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The Legality of Promoting Inclusiveness: May the University of California use race or ethnicity as factors in applicant outreach?

By David Benjamin Oppenheimer<sup>1</sup>

I. Introduction.

In 1996 the voters of California adopted Proposition 209, amending the state Constitution to add the following provision:

“Article 1, section 31 . . . [T]he 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.”<sup>2</sup>

This essay addresses whether this prohibition of discrimination and preferential treatment bars the University of California’s flagship Berkeley campus from using race or ethnicity as factors in its outreach programs designed to recruit applicants. I will review the disputes over the meaning of section 31, and particularly the term “preferential treatment,” during the Prop 209 campaign, and after it was adopted by the voters. I will conclude that a ban on “preferential treatment” based on race and ethnicity does not prohibit all considerations of race and ethnicity in University outreach programs. I will then discuss two justifications for using race and ethnicity in recruiting applicants – as a means to promote diversity, and as an affirmative anti-discrimination program. I will conclude that the University may use race and ethnicity in its outreach programs to reach minority applicants who otherwise might not apply, as long as the program is broadly designed to also reach other potential applicants, regardless of their race or

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<sup>2</sup> Art. 1, section 31(a), Cal. Const. (West, 2006).

ethnicity.

## II. The 1996 Legal Controversy Over The Meaning of Proposition 209.

When Proposition 209 was placed on the ballot for the 1996 general election, it was the immediate subject of controversy over its meaning. That controversy sparked considerable debate, and pre-election litigation. The two sides couldn't even agree on whether the initiative was about "affirmative action."<sup>3</sup> Opponents of the ballot measure warned voters that it would (or could)<sup>4</sup> bar all affirmative action, while proponents tried to re-assure the electorate that it preserved affirmative action, while prohibiting "preferential treatment."<sup>5</sup>

The ballot argument submitted by the opponents emphasized the harm that passage would have on affirmative action programs, claiming that:

"the initiative's language is so broad and misleading that it eliminates equal opportunity programs including: [¶] [1] tutoring and mentoring for minority and women students; [¶] [2] affirmative action that encourages the hiring and promotion of qualified women and minorities; [¶] [3] outreach and recruitment programs to encourage applicants for government jobs and contracts; and [¶] [4] programs designed to encourage girls to study and pursue careers in math and science."<sup>6</sup>

In rebuttal, the proponents tried to reassure voters that the initiative wouldn't harm most affirmative action programs, asserting that:

"Proposition 209 bans discrimination and preferential treatment-period. Affirmative

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<sup>3</sup> Defining the term is often controversial. In prior articles I have identified five models of "affirmative action" – (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) affirmative anti-discrimination. See David B. Oppenheimer, Five Models of Affirmative Action, 4 Berkeley Women's Law Journal 42 (1989); Understanding Affirmative Action, 23 Hastings Constitutional Law Quarterly 921 (1996).

<sup>4</sup> Lydia Chavez, *The Color Bind: California's Battle to End Affirmative Action*, University of California Press (1998). As Professor Chavez explains, there was disagreement among the opponents over whether to assume the worst about how the proposition would be interpreted, which might help motivate voters to vote no, or to minimize its impact, in order to support legal arguments to limit its interpretation by the courts if it passed. Thus, the opposition arguments ranged from assertions that it **would** ban all affirmative action, to assertions that it **could** ban most affirmative action.

<sup>5</sup> As Chavez explains, polling data suggested that a majority of voters supported "affirmative action" but opposed "discrimination" and "preferential treatment." Thus, the "talking points" for debaters prepped by the proponents directed them to insist that the proposition preserved affirmative action, while refusing to be drawn into a discussion about what they meant by the term. *Id.*, at 47 (Gallup polls), 80 (telephone polls).

<sup>6</sup> <http://vote96.ss.ca.gov/bp/> (follow "California Ballot Pamphlet, General Election, November 5, 1996, hyperlink "Proposition 209"). (Last accessed October 9, 2006).

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action programs that don't discriminate or grant preferential treatment will be unchanged. Programs designed to ensure that all persons - regardless of race or gender - are informed of opportunities and treated with equal dignity and respect will continue as before.”<sup>7</sup>

This controversy over the meaning of the initiative’s language was at the heart of the two government-sponsored descriptions provided to voters – the analysis prepared by the Legislative Analyst for the Ballot Pamphlet, and the Ballot Title and Summary prepared by the Attorney General. Consistent with the opposing views of the Proposition’s proponents and opponents, the Legislative Analyst described the proposition as an attempt to eliminate “affirmative action,” while the Attorney General described it as an attempt to limit “discrimination and preferential treatment,” entirely avoiding the term “affirmative action.” Within this difference in point of view, the critical question was the meaning of the term “preferential treatment,” and thus the breadth of the initiative.

The analysis prepared by the Legislative Analyst recognized the uncertainty over the legal effect of the prohibition of “preferential treatment.” The proposition was broadly described as an attempt to limit or bar affirmative action programs.<sup>8</sup> The Analyst wrote that public university “programs such as scholarship, tutoring, and outreach that are targeted toward minority or women students” might be affected, but added that it was uncertain whether they actually would be affected until there were “court rulings on what types of activities are considered ‘preferential treatment’ . . .”<sup>9</sup>

The Analyst also concluded that “some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could be changed to target instead high schools with low percentages of UC or CSU applications.”<sup>10</sup>

In short, the Legislative Analyst acknowledged that outreach programs that use race or ethnicity could be affected by the proposition, but that they might not be, depending on how the courts interpret the term “preferential treatment.” And, she pointed to UC’s outreach programs as potentially at risk, and suggested that they might need to be re-designed to eliminate using

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<sup>7</sup> Id.

<sup>8</sup> “This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting *to the extent these programs involve “preferential treatment” (emphasis added)* based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered “preferential treatment” . . .” Analysis of Proposition 209 by the Legislative Analyst, accessible at <http://vote96.ss.ca.gov/bp/209analysis.htm> (Last accessed September 24, 2006).

