

Summary Memorandum

July 5, 2006

To: Professor Sheldon Gen

From: Clair Dunn and Paula Zamudio

RE: Affirmative Action in California

This paper will analyze the policy issue of affirmative action. This analysis will begin by looking at the history of affirmative action and then looking specifically at California, the introduction of Proposition 209 and the subsequent effects that the proposition had on higher education enrollment rates for minority students.

Although founded by immigrants, the United States was all too soon run by an elite ruling class with few rights afforded to the ever-growing minority populations. Surely brewing since long before, the Civil Rights Act of 1964 is widely regarded as a change for the better for underserved groups. The affirmative action agenda setting stage of the policy cycle was spawned by concerned Americans who felt their equal rights were long overdue. What started as rights for African Americans was soon modified to include other ethnic populations and women. Since the Civil Rights Act of 1964, the policy cycle has been repeatedly evaluated and re-started at the agenda setting stage. Recent examples of this include inclusion for people with disabilities.

Of particular importance to this paper are the effects that California's Proposition 209 had on the minority enrollment rates in California institutes of higher education. Research has shown that upon dismissal of affirmative action policies, as in the case of the University of

California system, enrollment rates for minority students have decreased, supporting the theory that affirmative action policies are still needed to correct inequalities for minority populations.

Introduction

Most people agree that discrimination is wrong, particularly, when it involves race, gender, or sexuality. A contradiction has occurred over the last several decades. Affirmation action was originally implemented by executive order “to ensure that applicants are treated equally without regard to race, color, religion, sex or national origin.” What began as a corrective measure to level the playing field, affirmative action is now perceived by some groups as discriminatory and violating their fourteenth amendment rights. This paper intends to examine the conflict between the federal policy issue of affirmative action, equal protection under the law, and California’s Proposition 209, from its conception to present-day implementation and the subsequent effects on minority student enrollment in higher education.

Enrollment rates for minority students in higher education have traditionally been found to be consistently lower than that of their White counterparts. Historically, both the California State University and University of California systems report significantly lower enrollment rates for minorities. Affirmative action programs have been responsible for giving these underserved minorities the necessary tools and resources to achieve admittance into institutions of higher learning. Since their inception, enrollment rates for minority students have increased significantly, though still continue to lag far behind White students. Enrollment rates for minority students in California colleges were significantly lower than what they ought to be prior to Proposition 209. Its implementation only aggravated the situation.

The History of Affirmative Action

Federal affirmative action policies have a short history in the United States. Defined as the proactive policy of making special efforts in employment decisions, college entrance and other areas of public behavior as a way of compensating for past discrimination (Lee, 1999), affirmative action was initially intended to 'level the playing field' for those who had been previously over-looked and discriminated against. The impact of affirmative action policies has continually inspired controversy and an ongoing need for revision.

Affirmative Action Policy Process

The Ramspeck Act of 1940 can be credited as the first major piece of legislation to outlaw discrimination in the federal service based on race, creed, or color. While some scholars posit that the beginnings of affirmative action legislation are rooted in this act, traditionally, scholars, including a Congressional Research Service Report for Congress (2005), trace the origins of affirmative action law to the early 1960s when lower courts grappled with the seemingly intractable problem of racial segregation in the nation's public schools. For this reason, we will suggest that the agenda setting phase for federal affirmative action policies began in the 1940s, with formulation continuing into the 1960s. The adoption phase of the affirmative action policy cycle is most easily recognizable in the passing of the landmark non-discrimination Civil Rights Act of 1964 (CRS REPORT, 2005). The implementation phase followed by administering legislation for equal opportunities for federal government employees and contractors and programs to recruit more minority applicants to institutions of higher education. The evaluation phase of the initial federal affirmative action policy cycle was seen in the 1980s, as opponents of affirmative action argued that the effort made in the 1960s and 1970s to increase

the quality of schooling for underrepresented groups had been sacrificed in the pursuit of equality (Miller et al, 1997).

Stakeholders for federal affirmative action

Player	Preferences	Stages	Powers
Martin Luther King Jr.	Nonviolence, end segregation/discrimination	Agenda setting/formulation	Large following: i.e. churches
Rosa Parks	End segregation/discrimination	Formulation	A figurehead for the movement
Supreme Court	Equality, justice	Adoption	1954's <i>Brown v. the Board of Education of Topeka, Kansas</i>
Civil rights organizations	End segregation/discrimination	Agenda setting	power in numbers
Ku Klux Klan	Segregation	Agenda setting	Part of the opposition
President Lyndon B. Johnson		adoption	signed the Civil Rights Act of 1964

Affirmative Action and Proposition 209 Timeline

1940. Ramspeck Act provided a statutory ban on discrimination in the Federal Service based on race, color or creed.

1948. Executive Order 9980, issued by President Truman, established the Fair Employment board within the Civil Service Commission.

