

The Potential Impact of the Michigan Civil Rights Initiative on Employment, Education and Contracting

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Introduction

In November 2006, Michigan voters will decide whether to adopt a constitutional amendment banning affirmative action in many different facets of civic life. The Michigan Civil Rights Initiative (MCRI) is a proposed amendment to the state Constitution that would ban both discrimination and affirmative action programs that give consideration to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, county and municipal governments, public colleges and universities, community colleges and K-12 school districts. The full text of the ballot proposal is available in Appendix 1.

The Michigan initiative is modeled after Proposition 209,¹ a nearly identical constitutional amendment adopted by California voters in 1996. The California experience suggests that the people of Michigan can expect the impact of the initiative to be quite broad, affecting not only affirmative action but also outreach efforts designed to ensure access to opportunity. California courts have consistently construed Prop. 209 broadly, striking down not only those programs that were designed to benefit racial and ethnic minorities or women, or that included participation goals, but even those that sought to remedy documented patterns of discrimination.

Prop. 209 has resulted in the elimination of services such as college preparation programs for students of color, summer science programs for girls, outreach to minority- and women-owned businesses to notify them of government contracting opportunities, and funding for training of minority professionals in fields where they are underrepresented. It has ended the requirement that state boards reflect the population of the state and also ended numerous voluntary K-12 school integration efforts. It has led to significant decreases in government contracts awarded to minority- and women-owned businesses, hiring of minority and female university professors, college enrollment of minority students, and the percentage of women working in the construction trades. This

paper will focus primarily on the impact of Prop. 209 and the likely impact of the nearly identical Michigan ballot initiative relative to race, ethnicity and national origin. For a fuller explanation of impact on women and girls, see “The Gender Impact of the Proposed Michigan Civil Rights Initiative,” by Susan Kaufmann and Anne Davis, at www.cew.umich.edu . Race, ethnicity and gender are not fully separable, however, as women of color are doubly affected.

Although the MCRI is described as a civil rights initiative, it appears to confer no additional civil rights on the basis of race, gender, ethnicity or national origin. With proper enforcement, moreover, existing state and federal civil rights laws seem to be clear and adequate. Title VI of the 1964 federal Civil Rights Act protects against discrimination on the basis of race, color or national origin in any program receiving federal funding;² Title VII prohibits employment discrimination based on race, color, religion, sex and national origin,³ and Title IX of the Education Amendments of 1972 prohibits sex discrimination in education in programs that receive federal funding.⁴ Executive Order 11246 also forbids discrimination and requires affirmative action for certain classes of workers at federal contractors and subcontractors.⁵

The Elliott-Larsen Civil Rights Act, passed in Michigan in 1976, protects against discrimination in employment, education, public services and public accommodations on the basis of race, sex, color, national origin, age, height, weight, religion, familial status or marital status.⁶ Some Michigan municipalities protect additional groups against discrimination. The Equal Protection Clause of the Michigan State Constitution duplicates the federal equal protection clause, and guarantees the equal protection of the laws.⁷

The Michigan ballot initiative has been sponsored and financially supported by Californian Ward Connerly, who also sponsored Prop. 209 in California and similar initiatives in Washington and Florida.

Connerly v. State Personnel Board

Passage of a ballot initiative is only the first step in determining the initiative's policy implications; often, the courts are called on to interpret the language so that policy decisions can be made. In California, Governor Pete Wilson was the plaintiff in a lawsuit filed by the Pacific Legal Foundation against the State Personnel Board, seeking to end remaining state affirmative action programs. Ward Connerly joined him in this suit and continued to pursue the case after Governor Gray Davis defeated Pete Wilson in 1998. The suit came to be known as *Connerly v. State Personnel Board*.⁸

As a result of the *Connerly* decision, the state ended its affirmative action programs in civil service and community college hiring and in state government contracting. The decision stated, "Proposition 209 . . . prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny." A strict scrutiny standard requires that a suspect statutory classification (for example, a classification based on race) serve a compelling government purpose and be narrowly tailored to achieve that purpose. According to the court, limitations imposed by Prop. 209 would prevail where federal law merely permits, rather than expressly requires, the consideration of race or gender.

Thus, *Connerly v. State Personnel Board* declared that Prop. 209 would invalidate those California statutes that employ gender- or race-based classifications for the purpose of targeting programs or services, even if they are permitted under federal law or meet the strict scrutiny standard, except when either (a) federal law requires the state to engage in the particular action or (b) the state would be threatened with ineligibility for a federal funding program and a corresponding loss of federal funds if it did not engage in that action.

The California Court of Appeals did conclude, however, that Prop. 209 would not bar the state from collecting data on race, gender, ethnicity or national origin, a practice that Governor Pete Wilson had ended after Prop. 209's passage.

