

AN AFFIRMATIVE ACTION MANUAL

Understanding What It Is, Analyzing The Attacks Against It, Articulating The Arguments In Support Of It

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1.0 INTRODUCTION

1.1 WHY WE HAVE WRITTEN THIS MANUAL

On November 5, 1996, the voters of California will be asked to support or reject Proposition 209, the so-called California Civil Rights Initiative ("CCRI"). Proposition 209 presents an issue of extraordinary consequence: Whether we, the people of California, should prohibit ourselves -- constitutionally prohibit ourselves -- from ever again taking gender, race, national origin, ethnicity or color into account in the operation of public employment, public education, and public contracting.

Proposition 209, for all its prominence, is only one of many attacks on affirmative action -- in our own state and elsewhere. In California, the Regents of the University of California voted in July, 1995, to end affirmative action in admissions, employment, and contracting. In other states, proposed legislation aims to terminate a wide variety of affirmative action programs. On the federal level, various bills are now circulating in Congress to end affirmative action as we know it.

Given the stakes, you would think Proposition 209 would inspire the very best public debate -- honest, direct, responsible. Instead, we too often find ourselves surrounded by misleading examples, factual exaggerations, and dogmatic declarations. In the face of contradictory claims, it's hard to know what to believe, even about the most elementary questions. Why did affirmative action come into being? What purposes does it serve? What programs does it include? Is it all about quotas? Has it failed? Has it worked too well? Do we even need it anymore? Doesn't it violate color-blind, merit-based opportunity?

The public debate has generated at least as much bewilderment about Proposition 209 itself. Who's behind the CCRI? What do its many provisions mean? Is it even about affirmative action since the words do not appear in the text? Does it ban all affirmative action programs and practices? What about veterans' preferences, outreach programs, scholarships? Is it, as its sponsors insist, consistent with Dr. Martin Luther King's civil rights vision? Does it apply to state and local government programs? Does it apply to private companies too? Does it invite increased discrimination against women? Is it mainly intended to send a message that no one really believes will ever be enforced?

We do not pretend to be neutral or undecided. We're openly partisan: We oppose Proposition 209. We believe it is an extreme and unwise reaction to a messy and complex world. A constitutional amendment, after all, permanently alters how we govern ourselves. The proposed change would reverse how we, for the past thirty years, have finally begun coming to grips with our past, our present, and our future. Outlawing any consideration of gender, race, national origin, ethnicity or color in any aspect of public employment, public education, and public contracting would camouflage how we all think and act. Rather than dealing directly with our historical and contemporary practices, Proposition 209 would have us deny -- even to ourselves -- the reality of the world we share. On the November ballot, we're being asked to choose a course of action incompatible with where we've been, where we are now, and where we should be headed. We think that's a terrible mistake.

Still, we think affirmative action supporters share the blame for what has often been an evasive and even deceitful debate. Staunch supporters of Proposition 209 often villainize affirmative action, romanticize what "merit" has meant, and describe "color-blindness" in ways that contradict how they themselves think and behave. They selectively invoke horrifying images, nasty anecdotes, and dishonest data. At the same time, ardent opponents of Proposition 209 often celebrate "diversity" without much examining what it means and sometimes denounce "merit" as if it had no place in American life. Meanwhile, they carefully duck tough questions, embarrassing failures, and perhaps even their own misgivings about affirmative action programs they know well. We all frequently find ourselves down in the muck, even if we didn't originally do much to create it.

There's a certain perverse logic to this form of politics. Much as democracy honors education, discussion, and deliberation, we all feel the understandable need to persuade, especially about issues as important as affirmative action. As soon as one side begins caricaturing, covering up, and misleading, everybody else feels pressure to do the same. After all, says the conventional wisdom, that's how the pros play the game. If you're not willing to adjust to the rules, then you're naive and a loser.

But we've never understood why being persuasive requires caricaturing the views of others, or covering up your own doubts and reservations, much less misleading your audiences. In any event, we believe we should govern ourselves through qualities we admire rather than qualities we disdain. Refusing to play by the rules of modern politics couldn't help but improve democratic life -- for all of us. Forced to deal in something other than dogmatic exaggerations, forced to face one another with something other than stick figures, we'd at least be confronting how

to develop -- issue by issue, debate by debate -- the character of mind and habits of heart any healthy democratic republic requires.

Don't get us wrong. We don't imagine replacing fractious quarrels with cozy consensus. Ours is no utopian vision. Far from it. What we have in mind -- along with those others who have tried their best to talk straight about what they think and feel about affirmative action -- would be forcing ourselves to experiment with ways of actually conducting political arguments rather than just parodying them, avoiding them, or transcending them. Painful as it may sometimes be, we want an exchange that gets closer to what's being said "off the record" and, yes, "behind closed doors."

But much as everyone would benefit from renouncing how the pros play the game, those who question the wisdom of Proposition 209 may well have the most at stake. In confidential focus groups, these voters tell us they're afraid they've forgotten, if they ever even knew, how to defend affirmative action programs they think important. They feel infuriated by the nature of the attacks on affirmative action, humiliated for not knowing how better to justify their instincts, and sometimes even a little corrupt for earnestly backing what they themselves may have in some ways come to question.

More alarmingly, in these same confidential focus groups, voters tell us they often end up feeling worse and not better after they have heard yet another dogmatically exaggerated pro-affirmative action stump speech. "If supporters of affirmative action really had better raps to fight these attacks," several women commented, "wouldn't we be laying them all out there, particularly now, with so much on the line?" The new political game would seem to have come full circle: The very same stump speeches originally designed to counter the successes of the extreme Right and to reap the benefits of "going negative" often now seem to backfire -- on college campuses, in town meetings, in televised debates.

Instead of effectively rebutting the anti-affirmative action attack ads, dogmatically exaggerated pro-affirmative action raps serve often to do nothing but engender doubt. Raps that caricature, cover-up, and mislead sometimes leave even staunch defenders wondering about the intelligibility -- put aside the legitimacy -- of the justifications for affirmative action. They keep asking themselves the blunt question: Can't we state our position straightforwardly in terms we believe and people can understand?

Those who question the wisdom of Proposition 209 have no choice. We must deal honestly with affirmative action -- with its goals, achievements, and failures. We must face concerns and costs and risks. We're "stuck" grappling with the truth. But that's not just ok by us. That's as it should be. If affirmative action can't be defended openly, if affirmative action can't be defended directly, if affirmative action can't be defended "warts and all," then let's abandon it. And let's abandon every single program that bears its name.

We don't believe we're alone in feeling this way. When voters share their uneasiness about the affirmative action debate, they're saying, among other things, "let's simply have this fight out on the merits, both in our own minds and in every public forum." They may hate, as we do, anti-affirmative action attack ads. And they may bristle, as we do, at promises to build equal opportunity the "right way" when there's no reason to believe these promises are anything but empty rhetoric. Still, these voters don't want to feel, any more than we do, like they need to cringe at or hide from the very programs they support, the very positions they take, or the very world they hope to help shape. They want a chance to examine what we know about affirmative action -- blemishes, misgivings, contradictions and all -- and to make up their own minds about our future. It is in this spirit that we offer this Affirmative Action Manual.

1.2 WHAT WE HAVE INCLUDED AND WHY

In the Manual, we've tried to provide information that will help you understand what affirmative is, why we have it, and why we still need it. At the same time, we've tried to offer generous descriptions of the objections to and reservations about affirmative action. Finally, we've included honest responses to objections and reservations. When attacks are misleading or flimsy, we say so. And when concerns are more substantial, we say that too, facing squarely where there may be uncertainties, trade-offs, and costs.

After describing affirmative action, analyzing the attacks against it, and presenting the arguments for it, we provide lengthy appendices in the second half of the Manual. The appendices include materials we have drawn on and developed in the course of the past 18 months. We offer you everything from legal highlights to empirical studies to a bibliography of literature we regard as important. We also offer you the raw materials we've used in our work with the UCLA Community Outreach, Education, and Organizing's Project on Affirmative Action -- work that has included, all told, over a year's worth of workshops, speakers' trainings, "town-meetings," debates, and lectures. These raw materials range from a summary of empirical studies to a sample speaker training workshop script to a "think paper" on affirmative action and public opinion. If we hope to illuminate nearly every corner of the

affirmative action debate, we aim to galvanize too. With the Manual in hand, you have a tool that provides the information you need in order to act. You're in a position to cast a knowledgeable vote and to help others determine their own views on affirmative action. We will have fulfilled our mission if every person who uses this Manual learned enough to make an informed decision about affirmative action and took up the conversation with others. All of us can only gain from learning to understand affirmative action better than we do now.

1.3 HOW TO USE THIS MANUAL

We wrote this Manual to be read cover-to-cover. But, by all means, use this manual the way you would any other manual -- manuals you may have for your car, your stereo, your computer software. If you're interested in one or another section, skip right to it. You wouldn't read about transmissions if you needed to fix a fuel pump. And you shouldn't have to plow your way through, say "Types Of Affirmative Action," if you already know what this section has to say and are really much more concerned, for example, with whether "Affirmative Action Costs Too Much." We've copyrighted the Manual. But we encourage you to duplicate it in its entirety and to disseminate it to individuals, business organizations, community groups, educators, government officials, educators, and the media. All we ask is that you include the cite and copyright on any part of the Manual you share with others. Please contact us at Lopez@law.ucla.edu or (310) 206-7285 with any comments, requests, or questions about Proposition 209 and affirmative action. (You can also find the Manual on our web-site at "<http://www.law.ucla.edu/Classes/Archive/CivAA/>").

2.0 WHAT IS AFFIRMATIVE ACTION?

2.1 THE MEANING OF AFFIRMATIVE ACTION

Recent debate has left many voters more confused than confident about what exactly affirmative action means and what exactly Proposition 209 would constitutionally outlaw. As an antidote, we begin with definitions of affirmative action that often overlap in public conversation: what the expression broadly encompasses; what the modern term means (and what Proposition 209 aims constitutionally to outlaw); what the more derogatory "shadow" meaning does to influence our thinking and to bias the debate; what to make of this "shadow" meaning when contrasted with the affirmative action we're openly defending against the constitutional prohibition Proposition 209 would impose; and, once more, what exactly we're defending.

2.11 Affirmative Action -- Broadly Described

Affirmative action is an expression that can be described as including an astonishingly diverse array of programs and policies. For example, perhaps the oldest surviving affirmative action policy grants preferences to military veterans applying for civil service jobs by adding extra points to their civil service exam scores. Veterans programs, we realize, aren't usually called affirmative action. But that doesn't change how they operate in principle and in practice. Similarly, university policies routinely have granted preferences in admissions to athletes and the children of alumni ("legacies"). And many elite colleges achieve geographic diversity in their student bodies by preferring applicants from Wyoming or Alaska, say, over applicants from Massachusetts or New York.

It's important to appreciate, however, that Proposition 209 is not concerned with or designed to abolish affirmative action based on military service, alumni status, or geographical diversity. Instead, the proposed constitutional amendment would ban only those forms of state and local government-sponsored affirmative action programs specifically targeting women and people of color. So exactly what does this include?

2.12 Affirmative Action: Definition and Proposed Prohibitions

In contemporary debate, the umbrella term "affirmative action" refers to a broad array of gender, race, national origin, ethnicity or color-conscious programs (what we'll call "gender- and race-conscious" in the Manual). It includes outreach programs, targeted at specific groups, to notify them of education, employment and contracting opportunities. And it includes programs that favor -- among similar candidates, all of whom are otherwise qualified -- members of historically subordinated and still underrepresented groups.

Affirmative action policies create opportunities in institutions controlled both by our government (the "public sector") and by private citizens (the "private sector"). Most affirmative action programs are created voluntarily. In the public sector, elected officials enact statutes or executive orders to implement them. In the private sector, such programs are generally initiated by businesses of their own volition. Mandatory (or "involuntary") affirmative action programs are very rare and are only instituted by the courts at the conclusion of a discrimination lawsuit. If the parties settle the lawsuit before the jury renders a verdict, the settlement agreement is enforced by the court as a "consent decree." If the jury finds the defendant guilty of specific acts of discrimination, the jury's decision is enforced by the court as a "court order." In either case, only the actual defendant in the discrimination lawsuit is required to institute an affirmative action program -- and only in order to remedy the past discrimination. Later in the Manual, we'll carefully parse Proposition 209, describing in detail what each of its many provisions mean and what impact they collectively may have on current affirmative action programs. For now, however, it's important to note that the proposed constitutional amendment outlaws only gender- and race-conscious state and local government-sponsored affirmative action programs. It does not by its language outlaw (1) federally sponsored programs, (2) state or local governmental programs mandated through federally sponsored funding, (3) mandatory programs already in place and (4) voluntary programs initiated in the private sector.

2.13 The Shadow Definition of Affirmative Action

If you're already thinking that the definition we've just provided isn't the whole story, you'd be right. Indeed, in everyday life, the definition competes with a cluster of notions and images that together imbue affirmative action with a very different, very derogatory meaning. We shouldn't run from this "shadow" definition. Quite the opposite. Proponents of 209 often seem to be attacking this shadow meaning more than anything else. Unless we acknowledge this other affirmative action, we've got very little chance of clarifying exactly what we're defending and what we're not.

So what notions and images define the affirmative action that shadows our thinking and colors our debate? For many people, surveys tell us, the very term affirmative action conjures up exceedingly un-American notions. Unqualified people taking jobs from qualified people. Quotas for women over men. Quotas for minorities over whites. Abandoning centuries-old practices of gender- and race-blind, merit-based opportunity in favor of a heavily rigged system of recruitment, training, hiring, admissions, and government contracting. Lowering standards so much in the name of affirmative action that it hardly seems accurate to call the standards "merit-based" at all.

And for many people, surveys tell us, the very term affirmative action summons up not just these un-American notions but some pretty damning images. When they hear affirmative action, they apparently see a sincere but physically fragile woman firefighter endangering victims, fellow firefighters, and herself at a major blaze. When they hear affirmative action, they apparently see an earnest but intellectually lightweight Latino teacher embarrassing his students, his colleagues, and himself in trying to teach subjects beyond his well-intentioned but limited mental grasp. When they hear affirmative action, they apparently see a hustling but plainly overmatched Black contractor humiliating his clients, his co-contractors and himself in falling further and further behind on a pretty simple project that any number of competent white contractors could have easily handled.

In fact, in confidential focus groups, people tell us when they think of affirmative action they see images even more graphic still. They tell us they see a big, slow, Black guy. Or an obviously dense, inept and barely intelligible Pilipino or Latino. Or a woman trying frantically, in some circumstance or other, to measure up but obviously in way over her head. And when they think these thoughts, they believe the rest of us in this country do too -- except we won't admit it, not even to ourselves. And, they tell us, they honestly can't imagine how affirmative action can be a good thing -- a program ever worth defending, much less a program worth continuing. And, they tell us, they don't know whether any facts (no matter how accurate) or any arguments (no matter how persuasive) can possibly get these images out of their head. These images, they believe, simply tell us what people continue to believe and what remains central to the national consciousness.

2.14 What To Make of This Shadow Definition

Strong as the shadow definition's grip seems to be, it tells us little about what affirmative action has been. And the little it does tell us is largely misleading. As importantly, it tells us nothing about the affirmative action we support and defend against Proposition 209.

We realize people can, in good faith, worry about the times affirmative action operates in the wrong way. In the name of affirmative action, for example, some employers have used illegal quotas and have hired unqualified people. They've done it; they were wrong to do it; and we won't defend them or their programs. But every serious

study tells us these abuses of affirmative action are exceptions -- indeed, exceptions more prevalent in the very early years of affirmative action than in today's world.

Still, the facts often don't seem to matter in trying to get people to disregard this shadow meaning of affirmative action. At least in the debate surrounding Proposition 209, it remains commonplace for many of us to treat the indefensible exceptions as the norm. Having heard of a quota, having seen an incompetent woman or minority, we quickly convert the extremes into a poster child for an otherwise healthy and productive set of programs. Then, without much hesitation, we treat the misleading image as the monster we must attack for the good of us all.

Yes, we too have seen women, Asian Pacific Americans, American Indians, African Americans and Latinos in "over their heads" -- at schools and on jobs. But we've seen lots of white men in over their heads too -- in every sort of school, in every sort of industry, in government and in business, and on every sort of job, from President, Governor and CEO, to lawyer, doctor, and university professor, to assembly line worker, gardener, and pool man.

Incompetence is not a good thing. And we know first-hand how intolerable incompetence can feel when you've got it standing in front of you or sitting next to you. But incompetence existed long before gender- and race-conscious affirmative action programs came into being. Even more to the point, in our experience, incompetence runs across every social boundary. It seems far too easy, and all too common, to blame affirmative action for incompetent women or incompetent people of color, and far too easy, and all too common, not even to think about incompetent white men and how they got where they are.

We ought to weed out people who fail to perform up to standards -- in schools and on jobs. We ought to weed them out whether they're white men, women, or people of color. It's often not a pleasant task, we realize. Yet if we take care to make our standards meaningful and our application of them even-handed, then we owe it to ourselves to act. The presence of incompetence, however -- more to the point, the presence of incompetent women and minorities -- hardly demonstrates that affirmative action programs aren't about merit, qualified people, and standards that matter. Incompetence of every color and gender is a fact of life not a fault of affirmative action.

Indeed, it's something of a social achievement that, for the first time in our history, we've had the opportunity over the last thirty years to see incompetents of all sorts -- women and not just men, people of color and not just whites -- in a wide range of jobs and schools. We're not used to thinking about incompetence in this way, and no doubt someone will distort what we've just said or quote us out of context. But affirmative action should get credit -- not condemnation -- for letting us see, more than ever before, that genius, competence, and incompetence can be found in every gender and every race. When people speak of the American Dream, surely that's what they, in part, must mean we'll eventually see.

2.15 Once More: What Exactly We're Defending

People may well have other concerns or objections to our position. But at least they should accurately describe the affirmative action programs we're defending (and they should insist others do the same). Here again is what those programs do: In an effort to make available opportunities for those groups still not much represented because of historical and contemporary discrimination, in an effort to draw upon diverse skills and sensibilities, affirmative action takes gender and race into account in deciding which otherwise qualified candidates deserve a chance at education, employment, or government work.

But let's be more explicit. Affirmative action programs should not impose -- and the programs we defend do not impose -- criteria that substitute a search for gender and race in place of a search for qualified candidates. Merit doesn't just matter as a part of affirmative action programs. Merit is and should be at the heart of every defensible outreach, educational, employment and contracting program. Because merit matters, it's wrong if an unqualified person gets a job, a scholarship, or a government contract over a qualified person. It's wrong if an unqualified white man gets a job over a qualified woman or minority. And it's every bit as wrong if an unqualified American Indian, Latino, African American, Asian Pacific American or woman gets a job, a scholarship, or a government contract over a qualified white man.

But it's not presumptively wrong, as Proposition 209 advocates insist, to award a qualified woman, Asian Pacific American, African American, American Indian, or Latino a job, a scholarship, or a government contract over other qualified candidates (perhaps white men, perhaps other women or people of color), even those with, say, more experience, or better standardized test scores. Merit rarely means -- and rarely should mean -- automatically concluding that the person with the highest test score or the most years experience is demonstrably the best candidate. No single test or predictor reveals everything (or often very much about what) we might want or need to know about a candidate, and even the best tests and predictors are imperfect. Institutions regularly find themselves, in applying even the most trustworthy predictors, making carefully considered but necessarily tentative distinctions between qualified candidates. Done well, that's not violating merit or thwarting merit. That's taking merit seriously -

- fully aware of its promise and limits.

2.2 HISTORICAL ROOTS OF AFFIRMATIVE ACTION

Our contemporary battles over affirmative action find their origins in the national community's struggle to deal honestly and productively with where we have been, are now, and should be headed. That should come as no surprise. Still, many of us never learned a great deal about America's past; and many of us forget what we once may have known. No succinct sketch can do justice to the vying forces, the complex disagreements, and the power of simple inertia. Yet our common need for rich historical lessons should not obscure the importance of reminding ourselves, if only briefly, how affirmative action fits within the nation's history.

