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Travis J. Lindsey

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THE LAST REFUGE OF OFFICIAL DISCRIMINATION: THE FEDERAL FUNDING EXCEPTION TO CALIFORNIA'S PROPOSITION 209

Stephen R. McCutcheon, Jr.* & Travis J. Lindsey**

INTRODUCTION

The California Civil Rights Initiative, better known as Proposition 209,1 has been the law in California for over seven years.2 In the arenas of public education, contracting, and employment, the initiative bans government discrimination and preferences based on race, sex, color, ethnicity, or national origin.3 Immediately following the adoption of Proposition 209, proponents of state-sponsored discrimination and preferences challenged the constitutionality of the Proposition.4 Although the Ninth Circuit Court of Appeals upheld the constitutionality of Proposition 209, the decision did not end state-sponsored discrimination and preferences. Instead, the battle over Proposition 209 shifted to enforcement of the new law, including the interpretation and

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1. See CAL. CONST. art. I, § 31 (Deering 2002), reprinted in Appendix A.

2. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 697 (9th Cir. 1997) (explaining that Proposition 209 was passed by the California electorate in November 1996).

3. In this article, the term “race” refers to “race, ... color, ethnicity or national origin” as those terms are used in Article I, section 31(a) of the California Constitution.

4. See Coalition, 122 F.3d at 700.
This article provides a framework for understanding and evaluating claims that racial preferences and discrimination are required by the federal government as a condition of maintaining or establishing eligibility for receipt of federal funds and are therefore exempt from the mandate of Proposition 209 under section 31(e). As evidenced by recent litigation, the proper interpretation of this exception will be the most heated battleground over the initiative's enforcement. Both the proponents of state-sponsored discrimination and their opponents have much at stake over the interpretation of this exception. A broad construction of the federal funding exception will undermine the intent of the people of California to return California law to the principle of equal rights for all.

This article argues that California courts should narrowly construe the federal funding exception to ensure that the purpose of Proposition 209 is not frustrated. The plain language of section 31(e), the federal funding exception, includes two distinct criteria that must be satisfied: (1) any racial discrimination and/or preferences "must be taken to establish or maintain eligibility" for a federal program, and

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5. Proposition 209 includes three exceptions to the prohibition of state-sponsored discrimination and preferences on the basis of race and sex. These exceptions provide for sex-based bona fide occupational qualifications, see Cal. Const. art. I, § 31(c), the preservation of existing consent decrees, see id. § 31(d), and race- and sex-conscious actions required as a condition of eligibility for federal funding, see id. § 31(e).

6. Article I, § 31(e) of the California Constitution shall be referred to as the "federal funding exception" and "section 31(e)" throughout this article. This section provides: "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." Id. § 31(e).

7. Interpretation of the federal funding exception is currently being litigated in United Utilities v. Sacramento Municipal Utility District, No. 00AS3306 (Cal. Super. Ct. filed June 20, 2000), appeal docketed, No. C040761 (Cal. Ct. App. Mar. 21, 2002), and Hillside Drilling, Inc. v. City of Berkeley, No. C-99-4646 MMC, 2002 WL 413371 (N.D. Cal. Mar. 12, 2002), aff'd, No. 02-15767, 2003 WL 21462544 (9th Cir. Jun. 24, 2003). In United Utilities, the Sacramento Municipal Utility District (SMUD) is appealing a summary judgment ruling by the Sacramento Superior Court finding SMUD's public contracting program unconstitutional and outside the scope of the federal funding exception. In Hillside Drilling, the Ninth Circuit Court of Appeals affirmed the decision by the Federal District Court for the Northern District of California rejecting Hillside Drilling's challenge to minority participation and reporting requirements imposed by the City of Berkeley.
(2) unless the state entity discriminates and grants preferential treatment, it will become ineligible and lose federal funds as a consequence. Because section 31(e) provides an affirmative defense to an alleged violation of the ban on race- and sex-based discrimination, the state entity must carry the burden of proving that its action actually falls within the purpose and language of the exception. Furthermore, because state-sponsored discrimination and preferences are presumptively unconstitutional, the federally mandated race and sex preferences must meet a strict scrutiny analysis. A proper interpretation of the federal funding exception will allow state and local government entities to continue receiving federal funding while complying with federal law, without thwarting the intent of California’s voters.

Section I of the following analysis discusses the adoption and enforcement of Proposition 209. Section II explains how exceptions to statutes and constitutional provisions are narrowly interpreted in California to insure fulfillment of the law’s purpose. Section III examines the proper interpretation of the elements of the federal funding exception, and Section IV explains that Proposition 209 does not prevent compliance with federal funding conditions, illustrating this point with an examination of several common “affirmative action” requirements found in federal grant programs and federal regulations.

I. PROPOSITION 209 REVERSED THE TREND OF STATE-SPONSORED DISCRIMINATION THAT "AFFIRMATIVE ACTION" HAD BECOME

Proposition 209 ushered in a new civil rights era in California as the product of a retro-movement that sought to reverse the trend of race- and sex-based preferences promoted

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8. See CAL. CONST. art I, § 31(e) (reflecting the intent of the voters to not jeopardize the receipt of federal funds by the state and local governments); Analysis of Legislative Analyst, in CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1996), http://vote96.ss.ca.gov/Vote96/html/BP/ (Nov. 5, 1996); Official Title and Summary, (stating that Proposition 209 “does not prohibit... actions necessary for receipt of federal funds”). This exception was included by the drafters of Proposition 209 to foreclose the measure’s opponents from campaigning that “the CCRI would cost California voters $X million in federal money.” Eugene Volokh, The California Civil Rights Initiative: An Interpretive Guide, 44 UCLA L. REV. 1335, 1387 (1997).
by government agencies in the name of equality of opportunity. Before a single vote was cast, opponents of Proposition 209 asserted that the language of the initiative was vague and would encourage discrimination against women. To the contrary, Proposition 209 elevated the standard of judicial review for sex-based discrimination from the mere intermediate scrutiny imposed by the Fourteenth Amendment to the same standard applied to racial

9. See Pete Wilson et al., Argument in Favor of Proposition 209, in CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1996), supra note 8 (discussing the intent to restate the Civil Rights Act of 1964); see also Hi Voltage WireWorks, Inc. v. City of San Jose, 12 P.3d 1068, 1070 (Cal. 2000) (noting that it is appropriate for the court to consider the official ballot pamphlet when determining the will of the voters); W. Telecon, Inc., v. Cal. State Lottery, 917 P.2d 651, 654 (Cal. 1996) (discussing official materials put before the voters on Proposition 37 to create a state lottery).


Professor Neil Gotanda, echoing Professor Erwin Chemerinsky, stated that the reach of Proposition 209 would not be evident until courts interpreted it, which was impossible to predict because the text was drafted ambiguously. Neil Gotanda et al., Legal Implications of Proposition 209 - The California Civil Rights Initiative, 24 W. ST. U. L. REV. 1, 6 (1996) (citing Erwin Chemerinsky, The Impact of the Proposed California Civil Rights Initiative, 23 HASTINGS CONST. L.Q. 999, 1004 (1996)). Professor Chemerinsky may have been attempting to scare female voters when he argued that sex discrimination would no longer be reviewed under the strict scrutiny standard if Proposition 209 was passed. Chemerinsky, supra, at 1014. But see Pamela A. Lewis, Debunking the Myth that Subdivision (c) of the California Civil Rights Initiative Lessens the Standard of Judicial Review of Sex Classifications in California, 23 HASTINGS CONST. L.Q. 1153, 1155 (1996). Lewis argued that Proposition 209 would not jeopardize protections against sex discriminations:

Opponents of the CCRI [California Civil Rights Initiative] have seized upon the language in subdivision (c) regarding bona fide sex qualifications, and have argued that it will impact the judicial level of scrutiny applied generally to sex classifications. That assertion is erroneous. Subdivision (c) of the CCRI does not weaken the existing protections against sex discrimination provided by federal or state laws and constitutions.

Id.