Following the *Connerly* decision, the state legislature reinstated collection of such data. Ward Connerly then launched an unsuccessful⁹ California ballot initiative, the Racial Privacy Act, which would have provided that “The state shall not classify any individual by race, ethnicity, color or national origin in the operation of education, public contracting or public employment.”¹⁰

Impact of Prop. 209

In September 1997, Governor Pete Wilson held a press conference to announce a list of over 30 “offending statutes” that he believed violated Prop. 209 and called on the legislature to repeal or amend them.¹¹ The following programs were on his list:

- Pre-college outreach and preparation for low-income and minority students, including reading, math, science, SAT preparation, academic preparation and college outreach and information.¹²
- The California Summer Science and Technology Academy, which was “developed and operated to identify public high school pupils with high academic potential in mathematics, science, and technology, with an emphasis on females and minority members, to participate in university-based research programs.”¹³
- Outreach and funding for women and minority math, science and technology teachers.¹⁴
- A program helping paraprofessional teachers become fully licensed teachers, with an emphasis on training minorities.¹⁵
- Programs helping minorities and women become apprentices in the skilled trades.¹⁶
- Higher education funding for training of minority health professionals, who tend to be more likely to practice in underserved communities.¹⁷
- Scholarships, fellowships and grants at all levels of education that take into consideration race, gender, ethnicity or national origin.¹⁸
- Affirmative action in public contracting, including not only those efforts with explicit goals but also outreach programs and notification of bidding opportunities for women- and minority-owned businesses.¹⁹

- Diversity considerations in appointments made by the governor to Corrections Boards; for instance, the requirement that persons appointed to the Youthful Offender Parole Board "reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the state."²⁰
- Civil Service Affirmative Action Program.²¹
- Public contracting requirements to include businesses owned by minorities, women, and disabled veterans.²²
- Diversity and affirmative action considerations in hiring of community college faculty and administrators.²³

Subsequently, references to race and gender in those programs either have been eliminated or have been replaced by socioeconomic status, which is a highly problematic proxy for race, since not all underrepresented minorities have low incomes and even those who are affluent may still experience bias and discrimination. Socioeconomic status is ineffective as a proxy for gender.

The Impact of Prop. 209 on Contracting

In the contracting context, affirmative action programs are typically used to ensure transparency and openness in the bidding process, as well as to encourage outreach and participation. Since the 1989 U.S. Supreme Court decision in *City of Richmond v. J.A. Croson*,²⁴ affirmative action programs in public contracting have been permissible only in response to a documented history of discrimination, and then only when narrowly tailored. At the time Prop. 209 went into effect, most affirmative action programs in public contracting simply required prime contractors either to make good faith efforts to meet goals for subcontracting to women- or minority-owned businesses or to demonstrate that they had made outreach efforts to notify those businesses of bidding opportunities.²⁵ After Prop. 209 was implemented, subcontracting opportunities were no longer distributed to the directory of registered women- and minority-owned businesses, leading to a sharp decline in the opportunities known to disadvantaged business enterprises.²⁶

In addition, the Pacific Legal Foundation filed a series of lawsuits with the goal of ending affirmative action in municipal contracting. The first, *Hi-Voltage Wire Works, Inc. v. City of San Jose*,²⁷ led to a California Supreme Court ruling that under Prop. 209 not only diversity goals but also outreach efforts targeted to minorities or women are illegal. Although that decision directly applied only to contracting, it has been considered indicative of the courts' likely interpretation of similar programs in employment and education; accordingly, many California public entities have eliminated targeted outreach programs in those contexts as well. Other Pacific Legal Foundation lawsuits eliminated affirmative action in public contracting in Sacramento;²⁸ challenges to San Francisco's contracting program continue.²⁹

According to a report by Chinese for Affirmative Action, "Contract dollars awarded to businesses owned by minorities and women fell by 22% following the repeal of affirmative action programs in California,"³⁰ resulting "in a loss of at least \$94.5 million per year to these businesses."³¹

The Impact of Prop. 209 on Employment

As noted above, *Connerly v. State Personnel Board* ended affirmative action in civil service and community college employment in California. Prop. 209 also had a dramatic effect on hiring of faculty members at the University of California. Following its passage, the rate of all new University of California tenure-track appointments of faculty in underrepresented minority groups dropped 28%. While hiring of underrepresented minority faculty increased system-wide during 2001-2004, it did not return to the levels of the early 1990s. Hiring of African-American faculty has shown the largest decreases, with an overall decline of 14% between 1991-1995 and 2001-2004, and a 39% drop in hiring of tenured faculty.³² Hiring of women faculty also dropped immediately and dramatically on a number of University of California campuses.³³