1955. Executive Order 10955, issued by President Kennedy, introduced the concept of affirmative action by directing "positive measures for the elimination of any discrimination, direct or indirect, which now exists."

1961. President John F. Kennedy's Executive Order 10925 used affirmative action for the first time by instructing federal contractors to take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex or national origin." The order created the Committee on Equal Employment Opportunity.

1964. Civil Rights Act of 1964 was signed into law. Established the Equal Employment Opportunity Commission (EEOC).

1967. President Johnson amended E.O. 11246 to include affirmative action for women.

1978. The U.S. Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978) upheld the use of race as one factor in choosing among qualified applicants for admission. At the same time, it also ruled unlawful the University Medical School's practice of reserving 18 seats in each entering class of 100 for disadvantaged minority students.

1985. Efforts by some in the Reagan administration to repeal Executive Order 11246 were thwarted by defenders of affirmative action, including other Reagan administration officials, members of Congress from both parties, civil rights organizations and corporate leaders.

1994. In *Adarand Constructors, Inc. v. Peña*, 513 U.S. 1012 (1994) the Supreme Court held that a federal affirmative action program remains constitutional when narrowly tailored to accomplish a compelling government interest such as remedying discrimination.

1995. President Bill Clinton reviewed all affirmative action guidelines by federal agencies and declared his support for affirmative action programs by announcing the Administration's policy of "Mend it, don't end it."

1995. The Regents of the University of California voted to end affirmative action programs at all University of California campuses. Beginning in 1997 for graduate schools and 1998 for undergraduate admissions, officials at the University were no longer allowed to use race, gender, ethnicity or national origin as a factor in admissions decisions.

1996. California's Proposition 209 passed by a narrow margin in the November election. Prop. 209 abolished all public-sector affirmative action programs in the state in employment, education and contracting. Clause (C) of Prop. 209 permits gender discrimination that is "reasonably necessary" to the "normal operation" of public education, employment and contracting.

1997. The U.S. Supreme Court refused to hear a challenge to California's Prop. 209. By declining to review the case, the court did not decide the case on its merits but allowed Prop. 209 to go into effect.

1997. Lawsuits were filed against the University of Michigan and the University of Washington School of Law regarding their use of affirmative action policies in admissions standards.

1998. Both the United States House of Representatives and the United States Senate thwarted attempts to eliminate specific affirmative action programs. Both houses rejected amendments to abolish the Disadvantaged Business Enterprise program funded through the Transportation Bill, and the House rejected an attempt to eliminate use of affirmative action in admissions in higher education programs funded through the Higher Education Act.

1998. Ban on use of affirmative action in admissions at the University of California went into effect. UC Berkeley had a 61% drop in admissions of African American, Latino/a and Native American students, and UCLA had a 36% decline.

2000. Many Circuit Courts throughout the country heard cases regarding affirmative action in

higher education, including the 5th Circuit in Texas (Hopwood), the 6th Circuit in Michigan (Grutter and Gratz), the 9th Circuit in Washington (Smith), and the 11th Circuit in Georgia (Johnson). The same District Court in Michigan made two different rulings regarding affirmative action in Michigan, with one judge deciding that the undergraduate program was constitutional while another judge found the law school program unconstitutional.

2000. In an effort to promote equal pay, the US Department of Labor promulgated new affirmative action regulations including an Equal Opportunity Survey, which requires federal contractors to report hiring, termination, promotions and compensation data by minority status and gender. This is the first time in history that employers have been required to report information regarding compensation by gender and minority status to the federal equal employment agencies.

2001. California enacted a new plan allowing the top 12.5% of high school student's admission to the UC system, either for all four years or after two years outside the system, and guaranteeing the top 4% of all high school seniors' admission into the UC system.

2002. The Sixth Circuit handed down its decision in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) on May 14, 2002, and upheld as constitutional the use of race as one of many factors in making admissions decisions at the University of Michigan's Law School.

