ESSAY

THE LEGALITY OF PROMOTING INCLUSIVENESS: WHY THE UNIVERSITY OF CALIFORNIA MAY AND SHOULD USE RACE AND ETHNICITY AS FACTORS IN APPLICANT OUTREACH

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INTRODUCTION

In 1996 the voters of California adopted Proposition 209, amending the state constitution to add Article 1, section 31: "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."[1]

This essay addresses whether this prohibition of discrimination and preferential treatment bars the University of California (the University) from using race or ethnicity as factors in its outreach programs designed to recruit applicants, and whether the University needs to consider race in its outreach efforts to avoid

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1. CAL. CONST. art. I, § 31, subsec. (a).

discriminating against potential minority candidates. I will review the disputes over the meaning of section 31, and particularly the term "preferential treatment," during the Proposition 209 campaign, and after it was adopted by the voters. I will conclude that a ban on "preferential treatment" based on race and ethnicity does not prohibit all considerations of race and ethnicity in university outreach programs. I will then discuss an important justification for using race and ethnicity in recruiting applicants suggested by the California Supreme Court's reasoning in its interpretation of the initiative — as an affirmative anti-discrimination program. I will conclude that the University may use race and ethnicity in its outreach programs to reach minority applicants who otherwise might not apply, as long as the program is broadly designed to also reach other potential applicants, regardless of their race or ethnicity, and that it should use race and ethnicity to avoid discriminating against potential minority applicants.

I. THE 1996 LEGAL CONTROVERSY OVER THE MEANING OF PROPOSITION 209

When Proposition 209 was placed on the ballot for the 1996 general election, its meaning was the immediate subject of controversy. This controversy sparked considerable debate, and pre-election litigation. The two sides could not even agree on whether the initiative was about "affirmative action."[2] Opponents of the ballot measure warned voters that it could bar all affirmative action, while proponents tried to re-assure the electorate that it preserved affirmative action, while prohibiting "preferential treatment."[3]

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

> The initiative's language is so broad and misleading that it eliminates equal opportunity programs including: [¶] [1] tutor-

2. Defining the term is often controversial. In prior articles I have identified five models of "affirmative action" – (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) affirmative anti-discrimination. *See* David B. Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 925-33 (1996) [hereinafter Oppenheimer, *Understanding*]; David B. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42, 42-61 (1989) [hereinafter Oppenheimer, *Five Models*].

3. Polling data suggested that a majority of voters supported "affirmative action" but opposed "discrimination" and "preferential treatment." Thus, debaters were prepped by proponents to insist that the proposition preserved affirmative action, while refusing to be drawn into a discussion about what they meant by the term. LYDIA CHÁVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION 47, 80 (1998).

> ing and mentoring for minority and women students; [¶] [2] affirmative action that encourages the hiring and promotion of qualified women and minorities; [¶] [3] outreach and recruitment programs to encourage applicants for government jobs and contracts; and [¶] [4] programs designed to encourage girls to study and pursue careers in math and science.[4]

In rebuttal, the proponents tried to reassure voters that the initiative would not harm most affirmative action programs, asserting that:

> Proposition 209 bans discrimination and preferential treatment — period. Affirmative action programs that don't discriminate or grant preferential treatment will be [unchanged]. Programs designed to ensure that all persons — regardless of race or gender — are informed of opportunities and treated with equal dignity and respect will continue as before.[5]

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

The Legislative Analyst's analysis recognized the uncertainty over the legal effect of the prohibition of "preferential treatment." The proposition was broadly described as an attempt to limit or bar affirmative action programs.[6] The Analyst wrote that public university "programs such as scholarship, tutoring,

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4. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, 1996 GENERAL ELECTION (Arguments Against Proposition 209), *available at* http://vote96.sos.ca.gov/bp/209noarg.htm.

5. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, 1996 GENERAL ELECTION (Rebuttal to Argument Against Proposition 209), *available at* http://vote96.sos.ca.gov/bp/209norbt.htm.