By including almost any history we realize we risk losing parts of our audience. Some of you find accounts of our past a real "snooze." It puts you to sleep, interferes with getting at "the real issues." But if you're serious about trying to understand affirmative action -- whatever you decide to do in voting on Proposition 209 -- you simply must dig deeper than yesterday, or ten years ago, or even thirty years ago. How we've regarded one another -- in laws and in informal practices -- matters immensely to how we think about merit, how we think about race and gender, how we think about justice itself.

Others of you frown at having to see even one more account of how the United States, from its inception, treated women, American Indians, African Americans, Latinos, and Asian Pacific Americans. "That's all in the past," you might say. "Forget about it." You recoil, too, at the very use of words like "subordination," thinking perhaps the term is somehow exaggerated, polemical, even hysterical. "Things may have been bad and unfair," you might admit, "but c'mon, quit loading the dice."

But, sadly enough, what may sound exaggerated today has been all too real for much of the nation's existence. That alone doesn't make the case for affirmative action. But, at a minimum, we shouldn't be the sort of nation that allows itself to forget -- easily or at all -- profound wrongs, failings, and injuries. And, like it or not, we can't so easily escape or shed our history. Our past lives on in our institutions, in our viewpoints, and in our behavior. There's no "clean break" for any of us, much as we might wish or otherwise pretend. Those ideas currently competing for our allegiance -- about how we should think about one another, about what it means to "make it" in the United States, about how to deal with what unites and divides us -- inevitably trace their lineage to contrasting interpretations of the history we share.

2.21 Our Nation's Subordination of Women and Non-whites

For most of its history, our nation regarded women and people of color as inferiors and relegated them to subordinate castes. Formal laws and informal customs drastically limited and made a mockery of merit-based opportunity. The powers-that-be simply could not imagine acknowledging the talents, drive, and accomplishments of the very same people judged, in one way or another, as less than human or at least not the equal of white men. In every region of the country, in both the public and private sectors, the United States tolerated elitism, nepotism, cronyism, and out-and-out incompetence -- even sometimes instigated the ugliest forms of violence and degradation -- in order to avoid thinking at all seriously about the abilities of millions of women and minorities.

That's no overstatement -- even of recent history. Remember, for much of this century, laws in many states barred women from entering entire occupations -- mining, fire fighting, bartending, law, and medicine. A mere 30 years ago newspapers divided employment want-ads, men on one side, women on the other. You're right, the jobs were sometimes identical, but the wages and benefits sure weren't. Segregation, in one form or another, forced American Indians, African Americans and Latinos into low-wage, dead-end jobs. Laws prohibited Asian Americans from owning land and often forced them to work fields to which they could not hold title. A mere 30 years ago you could walk through most cities in the United States and never see a woman or a minority dressed in business clothes. And a mere 30 years ago you probably could count the number of business, executive, legislative, or judicial decisions ever made by women or African Americans, or Latinos, or Asian Americans or American Indians (at least off the reservations).

Worse still, there wasn't much opportunity for women and people of color to improve themselves -- to get themselves ready for higher education or for jobs requiring higher education. Universities, colleges, and professional schools often systematically excluded women, or channelled them into very few professions like teaching or nursing. Rigid barriers still precluded African Americans, American Indians, Asian Americans and Latinos from attending certain schools. And when laws did allow attendance, residential segregation, educational policies, and social practices typically limited minorities to the poorest-funded schools and to various "vocational" tracks, all far away from where their talents might well, with support, lead them. The last thing our nation cared to discover was

just how much merit women, African Americans, American Indians, Asian Americans and Latinos might bring to the economy, to education, and to political life.

Details only deepen the national embarrassment. Just pause to consider the briefest glimpse of certain groups whose lives Proposition 209 would drastically alter. American views of women betrayed the most insidious stereotypes -- defended by many as simply the "Divine Order of nature." Through the latter parts of the 19th century, women could not hold office, serve on juries, or bring suits in their own names. And married women could not own property or sign contracts or own the wages they might earn. They could not even serve as the legal guardians of their own children. Only with the passage of the Nineteenth Amendment in 1920, after decades of continuous campaigning, did women finally gain the right to vote. That victory did not lead, as many had hoped, immediately to women's full emancipation. As late as 1961, for example, the United States Supreme Court upheld a Florida law exempting women from jury duty and not until 1963, with the passage of the Equal Pay Act, did a piece of national legislation prohibit discrimination on the basis of sex.

If women have been put in a cage in the name of putting them on a pedestal, American Indians have been controlled, "civilized," and exterminated in the name of "what they deserve" and "what's best for them." The Founding Fathers, in the tradition of their European ancestors, saw in Indians twin images: savage beasts and tractable simpletons. Both images justified American willingness to systematically devastate what bound together Indian cultures -- their ability to work ingeniously with their environment, their methods of hunting and agriculture, their family and communal life. Employing technical military advantages and immoral treaty practices, the government and private parties together uprooted one Indian nation after another. Between 1853 and 1856 alone, American Indians lost 174 million acres of their land in a series of 52 treaties, all of which were subsequently broken by the federal government. Along the way, the United States cultivated racial and cultural taboos -- policies and beliefs about how everyone should think about Indians and other non-whites -- that served in ingenious ways to assign other people of color to familiar subordinate positions.

No group more conspicuously than African Americans experienced the full array of these racial and cultural taboos. Slavery -- practiced and condoned by the very same white men who declared that "all men are created equal" -- deprived Blacks of all legal rights, while the Constitution regarded them as only three-fifths of a person and property for others to own and sell. Even after emancipation, the Black Codes almost immediately replaced their cousins the Slave Codes and, in part through the complicity of the United States Supreme Court, the Civil War Amendments and the Reconstruction Acts proved nearly useless in securing promised protections. Throughout most of this century, Jim Crow laws assigned Blacks an entirely subservient and separate status, while outside the South, states denied Blacks the right to vote, prevented them from serving on juries, and excluded them from theatres, restaurants, hotels and inns. Whether in the form of Jim Crow laws or public and private traditions that permeated every part of the republic, the United States stamped Blacks as "beings of an inferior order," naturally deserving of and comfortable with their subordinated status.

Blacks and American Indians were scarcely the only non-white groups treated as biologically unsuitable for full membership in the national community. Recruited by American employers as cheap labor, Chinese laborers arrived in California and Hawaii in the mid-nineteenth century. Almost immediately they encountered profoundly bitter resentment. Their mere presence as workers in mines, on farms, and on railroads evoked deep racial biases of a sort already utterly familiar to Americans and completely consistent with the nation's patterns of subordination.

Castigated as a "Yellow" invasion of "coolie" labor, derided with unashamedly explicit racial epithets, they faced murderous violence, an anti-Chinese crusade, and finally the 1882 Chinese Exclusion Act (the first comprehensive federal immigration law, and the first law ever to institute a racial restriction on immigration).

To satisfy in part the need for cheap labor the Chinese immigrants had once provided, employers actively recruited workers from Japan. But Japanese immigrants immediately faced the very same racial forces that ultimately had excluded Chinese workers. Restrictionists effectively lobbied, in succession, for the Gentlemen's Agreement of 1907 (whereby Japan agreed to issue no more passports to workers wishing to come to the United States), the Asiatic Barred Zone of 1917 (excluding immigrants on racial grounds from India, Southeast Asia, and the Pacific Islands), and finally the Immigration Act of 1924 (barring all aliens "ineligible for citizenship" from coming to the United States). The code words "ineligible for citizenship" signalled, revealingly enough, what was happening to those Japanese (and other Asian Pacific) workers who remained in the United States: As non-whites, they could not become naturalized citizens, and they could not live next to, learn next to, testify against, much less marry whites. The formal degradation of Japanese, Chinese and other Asian Pacific Americans lasted well into the twentieth century. The United States granted naturalization rights to Asians only relatively recently: in 1943 for Chinese, in 1946 for Asian Indians and Filipinos, and in 1952 for all other Asians. And only in 1952 were Asians constitutionally permitted to own land in various states, including California. Even American citizenship hardly protected Japanese Americans from the most violent and shameful treatment. The December 7, 1941 bombing of

Pearl Harbor triggered the most vile of reactions, leading eventually to the internment of 110,000 persons of Japanese descent, over two-thirds of whom were American citizens. "A Jap's a Jap," insisted General DeWitt, head of the Western Defense Command. Meanwhile, the United States had little trouble distinguishing its German American and Italian American citizens from the German and Italian enemies. This contrast, of course, finds its origins less in the story of wartime hysteria and more in the two-hundred year-old racial caste system that saw Japanese Americans just as it had all non-whites over history: Genetically and culturally undeserving of equal citizenship.

The mestizos (the mixed-raced descendants of Indians, Europeans [mainly Spanish], and Africans) we today variously refer to as Chicanos, Mexican Americans, Mexicans or Mexicanos (or Latinos or Hispanics when speaking inclusively of all Latino groups in the United States) met with the same ugly fate as other non-whites in the United States. Indeed, they faced the entire arsenal of caste weapons our nation had developed in dominating racial groups it considered unworthy of equal respect -- from broken treaties, to forced removal, to formal segregation. The United States disregarded the Treaty of Guadalupe Hidalgo (signed in 1848 at the end of Mexican American War and stipulating that "property of every kind" belonging to Mexicans would be "inviolably respected" in the territory that was to become the southwestern United States). Twice it "removed" huge numbers of Mexican American citizens as well as Mexican immigrants to Mexico when it decided their presence as workers no longer suited our national purposes (during the depression's "repatriation program" violently uprooting hundreds of thousands and, during 1954's "Operation Wetback" indiscriminately and often brutally removing over one million "Mexican looking" people). Meanwhile, legal policies and social customs regularly subjected Chicano citizens and Mexican immigrants alike to everyday violence, segregated and inferior housing, segregated and inferior schools, segregated and inferior social services, segregated and most often dead-end job markets, and the all too-familiar taboos used to affirm the less-than-equal status of yet another non-white people.

2.22 What's American And What's Not

For all our talk of equality, our nation didn't simply tolerate subordination. We actively encouraged it. Time and again, we defined women and non-whites as simply outside any moral, legal, or political community that mattered. We did it through laws we enacted and through laws we ignored. We did it through cultural practices we acknowledged and through others we closeted. And when we defined people of color and women as undeserving of equal citizenship, we defended our ideas and our practices as genetically, culturally, even Divinely inspired. Most of all, we defended our ideas and practices as thoroughly consistent with the American ideal of equal citizenship. There were always those, thankfully, who disagreed with and challenged this way of thinking about equality. These dissenters have been men and women of all colors. They opposed depriving groups of their land and sovereignty. They opposed depriving groups of citizenship status. They objected to laws that authorized domination. And they objected to legal and social techniques that turned anti-subordination laws into laws that, in practice, acquiesced in domination. These dissenters chose to see people trapped in an inferior status, to call attention to the gap between this status and our apparent aspirations, and to reject as unacceptable any ideal of equal citizenship that could comfortably tolerate (much less embrace) such a paradox.

In response to the stands they took, dissenters typically found themselves portrayed as somehow "un-American." This label, to be sure, masked an element of embarrassment among those who used it as an accusation. Even proud defenders of the caste system didn't usually want to examine closely the everyday degradation they were imposing on women and non-whites. But the very ease with which defenders of our caste system used the label un-American to describe those who would disagree with them reveals a deeper and more resilient phenomenon. Those firmly within the grip of the paradoxical American ideal of equal citizenship really did regard what dissenters had to say as "making no sense." Treating actual status as relevant to the ideal of equality contradicted what they had come to understand "thinking like an American" meant.

Sure, the words we used to describe formally the American ideal of equal citizenship shifted over time -- largely as tortured responses to the claims of dissenters. "Equality extends only to equals" became "equality can mean 'separate but equal'" and then emerged as "equality applies to opportunity not results." But the underlying relationship between the quality of life for women and non-whites and the ideal of equal citizenship remained constant. No matter how degraded a life women and non-whites lived it was still compatible with the dominant idea of equality. From this vantage point, the nation's dominant forces "naturally" saw dissenters as making incoherent claims on the body politic: How else could they regard so fundamental a challenge to how communities went about their business? The modern civil rights movement revealed yet again this struggle to define what's American and what's not. Those who defended the inherited ideal of equal citizenship viewed those who insisted social reality mattered as mounting unpatriotic attacks. Defenders of the inherited tradition would have preferred we continue as a nation to live with the

status quo: "separate but equal" constitutional standards, inferior educational and social services for non-whites, unequal pay for women doing work equal to men's, and severely limited economic and political opportunities for both women and non-whites. They regarded these everyday inequalities -- this caste system of subordination -- as harmonious with the American ideal of equal citizenship. Indeed, they regarded these inequalities as so thoroughly compatible with our nation's traditions that we shouldn't even bother to take account of them in defining equality. The early victories of the movement -- Brown v. Board of Education, the Civil Rights Acts of 1964, the Voting Rights Act of 1965, to name only the most obvious examples -- marked notable triumphs of "un-American" dissent over the dominant tradition of "equal citizenship." Social reality mattered. How job markets and schools, for example, actually treated women and non-whites was to be regarded as relevant in the formulation of an equality worth defending. With these realities in mind, newly enacted laws introduced new standards and prohibitions -- those the courts interpreted and those the legislatures created. What was formerly un-American began to rival, perhaps even more than immediately following the Civil War, the grand tradition of equality.

2.23 The Initiation of Affirmative Action Programs

From nearly every political angle, it was obvious that the early judicial and legislative triumphs of the civil rights movement could not alone change private and public institutions. Discriminatory practices and attitudes were too deeply ingrained, too much a part of our institutions and our individual souls. In fact, the more people across the country began openly to disavow the formal inequality of legal status the more the civil rights movement feared inherited ways of thinking and acting soon might reassert themselves. After all, history had proven repeatedly how well newly announced standards of formal equality and newly announced prohibitions against discrimination seemed most of all freshly to immunize the old caste system from scrutiny and change. If we valued merit-based opportunities -- for outreach, recruitment, training, education, jobs and promotions -- we needed to create and put to use other tools that might complement the formal prohibition of discrimination.

Recognizing the need to attack the culture of subordination at its roots, leaders turned to affirmative action programs as one important way to create opportunity, to include the excluded, and to move toward merit-based social and economic life. Contrary to many popular accounts, affirmative action was, from the start, both the product of bipartisan ambitions and the source of deep disagreement. President Kennedy first used the term affirmative action in 1961 in establishing, through executive order 10925, the President's Commission on Equal Employment Opportunity and in requiring those who contract with the federal government "to take affirmative action to ensure that applicants are employed without regard to race, creed, color, or national origin." The term did not yet explicitly embrace, however, the gender- and race-conscious efforts we now associate with such programs.

That was soon to change. To give effect to Title VII of the 1964 Civil Rights Act (which prohibited an employer from discriminating on the basis of race, color, religion, sex or national origin), President Johnson issued Executive Order 11246. The Order required federal contractors to "take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color or national origin." (In 1967 he added gender to the list of categories.) Insisting that affirmative action programs served to achieve "not just equality as a right and a theory but equality as a fact and equality as a result," he bluntly emphasized the need to see social reality as a means of measuring whether opportunity was real rather than simply in name only.

Still, it was President Nixon who transformed affirmative action into a gender- and race-conscious national priority. Following findings of widespread discrimination in the powerful and lucrative Philadelphia construction industry, Nixon developed the common sense idea of using goals and timetables to measure hiring and promotion progress. In his so-called Philadelphia Plan, and later through more generalized plans developed by his Departments of Labor and Justice (with the help of his Secretary of Labor George Schultz and his Attorney General John Mitchell), he stressed the unacceptability of mindless quotas. But goals and timetables, he insisted, were an entirely different and "proper means to implement the nation's commitment to equal employment opportunity."

Ever the crafty politician, President Nixon apparently thought the Philadelphia Plan might serve more than a single purpose. Evidence suggests he may well have hoped to drive a wedge between organized labor (who opposed the imposition of goals and timetables) and civil rights groups (who, in part, favored Nixon's plan). At the same time, Nixon worried about employment opportunities in the nation's urban areas. He appreciated how much contemporary discriminatory hiring practices, like those of the Philadelphia construction industry, were at the core of much joblessness. If his aspirations were perhaps typically conflicted, Nixon nevertheless acted decisively. With his eyes wide open to social reality, he aimed to shake up those industries where our historical caste system undermined both equal opportunity and the integrity of any future merit system worth defending.

The history of affirmative action programs in our own state can be traced to similarly bipartisan roots. National laws dating back to the Nixon and Kennedy Administrations applied with equal force to California. And some branches

of the state's public and private sectors -- state agencies, local governments, large corporations, and small businesses -- began adopting their own individual programs. But efforts were more or less piecemeal until February 1, 1974 when then Governor Reagan formalized California's own statewide affirmative action program. He gave the State Personnel Board responsibility for evaluating progress towards the overall objective of achieving "a state work force with each ethnic group and women represented by occupation, responsibility and salary level in proportion to its representation in the labor market."

Gender- and race-conscious affirmative action programs challenged a two-centuries-old culture of subordination. For the first time in our nation's history, government programs took gender and race systematically into account in order to uproot a caste system. By contrast, our nation's experience with gender- and race-consciousness had been almost entirely limited to those governmental policies and social taboos that subordinated women and non-whites in the name of gender- and race-blind equality. Rather than pretend race and gender were something other than central to historical and contemporary practices, we were promoting constructive ways to deal with our beliefs and behavior.

What both supporters and opponents of affirmative action programs did understand was that, together with other tools of the modern civil rights movement, affirmative action programs might well generate unfamiliar pressures between races and genders. Tensions between races and between genders, of course, always had been profound, pervasive, and explosive. These tensions, however, reflected familiar territory: The strain between more or less permanently dominant groups and more or less permanently subordinate groups. By contrast, affirmative action programs promised the upheaval that most likely accompanies trying to uproot a caste system in a society accustomed to transformation in name only.

No one could answer in advance those questions we knew we would encounter. What would happen when we began to face how we think about and behave toward one another? What would happen when we began to scrutinize exactly how we make our judgments about one another's value and promise? What would happen when we began to acknowledge relative disparities in resources, support, connections, and opportunities? What would happen when we began painstakingly to struggle with our history and, perhaps more threateningly, with how much today's world parallels our past? What would happen when we all were made to face what we prefer to deny about our national community and ourselves?

The responses to these questions, we now know, entail nearly every imaginable possibility and emotion. We have begun to uproot the nation's culture of subordination, and, not unpredictably, the experience has left us in disarray. Some believe affirmative action programs have done too much and too fast; others believe the same programs have done too little and too slowly; others still believe affirmative action programs have done too much and too little and too fast and too slowly. Whether or not such disagreements are justified, together they do reveal what most proponents and opponents of affirmative action thoroughly appreciated some thirty years ago: Real change in this country is anything but easy.

Tumultuous as change can sometimes feel, emotional as arguments can sometimes get, we should never let the debate stray too far from its origins. Affirmative action programs came into being only relatively recently and only in direct response to our nation's peculiar history. Together with other civil rights tools, they offered, at once, a central path away from our past and a pivotal route to a quite different future, one where, for the first time, merit-based opportunity might finally be taken seriously, for everyone, including women and non-whites. That very promise (appreciated at least as much by opponents as by supporters) explains why debate about affirmative action remains both ferocious and unforgetting. Everyone realizes a great deal is at stake. We're deciding, yet again, what American equality means.

2.3 GOALS OF AFFIRMATIVE ACTION

Affirmative action traces its moral roots to several related goals: (1) fighting discrimination, (2) compensating for past injuries, (3) striving for a fair distribution of opportunities and responsibilities, (4) seeking social well-being, and (5) promoting diversity. There's no magic in dividing up the goals in this way. We might just as coherently lump them all together ("to promote equal opportunity") or divide them up differently ("a corrective for past injustice, a prophylactic against future discrimination, and a way to promote inclusion").

Still, there's an important payoff to our scheme. The particular categories we use will help us carefully identify separable goals in government programs and evaluate the fit between those goals and the means chosen to achieve them. This process will, in turn, help us assess arguments attacking or defending affirmative action programs that we might otherwise treat too imprecisely. (See Appendix F.) For example, whether or not we should encourage or condemn the admissions of disproportionately middle-class students of color through a medical school affirmative action program turns, more than most realize, on the particular goals the program is designed to serve. In the midst

of often heated and exaggerated Proposition 209 rhetoric, and in the face of demanding legal standards, it's no small matter lucidly to identify goals and means and carefully to assess whether a program's criteria fit its justifications.

