

January 2002

Proposition 209 and the Courts: A Legal History

Overview

Proposition 209, a state constitutional amendment placed on the ballot by citizens' initiative, was approved by California voters five years ago to ban discrimination or preferential treatment based on race, ethnicity and gender in public employment, education and contracting.

Since its passage in November of 1996, a number of legal cases have been working their way through the courts to define the scope of Proposition 209. Three pivotal court decisions are final.

This paper outlines the legal effects of Proposition 209, as determined to date by the courts, with the goal of providing decision-makers with the tools to craft policies that are consistent with the requirements of the initiative.

A common misconception about the initiative, for instance, was that it outlawed affirmative action outright. Yet it made no reference to affirmative action. The California codes do contain dozens of references to affirmative action, and these are compatible with Proposition 209 unless they discriminate or grant preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

The first of the pivotal lawsuits, *Coalition for Economic Equity v. Wilson*, challenged the initiative as written. The federal courts upheld its constitutionality.

The second decision, in the case of *Hi-Voltage Wire Works v. City of San Jose*, evaluated the legality of a city ordinance meant to help minority- and women-owned businesses obtain subcontracts on city construction projects in San Jose. The California Supreme Court decided the type of “participation goal” and “targeted outreach” required by the San Jose ordinance violated Proposition 209.

In the third case, *Connerly v. State Personnel Board*, the courts found that provisions in five state programs related to affirmative action violated Proposition 209 and the federal constitutional guarantee of equal protection.

Notably, in the *Connerly* decision, the California Court of Appeal, 3rd appellate district, specifically upheld the validity of the state’s requirement that data on minorities and women in state employment be collected and reported to the governor and the Legislature. Such data, the court said, “may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices.” If the data suggested a group of people was under-represented in state service, the court said, it might “indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department.”

Although specific provisions of laws ordering affirmative action were invalidated in *Hi-Voltage Wire Works v. City of San Jose* and *Connerly v. State Personnel Board*, the courts were careful to note that proactive steps to encourage diversity are permissible so long as they are consistent with Proposition 209.

This legal review of Proposition 209 discusses court cases and legislative developments in the areas covered by the initiative: public employment, public education and public contracting. It begins with an overview of the three pivotal decisions, followed by sections that examine relevant contracting, employment and education laws and practices. The discussion of public contracting is the most extensive because this has been the most active arena for litigation and legislation to date.

209 Is Upheld and Enforced by the Courts

Proposition 209, originally called the California Civil Rights Initiative, added section 31 to article I of the state Constitution. The major provision in article 31 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.

“State” in this section includes political subdivisions such as local governments and school districts. The federal courts have upheld Proposition 209’s overall validity.¹

In the first major test of how Proposition 209 would apply to specific public programs, the California Supreme Court last year determined a San Jose ordinance violated Proposition 209.² *Hi-Voltage Wire Works v. City of San Jose (Hi-Voltage)* looked at how Proposition 209 affected an ordinance requiring construction contractors to solicit bids from minority- and women-owned businesses. In a unanimous opinion, the state high court struck down a “participation goal” and “targeted” or “focused” outreach efforts to minorities and women, but acknowledged that some proactive or affirmative action steps are permissible. In his concurring and dissenting opinion, Chief Justice Ronald M. George elaborated on what is permissible under Proposition 209 by saying:

Although this court has concluded that the two components of the city’s public contracting program that are challenged in this case violate Article I, Section 31, this determination should not obscure the important point that this constitutional provision 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 exclusion, and to extend opportunities in public employment, public education and public contracting to all members of the community.

As the first major test of Proposition 209 to reach the California Supreme Court, the *Hi-Voltage* case gives significant guidance on the legality of state and local laws related to Proposition 209.

¹ *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th cir.), 122 F. 3d 718, stay denied 521 U. S. 1141, cert. denied 522 U. S. 963 (1997).

² *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537 (2000).

*Connerly v. State Personnel Board (Connerly)*³ is the most recent case to become final. This California Court of Appeal decision was final on November 5, 2001. Five affirmative-action statutory programs were challenged.⁴ The court invalidated all the statutory schemes at issue except the following requirements:

- Data collection and reporting requirements for government bonds (Gov't Code Sec. 16855),
- Data collection and reporting requirements for the state civil service system (Gov't Code Sec. 19792(h), 19793 and other related provisions),
- Layoff procedures for the state civil service system (Gov't Code Sec. 19798), and
- Data collection and reporting requirements for government contracts (Public Contracts Code Sec. 10115.5).