<sup>9</sup> Id.

<sup>10</sup> Id.

race or ethnicity if the Proposition passed, again depending on how the courts interpreted the phrase “preferential treatment.”<sup>11</sup>

The Attorney General submitted a “Ballot Label” and “Ballot Title and Summary” that described the Proposition as concerned with “discrimination and preferential treatment,” not “affirmative action,” using the following language:

**“PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL  
TREATMENT BY STATE AND OTHER PUBLIC ENTITIES.  
INITIATIVE CONSTITUTIONAL AMENDMENT.**

- § Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
- § Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
- § Mandates enforcement to extent permitted by federal law.
- § Requires uniform remedies for violations. Provides for severability of provisions if invalid.

In response to the Attorney General’s ballot description, the “No on 209” campaign and other organizations opposed to the proposition petitioned the Sacramento Superior Court for an order requiring the description to be re-written, asserting that the Attorney General’s description was misleading because it failed to describe the proposition as an attempt to prohibit affirmative action.<sup>12</sup> The Superior Court agreed, granting a writ of mandate. The court found that “the main purpose or chief point of the initiative, . . .” [is] “to effect changes or stop the affirmative action programs with the [S]tate of California . . . .”<sup>13</sup>

The Court of Appeal reversed. The court found that “any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence ‘false and misleading’ (Elec.Code § 9092)”<sup>14</sup> because “[m]ost definitions of the term [affirmative action] would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs.”<sup>15</sup> Thus, in the view of

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<sup>11</sup> Id.

<sup>12</sup> See *Lungren v. Superior Court*, 48 Cal.App.4th 435 (1996) at 437.

<sup>13</sup> Id. at 441 (quoting from Court of Appeal’s quotation of Superior Court transcript).

<sup>14</sup> Id. at 442.

<sup>15</sup> Id.

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the California Court of Appeal, Proposition 209 banned discrimination and preferential treatment based on race or ethnicity, but did not ban affirmative action outreach programs. The court did not address whether its definition of affirmative action outreach programs included outreach programs that utilized race or ethnicity.

On November 5, 1996 Proposition 209 passed, receiving 54.6% of the votes cast.<sup>16</sup> It was temporarily stayed by the United States District Court, but that stay was lifted by the United States Court of appeals for the Ninth Circuit. When a petition to review the Ninth Circuit's decision was rejected on November 3, 1997, the Proposition took effect.

In the wake of the initiative taking effect, the dispute over the meaning of the term “preferential treatment” has continued. It has been the source of disagreement not only in the courts, as described in Section III *infra*, but among the Legislature and the Executive as well. For example, in 2004 the California Legislature overwhelmingly passed a bill based on the position that to “consider” race and/or ethnicity does not necessarily constitute “preferential treatment” based on race and/or ethnicity. The bill authorized the University of California and California State University to “consider culture, race, gender, ethnicity, national origin, geographical origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given.”<sup>17</sup> The Legislative Counsel's office offered a legal opinion that the bill was not inconsistent with Article 1, Section 31 – that an admissions process could consider race as a positive factor in admissions without giving preferential treatment based on race.<sup>18</sup> The bill passed the Assembly by a vote of 47 to 27, and the Senate by a vote of 22 to 13, but it was vetoed by Governor Schwarzenegger.<sup>19</sup> The Governor explained that “[t]he practical implementation of the provisions of this bill would be contrary to the expressed will of the people who voted to approve Proposition 209 in 1996. Therefore, since the provisions of this bill would likely be ruled as unconstitutional, they would be more appropriately addressed through a change to the State Constitution.”<sup>20</sup>

Ultimately, the question of what meaning to give the term “preferential treatment” must

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<sup>16</sup> 2003 CA A.B. 2387 (vetoed by Gov. Sept. 29, 2004). See <http://vote96.ss.ca.gov/Vote96/html/vote/prop/page.961218083528.html> (Last accessed September 24, 2006).

<sup>17</sup> Assembly Bill 2387 (2003-2004) (Firebaugh). See [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2351-2400/ab\\_2387\\_bill\\_20040824\\_enrolled.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040824_enrolled.html). (Last accessed October 1, 2006).

<sup>18</sup> See Report of Senate Committee on Education, at [http://info.sen.ca.gov/pub/03-04/bill/asm/ab\\_2351-2400/ab\\_2387\\_bill\\_20040824\\_enrolled.html](http://info.sen.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040824_enrolled.html). (Last accessed October 1, 2006).

<sup>19</sup> See Complete Bill History at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2351-2400/ab\\_2387\\_bill\\_20040929\\_history.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040929_history.html). (Last accessed October 1, 2006).

<sup>20</sup> Governor's veto message dated September 29, 2004. See [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2351-2400/ab\\_2387\\_vt\\_20040929.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_vt_20040929.html). (Last accessed October 1, 2006).

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be left to the California Supreme Court.<sup>21</sup> But the Legislature's interpretation is entitled to great deference when there is ambiguity over a term's meaning.<sup>22</sup>

In light of the 2004 opinions of the Legislative Counsel, the members of the Legislature, and the Governor, as well as 1996 opinions of the Court of Appeals in the *Lungren* case, then-Attorney General Lungren, the Legislative Analyst, and the proponents and opponents of the initiative, we must acknowledge considerable doubt about the meaning of the phrase "preferential treatment" as used in Proposition 209. Clearly, Article 1 section 31 of the California Constitution prohibits the University of California from giving "preferential treatment" on the basis of race and/or ethnicity. But the ban on "preferential treatment" may not extend to "outreach," "affirmative action," or a decision to "consider" race and/or ethnicity as a "plus factor." With these limitations in mind, how have the courts interpreted the initiative following its adoption by the voters?