11. The United States Supreme Court has not held sex to be a suspect classification under the Fourteenth Amendment, and thus applies a form of intermediate scrutiny. See United States v. Virginia, 518 U.S. 515, 531 (1996); see also Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 19 (Ct. App. 2001) (noting that sex is subjected to only heightened scrutiny under the Fourteenth Amendment, but is treated as a suspect class under the California Constitution).
discrimination—strict scrutiny.\textsuperscript{12}

The American Civil Liberties Union and other proponents of race and sex preferences challenged Proposition 209 immediately after it was passed.\textsuperscript{13} "The ink on Proposition 209 was barely dry"\textsuperscript{14} when this band of liberal organizations filed a lawsuit in federal court attacking the Proposition's constitutionality.\textsuperscript{15} Although the Ninth Circuit Court of Appeals upheld the facial constitutionality of Proposition 209 in \textit{Coalition for Economic Equity v. Wilson},\textsuperscript{16} state and local government agencies as well as special interests did not give up attempts to undermine the measure.\textsuperscript{17}

\textsuperscript{12} The contention that Proposition 209 permits discrimination against women was conclusively put to rest by the California Third District Court of Appeal, which held: "[U]nder our state Constitution, strict scrutiny applies to gender classifications. In addition, Proposition 209 imposes additional restrictions against racial and gender preferences and discriminatory actions." \textit{Connerly}, 112 Cal. Rptr. 2d at 16.

\textsuperscript{13} On November 6, 1996, the day after the election, the American Civil Liberties Union, NAACP, and other liberal and race-based special interest groups filed a complaint in the Northern District of California against several officials and political subdivisions of the State of California, alleging Proposition 209 denied women and racial minorities equal protection of the laws under the Fourteenth Amendment and that it was void under the Supremacy Clause because it conflicted with Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. \textit{See also} Jeanne-Marie Pochert, \textit{Note, Proposition 209: Public Policy Considerations in Coalition for Economic Equity v. Wilson}, 35 \textit{SAN DIEGO L. REV.} 689, 689-90 (1998). \textit{See generally} Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 697 (9th Cir. 1997).

\textsuperscript{14} \textit{Coalition}, 122 F.3d at 700.

\textsuperscript{15} \textit{See id.} at 698, 700.

\textsuperscript{16} \textit{See id.} at 702, 709-10.

\textsuperscript{17} For example, the California legislature promptly moved to make "findings" which reinterpreted the meaning of Proposition 209's prohibition of discrimination to permit race- and sex-based "outreach." \textit{See S.B. 1735, 1997-1998 Sess.} (Cal. 1998) (vetoed Sept. 24, 1998). The support for this bill came overwhelmingly from organizations which define their membership and goals in terms of race and sex and other liberal special interest groups. \textit{See Senate Floor Analysis on S.B. 1735, 1997-1998 Sess.} (Cal. Aug. 30, 1998) (showing that forty of the fifty-three organizations supporting the bill are overtly based on race or sex), \textit{available at} http://info.sen.ca.gov/pub/97-98/bill/sen/sb_1701-1750/sb_1735_cfa_19980830_185658_sen_floor.html. The Governor of California, in his September 24, 1998 veto message, noted that it is not the role of the legislature to redefine the meaning of Proposition 209, and that the legislature's reinterpretation conflicts with its plain language. \textit{See Veto Message on S.B. 1735, 1997-1998 Sess.} (Cal. Sept. 24, 1998), \textit{available at} http://info.sen.ca.gov/pub/97-98/bill/sen/sb_1701-1750/sb_1735_vt_19980924.html. In the 2003-04 legislative session, Assembly Bill 703 attempts to redefine the common-sense definition of "discrimination"
The Ninth Circuit’s decision upholding Proposition 209 was only the beginning of the fight. As was noted at the time, “[a]lthough lawyers on both sides said [the] decision ends the major legal challenges to Proposition 209, there are likely to be further lawsuits involving its enforcement.” Professor Volokh successfully predicted “[t]here will be lots of litigation on the margins.” Those at the White House barely reacted. Referring to the President’s “mend it, don’t end it” stance on affirmative action, President Clinton’s press secretary simply stated “I think our views of Prop. 209 are very well known.” The Clinton administration filed amicus curiae briefs in the lower courts arguing that the initiative was unconstitutional.

Local government agencies’ reactions to the Ninth Circuit’s Coalition decision varied. Some decided to forgo any changes in their policies absent legal action by Proposition 209 supporters, while others took immediate steps to change their regulations to comply with the initiative. Several and “preferences” adopted by the voters with the definitions under the International Convention on the Elimination of All Forms of Racial Discrimination. These definitions would exempt “special measures” (i.e., the preferences Proposition 209 was intended to prohibit) from the definition of “discrimination” and eliminate the right of individual citizens to challenge race-based preferential treatment. Three of the four special interest organizations supporting A.B. 703 before the Assembly Judiciary Committee define their membership based on race. See Race Discrimination: Definitions and Actions, Hearing on A.B. 703 Before the Assembly Committee on Judiciary, 2003-2004 Sess. (Cal. May 6, 2003) (showing registered support for the legislation), available at http://info.sen.ca.gov/pub/bill/asm/ab_0701-0750/ab_703_cfa_20030513_114441_asm_comm.html.


20. See Savage, supra note 19.

21. Id.

22. See id.

23. See id.

24. See id.
recalcitrants have suffered adverse judgments, and others continue to litigate in hopes of thwarting the initiative.

*Hi-Voltage Wire Works v. City of San Jose* was one of the first Proposition 209 enforcement cases to be decided by the courts. After the passage of Proposition 209, the City of San Jose amended its public contracting program, purportedly to comply with Proposition 209. However, the amendments merely provided a face lift to the city’s traditional racial preference program. For example, the “Office of Affirmative Action/Contract Compliance” became the “Office of Equality Assurance,” and the participation goals stating the percentage of work that should be performed by minority and women subcontractors became an “evidentiary presumption” of nondiscrimination. Hi-Voltage Wire Works, an electrical contractor, challenged this program on the grounds that regardless of the city’s post-Proposition 209 amendments, the contracting program violated Proposition 209 by requiring contractors bidding on city projects to use a specific percentage of minority and women subcontractors, or to document efforts to recruit minority and women subcontractors for inclusion in their bids. Although both the San Jose Superior Court and the California Court of Appeal for the Sixth District held that the program violated Proposition 209, the city challenged the rulings in the


26. Proposition 209 claims are currently being litigated against the City and County of San Francisco, the Sacramento Municipal Utility District, and others. San Francisco in particular has vowed to defy Proposition 209. See *supra* note 25; Rebecca Smith, Comment, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action*, 38 SANTA CLARA L. REV. 235, 266 (1997).

27. 12 P.3d 1068 (Cal. 2000).
29. *Id.* at 1071.
30. *Id.*
31. *See id.* at 1070-72.
California Supreme Court. The supreme court, in an opinion that left no room for misunderstanding, confirmed that Proposition 209 mandates zero tolerance for discrimination, and struck down the program, giving Proposition 209 proponents a major victory.

Proponents of Proposition 209 scored another victory in Connerly v. State Personnel Board, when the California Court of Appeal struck down a variety of state statutes for violating Proposition 209. The statutes at issue in Connerly established race and gender preferences in the California State Lottery Commission’s public contracting, in the selection of underwriters for the sale of government bonds, in the hiring under the State’s civil service processes, and in the hiring and promotion by community colleges.

Similarly, in the public education context, a taxpayer with a child who attended school in the Huntington Beach Union High School District filed a lawsuit challenging its student transfer policy. White students who attended predominantly minority campuses could not transfer from their schools unless another white student transferred in. This case presented the issue of whether the policy violated Proposition 209, regardless of a California statute that allowed schools to maintain “appropriate racial and ethnic balance.” The school district won at the trial court level, but lost in the California Court of Appeal for the Fourth District, where the court rejected the school district’s argument that race-based assignments were harmless because all the schools provided the same educational

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32. See id. at 1072.
33. See Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1083 (Cal. 2000) (citing the ballot pamphlet).
34. See id. at 1083-84.
35. 112 Cal. Rptr. 2d 5 (Ct. App. 2001).
36. See id. at 16.
37. See id. at 31-32.
38. See id. at 32-36.
39. See id. at 36-39.
40. See id. at 39-42.
41. See Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96 (Ct. App. 2002).
42. See id. at 1278.
43. See id. at 1277-79 (school district relying upon California Education Code § 35160.5 (Deering 2002)).
program. The California Supreme Court denied the school district's petition for review.