2.31 Fighting Discrimination

In endorsing affirmative action, most legislators and policy makers originally stressed its role in fighting discrimination. Anti-discrimination laws, for all their importance, were simply not enough. Our own history taught us as much. Instead of acquiescing in yet another set of under-enforced laws, those who hoped to root out the American caste system introduced gender- and race-conscious programs designed to change the very way we practiced equality of opportunity. As a complement to anti-discrimination laws, affirmative action delivered the message that we needed to scrutinize how we thought about one another, how we conceived of merit, and how we behaved in our daily lives.

Other goals have ascended in importance over the course of the last thirty years -- particularly seeking social well-being and promoting diversity. And, more today than thirty years ago, people profoundly disagree about the prevalence of discrimination against women and people of color. Still, most people agree that affirmative action continues to play a central role in fighting discrimination, even when they object to such programs on other grounds. Only extremists pretend we don't need anti-discrimination laws, and only those with little knowledge of how laws work insist that legal prohibitions satisfactorily root out the discrimination that persists. Affirmative action programs can't and shouldn't be expected to do everything we need to change our culture. But if we're simply evaluating our collective capacity to fight discrimination, affirmative action programs remain as important today as they were thirty years ago.

2.32 Compensating For Past Injuries

Bipartisan supporters of affirmative action always justified their position, in part, by insisting that women and non-whites had been reduced to their present condition by a history of injustice. Injustice created moral obligations for the national community, they insisted, and affirmative action offered one way of meeting those responsibilities. Compensating for past injuries seemed to many perhaps the strongest intuitive reason for backing affirmative action programs. Indeed, if you focused not so much on the independent significance of past events but on their cumulative effect, the case for compensation seemed the stuff of righteous indignation.

Yet various classical objections undermined, over time, how much formal reliance governments would ultimately place on compensation as a goal of affirmative action programs. Some people question the very existence of past injustice. Considerably larger numbers insist we cannot ignore the passage of time. Wouldn't it be a windfall to compensate the children, grandchildren, and great grandchildren of those who suffered most? And wouldn't it be unfair to have the children and grandchildren and great grandchildren of those who imposed the harm bear the burden today, particularly when it's not obvious how exactly to assess the damage and fix the compensation? Others object to the group nature of compensation, insisting that equality in United States is an individual right. Still, compensating for past injuries seems to retain considerable attraction as a justification for affirmative action. People intuitively understand how past events can continue to limit today's opportunities. Non-whites and women, for example, plainly inherited less economic, social and cultural capital (material wealth, social contacts, "insider knowledge") and continue to confront ugly stereotypes that find their origin in the not-so-distant past. And people for whom compensation for past injustice makes sense wonder whether classical objections haven't been overstated. To argue against race-conscious affirmative action, for example, is not to support individual merit as against a group claim but to argue that some other group (defined by some other attributes like high test scores) is entitled to preference. After all, deciding that only students with the highest SATs should be admitted to a college is still making a group claim -- presuming that members of a group (those with highest test scores) are either the most deserving or the most likely to succeed in the classroom. Still, for all its continuing appeal, compensation for past injuries seems more today an often unarticulated moral intuition than an explicit goal of many voluntary affirmative action programs.

2.33 Striving For Fair Distribution

Some early proponents of affirmative action cared, and cared deeply, about the need to more fairly distribute society's opportunities and responsibilities. While not so frequently trumpeted as other justifications, the attraction of this goal remains basic: Where resources are limited, they should be distributed in a just manner. There needn't be any identifiable injury perpetrated by a particular wrongdoer to serve as a basis for distributive justice; we may think

it's wrong if any group perpetually controls limited opportunities, but we don't have to come to that conclusion to support more equitable distribution. We simply have to think a fair distribution of opportunities and benefits makes sense on its own terms.

In today's world, not many emphasize distribution as a goal of affirmative action, perhaps because "redistribution" is so out of favor in today's politics. Still, the aim of distribution is hardly irrelevant. When public school districts, for example, create a special elementary school (with innovative curricula, exceptional teachers, and considerable resources), not everyone's child can attend. Admission can take the form of a blind lottery or a search for particular test scores (low or high). But we might well decide -- particularly because the quality of a child's early education so profoundly affects her later-life opportunities -- that enrollment should reflect the racial and gender heterogeneity of the community. These distribution concerns may well end up packaged as "social well-being" or "diversity" goals. Whatever the form, striving for a fair distribution of opportunities and benefits remains a central moral element in affirmative action programs.

2.34 Seeking Social Well-Being

Affirmative action has always aimed at improving the general health of the national community. A great nation, proponents argued, simply should not tolerate great inequalities -- of income, of wealth, of opportunities. And affirmative action programs, whatever other ends they further, might simultaneously serve as a means of bringing those at the bottom and on the margins into the American mainstream. On the more apprehensive side, enhanced opportunities might help insure that historically subordinated groups might not rebel against a nation unwilling to change its ways peacefully. On the more confident side, enhanced opportunities would permit the nation for the first time to take greater advantage of its entire pool of talent.

If anything, the goal of social well-being has risen in importance in the past thirty years. People realize affirmative action is hardly the only way -- or often not even the best way -- to fight poverty or urban despair. Still, affirmative action programs are part of any sane commitment to a stable future. The 1992 Los Angeles riots, for all their complexity, certainly revealed the fury of marginalized groups. At the same time, affirmative action programs are seen as improving American competitiveness. What sense does it make, particularly with the globalization of markets and services, to waste the potential of nearly 2/3 of the national community? By expanding the pool of candidates who will become tomorrow's teachers, scientists, and management executives, we improve the quality of our products, our services, and our leadership.

2.35 Promoting Diversity

Even if there were no historical subordination or contemporary discrimination to remedy, affirmative action has always aimed simply to include women and people of color in the opportunities and responsibilities of equal citizenship. Thirty years ago, we unashamedly described ourselves as trying to "integrate" American life. More recently, we began using the term "diversity" to signify those various reasons gender- and race-conscious inclusion benefits individuals, institutions, and communities. For all the political baggage the term now carries, diversity as a goal captures certain critical assumptions and aspirations central to a more fully equal national community.

A person's gender and race often affect both life experiences and interpretations of those experiences. That's why a diverse group is more likely to exhibit a significant mix of fundamental assumptions, perspectives and prejudices than a homogenous one. That's not the same as saying that all people who look alike, think alike, much less that there's such a thing as a "woman's perspective" or a "Black perspective." A commitment to diversity does not presume that white men from Kennebunkport, Maine and Biloxi, Mississippi and DuBois, Wyoming share identical beliefs, values and life experiences -- any more than it presumes that a Guatemalteca from South Central Los Angeles and a Chicana from El Paso and a Puertorriqueña from Chicago and a Cubana from New York are all just fungible Latinas.

Diversity means variety, not homogeneity. It values differences within groups as much as it does differences between groups. A commitment to diversity allows us all to encounter people we have never known before -- not just distinctive ideas but flesh and blood human beings who can introduce their own views and defend them passionately. The encounters are not always warm and snugly, and they can sometimes send us all reeling. But a commitment to diversity recognizes that few things worth having ever come our way without taking risks and confronting difficulties with honesty and patience. Along the way, we learn about ourselves and one another, about how the combination of diverse energies often produces more than the sum of individual parts, and about how communities and institutions might integrate in more than name only.

2.36 Emphasizing Different Goals

Thirty years ago, fighting discrimination and compensating for past injuries topped the list of reasons for adopting and defending affirmative action programs. Most people acknowledged the impact on women and people of color of centuries of subordination and they more freely admitted to living in a world where discrimination was the norm rather than the exception. Other goals, particularly fair distribution and seeking social well-being, served inevitably to bolster in the minds of many (Richard Nixon principally among them) why we would adopt gender- and race-conscious merit-based programs. But remedial justifications overshadowed any desire to foster inclusion. As early as the mid-1970s, however, promoting diversity (and within it fair distribution and social well-being concerns) became increasingly the goal of choice. The explanations for this shift are many. Remedial goals focused too much, some insisted, on blame -- correspondingly insisting on benefitting victims (and only victims) and exacting burdens on sinners (and sinners only). Diversity, by contrast, focused on the aspects of inclusion so central to a healthy community. Using gender and racial distinctions to increase diversity did not stigmatize any class or group; it simply sought to root out the culture of subordination we had inherited and, however less than consciously, continued to practice.

But the backlash against affirmative action, evident in national politics since roughly the 1980 elections, now questions every purpose for gender- and race-conscious programs. Even as the goal of diversity has gained wider and deeper allegiance among many public and private sector leaders, it simultaneously means "quotas" and "departures from pure meritocracy" for others. And while compensating and warding off societal wrongdoing continues to stir passions, remedial goals are increasingly limited to circumstances where specific wrongful acts and individual victims can be identified. We believe each of these goals independently provides a basis for coherently defending affirmative action. And we believe, in combination, remediation and inclusion goals serve today as powerful justification for many programs now in operation. Still, whether any goal -- or any combination of goals -- justify gender- and race-conscious efforts to change a culture of subordination is precisely what voters in California have been asked to decide.

2.37 Implementing Goals In Real Life

In designing today's affirmative action programs, governments aim, at their best, carefully to justify their actions and tailor their designs to meet their goals. But they're among the first to acknowledge that they're still in the early stages of learning how to design superior merit systems. Only in the last thirty years, pressured by legal and cultural forces, have they even begun seriously to explore what it means to create morally and practically defensible merit-based systems -- systems that value women and people of color as much as white men. In this sense, the selection criteria in all merit systems are simply phases -- in many instances, quite rudimentary phases -- in an evolutionary process aimed at helping us better understand both what we want and how we might achieve it.

In designing gender- and race-conscious merit-based programs, governments almost inevitably accept a certain amount of ambiguity -- including whether a program serves one affirmative action goal or more. In some instances, this may simply be inevitable. Promoting diversity, for example, often ends up more fairly distributing opportunities and enhancing efforts to improve social welfare. But sometimes decision-makers combine goals that could well be kept as practically separate as they are theoretically distinct. Programs often aim, at once, to compensate for past injuries, fight current discrimination, and diversify those who can take advantage of the opportunities made available.

Nothing is inherently wrong with combining goals. It often will be justified, and it may even describe the norm in today's world. But there can be costs and risks. To the degree the mixture is less than deliberate, it may well undermine the capacity carefully to tailor criteria to match a program's purposes. Even when it is planned, programs that serve more than a single goal often yield results that on the surface may seem suspect. Sorting through the questions is anything but an impossible task. By determining what goals a medical school affirmative action program is supposed to serve, we can judge whether or not the admissions of disproportionately middle-class students of color makes moral, legal, and practical sense. But it does require, particularly in a world of exaggerated claims, taking the time to identify carefully justifications, means, and outcomes. In this sense, all of us who debate the wisdom of affirmative action share a task with the governments that we've charged with carrying forward our efforts to open up the world of opportunities.

2.4 TYPES OF AFFIRMATIVE ACTION

Affirmative action programs, whatever particular goals they serve, come in many different forms. They make

available opportunities in education, employment, and contracting. They make available opportunities early as well as later in a person's life. And they make available opportunities through everything from outreach to retention to promotion. We're not going to try to describe every sort of program (though you should review the list we've included in Appendix H). But we do want to highlight how programs are designed to intervene earlier and not just later in a person's life (childhood and adolescence) and earlier and not just later in the educational or employment process (outreach and recruitment). Much as we endorse early intervention, we doubt the clarity of the distinction drawn between much favored early intervention and much maligned later intervention.

2.41 Early as Well As Later Intervention

With debate often focusing exclusively on higher education and employment, we can easily overlook how affirmative action works elsewhere. Most importantly perhaps, we may fail to appreciate how today's gender- and race-conscious programs sensibly target every stage of development. From neo-natal care to academic support, modern affirmative action aims to address -- closer to their source -- the competitive disadvantages many women and non-whites subsequently face in university settings and labor markets. This evolving emphasis on early as well as later stages of life is no accident. Important as affirmative action is in university and job settings, it's often too little and too late. By the time someone's applying to a graduate school of engineering or by the time someone hopes to secure a job as a chief policy analyst for the state legislature, his personal resources (education, skills, contacts) may already be so severely constrained that they simply can't measure up. In fact, sadly enough, they often can't catch up either, no matter how talented, no matter how hard-working.

To attack disadvantages closer to their origins, government programs target the lives of women and people of color from their earliest stages. Aware of the connection between neo-natal care and later development, California's BabyCal program, for example, targets 'high risk' Black and Latina mothers, providing basic information and training. Other state programs offer Latino and Pilipino elementary school children academic support programs. To combat stereotypical notions about gender and achievement, some school districts offer specialized Girl's Math programs to junior high and high school students. And, to encourage interest in fields where historically few non-whites have worked, some enhancement programs target junior high and high school Blacks for programs in engineering and science.

Just as the government has targeted earlier as well as later stages in the lives of women and people of color, so too has it aimed its programs earlier as well as later in the process of admissions and hiring. "Expanding the pool" is the shorthand phrase for every form of outreach. Sometimes it means special recruitment trips by admissions officers to Asian Pacific, African American, and Latino neighborhoods. At other times, it means posting job advertisements in foreign language newspapers, in ethnic community centers, and in Black churches. Still at other times, it means actively soliciting the applications of women and people of color who might not otherwise consider the admission or job slot open to them.

2.42 The Preparation/Competition Line

Virtually everyone praises outreach programs and early interventions -- though these programs will be eliminated by Proposition 209 as surely as later intervention programs. Using by now familiar terms, some explain this support as entirely consistent with basic opposition to affirmative action. Early intervention, they insist, means education. Later intervention, by contrast, edges closer to guaranteeing results. In this formulation, education corresponds with the "American" ideal of opportunity, while stressing results smacks of non-merit based quotas.

There's something to this education/results dichotomy. But we think it misses the mark in capturing the underlying intuition that explains why early intervention is so much preferred to later intervention, even by some proponents of Proposition 209. Early intervention, they think, denotes preparation, while later intervention corresponds with interfering with competition. In this way of seeing things, outreach and even special early education can be defended by opponents of affirmative action as legitimately helping subordinated groups ready themselves for the world of competition. Meanwhile, affirmative action programs that target government contracts and jobs, for example, interfere with and violate the very spirit of American competition -- head-to-head, merit-based, and uncompromised (most of all by gender- and race-conscious concerns). The same distinction explains strong support for targeted outreach, even by those who otherwise find affirmative action programs repulsive.

But the line drawn between preparation and competition in these different contexts is more easily stated than deeply justified. Even if you believe favorably weighting a Black contractor's bid for the award of a government contract "interferes" with competition, why isn't the practice equally a matter of preparing the contractor for these and other responsibilities? A job can be an educator -- offering the chance to perform well and to learn what and whom you

need to know to advance to more demanding jobs. That's true, of course, not just of the award of a government contract but the offer of every sort of employment. Work provides the opportunity to learn, to prove oneself, to rise from one condition to a better one, and to bring one's family along with you.

This is anything but a clever analytical point. There's evidence in real life that even those who espouse the distinction between preparation and competition no longer much abide by it, at least not where their own interests are concerned. Not too long ago, education at every level was treated -- particularly by contrast to government contracts and jobs -- as obviously preparation and hence an appropriate target for affirmative action. But, particularly in California, more and more people now insist higher education should be treated more as competition than preparation. Even more tellingly, they now make the very same claim about special high schools, special middle schools, and even special elementary schools.

There's no end to the logic, of course. And that's our point. Every opportunity -- including being the target of special early intervention or special outreach -- can be understood as both a source of preparation and an object of competition. For several decades, a "common sense" line seems to have been drawn between earlier and later interventions. But the distinction was, at best, always overdrawn. And today, like it or not, the contrast seems obviously to be fading, particularly as we begin to treat life more and more like a scramble to gain every advantage possible, need it or not.

We understand the impulse to acquiesce in this dichotomy. Particularly for supporters of affirmative action, the still much presumed distinction between preparation and competition offers the hope of rescuing certain gender- and race-conscious early intervention programs in the event Proposition 209 passes. Perhaps ultimately careful analyses will reveal important matters of degree. But the bold contrast now drawn doesn't hold up in the way everyone supposes. And the real world hustle will increasingly expose this breakdown. We're better off dealing directly today with the mixed nature of every opportunity -- in education and on jobs.

2.5 LEGAL SCRUTINY OF AFFIRMATIVE ACTION PROGRAMS

Some would have us believe our current scrutiny of affirmative action programs is somehow lax, lenient, and inadequate. Proposition 209 fills a much needed void, they insist, offering protection against those affirmative action programs that go "too far." But those who push this view either don't know the law or mislead voters about what law requires. Federal constitutional law, substantially similar provisions in the California constitution, and federal statutory law all carefully regulate gender- and race-conscious measures.

Legal scrutiny of affirmative action programs is anything but forgiving. Indeed, at least with regard to race, it has been described by many as excessively strict, requiring proof not just difficult but impossible to marshal, even in the situations most glaringly in need of affirmative action. In any event, a basic understanding of the federal law that applies to all state and local governmental affirmative action programs illuminates just how difficult it is to create gender- and race-conscious programs that pass legal muster.

2.51 Federal Constitutional Protections: Race

Whether adopted voluntarily or imposed by court order or court-approved consent decree, race-conscious government affirmative action programs are legal only if, under the so-called "strict scrutiny" test, the interest is "compelling" and the program "narrowly tailored" to serve that interest. *Adarand Constructors, Inc. v Peña*, 63 U.S. L.W. 4523 (June 12, 1995). The purpose of this requirement is to ensure that governments adopt race-based measures only after careful deliberation, and only when truly necessary because alternative, less race-conscious measures are unavailable or would likely be ineffective.

There are three notably important issues still unresolved by *Adarand*:

While the Supreme Court has not ruled on outreach and recruitment programs, some courts have decided and many scholars believe this standard should not apply to most outreach and recruitment campaigns -- unless such efforts work to create "minority-only" pools of applicants. See *Memo of Assistant Attorney General, Walter Dellinger, and Coral Constr. Co. v. King County*, 941 F. 2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

The Court has not resolved whether a governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action before it takes such action or whether it's sufficient (as a number of circuit courts have decided after *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)) that the government had some evidence of discrimination when instituting an affirmative action measure and then later relies on post-enactment evidence.

The Court has not addressed the constitutionality of programs aimed at advancing non-remedial objectives -- such as promoting diversity or inclusion. It's clear, even under Justice Powell's controlling opinion in *Regents of the*

University of California v Bakke, 438 U.S. 265 (1978), the government must seek some further objective beyond the achievement of diversity itself. But it remains open whether and in what settings diversity is a permissible goal of affirmative action beyond the higher education context.

2.52 Federal Constitutional Protections: Gender

Adarand did not address the appropriate standard of review for affirmative action programs that use gender classifications as a basis for decision making. The Supreme Court has never resolved this matter. Both before and after Croson, however, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action programs that rely on gender in making classifications. See, e.g., Coral Constr. Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). Only the Sixth Circuit has equated race and gender classifications (see Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989; see also Brunet v. City of Columbus, 1 F.3d 404 (6th Cir. 1993), cert. denied, 114 S.Ct. 1190 (1994)).

The state of federal constitutional law, some say, creates an anomaly. Affirmative action, in their minds, is more easily justified for minorities than women. But Adarand requires strict scrutiny of racial classifications (benefitting or harming people of color), though actions benefitting women need only satisfy the less rigorous intermediate standard. To dissolve this anomaly, either Adarand would have to be overruled or the Court will have to extend strict scrutiny to all gender classifications. Willing to trade off more rigorous scrutiny of all gender-conscious affirmative action programs for more rigorous scrutiny of actions alleged to disadvantage women, the Department of Justice recently argued for strict scrutiny of all gender-based classifications in the Virginia Military Institute sex discrimination case. But the Court's final decision left the issue unresolved.