The *Connerly* court invalidated statutory sections enacted as long ago as 1974 that required goals for hiring and promoting women and minorities in state civil service and at the California Community Colleges and for awarding a share of state contracts to firms owned by minorities or women. These are discussed in the following section.

Some “Affirmative Action” May Be Legal under Proposition 209

A common misconception of the initiative was that it outlawed affirmative action. Affirmative action, which is not mentioned in the initiative's wording, has different meanings for different people. To some, it is synonymous with preferences based on race or gender that are clearly illegal under Proposition 209. For others, the term speaks to positive actions taken to overcome the effects of past and current discrimination.

The California codes contain a number of references to affirmative action concepts, programs and officers. Such references do not violate Proposition 209 *unless* the statute discriminates or grants preferential treatment on the basis of race, sex, color, ethnicity, or national origin. (Hereinafter these categories will be abbreviated as race or gender).

³ *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001).

⁴ The challenged statutes are: Government Code section 19790 – 19799 relating to the state civil service affirmative action employment program; Education Code section 87100 – 87107 relating to community college employment; Government Code section 8880.56(b)(4) relating to the state lottery procurement programs; Public Contract Code section 10115 – 10115.15 relating to minority and women participation goals in state contracts; and Government Code section 16850 – 16856 relating to professional bond service contracts.

The *Connerly* case in 2001 invalidated five of these affirmative-action statutory programs. These five programs were:

- Parts of the state civil-service employment system that required hiring and promotion goals based on race and gender;
- A statute requiring the California State Lottery to consider procurement contracts based on race or gender;
- A statutory scheme to encourage the state treasurer’s office to do business with bond firms owned by minorities or women;
- Affirmative-action hiring provisions for the community colleges; and
- Goals for participation of minority-owned and women-owned businesses in state contracts. However, these provisions previously were invalidated in federal court in *Monterey Mechanical v. Wilson*, discussed in the next section.

Public Contracting

Hi-Voltage and Other Public Contracting Cases

A California law requiring state entities to set goals for providing at least 15 percent of their contracts for goods and services to minority-owned businesses and at least 5 percent to women-owned businesses⁵ was found unconstitutional and is no longer enforced. Similar local ordinances are in doubt after the recent *Hi-Voltage* decision.

Prior to the passage of Proposition 209, the U.S. Supreme Court decided that federal, state and local programs designed to help minorities obtain public contracts are constitutional only if they are narrowly tailored to achieve a compelling governmental interest.⁶ Applying this “strict scrutiny” test to California’s law to help minorities and women obtain state agency contracts, the federal 9th Circuit Court of Appeal in *Monterey Mechanical v. Wilson* decided California’s law was unconstitutional because it violated the federal equal-protection standard.⁷ The court did not rule on whether these provisions also violated Proposition 209, but the trial judge in the *Connerly* case did invalidate these provisions under Proposition 209.

⁵ Public Contracts Code sections 10115 –10115.15.

⁶ *Richmond v. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷ *Monterey Mechanical v. Wilson*, 125 F. 3d 702 (1997).

Given this backdrop of cases and the passage of Proposition 209, the city of San Jose attempted to craft a public-contracting affirmative-action program that would meet the federal strict scrutiny test, as well the requirements of Proposition 209 in Article I, Section 31 of the state Constitution.

San Jose looked to an earlier study of public contracts awarded by the city that documented a pattern of discrimination by prime contractors against minority-owned and women-owned subcontractors. Relying on this history of discrimination, the city adopted a new public contracting scheme incorporating a number of outreach and documentation components. The California Supreme Court in *Hi-Voltage* invalidated the city's ordinance because it found two requirements in that ordinance violated Proposition 209. The court did not reach the question of whether the San Jose scheme would violate the federal equal-protection standard.

The two requirements invalidated were goals for participation by women- and minority-owned subcontractors and targeted outreach to such firms. To qualify as a bidder in San Jose, a contractor had to meet or exceed the city's goal for participation by these subcontractors. Each participation goal was based on the availability and ability of minority- and women-owned enterprises to do the work. If the contractor couldn't meet or exceed this participation goal, then the contractor had to meet targeted outreach requirements. This meant written notice to at least four minority- and women-owned businesses, soliciting them for the project, following up to determine their interest in bidding, and written reasons to justify rejection of low bids from such enterprises.