### III. Judicial Applications of Article 1, Section 31.

By far the most important judicial application of Article 1, section 31 since its adoption by the voters was the California Supreme Court's decision in *Hi-Voltage Wire Works, Inc. v. City of San Jose*.<sup>23</sup> In *Hi-Voltage*, the white owner of an electrical contracting firm asserted that parts of an affirmative action program run by the City of San Jose constituted "preferential treatment" on the basis of race under section 31. The program included a requirement that companies bidding on City contracts provide notice to "minority owned business enterprises" ("MBE's") and Women owned businesses ("WBE's") of the opportunity to bid on sub-contracts.

The City argued that its plan did not offend section 31 because it was merely an outreach plan, not a preferential treatment program. It pointed to the fact that contractors were not prohibited from contacting white owned businesses in seeking sub-contractors, they were merely not compelled to contact them.<sup>24</sup> But the court held that "preferential treatment" was "giving a priority or advantage to one person over others,"<sup>25</sup> and that the City was requiring contractors to give preferential treatment to minority sub-contractors over white sub-contractors, since there was no requirement that contract bidders provide notice to white sub-contractors.<sup>26</sup>

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<sup>21</sup> See *Sands v. Morongo Unified School District*, 53 Cal.3d 863, 902-903 (1991) (California Supreme Court is the final authority on interpretation of the state Constitution).

<sup>22</sup> See *C&C Construction v. Sacramento Municipal Utility District*, 122 Cal.App.4th 284, 302 (2004) and cases cited therein. In *C&C* the Court of Appeals held that the meaning of "discrimination" in section 31 was unambiguous. *Id.* at 302. For the reasons described herein, it would be hard to reach the same conclusion regarding the phrase "preferential treatment."

<sup>23</sup> 24 Cal.4th 537 (2000).

<sup>24</sup> *Id.* at 566.

<sup>25</sup> *Id.* at 560.

<sup>26</sup> *Id.* at 563-564.

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In her majority opinion, Justice Brown exhaustively recounted the history of racism against African Americans in American law, and argued that the great triumph of the 1960's was the commitment to make all racial discrimination unlawful, regardless of its target. Thus, providing “preferential treatment” to minority business enterprises, by giving them alone special notice of bidding opportunities, gave them a “priority or advantage” over other white-owned business enterprises merely because of the race of the business owner.

Turning from the meaning of “preferential treatment” to the meaning of “discrimination,” Justice Brown took an approach that could prove critical to understanding the scope of section 31. Although Justice Brown is regarded as a conservative on racial justice issues, she rejected the prevailing conservative view that limits the legal meaning of the term “discrimination” to intentional discrimination. Instead, she wrote “the voters intended Section 31 . . . ‘to achieve equality of public employment, education, and contracting opportunities’ [citing *Griggs v. Duke Power Company*<sup>27</sup>] and to remove ‘barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification.’ [again citing *Griggs*<sup>28</sup>] .”<sup>29</sup> Justice Brown’s reliance on the *Griggs* case may prove to be very important in future litigation over the meaning of section 31.

In *Griggs*, the U.S. Supreme Court adopted an “effects test” for employment discrimination to root out conduct that was neutral on its face but discriminatory in application. For many conservatives the *Griggs* case is identified as the first case where the Supreme Court moved away from “color-blindness” and toward support for affirmative action.<sup>30</sup> Here, Justice Brown is recognizing that courts need to look beyond intent to see whether the effects of neutral conduct are discriminatory. In the Hi-Voltage case, this led to the conclusion that white-owned businesses were being unfairly excluded based on the owner’s race. But in university recruitment cases, as discussed below, color-consciousness may be necessary to avoid discriminatory effects. Or, a color-conscious recruitment plan may operate as an anti-discrimination device.

According to Justice Brown’s majority opinion, the major problems with the City of San Jose’s program was the exclusion of potential white male subcontractors from the group receiving notice of opportunities to bid, solely because of race, coupled with the compulsion to contact potential minority and female subcontractors. “The relevant constitutional consideration is that they [prime contractors] are compelled to contact MBE’s/WBE’s, which are thus accorded preferential treatment within the meaning of section 31.”<sup>31</sup> By contrast, a program would be permissible if “‘designed to ensure that all persons – regardless of race or gender – are informed

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<sup>27</sup> 401 U.S. 424, 431 (1971).

<sup>28</sup> Id. at 431.

<sup>29</sup> Hi-Voltage, *supra*, 24 Cal.4th at 549.

<sup>30</sup> See, e.g., Stephan and Abigail Thernstrom, *America in Black and White: one nation, indivisible*, New York, NY. Simon & Schuster (1997) (and sources cited therein).

<sup>31</sup> Hi-Voltage, *supra*, 24 Cal.4th at 562.

of opportunities and treated with equal dignity and respect.”<sup>32</sup>

The two principal opinions in *Hi-Voltage* (the majority opinion by Justice Brown,<sup>33</sup> and a concurring and dissenting opinion by Chief Justice George<sup>34</sup>) were both concerned with not over-stating the effects of the decision. Thus, Justice Brown stated that “[a]lthough we find the City’s outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. . . . We express no opinion regarding the permissible parameters of such efforts.”<sup>35</sup> Chief Justice George makes the same point, writing “although the arguments in favor of Proposition 209 identified some types of affirmative action programs at which the measure was directed, the argument did not purport to define with any degree of specificity the factors that should be considered in determining whether a program ‘discriminates against’ or ‘grants preferential treatment to’ an individual or group on the basis of the prohibited characteristics.”