2.53 Federal Civil Rights Statutes: Title VI and Title VII

In addition to the constitution, the 1964 Civil Rights Act offers protection for people claiming "reverse discrimination" on the basis of gender and race. If the reverse discrimination claim challenges an affirmative action program instituted by a recipient of Title VI funds (which prohibits discrimination by recipients of federal grants), it will be scrutinized by the same strict standards guaranteed by federal constitutional law. If the reverse discrimination claim challenges an affirmative action program instituted by an employer covered by Title VII (which forbids discrimination in the work place), the program must have a "permissible basis" (remedy a clear and convincing history of past discrimination, correct a "manifest imbalance" in a traditionally segregated job category, or perhaps promote diversity) and must not "unnecessarily trammel" the interests of non-beneficiaries (a test that amounts to the "narrow tailoring" analysis of federal constitutional law).

The point is the law applies painstaking scrutiny to both race and gender considerations in affirmative action programs. In fact, the law's heightened scrutiny of race (a scrutiny sometimes described as "fatal in fact if not in theory") is the most exacting legal standard this country applies. Proponents of Proposition 209 would have us believe that we need to bar -- constitutionally bar, permanently bar -- even a program narrowly tailored to a genuine compelling interest, one that would move us toward a more just society. That's extreme, by any measure.

3.0

ATTACKS AGAINST

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ARGUMENTS SUPPORTING AFFIRMATIVE ACTION

Despite its bipartisan origins, its overlapping goals, and the significant progress it would seem to have fostered, affirmative action has elicited increasingly feverish attacks. Opposition comes in all forms -- from chatty op-ed pieces to formal legal challenges to well-financed lobbying campaigns. The two most successful campaigns in California, both led by Governor Wilson, resulted in the University of California's Board of Regents' resolution to ban affirmative action programs on all its campuses and the successful signature drive to put Proposition 209 on the November ballot.

In support of these efforts an almost bewildering assortment of arguments now make the rounds. People tell us they find it difficult sorting through, much less evaluating, all they hear and read. They sense that arguments are

sometimes dogmatically exaggerated and even pretextual. But their confusion runs deeper: Do people oppose affirmative action, they ask, because it has been successful, because it hasn't, or because it has and it hasn't? Supporters of affirmative action only sometimes engage these questions, often focusing more on generating their own competing sound-bites.

We've tried to bring some basic coherence to the debate. We identify the basic attacks on affirmative action, the claims that together inform these attacks, and the evidence that support these claims. At the same time, we marshal the arguments in support of affirmative action that correspond to each attack. In the course of this discussion, we distinguish strong from weak arguments, identify costs and trade-offs, and underline competing visions of a better world. Along the way we hope to provide you with the means for sorting through not just other people's arguments but your own intuitions and experiences.

If you had the time carefully to study the many miscellaneous attacks made against affirmative action, you would discover they fall into something like the following categories:

- (1) Affirmative Action Violates The American Ideal Of Merit-Based, Color-Blind Opportunity;
- (2) Apart From Any Other Objection, It Hasn't Worked;
- (3) Whether Or Not It's Worked, It Costs Too Much;
- (4) In Any Event, We No Longer Need It;
- (5) What We Need Instead Is Class-Based Affirmative Action

And if you worked carefully through the particular contentions clustered within each category, you perhaps would find as we have that many miss the mark, sometimes carelessly, sometimes quite deliberately. You would also discover, we believe, that other contentions focus attention on what divides us in our appraisal of affirmative action. In this section, we deal directly with all these contentions, putting into issue the legitimacy, the effectiveness, and the price of affirmative action. Most of all, we deal directly with how contrasting views of affirmative action parallel contrasting interpretations of where we've been, where we are now, and where we should be headed.

3.1 AFFIRMATIVE ACTION VIOLATES THE AMERICAN IDEAL OF MERIT-BASED, COLOR-BLIND OPPORTUNITY

Few ideals are so central to this nation's identity as the belief that opportunity should be merit-based and color-blind. From our founding, this ideal has been said to distinguish us from other societies where life, liberty, and happiness depended upon heredity, caste, and privilege. That's why attacks on affirmative action sounding merit-based and color-blind themes roll off the tongue so easily and sound so natural to the ear. "Judge people by the content of their character," "race and gender shouldn't matter," and "it should be illegal to grant any preference" are distinctively American declarations. They play to our perceived tradition and pack real emotional wallop.

But our devotion to merit and our aversion to gender- and race-consciousness together mask a more complicated reality. Familiar as it may be, merit-based, color-blind opportunity has no single or fixed definition. In fact, we fight over its meaning all the time. We need to understand exactly what merit-based and color-blind can mean in order to evaluate whether or not affirmative action sabotages these quintessentially American aspirations.

3.11 What Does Merit-Based Opportunity Mean?

For most of our history, "merit-based opportunity" did not mean treating women and people of color as equals -- as deserving a chance to succeed or fail. With the introduction of affirmative action thirty years ago, we aimed to integrate our institutions and rescue the ideal of merit from further disgrace. Together these remain central to our understanding of this American creed.

3.111 The Pre-Affirmative Action Days

Merit can be understood as the ability to contribute to valid institutional goals. To distribute jobs and educational opportunities according to a pure merit-based ideal means to award them to candidates who can reasonably be expected to perform competently, or well, or best. If we abide by this standard, we reward people for what they can do, we maximize social welfare, and we promote and reinforce both autonomy and personal responsibility.

In real life, however, there's no such thing as "pure merit" in selecting or hiring people. Measures of merit used to predict performance -- criteria for admission to schools, for hiring, or for awarding contracts -- are imperfect. No test or set of tests is a completely accurate or unbiased predictor, and the better tests may be too expensive to use.

Moreover, the process of selecting students, employees, or contractors is rarely an analytically precise choice based on reliably measured attributes. In different settings, we look variously for "qualified" or "very qualified" or even

the "best qualified candidates," knowing inevitably we are basing our decision in part on convenience, familiarity, and intuition. We don't have perfect confidence in our ability to measure merit or in the criteria we're currently using to evaluate it.

Making choices in this way is, in many regards, natural and understandable. Think for a moment about how we develop merit-based systems -- about how we decide what it means to do something adeptly and what mechanisms might reveal these abilities. There isn't some encyclopedia of merit where we can just look up a task and find a description of what constitutes a competent performance and what predictors qualify a candidate to do a task well. Instead, we decide what it means to do something skillfully based largely on our memories of seeing the work done well in the past. And we devise predictors based on attributes shared by people who have consistently performed well. Over time, we redefine our notions of both competence and excellence, largely based on the infusion of new people and the surfacing of different qualities or combinations of qualities. If merit has always been a fuzziest and more hit-and-miss operation than American mythology acknowledges, it still can reflect, at least at its best, a healthy form of trial and error.

For most of this country's history however, our merit-based systems have not operated either at their best or even in healthy ways. Until relatively recently, most systems never seriously considered either women or people of color for most positions. Indeed, most systems relied on "connections" more than anything else. Employers hired from the same limited pools of applicants, universities admitted students from the same limited clusters of schools and families, governments chose from the same limited groups of contractors. In this sense, the standards and their application may well have been unjust not just to women and non-whites but to those white men "out of the loop." Meanwhile, most employers and universities learned precious little about how to think about or implement defensible merit-based systems. For all the homage we paid to merit-based opportunity, we remained fairly primitive in our understanding of how to think about and predict quality work.

Partly in response to the practices of patronage, cronyism, and nepotism that masqueraded as merit-based systems, progressive reforms in this century introduced standardized exams into employment and educational settings. Almost no one insisted the tests, for all the fanfare they received, either perfectly predicted a person's performance or necessarily improved the overall performance of the organization. Instead, virtually everyone understood the advent of standardized exams as a reaction to cultural rot -- in part the ineluctable logic of a caste system and in part the abuse of individual discretion -- and, hopefully, a positive step in the evolution of justifiable selection criteria. Even this ostensibly progressive reform yielded at best ambivalent results. If employment and admissions choices included for the first time a somewhat more diverse pool of talent, the exams employers and universities often chose to employ still suspiciously excluded large numbers of women and people of color. On closer examination, the tests big companies came quickly and routinely to rely upon could not be justified by any sensible connection to what was really required on jobs. And the numbers universities came soon to rely upon in the selection of students (Scholastic Aptitude Test (SAT) scores and secondary school grade point averages (GPAs)) obscured more than they clarified whether educators were predicting who would be good students, productive workers, or virtuous citizens. Only thirty years ago, most employers and educators in the United States only rudimentarily understood or even cared about merit.

3.112 Enter Affirmative Action

Far from intending to compromise the American ideal of merit, civil rights advocates introduced affirmative action as a way of salvaging it. Lack of merit didn't explain, for example, why Blacks had been closed out of jobs in Philadelphia's construction industry. Nor did it explain why women had been shut out of professional schools and managerial positions. And nearly everybody knew as much. America's caste system had segregated many educational and employment opportunities and had left women and people of color without the social resources for most others. In the course of integrating American economic and social life, affirmative action aimed, over time, to remake merit-based opportunity in ways that might one day match the nation's lofty rhetoric.

These intentions were, in certain quarters, almost immediately violated. Some managers and some admissions offices, for example, selected minorities simply because they were non-white and chose women simply because they were women. Aspiring at all costs to include women and people of color, they rather diligently disregarded all other institutional goals. Others were less well-intentioned. Perhaps because they didn't believe women and non-whites could ever cut it (and certainly because they didn't want to undertake a painful reexamination of how opportunities were distributed), they instituted a single-minded gender and race search instead of a fresh and flexible approach to integrating gender- and race-consciousness into a reconsideration of merit.

Whatever the intentions, and however rare the occurrences, these cases of abuse gave affirmative action a bad reputation. And right from the start. Obviously, in many quarters, that wasn't at all hard to do. In a culture where

women and people of color had been forever regarded as less than equal, hiring them solely to fill some formal or informal "quota" smacked of the worst sort of handout: the sort of thing you did for people only when you knew they couldn't cut it. Rather than deservedly symbolizing a healthy and long overdue challenge to discriminatory notions of merit, affirmative action suddenly came to signify, at least for large numbers already primed to feel this way, the diminution of all that made the nation great and distinctive. Worse still, this nasty reputation -- like the ugly stereotypes it reinforced -- proved hard to shed.

For all that was wrong with and ultimately damaging about these abuses, by far the more pervasive challenge facing affirmative action was the initial years of institutional foot-dragging. Most decision-makers simply were unwilling, for some years, to rethink in good faith how merit had been working. They simply couldn't be bothered. Apparently they were more comfortable with and anxious to maintain the status quo. Perhaps they, too, regarded affirmative action as a crass "give away" to inferior candidates. In any event, they resisted efforts to include -- as employees, as contractors, as students -- demonstrably qualified women and minorities. In many instances, blatant resistance subsided only when old decision-makers were replaced by new ones less threatened by change.

Meanwhile, there were some institutions, from the very beginning, that treated affirmative action as a welcome catalyst to thinking seriously about what exactly merit might legitimately come to mean. Mind you, they weren't in hot pursuit of some fantasy called "pure merit." They wanted to explore merit as a practical concept that related to context, to performance, and to pools of talent they had never even considered. Affirmative action required them -- ultimately disciplined them -- to look beyond existing selection mechanisms to what really constitutes excellence. And, yes, by inclining them to "take chances" on people whom they hadn't previously regarded as capable, affirmative action often turned up the "unexpected." Different sorts of people could do excellent work, sometimes in different ways, sometimes in ways that entirely redefined what it meant to perform well.

What these more serious employers and universities learned along the way may seem obvious today. But it remains pivotal to understanding merit. The projected potential of individual applicants typically turns not only on that person's attributes. It depends at least as much on the mix of people in the organization and how collectively the combination performs. Employers and universities are, in most circumstances, assembling a team. Of course, they must pay close attention to what particular tasks entail and which predictors might reliably screen for these qualities. But even the most ostensibly individuated task can't easily be severed from the employer's or university's overall team ambitions. In the very act of defining tasks and predictors, employers and universities must take careful account for how various mixes of people might work together. Otherwise they miss their mark.

This insight was not, in certain respects, entirely new. Savvy employers have always realized they were putting together teams. They just couldn't picture women and non-whites qualified for consideration -- much less ultimately making distinctive contributions to the overall organizational ambitions. And great universities have spoken for over a century of their ambitions to bring together talented students and talented faculty from diverse backgrounds into a democratic dialogue where they will learn from each other. They, too, simply couldn't fathom women and non-whites playing anything but marginal roles in the dialogue they envisioned. In this sense, affirmative action demanded that institutions draw upon old strengths and extend them into uncharted territories.

In the face of significant foot-dragging and lingering damage to its otherwise worthy reputation, affirmative action nonetheless managed to initiate the painful process of legitimating our national allegiance to merit-based opportunity. For the first time in our history, institutions began to tackle exactly what merit meant. At least at their best, they took stock of overall institutional ambitions, evaluated what constituted work well done, and evolved predictors tailored to screen qualified from unqualified candidates. And they did this all repeatedly, not because they thought perfection was a possibility, and not even because they realized they were just beginning to develop any expertise worth defending. They did this all repeatedly because ambitions, quality performance, and predictors inevitably change. In search of justice, they began to discover how much gender- and race-conscious affirmative action taught them about merit itself.

3.113 So Why Insist Affirmative Action Violates Merit?

There are less and more credible versions of this attack. And it's important to keep them straight.

3.1131 Less Credible Versions

Many who attack affirmative action as a violation of merit-based opportunity simply aim to exploit the issue. They repeatedly contrast, on the one hand, the most horrifying failures of affirmative action with, on the other hand, an image of "pure merit." No one should buy into this formulation of the issue. There have been horrifying failures but they've been relatively isolated and, as importantly, we condemn them at least as strongly as proponents of

Proposition 209. And while it's not clear how many think "pure merit" matches any world they've lived in, the ideological appeal of the image gives the attack real staying power. No one should make or reward this form of the attack, but it's hard to believe it won't continue to be manipulated as long as it seems to work at all.

Even those who don't rely on images of "pure merit" still seem all too often to contrast what we have called the derogatory "shadow meaning" (see section 2.13) of affirmative action with an exceedingly romanticized view of how merit has worked in our history. You know the routine. They invite you to think of incompetent women or minorities they have encountered; then, drawing on century-old stereotypes, invite you to treat these exceptions as the norm; then, tacitly exaggerating the virtues of pre-affirmative action merit systems, invite you to blame these failures on affirmative action; then, finally, invite you to believe that, in the absence of gender- and race-conscious considerations, merit-based systems would banish or at least drastically reduce the presence of incompetents. But this version of the attack shouldn't receive much more respect than the form that capitalizes on "pure merit" and ugly stereotypes. There are, we repeat, incompetent women and minorities in various walks of life. And there were, proponents of affirmative action fail to mention, incompetent white men in every walk of life before affirmative action, just as there are incompetent white men in every walk of life since the arrival of gender- and race-conscious programs. It's silly to insist that affirmative action created incompetence. And there's simply no reliable evidence to support the claim (made by some, we realize, often behind closed doors) that gender- and race-conscious programs have increased the level of incompetence in any realm of life.

In fact, the evidence is quite to the contrary. The great majority of those who've worked hard to implement responsible gender- and race-conscious merit-based programs -- in education and in employment -- praise both what affirmative action has taught them about merit and what it has brought them in terms of performance. They appreciate, perhaps more than others, how much centuries old stereotypes can lead some people to look for and complain about incompetence in the very same people long regarded as inferior. They appreciate, too, how much the very presence of competent and even extraordinary women and minorities not only works slowly to rebut these stereotypes but to reconfigure how we think about merit in the first place. Of course, we can ignore the record -- as for example, the majority of Board of Regents did in voting to end affirmative action in the University of California. But we do so at great risk to our credibility and to the very systems we aim to sustain.

3.1132 More Credible Versions

The problem with affirmative action, in this more credible attack, is not that it encourages the hiring or admission of unqualified candidates, and not that it undermines an otherwise pure or even wonderful merit system, and not even that candidates can't sometimes be more or less equal. Instead, the difficulty with affirmative action is that it encourages the selection of demonstrably less qualified over more qualified candidates for reasons that are either not good enough or downright unacceptable. In this form, the attack doesn't pretend merit-based mechanisms and affirmative action can't mesh, but only that the mesh is too great a compromise to live with and therefore must be rejected in unconditional terms (as the constitutional ban Proposition 209 proposes) and not merely rigorously scrutinized (as current law requires).

Praiseworthy for avoiding the crude and manipulative caricatures of its brethren, the persuasiveness of this attack turns on three exceedingly strong claims: (1) that affirmative action encourages the selection of demonstrably less qualified over demonstrably more qualified candidates; (2) that the reasons affirmative action accommodates whatever compromises it engenders are not good enough, downright unacceptable or both, and (3) that the compromise of merit is so great we must reject affirmative action in unconditional terms and not rest comfortably with the strict scrutiny the law now requires.

Just how accurate is the claim that affirmative action encourages the selection of demonstrably less qualified over more qualified candidates? To the degree selection criteria used by a government institution are more "soft" (matters of judgment) than "hard" (standardized tests), the attack meets with stiff resistance, particularly from those who know most about such programs. From "blue collar" slots to professional positions, experts tell us, discretionary calls are by their nature inexact. If employers do their screening well, it's entirely understandable that they treat a short-list as "comparably qualified." In such circumstances, it may well be a mistake for an employer to treat one candidate as obviously superior to other "comparably qualified" candidates. Of course, the degree of precision in "comparably" depends upon the circumstances. But however accessible and transparent an institution makes its factors and processes, there's simply no systematic evidence that affirmative action encourages the selection of demonstrably "less qualified" candidates.

To the degree selection criteria are more "hard" than "soft," the more credible attack gains its widest support -- at least where the numbers do predict some aspects of performance. The most powerful example (according to surveys, polls, and focus group findings) is the state university admission system. California's universities admit students of

color (American Indians, Latinos, African Americans and some Asian Pacific Americans) with lower average numbers than the numbers of other admitted students. For many, these findings constitute nothing less than an admission that affirmative action encourages the selection of candidates demonstrably less qualified than merit-based candidates in violation of merit-based opportunity.

In response to this attack on university admissions system in particular and affirmative action in general, opponents of Proposition 209 often invoke meaningful but only partly responsive rebuttals. Paying too much attention to "hard" criteria, goes the first rebuttal, simply reflects our uncritical faith in testing numbers. Numbers feel "objective," as if somehow they aren't also the product of judgment -- judgment about what it takes to do a job well, judgment about what it means to identify relevant predictors, judgment about whether the test employed accurately measures the predictors. Besides, goes the argument, such blind faith often proves badly misplaced. The story of the past thirty years of employment litigation is, as much as anything, one where thousands of employers, pressed finally to justify presumed-to-be trustworthy testing instruments, failed to demonstrate the relationship between what was being tested and job performance.

True enough, it seems to us, we do often overrate numbers. And they can obscure, even interfere with reliable selection practices. But, in fairness to "hard" criteria, sometimes the reliability of worthy tests is difficult to prove, even for the most well meaning institution. Sampling and measurement errors interfere with a "good read." Even more to the point, numbers sometimes do reliably predict aspects of performance. In fact, GPA and standardized test scores fall squarely within this category. When they do it's natural, not devious, for people to wonder why they're not used exclusively as the screening mechanism for university admission. Perhaps there are good reasons, but they need to be explained, particularly in the face of skepticism about the worthiness of students admitted with "lower numbers."

At this point in the argument, opponents of Proposition 209 often offer yet another meaningful rebuttal, but again one that only partly replies to the attack. Supporters of affirmative action seem to want to defend its record by "outing" other exceptions to the standard admissions numbers. More perhaps in the last year than ever before, they have uncovered damning evidence of how universities have long taken account of "legacy" status (an alumni relative), rich or politically powerful parents, and profitable athletic skills. (In other contexts, this response also stresses how government employers grant numerical boosts to veterans on civil service exam scores -- whether veterans actually participated in combat, suffered emotional distress or physical injury, or social or economic disadvantage.) How come, goes this response, many of the same people who attack affirmative action disregard these other "violations" of number-driven university admissions systems?

There is much to this reply. There's something suspicious, perhaps obviously hypocritical, about a world where longstanding exceptions to a numbers-dominated admissions system are treated as presumptively compatible with the merit ideal while affirmative action is not. Indeed, during some years, the students admitted through these other "loopholes" outnumber the students of color admitted with lower numbers than the class average. More to the point, the ends achieved through affirmative action would seem, at least on moral grounds, far weightier than those ends sought through these "deviations" from merit. At best, our commitment to merit is oddly opportunistic and entirely erratic.