Unable to defeat Proposition 209 claims on their merits, opponents of Proposition 209 either have turned to the federal funding exception under subsection (e) of Article I, section 31, or have argued that the preemption exception under subsection (h) insulates their racial preferences from challenge. Published opinions have not heretofore addressed these questions. However, in United Utilities v. Sacramento Municipal Utility District, the Sacramento Superior Court addressed the question of whether the federal funding exception foreclosed the plaintiffs' legal challenge to the Sacramento Municipal Utility District's contracting program, which involved race-based preferences. Interpreting the federal funding exception in accordance with the plain language, the court held that Sacramento Municipal Utility District (SMUD) must prove that the race-based elements of its contracting program are required as a condition of receiving federal funds, and that SMUD would lose federal funding in the absence of preferential treatment to women and minorities. In striking down the discriminatory portions of the contracting program, the court found that SMUD failed to demonstrate that its bid discount program was required as a condition of receiving federal funds, and therefore, the exception did not apply. Moreover, the court found that SMUD failed to produce evidence that it would lose federal funds if it discontinued its program. SMUD has appealed the decision to the California Court of

44. See id. at 1283, 1286-87; see also Brown v. Bd. of Educ., 374 U.S. 483, 495 (1954) (rejecting arguments that a professed equality of schools excuses discrimination in school assignments).
45. See Crawford, 121 Cal. Rptr. 2d at 105 (noting California Supreme Court denial of petition for review on August 28, 2002).
46. Subsection (h) of Article I, section 31 provides that should any provision of section 31 conflict with federal law or the United States Constitution (i.e., be preempted), that the remainder shall be implemented to the maximum extent permitted by federal law and the United States Constitution.
48. See id. at 3.
49. See id. The court explained that "[o]n the decisive issue [of] whether the [racial preference program] is required to establish or maintain eligibility for federal funding . . . the court is left with nothing but speculation." Id. at 5.
50. See id. at 3.
Appeal for the Third District. 51

Both sides of the debate over government-sponsored discrimination have much at stake over the interpretation of section 31(e). Should the courts construe section 31(e) in accordance with its plain meaning and the intent of the voters to eliminate race and gender preferences, government agencies will have to repeal additional discriminatory programs that are currently justified by ambiguous federal mandates for “affirmative action.” The ultimate outcome of United Utilities is unknown, 52 as is the final interpretation of section 31(e).

II. TO RESPECT THE WILL OF CALIFORNIA’S VOTERS, THE EXCEPTIONS TO PROPOSITION 209 MUST BE NARROWLY CONSTRUED

A. Narrow Construction of Legal Exceptions Is the Norm in California, and Is Especially Compelling in the Case of Popular Initiatives Like Proposition 209

Laws commonly contain exceptions which represent the intent of the legislature or voters. 53 Proposition 209 is no different, and includes several narrow exceptions to its broad prohibition of race- and sex-based discrimination. 54 Article I, section 31(a) states, “[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.” 55 Sections 31(c)-(e) and (h) of the initiative contain exceptions to part (a), including exceptions for bona fide occupational qualifications, existing

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52. The briefing in the court of appeal was completed in June 2003, and the parties are awaiting oral arguments.
53. The purpose of judicial interpretation is to determine legislative intent, or in the case of initiatives, the intent of the voters. See Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1082-83 (Cal. 2000) (considering the legislative intent based on ballot materials provided to the voters); see also Volokh, supra note 8, at 1360-87. Without providing exceptions, Proposition 209 would have prohibited single sex bathrooms, dormitories, and sports teams, id. at 1360, and bone fide occupational qualifications, id. at 1368, or at least presented conflicts with federal law, id. at 1387-88.
54. See CAL. CONST. art. I, § 31(c)-(e), (h) (Deering 2002).
55. See id. § 31(a).
consent decrees, and the federally required preferences that are the subject of this article. 56

In general, exceptions must be strictly construed, 57 and "will not be extended beyond the import of their terms," 58 California case law has held that courts should narrowly construe exceptions such as section 31(e) to insure that the purpose of the law in question is fulfilled. 59 The drafters of Proposition 209 intended the exceptions to be limited and narrowly interpreted, with the measure enforced to the fullest extent permitted by federal law and the United States Constitution. 60

In light of section 31(a)'s purpose of restoring civil rights to the fundamental proposition of equal opportunity for each individual, it is essential that courts interpret the federal exception narrowly. 61 Proposition 209 was introduced to

56. Section 31(c) exempts bona fide qualifications based on sex; section 31(d) exempts court orders and consent decrees; section 31(e) exempts actions necessary to establish or maintain eligibility for federal funding; and section 31(h) exempts actions from section 31(a) when section 31(a) would be preempted by federal law or the Constitution. See id. § 31(c)-(e), (h).


59. See San Jose Teachers Ass'n v. Barozzi, 281 Cal. Rptr. 724, 727 (Ct. App. 1991) (citing Telefilm, Inc. v. Superior Court, 201 P.2d 811, 816 (Cal. 1949)) ("[O]ne who relies on the exception must establish it within the words as well as the reason."); see also Gold v. Superior Court, 475 P.2d 193, 199 (Cal. 1970) ("To fulfill this legislative purpose the statutory exception must be narrowly construed and carefully restricted."); National City v. Fritz, 204 P.2d 7, 8-9 (Cal. 1949) (construing an exception narrowly to further the intent of the statute); Hurst v. City & County of San Francisco, 201 P.2d 805, 807 (Cal. 1949) (construing exception to city charter provision narrowly as charter served to limit county power).

60. See CAL. CONST. art. I, § 31(h) (providing that section 31(a) "shall be implemented to the maximum extent that federal law and the United States Constitution permit"); see also Volokh, supra note 8, at 1386, 1388 (noting that section 31(h) provides that section 31(a) "shall be implemented to the maximum extent that federal law and the United States Constitution permit"). Professor Volokh was a legal advisor to the drafters of Proposition 209. However, "[his] Article is not a campaign document. It was... published after the election and... played no role in the campaign debates." Id. at 1336 n.2.

61. See Pete Wilson et al., Argument in Favor of Proposition 209, in CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1996), supra note 8 (arguing that "special interest[] hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set asides"); see also Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 27 (Ct. App. 2001) (quoting Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1083 (Cal. 2000)) (noting that "[i]n adopting Proposition 209, the voters 'intended to reestablish
replace the divisive use of race- and sex-based preferences with race neutrality. There can be no “dispute [that] the clear intent of the voters was to outlaw preferential programs” that give advantages on the basis of race and sex.

The principle of narrowly construing exceptions in view of voter intent has recently been applied by the California courts in closely analogous circumstances. In Schweisinger v. Jones, the California Court of Appeal had to interpret the scope of an exception to Proposition 140, an initiative which established legislative term limits. The court looked to the plain language of the statute in light of the intended goals of voters in adopting Proposition 140, noting “the People, through a reform measure designed to severely limit incumbency, prohibited service of more than three terms, subject to a single defined exception. The exception should not be read broadly and other exceptions are precluded by the doctrine, expressio unius est exclusio alterius.” The court further concluded that “[a broad interpretation of the exception] would create a loophole which would frustrate the intention of the People.”

the interpretation of the Civil Rights Act and equal protection that predated [the decisions in Steelworkers v. Weber, 443 U.S. 193 (1979) ... and other cases], by prohibiting the state from classifying individuals by race or gender”).


A persistent theme in the campaign for the California Civil Rights Initiative has been its claim of moral superiority. CCRI advocates argue that the CCRI embodies racial neutrality. They call for a color-blind America, and they invoke the name of Martin Luther King. The proponents of the CCRI loudly proclaim that it is they who seek racial justice, and it is the defenders of affirmative action who are reinforcing racial discrimination. Race color blindness has been presented as a progressive, forward-looking “vision” of racial justice. I believe that this is a total distortion of race color blindness.

Id.

64. 81 Cal. Rptr. 2d 183 (Ct. App. 1998).
65. See id. at 186.
66. Id. at 186-87 (first emphasis added).
67. Id. at 187.
B. The General Rule of Narrow Interpretation of Exceptions Applies to Proposition 209 as a Measure to Reform State Constitutional Law

The narrow construction principle described in *Schweisinger* applies equally to the federal funding exception under section 31(e). Courts must construe this exception in light of the purpose of section 31(a), and not in a manner that frustrates the intention of the people. As a whole, section 31 was adopted to reform the status of discrimination law in California and like the original Civil Rights Act of 1964, is intended "to achieve equality of [public employment, education, and contracting] opportunities" and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." To ignore the purpose of achieving equality and allow government agencies to interpret the federal funding exception broadly would be to repeat the sad history of courts thwarting the purpose and intent of civil rights legislation.