6. "This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting *to the extent these programs involve "preferential treatment"* based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs." CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, 1996 GENERAL ELECTION (Analysis by the Legislative Analyst), *available at* http://vote96.sos.ca.gov/bp/209analysis.htm (emphasis added).

and outreach that are targeted toward minority or women students" might be affected, but added that it was uncertain whether they actually would be affected until there were "court rulings on what types of activities are considered 'preferential treatment' . . .".[7] The Analyst concluded:

> [S]ome programs we have identified as being affected might be changed to use factors other [th]an those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could be changed to target instead high schools with low percentages of UC or CSU applications.[8]

In short, the Legislative Analyst acknowledged that outreach programs that use race or ethnicity could be affected by the Proposition, but that they might not be, depending on how the courts interpreted the term "preferential treatment." Furthermore, she pointed to University of California's (UC) outreach programs as potentially at risk, and suggested that they might need to be re-designed to eliminate using race or ethnicity if the Proposition passed, again depending on how the courts interpreted the phrase "preferential treatment."[9]

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

> **Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.**
>
> - Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
> - Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
> - Mandates enforcement to extent permitted by federal law.
> - Requires uniform remedies for violations. Provides for severability of provisions if invalid.[10]

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7. *Id.*
8. *Id.*
9. *Id.*
10. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, 1996 GENERAL ELECTION (Official Title and Summary Prepared by the Attorney General), *available at* http://vote96.sos.ca.gov/BP/209.htm.

In response to the Attorney General's ballot description, the "No on 209" campaign and other organizations opposed to the Proposition petitioned the Sacramento Superior Court for an order requiring the description to be re-written, asserting that the Attorney General's description was misleading because it failed to describe the proposition as an attempt to prohibit affirmative action.[11] The Superior Court agreed, granting a writ of mandate, finding that the Attorney General had failed to fully state "the main purpose or chief point of the initiative [was], . . . to effect changes or stop the affirmative action programs within the [S]tate of California."[12]

The Court of Appeal reversed. The court found that "any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence 'false and misleading'"[13] because "[m]ost definitions of the term [affirmative action] would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs."[14] Thus, in the view of the California Court of Appeal, Proposition 209 banned discrimination and preferential treatment based on race or ethnicity, but did not ban affirmative action outreach programs. The court did not address whether its definition of affirmative action outreach programs included outreach programs that utilized race or ethnicity.

On November 5, 1996, Proposition 209 passed, receiving 54.6% of the votes cast.[15] It was temporarily stayed by the United States District Court, but that stay was lifted by the United States Court of Appeals for the Ninth Circuit. When a petition to review the Ninth Circuit's decision was rejected on November 3, 1997, the Proposition took effect.

In the wake of the initiative taking effect, the dispute over the meaning of the term "preferential treatment" has continued. It has been the source of disagreement not only in the courts, as described in Section II *infra*, but among the Legislature and the Executive as well. For example, in 2004 the California Legislature overwhelmingly passed a bill providing that to "consider" race and/or ethnicity does not necessarily constitute "preferential

11. *See Lungren*, 48 Cal. App. 4th at 441.

12. *Id.* at 441 (quoting the Superior Court transcript of its decision) (omitting citation).

13. *Id.* at 442.

14. *Id.*

15. Cal. Sec'y State, 1996 General Election Returns for Ballot Propositions, http://vote96.sos.ca.gov/Vote96/html/vote/prop/page.961218083528.html (last visited Oct. 1, 2006).

treatment" based on race and/or ethnicity.[16] The bill authorized the University of California and California State University to "consider culture, race, gender, ethnicity, national origin, geographical origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given."[17] The Legislative Counsel's office offered a legal opinion that the bill was not inconsistent with Article 1, section 31 of the California Constitution — that an admissions process could consider race as a positive factor in admissions without giving preferential treatment based on race.[18] The bill passed the Assembly by a vote of 47 to 27, and the Senate by a vote of 22 to 13, but it was vetoed by Governor Arnold Schwarzenegger.[19] The Governor explained that "[t]he practical implementation of the provisions of this bill would be contrary to the expressed will of the people who voted to approve Proposition 209 in 1996. Therefore, since the provisions of this bill would likely be ruled as unconstitutional, they would be more appropriately addressed through a change to the State Constitution."[20]