Still, this response evades as much as it confronts the attack on the university admissions system. The answer to these "loopholes," insist at least some proponents of Proposition 209, is not to tolerate them: We should banish them, once and for all, along with affirmative action. It's not obvious, to be sure, just how many people hold this view, much less how many would enforce it. Even among strong opponents of affirmative action, one can detect a pragmatic willingness to treat these other exceptions as financial necessities, if nothing else, and worth whatever damage they may do to merit. But that's no answer to those who would tolerate no-exceptions to the almost exclusively by the numbers rule. If supporters of affirmative action are going to meet this position head-on, we have to face squarely the claim that affirmative action admits demonstrably less qualified over more qualified candidates and then explore the adequacy of reasons offered for any measurable compromise.

Let's start at the top. Only extremists pretend that numbers should be both the end and the beginning of the admissions process. GPAs and standardized test scores are helpful (though by no means perfect) in predicting grades, particularly in the earliest year or two of any program. But it's not that numbers are a perfect measure of ability or future performance, insist the most sophisticated critics, it's that they seem better than other measures, particularly those affirmative action tend to value, and therefore should be heavily if not exclusively featured. If this refinement more carefully tailors itself to what we know about the limits of tests, it also reveals the ways in which exclusively-by-the-numbers advocates disagree with the great majority of universities (private and public) about the very purpose of education and the definition of merit best suited to serve that purpose.

Numbers are used as only one set of factors in every admissions process, mainly because they tell us too little, and often even mislead. That's true, as most teachers and administrators will insist, both of the individuals whose merits

are presumably disclosed by numbers and of the entering class whose overall qualities matter immensely to the university's greater pedagogical ambitions. Even before the advent of affirmative action, reducing all students to nothing but their numbers would have compelled schools to ignore, among other things, maturity, resourcefulness, leadership, creativity, motivation, perspectives, and ambitions. Perhaps a small handful of extremists championed such an admissions system. But it never made sense to the great majority of universities, all of whom hoped to train political, spiritual, and artistic leaders in diverse learning environments. It never dawned on universities then, any more than it does today, to refuse to consider -- and, yes, to weight -- information other than what numbers might reveal. Indeed, focusing only on numbers, in light of widely shared educational ambitions, would be not just eccentric but irrational.

The choice is not, as Proposition 209 advocates would have us frame it, between less qualified "affirmative action" candidates and more qualified "merit" candidates. Instead, the choice is between an idea of merit that turns (almost) exclusively on the numbers and an idea of merit that sees numbers as one set of considerations in measuring the quality of both individual candidates and an overall class. An admissions system based on many considerations (soft and hard) is no less a merit system than an admissions system based largely if not exclusively on numbers. Indeed, an (almost) exclusively by-the-numbers system would mismeasure the very aspirations universities for some time have tried to achieve and the diverse qualities in candidates for which an admission system hopes to screen. In the name of merit-based opportunity, that would be an odd result indeed to impose upon an educational system -- or, for that matter, any other institution.

It's not so much that by-the-numbers advocates can't imagine wanting to implement an admissions system that looks to the "whole person." Of course, they'd prefer a test for maturity, resourcefulness, leadership, creativity, motivation, perspectives, and ambitions. And, in the absence of such tests, they worry subjective judgment will lead to inequities. But they'll often agree, at least off the record, to the virtues of a system designed to measure the "whole person," using "soft" and "hard" criteria. What they protest, however, is that affirmative action's version of such an approach embraces considerations they regard as unconvincing and, in any event, unacceptable.

In explaining this objection, they sometimes stress what they call "the individual nature of merit." Affirmative action, they insist, invites attention to group rather than the individual qualities they claim as the hallmark of America's merit system. But they misunderstand how every system of merit works. A claim to merit is, inevitably, a claim made on behalf of the group of persons identified by some set of characteristics -- geographical diversity, gender, standardized test scores and GPA. To argue against affirmative action is not to support individual merit as against group claims, as some by-the-numbers critics believe, but to argue that some other groups, defined by some other attributes (in this case by their numbers), is entitled to preference.

What's really bothering them is that affirmative action treats gender and race -- and not just other groups attributes -- as relevant considerations in measuring both the "whole person" and the overall mix of people in an entering class. Universities can measure groups by virtually any other characteristics (test-taking smarts, creativity, motivation, perhaps even clout, connections, and athleticism), but race and gender can't be among them. They would have us believe that such group-based distinctions, whether they are used to benefit previously disadvantaged groups or to create otherwise admirably diverse environments, do irreparable damage to merit. They contend that to pursue equal opportunity, we must use "color-blind" means and "color-blind" goals.

3.12 What Does Color-Blind Opportunity Mean?

In light of our nation's history, color-blind is a term that obviously can take on quite different, even contradictory meanings. One view, of which Proposition 209 represents an extreme version, deems gender and race morally irrelevant to government decision-making under all circumstances. Another view, on which affirmative action principally draws and embodies, sees gender and race as necessary to compensate and integrate and as illegitimate only when used by government as a basis for disadvantage or as a means for subordinating yet another group. Still a third view, derided by virtually all opponents and even by some supporters of affirmative action, unashamedly sees gender and race as notable aspects of the human condition and necessary dimensions of any merit-based equal opportunity.

3.121 The Proposition 209 View: "Zero Tolerance"

Make no mistake. Proponents of Proposition 209 push the strongest brand of color-blindness -- what we call "zero tolerance." They're not comfortable with the rather painstaking scrutiny the law applies to gender considerations in affirmative action programs. And they're not comfortable with the law's heightened scrutiny of race -- a scrutiny that sometimes is described as "fatal in fact if not in theory." They insist upon barring -- constitutionally barring,

permanently barring -- even those programs narrowly tailored to genuine compelling interests, ones that would move us toward a more just society. That's extreme, by any measure.

In support of their position, they attack programs that in any way include gender and race as considerations -- among many other considerations -- as exactly the wrong way to achieve equal opportunity. Even if affirmative action programs help us "get beyond racism," gender and racial considerations are, to their minds, morally objectionable. A candidate's potential to do a task well must be evaluated on the basis of what he or she has done and not on the basis of what he or she is. Gender and race tell us nothing about ability -- nothing about any intellectual, social, or psychological traits relevant to measuring the worth of an applicant.

Proponents of 209 draw guidance, they proclaim (and no little cover, to be sure), from the often quoted words of Martin Luther King: "I have a dream," said King, "that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." This passage, they maintain, symbolizes King's agreement with their own "zero-tolerance" brand of color-blindness. Indeed, for zero-tolerance advocates, this passage reveals just how far the civil rights movement has turned its back on its origins and its justly heralded leader. They all but proclaim that King himself would vote yes on Proposition 209.

It's always risky, however, offering so unequivocal an interpretation on the basis of a single passage from a man so protean as King. Whatever the familiar turn-of-phrase standing alone might be taken to mean, surely proponents of Proposition 209 misinterpret the body of King's ideas. In fact, King spoke approvingly of race-conscious efforts: *It is impossible to create a formula for the future which does not take into account that our society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis?*

Whenever this issue of compensatory or preferential treatment of the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask for nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entered at the starting line in a race of three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.

But misreading King -- even misrepresenting him -- hardly disqualifies critics of affirmative action from insisting on the moral and practical necessity of absolute "color-blindness." Indeed, the sort of ban Proposition 209 champions finds its roots in the oldest American tradition. In this tradition, of course, equal citizenship amounts to nothing more than the achievement of formal equality before the law. If we insist on blind laws, we will have demanded all we can of government in uprooting systematic gender and racial subordination. Anything more must be left to behavior, and behavior sooner or later will follow law. Meanwhile, government need not and cannot take account of social reality. That would be to endorse a view of equal citizenship that requires an equality that is more than formal -- a premise underlying those affirmative action programs Proposition 209 hopes constitutionally to ban.

This account of Proposition 209's brand of color-blindness does evoke images of those many years where subordination in fact was embraced as utterly compatible with equality in principle. Uncharitable as that may seem, it probably won't bother many supporters of Proposition 209. That's not to say they condone either gender or racial discrimination. But inequality, on their view, is simply a fact of life. More importantly, it's evidence that merit systems are actually working. We can't all be on the top, they observe, or even on our way there.

It may seem harsh, supporters of Proposition 209 acknowledge, to insist the government must be, in the extreme, "colorblind." Zero tolerance, after all, offers absolutely no room for deviation. But, insist Proposition 209 advocates, it's precisely because gender and race have been the source of so much of this country's heartache that we can't allow ourselves to travel down that path any longer. If we constitutionally prohibit government from taking account of gender and racial differences, we will have done our job. Better still, we will have moved closer to realizing in law a world where gender and race make no difference to people -- except as the unfortunate vestiges of past discrimination. All racial distinctions and almost all gender distinctions are to disappear, and our only "race," and for most purposes our only "gender," will be "American."

3.122 The Mainstream Affirmative Action View: "Anti-Discrimination"

There's a competing view of color-blindness -- one grounded in this nation's history and reflected in the very affirmative action programs Proposition 209 so thoroughly condemns. Yes, over the years this vision certainly has informed the campaigns of many dissenters -- not just women and minorities but many white men who fought for changes that would match the rhetoric of American equality. But these days the view can hardly be regarded as "un-American." Many corporate, religious, and political leaders spend their time fighting for its realization and many

"everyday" folks try in flawed ways to live it. Indeed, at its core, this vision of color-blindness is plain-spoken, common-sensical, and mainstream.

As most supporters of affirmative action see the world, color-blindness obviously means "not racist." And, in their view, surely we should want to include "not sexist" too, even though we rarely speak of being "gender-blind." What we cannot mean by color-blindness, in their eyes, is that we expect to be (phenotypically) blind to gender and race. Who really believes we will not notice the color of someone's skin or their gender? In any event, goes this view, exactly how many of us still want to live in a culture where the variety and diversity of its citizens is deliberately denied or suppressed? We've had plenty of that for two centuries and it never led to much good.

The "color-blindness" we should aspire to as a nation, the sort affirmative action aims to bring us, is not one where we would pretend to avert our eyes or our government's eyes from our differences in gender and race. Instead, central to its ambitions is fighting against our inherited tendency to associate being of color or being female with being inferior -- and to feel entirely justified discriminating against women and minorities. Color blindness means trying to uproot a culture where being a woman or a minority meant you were inherently unworthy of equal citizenship and the opportunities and responsibilities that accompany that status. More to the point, it means fighting to make equal citizenship a reality in fact and not simply a formal status before the law.

Proposition 209's advocates seem to believe that the answer to our ugly history is to ban the government from ever again paying attention to race and gender. Only when race and gender are never mentioned, Proposition 209's logic seems to say, will we begin to conquer racism and sexism. The danger in this approach, in the eyes of those who hold affirmative action's view of color-blindness, is twofold. We're kidding ourselves -- and down deep we know it -- when we say it's possible to blind ourselves (or the officials who run our government) to race and gender. Even more frighteningly, in pretending to blind ourselves to gender and race it's all too possible, particularly in light of even recent history, to become racism-blind and sexism-blind. Proposition 209's advocates are, on the whole, well-intentioned. But shutting our eyes to social reality -- to inequality, suffering, despair -- is not the path to a colorblind society. Our own history tells us as much.

If our goal is to destroy the inferiority we associate with being of color or female, how can we do better than to offer qualified women and minorities the opportunity to demonstrate their abilities? Every time women or people of color succeed in an area traditionally closed to their participation, they make it harder for us to maintain the views we may have inherited. Even more promisingly, successful candidates ultimately challenge us to redefine our notions about the talents and worth of people who look like them. Giving qualified people the opportunity to demonstrate their talents is fundamentally what color-blindness should be about and what every defensible affirmative action program is designed to achieve.

Using gender and race, mainstream affirmative action supporters concede, does generate certain tensions with the ultimate goal of color-blindness. But the tensions are not absolute, and often are more apparent than real.

Affirmative action does use race and gender (means) hopefully to achieve a color-blind society (ends). But, remember, the aim of color-blindness has never been to guarantee that gender and race would not factor in merit decisions. Instead, the goal has been, from the beginning, to fight gender and race as sources of historical and contemporary discrimination.

There is the seemingly more troubling tension between measuring an individual's merit in part by taking into account her race or gender. Remember, insist zero-tolerance advocates, "merit" is about ability (what we can do) not "status" (what we are). To confuse or conflate the two -- as gender- and race-consciousness does, say zero-tolerance proponents -- denies the individual recognition in terms of her "merit" in the sense of attainments and achievements. But this argument depends entirely on being able cleanly to separate people from their context. Try as we might, that's just impossible. What we can do turns, in part, on who we are. We all deeply understand that, even perhaps when we sometimes argue to the contrary. The cultural dimensions (including racial and gender dimensions) of attainments and achievements are not separable, for purposes of the judgment of others, from our "individual" achievements.

That's not at all to say, and mainstream supporters of affirmative action do not say, that gender and race tell us with certainty where a person has been, much less exactly how those experiences will affect performance. Neither race nor gender have the power to determine people as either meritorious or meritless. Instead, they can be understood as something much closer to "cultural influences," collapsing the false dichotomy between mere "status" and "achievements of the individual." And these cultural influences, like all others, contribute to what a person can bring to a task and to an organization. Again, we stress contribute not determine. Recognizing gender and race as cultural influences doesn't obliterate the individual. But it does blur the boundary between people and context. And it makes obvious just how wrong zero-tolerance advocates are to insist gender and race are simply irrelevant to healthy determinations of merit.

Still, race and gender are different. And mainstream affirmative action supporters are the first to acknowledge they can't be treated exactly like other cultural influences. But that's not at all because they are morally irrelevant to merit determination. Instead it's because they are both thoroughly relevant and morally central to the distribution of opportunities. That's why we have had fights, riots, and wars in their name. And that's why, even today, we continue to grapple with how to deal with them not just in formal law but in everyday decisions and interactions. In any event, using gender and race to help us get to the color-blind society most Americans envision does not present anything like the absolute contradiction zero-tolerance advocates would have us believe. Far from it, insist mainstream supporters of affirmative action. So long as we carefully scrutinize our use of gender and race (and current laws demand just that), we can manage this tension and protect ourselves against the ugly excesses of the past. Not only can we manage -- we have managed, and, given the odds, with notable success. The last thing we need is to constitutionally ban ourselves from using what we must to get to where we want.

3.123 Color-Consciousness In Place of Color-Blindness

There is another, far more controversial view of "color" (gender and race) and its place in the world of merit. This view shares many goals with the mainstream supporters of affirmative action: Like its more popular alternative, it aims to end subordination, to abandon color-blind criteria rather than misrepresenting them in order to achieve desired results, and to resist the temptation to treat either gender or race as themselves sources of distinction or achievement.

But this controversial view breaks fundamentally with much of what makes the mainstream view of affirmative feel safe and sensible to potential supporters. The open consideration of gender and race, according to this more controversial view, does not distort otherwise worthy "merit" standards, does not deviate from an otherwise healthy vision of equal citizenship, does not endanger the integrity of the general system of unbiased judgment of value, and does not require a "good excuse" until, having reached our color-blind goals, it can be abandoned, thankfully, once and for all.

Because, on its face, this view seems so "out there," so "un-American," it invites immoderate responses. Advocates of Proposition 209 either dismiss this view or, in an effort to gain more votes, attribute its tenets to mainstream supporters of affirmative action. Mainstream supporters of affirmative action, understandably, fear being tainted by this more controversial view. They disagree with its conclusion and, as importantly, fear the "radical rhetoric" it seems to espouse will negatively effect the November election.

What may be surprising is how much this view seems to parallel certain intuitions and convictions of a wide range of Americans. Even if many aren't out in the streets proclaiming their allegiance, many business, religious, and political leaders certainly act on many of its assumptions, and many everyday folks certainly voice opinions awfully similar to what seems central to this vision. In any event, the contrast between this and the other two views helps illuminate the depth of disagreement around affirmative action and its role in our future.

Gender- and race-conscious merit-based opportunity is not an immoral evil, as Proposition 209 would have us believe. And it's not even a necessary compromise, as at least some mainstream supporters take pains to acknowledge. Instead, in the more controversial view, gender- and race-conscious merit-based opportunity demands and foreshadows, at least at its best, precisely the sort of merit-based decision making we need to be making now and in years to come. That's right, we need to scrap color-blindness as an ideal and replace it with an ideal better suited to our past, our present, and our future.

As a political community, in this view, we need to structure competition (in all areas of life) where no group or community remains systematically subordinated. Gender and race are rough but reliable-enough proxies for connection to still-subordinated communities. They are not indices of merit itself, mind you, but predictors of individual traits that may matter in the performance of particular tasks and as part of particular teams. Using these proxies as part of any merit-based system will enhance the possibility of providing opportunities to qualified women and people of color, will give those selected a voice in similar decisions in the future, and will enlarge the community for having opened itself up to change.

The benefits of such programs are by now familiar. The inclusion of women and people of color might well markedly enhance performance. At worst, institutions and communities will gain the sensibilities, insights, and skills they for so long had neglected and much need. As a result, we will have put into issue conventional concepts of merit -- particularly as they relate to women and people of color. How well have old systems served us? How sophisticated have we been in our assessments and predictions of quality? How much have we understood the impact of "inclusion" on individuals, institutions, and communities?

What's different, of course, about this view is that it aims to make gender- and race-conscious merit-based decision making routine not aberrational, a more or less permanent part of how we distribute opportunities. When asked

bluntly, "do you mean to say "affirmative action" will last forever?" the finesse move may well be to answer, "well, only so long as subordination persists." That seems fair enough, honestly linking the life of this sort of merit-based evaluation to the persistence of what it aims to root out of the culture. But the less politic response, also consistent with this view, may well be to say "yes, this form of merit-based decision making will last so long as we can foresee."

What sets this view apart, at least most visibly, is its inclination to make gender- and race-conscious merit the permanent norm in government decision making. That alone makes it frightening for most people, even if they find themselves drawn to or nodding in agreement with parts of the argument. Truth is, it's not at all obvious that the principal objections made to this vision of merit ("if we allow gender- and race-consciousness to be assimilated into our conception of merit aren't we being unfair to everyone -- to the individual who is denied the recognition of his or her "merit," to the institution that is "stuck" with this sort of decision making, to the national community that is accused, if only tacitly, of stubborn oppression?") aren't largely answered by the more mainstream view of colorblindness. In any event, what perhaps most distinguishes this view is the conviction that we can't deal with the problems of racial and gender subordination unless we deal with them directly, and we can't achieve the full value of "inclusion" -- a pluralistic equal citizenship -- without self-consciously designing our institutions with that goal in mind. Affirmative action, at its best, redefines the very ideal of merit-based opportunity and equal citizenship to which the nation subscribes.

3.124 The Bottom Line

Of course you don't have to buy the more controversial view to reject the zero-tolerance idea of color-blindness central to Proposition 209. All you have to find, consistent with the mainstream view, is that Proposition 209 simply goes too far, too inflexibly, and too permanently. Even if color-blindness remains your goal, as it does for millions of mainstream affirmative action supporters, there are compelling reasons to decide that gender and race are morally relevant and practically necessary considerations in making available opportunities to otherwise qualified candidates. Particularly when these considerations are so carefully scrutinized in practice -- when we're so carefully protected against abuse by the government -- it seems unwise to return to the days where formal colorblindness before the law is all we claim to need to diversify our world and fight what remains of subordination. The arguments against affirmative action hardly end here, however. Some proponents of Proposition 209 recognize a case can be made that affirmative action is consistent with a rigorous and coherent view of merit-based, color-blind opportunity. Indeed, they sometimes agree that affirmative action's view of merit-based, color-blind opportunity has dramatically improved how we all have come to think about merit. Still, they object to its continuation, arguing, alternatively (and yes, sometimes inconsistently), that it hasn't worked; that it costs too much; that we no longer need it; or that it's worked some but what we need instead is class-based affirmative action.

3.2 AFFIRMATIVE ACTION HASN'T WORKED

Apart from any moral or political objections, affirmative action just doesn't do what it's cracked up to do. At least, that's what various proponents of Proposition 209 insist. In particular, they make two (somewhat contradictory) arguments: women and minorities made more progress before affirmative action and affirmative action can't confidently take credit for any progress we have seen.