The imperative of narrowly construing exceptions is especially compelling for measures like Proposition 209, enacted through the initiative process to reform the state government when the legislature has failed or refused to do so. The courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process," and have sought to "jealously guard" and effectuate the initiative process. In *Beaumont Investors v. Beaumont-Cherry Valley Water District*, the government...
attempted to skirt Proposition 13’s restriction on local agencies’ power to impose taxes by characterizing a prohibited special tax, used to fund the construction of future water facilities, as a “service fee” exempt from Proposition 13. The court of appeal reasoned that it had the duty to protect Proposition 13’s purpose of restricting local authorities’ power, and prevent a “perversion” of the voters’ intent. The *Beaumont* court therefore required the government to carry the burden of establishing that it fit the exception to Proposition 13.

The exceptions to Proposition 209, like the exception to Proposition 13 in *Beaumont*, should be narrowly construed in a manner consistent with its language. More importantly, the exceptions to Proposition 209 should be construed to protect the will of the voters against the creation or exploitation of loopholes. Given the number of special interest groups with a vested interest in undermining Proposition 209, there can be no doubt that the initiative needs to be protected from the onslaught of attacks by special interest groups. Interpreting the federal exception narrowly will not only follow well-established case law, but also further ensure the elimination of discrimination and preferences, as the people intended.

III. SECTION 31(e) PROVIDES A NARROW EXCEPTION TO THE PROHIBITION OF STATE-SPONSORED DISCRIMINATION

A. The Federal Funding Exception Requires State-Sponsored Discrimination to Meet Two Criteria

The plain language of section 31(e) exempts state-sponsored discrimination from section 31(a)’s prohibition only when it is required as a condition of establishing or

74. See id. at 571.
75. See id.
76. See id.
77. See Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000) (discussing the ballot pamphlet and the intent of the voters to countermand the government’s imposition of quotas, preferences, and set-asides).
maintaining eligibility for federal programs that will provide funding to the state, and the state will lose funds if it becomes ineligible. On its face, section 31(e) provides: “Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.”

To fall within the plain language of this exception, the state-sponsored discrimination and/or preferences must meet two criteria. First, section 31(e) requires the state entity to prove that its race-based classification is an “action which must be taken to establish or maintain eligibility for a federal program.” Second, the state entity must prove that ineligibility for the federal program “would result in a loss of federal funds to the State.”

1. Subsection 31(e) Exempts Only Those Actions Required as a Condition of Eligibility for Federal Funding—Consistency with Federal Law Is Not Enough

The first element under the federal funding exception provides that the discriminatory government action must be required for the entity to establish or maintain eligibility for a federal program. If the federal government merely

79. The fundamental purpose of judicial interpretation of statutes is to determine the intent of the legislature or, in the case of initiatives, the voters. If the language is clear and unambiguous there is no need for construction. "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." Lungren v. Deukmejian, 755 P.2d 299, 304 (Cal. 1988). "A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words." Hi-Voltage Wire Works, 12 P.3d at 1082.
80. CAL. CONST. art. I, § 31(e) (Deering 2002).
81. Id.
82. Id.
83. See id. Professor Jung has stated, "Generally speaking, . . ., federal law does not require states to engage in affirmative action in public education, employment or contracting. In public employment and public education, federal law prohibits discrimination and permits, but does not require affirmative action." David J. Jung, Proposition 209, Preferences and Federal Financial Assistance, PUBLIC LAW RESEARCH INSTITUTE REPORTS (University of California, Hastings College of the Law, 1996-1997), at http://www.uchastings.edu/plri/96-97rp.html (last visited Nov. 17, 2003). Unfortunately, Professor Jung does not indicate what he means by "affirmative action." As the Ninth Circuit noted in Coalition, "the term 'affirmative action' is an amorphous value-laden term, rarely defined so as to form a common base for
encourages or permits the agency to take race-conscious actions, the first element has not been met.\textsuperscript{84}

The discriminatory conduct thus must be necessary for eligibility—it is not enough that the conduct be potentially helpful or generally consistent with the spirit of the federal program. If it is possible to be eligible without the discrimination, then the discrimination is prohibited, because it is not true that the action "must be taken" for eligibility.\textsuperscript{85}

Government entities defending Proposition 209 claims have protested such a strict construction of the first element of the exception.\textsuperscript{86} This protest relies on the arguments that federal grant conditions regarding affirmative action efforts\textsuperscript{87} are often vague, lack specific mandates, and most important for the purposes of this article, do not specifically require discrimination or preferences based on race and sex.\textsuperscript{88} Consequently, the state likely cannot produce evidence that its race- or sex-based preference program is required as a condition of receiving a federal grant. Instead the state is relegated to arguing, for example, that the generic obligations imposed under Title VI requiring non-discrimination andremedying of identified discrimination actually require race- and sex-based preference programs. Therefore, preferential

\textsuperscript{84} See CAL. CONST. art. I, § 31(e); see also Official Title and Summary, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1996) (explaining that Proposition 209 "[d]oes not prohibit...actions necessary for receipt of federal funds"), at http://vote96.ss.ca.gov/Vote96/html/BP/ (Nov. 5, 1996), Analysis of Legislative Analyst (explaining that Proposition 209 provides an exception to "keep the state or local governments eligible to receive money from the federal government).

\textsuperscript{85} Volokh, supra note 8, at 1387. But see Hillside Drilling, Inc. v. City of Berkeley, No. C-99-4646 MMC, 2002 WL 413371, at *19 (N.D. Cal. Mar. 12, 2002) (holding that the City of Berkeley was entitled to rely on the exception set forth in Art. I, § 31(e) in the absence of any evidence that the city violated the federal regulations governing eligibility for federal highway funds, as opposed to requiring the city to submit evidence that the city's specific program was required by the federal regulations).

\textsuperscript{86} See, e.g., Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment at 13-17, United Utils. v. Sacramento Mun. Util. Dist., No. 00AS3306 (Cal. Super. Ct. complaint filed June 20, 2000).  

\textsuperscript{87} See discussion infra Part IV.

\textsuperscript{88} See CAL CONST. art. I, § 31(e).
treatment is "necessary" to maintain or establish eligibility for federal funding. To no avail, SMUD fervently made such arguments to the trial court in *United Utilities v. Sacramento Municipal Utility District.* SMUD receives federal funds from several federal programs which require it to comply with Title VI and all associated regulations. SMUD argued that regulations adopted by the Department of Energy, Department of Defense, and Department of Transportation require its racially preferential contracting program, the Equal Business Opportunity Program (EBOP), as a condition of eligibility for funding. All three agencies, however, merely require recipients to comply with Title VI, and their regulations state that recipients must take "remedial action" or "affirmative action" to remedy past discrimination. The utility district failed to identify any law or regulation that actually required it to discriminate in favor of minorities and women and instead was left with speculation and supposition that the amorphous requirements for "remedial action" and "affirmative action" translate into a mandate for preferences based on race and sex.

The language of the first element of the federal funding exception clearly dictates that the federal government must specifically require the state government agency to operate a specific discriminatory program to become eligible for or maintain eligibility for a federal program. For example, if the Federal Department of Transportation had ordered SMUD to implement its bid discount program for minorities and women

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89. See infra notes 90-95 and accompanying text; see also Hi-Voltage Wire Works, Inc. v. City of San Jose, 84 Cal. Rptr. 2d 885, 898 (1999) (rejecting the argument of the City of San Jose that Title VI of the Civil Rights Act of 1964 required the city to "respond proactively" to a disparity study through the use of racial preferences), aff'd, 12 P.3d 1068 (Cal. 2000).
91. See id. at 2.
92. See id. at 15.
93. See id.
as a condition of establishing or maintaining eligibility for Department grants, SMUD might have been able to meet the first element. The trial court found, however, that "SMUD offer[ed] no evidence of any express contractual conditions that make the approval of federal funds for a project contingent upon the EBOP." The strict language of the first element of the federal exception leaves no room for discretionary racial preference programs such as that of SMUD.