The Impact of Prop. 209 on K-12 Education

Following the end of court-ordered desegregation plans, some school districts in California adopted voluntary measures to preserve diversity within public schools. The Pacific Legal Foundation filed lawsuits under Prop. 209 that ended voluntary school integration programs in Huntington Beach and Gilroy; a suit against the Capistrano school district is still pending. Ward Connerly's American Civil Rights Institute, represented by the Pacific Legal Foundation, also filed two lawsuits in October 2005 against the Los Angeles school district. One challenges voluntary integration programs, including magnet schools, that were first adopted in Los Angeles under court order.³⁴ The second, like a previous Pacific Legal Foundation lawsuit against the Los Angeles School District,³⁵ challenges the consideration of race in teacher assignments.³⁶

The Impact of Prop. 209 on University Enrollments

According to Richard Atkinson, the former president of the University of California system, "In 1995, before Proposition 209 took effect, underrepresented minority students accounted for 38 percent of California high school graduates and 21 percent of entering University of California freshmen, a difference of 17 percent. In 2004, they made up 45 percent of high school graduates but had fallen to 18 percent of incoming UC freshmen, a difference of 27 percent."³⁷ The enrollment decreases at UC Berkeley and UCLA have been even steeper. Atkinson continues, "In 1995, UC Berkeley and UCLA together enrolled a total of 469 African-American women and men in a combined freshman class of 7,100. In 2004, the number was 218, out of a combined freshman class of 7,350. African-American men, in particular, are virtually disappearing from our campuses. UCLA and Berkeley together admitted 83 African-American men in 2004."³⁸ In 2006, UCLA, which is located in the county with the second largest African American population in the United States,³⁹ will enroll the smallest number of entering African American freshmen "since at least 1973."⁴⁰

The number of Latino students attending the University of California also dropped sharply following passage of Prop. 209. Although the percentage of

Latino students admitted to the University of California system is recovering to pre-209 levels, it does so in the context of rapidly increasing Latino population in the state of California. The percentage of Latinos at Berkeley and UCLA is still substantially lower than in 1997. Enrollment of Native American freshmen has declined by approximately two-thirds from pre-209 levels.⁴¹

Low and, in some cases, declining enrollments of underrepresented minority students appear to be the result of several factors resulting from Prop. 209: the end of affirmative action;⁴² elimination of targeted outreach programs; the perception, as numbers dwindle, that the University is unwelcoming;⁴³ and a growing tendency for students with strong academic records to enroll elsewhere.⁴⁴ These Prop. 209-related trends are occurring in the context of “disparities in [K-12] educational opportunity for underrepresented students;”⁴⁵ reduction or elimination of state funding for race-neutral college preparatory and outreach programs;⁴⁶ increasing competition and selectivity in University of California admissions as applications rise faster than capacity,⁴⁷ and decreasing need-based financial aid.⁴⁸

Since the passage of Prop. 209, an increasing number of high-achieving African American, Latino and Native American students who are accepted into the University of California system choose instead to attend elite private institutions, such as Stanford, Harvard and Yale. In 1997, 14.1% of underrepresented minority students denied admission to UC Berkeley and UCLA but accepted to another UC campus chose a private college or university. By 2002, 59% of such students opted for colleges outside the UC system.⁴⁹ Their departure contributes to low numbers of underrepresented students of color on UC campuses, which reinforces the impression among prospective students that the climate is inhospitable, thereby further dampening both applications and enrollments.⁵⁰ Furthermore, the absence of these students diminishes the opportunities for all students to benefit from a diverse academic environment.

According to a July 2005 report on graduate and professional enrollments, since passage of Prop. 209, “enrollment at UC campuses of most historically

underrepresented minorities remains alarmingly low,⁵¹ with sharp drops of underrepresented minority students in schools of law, medicine and business. Training of fewer minority professionals by the University of California has serious implications for their communities and the well-being of the state of California. For example, both California and national studies have found that minority “physicians are more likely to practice in medically underserved communities.”⁵²

The University of California has tried many race-neutral means of increasing enrollments of underrepresented students but, according to Atkinson, “Despite enormous efforts, we have failed badly to achieve the goal of a student body that encompasses California's diverse population. . . . Any state tempted to emulate the example of California should think long and hard about the consequences.”⁵³

For UC Berkeley Chancellor Robert Birgeneau, diversity is the foundation of effective education: “We are . . . missing out on exceptional African American, Latino and Native American students who can not only succeed here, but whose participation can improve the education the university offers all its students. . . . The single most important skill that a 21st century student must master is ‘intercultural competence’—the ability . . . to navigate successfully in today’s globalized society.”⁵⁴