Ultimately, the question of what meaning to give the term "preferential treatment" must be left to the California Supreme Court.[21] But the Legislature's interpretation is entitled to great deference when there is ambiguity over a term's meaning.[22]

In light of the 2004 opinion of the Legislative Counsel, the conflicting views of the members of the Legislature and the Governor in 2004, as well as 1996 opinion of the Court of Appeal in the *Lungren* case, the 1996 descriptions by Attorney General Lungren and the Legislative Analyst, and the arguments by the proponents and opponents of the initiative, we must acknowledge considerable doubt about the meaning of the phrase "preferential treatment" as used in Proposition 209. Clearly, Article 1, section 31 of the California Constitution prohibits the University

16. Cal. Asemm. B. 2387, 2003-2004 Leg., Reg. Sess. (2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040824_enrolled.pdf.

17. *Id.*

18. *Id.*

19. History of Assembly Bill 2387, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040929_history.html (last visited Oct. 1, 2006).

20. Governor's September 29, 2004 Assembly Bill 2387 Veto, http://www.leginfo.ca.gov/pub/03-04//bill/asm/ab_2351-2400/ab_2387_vt_20040929.html (last visited Oct. 1, 2006).

21. *See* Sands v. Morongo Unified Sch. Dist., 53 Cal.3d 863, 902-03 (1991) (determining that the California Supreme Court is the final authority on interpretation of the state Constitution).

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

of California from giving "preferential treatment" on the basis of race and/or ethnicity. But the ban on "preferential treatment" may not extend to "outreach," "affirmative action," or a decision to "consider" race and/or ethnicity as a "plus factor." With these limitations in mind, how have the courts interpreted the initiative following its adoption by the voters?

II. JUDICIAL APPLICATIONS OF ARTICLE 1, SECTION 31

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

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

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

According to Justice Brown's majority opinion, the major problems with the City of San Jose's program was the exclusion

23. 24 Cal. 4th 537 (2000).
24. *Id.* at 566.
25. *Id.* at 560.
26. *Id.* at 563-564.

of potential white male subcontractors from the group receiving notice of opportunities to bid, solely because of race, coupled with the compulsion to contact potential minority and female sub-contractors. "The relevant constitutional consideration is that . . . [prime contractors] are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31."[27] By contrast, a program would be permissible if "'designed to ensure that all persons — regardless of race or gender — are informed of opportunities and treated with equal dignity and respect . . . '."[28]

The two principal opinions in *Hi-Voltage* (the majority opinion by Justice Brown,[29] and a concurring and dissenting opinion by Chief Justice George[30]) were both concerned with not overstating the effects of the decision. Thus, Justice Brown stated that "[a]lthough we find the City's outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. . . . We express no opinion regarding the permissible parameters of such efforts."[31] Chief Justice George makes the same point, writing:

> [A]lthough the arguments in favor of Proposition 209 identified some types of affirmative action programs at which the measure was directed, the argument did not purport to define with any degree of specificity the factors that should be considered in determining whether a program "discriminates against" or "grants preferential treatment to" an individual or group on the basis of the prohibited characteristics.[32]

To appreciate the degree to which Justice Brown and Chief Justice George leave open considerations of race that do not constitute "preferential treatment," the concurring opinion by Justice Mosk is noteworthy.[33] Justice Mosk concurred separately because, in his words "[he] wish[ed] to say something more."[34] That something more was that race should never be considered to any degree whatsoever, and Justice Mosk said it alone; no other Justice joined his opinion. As Justice Mosk read the initiative,

> [n]either section 31's prohibition against the improper assigning of any burden or benefit in the operation of public employment, public education, or public contracting, nor its

27. *Hi-Voltage*, 24 Cal. 4th at 562.
28. *Id.* at 564 (quoting from Ballot Pamphlet Rebuttal to Argument Against Proposition 209).
29. *Id.* at 541.
30. *Id.* at 576.
31. *Id.* at 565.
32. *Id.* at 586 (George, C.J., concurring and dissenting).
33. *Id.* at 586.
34. *Id.* at 570.