2. **The State Must Prove that It Will Suffer an Actual Loss of Federal Funds if It Refuses to Grant Preferential Treatment on the Basis of Race or Sex**

The second element of section 31(e) states that the government agency must be required to take discriminatory action to establish or maintain eligibility, and failure to do so must result in ineligibility and consequently a loss of federal funds. Hypotheticals or conjectures about what federal agencies might do are insufficient to meet the requirements of the federal funding exception's plain language. To satisfy this test, the state must make a clear and definite showing that the federal government will withdraw its funds if the

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95. See id.; see also id. at 2 (describing how SMUD's 1998 EBOP used race-conscious "participation goals" and in some instances "evaluation credits," both of which violated Article I, section 31(a)).
96. See CAL. CONST. art. I, § 31(e) (Deering 2002).
98. See Van Pelt v. Carte, 26 Cal. Rptr. 182, 185 (Ct. App. 1962) (noting that "Conjecture, surmise, and guesswork may not give rise to an affirmative finding of fact"); see also Oldenburg v. Sears, Roebuck & Co., 314 P.2d 33, 36 (Ct. App. 1957) (holding that judgment cannot be based on guesses or conjectures, and verdicts may not be upheld by speculation).
99. See Van Pelt, 26 Cal. Rptr. at 185; Oldenburg, 314 P.2d at 36; see also Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 28 n.5 (Ct. App. 2001) ("Proposition 209 yields where federal law requires the state to engage in particular action, but not where it would merely permit such action."); Volokh, supra note 8, at 1387. Professor Volokh explains the standards by writing:
The discriminatory conduct thus must be genuinely necessary for eligibility—it's not enough that it be potentially helpful, or generally consistent with the spirit of the federal program. If it's possible to be eligible without the discrimination, then the discrimination is prohibited, because it's not true that the action 'must be taken' for eligibility.
Id. (emphasis added).
state fails to establish or maintain its discriminatory program. Obviously, if the funding can be enjoyed without resorting to a race-based program, section 31(e) does not apply because the race-based program is not an action that "must be taken" to establish or maintain eligibility for federal funding. ¹⁰⁰

Even if a federal agency threatens to deny or discontinue eligibility for federal funding, state and local governments must exhaust available administrative processes to determine whether they can obtain eligibility for federal funding without the use of state-sponsored discrimination, and if not, obtain a final agency determination of the specific actions required for compliance with federal "affirmative action" grant conditions. ¹⁰¹ Absent a final agency determination that eligibility for funding cannot be had without race-based action, such actions cannot be said to be "required." Moreover, failure to obtain a final agency determination of the actual requirements would supplant the federal agency's role in interpreting its own regulations and administering its own administrative processes. ¹⁰²

In United Utilities, SMUD did not convince the court that it risked losing federal funding if it did not maintain its EBOP program. ¹⁰³ SMUD failed to offer any evidence from federal agencies indicating that the failure to use the EBOP program would result in the loss of federal funds. ¹⁰⁴ SMUD's

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¹⁰⁰ See supra note 99.

¹⁰¹ See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government may not condition receipt of benefits on compliance with an unconstitutional condition). Cf. CAL. CONST. art III, § 3.5 (Deering 2002) (requiring an appellate court determination that the enforcement is prohibited by federal law or federal regulations before state administrative agencies can refuse to enforce a statute); Stone v. City & County of San Francisco, 968 F.2d 850, 861, 864 (9th Cir. 1992) (requiring a finding that alternatives are inadequate before overriding state laws).

¹⁰² Under the Administrative Procedures Act, pending judicial review of an agency's decision, the agency or the federal courts may postpone or stay the order denying eligibility for funding, or set it aside, ensuring that federal funding continues uninterrupted. 5 U.S.C. §§ 705, 706(2) (2002). But, until the available administrative remedies—and even judicial remedies, if appropriate—are exhausted, there is no showing that the federal funding exception under section 31(e) is satisfied.


¹⁰⁴ See id. at 3.
entire argument rested upon speculation that the federal agencies might terminate its eligibility for funding—even though no regulation or law required SMUD to maintain race- and sex-based preferences in its contracting program.\textsuperscript{105} The strongest evidence SMUD could muster was a letter from the Department of Energy reiterating that Title VI empowers the Department to terminate funding to entities that refuse to cease discriminating.\textsuperscript{106} The court noted, however, that the Department of Energy has neither found SMUD guilty of discrimination and required SMUD to adopt a race-based preference program, nor stated that SMUD would be in danger of losing its grant without the EBOP program. Rightfully, the court refused to find that SMUD satisfied the heavy burden imposed by section 31(e) through its speculation about what federal agencies might do.\textsuperscript{107}

Advocates of preferences may attempt to argue that their discriminatory program is “necessary” because the federal government has approved the program. But this argument ignores the distinction between what the federal government requires and what it permits, and the notion that states can meet the “affirmative action” grant conditions without discriminating. For example, federal magnet school grants given to public schools to aid their voluntary desegregation efforts\textsuperscript{108} require the school districts to establish desegregation programs that promote diversity and multiculturalism.\textsuperscript{109} The grant condition, however, does not dictate the specifics of the school’s program or mandate race-based school assignments.\textsuperscript{110}

\begin{itemize}
  \item[\textsuperscript{105}] See id. at 3-5.
  \item[\textsuperscript{106}] See id. at 5.
  \item[\textsuperscript{107}] See id. The court reasoned that SMUD did not meet the burden when it noted:

  Were the court to adopt the position advocated by SMUD, governmental agencies in California would be able to use subsection (e) to foreclose the mandate of subsection (a) based upon their own interpretation of what a federal agency might decide or do . . . furthermore it would require the courts to make guesses about whether federal agencies would agree that race-based programs are required and whether they would withdraw funding without them.

  Id.

  \item[\textsuperscript{109}] See id. § 7231d.
  \item[\textsuperscript{110}] See id. § 7231d, f.
\end{itemize}
Desert Sands Unified School District (Desert Sands) and Los Angeles Unified School District (LAUSD) both receive magnet school grants.\(^{111}\) Although they serve the same purpose, their desegregation programs differ dramatically. LAUSD assigns students to schools based on their race by denying enrollment to students if the racial imbalance will increase at a school that is predominantly non-white.\(^{112}\) Desert Sands allows all students to apply for magnet schools and selects students from a random lottery process that is not weighted based on race or sex. Without discriminating, this lottery has resulted in more diverse schools in the district.\(^{113}\) The federal Department of Education has approved both schools' programs, thus indicating that although the department may approve race-based desegregation plans, it does not require LAUSD to discriminate in school assignments in order to receive a grant.

**B. The State Bears the Burden of Proving It Satisfies the Federal Funding Exception**

A court cannot decide a lawsuit without applying the basic concept of burden of proof.\(^{114}\) In a Proposition 209 case, the plaintiff bears the initial and ultimate burden of proving the unconstitutionality of the government action under section 31(a).\(^{115}\) Then, the government bears the burden of proof on an affirmative defense that its actions are exempt under the federal funding exception.\(^{116}\) Both public policy and


\(^{112}\) See id. at 4.

\(^{113}\) See id.


\(^{115}\) The plaintiff "bears the initial and ultimate burden of establishing unconstitutionality." Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 28 (Ct. App. 2001) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986)). This initial burden can be met by showing that a government scheme employs race or gender classifications.

\(^{116}\) See San Jose Teachers Ass'n v. Barozzi, 281 Cal. Rptr. 724, 727 (Ct. App. 1991) (citing Telefilm, Inc. v. Superior Court, 201 P.2d 811, 816 (Cal. 1949)) (holding that "one who relies on the exception must establish it within the words as well as the reason"); see also Morris v. Williams 433 P.2d 697, 715 (Cal. 1967) (defendant ordinarily bears the burden of proving any affirmative defense). The term "burden of proof" has commonly been used to describe both the burden to persuade the trier of fact that a fact is true, and the burden to
pragmatism strongly support the assignment of this burden to the government. First, as previously noted, there is strong public interest in maintaining the vitality of laws enacted through the initiative process. Second, because the government uniquely possesses evidence of the federal programs in which it participates and the conditions placed upon that participation, the government is in the best position to establish whether section 31(e) applies.

According to the California Evidence Code, a party ordinarily has the burden of proof of each asserted fact, "the existence or nonexistence of which is essential to the claim for relief or defense." Traditionally, burdens of proof were assigned to the party to whose case the fact was essential, or to the party who was required to establish the "affirmative position." The party with the burden of proof maintains adequate records and evidence of compliance with the law and the voters' intent. See supra text accompanying notes 53-70.

117. See supra text accompanying notes 53-70.

118. See, e.g., Beaumont Investors v. Beaumont-Cherry Valley Water Dist., 211 Cal. Rptr. 567, 571 (Ct. App. 1985) (placing the burden of proof on the government ensures creation of an adequate record and furthers the voters' intent by forcing the government to prove it is complying with the law).