Affirmative Action in College Admissions

While the University of California has been training fewer minority professionals since passage of Prop. 209, the University of Michigan Law School has pursued a policy of promoting diversity in the classroom through affirmative action, as upheld by the U.S. Supreme Court in *Grutter v. Bollinger*. A 1999 study of University of Michigan Law School alumni reaching back to 1970 found that white and minority alumni were equally likely to pass at least one state bar, practice law successfully and persistently, and earn high incomes. In addition, minority alumni engaged in more *pro bono* work than their white colleagues and were significantly more likely to hold leadership positions in government,

including judgeships.⁵⁵ The report further found that “Law School Admission Test scores and undergraduate grade point averages ... seem to have no relationship to achievement after law school, ... whether achievement is measured by earned income, career satisfaction, or service contributions. For both our minority and white alumni those numbers that counted so much at the admissions stage tell little if anything about their later careers.”⁵⁶

In 2003, the U.S. Supreme Court, in both the *Grutter v. Bollinger* and *Gratz v. Bollinger* lawsuits against the University of Michigan, affirmed the validity of affirmative action in college admissions. During a holistic review of each applicant’s strengths and potential contributions to the class, the Court concluded, race/ethnicity could be considered as one factor among many others, provided that this consideration is not done in a mechanistic way. The Court was persuaded to make this decision for a variety of reasons:

- Students of *all* races who live and learn among diverse peers in both formal classroom and informal settings in which they are challenged to absorb and respond to new points of view develop the capacity for more original and critical thinking. They also develop “democracy skills,” including greater tolerance for differences as a normal part of life and the ability to negotiate both difference and commonality within and between groups. Years after graduating, students who have learned to effectively engage with members of other groups in college remain more likely to maintain cross-racial relationships.⁵⁷ Such experience is particularly important because most students, particularly whites, grow up in segregated communities and experience diversity for the first time when they go to college.
- “Race unfortunately still matters”⁵⁸ in American life, as evidenced by continuing disparities.
- “The path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.”⁵⁹
- Over 300 organizations filed *amicus*, or friend of the court, briefs on behalf of the University of Michigan, the largest number ever filed in a case before the Supreme Court. Filers represented a broad span of American life, including academic institutions and professional associations, MTV, Fortune 500 companies, labor unions, General Motors, Daimler-Chrysler, Steelcase, and the U.S. military.

The Court found particularly persuasive the *amicus* (friend of the court) brief filed on behalf of the military, which stated that it could not assemble a diverse officer corps without employing affirmative action in the military academies, and it could not lead effectively—or even safely—if officers did not reflect the diversity of the enlistees, making affirmative action a matter of national security.⁶⁰ After describing how the military’s “racial problem” in Vietnam “was so critical that [the military] was on the verge of self-destruction,”⁶¹ the brief presented current affirmative action practices, stressing that “there is no race-neutral alternative that will fulfill the military’s, and thus the nation’s, compelling national security need for a cohesive military led by a diverse officer corps of the highest quality to serve and protect the country.”⁶²

The brief filed by 65 Fortune 500 businesses similarly emphasized the centrality of affirmative action to their core values and operations.⁶³ The brief explains that the participating corporations value diverse students educated in diverse settings because they are better able to integrate different perspectives to solve problems, develop and market products that appeal to a variety of customers, partner with constituencies in the U.S. and around the world, and discourage discrimination and stereotyping. “Overall,” it continued, “an educational environment that ensures participation by diverse people, viewpoints and ideas will help produce the most talented workforce.”⁶⁴

The importance corporations place on being able to hire the diverse workforces they require is demonstrated by recent decisions made by Alcoa and General Motors to stop sending recruiters to the University of Wisconsin-Madison and by Dow Chemical to cease recruiting at Michigan Technical University, in both instances citing lack of diversity in the student body as the reason for the decision.⁶⁵

While affirmative action in public college and university admissions has been prohibited in California, and would be in Michigan if the MCRI were to pass, other groups would continue to get special consideration in the admissions

process in the more selective institutions: students who live in parts of the state—like Michigan’s Upper Peninsula—or attend high schools that send relatively few students to the university; students from academically challenging “feeder” schools that are mostly in affluent (and white) suburbs; “legacy” students whose parents, grandparents or siblings attended the institution; those who apply for early admission; veterans; and athletes who have been awarded athletic scholarships in any of the varsity sports. Only race, ethnicity, gender and national origin would be barred from consideration, no matter how compelling the educational, social or economic benefits of educating a diverse student body.

What Will Be the Likely Impact of Passage of the MCRI?