To appreciate the degree to which Justice Brown and Chief Justice George leave open considerations of race that do not constitute “preferential treatment,” the concurring opinion by Justice Mosk is noteworthy.<sup>36</sup> Justice Mosk concurred separately because, in his words “I wish to say something more.”<sup>37</sup> That something more was that race should never be considered to any degree whatsoever, and it was said alone; no other Justice joined the opinion. As Justice Mosk read the initiative,

“[n]either section 31’s prohibition against the improper assigning of any burden or benefit in the operation of public employment, public education, or public contracting, nor its command of equal treatment therein, is limited solely to ends. Rather, both extend to means as well. Thus, one may not assign any burden or benefit improperly in an attempt to assign some other burden or benefit properly. Similarly, one may not afford treatment that in any respect is unequal in an attempt to afford treatment that in some other respect is equal. For section 31 at least, the end does not justify the means. Rather, means and end must each justify itself in light of section 31’s prohibition and command.”<sup>38</sup>

In other words, Justice Mosk alone would not permit the use of race or ethnicity even within a plan designed to produce a non-discriminatory result. He rejects the view expressed by Justice Blackmun that “[i]n order to get beyond racism we must first take account of race.”<sup>39</sup>

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<sup>32</sup> Id. at 564 (quoting from Ballot Pamphlet rebuttal to argument against Prop. 209).

<sup>33</sup> Id. at 541.

<sup>34</sup> Id. at 576.

<sup>35</sup> Id. at 565.

<sup>36</sup> Id. at 586.

<sup>37</sup> Id. at 570.

<sup>38</sup> Id. at 571.

<sup>39</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).



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In limiting the scope of their opinions, and leaving room for “affirmative action” programs that take account of race but do not constitute “preferential treatment,” both the majority opinion by Justice Brown and the concurring and dissenting opinion by Chief Justice George cited an example of an affirmative action program that did take account of race but did not constitute preferential treatment based on race. They pointed to the City of Los Angeles plan that the California Supreme Court had previously upheld in *Domar Electric, Inc. v. City of Los Angeles*.<sup>40</sup> The Los Angeles plan required contract bidders to establish that they had provided notice of opportunities to bid on subcontracts to MBE’s, WBE’s, and “other business enterprises” (“OBE’s”). The court concluded that the Los Angeles plan did not constitute preferential treatment based on race or sex since it also required notice to OBEs. That is, an outreach plan could target women and minorities based on sex, race or ethnicity, as long as it also targeted other groups on a basis other than sex, race or ethnicity. As the court explained:

“[T]he outreach program here poses none of the particular evils identified by *Domar*. The program does not require bidders to contract with any particular subcontractor enterprise, nor does it compel them to set aside any percentage of a contract award to MBE’s or WBE’s in order to qualify for a municipal contract. And even though the Board’s outreach program provides an estimate that a participation level of 1 percent by MBE’s and WBE’s may be anticipated by the exercise of good faith efforts, a bidder gets no advantage or disadvantage from meeting or not meeting the specified participation level. Thus, the program provides no incentive to a bidder to use MBE’s or WBE’s if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field. . . .

As the United States Court of Appeals for the Ninth Circuit recognized, perhaps the most important goal of competitive bidding is to protect against ‘insufficient competition to assure that the government gets the most work for the least money.’ (citation omitted). Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition.”<sup>41</sup>

Thus, under the reasoning of the *Domar Electric* decision, an outreach program which considers minority race and/or ethnicity, among other factors, and which is designed so that it does not reach fewer non-minority applicants than would otherwise be recruited, is permissible.

Does the *Domar Electric* case, which preceded the adoption of section 31, tell us anything about how to interpret section 31? Yes. Both Justice Brown and Chief Justice George cite *Domar Electric* as an example of a permissible affirmative action outreach program. Chief Justice George discussed the relationship between *Lungren v. Superior Court*, the pre-election

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<sup>40</sup> 9 Cal.4th 161 (1995).

<sup>41</sup> *Id.* at 177.

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decision upholding the Attorney General’s ballot description of Proposition 209, and *Domar Electric*. He explained that the correctness of the *Lungren* decision’s statement that “affirmative action” is broader than “preferential treatment,” and its statement that outreach programs are outside the scope of section 31, is demonstrated by the fact that the Los Angeles “race and sex plus other” plan was upheld in the *Domar Electric* case.<sup>42</sup>

Other decisions by California’s appellate courts tell us little about how a university outreach program would be analyzed under section 31.

In *Kidd v. State of California*,<sup>43</sup> the Court of Appeals held that a State Civil Service affirmative action hiring program was in violation of the State Constitution’s civil service provisions, as well as section 31. There was no discussion of higher education recruiting.

In *Connerly v. State Personnel Board*,<sup>44</sup> the Court of Appeals held that five statutory affirmative action programs were in violation of section 31. Four, however, had nothing to do with education.<sup>45</sup> The fifth was concerned with Community Colleges, but with their hiring practices, not their recruitment of students.<sup>46</sup>

The decision did concern outreach programs, but in the context of programs seeking employees and/or contractors, not students. Nonetheless, the decision, in dicta, raised the question of outreach to students in higher education. In this regard, the decision added a truism that addresses the question, but does not advance the discussion. The court explained:

“Several respondents assert that statutory schemes which may be denominated as outreach, recruitment, or inclusive measures do not violate principles of equal protection or Proposition 209.

With respect to a benefit or advantage, such as admission to a school of higher education, a government job, or a public contract, the cognizable interest of a competitor is in being able to compete on an equal footing without regard to the race or gender of other competitors. A competitor does not have a constitutionally cognizable interest in limiting the pool of applicants with whom he or she must compete. Therefore, outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden.

But if the statutory scheme relies upon race or gender classifications, it must, for

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<sup>42</sup> *Hi-Voltage*, supra, at 594 (concurring opinion of George, C.J.).

<sup>43</sup> 62 Cal.App.4th 386 (1998).

<sup>44</sup> 92 Cal.App.4th 16 (2001); attorney’s fees award reversed, 37 Cal.4th 1169 (2006).

<sup>45</sup> They concerned the State Lottery Commission, the sale of State bonds, the Civil Service hiring system, and State contracting. See *Id.* at 27.

<sup>46</sup> *Id.* at 57-60.

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equal protection analysis, be subjected to strict judicial scrutiny. And if it discriminates against or grants preference to individuals or groups based upon race or gender, it is prohibited by Proposition 209.”<sup>47</sup>

The statement is unarguably correct, but gives no further help in determining when consideration of race constitutes the granting of “preferential treatment.”

