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Electoral Economics: Proposition 209 and the Public Consensus

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Proposition 209

Abstract:

The question posed is whether proposition 209 unconstitutionally bars a remedy to discrimination against a specified group "women and minorities", and thereby denies equal protection of the laws to a targeted group. The partial template for this problem is provided by the Supreme Court's disposition of *Romer v. Evans*.

The conclusion of my analysis here is that it does not. My analysis relies on two theories, one formal and one political. The formal proposition is this: a remedy is only meaningful as a response to an injury. In equal protection and discrimination jurisprudence, the Federal courts have imposed, and the Supreme Court has upheld, quotas, busing, and other affirmative measures against discrimination where there has been a judicial finding of past discrimination. There has been no such finding against the University of California or any of the contracting agencies of the state of California. Further, each time such a remedy to a demonstrated injury has been imposed, the Court has demanded that the remedy conform to a tight fit to the demonstrated injury. No injury has been demonstrated here, therefore no remedy exists, and to quote Chief Justice Marshall in *McCulloch vs. Maryland* "what does not exist can not be taken away."

The second theoretical strategy relies on the Court's decisions in cases like *Miller v. Schoene* and *Williamson v. Lee Optical*, post substantive due process cases where a non-neutral re-distribution of rights or property was scrutinized in light of the relative political participation of the parties in the dispute. The crucial issue here is whether the constituencies impacted by such a redistribution are properly represented by the state agencies of authority. An analysis of this sort leads naturally to an examination of the "political structure" question raised by the three-judge panel of the Ninth Circuit. I elaborate upon this line of reasoning and conclude that the patchwork arrangement of "special interest deals and bargains" by which the state agencies have instituted "affirmative action" shows none of the accountability to representative constituencies demanded when the act is not a remedy to discrimination but is simply a redistribution of resources from one interest group to another.

Proposition 209 and the Public Consensus

An examination of the constitutionality of an amendment to the California constitution by an examination of the representation of constituencies in the political process.

[This is an incomplete analysis which requires more empirical study]

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Introduction

When I initially staked out a position in support of proposition 209, my opening defense was going to be on the order of "4,736,180 voters can't all be stupid". But in light of the effects of proposition 13, it isn't at all clear that a referendum passed by the electorate must be rational, or even constitutionally viable. The Supreme Court puts more weight on the latter condition and less on the former. "Rational" or not, the Court often errs on the side of granting deference to

the will of the people, as expressed in the political process. Yet the Court has never abdicated its duty to adjudicate cases and controversies which come before it with important constitutional questions. In this modern era of the regulatory state, in this era in which the bright-line spheres of rights and powers characteristic of substantive due process are always blurred, the Court's role as the arbiter of disputes among competing agents in our society is more important than ever.

Setting the Stage for Affirmative Action.

No where has the modern problem of the regulatory state been put into higher relief than with the problem of affirmative action. Following on the heels of *Brown v. Board of Education*, the political and judicial process of this country has been put to the service of establishing civil rights for African Americans and similarly disadvantaged groups. The tone was set by Justice Stone's footnote 4 in *United States v. Carolene Products* in which he asserted that legislation which impacted upon groups which would later be called "discrete and insular" should be reviewed under a heightened judicial standard. The prototype for this heightened judicial review was the distinction the Court had historically made between cases of "direct" and "indirect" classifications made by regulatory legislation which was reviewed under commerce clause jurisprudence.

After *Brown*, however, although legislative milestones like the Civil Rights Act of 1964 were being deployed on the national level, the progress in desegregating schools and public accommodations on the local level was frustratingly slow. The Federal Judiciary was forced to take an activist position to insure that the mandate of equal rights for all would come to

pass in our lifetime. Those of us who lived through the 1960's remember the crusading judges, pen and national guard in hand, who forcibly desegregated school districts, fire departments, and other public agencies from South Carolina to South Boston.