At present, reviewing the impact of Prop. 209 in California is perhaps the best means available to predict the likely effects of the Michigan ballot initiative. The California experience suggests that those effects could include:

- Ongoing legal challenges—including litigation, administrative complaints and threats of legal action—against the state, counties, municipalities and school districts that are perceived, rightly or wrongly, as operating educational, employment or contracting programs that consider race, gender, ethnicity or national origin
- Diminished access by minority- and women-owned businesses to government contracts
- Drops in hiring of faculty of color and women faculty in the state’s public universities
- Nullification of the *Grutter v. Bollinger* decision in Michigan, because that decision permitted, but did not require, consideration of race and ethnicity in college admissions
- Decreases in college enrollment of underrepresented students of color, particularly in the state’s more selective institutions, that are likely to worsen over time, making it very difficult to maintain a diverse student body, provide significant access to opportunity, or prepare students for life and work in the 21st century
- An accompanying decrease in diversity among the public college and university graduates that businesses in Michigan and throughout the country seek to hire, quite possibly causing businesses to look elsewhere for employees

- A resulting decrease in the number of doctors, lawyers and other professionals willing to serve the state's and nation's underserved communities, with serious implications for health status and leadership development in communities of color
- Elimination or amendment of targeted programs and services designed to increase access and opportunity, including:
 - College outreach programs that take place using public facilities or funding and that target participants based on race, gender, ethnicity or national origin, such as pre-college preparation programs or summer science programs designed to increase the participation of girls or minorities in science and math
 - Recruitment or apprenticeship programs designed to increase opportunity for minorities and women in the skilled trades—fields in which their access has historically been very low
 - Higher education funding for minority health professionals, who are more likely to practice in under-served communities
 - Outreach and funding for minority and female math, science and technology teachers
 - Government outreach programs that ensure that women- and minority-owned businesses have a fair chance to secure government contracts
 - Scholarships, fellowships and grants at all levels of education that take gender, race, ethnicity or national origin into account, including those designated for students descended from various European nationalities
 - Review systems designed to monitor and address barriers to achieving full participation, such as discrimination based on race, gender, ethnicity or national origin
 - Efforts to ensure adequate representation of women and minorities on boards and commissions, including advisory boards dealing with corrections, education and public health.⁶⁶

The Michigan Context

According to former University of Michigan President James Duderstadt:

Our state is having great difficulty in making the transition from a manufacturing to a knowledge economy. In recent years we have led the nation in unemployment, and our leading city, Detroit, now ranks as the nation's poorest. Furthermore, the out-migration of young people in search of better jobs is the fourth most severe among the states; our educational system is underachieving with one-quarter of Michigan adults without a high school diploma and only one-third of high school graduates college ready. Fewer than one-quarter of Michigan citizens have college degrees.⁶⁷

Pervasive racial segregation is a major factor in low educational attainment, the poverty of Detroit and other Michigan cities, and out-migration. Three of the top 10 and five of the top 25 most segregated cities in the country are in Michigan, and the Detroit metropolitan area is the second most segregated in the nation—second only to Gary/Hammond, Indiana.⁶⁸ Segregation has major consequences for access to good schools and good jobs—or any jobs. While African Americans, in particular, are often limited by lack of transportation, housing discrimination or real estate steering to inner city neighborhoods or inner-ring suburbs, jobs typically develop in the outer suburbs or exurbs. A Wayne State University study shows that 78% of the Detroit region's jobs are being created at least 10 miles from the central city.⁶⁹

While numerous surveys have demonstrated that Americans generally support school integration and believe in the importance of having children learn and interact with diverse classmates,⁷⁰ in actuality, both adults and children are experiencing rapidly increasing segregation at home and at school. Michigan schools are the third most segregated in the U.S. for African Americans,⁷¹ who are more likely to attend schools with high concentrations of poverty and all its attendant problems, less experienced teachers, high student and teacher turnover, and less access to challenging college preparatory classes.⁷² Unequal educational outcomes for elementary and secondary students, which affirmative

action in education is designed to address, are closely linked to poverty, segregated communities, and segregated schools.