In *Crawford v. Huntington Beach Union High School District*,<sup>48</sup> the Court of Appeals found that a race-based transfer policy limiting transfers in and out of a high school violated section 31. There was no discussion of outreach or recruiting.

In *Coral Construction v. City and County of San Francisco*,<sup>49</sup> the Court of Appeals rejected a section 31 challenge to the San Francisco affirmative action contractors program, finding the plaintiff lacked standing. There was no discussion of recruitment or outreach.

In *C&C Construction v. Sacramento Municipal Utility District*,<sup>50</sup> the Court of Appeals held that an affirmative action contracting program similar to the *Hi-Voltage* program violates section 31. Here too, the program did not concern recruiting of students in higher education. The major issue was whether the program fit within an exception to section 31 for programs necessary to maintain federal funding.<sup>51</sup> The meaning of “preferential treatment” was not before the court, because parties stipulated that if the federal funding exception did not apply, the program violated section 31.<sup>52</sup>

In *Hernandez v. Board of Education*,<sup>53</sup> the Court of Appeals held that transitional funding of magnet schools that had been created as part of a de-segregation plan did not violate section 31. There was no discussion of recruiting or outreach.

Finally, *Horsford v. Board of Trustees of California State University*<sup>54</sup> is an employment discrimination case, which has nothing to do with recruitment.

No judicial decision has yet addressed the question of what kinds of affirmative action remain available to the University of California in recruiting applicants. But the California Supreme Court’s reliance on *Domar Electric* as an example of the kind of outreach program

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<sup>47</sup> Id. at 46 (citations omitted).

<sup>48</sup> 98 Cal.App.4th 1275 (2002).

<sup>49</sup> 116 Cal.App.4th 6 (2004).

<sup>50</sup> 122 Cal.App.4th 284 (2004).

<sup>51</sup> Id. See lead opinion by Justice Nicholson at 291, concurring opinion by Justice Raye at 312, and dissenting opinion by Justice Blease at 736.

<sup>52</sup> Id. at 297.

<sup>53</sup> 126 Cal.App.4th 1161 (2004).

<sup>54</sup> 132 Cal.App.4th 359 (2005).

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permitted by section 31 suggests that the University may engage in affirmative action outreach programs designed to reach minority applicants who might otherwise not apply, as long as the program is broadly designed to also reach other additional Californians, regardless of their race or ethnicity.

IV. Justifications for Affirmative Action Outreach to Reach Minority Applicants.

It's one thing to conclude that under section 31 the University may use race and/or ethnicity as factors in its outreach programs, and another to conclude that it should. This section addresses the justifications for the Berkeley campus to use affirmative action outreach to include African American, Hispanic American, American Indian, and under-represented groups of Asian American applicants among those recruited. I will suggest that there are two principle justifications for the Berkeley campus to consider race and ethnicity, among other factors, in its outreach to applicants. The first is the importance of enrolling a diverse student body; the second is the need to counter structural discrimination against certain minority groups with affirmative anti-discrimination efforts.

A. The Diversity Justification.

The diversity justification for higher education affirmative action was articulated and endorsed by Justice Powell in the *Bakke* case.<sup>55</sup> There, the Court found that while the University of California's Davis medical school could not set aside sixteen places exclusively for minority students, it could properly use racial and/or ethnic diversity as a "plus factor" in making admissions decisions. The *Bakke* case is not directly on point in considering the use of race for outreach; *Bakke* was decided under the Equal Protection clause of the Fourteenth Amendment, not section 31, and admissions offers are more likely to be regarded as "preferential treatment" than are outreach efforts. Nonetheless, Justice Powell's reasoning in *Bakke* illustrates why the University of California can properly justify the consideration of race and/or ethnicity as part of a larger diversity-based recruitment program.

"[T]he attainment of a diverse student body. . . clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom:

'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

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<sup>55</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

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“Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*:<sup>56</sup>

‘Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”

“The atmosphere of ‘speculation, experiment and creation’ – so essential to the quality of higher education--is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the ‘nation's future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>57</sup>

Justice Powell then quotes from an article by William Bowen, then the President of Princeton University:

“‘[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, ‘People do not learn very much when they are surrounded only by the likes of themselves.’

\* \* \*”

“‘In the nature of things, it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.’”<sup>58</sup>

Returning to the value of diversity, Justice Powell further observed:

“The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a

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<sup>56</sup> 385 U.S. 589, 603 (1967).

<sup>57</sup> *Bakke* at 312-313 (opinion of Powell, J.) (footnotes omitted).

<sup>58</sup> *Id.* at 313, note 48, (opinion of Powell, J.) (quoting from Bowen, *Admissions and the Relevance of Race*, *Princeton Alumni Weekly* 7, 9 (Sept. 26, 1977)).

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necessary means toward that end. An illuminating example is found in the Harvard College program:

‘In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

‘In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . .

‘In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.’<sup>59</sup>

Justice Powell continued: “In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from

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<sup>59</sup> App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3.

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year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.

\* \* \*”

“This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”

“Universities, like the prosecutor in Swain, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.”<sup>60</sup>

Justice Powell's defense of racial and ethnic diversity as a justification for affirmative action in admissions was reaffirmed in 2003 in *Grutter v. Bollinger*.<sup>61</sup> In *Grutter*, a white applicant to the University of Michigan's law school challenged the rejection of her application, claiming that the school's affirmative action program violated her rights under the Fourteenth Amendment. In her majority decision, Justice O'Connor explains the school's policy as follows:

“The policy aspires to ‘achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.’ The policy does not restrict the types of diversity contributions eligible for ‘substantial weight’ in the admissions process, but instead recognizes ‘many possible bases for diversity admissions.’ The policy does, however, reaffirm the Law School's longstanding commitment to ‘one particular type of diversity,’ that is, ‘racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.’ By enrolling a ‘critical mass’ of [underrepresented] minority students,’ the Law School seeks to ‘ensur[e] their ability to make unique contributions to the character of the Law School.’”