Affirmative action was the natural extension of this process. Policies legitimately called affirmative action have a long history pre-dating this era of judicial activism. Institutions like Columbia Law School have practiced outreach to minority candidates who ordinarily would be shut out of an Ivy League education. Private foundations and charities have had policies in place for many years which sought to elevate the condition of African Americans even while much of white America was closed to their access. But it is only with the era of judicial activism in the 1960's and early 1970's that a major push was made to increase the representation of African Americans in our public institutions of higher education and in the larger world of government and corporate business. Although with decisions like *Sweatt v. Painter*, *de jure* segregation of our professional institutions was ended, it would take another 20 years for a serious effort to end segregation in fact.

The problems with the various solutions tried by public institutions to effectuate this goal are the problems of bureaucracy in general: a general insensitivity to the particular conditions which optimally require a remedy tailored for that purpose. A school like Columbia or Harvard has the time, the resources, and most important, the limited scope of its mission, to give a process like affirmative action the attention it requires.

When the goal of equality of opportunity must be accomplished on a mass scale by the state, corners have to be cut. Yet when the state acts, the bar against nondiscrimination set by the 14th amendment to the Constitution is much higher. The result is a case like *Regents of The University of California v. Bakke*, in which the Court held that Alan Bakke's constitutional right to equal protection had been violated because the university used a system based on a numerical quota to admit minority applicants to the medical school at Davis who had a lower composite score than Bakke. The court did not deny the University of California the right to use race in its

admissions decisions, it did not foreclose the possibility of admission criteria which composed a composite score which includes race as one of a complex of factors to be considered but (and this is important to our assessment of 209) the Court did not require the state to include race.

Admissions to the state medical school is an area where the Court, in the absence of a judicial finding of systematic discrimination, grants discretion to the state to determine what subsidies it will provide.

What is Wrong with Proposition 209 ?

A major objection to proposition 209 raised by plaintiffs The Council for Economic Equity, et. al, is that it dismantles affirmative action and thereby selectively disadvantages a group which is underrepresented in the political process. The plaintiffs claim to represent this group which they term "women and minorities". The argument used to allege this differential impact is the so-called "political structure" argument which figures prominently in *Hunter v. Erickson*(1969) and *Washington v. Seattle School District No. 1* (1982).

In *Coalition v. Wilson et al* (97-15030), circuit court judges O'Scannlain, Leavy, and Kleinfeld reject the political structure objection to 209 on the grounds that "women and minorities" taken as an aggregate constitute a majority of the population (and the electorate) and so how can a political bloc be biased against itself. This is a good argument and one disanalogy with the *Hunter* and *Seattle* cases where the majority electorate was of a different racial composition from the impacted individuals. I

would scrutinize this argument further than the district court, however. Suppose we were to drop women from the electoral equation, so that we do not buttress the results of the referendum in favor of 209 when it may be the case that women voted in smaller percentages than men. *Mutatis mutandis* we would then have certain "minorities" who would be disadvantaged by the action of an electorate which is already over 50% non-anglo-saxon. How do you identify the legitimate classes of winners and losers in a case where some "women" and some "minorities" may act legislatively to disadvantage other "women and minorities".

The problem of identification in my mind is crucial and a relevant citation at this point is *Romer v. Evans* where the issue was a state initiative which invalidated local ordinances which prohibited discrimination against gays and lesbians. That initiative was doubly suspect because it specifically named a particular class to be denied civil rights protection; and secondly it denied remedies for discrimination required under equal protection.

Proposition 209 does not explicitly deny remedies for discrimination to any group as measure 2 does. Rather, section 31(g) states:
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.

The question of whether a denial of racial and gender based preferences constitutes a denial of equal protection remedies for "women and minorities" is an important one to which I will turn now.

Is Preferential Treatment, Per se, a Remedy?

Black's Law Dictionary defines remedy, in relevant part, as:
The means by which a right is enforced or the violation of a right is prevented, redressed or compensated.