Sustaining the nation's economy and resolving Michigan's economic crisis demand that all citizens be educated to the full extent of their interests and abilities, especially in science and technical fields. According to a June 2006 report by Michigan Future, Inc. called *A New Agenda for a New Michigan*:

Michigan's slower job growth is not caused by the loss of manufacturing jobs. ... It is in the nonmanufacturing industries that Michigan is lagging the nation, especially in the dynamic, middle- and high-wage knowledge-based industries. These industries ... now account nationally for 43% of all jobs. They have seen employment growth nationally of nearly 32% [since 1990] compared with 17% in Michigan.⁷³

That report also points out that Michigan ranks 31st in the country for the percentage (24.6% in 2004) of residents 25 years and over who have a four-year college degree or more.⁷⁴

A March 2006 survey of 1,200 "new economy" business executives in five states conducted for Western Michigan University found that they believed an educated workforce to be much more critical to business creation than favorable tax policy.⁷⁵ According to a report issued in 2004 by the Lieutenant Governor's Commission on Higher Education and Economic Growth, chaired by Lt. Governor John Cherry and popularly known as the Cherry Commission: "States that educate and nurture creative talent ... keep and attract people and investment and can capitalize on the multiplier effects that create new companies and jobs."⁷⁶

Michigan leaders believe that recruiting and retaining knowledge workers requires that Michigan cities be revitalized and hospitable to a diverse citizenry. According to Dean Rebecca Blank of the University of Michigan Ford School of Public Policy, "the problems of Detroit are closely linked to out-migration from Michigan. ... Urban areas with dynamic downtowns,

extensive cultural and recreational opportunities, and multiple career choices are the best attractors of the young and educated population. Too many of Michigan's graduates see Chicago as a far more attractive urban area than Detroit and seek jobs out of state."⁷⁷

According to the authors of *A New Agenda for a New Michigan*:

"metropolitan Detroit, and ... metropolitan Grand Rapids, are highly likely to be the main drivers of a prosperous Michigan. In fact, it is hard to imagine a high-prosperity Michigan without an even higher prosperity metropolitan Detroit."⁷⁸ That report continues, "The places that do the best in attracting talent from anywhere on the planet win. ... Leading-edge metropolitan areas are a tapestry of people from all backgrounds. Tolerant attitudes and great diversity characterize successful regions across the country." The report concludes, "This means ... building a culture that condemns rather than tolerates discrimination and segregation."⁷⁹

Linking the educational imperative with urban and economic development, the Cherry Commission declares:

Michigan's residents, businesses, and governments can either move **forward** to a future of prosperity and growth fueled by the knowledge and skills of the nation's best-educated population or they can drift **backward** to a future characterized by ever-diminishing economic opportunity, decaying cities, and population flight—a stagnant backwater in a dynamic world economy.⁸⁰

Conclusion

Evidence from California indicates that Prop. 209 has eroded or eliminated previously legal, court-sanctioned efforts by state and local governments and educational institutions to reach out to women and minorities in order to reverse historic discrimination and exclusion by providing fair and equal access to opportunity. This evidence further suggests that affirmative action remains an

important tool for disrupting old patterns of exclusion and segregation, promoting diverse classrooms and workplaces in which innovation is fostered, ensuring equity, meeting the country's workforce needs, generating upward mobility, and creating a diverse cadre of leaders prepared to lead Michigan and the nation through a difficult period of economic transition. Expanding opportunity benefits women and men of all racial and ethnic groups by developing the nation's talent pool and stimulating economic growth. The choice Michigan makes in November will, therefore, have a long-term impact on our future.

Appendix 1

Approved ballot language for statewide ballot proposal sponsored by Michigan Civil Rights Initiative Committee. Language was approved by the Board of State Canvassers on January 20, 2006.

**APPROVED BALLOT LANGUAGE
A PROPOSAL TO AMEND THE STATE CONSTITUTION TO BAN
AFFIRMATIVE ACTION PROGRAMS THAT GIVE PREFERENTIAL
TREATMENT TO GROUPS OR INDIVIDUALS BASED ON THEIR RACE,
GENDER, COLOR, ETHNICITY OR NATIONAL ORIGIN FOR PUBLIC
EMPLOYMENT, EDUCATION OR CONTRACTING PURPOSES**

The proposed constitutional amendment would:

- Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.
- Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin.)

Should this proposal be adopted?

Yes 

No 

¹ “Proposition 209,” passed November 5, 1996, enacted, now embodied in the California Constitution, Article I, Section 31 13.41. Hereafter Prop. 209.

² Title VI of the Civil Rights Act of 1964 42 U.S.C. § 2000d *et seq.*

³ Title VII of the Civil Rights Act of 1964 42 U.S.C. § *et seq.*

⁴ Title IX of the Education Amendments of 1972 20 U.S.C. §§ 1681 – 1688. Title 20 – Education. CHAPTER 38 – Discrimination Based On Sex Or Blindness.

⁵ Executive Order 11246 of Sept. 24, 1965, appears at 30 FR 12319, 12935, 3 CFR, 1964-1965 Comp. p. 339.