> command of equal treatment therein, is limited solely to ends. Rather, both extend to means as well. Thus, one may not assign any burden or benefit improperly in an attempt to assign some other burden or benefit properly. Similarly, one may not afford treatment that in any respect is unequal in an attempt to afford treatment that in some other respect is equal. For section 31 at least, the end does not justify the means. Rather, means and end must each justify itself in light of section 31's prohibition and command.[35]

In other words, Justice Mosk alone would not permit the use of race or ethnicity even within a plan designed to produce a non-discriminatory result. He rejects Justice Blackmun's view in *Bakke* that "[i]n order to get beyond racism we must first take account of race."[36]

In limiting the scope of their opinions, and leaving room for "affirmative action" programs that take account of race but do not constitute "preferential treatment," both the majority opinion by Justice Brown and the concurring and dissenting opinion by Chief Justice George cited an example of an affirmative action program that did take account of race but did not constitute preferential treatment based on race. They pointed to the City of Los Angeles plan that the California Supreme Court had previously upheld in *Domar Electric, Inc. v. City of Los Angeles.*[37] The Los Angeles plan required contract bidders to establish that they had provided notice of opportunities to bid on subcontracts to MBEs, WBE's, and "other business enterprises" (OBE's). The court concluded that the Los Angeles plan did not constitute preferential treatment based on race or sex since it required notice to OBEs as well as MBE's and WBE's. That is, an outreach plan could target women and minorities based on sex, race or ethnicity, as long as it also targeted other groups on a basis other than sex, race or ethnicity. As the court explained:

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

35. *Id.* at 571.

36. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

37. 9 Cal. 4th 161 (1994).

> WBE's if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field . . . .
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> . . . .
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> . . . As the United States Court of Appeals for the Ninth Circuit recognized, perhaps the most important goal of competitive bidding is to protect against "insufficient competition to assure that the government gets the most work for the least money." (citation omitted). Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition.[38]

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

Does the *Domar Electric* case, which preceded the adoption of section 31, tell us anything about how to interpret section 31? Yes. Both Justice Brown and Chief Justice George cite *Domar Electric* as an example of a permissible affirmative action outreach program. Chief Justice George discussed the relationship between *Lungren v. Superior Court*, the pre-election decision upholding the Attorney General's ballot description of Proposition 209, and *Domar Electric*. He explained that the correctness of the *Lungren* decision's statement that "affirmative action" is broader than "preferential treatment," and its statement that outreach programs are outside the scope of section 31, is demonstrated by the fact that the Los Angeles plan, which could be described as a "race and sex plus other" plan, was upheld in *Domar Electric*.[39]

No judicial decision has yet addressed the question of what kinds of affirmative action remain available to the University of California in recruiting applicants. But the California Supreme Court's reasoning in its holding in *Hi-Voltage*, and its reliance on *Domar Electric* as an example of the kind of outreach program permitted by section 31, strongly suggests that the University may engage in affirmative action outreach programs designed to reach minority applicants who might otherwise not apply, as long as the program is broadly designed to also reach other additional Californians, regardless of their race or ethnicity.

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38. *Id.* at 175, 177.
39. *Hi-Voltage*, 24 Cal. 4th at 594 (concurring opinion of George, C.J.).

III. ANTI-DISCRIMINATION AS A JUSTIFICATION FOR AFFIRMATIVE ACTION OUTREACH TO REACH MINORITY APPLICANTS

It is one thing to conclude that under section 31 the University may use race and/or ethnicity as factors in its outreach programs, and another to conclude that it should. This section addresses one important justification for the University to use affirmative action outreach to include African American, Chicano/Chicana, Latino/Latina, American Indian, and under-represented groups of Asian American applicants among those recruited — the need to counter structural discrimination against certain minority groups with affirmative anti-discrimination efforts.

In *Hi-Voltage*, Justice Brown took an approach that could prove critical to understanding the scope of section 31. Although Justice Brown is regarded as a conservative on racial justice issues, she rejected the prevailing conservative view that limits the legal meaning of the term "discrimination" to intentional discrimination. Instead, she adopted, cited and quoted the "effects test" established in *Griggs v. Duke Power Company*,[40] writing "the voters intended section 31 . . . '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.'"[41] Justice Brown's reliance on *Griggs* may prove to be very important in future litigation over the meaning of section 31.