The general term remedy, has a special connotation when viewed in the historical context of federal and supreme court adjudication of cases involving a violation of constitutional equal protection. Indeed, as professor Tribe points out, the Court is never color blind, and has,

with some unease, mandated affirmative remedies in the form of set-asides and quotas, but only in the case where "egregious" violations have occurred.

By contrast, in *Regents v. Bakke*, the court articulates the doctrine which guides its reserve in the assignment of affirmative remedies in the absence of a specific finding of fact of systematic discrimination:

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

My answer to the question is this: without a judicial fact-finding there is no injury. Without an injury there can be no remedy. Affirmative action, therefore, aside from the remedies which are specifically preserved intact by article 31, is not a remedy and prop 209 cannot deny what does not exist. Q.E.D.

Constituencies in a Democracy

A most important question facing us at this point is the legitimate extent of the political power wielded by organized blocs, coalitions, and other constituencies in the democratic state. The question of how much latitude should be given to the people's representatives: the legislature, state boards with delegated executive power (e.g. state contracting boards), and quasi-autonomous boards (e.g. the Board of Regents); and how much should be reserved to the people themselves is a question which has occupied the thoughts of public servants since revolutionary times. Alexander Hamilton in *Federalist No. 78*:

It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

In the present instance, the people of the state of California have spoken through the most broadly based legislative instrument available -- the referendum. The federal judiciary has interposed its judgment to examine the initiative against the standard of the United States Constitution because, democratic or not, if the measure fails by that standard, it must fall. In *Romer v. Evans*, the state initiative did not pass muster. In this case, the court of appeals has given its assent.

I will go further than the court, however, in scrutinizing proposition 209, and I will do so through the lens of constituencies and the legitimacy of political action. How is the coalition against 209 constituted? What interests are represented by the Coalition for Economic Equity, et. al.? Is it enough to say that having the NAACP named as a plaintiff in this action implies that their position is supported by all, or even most, African Americans?

Conceivably, such a putatively broad based coalition could have collected enough votes from the non-white, non-male, majority of the electorate to defeat 209.

These questions are germane, not only to an examination of the electoral politics of 209, but also to crucial equal protection questions:

1. Can it be shown that these plaintiffs represent the "women and minorities" they claim to represent?
2. How were the affirmative action benefits which will be lost approved in the first place and by what authority or political process?
3. Is there an equal protection problem with respect to the other "minorities and women" who are not included under the umbrella of these programs.

Answer:

1. See the discussion above. The answer is no.

2. The regents of the University of California and the University administration was put into a state of confusion on its affirmative action policies with the advent of the supreme court decision in Regents v. Bakke.

Since then, the university has tried to reorganize its admissions criteria while following the letter, if not the spirit of that decision. The letter of that decision stated that the Medical School at Davis could not use numerical quotas to raise its diversity statistics to given numerical levels. The spirit of the supreme court decision was to tell the University to go back to the drawing board and formulate a new policy which would not violate the equal protection guarantees to students like Alan Bakke. In the wake of that decision, the University instituted procedures to increase "under-represented minorities", the graduate and professional schools wrote their own standards, the contracting agencies promulgated still another set of instructions. This patchwork mosaic of affirmative action protocols is triply suspect :

a. Because there has been no judicial finding of fact in any of these cases to justify a redistributive remedial action.

b. Because the executive and quasi-autonomous boards have not been demonstrated to have any legitimate constituency; and,

c. This answers question 3 above. The fact is that there is no agreement on which ethnic minorities are included in which protocol. Chinese are included in contracting awards, but not graduate school admissions(Chinese in fact have been denied admission to U.C. Berkeley when their representation went over 40%). South Asians are not included in any category I know of.

All of this raises serious equal protection concerns and the following paragraph forces us to interrogate our thinking. Professor Tribe gives such a complete and eloquent summary of the evidence I have been presenting that I beg your leave to quote it in its entirety.