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<sup>60</sup> Bakke at 319, note 53 (opinion of Powell, J.) (footnotes omitted).

<sup>61</sup> 539 U.S. 306 (2003).

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“The policy does not define diversity ‘solely in terms of racial and ethnic status.’ Nor is the policy ‘insensitive to the competition among all students for admission to the [L]aw [S]chool.’ Rather, the policy seeks to guide admissions officers in ‘producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.’”<sup>62</sup>

Turning to the justification for such policies, Justice O’Connor found that under the “strict scrutiny” test applied to racial classifications by government, the University had established a “compelling interest” in using race and ethnicity as part of its program to recruit a diverse student body. She explained:

“The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. . . . We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission . . . .”

“As part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School seeks to ‘enroll a 'critical mass' of minority students.’ The Law School's interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ That would amount to outright racial balancing, which is patently unconstitutional. . . .”

“. . . As the District Court emphasized, the Law School's admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”

“The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’ These benefits are not theoretical but real, as major American businesses have made clear

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<sup>62</sup> Id. at 315-316 (citations omitted).



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that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.' . . ."

"Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges."

"In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . ."

"The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."<sup>63</sup>

Like the University of Michigan Law School, the University of California's Berkeley campus seeks, as permitted by *Bakke* and *Grutter*, a diversified student body. In this context, diversity may include ethnic and racial diversity.

Relying on *Bakke*, the University may seek an atmosphere of "speculation, experiment and creation," and may see a diverse student body as critical in this quest. It is the responsibility of the University to train our State's and Nation's future leaders, trained through wide exposure

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<sup>63</sup> Id. at 328-333 (citations omitted).

to that robust exchange of ideas. The campus leaders may recognize that “[p]eople do not learn very much when they are surrounded only by the likes of themselves.” Thus, “a farm boy from [the Central Valley] can bring something to [Berkeley] that a San Franciscan cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.” The criteria sought may “include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”<sup>64</sup>

Relying on *Grutter*, such a “policy does not define diversity ‘solely in terms of racial and ethnic status.’” The University may set a “goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse.’” The University may rely on “numerous studies [that] show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’ These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Here, as in Michigan, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”<sup>65</sup>

#### B. The Anti-Discrimination Justification.

As noted *supra*, anti-discrimination efforts may also be described as a form of affirmative action.<sup>66</sup> If an anti-discrimination program operates without “preferential treatment” or “discrimination” it is the kind of affirmative action program that section 31 was intended to retain. Justice Brown’s reliance on *Griggs* in her opinion in *Hi-Voltage* supports the position that “discrimination” under section 31 includes unintentional as well as intentional discrimination, and all discrimination is improper under section 31. Thus, if the University, even without intent, is discriminating on the basis of race and/or ethnicity in its current recruitment efforts, it is obligated under section 31 to undertake affirmative anti-discrimination efforts to correct the discriminatory effects of its policies.

As other reports at this conference demonstrate, the Berkeley campus of the University of California is not recruiting or otherwise attracting applications from anywhere near the number of racial and ethnic minority group members that we should expect. There is no reason to believe that this is the result of intentional discrimination on the part of University officials.

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<sup>64</sup> Bakke, at 316 (opinion of Powell, J.).

<sup>65</sup> *Grutter*, at 332.

<sup>66</sup> See David B. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 *Berkeley Women’s Law Journal* 42 (1989); *Understanding Affirmative Action*, 23 *Hastings Constitutional Law Quarterly* 921 (1996).

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From what we know about the nature of discrimination this should be no surprise. But unintentional discrimination is nonetheless discrimination, and requires a remedy under section 31.

Scientists, courts, and legal scholars are increasingly aware that unintentional racial discrimination permeates American society. In legal scholarship, the ground breaking work of Charles Lawrence in the 1980's demonstrated that the unconscious plays a substantial role in why white Americans discriminate against members of racial and ethnic minorities.<sup>67</sup> In my own work on the subject, building on Lawrence's, I relied on the social psychology of white racism to argue that employment discrimination should be viewed as a form of negligence.<sup>68</sup> Linda Krieger took these concepts to a new level in revealing how the science of cognitive bias demonstrates that it is nearly impossible for a white-dominated society not to discriminate against racial and ethnic minority group members.<sup>69</sup> The scientific evidence that most white Americans have unintended deep seated biased views of African Americans is as unassailable today as Darwinian evolution (and perhaps nonetheless equally controversial).

To explore what white bias and structural racism tell us about potential UC applicants, I suggest we explore the life of a fictional, but demographically typical, seventeen year old African American high school junior. What do we know about the life experience of any seventeen year old high school junior in California thinking (or not) about applying to college? First, we know that social class plays a substantial role in how well prepared he or she is for college, and in how well informed he or she is about college opportunities and the application process. Family wealth, family income, parents' educational achievement, high school attended, and neighborhood all act as strong predictors of preparation and information. And, since there is a strong correlation between all five of these factors and race/ethnicity, race and ethnicity also act as strong predictors of preparation and information. The whiter the school and neighborhood, the more likely they are populated by well informed and well prepared students who have more family wealth, more family income, and more parental education.<sup>70</sup>

But class alone cannot fully explain the disadvantages experienced by our seventeen year old African American high school junior. The structure of American racism plays a profound additional role, beyond the disadvantages of low wealth, income and education.<sup>71</sup>

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<sup>67</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987).

<sup>68</sup> David B. Oppenheimer, *Negligent Discrimination*, 141 *Univ. Of Penn. L. Rev.* 899 (1993).

<sup>69</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995).

<sup>70</sup> See generally, Jonathan Kozol, *Savage Inequalities* (1992).

<sup>71</sup> See generally, Michael Brown et al, *Whitewashing Race: The Myth of a Color-Blind Society* (University of California Press 2003) of which I am one of the seven co-authors.