3.21 More Progress Before Affirmative Action

Citing data charting the social mobility of African Americans, some supporters of Proposition 209 emphasize that income growth and income equality advanced more in the pre-affirmative action era (1945-1965) than in the post-affirmative action era (1973-1995). Not many hold this view, even within the anti-affirmative action ranks. But among its proponents are prominent conservative libertarian economists, some who regularly make the rounds, armed with what they seem to regard as serious and unassailable facts about real life. Time and again, they ask, wryly: It's none of our business, but why do supporters of affirmative action want more "benevolent intervention" that has so obviously failed?

Supporters of affirmative action typically sidestep this argument. At times they seem to regard it as too quirky to attract much attention, too counter-intuitive to count for much. Perhaps they're right. At other times, though, they seem overwhelmed by the attack. It's almost as if as if talk of "data," "distributional segments," and economic history represents a dangerous domain where they best not wander. But, truth is, answers to this sort of argument are really not all that exotic. And they may well matter to some serious voters.

This country enjoyed tremendous economic growth from World War II through the late 1960s. For the first time, America emerged as one of the predominant powers in the world market. As economic conditions improved for the country as a whole, the incomes earned by people of color, particularly African Americans, grew more rapidly than ever before. But closer examination reveals that these gains occurred in profoundly segregated work places where the varieties and levels of jobs available to people of color were extremely limited. Even more particularly, the economic wealth of people of color in the decade before affirmative action was always substantially below that enjoyed by white Americans.

It is no coincidence that affirmative action saw its beginnings in the post-World War II era, a time when prosperity and a general sense of well-being was widespread. But the decades of strong economic growth ended with the close of the 1960s and though our economy has continued to grow in absolute terms, the rate of growth has declined from the early 1970s to the present. The impact of the increasingly global marketplace on wages has been one of stagnation. The median earnings for all men, for example, dropped from \$35,000 in 1973 to \$25,000 in 1990 (in 1990 dollars). Wages are also becoming increasingly polarized -- greater percentages of people are earning low incomes and high incomes and a smaller percentage of people can actually be considered middle income. The percentage of male full-time workers earning less than \$20,000 per year was 13% in the late 1960s; that figure rose to 33% by the late 1980s.

The bottom line? Income growth was much higher and income inequality decreased more, at least for African Americans, between the years 1945-1965 than during the 1973-1995 period. But it's a stretch, at best, and pretty whacked out, at worst, to attribute the differences singularly to the impact of affirmative action programs. There was, after all, particularly high economic growth and movement toward social equality during the World War II years and certainly high economic growth in 1965-1973, both periods of "activist government." In fact, the post-war growth between 1945-1965 was unusual in historical terms, with the slower growth of 1973-1995 more typical. At the same time, most economists would perhaps explain the main cause of rising inequality over the past generation as the result of the globalization of the economy, which hurts poorly-educated workers in the U.S. most of all, and the general stagnation of social policy. Though this attack on affirmative action seems dead wrong in its specifics, there may well be some common ground between those who advance the arguments and at least some who support affirmative action. It's imaginable that the focus on many traditional civil rights remedies -- busing, perhaps most obviously -- may well have diverted attention from other programs that might, together with gender- and race-conscious merit systems, do much to increase human capital in urban and rural areas. In any event, it's no great insight that affirmative action, like so many other social policies, must take aim at its goals in the midst of adverse economic conditions.

3.22 Affirmative Action Cannot Confidently Claim Credit For Any Progress

Few would deny the breakthroughs made over the last thirty years. More now than three decades ago, little girls study math and pursue careers in the sciences and engineering. More now than three decades ago, various branches of the armed services count women and non-whites among their active duty officers. More now than three decades ago, local law enforcement agencies count women and non-whites among their officers. More now than three decades ago, entry-level and middle-management slots are filled with women and people of color.

Breakthroughs and fundamental change are, of course, quite different issues. But proponents of Proposition 209 don't contest that opportunities available for millions of women and people of color have increased. What they insist, however, is that affirmative action cannot confidently claim credit for what progress we've seen. They're right -- in one sense. It would be a stretch for anyone to make this sort of claim about affirmative action -- just as it would be a stretch for anyone to make this sort of claim about any other possible explanation. But the reason why exposes this attack as more debating technique than important argument.

The breakthroughs we've witnessed in the past thirty years can be attributed to so many different interacting forces that, at a minimum, it's exceedingly difficult to isolate a "principal" cause. Social scientists, more careful perhaps than the rest of us in assessing such matters, make a living demonstrating that this sort of causation is almost impossible to prove. If you put the burden of confidently claiming credit on the supporters of any social policy, they'd almost always fail, at least by the standards of professional social science. That's important if anyone tries to claim too much for some program, but otherwise it doesn't mean nearly as much as Proposition 209 advocates would have us believe.

If proponents of Proposition 209 are interested in how change erupted and evolved, they should join in offering their own careful explanations for the breakthroughs we've experienced. Do they think these changes are simply coincidental with the arrival of affirmative action? Do they presume them the product of the natural evolution of social forces? Do they consider them the product of other anti-discrimination laws? None of these hypotheses is, in

theory, refutable. But when you place an insuperable burden of proof on the opposition it would behoove your side to engage in serious empirical work of your own.

Meanwhile, at least in the minds of the great majority of those who make the decisions about filling merit-based slots, affirmative action has played a central role in the change we've seen. In 1990, before presidential politics may well have skewed all behavior, Elizabeth Dole publicly hailed affirmative action when she led a celebration of the 25th anniversary of Executive Order 11246. That kind of recommendation -- even when it's shared by the overwhelming majority of those in public and private sector decision making -- is not the same as being able to prove the (virtually) unprovable. But it's not bad evidence to rely upon in the absence of scientific certainty.

3.3 WHETHER OR NOT IT'S WORKED, AFFIRMATIVE ACTION COSTS TOO MUCH

Some champions of Proposition 209 insist it hasn't worked. Others acknowledge its considerable accomplishments. Whether or not they concede the achievements of gender- and race-conscious merit based opportunity, Proposition 209's proponents almost universally maintain that affirmative action costs too much. In their minds, it actually (1) harms women and people of color, its ostensible beneficiaries, (2) exacerbates social friction, undermining consensus necessary for effective reform, and (3) costs too much to administer and to absorb the losses in excellence it inevitably produces.

3.31 It Harms Women and People of Color

Affirmative action, goes this argument, stigmatizes women and people of color. It implies they cannot compete on an equal basis. In fact, this harm hangs over the heads of those who've made it "on the merits," and not just those who've made it on the basis of "affirmative action handouts." As a result, goes this line of thinking, affirmative action leaves women and people of color doubting themselves, often profoundly. They ask themselves, often out of the earshot of others, whether they've truly earned their positions or their promotions, their honors or their raises? Indeed, continues this argument, it often leads them to lower their own expectations of themselves. Accustomed to handouts, we're told, many women and people of color simply do not try as hard as they might otherwise.

There is very little systematic evidence of how women and people of color perceive gender-and race-conscious programs and about how affirmative action affects their self-image. On the basis of much testimony (in and out of court) and some studies, however, there's reason to believe this argument is largely misconceived and exaggerated. Many women and non-whites have never regarded affirmative action as a deviation from or compromise of otherwise defensible merit systems. After all, they always realized that the near total absence of women and people of color in large numbers of schools and jobs hardly meant none of their own kind was qualified. Instead, they view affirmative action not only as compensation for a history of subordination but as a new and more reliable merit-based system trying, however haltingly, to open competition to the qualified.

As importantly, many women and non-whites thoroughly understand the political nature of "merit" -- in the small and large sense. Connections, more than anything else, determine which people have gotten what jobs over the years. "It's who you know, not what you know." Even more profoundly, they realize merit is a term always waiting to be redefined. It's not some natural set of characteristics that divine what an institution is looking for.

Organizations make up selection criteria, sometimes wisely, often not, and even more frequently in our nation's history, without ever thinking women and people of color were to be treated as part of any relevant pool. If to meet institutional needs gender or race now are seen by institutions as in one way or another part of the bundle of traits called merit then it makes good sense, rather than signifying a degradation of a once grand old system.

Still, no one should doubt that affirmative action does stigmatize. Sometimes woman and people of color think less of themselves or at least doubt themselves in ways they wish they could escape. Indeed, in recent years we've heard and read several much-publicized accounts of beneficiaries sharing their hurts and expressing their reservations about affirmative action. And rather more obviously some white men think quite disparagingly of those women and people of color benefitting from affirmative action programs. Indeed, a fair amount of the most vociferous support of Proposition 209 finds its roots in such sentiments.

But it's preposterous, in light of this country's history, to attribute this stigma entirely or even significantly to affirmative action. White men regarded women and non-whites as inferiors -- in law and in fact -- long before the arrival of affirmative action. Indeed, they defended this way of thinking until only quite recently. And women and people of color, like it or not, no doubt internalized the resulting stigma more than they might ever wish to acknowledge. But no one really believes that if you get rid of affirmative action you'd get rid of the stigma.

In the final analysis, the question is not whether affirmative action can harm women and people of color. Let's accept the fact that it can, though to what extent may well remain unknowable and vary from person to person.

Instead, the hard-to-determine extent to which affirmative action reduces the achievements of women and people of color must be compared with the stigmatization that occurs when women and people of color are either totally or largely absent from a broad range of institutions. The very presence of qualified women and people of color in positions previously unopen to them upsets conventional images, reinvigorates our merit systems, and teaches us all about where women and non-whites belong in the world we share. At least for most women and people of color, and for a significant number of white men, the positives of affirmative action far outweigh the negatives.

3.32 It Exacerbates Social Friction

If harming women and people of color is regrettable, exacerbating social resentments is, for many Proponents of 209, the most intolerable of affirmative action's supposed costs. Many white men do indeed bear great rancor toward affirmative action programs and women and people of color. To some degree, this bitterness is entirely misplaced. They often blame affirmative action for not getting jobs they never would have gotten and didn't deserve in the first place. Scapegoating women and people of color is a lot easier than facing their own inadequacies. That's an old story -- for all of us.

But, where gender or race considerations matter in particular ways to merit, some qualified white and male candidates will lose some opportunities to some qualified women or people of color. That loss is real and it doesn't help to remind them, true as it is, that they also regularly lose out in the application of "legitimate" merit-based systems. Either they don't like losing out when race and gender are defined as part of merit or they don't like losing out in any circumstances to a woman or person of color. But so long as the affirmative action program carefully tailors its predictors to legitimate institutional goals, the loss is simply part of the fair competition equal opportunity entails.

That's not at all to dismiss as unreal this perception of diminished opportunities. No one likes thinking, much less experiencing in an actual selection process, that life's possibilities are fewer than one originally believed. But the perception is grounded in expectations that are themselves illegitimate. They are the product, in directly traceable ways, of historically skewed "merit" systems uniformly benefitting whites and males and, even today, offering considerably greater opportunities to whites and males, on average, from birth to death. In any event, if we really hope to change the culture of subordination there is real danger in too carefully trying to monitor and avoid white and male resentment. Remember, this resentment has accompanied every single effort in this nation's history to openly acknowledge, much less root out, our caste system. If we too readily let fear of White male backlash limit the range and pace of change, we've automatically circumscribed our ambitions in ways that drastically reinforce the status quo.

We would also be ignoring the fact that some white men acknowledge the gains affirmative action has brought into their own lives. All White men benefit, if only indirectly, by the progress achieved by women in the last thirty years. As husbands and sons, men tangibly profit from the unprecedented success of women in the work place -- two wage households are more common now than in any time in history. Beyond the pocketbook, the entrance of women into the work place has redefined the roles men can assume both inside and outside the home. Fathers now spend more time with their children than thirty years ago and the opportunities open to women because of affirmative action has, at least in part, made this possible.

There is, finally, a sometimes articulated fear that affirmative action causes divisiveness between those benefitting most directly from affirmative action. In its most extreme form, this claim comes in full-dress apocalyptic imagery: Latinos fighting Blacks, Asians fighting one another and all other people of color, American Indians wondering how they got left out of the power-grab. There are sometimes disputes between and within groups of color, just as there are sometimes disputes between different constellations of women. And, occasionally, these disputes revolve around the operation of affirmative action programs. But far more often these disputes reflect everyday interaction of all sorts. They're not always pleasant, and can even sometimes be violent. But the notion that they would disappear or even diminish were affirmative action permanently banned seems quixotic at best and manipulative at worst. Like everyone else, women and people of color are simply going to have to learn to live with one another and with more justifiable ideas of merit affirmative action has introduced, even when these ideas sometimes don't serve narrow self-interest.

3.33 It Costs Too Much To Administer and To Absorb Losses in Excellence It Produces

While the argument is not nearly so common, some supporters of Proposition 209 insist affirmative action programs cost us too much to administer and too much in lost excellence. Like any social policy, there are costs to formulating, implementing, and monitoring affirmative action programs. Naturally enough, these costs mean less is

available to initiate and administer other programs. But there's no credible evidence that affirmative action poses a peculiarly distinctive problem. Indeed, many in the public and private sector have long believed that, in creating the material well-being and emotional health that typically accompanies enhanced opportunity, affirmative action programs not only pay their own way but reduce the costs of other social policies. Particularly for communities of color, affirmative action programs offer real possibilities for people to prove themselves -- helping to keep kids off the streets and adults fully engaged in rewarding work.

Finally, proponents of Proposition 209 insist affirmative action costs us too much in lost excellence. That's just another way of saying that candidates chosen through gender- and race-conscious programs are demonstrably less qualified than candidates chosen through programs where gender and race are banned as considerations. There's absolutely no proof of this claim, however. If anything, the argument builds upon the "shadow definition" of affirmative action, invoking aberrational failures (the incompetent affirmative action hire) and unjustifiably treating them as poster children for gender- and race-conscious merit systems. Indeed, the best available evidence challenges this claim quite directly. The great majority of decision makers in the public and private sectors regard their post-affirmative action work forces as considerably better suited to their missions -- more excellent, more productive -- than those chosen in earlier eras.

3.4 WE NO LONGER NEED IT

Acknowledging that affirmative action may well have played an important short-term role in fighting discrimination and opening up opportunities, proponents of Proposition 209 still insist we no longer need it. Whatever discrimination exists these days can be best monitored, they insist, by the market and by the enforcement of discrimination laws. Indeed, what remaining disparities we see between groups are not in any significant measure the product of continuing discrimination. Instead, these disparities reflect "cultural differences." Insofar as groups desire to improve their material well-being, they must set their mind to the task of changing their cultural traditions and sensibilities. It's a matter of will, really.

3.41 Let The Market And Anti-Discrimination Laws Do Their Work

Among Proposition 209 advocates who argue we no longer need affirmative action are those who sketch a remarkably cheery picture of how, together, the free market and anti-discrimination law work.

3.411 Free Market Forces

Some proponents of Proposition 209 believe that the most effective force for combatting discrimination, increasing opportunity, and changing society is the free market. In the free-market world view, affirmative action is unnecessary. The market will punish those companies that discriminate against women and minorities. In all likelihood, certain companies will continue to discriminate. But the market will punish such behavior. Non-discriminating companies will hire talented women and minorities and will be better off for having done so. These companies ultimately will drive the discriminating companies out of the marketplace.

Here's the example frequently offered by anti-affirmative action forces to make their case. What would happen if a NBA basketball team decided no longer to employ Black men as players? The competition they would face from other teams who didn't discriminate would drive the discriminating team into the basement of the league standings, they say, punishing the discriminatory behavior. We're to conclude from the example that, if we really believe women and minorities are so able they must be hired, the market will recognize as much, reward those companies doing the hiring, and punish those companies who persist in discriminating.

This anti-affirmative action argument assumes, of course, that men of color and women of every color are active in the marketplace -- for example, submitting applications, and interviewing for every available position. In fact, the argument doesn't make much sense unless this is true. After all, companies can't reward the talents of women and minorities who never apply. Since virtually all agree that adequate pools of women and non-whites hinge upon "getting the word out" in ways that specifically target by gender and race, Proposition 209 advocates find themselves in a bind. They should favor (and some claim they do) "early intervention" programs of all sorts (those recruiting applicants and those targeting boys and girls for enrichment services). Yet it's precisely those early intervention programs, among other programs, that Proposition 209 will permanently ban. In good faith, they can't, through a proposed law, constitutionally outlaw gender- and race-conscious considerations and, at the same time, argue the virtues of a free market that depends on gender- and race-targeted efforts to build and attract talent.

But is it really true that the market systematically punishes companies that discriminate on the basis of race and gender? What we know about how people actually get and don't get jobs suggests more than a little free-market utopian idealism at work here. For all the advances institutions have made in pursuing genuine equal opportunity, most people still find their jobs through social networks. Connections count. So long as applicants possess the minimum qualifications, the truly decisive factor in landing a job is often who we knew.

From the employers' perspective, it's simply human nature to give advantages and breaks to those people they feel most comfortable with -- people already connected to them as family or friends or workers. Even when they use formal recruitment devices, jobs still are filled most frequently through these powerful, informal networks. And these connections count, it seems, perhaps as much for jobs at the top as for jobs on the lines. When Ford Motor Company selected Henry Ford II to replace his father does anybody really believe he was demonstrably the most qualified person for the job? At the same time, firms and sometimes entire industries still remain largely closed to women and non-whites precisely because employers make decisions in just this way.

Many jobs, obviously, are not filled through informal networking. Particularly in larger companies, employers must sift through thousands of applications from strangers to fill a single position. In the face of this daunting task, it's easier and cheaper for these employers to rely on broad generalizations about groups of people than to scrutinize every individual applicant to discern each person's relative merits. Some group generalizations don't usually bother us. Thinking that people with high grades in school, for example, likely will do well in a particular job is a group stereotype. It doesn't strike us as inherently unjust, though it may well be inaccurate. But employers also make more invidious generalizations -- that, for example, Asians are fine for technical work but not good in managerial positions requiring superior communications skills.

The market is well-equipped to punish these more invidious generalizations -- or at least so Proposition 209 advocates assure us. But here's where classroom theory bears little resemblance to what happens in the everyday economy. In the real world, there are almost always more qualified people than positions available. Most positions do not require qualifications possessed by only a tiny percentage of the population. Any one of a large number of qualified people could do the job about as well as any other qualified person -- they're "comparably qualified." As long as there is a qualified white man available to fill a position, how will the market punish a discriminatory company for refusing to consider qualified women or people of color?

The market most effectively punishes companies who discriminate in hiring their top managers, insist Proposition 209 advocates, since the highest levels of the corporate ladder are where a single individual can have the largest impact on a company. Hiring the wrong person for the mail room might slow down mail delivery, but hiring the wrong person for the executive suite could devastate an organization's future. But the market doesn't seem to be punishing companies who discriminate in their upper echelons. Ninety seven percent of the senior managers of Fortune 1000 companies are white and 95%-97% are male. We know there may not be nearly as many woman and people of color as there are white men in the "pipeline" for these jobs. But only those who choose to bury their head in the sand believe "pipeline problems" explain these Fortune 1000 numbers. The market doesn't work in practice the way proponents of Proposition 209 would have us believe.

Ultimately, anti-affirmative action forces are asking us all to take it on faith that the market will work today as it never has before in punishing companies that discriminate. It's worth the wait and worth the risk, they insist. Are we really willing to jeopardize 66% of the population while we waiting for a lumbering market to react? Are we willing to risk their future, and our collective welfare, on a market that may not react at all? Or are we going to say, instead, that we have waited long enough and will continue to take affirmative steps -- among them, pursuing affirmative action programs -- to combat discrimination in, and enhance the quality of, our workforce?

3.412 Anti-Discrimination Laws

Whatever discrimination the market can't handle, insist proponents of Proposition 209, anti-discrimination laws will effectively curb. Laws certainly can play a role in changing the world. They can educate us about how we should behave and set a standard against which our actions might be measured. But if laws are not adequately enforced the norms they mean to establish lose credibility -- and fast. Certainly, our nation's history confirms just how well laws on the books have worked in the absence of unequivocal willingness to enforce them. And, for those who would insist such history is now far behind us, current enforcement resources offer little reason to share the confidence anti-affirmative action forces mean to inspire in us.