The court likened participation goals to a "set-aside" or "quota" clearly granting a preference based on race or gender. It invalidated the targeted outreach component "because prime contractors must notify, solicit bids from, and negotiate with minority- and women-owned businesses, but may exclude other potential subcontractors."

The state Supreme Court's decision implies that Proposition 209 sets higher requirements than the federal equal-protection standard when evaluating whether affirmative action in public contracting is permissible. What type of affirmative action might be allowed in public contracting under Proposition 209 remains a question. The court said, yes, some programs are still allowed so long as they don't discriminate or grant preferences based on race or gender. Janice Brown, in her majority opinion, declined to elaborate on what forms of outreach might be lawful. Chief Justice George, in his concurring and dissenting opinion, laid out examples of neutral outreach that do not target minorities or women and are therefore allowed. However, since the chief justice offered his neutral examples in the context of his concurring and dissenting opinion, future litigation and legislation may still have to resolve what is and is not permissible.

Pending Contracting Cases

The *Hi-Voltage* case of 2000 will set the standards for evaluating pending and future contracting cases under Proposition 209. And there is a long list of pending actions, most initiated by the Pacific Legal Foundation, a strong supporter of Proposition 209.⁸ Research identified a single case in the public-contracting arena brought by groups opposed to Proposition 209. This action was filed by the Lawyers Committee for Civil Rights in San Francisco against the Contra Costa County. It seeks federal remedies for alleged ongoing discrimination against minorities who bid on contracts in Contra Costa County.⁹

Effect of Federal Adarand Decision

The U.S. Supreme Court decided on November 27, 2001, not to hear *Adarand Constructors, Inc. v. Mineta* for the third time. In a 1995 decision (known then as *Adarand Constructors v. Pena*), the high court decided to apply a strict scrutiny test to statutory affirmative-action programs initiated by Congress. The case involves a federal highway-contracting program that gives contractors a monetary bonus if 10 percent of their subcontractors are firms owned by disadvantaged minorities or women. The case was remanded to the federal district court to decide if this bonus program met the strict scrutiny test. The federal District Court said it did not, and the 10th Circuit Court of Appeals ruled the opposite. Now that the U.S. Supreme Court declined to hear the case, the federal highway-contracting program will remain valid unless and until another decision overturns the 10th circuit court decision.

Although this case is important to understanding the evolution of federal case law interpreting the equal-protection clause of the federal Constitution, it is not an integral Proposition 209 case. As the *Hi-Voltage* case suggests, California law under Proposition 209 probably sets even higher requirements than the federal equal-protection standard.

Because the federal highway-contracting program is currently valid, the state and local entities will have to evaluate whether the federal exception to Proposition 209 applies to them. If state and local entities want to establish or maintain eligibility for this federal program, they may be exempt if they were required to take actions based on race or gender “to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.”¹⁰

State Public Contracting Legislation

⁸ See the Pacific Legal Foundation web site at www.pacificlegal.org for a description of these cases.

⁹ *Lucy Sales v. County of Contra Costa*, pending federal district court.

¹⁰ Subsection (e) of article I, section 31(See Appendix).

A number of bills related to contracting and Proposition 209 have been introduced in the California Legislature in the years since passage of Proposition 209. Some of these passed the Legislature but were vetoed by Governors Pete Wilson or Gray Davis.

When Governor Davis vetoed SB 44 (Polanco)¹¹ in 1999, he appointed a Task Force on Diversity and Outreach to make policy recommendations related to Proposition 209. Those recommendations were issued in August 2000.¹² After Davis vetoed a similar bill, SB 2047 (Polanco),¹³ in 2000, he said in his veto message he was waiting for the California Supreme Court decision in *Hi-Voltage* and needed to review his task force's recommendations.

Two relevant bills were introduced in 2001: SB 1045 (Polanco)¹⁴ and AB 1084 (Wesson). AB 1084 reached the governor's desk and was signed into law.

Davis signed AB 1084, Chapter 882 (Wesson), into law in October 2001. It seeks to increase the participation of small businesses in public contracts for construction, goods and services. AB 1084:

- Requires state agencies to collect data on the race and gender of state contractors;
- Creates a new preference category, in awarding state building contracts, for large businesses that subcontract with small businesses and micro-businesses;
- Allows state agencies to give a contract preference to small businesses based on qualifications rather than bidding price alone; and
- Expands the non-competitive bidding process to include construction of less than \$200,000.