2003. The Supreme Court handed down its decisions in *Grutter v. Bollinger*, 539 U.S.(2003) and *Gratz v. Bollinger*, 539 U.S. (2003). In *Grutter*, the Court held that the University of Michigan's use of race among other factors in its law school admissions program was constitutional because the program furthered a compelling interest in obtaining "an educational benefit that flows from student body diversity".

2003. Assembly Bill 703 signed by Governor Davis. The bill, proposed by Mervyn Dymally, D-Compton, sought to assign a definition to term "racial discrimination" as stated in Section 31 of Article 1 of the California Constitution. The State was sued and the judge ruled that the bill was unconstitutional as it rendered Proposition 209 mute.

Affirmative Action & Proposition 209

Proposition 209 was a direct challenge to federal affirmative action policy. Its aim was to end race- and gender-based preference in university admissions and state contracting. Though it was presented as a policy to make admissions neutral, it failed to address the serious gaps among applicants and served to alienate students of color, who were already woefully underrepresented in the University of California system. It did not end the continued preference given to athletes,

children of alumni and veterans (who are one of the largest groups to benefit from affirmative action) (Spann, 1997).

Pre-Agenda Setting

Since the University of California was pivotal in the creation of Proposition 209, we will use examples that involve universities who are part of the UC System. This proposition not only affected admissions procedures for all public universities in California but also affected race or gender specific programs within all public universities schools in California. It also influenced challenges to admission processes across the country.

Proposition 209 was not the first time that the University of California came under attack for its admissions procedures. In 1977, Allan Bakke filed a suit against the University of California claiming that UC Davis Medical school had “violated his rights under the Equal Protection Clause of the Fourteenth amendment” (Wikipedia.com) On his third attempt to apply to UC Davis medical school, he was denied admission again. Though he had not scored high enough to be considered for the regular admission, he would have been eligible for one of the four slots assigned to underrepresented students that had not been filled at the time of his medical school rejection. Justice Powell ruled saying that race could not be the only factor but could be a “plus factor.” However, quotas were unconstitutional because they discriminated against other groups.

In the 1980's, UC Berkeley was then accused of discriminating against Asians applicants. After receiving complaints that there had been caps placed on Asian applicants at UCLA and UCB, the Dept. of Education launched an investigation. The U.S. Dept. of Education released their report clearing UCB and UCLA of the allegations. Critics claimed that UC was placing too

much emphasis on extra curricular activities and not enough emphasis on academics. In reaction, UC changed its policy to focus on both academics as well as extra curricular activities. However, this investigation revealed that there was dual admissions process in the Boalt School of Law and that minority applicants were judged by different standards.

After its seven year investigation, the Dept. of Education that they had found no evidence that Berkeley had discriminated against white students and no drop in academic standards. They also reported that only 3% of admits to Berkeley did not meet their minimum requirements.

Proposition 209 Policy Process

Agenda setting and formulation

In 1994, California Governor Pete Wilson announced that he would like to see an end to gender- and race-based selection in employment and admissions. In early 1995, Ward Connerly, a Regent of the University California, said that he too wanted to end the university's affirmative action programs. As an African American male opposing race- and gender-based selection, Ward Connerly held a lot of weight on this issue. Wilson and Connerly brought the issue before the Regents. On July 20th, 1995, the UC Regents voted 15-10 to end “race based preferences in admissions, hiring, and contracting.” This ruling went into effect in the 1996 admissions cycle for graduate and professional admissions and the 1998 admissions cycle for undergraduates.

The policy changes occurring in California, were beginning to provoke similar attacks on affirmative action polices at other public universities. In 1996, the Fifth Circuit Court of Appeals invalidated a policy that the University of Texas Law School used to seek out a certain

number of black and Latino students. Three of the appellate judges objected to the use of race based admissions. The Supreme Court would not hear the case in 1997.

Adoption

With the backing of Pete Wilson and Ward Connerly, proposition 209 was put before the voters of California. On November 5th, 1996, 54% of voters voted yes on Proposition 209. The American Civil Liberties Union immediately brought a suit against 209. The Ninth Circuit Court of Appeals sided with Governor and upheld 209. The Supreme Court refused to hear the case.

Implementation

In 1997, 209 and the Regent's policy had gone into effect at the UC graduate and professional schools. Minority groups began to claim that they were being denied access to certain schools and were being discriminated against. In Michigan, the Center for Individual Rights filed suits on behalf of white students who were denied admissions to University of Michigan's undergraduate program.