In *Griggs*, the United States Supreme Court held that discrimination included practices that are neutral on their face but discriminatory in application. For many conservatives, *Griggs* is identified as the first case where the Supreme Court moved away from "color-blindness" and toward support for affirmative action.[42] By relying on *Griggs*, Justice Brown is recognizing that courts need to look beyond intent to see whether the effects of neutral conduct are discriminatory. In *Hi-Voltage*, this led to the conclusion that white-owned businesses were being unfairly excluded based on the owner's race. But in university recruitment cases, color-consciousness may be necessary to avoid discriminatory effects. Thus, a color-conscious recruitment plan may operate as an anti-discrimination device.

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40. 401 U.S. 424 (1971).

41. *Hi-Voltage*, 24 Cal. 4th at 562 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429, 431 (1971)).

42. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 182-241 (1992); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997).

As noted *supra*, anti-discrimination efforts may also be described as a form of affirmative action.[43] If an anti-discrimination program operates without "preferential treatment" or "discrimination," it is the kind of affirmative action program that section 31 was intended to retain. Justice Brown's reliance on *Griggs* in her opinion in *Hi-Voltage* supports the position that "discrimination" under section 31 includes unintentional as well as intentional discrimination, and all discrimination is improper under section 31. Thus, if the University, even without intent, is discriminating on the basis of race and/or ethnicity in its current recruitment efforts, it is obligated under section 31 to undertake affirmative anti-discrimination efforts to correct the discriminatory effects of its policies.

As widely reported, the University of California is not recruiting or otherwise attracting applications from anywhere near the number of racial and ethnic minority group members that we should expect.[44] There is no need to conclude that this is the result of intentional discrimination on the part of University officials to determine that the result is improper. The essential lesson of *Griggs* is that unintentional discrimination is nonetheless discrimination, and thus requires a remedy under section 31.

Scientists, courts, and legal scholars are increasingly aware that unintentional racial discrimination permeates American society. In legal scholarship, the ground breaking work of Charles Lawrence in the 1980s demonstrated that the unconscious plays a substantial role in why white Americans discriminate against members of racial and ethnic minorities.[45] In my own work on the subject, building on Lawrence's work, I relied on the social psychology of white racism to argue that employment discrimination should be viewed as a form of negligence.[46] Linda Krieger took these concepts to a new level in revealing how the science of cognitive bias demonstrates that it is nearly impossible for a white-dominated society not to discriminate against racial and ethnic minority group members.[47] The scientific evidence that most white Americans have unintended deep seated biased views

43. *See* Oppenheimer, *Understanding*, *supra* note 2; Oppenheimer, *Five Models*, *supra* note 2.

44. *See* STUDY GROUP ON UNIVERSITY DIVERSITY: OVERVIEW OF REPORT TO THE REGENTS (2007), http://www.universityofcalifornia.edu/news/2007/diversityreport0907.pdf.

45. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

46. David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

47. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

of African Americans is as unassailable today as Darwinian evolution (and perhaps nonetheless equally controversial).

To explore what white bias and structural racism tell us about potential UC applicants, I suggest we explore the life of a fictional, but demographically typical, seventeen-year-old African American high school junior. What do we know about the life experience of any seventeen-year-old high school junior in California thinking (or not) about applying to college? First, we know that social class plays a substantial role in how well prepared he or she is for college, and in how well informed he or she is about college opportunities and the application process. Family wealth, family income, parents' educational achievement, high school attended, and neighborhood all act as strong predictors of preparation and information. And, since there is a strong correlation between all five of these factors and race/ethnicity, race and ethnicity also act as strong predictors of preparation and information. The whiter the school and neighborhood, the more likely they are populated by well-informed and well-prepared students who have more family wealth, family income, and parental education.[48]

But class alone cannot fully explain the disadvantages experienced by our seventeen year old African American high school junior. The structure of American racism plays a profound additional role, beyond the disadvantages of low wealth, income and education.[49]

In the case of our seventeen year old African American high school junior, it is likely that his or her (hereafter his) African American parents earn substantially less than similarly educated whites.[50] They are less likely to be hired or promoted than similarly qualified whites, and earn less even if they do hold similar jobs.[51] Even correcting for income, they have far less wealth than

48. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

49. *See generally* MICHAEL BROWN ET AL, WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003) (of which I am one of the co-authors).