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In the case of our seventeen year old African American high school junior as an example, it is likely that his or her (hereafter his) African American parents earn substantially less than similarly educated whites.<sup>72</sup> They are less likely to be hired or promoted than similarly qualified whites, and earn less even if they do hold similar jobs.<sup>73</sup> Even correcting for income, they have far less wealth than whites of similar income, in significant part because whites have typically been granted or inherited the wealth-building advantages of home ownership through government subsidized loans that were restricted to whites until the 1970's, and are still disproportionately granted to whites.<sup>74</sup> If they were able to buy a home, it was probably in a minority neighborhood, where home values rise less quickly than in white neighborhoods, yet they were more likely to pay a sub-prime interest rate than whites with similar income and credit ratings.<sup>75</sup> They were more likely to need a car to get to and from that home, because subsidized public transportation is disproportionately provided to white neighborhoods,<sup>76</sup> even though the need is greater in minority neighborhoods, where fewer people can afford to own cars. One reason car ownership is out of reach for more African Americans than whites is that car dealers charge whites less than blacks for identical cars,<sup>77</sup> and then charge blacks with the same credit

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<sup>72</sup> Among high school graduates, African Americans earn 78 cents for every dollar earned by white Americans. Among college graduates, African Americans earn 84 cents for every dollar earned by white Americans. Even among 25-34 year old college graduates, who have lived their entire lives under the protection of the civil rights laws, the earnings gap is still 15 cents on every dollar. Compare [http://pubdb3.census.gov/macro/032006/perinc/new04\\_003.htm](http://pubdb3.census.gov/macro/032006/perinc/new04_003.htm) (White earnings) with [http://pubdb3.census.gov/macro/032006/perinc/new04\\_006.htm](http://pubdb3.census.gov/macro/032006/perinc/new04_006.htm) (Black earnings). (last accessed October 8, 2006).

<sup>73</sup> See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring (1991); Jenny Bussey & John Trasvina, Racial Preferences: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California, Discrimination Research Center (2003).

<sup>74</sup> Douglas S. Massey & Nancy A. Denton, American Apartheid (1993).

<sup>75</sup> See Debbie Gruenstein Bocian et al, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages, Center for Responsible Lending (2006).

<sup>76</sup> See, e.g., Juliet Ellis, End Funding Discrimination in Public Transit, San Francisco Chronicle, Dec. 1, 2005; Guillermo Mayer & Richard A. Marcantonio, Bay Area Transit – Separate and Unequal (2005) <http://urbanhabitat.org/node/313> (Last accessed October 10, 2006); cf., Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority, 263 F.3d 1041 (9<sup>th</sup> Cir. 2001), cert. den. 535 U.S. 951 (2002) (affirming special master's orders in consent decree, in case claiming racial and ethnic discrimination in Los Angeles public transit system).

<sup>77</sup> Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harvard Law Review 817 (1991) (white men offered cars at \$818 over dealer cost while black men asked for \$1,534 over dealer cost and black women asked for \$2,169 over dealer cost; Ayers estimates that blacks pay an extra \$150,000,000 annually for new cars because of race-based price discrimination.)

ratings as whites higher interest rates.<sup>78</sup>

One reason that public transit is so much better in white neighborhoods is that minority neighborhoods have less political influence. This also means there is less attention paid to garbage collection, street sweeping, road and sign repair, street lights, and other services that support a neighborhood. Why? Partly because the Republican Party has written off the black vote, and often works to suppress it.<sup>79</sup> But it's also because there are fewer black voters per capita because so many black men (currently one in four) have been disenfranchised by our criminal justice system.<sup>80</sup> Why are do many African Americans have criminal records? In part, because African Americans as compared to similarly situated whites are more likely to be: stopped by the police; searched when stopped; arrested; booked on felony charges; refused "OR" release; refused a low bail; refused deferral; charged with a felony; tried, convicted; denied probation; denied an alternative sentence; sentenced to prison; and denied parole. That is, at every step of the criminal justice system African Americans are treated less well than similarly situated white Americans.<sup>81</sup> Our seventeen year old African American high school junior has probably had more encounters with the police, and more serious encounters, than a seventeen year old white American high school junior who had engaged in the same exact conduct.

What has his experience been at school? He has probably been disciplined more than white students who had engaged in the same conduct.<sup>82</sup> His school probably has far fewer resources than schools serving white neighborhoods, including textbooks, classroom space, science labs, language labs, library resources, academic counseling, pre-college counseling, college preparatory classes, advanced placement classes, food service facilities, and athletic facilities.<sup>83</sup> He'll probably get little or no meaningful pre-college counseling, and thus won't know which classes he needs to take to qualify for UC or CSU, nor how he should be preparing

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<sup>78</sup> Mark A. Cohen, Preliminary Report on the Racial Impact of FMCC's Finance Charge Markup Policy (2004), [http://www.nclc.org/initiatives/cocounseling/FMCC\\_Cohen.pdf](http://www.nclc.org/initiatives/cocounseling/FMCC_Cohen.pdf) (Last accessed October 10, 2006); Review of Nissan Car Loans Finds that Blacks Pay More (2001) <http://www.racematters.org/blackspaymoreformissans.htm> (Last accessed October 8, 2006).

<sup>79</sup> See, The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today (People for the American Way - NAACP 2004), <http://www.pfaw.org/pfaw/general/default.aspx?oid=16367> (Last accessed October 8, 2006); cf. Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* (2006).

<sup>80</sup> Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006).

<sup>81</sup> See *Whitewashing Race, supra*, at 132-160.

<sup>82</sup> Russell J. Skiba et al, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (2000), <http://www.indiana.edu/~safeschl/cod.pdf> (Last accessed October 8, 2006).

<sup>83</sup> Jonathan Kozol, *Savage Inequalities, supra*; Notice of Proposed Settlement, *Williams v. State of California*, San Francisco Superior Court 312236 (May 17, 2000) [http://www.aclu-sc.org/attach/w/williams\\_notice\\_settlement.pdf](http://www.aclu-sc.org/attach/w/williams_notice_settlement.pdf) (Last accessed October 8, 2006).