119. Burden of proof is also known as the "burden of persuasion," which means the burden of making the trier of fact believe the facts asserted by a party. See People v. Valverde, 54 Cal. Rptr. 528, 530 (Ct. App. 1966); see also Witkin, Cal. Evid. § 1, at 155; § 3, at 157.

120. See supra note 122; see also 2 STRONG, supra note 116, § 337; 9 WIGMORE, supra note 116, § 2486.

121. See supra note 122; see also 2 STRONG, supra note 116, § 337; 9 WIGMORE, supra note 116, § 2486.
that burden throughout the trial.\textsuperscript{124}

In \textit{United Utilities}, the trial court, in ruling on the cross motions for summary judgment, held that the defendant had the burden of proving that its program fits under the section 31(e) exception.\textsuperscript{125} Citing \textit{Beaumont Investors v. Beaumont-Cherry Valley Water District},\textsuperscript{126} the court reiterated the importance of "jealously guarding and effectuating" the initiative process,\textsuperscript{127} and required SMUD to produce evidence to support its affirmative defense under section 31(e).\textsuperscript{128} The \textit{Beaumont} court emphasized that if a plaintiff carried the burden of proof, it would create an incentive for the government to avoid creating a record as a litigation tactic.\textsuperscript{129}

In almost all challenges arising under Proposition 209, the defending government agency will be the only party possessing sufficient information to prove—or disprove—the applicability of the federal funding exception. At a minimum, the government will have at its disposal any contracts entered into with federal agencies as well as all communications regarding any federal grant conditions with which it is required to comply.


\textsuperscript{125} Decision on Cross-Motions for Summary Judgment at 3, United Utils. v. Sacramento Mun. Util. Dist., No. 00AS3306 (Cal. Super. Ct., decision filed Jan. 8, 2002). The federal district court's opinion in \textit{Hillside Drilling, Inc. v. City of Berkeley}, No. C-99-4646 MMC, 2002 WL 413371 (N.D. Cal. Mar. 12, 2002), provides an example of the misallocation of this burden and profound misunderstanding of section 31(e). In \textit{Hillside Drilling} the court held that Berkeley was entitled to rely on section 31(e) unless the plaintiff proved that Berkeley violated federal regulations. \textit{Id.} at \textsuperscript{*5}. In so doing, the court not only imposed the burden of proof on the plaintiff, but effectively provided Berkeley with the presumption that it was entitled to rely upon section 31(e) that the plaintiff must prove otherwise.

\textsuperscript{126} 211 Cal. Rptr. 567 (Ct. App. 1985).


\textsuperscript{128} See id.

\textsuperscript{129} See \textit{Beaumont Investors}, 211 Cal. Rptr. at 571; see also 2 STRONG, \textit{supra} note 116, § 337; Richard A. Epstein, \textit{Pleadings and Presumptions}, 40 U. CHI. L. REV. 556, 579 (1973). Professor Epstein suggests that each issue and its burden should be allocated for reasons of efficiency to the party with superior access to the evidence necessary to resolve it as a matter of fact. If the evidence is in the party's favor he has every incentive to make it known. If it is not, his silence will seal his defeat. See id.
IV. IN MOST CASES THE STATE CAN COMPLY WITH FEDERAL GRANT REQUIREMENTS WHILE MEETING PROPOSITION 209'S MANDATE OF RACE- AND SEX-NEUTRALITY

As demonstrated by Coalition for Economic Equity v. Wilson,130 Hi-Voltage Wire Works v. City of San Jose,131 and more recently United Utilities v. Sacramento Municipal Utility District,132 federal law and the greater protections against discrimination under Proposition 209 are not mutually exclusive.133 This portion of the analysis will examine several well-known federal laws and grant programs that under limited circumstances require “affirmative action,” and will explain how the state can comply with these federal requirements while still complying with Proposition 209.

130. 122 F.3d 692 (9th Cir. 1997), vacating, 946 F. Supp. 1480 (N.D. Cal. 1996). Although speaking to the related issue of preemption, the Ninth Circuit in Coalition explained that nothing in Title VII conflicts with the provisions of Proposition 209. See id. at 709-10. The district court in Coalition found no conflict between Proposition 209 and Titles VI and IX, and those Titles do not, on their face, state an intention to preserve voluntary “affirmative action.” Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1517 (N.D. Cal. 1996). While finding that Proposition 209 violated the Equal Protection Clause of the Fourteenth Amendment and Title VII, the district court noted that “[b]ecause Proposition 209 allows required actions under Titles VI and IX no conflict could transpire between actions required by the statutes and Proposition 209.” Id. at 1518 (emphasis added). 131. See 12 P.3d 1068, 1088 (Cal. 2000) (highlighting that Title VII permits, but has not been interpreted to require, race- and sex-conscious programs). 132. See Decision on Cross-Motions for Summary Judgment, United Utils., No. 00AS3306. 133. The Ninth Circuit in Coalition reiterated the state’s “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” Coalition, 122 F.3d at 709 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 n.18 (1980)). Moreover, both Titles VII and IX provide for supremacy of state law, except when state law requires actions prohibited by federal law. See 42 U.S.C. § 2000e-7 (2003) (Title VII expressly provides for supremacy of state law, except for “any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”); id. § 2000e-2(j) (“Nothing contained in this subchapter shall be interpreted to require any [entity] ... subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group ... ”); id. § 2000h-4 (Title IX preserves state laws “unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.”); see also Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281-82 (1987) (noting that Congress “simply left [state antidiscrimination laws] where they were before the enactment of title VII”).
A. Title VI Imposes No Impediments to Enforcement of Proposition 209

Probably the most common federal grant condition is a general requirement that recipients comply with Title VI of the Civil Rights Act of 1964. Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

The express language of Title VI appears to prohibit not only exclusion from participation, denial of benefits, and discrimination under federal programs, but also preferential

134. See 42 U.S.C. § 2000d-4a (2003). The statute is very thorough in its description of governmental and quasi-governmental entities that are covered by Title VI. Section 2000d-4a provides:

For the purposes of this title, the term “program or activity” and the term “program” mean all of the operations of—

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 7801 of Title 20 [Section 9101 of the Elementary and Secondary Education Act of 1965]), system of vocational education, or other school system;

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

135. Id. § 2000d-1 (emphasized added).

135. Id. § 2000d.
treatment based on race. As Title VI reaches no further than the Equal Protection Clause of the Fourteenth Amendment, and the standards under Title VI are identical to those under the Fourteenth Amendment, Title VI cannot be construed to require the racial preferences that the Fourteenth Amendment barely permits.

In fact, in Alexander v. Sandoval, the United States Supreme Court noted that, like the Equal Protection Clause, Title VI prohibits only intentional discrimination—not the mere statistical disparity identified in the disparity studies often used to justify state-sponsored racial discrimination and preferences. The Alexander court explained:

it is... beyond dispute—and no party disagrees—that § 601 [Title VI] prohibits only intentional discrimination.... Essential to the Court's holding [in Bakke] reversing that aspect of the California court's decision was the determination that § 601 "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."... What we said in Alexander v. Choate, is true today: "Title VI itself directly reaches only instances of intentional discrimination."

Furthermore, Title VI was not intended to deny eligibility for federal funding for anything other than a violation of the constitutional obligation of nondiscrimination. In Bakke, Justices Brennan, White, Marshall, and Blackmun agreed that "[n]owhere [in the legislative record] is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner

136. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 n.11 (11th Cir. 1993).
137. See Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 287; id. at 328 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).
138. The Ninth Circuit in Coalition wrote: "That the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." Coalition, 122 F.3d at 708. The court further emphasized that "the Fourteenth Amendment... does not require what it barely permits." Id. at 709; see Elston, 997 F.2d at 1406 n.11 ("Since Title VI itself provides no more protection than the equal protection clause—both provisions bar only intentional discrimination—we will not engage in a separate discussion of the Title VI statutory claims, as such an inquiry would duplicate exactly our equal protection analysis.").
140. Id. at 280-81 (internal citations omitted) (emphasis added).
inconsistent with the standards incorporated in the Constitution.\footnote{141}

Applying the plain language and intent of Title VI, if a state gives preferential treatment in the form of bid discounts to construction companies owned by Hispanics, all other construction companies are arguably excluded, denied benefits, and/or discriminated against by this action. An exception to this interpretation arises when the racially preferential program is required to correct past discrimination such as the "pervasive, systematic, and obstinate discriminatory conduct" in \textit{United States v. Paradise},\footnote{142} and is narrowly tailored to remedying the past discrimination.\footnote{143} Based on this interpretation of Title VI, most California state agencies should not have a problem simultaneously complying with Title VI and Proposition 209. Recipients must simply not exclude, deny benefits, or subject anyone to race-based discrimination, which is precisely the discrimination Proposition 209 prohibits. Compliance with Proposition 209, by definition, guarantees that Title VI is satisfied.