50. Among high school graduates, African Americans earn 78 cents for every dollar earned by white Americans. Among college graduates, African Americans earn 84 cents for every dollar earned by white Americans. Even among 25-34 year old college graduates who have lived their entire lives under the protection of the civil rights laws, the earnings gap is still 15 cents on every dollar. *Compare* Bureau of the Census, 2006 Annual Demographic Survey Table 003, http://pubdb3.census.gov/macro/032006/perinc/new04_003.htm (White earnings) *with* Bureau of the Census, 2006 Annual Demographic Survey Table 006, http://pubdb3.census.gov/macro/032006/perinc/new04_006.htm (Black earnings) (last visited Oct. 8, 2006).

51. *See, e.g.*, MARGERY A. TURNER, MICHAEL E. FIX & RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991); JENNY BUSSEY & JOHN TRASVIÑA, RACIAL PREFERENCES: THE TREATMENT OF WHITE AND AFRICAN AMERICAN JOB APPLICANTS BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA 1 (2003).

whites of similar income, in significant part because whites have typically been granted or inherited the wealth-building advantages of home ownership through government subsidized loans that were restricted to whites until the 1970s, and are still disproportionately granted to whites.[52] If these African American parents were able to buy a home, it was probably in a minority neighborhood, where home values rise less quickly than in white neighborhoods, yet they were more likely to pay a higher ("subprime") interest rate than whites with similar income and credit ratings.[53] They were more likely to need a car to get to and from that home, because subsidized public transportation is disproportionately provided to white neighborhoods,[54] even though the need is greater in minority neighborhoods, where fewer people can afford to own cars. One reason car ownership is out of reach for more African Americans than whites is that car dealers charge whites less than blacks for identical cars,[55] and charge a higher interest rate to blacks than they do to whites with the same credit ratings.[56]

One reason that public transit is so much better in white neighborhoods is that minority neighborhoods have less political influence. This also means there is less attention paid to garbage collection, street sweeping, road and sign repair, street lights, fire fighting, water and sewer systems, and other services that support a neighborhood. Why? Partly because the Republican Party has written off the black vote, and often works to suppress it.[57] But it is also because there are fewer black voters per capita because so

52. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993).

53. *See* DEBBIE GRUENSTEIN BOCIAN ET AL, CTR. RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006).

54. *See, e.g.*, Juliet Ellis, *End Funding Discrimination in Public Transit*, SAN FRANCISCO CHRON., Dec. 1, 2005, *available* at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/12/01/EDG0PG0PRC1.DTL; Guillermo Mayer & Richard A. Marcantonio, *Bay Area Transit – Separate and Unequal*, RACE, POVERTY, & ENV'T, Winter 2005-2006, *available at* http://urbanhabitat.org/node/313 (last visited Oct. 10, 2006); *cf.*, Labor/Cmty. Strategy Ctr. v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001) (affirming special master's orders in consent decree, in case claiming racial and ethnic discrimination in Los Angeles public transit system), *cert. denied.* 535 U.S. 951 (2002).

55. Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (white men were offered cars at $818 over dealer cost while black men were asked for $1,534 over dealer cost and black women were asked for $2,169 over dealer cost; Ayers estimates that blacks pay an extra $150,000,000 annually for new cars because of race-based price discrimination).

56. MARK A. COHEN, PRELIMINARY REPORT ON THE RACIAL IMPACT OF FMCC'S FINANCE CHARGE MARKUP POLICY (2004), http://www.nclc.org/initiatives/cocounseling/FMCC_Cohen.pdf; Diana B. Henriques, *Review of Nissan Car Loans Finds that Blacks Pay More*, N.Y. TIMES, July 4, 2001, at A1.