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for the SAT. His teachers are far less likely to have teaching experience or even permanent teaching credentials. They are likely to expect less of him academically than they do of otherwise similarly situated white students.<sup>84</sup> And teacher expectations tend to be strong predictors of student performance.<sup>85</sup>

If he's looked for a summer or part-time job, he has probably encountered substantial racial discrimination. Employers are less likely to offer him a job than similarly or even less qualified white applicants.<sup>86</sup> In one recent study employers actually preferred white ex-cons over equally qualified black applicants with no criminal record.<sup>87</sup> If he was offered a job, the pay was probably lower and the job responsibilities less desirable than that offered to white students of the same age, experience and qualifications.<sup>88</sup>

If all of this hasn't left our seventeen year old student feeling like an outsider in his own country, he merely needs to go shopping in any local mall or downtown business district. It's likely that as he enters most stores he'll be regarded as a likely potential shop-lifter, followed and/or watched by store personnel. If he stands near a white person on an elevator or at a check-out counter, he's likely to notice him or her clutching his wallet or her purse, probably unconsciously. If he walks down a quiet street, he'll probably have the experience of white people crossing the street to avoid getting too close to him.

While our seventeen year old African American high school junior is fictional, the data I rely on is empirical. But sometimes an anecdote speaks volumes in illustrating the social meaning of data. A few years ago the school board in the largely-white city of Riverside California, home to one of the University of California's campuses, decided to name a new high school over Martin Luther King Jr. The decision sparked a major controversy among white residents, who protested the decision. They explained to the school board that they meant no disrespect to Dr. King, whom they acknowledged as a great American, but they were concerned their children would have a harder time getting into college if they attended a high school named

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<sup>84</sup> See, e.g., R. F. Ferguson, Teachers' Perceptions and Expectations and The Back-White Test Score Gap. In C. Jencks and M. Phillips (Eds.), *The black-white test score gap* (pp. 273-317). Washington, DC: Brookings Institution (1998).

<sup>85</sup> See, e.g., Claude M. Steele & Joshua Aronson, Stereotype Threat and The Intellectual Test Performance of African-Americans, *Journal of Personality and Social Psychology*, 69, 797-811 (1995).

<sup>86</sup> See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, *Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring*, *supra*.

<sup>87</sup> Devah Pager & Bruce Western, *Race at Work: Realities of Race and Criminal Record in the NYC Job Market* (2005), [http://www.nyc.gov/html/cchr/pdf/race\\_report\\_web.pdf](http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf) (Last accessed October 8, 2006).

<sup>88</sup> See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, *Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring*, *supra*.

after Dr. King, because college officials would assume they were black.<sup>89</sup>

Each of the disadvantages suffered by our fictional seventeen year old are interrelated, and cumulative. White Americans disproportionately benefit from government help with housing and transportation, allowing them to save and invest more, even as they are paid more and charged less, and their political influence grows. The effect is like that of compound interest, in which privilege is accumulated exponentially. By contrast, African Americans are disproportionately penalized by the withholding of government assistance, even as they also suffer from systemic bias. With fewer opportunities to earn, save and invest, combined with higher prices for lower quality goods and services, African Americans bear the cost of accumulative disinvestment.<sup>90</sup>

One way to think about the structure of American racism is that it acts as a vast tax and subsidy system.<sup>91</sup> On the tax side, African Americans are assessed a race tax, an extra charge for being black, that requires that they: pay more for lower quality housing that will appreciate at a slower rate; pay more for home and car loans; pay more for goods and services; receive fewer government services, including public transit, garbage collection, street sweeping, and – most importantly – sub-standard education; and be treated with suspicion that they are dishonest, unintelligent, and potentially violent. The race tax paid by African Americans permits a subsidy payment to white Americans, who, by comparison: pay less for higher quality housing that will appreciate at a faster rate; pay less for home and car loans; pay less for goods and services; receive greater government services, including better (though perhaps still woefully inadequate) education; and be treated without an expectation that their race requires that they be treated with suspicion. And while the structure of American society particularly disadvantages African Americans, it disadvantages other minority groups as well, including Latinos, American Indians, and some groups of Asian Americans, all of whom are under-represented among Berkeley's applicants and students.

Once we recognize the accuracy of this description of white privilege and black disadvantage, it's hard not to see it as a form of "preferential treatment" for whites, based on race. It should be self-evident that a university recruiting plan that ignores race cannot succeed in recruiting a racially diverse student applicant pool. To use race and ethnicity as factors, among other factors, in a recruiting program designed to recruit a broadly diverse applicant pool, is an affirmative anti-discrimination policy. It does not give "a priority or advantage to one

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<sup>89</sup> See Don Terry, *Mostly White City Honors Dr. King, Amid Dissent*, *New York Times* Jan. 7, 1998.

<sup>90</sup> This is the central theme, and insight, of *Whitewashing Race*.

<sup>91</sup> For more on the idea of racism as a form of taxation, see Randall Kennedy, *Race, Crime and the Law* 159 (1997); Robert S. Chang, *Critical Race Studies, Closing Essay: Developing A Collective Memory To Imagine A Better Future*, 49 *U.C.L.A. L. Rev.* 1601, 1609 (2002); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 *Cal. L. Rev.* 683, 744 (2004).

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person over others;” it does the reverse; it is one step the University can take to help reduce the unintended discrimination against minorities that permeates California and American society. It fits well within the limitations of section 31 set forth by Justice Brown in *Hi-Voltage*, “to ensure that all persons – regardless of race or gender – are informed of opportunities and treated with equal dignity and respect.”<sup>92</sup> In the absence of such a policy, the University cannot hope to recruit as successfully among minority group members as it does among whites.

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<sup>92</sup> *Hi-Voltage*, *supra*, at 564 (opinion of Brown, J.).