In 1998, the Regent's policy went to affect at the undergraduate admissions. The class of 1998 was the least diverse cohort. The ACLU filed a suit against the State of California, on behalf of 750 minority students who were denied admissions. That year admissions had been weighted heavily against advanced placement classes. ACLU claimed that the State was discriminating against high school students in low-income and minority areas who attended schools that rarely offered AP classes and thus were at a disadvantage. The State had neglected to protect these minority student's fourteenth amendment rights.

Evaluation

On May 16, 2001, the University of California reversed its decision on Affirmation Action stating that it had complied with the constitution of California “by treating all students equally in the admissions process without regard to their race, sex, color, ethnicity or national origin, and by treating employees and contractors similarly” (UC Regents website).

Ongoing policy process

On February 19, 2003, Assembly Bill 703 signed by Governor Davis (California State Senate). The bill, proposed by Mervyn Dymally, D-Compton, sought to assign a definition to term “racial discrimination” as stated in Section 31 of Article 1 of the California Constitution. Prior to the bill, “racial discrimination” had not been specifically defined. Assembly Bill 703 sought to use the definition of “racial discrimination” that is used in paragraphs 1 and 4 of Article 1 of Part 1 of the International Convention on the Elimination of All Forms of Racial Discrimination. Dymally argued that the aim of the bill was “to encourage outreach programs, which can range from simple job advertising to rules aimed at boosting the number of female and minority contractors” (Sacramento Bee). A Sacramento Superior Court Judge ruled that the California lawmakers adoption of Assembly Bill 703 violated the “state’s ban on race-based preferences.” The suit was brought to the courts by Ward Connerly and the Pacific Legal Foundation.

Proposition 209 policy cycle length

The stages of the Proposition 209 policy cycle varied in length, as can be seen from the chart below:

Policy Stage	Actors	Length of Cycle
Agenda Setting	Pete Wilson, CA Governor Ward Connerly, UC Regent	Approximately 1 year - 1994
Formulation & Adoption	Pete Wilson, Ward Connerly, UC Regents	UC Regents dissolved race- and gender-based admissions July 20 th , 1995, setting the stage for proposition 209
Adoption by California Voters	Pete Wilson, Ward Connerly, various pro- and Anti-affirmative Action interest groups	November 5 th , 1996, 54% of California voters voted to eliminate affirmative action from admissions.
Implementation	University of California and California State Universities	Began with graduate admissions in 1996 and undergraduate admissions in 1998. Affected in all state universities in 1998
Evaluation	Various interest groups have written on the effects or non- effects of Proposition 209	Ongoing
Agenda Setting/Formulation	UC Regents	Rescinded their previous ruling on affirmative action stating they had done everything according the CA Constitution.
Adoption	Mervyn Dymally, D- Compton	Introduces Assembly Bill 703 which defines “racial discrimination”
Agenda Setting/Formulation	Pacific Legal Foundation on behalf of Ward Connerly	Definition of “racial discrimination” nullified Proposition 209 which was considered unconstitutional

Tearing apart the exact cycles of such a policy can be difficult as there are often several policy stages are occurring at the same time. For example, as long as affirmative action remains unconstitutional the public will continue to engage in agenda setting. As changes are considered by one group, another is evaluating those changes.

Stakeholders for Proposition 209

Although formal players can be identified in this process, it is difficult to ignore the presence and influence of players, such as Pete Wilson and Ward Connerly, who are both formal and part of the elite. Ward Connerly has been persistently objected to affirmative action policies and has worked to have affirmative action eliminated.

Player	Preferences	Stages	Powers
Ward Connerly	Want to end race based admissions to higher education and for contracts	Agenda Setting Formulation Adoption	African American Male, member of the UC Board of Regents, founder and chairman of the American Civil Rights Institute
Pete Wilson	Supported the end of race based admissions	Agenda Setting Formulation Adoption	Governor of California and supported Ward Connerly.
American Civil Rights Institute, Institute for Justice, Pacific Legal Foundation, Center for Individual rights	Interest Groups in support of Proposition 209 (primarily groups who oppose any type of government intervention)	Formulation Agenda setting	Expert Knowledge Litigation
ACLU of Southern CA	For	Evaluation	Expert knowledge Litigation
Feminist Majority By Any Means Necessary California Votes NO! on 209	Interest Groups against Proposition 209	Adoption	Ability to mobilize their constituents
UC Regents	Oversees the all the Universities part of the UC system.	Agenda Setting (both for and against this issue) Formulation Evaluation Adoption	Have ability to influence public either for or against affirmative action
Administrators and Admissions Coordinators at UC Universities	Review applications at each university. Work with students on a day to day basis.	Implementation	Since the admissions procedures are subjective, admissions coordinators have a lot influence on the admissions process

Process Models

Several process models hold true when examining the policy cycle for affirmative action. What becomes apparent is that certain theories are more prominent during particular parts of the policy cycle. Of particular relevance in this topic the following models and theories will be discussed: political elites and symbolism, and incrementalism versus punctuated equilibrium. Via the work of admissions counselors and the individual universities, we also see “street-level” bureaucrats at work.