57. *See* PEOPLE AM. WAY & NAT'L ASS'N ADVANCEMENT COLORED PEOPLE, THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN

many black men (currently one in four) have been disenfranchised by our criminal justice system.[58] Why do so many African Americans have criminal records? In part, because African Americans as compared to similarly situated whites are more likely to be: stopped by the police,[59] searched when stopped,[60] arrested,[61] booked on felony charges,[62] refused "OR " (own recognizance) release,[63] refused a low bail,[64] refused deferral,[65] charged with a felony,[66] tried, convicted; denied probation; denied an alternative sentence; sentenced to prison,[67] and denied parole.[68] That is, at every step of the criminal justice system African Americans are treated less well than similarly situated white Americans.[69] Our seventeen year old African American high school junior has probably had more encounters with the police, and more serious encounters, than a seventeen year old white American high school junior who has engaged in the same conduct.

What has his experience been at school? He has probably been disciplined more than white students who engaged in the

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AMERICA TODAY (2004); *cf.* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006).

58. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

59. Kary L. Moss & Daniel Korobkin, *Destination Justice*, 80 MICH. B.J. 36, 38-39 (2001).

60. African Americans were searched 10.2% of the time, compared to 11.4% for Hispanics and 3.5% for whites. ERICA L. SMITH & MATTHEW R. DUROSE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002 5 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cdsp02.pdf.

61. MISSOURI ATTORNEY GENERAL'S OFFICE, 2003 ANNUAL REPORT ON MISSOURI TRAFFIC STOPS 3, 4 (2003).

62. *See* COUNCIL ON CRIME AND JUSTICE, AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (2006), http://www.racialdisparity.org/files/African%20American%20Males.pdf.

63. *Id.*

64. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUCATION FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16 (2006), *available at* http://www.civilrights.org/publications/reports/cj/justice.pdf; *see also* James B. Johnson & K. B. Turner, *The Effect of Gender on the Judicial Pretrial Decision of Bail Amount Set*, 70 FED. PROBATION 56 (2006).

65. LEADERSHIP CONFERENCE ON CIVIL RIGHTS ET AL., *supra* note 64, at 11-12.

66. *Id.* at 14-16.

67. *Id.* at 24-25; *see also* MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007), http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.

68. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990-2000 8, http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf.

69. *See* BROWN, *supra* note 49, at 132-160.

same conduct.[70] His school probably has far fewer resources than schools serving white neighborhoods, including textbooks, classroom space, science labs, language labs, library resources, academic counseling, pre-college counseling, college preparatory classes, advanced placement classes, food service facilities, and athletic facilities.[71] He will probably get little or no meaningful pre-college counseling, and thus will not know which classes he needs to take to qualify for UC or CSU, nor how he should be preparing for the SAT. His teachers are far less likely to have teaching experience or even permanent teaching credentials.[72] They are likely to expect less of him academically than they do of otherwise similarly situated white students.[73] And teacher expectations tend to be strong predictors of student performance.[74]

If he has looked for a summer or part-time job, he has probably encountered substantial racial discrimination. Employers are less likely to offer him a job than similarly or even less qualified white applicants.[75] In one recent study employers actually preferred white ex-cons over equally qualified black applicants with no criminal record.[76] If he was offered a job, the pay was probably lower and the job responsibilities less desirable than that offered to white students of the same age, experience and qualifications.[77]

If all of this has not left our seventeen year old student feeling like an outsider in his own country, he merely needs to go shopping in any local mall or downtown business district. It is likely that as he enters most stores, he will be regarded as a likely potential shop-lifter, followed and/or watched by store personnel. If he stands near a white person on an elevator or at a check-

70. RUSSELL J. SKIBA ET AL, THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT (2000), http://www.indiana.edu/%7Esafeschl/cod.pdf.

71. KOZOL, *supra* note 48; Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277 (2007); Notice of Proposed Settlement, *Williams v. State of California*, San Francisco Superior Court 312236 (May 17, 2000), http://www.aclu-sc.org/attach/w/williams_notice_settlement.pdf.

72. STEPHEN J. CARROLL ET AL, CALIFORNIA'S K-12 PUBLIC SCHOOLS: HOW ARE THEY DOING? 71 (2005) (finding that teachers in primarily minority schools in California are five times more likely to lack credentials compared with teachers in primarily white schools).

73. *See, e.g.*, Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap, in* THE BLACK-WHITE TEST SCORE GAP 273 (Christopher Jencks & Meredith Phillips eds., 1998).