\textbf{B. Regulations Implementing Title VI Do Not Require Violation of the Constitutional Duty of Nondiscrimination Under Proposition 209}

Several federal agencies that grant billions of dollars each year have adopted regulations implementing the mandate of Title VI.\footnote{144} Some federal agencies have

\begin{itemize}
\item See id. at 165. The program at issue in \textit{Paradise} involved a requirement that one black be promoted for each white promoted in the Alabama State Police on an interim basis. \textit{Id.} at 153. The district court ordered this eleven years after the State Police had failed to develop adequate promotion procedures to eradicate the effects of prior intentional discrimination against blacks. \textit{Id.} At the time of the original lawsuit there had never been a black State Trooper on the force. \textit{Id.} at 154. The Supreme Court held that "[t]he race-conscious relief imposed was amply justified and narrowly tailored." \textit{Id.} at 185; see also \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 509 (1988) ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion . . . [and the local government can take action] penalizing the discriminator and providing appropriate relief to the victim of discrimination.").
\item Several federal agencies have adopted regulations to comply with Title VI, including the Department of Energy, see 10 C.F.R. Part 1040 (2002); the Federal Highway Administration, Department of Transportation, see 23 C.F.R.
\end{itemize}
interpreted Title VI broadly to require funding recipients to do more than engage in nondiscrimination, but to take affirmative steps to eradicate the effects of past discrimination, or to overcome "under-representation" by minorities in the program in question.\footnote{146} Even if the mandate of Title VI is interpreted to require such remedial measures, it does not follow that those remedial measures must include race- or sex-based preferences as opposed to race- and sex-neutral remedies that protect the rights of each individual.\footnote{146}

In addition, Title VI does not require state and local governments to implement race- and sex-based preferences in response to an alleged statistical disparity.\footnote{147} Statistical
disparities may raise an "inference" of discrimination, giving a state or local government a reason to examine its policies and practices for actual discrimination. But, a disparity study, without more, does not constitute proof of intentional discrimination by the state or local government, and does not create an obligation to provide race- and sex-based preferences. Title VI, like the Equal Protection Clause of the Fourteenth Amendment, prohibits only intentional discrimination, not mere alleged statistical disparity. Although state and local governments may enact race- and sex-neutral "affirmative action," and take steps to remedy discrimination by penalizing those guilty of discrimination and making victims whole, the language of Proposition 209 requires the use of neutral means, unless the Equal Protection Clause strictly requires race- or sex-conscious action. Thus before the state or local government entity is relieved of its constitutional duty of neutrality under section 31(a), the race- or sex-conscious action must truly be required under the Equal Protection Clause, and must be necessary to maintain or establish eligibility for the grant.

1. The Department of Energy Requires State and Local Entities to Promise Nondiscrimination and to Eliminate Discriminatory Policies and Practices

Title 10, section 1040.1 of the Code of Federal Regulations provides that "no person shall, on the ground of race, color, national origin, . . . be subjected to is described as voluntary." Id. Justice Mosk further stated:

It is now clear that undergirding much of the rhetoric supporting racial quotas, and preferential treatment in general, is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange and index them precisely on the basis of their race. The objective is not equal treatment but equal representation.

Id. at 290-91.

149. See Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1088 (Cal. 2000).
150. See supra text accompanying notes 139-40.
151. See Croson, 488 U.S. at 524-25 (Scalia, J., concurring) (permitting race-conscious measures only to the extent necessary to disestablish a discriminatory system, and noting that such "power extends no further than the scope of the continuing constitutional violation").
discrimination . . . in connection with any program or activity receiving Federal financial assistance from the Department of Energy. 152 No Department of Energy regulation mandates that state or local government entities must adopt race- or sex-based quotas, recruitment requirements, or bid preferences as a condition of eligibility for funding by the Department of Energy. The regulations do provide that recipients of funds may engage in voluntary affirmative action to “encourage participation by all persons regardless of race, color, national origin, sex, handicap, or age,” but encouraging participation is far from requiring race- or sex-based affirmative action. 153

Consistent with Title VI’s goal of eliminating discrimination, the Department of Energy’s regulations require funding recipients to evaluate their policies and practices to ensure that they do not discriminate. 154 If their policies and practices discriminate, they must change them, 155 and “take appropriate remedial steps” 156 to remedy the effects of these discriminatory policies and practices.

On its face, this duty to “take appropriate steps” neither expressly mandates racial preferences, whether in the form of goals, timetables, or plus factors, nor requires any action that would be prohibited under section 31(a) of Proposition 209. 157 Indeed, Department of Energy regulations do not require funding recipients to take any particular type of remedial action unless specifically ordered by the Department of Energy’s Director of the Office of Equal Opportunity. 158

The Department of Energy provides an administrative process for challenging any such order and for determining whether race- or sex-based remedial action is required as a condition of eligibility for funding. 159 Unless and until the

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152. 10 C.F.R. § 1040.1(a) (2002).
153. Id. § 1040.7(b).
154. See id. § 1040.7(c)(1).
155. See id. § 1040.7(c)(2).
156. Id. § 1040.7(c)(3).
157. Cf. Lungren v. Superior Court, 55 Cal. Rptr. 2d 690, 694 (Ct. App. 1996) (quoting Dawn v. State Pers. Bd., 154 Cal. Rptr. 186, 190 (Ct. App. 1979)) (“[T]he term ‘affirmative action’ . . . is rarely defined . . . so as to form a common base for intelligent discourse.”). The Lungren court also explained that most definitions of the term “affirmative action” (i.e., appropriate steps) would include race- and sex-conscious actions, as well as neutral outreach. See id.
158. See 10 C.F.R. § 1040.7(a).
159. See 42 U.S.C § 2000d-1; see also 10 C.F.R. § 1040.111-124 (providing the
provided processes are exhausted, there is no showing that the Department of Energy requires any actions that would be prohibited by section 31(a) of Proposition 209, or that the recipient’s race- or sex-conscious actions are immunized by section 31(e). Under the existing administrative process, the Department cannot terminate funding unless the Department (1) holds hearings to determine whether the recipient is discriminating and (2) makes express findings that the recipient is discriminating, and (3) the recipient refuses to stop discriminating in the face of these findings. Assuming all of the steps in this process occur, the Director of the Department of Energy is required to report to the House and Senate the circumstances and the grounds for denying or terminating funding before eligibility for funding can be denied or terminated.

2. The Department of Defense Conditions Eligibility for Funding on the Recipient’s Promise of Nondiscrimination

Mirroring Title VI’s prohibition of intentional discrimination on which they are based, the Department of Defense’s regulations provide that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from any component of the Department of Defense.

This language does not require funding recipients to provide racial preferences as a part of their program. Moreover, nothing in the regulations requires that any remedial action be race-based rather than race-neutral. The operative language provides: “In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome administrative process for determining compliance and noncompliance with nondiscrimination requirements, including notice and an opportunity to be heard.

160. See supra note 159.
161. See 42 U.S.C § 2000d-1; see also 10 C.F.R. 1040.114.
the effects of prior discrimination." The phrase "affirmative action" is not synonymous with "racial preferences." Chief Justice George, in his concurrence and dissent in Hi-Voltage, strongly disagreed with the proposition that only race-conscious efforts can constitute "affirmative action." The Chief Justice expressly noted that "proactive efforts need not necessarily involve race-conscious or gender-conscious measures." The regulations neither dictate that any such affirmative action must be race-based, nor indicate that it would be insufficient to eliminate the allegedly discriminatory policies, terminate any employees or program participants engaging in discrimination, and make the actual victims of discrimination whole. The Department of Defense regulations also provide an administrative process for determining the actions required as a condition of eligibility for funding, and make clear that eligibility for funding cannot be denied or revoked without (1) a hearing, (2) express findings of discrimination, (3) approval by the Secretary of Defense, and (4) notice to the House and Senate.