The Madisonian ideal of law as the expression of a general public good stands in sharp opposition to the pluralist notion that law aspires merely to satisfy the preferences of ad hoc interest groups. Whether or not judicially enforced, this ideal of law as rationally embodying a shared social vision may serve to broaden the perceived responsibilities of lawmakers and administrators in fulfilling their constitutional oaths.

The role of courts in reminding others of this ideal should not be underestimated. Even when judges stress the virtues of deference to choices made by the political branches--particularly in such spheres as zoning, taxation, and economic distribution or regulation --and even when they do not act in a spirit of suspicion that some illegitimate prejudice or other flaw has poisoned the political process by which the public interest, or the general good, has been defined, the very fact that judges continue to speak in the language of rationality, requiring some demonstration that the government's actions bear a discernible relationship to a defensible vision of the public good, reaffirms the possibility of a politics that transcends special interest deals and bargains, and of a polity that builds on civic virtue and public-spiritedness rather than one that wallows entirely in the exchange of private benefits and burdens.

To the degree that the Constitution in general, and the fourteenth amendment in particular, embody efforts to transcend such factionalism and elevate public law above private interest, the judicial role in insisting upon rationality serves to reinforce a major constitutional aspiration.

[emphasis added]

Of course, "special interest deals and bargains", like them or not , are a normal part of the political compromise which goes on everyday as the cost for enacting legislation in our system, and where such special deals are not legislatively enacted but are instead promulgated by the fiat of semi-autonomous boards and commissions, this delegation of power may be the reasonable cost of doing efficient government business. These special deals have often been forged behind closed doors at the state capital without

public oversight or review and the beneficiaries may be anyone from military veterans to sanitation workers, but where the criterion of inclusion and exclusion is race, and in the absence of a judicial finding of systematic discrimination, and without a demonstrated compelling public purpose, the legislative or executive act must undergo close scrutiny indeed.

If individual enactments of affirmative action programs in cases like Croson and Adarand v. Peña must undergo such searching scrutiny, how much more should a patchwork collection of programs be required to undergo. Proposition 209 is simply the way the people of California have told the state agencies acting under their authority to conform to these equal protection requirements. Article 31 is not the injury which calls for remedial action. It is the remedy.

Remember, in the regulatory state, discrimination is never benign.

All action is redistributive and what is a benefit to the winners is a denial to the losers. However, Professor Tribe is challenging us to go beyond a zero-sum solution which is rightly being dismantled as we speak, and to institute a system of true justice and equity which has the universality of Kant's categorical imperative and the durability and legitimacy implied by the vision of a philosopher like John Rawls.

Epilogue

Chief Justice John Marshall intimately understood the dialectic involved when organs of government act to the benefit or detriment of other agencies or the people as a whole. In his masterpiece of judicial reasoning and exegesis, *McCulloch v. Maryland*, Marshall is examining the separation of powers issue raised when a state imposes a tax on a chartered bank of the national government, but the findings carry over by analogy to the present case. Remember that affirmative action "deals and bargains"

(to use Professor Tribe's very apt term) are a tax on everyone in the excluded classes who do not share in the benefits, and the question of what, if any, legitimate constituency is represented in these deals is one which is crucial to an equal protection analysis of the validity of proposition 209.

Chief Justice John Marshall:

" The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies [exigencies, not items of discretion] of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by people of a particular state, not given by the constituents of the legislature[special interest lobbies], which claim the right to tax them, but for the people of all the states[the people of California as a whole]. They are given by all for the benefit of all--and upon theory, should be subjected to that government which belongs to all...

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union [i.e., the affirmative action 'tax' imposed on the people of California as a whole]... The right never existed, and the question whether it has been surrendered cannot arise.

[emphases added]

Coda: Two Questions

1. Is it an unconstitutional usurpation of political power for an outgoing White majority to enshrine a level playing field in an amendment to the California constitution before a new power bloc of groups claiming to represent the interests of "women and minorities" takes power?