Consider the struggles of African American citizens to exercise perhaps the most fundamental of democratic rights - the right to vote. In 1870 Congress passed the fifteenth amendment making it illegal to deny any citizen the right to vote on account of race, color or previous condition of servitude. Yet even a federal constitutional amendment was unable to prevent white citizens from using poll taxes, grandfather clauses, arcane literacy tests, and all-white

primaries to successfully keep Blacks from voting for nearly a century. Although Congress enacted federal civil rights laws designed to combat these discriminatory tactics in 1957, in 1960 and again in 1964, the practices persisted.

In 1965, Dr. Martin Luther King organized a voter registration campaign in Selma, Alabama -- a jurisdiction in which only 2% of all voting age Blacks were allowed to register. National television coverage showed the civil rights demonstrators being clubbed, trampled by horses, and viciously attacked with tear gas -- all because they were simply trying to register to vote. After two white civil rights activists were murdered during the Selma campaign, Congress drafted the most stringent voting rights law ever passed, the 1965 Voting Rights Act. Southern states immediately challenged the constitutionality of the Act. Only after protracted litigation did enforcement of the new law begin breaking down the 100 year old barriers erected between Blacks and the voting booth.

Or consider what is perhaps the most famous and heralded case ever decided by the U.S. Supreme Court -- *Brown v. Board of Education*. In 1954 the Supreme Court ruled that separate educational facilities are inherently unequal and that racial segregation harms Black children: "to separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." In the moment in which the decision was handed down, the centuries old practice of segregation was made illegal. At least formally, Jim Crow was declared dead.

In reality, however, little changed for Black school children in the years immediately following *Brown*. Southern resistance to the decision was profound. In 1956, ninety-six Southern Congressmen signed the Southern Manifesto by which they swore to use all lawful means to reverse *Brown*. The governors of Arkansas, Mississippi, Georgia and Alabama intoned "Surrender? Like hell!" Arkansas' Governor Faubus even called out the National Guard to prevent Black students from attending a "white" Little Rock high school.

In other parts of the county, school districts relied upon inertia to resist *Brown* -- with all deliberate delay, they failed to institute meaningful desegregation. By 1968, fourteen years after the decision was handed down, two-thirds of all Black students still attended virtually all-Black schools. By 1984, thirty years after the decision, two-thirds of all Black students attended schools in which minorities constituted more than half the student body and Northern schools were actually more segregated than in 1954, thanks to white flight to suburbs and to private or parochial schools. It is a particularly bitter irony that in 1979 Linda Brown, the original plaintiff from the 1954 decision, filed suit against the same board of education on behalf of her children for failing to desegregate the Topeka public schools. In 1989, thirty five years after the landmark decision, a federal court ruled that Topeka still had not sufficiently dismantled its segregated school system.

One hundred years passed before the fifteenth amendment's promise of equal access to the voting booth became a reality for millions of citizens of color. Thirty years after *Brown*, far too many students of color are still attending largely segregated schools. The point is obvious: Laws alone do not change society, whether they are laws passed by Congress or handed down by the highest court in the land. Ensuring equality of opportunity for all people requires something more than successfully lobbying for the passage of a law or persuasively arguing for a favorable judicial opinion.

Still, proponents of Proposition 209 argue that times have changed. We're willing, they insist, to enforce vigorously anti-discrimination laws. Even if we take them at their word, just how well are we currently equipped to fulfill this promise? Any fair-minded assessment of the resources we now have available for the enforcement of anti-discrimination laws gives one pause. Indeed, the action of those groups most closely associated with the anti-affirmative action movement seem, if anything, designed to cripple what enforcement mechanisms were once in place.

Take available dollars. Under Reagan and Bush's watch, the budgetary resources of the federal government's principal civil rights enforcement branches either stayed the same or diminished in real terms. Meanwhile, already backlogged claims of discrimination grew, and states failed miserably in picking up the slack. The Clinton Administration requests for budget increases in 1994 and 1995 met with limited success. And in 1996, Congress pressed for such across-the-board budget cuts that the very existence of some agencies is now threatened.

At the same time, the same forces in Congress who oppose affirmative action have fought hard to weaken enforcement mechanisms. They've opposed everything from broader agency remedial powers to the availability of more private lawsuits to substitute for the already weakened federal and state enforcement effort. By way of explanation, they insist existing laws already tilt against potential defendants. If we can agree that it is difficult and expensive to detect and prove discrimination, then the shift in concern away from those who suffer injury toward those who may have inflicted it seems, at best, peculiar. In any event, existing resources fail by a wide margin to match the proclaimed willingness to enforce anti-discrimination laws.

3.42 "It's Your Culture, Stupid"

But at bottom, those who support Proposition 209 may not worry much about whether they're wrong about the market or anti-discrimination laws. As they see it, today's disparities between groups aren't really the product of continuing discrimination. They reveal, instead, important "cultural differences." Mexican, Pilipino, Black, or Navajo cultures, for example, may or may not be inherently bad. But they certainly don't lend themselves to success in this country. If these groups really want to change their conditions, they have got to acknowledge the source of their problems and attack directly those inherited values that interfere with "making it" in the United States. They must change themselves -- not blame others -- if they're to gain their fair share of opportunities, responsibilities, and benefits.

In the more graphic version of this argument, Blacks, Mexicans, Pilipinos, and Navajos are not biologically subordinate (though some do make this claim) but culturally inferior. Barrios, ghettos and reservations encourage pathological behavior, which in turn often spreads far beyond geographical boundaries. If these people suffer disproportionately, it's as a result of their own pathologies, not racism. They are their own worst enemies and white America is the convenient scapegoat. The answer is for them to take some responsibility, put their own house in order, pull themselves up by their bootstraps. Any efforts to assist them, particularly any handouts like affirmative action, will only perpetuate their dependent and destructive tendencies.

In the more technically sophisticated rendition of this same argument, employers who judge individual women and non-white applicants on the basis of group generalizations act rationally. The cost of gathering detailed personal information on prospective job applicants is quite high, and gender and race are easily ascertainable. So long as there is a statistical connection between race or gender and a particular characteristic that the employer is interested in avoiding, race and gender might prove cost-effective proxies for screening out bad applicants.

Yes, some individual candidates who prove to be the exception to the rule do get hurt. But on average, proponents of Proposition 209 insist, the decisions are entirely defensible. If members of the group being stereotyped want to change mainstream perceptions of their culture, they must convince their own kind to change so that it is no longer rational to believe in and use the stereotype. Once a group changes, those institutions that cling to the old stereotypes will suffer: They will be making decisions based on inaccurate perceptions -- they will be practicing irrational discrimination. Employers who discriminate irrationally, once the free market goes to work, will lose out on hiring qualified, competent employees and will decline accordingly.

This approach to thinking about groups sounds, for many, at once horrifying and appealing. At the intuitive level, it's perhaps impossible to overestimate the lure of a solution like "what they need is to pull themselves up by their bootstraps." It has the simple moral clarity we all find ourselves craving when confronting unbelievably complex, ambiguous, and seemingly intractable problems. In addition, most people in their heart of hearts can't dismiss their belief that some people really are pathological. Is it so unfair, they ask themselves, to judge people on the basis of stereotypes if they're true?

Of course, whether these stereotypes are true has been the subject of decades of debates. Some insist they are, pointing in particular to various dysfunctions in barrios, ghettos, and reservations. Others (ourselves included) insist these stereotypes dramatically distort reality. They attribute confidently to groups what is true of only some individuals. They attribute to certain minority groups what may be, on closer inspection, at least as true of more mainstream groups. And they radically underestimate (and often blithely ignore) how low-income communities are themselves the product of larger national and global forces.

But we don't have to convince you these stereotypes are dead wrong to insist that Proposition 209's advocates can't rely upon them to explain away contemporary disparities. Even those experts who think these stereotypes may be true of certain urban and rural neighborhoods do not agree that judging an entire people by a neighborhood's problems makes any sense. It's grossly inaccurate and, if anything, encourages precisely what it claims to want to discourage. When members of minority groups realize that irrational stereotypes continue to prevent them from getting a decent job, they begin wondering just how much it's worth it to prepare themselves for opportunities. Meanwhile, society loses precisely the productivity advantages it hoped to gain by engaging its entire pool of talent. Finally, it contradicts experience to maintain that affirmative action inevitably perpetuates dependency and stifles self-reliance. No doubt some small fraction of beneficiaries think and act less independently. And these exceptions stick out, apparently, in the minds of many. But these exceptions hardly prove the claim advanced by proponents of Proposition 209. Consider a young Latina who, through her own hard work and the hard work and sacrifice of her parents, becomes the first in her family to go to high school. Early outreach affirmative action programs like Girls' Math encourage her to stay in school and to consider non-traditional careers in the math and sciences. And, if she cuts it, if she makes the competition, she may well find herself with a job beyond her imagination.

Proponents of Proposition 209 would have us believe we've done this girl no good. Having taken advantage of a Girls' Math program as a stepping stone to becoming a chemical engineer, we're to understand we've inevitably

encouraged her to become more dependent, perpetuating a cultural pathology. The same would be true, we're to believe, of the Black undergraduate who takes advantage of affirmative action programs designed to help African Americans prepare for the highly competitive process of entering law school. Likewise for the members of a Japanese American family who start their own vegetable farm and build it into a food distribution business that contracts with the state government through one of the minority-owned business set-aside programs. Absent empirical support for their sweeping claims, those proponents of Proposition 209 who accuse affirmative action of deepening cultural pathologies seem, if anything, to be making a case for more not less irrational discrimination. After all, how else are we to interpret their insistence that the past thirty years have only worsened the dependence of already dysfunctional cultures? In the name of the free market, and in support of Proposition 209, they may only heighten the need for affirmative action to fight the ugly stereotypes they encourage.

3.5 WE NEED CLASS-BASED AND NOT "COLOR-CONSCIOUS" AFFIRMATIVE ACTION

In the national debate surrounding affirmative action, interest has surfaced in replacing gender- and race-conscious with "class-based" affirmative action (or, as some refer to it, affirmative action based on "economic disadvantage"). Class-based programs would respond directly to the handicaps of poverty as experienced by all poor people. In that sense, they are seen by some as superior to gender and race-conscious systems which divide us on gender and racial lines and which award benefits to many who do not qualify as in any way economically disadvantaged. Somewhat inconsistently, many of the same people who advance the independent integrity of class-based affirmative action market it as a second-best surrogate for gender- and race-conscious programs out of favor in the current political climate.

Despite this growing support, class-based programs have yet to receive much sustained scrutiny -- by scholars, elected officials, or the body politic. Central questions remain unexplored, including the nature of the disadvantage poverty creates, the precise goals affirmative action might be intended to serve, the relationship between "class-consciousness" and existing merit systems, and the level of disadvantage necessary to trigger coverage. Indeed, as some have noted, class-based affirmative action would seem subject to most of the objections leveled at gender- and race-conscious programs. In this sense, it seems strange and perhaps suspicious that some avid supporters of Proposition 209 sometimes imply their support for class-conscious merit, often to cushion the impact of outlawing (they hope) gender- and race-conscious programs.

This renewed interest in class-based affirmative action obscures the degree to which the nation has already adopted such schemes. Many programs -- from early intervention to university admission -- have long targeted in various ways the economically disadvantaged. It is true, that these programs often merged gender- and race-conscious concerns with class-concerns. But both in terms of formal principles and certainly in terms of practice class-based programs have for some time been in operation. Perhaps talk of class-based affirmative action has escaped scrutiny not simply because gender- and race-consciousness is currently under the gun. We may feel we already "know" these programs and approve of them.

There are powerful reasons, we believe, for backing class-based affirmative action -- both by supporting current programs and by expanding class-consciousness further in merit-based systems. Such programs, however, are not, by any means, the single answer to poverty. Indeed, without the development of other well-coordinated poverty-programs, class-based affirmative action might well be asked to carry more weight than it can possibly bear. Still, justice and good sense insist we take this talk of class-based affirmative action seriously.

At the same time, class-based programs are not meaningful substitutes or surrogates for gender- and race-conscious affirmative action. The best available evidence tells us such substitutions would often devastate the interests women and people of color. A study of the University of California at Berkeley, for example, reports that implementing a class-based program in place of its now outlawed gender and race programs would reduce the number of African Americans from 6.4% in 1994 to between 1.4 and 2.3% of its freshman class. It is true that, in the absence of a class-based program, the same UC study reports the numbers of African Americans would fall even further to between 0.5 and 1.9%. While the difference is real, it hardly justifies the lavish praise class-based alternatives sometimes receive as healthy alternatives to current affirmative action programs.

There's even evidence suggesting that the ultimate beneficiaries of certain class-based affirmative action programs will have little in common with the rural Appalachian poor whose image anti-affirmative action advocates are so fond of invoking. If a class-based affirmative action admissions program gave preferences to students whose families earned less than \$20,000 annually, fully forty percent of the students meeting this class-based criterion would be white. Indeed, the largest group among the "poor" white students are actually children raised in middle-class families who attended middle-class high schools but whose family incomes fall below \$20,000 because their parents have divorced and the students are living with their mothers. Maybe this group deserves special attention in

a defensible merit-based admissions programs. But we should debate the question squarely rather than through loose proposals for class-based programs that are described as offering considerably different outcomes.

In any event, there's an odd dynamic at work here. Many of those supporting Proposition 209 offer class-based programs as a way of ameliorating the effects of banning gender-and race-conscious programs. They seem to have in mind, so far as their statements reveal, highlighting race and gender in their efforts to sweep as many people of color and women within the definition of economic disadvantage. They seem, in effect, to be offering as a surrogate a class-based system that transparently takes gender, and particularly race, into account directly in violation of Proposition 209's clear mandate.

More generally, the problem is obviously that class doesn't target, by definition, either the talents or the needs of women and people of color. Females, for example, tend to score lower than males on standardized tests in math and science, and people of color tend to score lower on standardized tests than whites. These trends remain constant even where females are wealthy and males poor, students of color wealthy and white students poor. Class-based affirmative action admissions programs will do nothing to address this disparity, and the current under-representation of these groups would continue.

Class-based affirmative action entirely sacrifices certain central goals of gender- and race-conscious programs. Consider an affirmative action admissions program at a medical school. If the goal of the program is to increase the number of doctors from poor backgrounds, a disadvantage-based admissions program would make sense. But where the goal is to increase the numbers of Asian, Latino, American Indian and Black doctors, then the students who are most likely to graduate from medical school and become effective doctors may very well be (like it or not) the students of color who come from middle class families and went to prestigious undergraduate universities. Or consider the principal goal animating most undergraduate affirmative action admissions programs -- admitting a diverse student body. Obviously poor people come in all colors, but the majority of poor people are white so setting aside admissions seats for poor students skews the entering class towards whites and frustrates the goal of producing a racially inclusive class.

Perhaps the most troubling aspect of relying exclusively on class-based affirmative action is that it means turning our backs on the very real problems of sexism and racism. More than occasionally, history reveals how this nation has substituted formal equality for more robust efforts to attack the ugly realities of race and gender. Much has changed to be sure, no small thanks to affirmative action. But it's delusional, at best, to treat contemporary gender and race problems as so minimal as to absolve us all of taking responsibility for continuing our efforts to root out the culture of subordination. For all its virtues, class-based affirmative action serves more as a debating prop than a serious alternative to current affirmative action programs.

4.0 PROPOSITION 209: THE CCRI

Proposition 209 would add a section to the California Constitution making nearly all public affirmative action programs illegal. It would outlaw any consideration of gender, race, national origin, ethnicity or color in any aspect of public employment, public education and public contracting. With so far reaching an impact, we should all know as much as possible about its particular provisions.

4.1 WHERE DID PROPOSITION 209 COME FROM?

The authors of the CCRI are Glynn Custred and Tom Wood. Custred is an anthropology professor at California State University, Hayward. Wood is the executive director of a conservative organization, the California Association of Scholars (CAS). Funded by its parent organization, the National Organization of Scholars, and other conservative foundations, the CAS is dedicated to fighting "political correctness" on California's campuses -- principally by opposing ethnic studies, women's studies, sexual harassment policies and policies promoting racial diversity (such as affirmative action).

Custred and Wood are committed to permanently banning affirmative action. They believe it amounts to preferential treatment for women and minorities and reverse discrimination against white males. They believe that racism and sexism are no longer a serious problem because the market and anti-discrimination laws have together leveled the

playing field. According to the CCRI world wide web site on the Internet ([HTTP://WWW.CAL-NET.COM/CCRI/](http://WWW.CAL-NET.COM/CCRI/)), Proposition 209 is needed to:

end the regime of race- and sex-based quotas, preferences and set-asides now governing state employment, contracting and education due to years of court decisions and bureaucratic regulations. The noble goal of the Civil Rights Act of 1964 -- equality before the law -- has been twisted into government-sanctioned discrimination. This system violates the fundamental principle of equal protection of the law against discrimination on the basis of the immutable characteristics of race, sex, color, ethnicity and national origin. CCRI is needed to end this wasteful and divisive system and restore color-blindness to California law and government. CCRI will help make the California Constitution an instrument of unity, not division.

Although Custred and Wood are the principal authors of Proposition 209, the group pushing the initiative (officially known as Californians Against Discrimination and Preferences) has several notable members. The CCRI is officially endorsed and supported by conservative California politicians such as Governor Pete Wilson and University of California Regent Ward Connerly. Politicians outside of California who have endorsed the CCRI include Republican presidential candidate Bob Dole and former Ku Klux Klan leader David Duke.

4.2 HOW DID PROPOSITION 209 GET ON THE NOVEMBER BALLOT?

In California, we have two ways of creating new laws, the legislative process and the initiative process.

4.21 The Legislative Process

Our elected state legislators can introduce proposed legislation ("bills") in the state Assembly in Sacramento. If a bill receives the required number of votes, it goes to the governor to sign into law. Both legislative bills and amendments to the California Constitution are created this way.

4.22 The Initiative Process

Ordinary citizens who have not been elected to office can write a proposed law and then lobby people to sign a petition to put the proposal on the ballot for the next general election. An "initiative" becomes law if it receives a majority of the votes cast by the general population.

The number of petition signatures required to put an initiative on the ballot varies. Proposed changes in the statutory law (as opposed to the California Constitution) must obtain signatures equal to 5% of the people who voted in the last gubernatorial election. Proposed constitutional amendments, like Proposition 209, must secure signatures at least equal to 8% of the people who voted in November of 1994 (our most recent gubernatorial election), or around 700,000 signatures. If a majority of the people who vote on November 5th favor Proposition 209, it will become an amendment to our California Constitution.

4.3 WHAT DOES PROPOSITION 209 SAY?

Thousands, if not millions, of people will see the actual text of Proposition 209 for the first time only when they step into the voting booth in November. That's unfortunate, we think, though entirely understandable given the complexity of the California ballot. Here's the full text.

PROPOSITION 209: THE CALIFORNIA CIVIL RIGHTS INITIATIVE

(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 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.

Because Proposition 209 purports to be about "civil rights" and because the words "affirmative action" never appear in the text of the initiative itself, well-intentioned but uninformed voters may actually vote YES believing they are supporting civil rights and affirmative action. Who wouldn't want to vote in favor of a law prohibiting the state from discriminating against people?

The confusing language is certainly not an accident. The authors made the language of Proposition 209 similar to Title VII, the landmark federal civil rights law making it illegal to discriminate in employment. Proponents of Proposition 209 consistently associate their anti-affirmative action initiative with the memories of Dr. Martin Luther King, Jr. and the Civil Rights Movement of the 1950s and 1960s -- in part because they realize, from surveys, that the vast majority of voters still strongly back "civil rights." All the more reason to parse carefully the language.

4.4 WHAT DOES THE TEXT OF PROPOSITION 209 REALLY MEAN?

4.41 Clause 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."

This is the heart and soul of the CCRI. If every other clause of the CCRI were eliminated, clause A alone would render illegal every public affirmative action program based on race, sex, ethnicity or national origin. The most deadly phrases in clause A are:

". . . GRANT PREFERENTIAL TREATMENT TO . . ."

Any program that gives one group an opportunity not extended to another group is, arguably, "preferential treatment" and would be eliminated by clause A. This language eliminates affirmative action without ever mentioning the words "affirmative action." Characterizing affirmative action as "preferential treatment" is obviously a calculated move. It substitutes a not much used and apparently inflammatory term for a more honest account of a history of the distinctly nonpreferential treatment that made affirmative action necessary. Still, affirmative action programs do grant opportunities ("preferences") to some qualified candidates over other qualified candidates.

". . . ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN . . ."

This language specifies the characteristics that a government cannot consider and would therefore permanently ban the operation of most affirmative action state and local programs. Notice, however, that the language does not forbid use of preferential programs for military veterans, athletes, children of alumni, or friends of the powerful.

". . . IN THE OPERATION OF PUBLIC EMPLOYMENT, PUBLIC EDUCATION OR PUBLIC CONTRACTING . . ."

This language defines the boundaries of Proposition 209's rather extraordinary reach. "Public employment" covers everybody who works for the state, or any county, or any city in California. The proposed constitutional amendment affects a tremendous number of Californians. After all, more Californians work for the government than for any other single employer. "Public education" includes all levels -- from preschool to graduate school. "Public contracting" encompasses every contract between the government and a private company. In other words, Proposition 209 aims to eliminate all affirmative action programs in state, county and city governmental agencies, in

public schools at every level, and in the programs where private companies do business with any state, or California county or city.

4.42 Clause F

"FOR 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. "

This crucial clause defines what the word "state" means in clause A. Many of us assume the word "state" means "the state of California." But, as used in Proposition 209, "state" includes every possible level of government from Pete Wilson's office to the local city council.

The language ". . . BUT NOT NECESSARILY BE LIMITED TO . . ." suggests that even more organizations than those actually listed in clause F could be considered as part of the "state." For example, if a private organization receives primary funding from a state source, it might be fall within the definition of "state" under Proposition 209 and be forbidden from operating or instituting an affirmative action program. The private organization would be in the unenviable position of either having to continue accepting funding from the state while eliminating its affirmative action programs or having to refuse state funding as the cost of continuing its affirmative action programs.

4.43 Clause B

"THIS SECTION SHALL APPLY ONLY TO ACTION TAKEN AFTER THE SECTION'S EFFECTIVE DATE."

This section means that Proposition 209 is not retroactive. In other words, if a person were admitted to school, awarded a contract with the government or promoted within a government agency, those opportunities could not be taken away if Proposition 209 passes. But this clause does not mean that affirmative action programs already in existence would not be eliminated. On the contrary, Proposition 209 would eliminate all existing or future public affirmative action programs using the characteristics listed in clause A.

4.44 Clause 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."

Despite the devastating impact of clause A, no section of Proposition 209 has generated as much controversy and debate as clause C. The words that are the focus of the controversy are ". . . BONA FIDE QUALIFICATIONS BASED ON SEX WHICH ARE REASONABLY NECESSARY . . ."

4.441 Perspective #1: Clause C's language comes directly from the text of Title VII of the Civil Rights Act of 1964 and carves out a common sense exception to Clause A's ban on gender classification.

Proponents of Proposition 209 contend that the language of clause C is lifted directly from Title VII, which says (in relevant part):

IT SHALL NOT BE AN UNLAWFUL EMPLOYMENT PRACTICE FOR AN EMPLOYER TO HIRE AND EMPLOY EMPLOYEES . . . ON THE BASIS OF HIS RELIGION, SEX, OR NATIONAL ORIGIN IN THOSE CERTAIN INSTANCES WHERE RELIGION, SEX, OR NATIONAL ORIGIN IS A BONA FIDE OCCUPATIONAL QUALIFICATION REASONABLY NECESSARY TO THE NORMAL OPERATION OF THAT PARTICULAR BUSINESS . . . (please see the Appendix A, "Legal Highlights," for a fuller version of the text of Title VII).

Proponents of Proposition 209 insist this language is necessary because there are rare circumstances where gender is a relevant characteristic for selecting a person. For example, without such a clause we might have to hire male prison guards to strip search female prisoners or we might have to hire male locker room attendants for female locker rooms or we might have to allow boys to compete on girls athletic teams.

The language "[N]OTHING IN THIS SECTION . . ." is particularly important to the proponents. This language, they contend, expressly limits the impact of clause C to how the text of Proposition 209 itself is interpreted. They contend the language of clause C could not be used to interpret other parts of the California Constitution. For

example, the California Constitution requires all gender-based distinctions to pass the strict scrutiny test to be upheld. Proponents argue that clause C would not repeal this requirement; if a court found that a gender classification was unconstitutional because it failed the strict scrutiny test, nothing in clause C would change that result.

4.442 Perspective #2: Clause C will allow increased discrimination against women in California.

Some opponents of Proposition 209 fear that clause C will actually lead to increased discrimination against women of all colors in California. There are at least three reasons why the CCRI's opponents make this claim.

4.4421 Clause C will lower the test for gender-based distinctions from strict scrutiny to mere rationality.

To understand this concern, we must briefly examine how courts review gender-based distinctions:

In view of the history of our nation's subordination of women, courts are justifiably suspicious any time a governmental agency treats people differently because of gender. When a court reviews a policy that makes a gender-based distinction, it applies a test to measure the law's constitutionality. The tests that courts impose are just like most of the tests we took in school. Some are so hard that almost nobody passes them. Others are so easy they're a joke. And still others fall somewhere in between. Each state has its own test and the federal government has its own separate test for gender-based distinctions.

When a court applies the federal test, the test is one of those that falls somewhere in the middle -- in fact, it's called intermediate scrutiny. To pass this test, the governmental agency making the gender-based distinction must prove that the distinction serves an important governmental objective and that the means used to achieve that objective are substantially related to that objective.

The California Constitution requires, by contrast, that gender-based distinctions be assessed according to the hardest test of all -- the so-called "strict scrutiny" test. To pass this test, the governmental agency that uses the gender-based distinction must prove that the distinction is necessary to achieve a compelling governmental objective and that the means used to achieve that objective are necessary. The distinction is considered "necessary" only if there is no less discriminatory way of achieving the objective. Although the terminology may seem flexible, it is much harder for a gender classification to survive California's strict scrutiny test than the federal government's intermediate scrutiny test.

The last type of test -- by far the easiest standard to meet -- is called the "rational basis" or "mere rationality" test, and it is used by both the federal government and California to measure distinctions that have nothing to do with race or gender. To pass the mere rationality test, the person objecting must prove either that the distinction serves no legitimate objective or that the means used to achieve an otherwise legitimate objective are not reasonably necessary. Note that unlike the first two types of tests, here the distinction is presumed constitutional. Under intermediate scrutiny and strict scrutiny the distinction is presumed unconstitutional and the government bears the burden of proving that it is not discriminatory.

Some opponents of Proposition 209 think that the words "REASONABLY NECESSARY" in clause C mean that if Proposition 209 passes, California will no longer apply the hardest test to pass (strict scrutiny) and will instead apply the easiest test to pass (mere rationality or reasonably necessary) in evaluating gender-based distinctions. If they are right, then a governmental agency could make gender-based distinctions favoring men or favoring women and those distinctions would almost certainly be deemed constitutional by the courts. Because the freedom to use gender-based distinctions has historically been used to discriminate against women more than to help them, opponents of Proposition 209 anticipate the "reasonably necessary" test will allow more discrimination against women.

4.4422 Omitting the Word "Occupational" from BFOQ will allow increased discrimination.

Title VII, the statute upon which Proposition 209 is assertedly based, allows for a narrow exception to the general rule that employers cannot use gender-based distinctions. Under this exception, a gender-based distinction is allowed where gender is itself a bona fide occupational qualification (BFOQ). (See text of clause E of Title VII in the Legal Highlights appendix). The classic example of a BFOQ is that prison guards who conduct strip searches should be the same gender as the prisoner searched so as to not violate the prisoners' rights to privacy. Traditionally, the courts rarely allow employers to invoke this BFOQ exception.

Many of Proposition 209's opponents contend that the seemingly analogous exception carved out by clause C -- bona fide qualification -- is actually extremely broad. The word "occupational" in BFOQ, they claim, is what has kept the BFOQ exception so narrow. This limitation requires that an employer may invoke the BFOQ exception to

justify a gender-based distinction only if it can draw a direct correlation between an employee's gender and some unique feature of the work he or she will perform. Proposition 209's opponents fear that when an employer no longer must draw this direct correlation and instead can simply intone that gender is a bona fide qualification for a position or opportunity, the government will use BFQ as a broad excuse for not providing opportunities to women. An employer could arguably justify hiring only men to work with certain radioactive or toxic materials that pose risks to fetuses under a BFQ exception. The same employer would not be able to justify this discrimination under the BFOQ exception because there is no direct correlation between a person's gender and his or her ability to perform the job. For example, a woman who isn't pregnant and a man could perform the job equally well.

4.4423 Adding "public education" and "public contracting" allows increased discrimination in new areas.

Title VII's BFOQ exception applies only to employment situations because Title VII has nothing to do with public education or public contracting. Opponents of Proposition 209 contend that since clause C adds public education and public contracting to the list of areas where a BFQ exception can be invoked, Proposition 209 opens the door for governmental agencies to offer certain educational or contracting opportunities to men only.

4.443 Perspective #3: Clause C doesn't automatically require judges to test gender-based distinctions using the mere rationality test, but it does open the door for judges to test gender-based distinctions using the intermediate test.

Still other opponents of Proposition 209 offer a view we find the most persuasive. Perspective #2, they claim, overstates the likelihood that clause C will result in gender-based distinctions being judged by a mere rationality rather than a strict scrutiny standard. Instead, clause C creates the possibility that some judges will decide to analyze gender-based distinctions under a less demanding standard, but it doesn't unequivocally require them to do so. Instead, it invites judges already so inclined to lower the test from strict scrutiny to intermediate scrutiny. Those who offer this interpretation focus their attention on the very arguments Proposition 209's proponents offer as assurances that clause C will not allow increased discrimination. Since the California Constitution already requires gender-based distinctions to pass the strict scrutiny test, insist proponents, Proposition 209 can't allow for any discrimination against women that would fail the strict scrutiny test. At the same time, proponents insist that since the language of clause C tracks the language of Title VII, Proposition 209 relies on the Title VII's traditional methods of interpretation.

But these dual assurances deliver an intrinsically contradictory message -- to judges and everyone else. Proposition 209 maintains California's traditional method for testing gender-based distinctions -- strict scrutiny -- while at the same time importing the federal government's traditional methods for testing gender-based distinctions -- intermediate scrutiny. By importing language from federal laws, clause C invites the distinct possibility that judges will have to decide how to reconcile this conflicting guidance. In the hands of a conservative California judiciary, clause C may well lead to the application of the less rigorous standard to gender-based classifications. **4.444 Perspective #4: Regardless of how clause C is interpreted, it is clause A that threatens to eliminate opportunities for women in California.**

At least some opponents of Proposition 209, ourselves included, wonder whether debate over clause C is diverting attention from Clause A's devastating impact on women of every color. No one seriously disputes that clause A will threaten and eliminate public affirmative action programs that benefit girls and women. In fact, even if the perspective on clause C offered by the proponents of the Proposition 209 proves correct, countless public affirmative action policies for girls and women will be dismantled because of the operative language of clause A.

4.45 Clause 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."

Sometimes consent decrees (a settlement reached by parties before the judge enters judgment in a lawsuit) and court orders (a judge or jury verdict) require a defendant to institute a "mandatory" affirmative action program. Clause D is intended to prevent a conflict between already existing court orders and consent decrees, on the one hand, and Proposition 209, on the other.

Notice, however, that Clause D applies only to those court orders and consent decrees which are "in force as of the effective date of this section." This means that, in the future, Proposition 209 will prevent state courts from ever

issuing a consent decree or a court order that establishes an affirmative action program. For example, even if a judge found that a police department had a long history of discriminating against Asian American applicants as police officers, she could not require the police department to establish an affirmative action program designed to remedy this discrimination.

4.46 Clause 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."

Some federal programs require that certain state and local agencies maintain affirmative action policies as an express prerequisite to receiving federal funding. If eliminating the affirmative action program in order to comply with Proposition 209 would cause the agency to lose federal funding, however, clause E allows the agency to continue the program to preserve federal funding. This section does not mean that affirmative action programs are safe so long as they are run by an agency receiving federal funding. Further, clause E protects affirmative action programs only so long as federal laws and policies require such programs. Since affirmative action is under fierce attack at the federal level, however, there is no assurance that today's federal mandates for affirmative action will provide a basis in the future for invoking clause E's protection.

4.47 Clause 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."

This section allows any injured party, regardless of race, sex, color, ethnicity or national origin, to file a lawsuit against any entity that violates Proposition 209. It also ensures that the remedies offered to such a plaintiff are identical to what he or she would be offered under California antidiscrimination laws.

4.48 Clause 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."

The authors drafted this section fully expecting a court challenge should Proposition 209 pass on the November ballot. If the courts determine that portions of Proposition 209 are unconstitutional, the authors do not want the entire text declared unconstitutional. If the courts rule entire sections invalid, the authors do not want the remaining sections nullified.

4.5 WHAT WE CAN DO IF PROPOSITION 209 PASSES IN NOVEMBER.

If Proposition 209 passes in November, it will become an amendment to the California Constitution. The only way to repeal an amendment is to go through the same process that ratified the amendment. Opponents of the Proposition 209 would have to circulate petitions for a ballot initiative to repeal the new amendment and collect signatures equal to 8% of the total number of people who voted in the last gubernatorial election -- roughly 700,000 signatures. Then a majority of voters in the next election must vote in favor of the initiative repealing the amendment. This is a long and arduous process, though obviously not an impossible one.

The other way a successful Proposition 209 could be overthrown is if the courts rule it unconstitutional. Drawing on recent experience with Proposition 187, many presume Proposition 209 will never take effect. They expect, though they usually can't explain why, that courts will enjoin its implementation for one or another reason. Such confidence is certainly exaggerated and perhaps even unfounded. Proposition 209 does raise serious constitutional questions, about which scholars already have offered conflicting views. But we cannot say, as scholars did about Proposition 187, that any sensible court will have no choice but to block its implementation. Proposition 209 may well prove unconstitutional, but no one who concludes it's a bad idea should presume the courts will "protect us from

ourselves."

4.51 The Importance of Voting.

Consider those groups who will lose the most if Proposition 209 passes: African Americans, American Indians, Asian Americans, Latinos and women. Now consider the various groups of people who have all been denied the right to vote at one time or another during our country's history:

African Americans (prohibited by law until 1870 and prohibited by de facto Jim Crow practices until 1965)

American Indians (most prohibited by law until 1870, some prohibited by law until even more recently)

Asian Americans (non-citizens prohibited from voting and Asian Americans not unconditionally allowed to become citizens until 1952)

Latinos (prohibited by law until 1870 and prohibited by de facto practices such as poll taxes and grandfather clauses until 1965)

white women (prohibited by law until 1920).

It's trite but true that the only certain way to block Proposition 209 is to register to vote and to vote. For all the reasons we may have for doing nothing, it's a big mistake. There's no way around the truth: Votes count.

5.0 CONCLUSION

Some three decades ago, bipartisan forces introduced affirmative action into how we think about and make merit-based decisions. They did so convinced that the nation needed something considerably more effective than the formal equality that historically promised so much and did so little to displace the American caste system. They did so certain that some combination of anti-subordination and diversity goals justified taking gender and race into account in making available education and jobs. They did so confident that no one could predict where affirmative action might lead us. Color-blind, merit-based opportunity had never been the nation's norm, after all. And the integration of dominant and subordinate groups remained more a threatening aspiration than a comforting reality -- a mystery to the very people who sang its praises.

The relatively young career of gender- and race-conscious merit-based systems can hardly be described as having gone smoothly. We've endured now and then, particularly in the early years, overzealous enforcement of vulgar versions of affirmative action. And, far more frequently, we've suffered the foot dragging of governments altogether averse to examining their own familiar practices and to taking women and non-whites seriously. Meanwhile, we've managed to acquire valuable experience. Through painstaking trial-and-error, we know more now than ever before. We know more now than ever before how we think about gender and race. We know more now than ever before how we think about merit. And we know more now than ever before just how much we still have to learn in designing selection mechanisms that, at once, measure a candidate's potential, satisfy an institution's overall needs, and serve a democracy's need to include.

Precisely because affirmative action makes us deal with one another, with our ideas of merit, and with our competing claims to equal citizenship, we've had our downs and our ups. If on some days relationships and institutions feel entirely transformed, we've all also experienced misgivings, disappointments, and antagonisms. What often appears to be the ugly by-products of affirmative action reflect, in most instances, underlying tensions centuries in the making. Still, it's much easier to blame affirmative action than to cope with what amounts to generations of grievances and stereotypes. And it's much more seductive to believe we could rid ourselves of "these troubles" simply by outlawing affirmative action than to grasp how much we no longer may be able or should even want to "turn back the clock."

Hard economic times have not helped. Panicked that we may need everything we can get our hands on, we've grown less willing than in earlier years to share what we have. At the same time, we've grown far more inclined than in earlier years to blame others for where they find themselves and to explain away our unwillingness to help out. We demand, for example, that people get off welfare and into jobs. Yet we never confront how few living-wage jobs we're creating, not simply because growth remains an economic riddle but because we've consciously chosen as a nation to keep wages down and the unemployment rate at a "natural" five or six percent. We demand, too, that people, especially young people, prepare themselves well for the demands of the new global economy. Yet we never

acknowledge how much our own reluctance to pay for quality public education dooms many young people, at best, to mediocre training and marginal jobs.

In the face of these pressures, it's entirely understandable that we might want to reconsider affirmative action. These days every social policy is up for grabs, perhaps even Social Security and Medicare. There's absolutely no reason to exempt gender- and race-conscious merit-based programs from careful scrutiny. And, truth is, we haven't. Those who have conducted the more comprehensive studies describe difficulties, dilemmas, and even disgraces. At the same time, however, they report substantial advances. We've got a long way to go, but we're doing a better job now than ever before in making opportunity available to women and people of color, in enhancing the quality of American institutions, and in preparing for an even more integrated future. The Clinton Administration's "mend it, don't end it" slogan, much as it has been mocked and dismissed, fairly accurately captures the near universal sentiment of those who have taken the time carefully to study three decades of affirmative action experiences. Proposition 209's presence on the November ballot is, in light of this history, both surprising and predictable. As a practical reply to the world we inhabit, recommending that we constitutionally prohibit ourselves from ever again using gender and race in affirmative action programs seems, at best, reckless and, at worst, reactionary. Proposition 209 would terminate and perhaps reverse how we finally have begun to come to grips with our past, our present, and our future. In the name of equality, it would have us ignore the reality of the communities we share. In the name of merit, it would have us outlaw those programs principally responsible for our finally beginning to take merit-based opportunity seriously. In the name of democracy, it would have us stifle efforts to share responsibility and clout. Proposition 209 is, at the same time, long overdue. We never really had a national debate when affirmative action was first introduced. Most people failed to appreciate its overlapping goals, its methods, or how it meshed with our merit-based, color-blind creed. In some ways, this proposed amendment to the California constitution serves as a national referendum on affirmative action, much as Proposition 187 did on undocumented immigration. Trouble is, Proposition 209 offers itself as the late-arriving antidote to a short-circuited democratic debate at a time when we've forgotten how to conduct honest, direct, and responsible political arguments. Instead of finally examining affirmative action, we've already spent too much time caricaturing it.

There's no question the nation is in the midst of a wrenching transition. For many the strain is entirely disconcerting. Three decades ago, most white men could expect their pick of education and jobs; women and people of color never competed in most areas and, conveniently, never expected much more, particularly in light of the education made available to them. Today, the United States has become an increasingly multi-cultural nation, to which all must adapt. If white men must understand their privilege cannot endure, women and people of color must grab and make the most of those opportunities that come their way. Together, merit and justice promise no more and require no less.

Affirmative action, warts and all, has served our nation well. Rooted in both honesty and reconciliation, refusing to tolerate either incompetence or discrimination, it provides us now more than ever with a no-nonsense approach to our dilemmas and dreams. We can't deal with the problems of gender and race unless we deal with them directly. We can't structure competition so no group or community remains systematically subordinated unless we open opportunities to our entire pool of talent. We can't achieve the full value of inclusion without deliberately designing our institutions with that goal in mind. Far from constitutionally banning affirmative action, we should embrace its promise and continue to guard against its abuses. For that, we're already well equipped. We should reject Proposition 209.