3. The Department of Transportation Requires Most Funding Recipients to Promise Nondiscrimination, but Imposes Additional Requirements on Federal Highway, Transit, and Airport Construction Projects

To fulfill its obligation to implement Title VI, the Department of Transportation prohibits recipients of funds from discriminating on the basis of race. Title 49, section 21.1 of the Code of Federal Regulations provides that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation."
The Department of Transportation also requires recipients of funds to take "affirmative action" to remedy their own discrimination. The applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin. 170

The mere inclusion of an amorphous call for "affirmative action" or for remedial efforts to eradicate the effects of past discrimination does not mandate race-based action, and does not sufficiently demonstrate that such action is required as a condition of establishing or maintaining eligibility for funding from the Department of Transportation. Similar to other federal executive agencies, the Department of Transportation’s regulations provide for an extensive administrative process for determining whether race-based action is necessary, 171 including administrative hearings 172 and the right to appeal any decision to terminate or deny eligibility for funding to the Secretary of Transportation. 173

In addition to the general nondiscrimination requirements of Title VI, the Federal Department of Transportation’s Disadvantaged Business Enterprise program (DBE program) 174 imposes requirements on participants in particular federal highway, transit, and airport construction programs. 175 One of the objectives of the program is to “ensure nondiscrimination in the award and administration of Department of Transportation-assisted contracts in the Department’s highway, transit, and airport financial assistance programs.” 176 The program dictates that recipients may not discriminate:

(a) You must never exclude any person from participation

170. Id. § 21.5(b)(7).
171. See id. § 21.13.
172. See id. § 21.15.
173. See id. § 21.17.
176. Id. § 26.1(a).
in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin. 177

The program specifically requires grant recipients to set an overall goal for DBE participation, particularly in Department of Transportation-assisted contracts, unless they will be using $250,000 or less of federal funds. 178 The overall goal must be based on demonstrable evidence of the availability of willing and able DBEs relative to all businesses willing and able to participate in the Department of Transportation-assisted contract. 179 At first glance, the DBE program appears to not require preferences. 180 The regulations do, however, provide that set-asides may be used when no other method could reasonably be expected to correct egregious instances of discrimination. 181 The regulations require recipients to first attempt to meet their goals with race-neutral means, and only if the attempt fails then to resort to race-conscious alternatives. 182

Federal grant recipients can simultaneously comply with the DBE program and Proposition 209 as long as race-neutral efforts sufficiently meet the goals of their program. If recipients are unable to achieve DBE participation through such efforts, they may be forced to grant preferences. 183 The

177. Id. § 26.7.
178. See id. § 26.45(a)(1)-(2).
179. See id. § 26.45(b).
180. The regulations state, “You are not permitted to use quotas for DBEs on DOT-assisted contracts.” Id. § 26.43(a). This remains constitutionally problematic as “[a] participation goal differs from a quota or set-aside only in degree; whatever label, it remains ‘a line drawn on the basis of race and ethnic status.’” Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1084 (Cal. 2000) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978)).
182. See id. § 26.51(a), (d).
183. This forced grant of preferences, however, begs the question of whether program goals themselves are well-founded or are set artificially high to ensure
language of the regulations on this point is quite clear: "you must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means." The United States Supreme Court has indicated that affirmative action requirements such as these may be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Until the Court issues a clear decision or finds the DBE program unconstitutional, Department of Transportation grant recipients probably have no choice but to grant preferences if race-neutral means of achieving participation goals are unsuccessful, and face the potentiality of lawsuits alleging that the grant recipient is denying contractors the right to compete on equal footing, regardless of their race.

4. Cops on the Beat—The Attorney General's Law Enforcement Block Grants

Under 42 U.S.C. § 3796dd, state and local police agencies may apply for, and the United States Attorney General may award, grants to "increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety." Grant applications must include "assurances that the applicant will, to the extent practicable, seek, recruit, and hire members of racial and ethnic minority groups and women in order to increase their ranks within the sworn positions in the law enforcement agency." Without violating Proposition 209, grant applicants can promote the recruitment and hiring of minorities with broad, race- and sex-neutral outreach. The language of the statute does not suggest that recipients must pursue race- or sex-conscious means of ensuring that qualified minorities and women must be singled out for special notice of opportunities. There are many race- and sex-neutral avenues that law enforcement agencies can pursue such as

that race-neutral means fail and that race-conscious efforts will be required.

184. See id. § 26.51(d) (emphasis added).
185. See supra notes 141-42, 145 and accompanying text.
187. Id. § 3796dd-1(c)(11).
188. See id.
advertising in publications that cater to women or particular ethnic groups, sending recruiters to schools that have significant minority populations, and insuring that the recruitment and hiring processes do not discriminate in any way.


The general purpose of this grant program is "to reduce crime and delinquency in the United States." Recipients, which include state and local police agencies, correctional agencies, criminal court systems, probation and parole agencies, and similar agencies, are required to "formulate, implement and maintain an equal employment opportunity program [(EEOP)]." Only recipients that have fifty or more employees, receive grants or subgrants of $25,000 or more, and have a service population of at least 3% minorities are required to formulate an EEOP.

The EEOPs must have a statement of specific steps the recipient will take for the achievement of full and equal opportunity. Recipients also must describe their program for recruiting minorities. Furthermore, recipients are expected to evaluate their EEOPs continually. Recipients who need to make improvements are "encouraged" to develop guidelines under their program which will correct disparities in a timely manner.

While still meeting the requirements of the regulations, state and local agencies that receive grants under the Omnibus Crime Control and Safe Streets Act can comply with Proposition 209 by adopting programs to achieve equal opportunity and recruiting minorities using race-neutral means. Furthermore, recipients are not forced, but merely

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189. Grant recipients could pursue both of these measures as long as they also advertise in general publications and recruit at a wide variety of schools.
190. 28 C.F.R. § 42.301 (2002).
191. See id. § 42.302(b).
192. Id.
193. See id. § 42.302(d).
194. See id. § 42.304(g)(1).
195. See id. § 42.304(g)(2).
196. See 28 C.F.R. § 42.306(a) (2002).
197. See id.
198. The race-neutral means discussed in regard to the "Cops on the Beat..."
encouraged to develop guidelines to correct disparities in a timely fashion. The regulations do not require that such guidelines include preferences.

V. CONCLUSION

How courts interpret the federal funding exception is extremely important to the vitality of Proposition 209. A broad interpretation of this exception will undermine the intent of California's voters to remove the State from the business of granting preferential treatment to some individuals and groups simply because of their race or sex. To safeguard the will of the voters and give effect to the initiative process, courts must interpret the federal funding exception narrowly, in accordance with both its plain language and the voters' intent to prohibit state-sponsored discrimination.

Should a state or local government seek to use presumptively unconstitutional racial preferences, the government entity must meet its burden of proving the affirmative defense under section 31(e). This includes exhaustion of race- and sex-neutral means to meet federal affirmative action conditions. And, if the federal granting agency threatens to discontinue funding the government entity for the lack of racial preferences, the entity must obtain a final agency determination that eligibility for funding will be terminated unless the recipient discriminates in favor of certain groups on the basis of race or sex. Even if the state government obtains such a determination, the defense under section 31(e) may fail. The racial preferences may be challenged as illegal under the Equal Protection Clause of the United States Constitution, and may be challenged as exceeding the federal agency's delegated powers. Only clear and specific evidence that the recipient will lose federal funding unless it grants racial preferences is sufficient to satisfy section 31(e) so as to exempt its racial preferences from the prohibition under section 31(a).

This common-sense and plain-language construction of

Program," supra text accompanying notes 186-88, are also applicable to the "Safe Streets Act of 1968."
199. See 28 C.F.R. § 42.306(a).
200. See id.
section 31(e) does not sound the death knell for affirmative action because state and local governments have a variety of race- and sex-neutral tools at their disposal. Moreover, this interpretation does not require the violation of federal laws or regulations. Federal grant recipients can meet both federal grant conditions requiring nondiscrimination and Proposition 209's prohibition of state-sponsored discrimination. If this proposition is untrue, and state and local government cannot satisfy federal laws prohibiting discrimination by requiring that all individuals and groups shall be treated equally, "the central tenet of the Equal Protection Clause teeters on the brink of incoherence."

201. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997).
APPENDIX A: INITIATIVE TEXT

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.