Collecting Data on Public Contracts

The issue of collecting data on public contracts has a complicated legal and legislative history. The bottom line is that the Legislature and the governor have now restored the authority of the state to collect such data.

¹¹ SB 44 would have made a legislative finding that Proposition 209 did not prevent governmental agencies from using outreach programs to recruit minorities and women if they were under-represented in entry-level positions or educational institutions.

¹² See http://www.bth.ca.gov/news_pub/divtaskfrc.pdf.

¹³ In addition, SB 2047 would have required state agencies to collect data on their contractors by race and gender.

¹⁴ SB 1045 is a two-year bill now pending in the Assembly Appropriations committee. It would reaffirm diversity as a public-policy goal in public contracting and employment.

Once the *Monterey Mechanical* case became final in 1998, Governor Wilson issued Executive Order W-172-98. It directed every state agency to cease enforcement of the state's minority- and women-business enterprise participation goals and ended all administration actions, programs, and regulations that had monitored, promoted, or sought to comply with this law.

The governor's order to stop gathering data on state agencies' contracts with minorities and women was immediately challenged by a coalition of civil rights groups. This case, now called *Barlow v. Davis* because the final decision was issued during the tenure of Governor Davis, upheld Governor's Wilson order.¹⁵ The courts ruled that the data collection was an inseparable part of the public-contracting law that had been ruled unconstitutional in *Monterey Mechanical*.

But the *Connerly* ruling reached the opposite conclusion from the *Barlow* decision when it found that the data collection and reporting requirements could be logically severed from the other public-contracting statutes.

And finally, AB 1084, legislatively restores the collection of data by state agencies related to the race and gender of contractors and subcontractors.

Public Employment

Public Employment Cases

Since the passage of Proposition 209, two California appellate cases addressing state employment are final: *Kidd v. State of California*¹⁶ and *Connerly*. *Kidd* involved a challenge to a State Personnel Board (SPB) policy called "supplemental certification." Supplemental certification allowed minority and female applicants for positions in state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates – as required of all other applicants. SPB suspended use of supplemental certification sometime before 1998 when this case was decided. The court found that supplemental certification violated Proposition 209 and the merit principle embodied in the California Constitution.

The *Connerly* case invalidated the statutory framework establishing affirmative action in state civil service, although it upheld the part of the law requiring the state to collect data on minorities and women in state employment and to report this data to the governor and the Legislature. Specifically, the court found "that the statutory requirements for the establishment of goals and timetables to overcome

¹⁵ *Barlow v. Davis*, 72 Cal. App. 4th 1258 (1999).

¹⁶ *Kidd v. State of California*, 62 Cal. App. 4th 386 (1998).

identified under-utilization of minorities and women violates principles of equal protection and Proposition 209.”

The SPB must review its policies and procedures to make sure it acts in accord with the *Connerly* decision and other decisions interpreting the reach of Proposition 209.

The *Connerly* case also invalidated affirmative-action employment requirements for the community colleges. It was silent on whether these requirements could fall under an exception provided in the initiative for preferential treatment that is required as a condition for receiving federal funding.¹⁷

Legislation and Litigation

SB 1191, Chapter 745 (Speier) was signed into law in October 2001. It rewrote Government Code section 19793 to say the following:

By November 15 of each year beginning in 1978, the State Personnel Board shall report to the governor, the Legislature, and the Department of Finance on a census of the state work force and any underutilization problems in a state agency or department that may indicate failure to provide equal employment opportunity to minorities, women, and persons with disabilities during the past fiscal year. The report also shall include information on laws that discriminate or have the effect of discrimination on the basis of race, color, religion, national origin, political affiliation, sex, age, or marital status. The Legislature shall evaluate the equal employment opportunity efforts of state agencies during its evaluation of the Budget Bill.

One bill is still pending in the 2001-02 legislative session that would potentially amend the civil-service affirmative-action statutory program. SB 1161 (Polanco) would require the SPB to develop a system to require state agencies to disseminate state recruitment, examination, and employment information broadly to all sectors of California’s work force.

As for litigation, the Pacific Legal Foundation is involved in several other local employment cases.¹⁸

Data Collection in Public Employment

State and local entities continue to gather information about the racial and gender composition of their work forces. This practice was specifically upheld in the *Connerly* decision. It determined there was validity in collecting data on minorities

¹⁷ Article I, Section 31, Subsection (e). See the appendix for the text in subsection (e).