⁶ Michigan Elliott-Larsen Civil Rights Act. Act 453 of 1976 MCLA 37.2101 *et seq.*, M.S.A. 3.548(101) *et seq.*

⁷ State Constitution (Excerpt) Constitution Of Michigan Of 1963; Const. 1963, Art. I, § 2, Eff. Jan. 1, 1964

⁸ *Connerly v. State Personnel Board* No. C032042, Cal. Ct. App., 3rd Dist., 9/4/2001

⁹ The Act was defeated because of citizen concerns that the law would make it impossible not only to monitor trends in public employment, education and contracting but also to conduct public health population studies, target health care interventions to groups that need them, engage in social science research related to race or to people of color, and enforce civil rights laws, among other things. Schevitz, T. “Prop. 54 Defeated Soundly, State Initiative on Racial Privacy Raised Issues about Health, Education.” San Francisco Chronicle. October 8, 2003. Similar concerns were raised in a briefing on “The Consequences of Government Race Data Collection Bans on Civil Rights” held by the U.S. Commission on Civil Rights in May 2002.

¹⁰ “Ward Connerly’s Campaign to Erase Black People.” *The Black Commentator*, 52:1. www.blackcommentator.com

¹¹ Governor’s Office PR97:331 (September 9, 1997), “Wilson Unveils List of 30 Offending Statutes.” Available at <http://aad.english.ucsb.edu/docs/wilson.9-97.html>

¹² Pre-Prop. 209, the Early Academic Outreach Program, which includes summer school, after school and weekend classes targeted low-income and ethnically underrepresented students pre-209, but the program has since been revised to target “under-resourced communities.” California Education Code 69560 *et seq.* The CAL-SOAP program was authorized to fund programs “designed to increase the accessibility of postsecondary educational opportunities to low-income and ethnic minority elementary and secondary school students.” These programs included reading, math, science, SAT preparation, academic preparation and college outreach and information. CAL-SOAP now makes eligible those “low-income, elementary and secondary school students or geographic regions with documented low-eligibility or college participation rates, and who are first in their families to attend college.”

¹³ California Education Code 8630 and 8631: The California Summer Science and Technology Academy was “developed and operated to identify public high school pupils with high academic potential in mathematics, science, and technology, with an emphasis on females and minority members, to participate in university-based research programs.” Post-Prop. 209, reference to females and minority members was removed from this program.

¹⁴ Science, Mathematics, and Technology Teacher Pipeline Program, education Code 8650 *et seq.* per *Reaching for the Dream: Profiles in Affirmative Action: The Programs and the People Whose Lives They Change*, Equal Rights Advocates. p. 5.

¹⁵ California School Paraprofessional Teacher Training Program, Education Code 44390-44393. In 1997, the legislature eliminated references to race and ethnicity, per *Reaching for the Dream*, p. 11.

<http://www.equalrights.org/publications/reports/aabook/index.asp>

¹⁶ California Labor Code 1777.5 and 3075.1 governed affirmative action in apprenticeship programs until Governor Wilson issued Executive Order W-124-95 dismantling the state affirmative action requirement, per *Reaching for the Dream*, p19. California Public Contract Code 10115-10115.15. Governor Wilson issued an executive order March 10, 1998 that ordered state agencies to cease any enforcement of the minority and women business enterprise participation goals and the good faith effort requirements related thereto under Public Contract Code Section 10115 *et seq.* “In the absence of affirmative action programs and monitoring, employers have been left at best without direction or motivation to provide equal opportunity for tradeswomen. At worst, the vestiges of the male-dominated construction industry have returned. While federal affirmative action programs remain intact, some contractors returned to old practices of exclusion. Some employers believe and have told tradeswomen that because there is no more affirmative action, they no longer have to hire women.” *Proposition 209 and the Decline of Women in the Construction Trades*. The Discrimination Research Center and Equal Rights Advocates. June 2004.

¹⁷ California Health and Safety Code, Sections 128330-128370; 128375-128401; 128425-128450 now specify underrepresentation in profession as a qualifying attribute. Formerly known as Minority Health Professionals Education Foundation, now Health Professions Education Foundation. The Registered Nurse Education Program was designed to encourage minorities to enter nursing. For information on minority physicians’ service to underserved communities, see *Minority Students in Medical Education: Facts and Figures X*. Washington, D.C.: Association of American Medical Colleges, 36, as cited in Bowen, William G. and Derek Bok. *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, N.J.: Princeton University Press, 1998 p. 167 n. 14.

¹⁸ California Codes, Education Code Section 69640-69656. The Extended Opportunity Programs and Services (EOPS) now specify “socioeconomic handicaps” and language, social, and economic disadvantages. Education Code §§

87100, et seq. were found to violate Prop. 209 on 9/4/2001. This section governed the “steps that the district will take in eliminating improper discrimination or preferences in its hiring practices” (Section 87102. (a)); The Millennium Scholarship Program, established in 2000 at UC San Diego was cancelled because it was in violation of Prop 209. Schevitz, Tanya. “Audit Finds Campus Needs Extra \$1 Million to Pay for Violating Affirmative Action Ban.” *San Francisco Chronicle*. Sept. 11, 2001. p. A-3.

