business enterprises (OBE), are likely acceptable under Proposition 209. Contracting agencies generally advertise opportunities for prime contractors in local newspapers. Prime contractors, regardless of race or gender, are well-aware of this process. However, the need for notice and outreach is more critical when it comes to contracts between prime contractors and subcontractors. Before Proposition 209, state law (Public Contracts Code Section 2000 *et seq.*) authorized state and local contracting agencies to require prime contractors, in order to be deemed “responsive” to a bid, to either (1) use a designated percentage of MBE or WBE, or (2) document “good faith” efforts to outreach to MBE and WBE. While contracting agencies can no longer force a prime contractor to document

which one of these two options it uses, they could nonetheless require the prime contractor to engage in *some* degree of outreach in order to increase the pool of bidders, thus making the bidding process more competitive *and* ensuring opportunity for WBE, MBE, *and* OBE⁹

Data Collection: For the reasons noted above, both the *Connerly* decision and the history of Proposition 54 indicate that requiring contracting agencies and prime contractors to collect and report information, including information on contractor's race and gender status, does not implicate Proposition 209. To the extent that Governor Wilson's executive orders implementing Proposition 209 prohibited data collection in its prohibition against "monitoring," such a prohibition was clearly not required by Proposition 209 and could be vacated by a subsequent executive order.

⁹ In addition to Chief Justice George's concurring opinion in *Hi-Voltage*, see *Domar v. Los Angeles* (1994) 9 Cal. 4th 161 and *Domar v. Los Angeles* (1995) 41 Cal. App. 4th 810. The *Domar* decisions were decided before Proposition 209, but held that outreach efforts including OBE along with MBE and WBE were non-discriminatory. [If this approach is non-discriminatory, it seemingly would not violate Proposition 209.]