¹⁸ See the Pacific Legal Foundation web site at www.pacificlegal.org for a description of these cases.

and women in state employment and in making reports to the governor and the Legislature on that data, as required by state law. In reaching this conclusion, the court said that such information serves legitimate and important purposes in helping to determine whether minorities and women are under-represented in state service. Such information, the court said:

may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices. It may indicate the need to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group. And it may indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department.

The constitutionality of collecting statistics on public-employment applications was challenged in *Haggerty v. State of California*. The California District Court of Appeal, in an unpublished opinion, upheld the practice of gathering this data.

Ward Connerly and his Civil Rights Coalition (the plaintiff in the *Connerly* case) are sponsoring an initiative that would bar the state from collecting data on race in state education, employment and contracting. The Connerly coalition is collecting signatures to attempt to place this initiative on the November 2002 ballot.

Public Education

College and University Admissions

Both before and after passage of Proposition 209, the legal status of using race, ethnicity or gender as factors in higher-education admissions was the most visible affirmative-action issue in the news media. In 1995, the University of California Board of Regents eliminated the use of race and ethnicity as admissions criteria when it passed resolution SP-1. In November 1996, the voters passed Proposition 209. Following these two events, applications from members of minority groups decreased, as did the ratio of minority students admitted to the two most prestigious UC campuses (Berkeley and UCLA). Conversely, the ratio of minorities admitted to the less competitive campuses of Santa Cruz and Riverside increased.¹⁹

In 2001, the regents repealed SP-1 and adopted several revisions in procedures consistent with Proposition 209 aimed at increasing the diversity of admissions to UC campuses. These revisions include granting automatic eligibility to high school

¹⁹ “Underrepresented Minority Admissions at UC after SP-1 and Proposition 209: Trends, Issues and Options,” Saul Geiser, Carla Ferri, Judy Kowarsky, University of CA, Office of the President, Nov. 2000.

students graduating in the top 4 percent of each high school class, allowing for dual admissions to a community college and a UC campus, and adopting a comprehensive application process. Funding for dual admissions was not approved by the Legislature in 2001. Consequently, the 2003 implementation date will be delayed.

The most recent policy revision was adopted by the regents in November. This change puts in place a comprehensive application-review process for all candidates that looks at tests and grades as well as other factors, such as economic background, special talents and success in overcoming hardships. One additional policy proposal – to no longer considering SAT 1 exams as part of the admissions process – is being considered to increase diversity.

One case, *Rios v. Regents of the University of California*, is pending in federal court challenging the admissions policies at UC Berkeley and UCLA. These admissions policies are challenged as a violation of the Civil Rights Act of 1964 and the U.S. constitution's equal protection clause; the admissions policies are not being challenged as violating Proposition 209.

U.S. Supreme Court Cases

The U.S. Supreme Court continues to grapple with the question of whether race can be considered as a factor in higher education admissions. For the most part, these cases involve federal law. Race probably cannot be used as a factor in higher education admissions in California's public universities because it would probably violate Proposition 209. For the U.S. Supreme Court to settle this question on the national level may have little effect in California because of the additional requirements in Proposition 209.

That said, it's still important to understand the debate continues to rage at the national level and a final decision could still impact California's public and private universities. The U.S. Supreme Court has not ruled on this question since its 1978 decision in *Regents of the University of California v. Bakke (Bakke)*.²⁰ Then, a five-justice majority struck down a medical school's policy of setting aside a fixed number of slots for minorities. Since the *Bakke* decision, universities looked for guidance in Justice Lewis Powell's concurring opinion that said race could be used a "plus factor" in admissions to ensure racial diversity. Using race as such a plus factor has led to a number of pending cases.

Two cases reaching opposite conclusions have both been turned down for review by the Supreme Court: *Smith v. University of Washington School of Law (Smith)*²¹ and

²⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

²¹ *Smith v. University of Washington School of Law*, 233 F. 3d 1188 (2000), cert. denied May 29, 2001.

Hopwood v. University of Texas School of Law (Hopwood).²² In the *Smith* case, the 9th U.S. Circuit Court of Appeal upheld a race-conscious admission policy, and in the *Hopwood* case, the 5th Circuit Court of Appeal rejected the use of race in university admissions. Several other cases are pending in federal courts in Georgia and Michigan. One of these will likely reach the Supreme Court in the near future.