74. *See, e.g.*, Claude M. Steele & Joshua Aronson, *Stereotype Threat and The Intellectual Test Performance of African-Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

75. *See, e.g.*, TURNER, *supra* note 51.

76. DEVAH PAGER & BRUCE WESTERN, RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NEW YORK CITY JOB MARKET (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf.

77. *See, e.g.*, TURNER, *supra* note 51.

out counter, he is likely to notice him or her clutching his wallet or her purse, probably unconsciously. If he walks down a quiet street, he will probably have the experience of white people crossing the street to avoid getting too close to him.

While our seventeen-year-old African American high school junior is fictional, the data I rely on is empirical. But sometimes an anecdote speaks volumes in illustrating the social meaning of data. A few years ago the school board in the largely-white city of Riverside, California, home to one of the University of California's campuses, decided to name a new high school after Martin Luther King, Jr. The decision sparked a major controversy among white residents, who protested the decision. They explained to the school board that they meant no disrespect to Dr. King, whom they acknowledged was a great American, but they were concerned their children would have a harder time getting into college if they attended a high school named after Dr. King, because college officials would assume they were black.[78]

Each of the disadvantages suffered by our fictional seventeen year old are interrelated, and cumulative. White Americans disproportionately benefit from government help with housing and transportation, allowing them to save and invest more, even as they are paid more and charged less, and their political influence grows. The effect is like that of compound interest, in which privilege is accumulated exponentially. By contrast, African Americans are disproportionately penalized by the withholding of government assistance, even as they also suffer from systemic bias. With fewer opportunities to earn, save and invest, combined with higher prices for lower quality goods and services, African Americans bear the cost of accumulative disinvestment.[79]

One way to think about the structure of American racism is that it acts as a vast tax and subsidy system.[80] On the tax side, African Americans are assessed a race tax, an extra charge for being black, that requires that they: pay more for lower quality housing that will appreciate at a slower rate; pay more for home and car loans; pay more for goods and services; receive fewer government services, including public transit, garbage collection, street sweeping, and – most importantly – sub-standard education; and be treated with the suspicion that they are dishonest,

78. *See* Don Terry, *Mostly White City Honors Dr. King, Amid Dissent*, N.Y. TIMES, Jan. 7, 1998, at A12.

79. This is the central theme, and insight, of WHITEWASHING RACE, *supra* note 49.

80. For more on the idea of racism as a form of taxation, *see* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1997); Robert S. Chang, *Closing Essay: Developing a Collective Memory to Imagine a Better Future*, 49 UCLA L. REV. 1601, 1609 (2002); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 744 (2004).

unintelligent, and potentially violent. The race tax paid by African Americans permits a subsidy payment to white Americans, who, by comparison: pay less for higher quality housing that will appreciate at a faster rate; pay less for home and car loans; pay less for goods and services; receive greater government services, including better (though perhaps still woefully inadequate) education; and are treated without the expectation that their race requires that they be treated with suspicion. And while the structure of American society particularly disadvantages African Americans, it disadvantages other minority groups as well, including Latinos, American Indians, and some groups of Asian Americans, all of whom are under-represented among UC's applicants and students.

CONCLUSION

Once we recognize the accuracy of this description of white privilege and black disadvantage, it is hard not to see it as a form of "preferential treatment" for whites, based on race, and thus a violation of Section 31 of the California Constitution. It should be self-evident that a university recruiting plan that ignores race cannot succeed in recruiting a racially diverse student applicant pool. To use race and ethnicity as factors, among other factors, in a *Domar*-like recruiting program designed to recruit a broadly diverse applicant pool, is an affirmative anti-discrimination policy. It is a permissible plan under section 31 because it does not give "a priority or advantage to one person over others;" it does the reverse; it is one step the University can take to help reduce the discrimination against minorities that permeates California and American society. It fits well within the limitations of section 31 set forth by Justice Brown in *Hi-Voltage*, "'to ensure that all persons – regardless of race or gender – are informed of opportunities and treated with equal dignity and respect.'"[81] In the absence of such a policy, the University cannot hope to recruit as successfully among minority group members as it does among whites.

81. *Hi-Voltage*, 24 Cal. 4th at 564 (opinion of Brown, J.).