¹⁹ Percentage goals and outreach, known as good faith efforts, requirements in regard to women- and minority-owned businesses in the California Public Contract Code, were found to violate the California Constitution, Article I, Section 31, known as Prop. 209: *Connerly v. State Personnel Board* No. C032042, Cal. Ct. App., 3rd Dist., Sept.4, 2001.

²⁰ The Welf. & Inst. Code Sec. 1717(b) requires that persons appointed to the Youthful Offender Parole Board reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the state.

²¹ *Reaching for the Dream*, p. 19. Each state agency and department was required to correct the underutilization of minorities. In the mid-1990s the California State Personnel Board found that Hispanics and women were underutilized by state agencies and departments in comparison to their availability in the workforce.

²² The two Public Contracting Codes affected include Pub. Cont. Code § 10108.7 and Pub. Cont. Code §§ 10115-10115.15. Pub. Cont. Code § 10108.7 requires that a person making a bid with the Department of Corrections provide the name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals. The second provision, Pub. Cont. Code §§ 10115-10115.15, requires State agencies and departments to establish a goal that 15% of the value of the contract work be provided to minority business enterprises and 5% of the value be provided to women business enterprises.

²³ Education Code § 87663(d): The peer review process for faculty members at community colleges was required to address the forthcoming demographics of California, and the principles of affirmative action. The process required that the peers reviewing were both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching. This provision was struck down by *Connerly v. State Personnel Board*.

²⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁵ Chinese for Affirmative Action. *Losing Ground: The Impact of Proposition 209 on Minority and Women-Owned Businesses in California*. October 2003, p. 3. www.caasf.org

²⁶ *Proposition 209 and the Decline of Women in the Construction Trades*. The Discrimination Research Center and Equal Rights Advocates. June 2004; Katz, Nancie L. “How Prop 209 Affects Claudia Ramsey’s Shop.” *The Christian Science Monitor*. Nov. 18, 1997. <http://www.search.csmonitor.com/durable/1007/11/18/us/us.5.html>; Parker, Beth A. *The Impact of Proposition 209 On Education, Employment and Contracting Opportunities for Women in California*, San Francisco, CA: Equal Rights Advocates. 1998.

²⁷ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

²⁸ *United Utilities, Inc. v. Sacramento Municipal Utility District*, *C&C Construction, Inc. v. Sacramento Municipal Utility District*

²⁹ *Coral Construction Company v. City and County of San Francisco*, *Schram Construction, inc. v. City and County of San Francisco* and *S. F. Public Utilities Commission, Cheresnick v. City and County of San Francisco*.

³⁰ Chinese for Affirmative Action. p. 1.

³¹ Chinese for Affirmative Action, p. 5.

³² University of California Task Force on Faculty Diversity, 2005-2006, Slide presentation, slide 20.

³³ *New Appointments of Ladder Rank Faculty at the University of California, Pre and Post Proposition 209*. Office of Academic Advancement; Office of the Provost, The University of California. December 2000; Greenwood, M.R.C. “Testimony to Senate Select Committee on Government Oversight.” University of California, Santa Cruz.

<http://www.ucop.edu/acadadv/testimony.html> See also West, Martha S., et al. *Unprecedented Urgency: Gender Discrimination in Faculty Hiring at the University of California*. 21. May 2005. <http://www.law.ucdavis.edu/PDFs/unprecedented.pdf>

³⁴ *American Civil Rights Institute v. Los Angeles Unified School District*.

³⁵ This lawsuit is also entitled *American Civil Rights Institute v. Los Angeles Unified School District*.

³⁶ *Friery v. Los Angeles Unified School District* No. 01-56016; 300 F.3d 1120; 2002 American Civil Rights Institute v. Los Angeles Unified School District.

³⁷ Atkinson, Richard C, and Pelfrey, Patricia A., *Opportunity in a Democratic Society*, a paper providing the bases for the Third Annual Nancy Cantor Distinguished Lecture on Intellectual Diversity, delivered by Richard C. Atkinson at the University of Michigan on May 18, 2005.

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<http://www.latimes.com/news/printedition/front/la-me-ucla3jun03.1>

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⁴² Birgeneau, Robert J. (UC Berkeley Chancellor) “Anti-Bias Law Has Backfired at Berkeley,” *UC Berkeley Web Feature*. March 29, 2005. http://www.berkeley.edu/news/media/releases/2005/03/29_oped.shtml “‘The System is Broken’:

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