Pending California Education Cases

The Pacific Legal Foundation has initiated three lawsuits related to admission to K-through-12 schools in California.²³ Two of these cases involve popular school sites that have more students seeking admissions than slots available. These schools have selection criteria that include a consideration of race and/or gender.

Recent Legislation

One education measure related to Proposition 209 was signed into law in the 2001-02 legislative term: AB 652, Chapter 459 (Horton). This bill requests the UC Regents to report to the Legislature on existing and planned efforts to recruit students to the universities' schools of medicine, dentistry and optometry from communities and populations that are medically underserved. The bill also asks the university to use existing resources for outreach related to these graduate health programs.

Conclusion

Proposition 209 has survived its key legal tests. More cases are in the pike that will further define the reach of Proposition 209, but the courts have now given an outline for how this proposition will be interpreted in the future. This outline should help policymakers drafting future equal-opportunity legislation.

The best guidance to date on Proposition 209 comes from the *Hi-Voltage* case, where a participation goal and targeted outreach were invalidated. Unfortunately, the majority opinion opted not to give public entities clear guidelines on what else is and is not permissible under the initiative. Chief Justice George's concurring and dissenting opinion relies on the examples set out in the ballot arguments and cites other examples of acceptable proactive steps consistent with the initiative. Public entities must look to both the majority opinion and the concurring opinions for clues on how to craft outreach legislation consistent with Proposition 209.

The *Connerly* case did not help to flush out what kinds of outreach are permissible under Proposition 209, but it did provide additional clues to help solve the mystery

²² *Hopwood v. University of Texas School of Law*, 236 F. 3d 256 (2000), cert. denied June 25, 2001.

²³ See the Pacific Legal Foundation web site at www.pacificlegal.org for a description of these cases.

of how to implement it. From this case, we learned when state statutory programs are illegal. We learned that collecting and reporting data concerning the participation of minorities and women in government programs does not violate equal-protection principles or Proposition 209.

Imbedded in the *Connerly* decision are other important clues about permissible activities. For instance, in the court's discussion of equal protection, it says "all of the justices agree that governmental entities may use race- and gender-neutral methods of fostering equal opportunity..." When reviewing the California State Lottery statute related to awarding contracts that utilize subcontractors with socially and economically disadvantaged small business concerns, the court pointed out that "economic disadvantage is a criterion that may be determined through application of race-neutral and gender-neutral financial factors."

The recent policy actions taken by the UC Board of Regents to encourage diversity in university admissions without violating Proposition 209 portend the future in a post-Proposition 209 California. Public policies can be consistent with Proposition 209 and crafted in a way to nurture California's diversity.

Appendix

Key Cases Discussed in This Briefing Paper

Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (9th cir.), 122 F. 3d 718, stay denied 521 U. S. 1141, cert. denied 522 U. S. 963 (1997). Found Proposition 209 constitutional as written or in legal terminology “on its face.”

Hi-Voltage Wire Works v. City of San Jose, 24 Cal. 4th 537 (2000). Said the type of “participation goal” and “targeted outreach” required by a city ordinance for construction contractors to involve minority- and women-owned subcontractors violated Proposition 209.

Connerly v. State Personnel Board, 92 Cal App. 4th 16 (final Nov. 5, 2001). Invalidates five affirmative-action statutory programs, and upholds the ability of the state to collect and report data concerning minorities and women in state employment and contracting.

Monterey Mechanical v. Wilson 125 F. 3d 702 (1997). Said California’s law requiring state agencies contracting for goods and services to set goals for providing at least 15 percent of their contracts to minority-owned businesses and at least 5 percent to women-owned businesses violates the federal equal-protection-constitutional standard.

Adarand Constructors, Inc. v. Mineta is now before the U.S. Supreme Court for the third time. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), said federal programs designed to help minorities obtain public contracts are only constitutional if they meet the “strict scrutiny” test. The pending *Adarand* case looks at whether the federal highway-contracting program is constitutional under this strict scrutiny test.

Kidd v. State of California, 62 Cal. App. 4th 386 (1998). Found that “supplemental certification” violated Proposition 209 and the merit principle embodied in the California constitution because it allowed minorities and women applicants for positions in state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Struck down U.C. Davis’ medical school policy of setting aside a fixed number of slots for minority applicants.

Complete Text of Proposition 209

Article 1, Section 31 of the California Constitution

- (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 antidiscrimination 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 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.