The question is moot based on the figures from the Secretary of State's office which indicates that white males are already in a minority of the electorate. If that were not the case, it would torture the meaning of equal protection to assert that it is unconstitutional to incorporate language into the California constitution which in relevant parts is almost identical to language in the fourteenth amendment to the United States constitution and in the Civil Rights Act of 1964.

Secondly, to answer a question which was indirectly posed by Professor Meister's assertion in our discussion on *Romer v. Evans* that there are conceivable instances where explicit race and gender based preferences could pass muster in particular localities in the absence of a judicial finding of systematic discrimination, i.e., as a matter of normal political administration, the results could only be characterized as bizarre. If such administrative judgments were to pass constitutional muster, one could envision a Balkan patchwork of municipalities all across the country each with its own peculiar system of preferences and discriminations established. Back to Jim Crow.

2. Does proposition 209 foreclose remedies that are available to other groups organized in the political process, for example, veterans, to sue for benefits and special preferences?

The set-asides granted by the people of California to veterans are a privilege which was granted through the political process. Similarly preferences and set-asides to selected minority groups have been established as a subsidy at the discretion of the State of California. Apart from judicially imposed remedies where there has been a judicial finding of fact indicating past discrimination, either of these subsidies can be withdrawn by the same political process which instituted them. If either group (and although I can clearly identify veterans I still cannot clearly delineate the "women and minorities" named in the court of appeals case) wishes to sue, on any theory including an expectation of entitlement to these preferences, it would have to justify its case in a court of law. It seems it would be especially difficult for the "Coalition" to establish that it is entitled to these preferences when so many deserving minorities are excluded for no reason other than the fact that they are not effectively organized. Veterans (including all races) could at least claim that they have given substantial service to the country.

Of the over 9 million voters in the election: 8% African American, 22% Latino, 26% Asian Pacific Islander, 44% Caucasian and other. Source: Secretary of State, State of California.

Laurence Tribe, *American Constitutional Law*(1988) p. 1521. See *Local 28 v. EEOC, U.S. v. Paradise*,
Swann v. Charlotte-Mecklenburg.

Let us recall here that the Court's deference to redistributive legislation is conditioned upon its perception of the relative access or participation of the parties in the redistribution. *Williamson v. Lee Optical*.

Also that the public purpose to be served is to be taken into account in the examination of the action *Miller v. Schoene*.

But that where the law relies on an explicitly racial criterion, a compelling public purpose must be served. *Korematsu v. United States*.

Further note, The Supreme Court in *Bakke* did not find that the compelling public purpose claimed by the state of California to provide more practicing medical doctors to poor communities was not served by admitting more minority applicants to the medical school at Davis.

Tribe, *ibid.*, p. 1451

The standard was set in *City of Richmond v. J.A. Croson Co.* where the court held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.", and that, according to Professor O'Brien, the single standard of review for racial classifications should be "strict scrutiny."

The Court continues this analysis in *Adarand Constructors v. Pena*

The Court established, in cases through Croson, a three-pronged test of review for such "compensatory" legislation which includes:

1. Skepticism: "any preference based on racial or ethnic criteria must necessarily receive a most searching examination."

2. Consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."

3. Congruence: "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo
McCulloch v. Maryland (1819)

It is established that the state may subsidize certain activities which it wishes to promote. Woolsey v. Maynard, Maher v. Roe.

But where fundamental rights are infringed, the state is constrained and the examination of whether the act under question is a carrot or a stick is closely scrutinized. Sherbert v. Verner. Although it has been long established that equal access to state graduate and professional schools, etc., is a right (Sweatt v. Painter), it hasn't at all been established that preferential admission to such schools, in the absence of a judicial finding of past discrimination, is a right, and that a denial of such is an unconstitutional infringement of a fundamental right.