Domhoff (Cahn & Theodoulou, 1995) posits that “the idea that a relatively fixed group of privileged people might dominate the economy and government goes against the American grain and the founding principles of the country”, yet that is exactly what he believes. Defined by Mills (Cahn, & Theodoulou, 1995) the political elites in the United States are comprised of the warlords, corporation chieftains and the political directorate. It is these political elite who designed the constitution, and these elite who still continue to rule over society, advancing agendas and creating policy that is best suited to their needs. Similar to *The Comparative Study of Political Elites* by Robert D. Putnam, the origins, motivations and structures are all relevant to those in power.

Relevant to the public policy of affirmative action, the political elite theory explains why policies have been slow in coming and filled with controversy, the underrepresented minority in our country are not members of the political elite. They have no access, no voice in deciding the policy that is being enacted to benefit (or not) their groups. Edelman, (Cahn, & Theodoulou, 1995) for his part, notes that “citizens who are informed about political developments can more effectively protect and promote their interests and the public interest.” This rings true, but it has

been shown time and time again that the political elite, essentially, dominate the policy processes of this country.

As Edelman notes, symbolism and myths, for their part, are used by political elite to secure and maintain the support and quiescence of the politically naive masses (Cahn, & Theodoulou, 1995). It can be argued, as Edelman does, that the majority of the American public, have historically been manipulated by the effective use of symbols by politicians, leaders and powerful organizations to advance their political goals and justify the transference of material and other benefits to a particular group no matter how narrow or inequitable the distribution of benefits (Davis, 2006). Similar to throwing a dog a bone, the political elite have paraded affirmative action programs back and forth, as symbols to their so-called commitment to equality in this country.

There is contrast between the federal affirmation action policy processes and the State affirmative action processes. Both incrementalism and punctuated equilibrium appear to occur at the same time but at the different levels of government. Lindbolm's (Cahn, & Theodoulou, 1995) argues that policy changes occur at a slow pace by small increments. Essentially, policy makers are constantly "fine tuning" existing policy. Though there have been attempts to eliminate federal affirmative action laws under the Reagan administration, affirmative action has remained unchanged at the federal level. The fine tuning occurs when citizens bring cases before the judiciary.

In contrast to Lindbolm's incremental change theory, Schulman (Cahn, & Theodoulou, 1995) posits that there are occasions when major policy making occurs. This theory is called the punctuated equilibrium theory. These occasions are "Nonincremental, indivisible policy pursuits [that] are beset by organizational thresholds or "critical mass" points closely associate with their

initiation and subsequent development.” The advent of affirmative action represents a paradigms shift that was occurring in the 1960’s. President Johnson’s executive order represents a “spike” in public policy making. Similarly, reactions to affirmative action at the State level, or more specifically the idea of preferences, are also spikes in the policy making process. These are a reaction to the status quo.

One of the failures of Proposition 209 is that it did not adequately address implementation. Other than eliminating the use of race- or gender-based preferences at admissions, it did not indicate how this policy should be carried out. As with many polices, how the policy is carried out is open to interpretation. The influence of the administrators at the “street-level” (Hershberger, 2006) is not acknowledged. As the people who work with the students on a day-to-day basis, they notice the lack of diversity more so than those who do not. Since there is no exact formula to admissions processes, the admissions process is highly subjective and university administrations have discretion over who is accepted. In addition, the University of California felt it had authority to reverse its decision on Affirmation in 2001 stating in had followed the California constitution. It determined how it was going to interpret the policy. Another way the administrators can circumvent Proposition 209 is to apply for federal (NIH) or private (Ford Foundation) funds that aim to support minority students. At all UC’s there are federal funds available to help underrepresented students.

Conclusion & Prognosis

A challenge has occurred in the public university. Private universities do not have to adhere to Proposition 209 and they have been able to attract minority students that would have traditionally been welcomed at public universities. The result: private universities are becoming

more diverse than public universities (The Journal of Blacks in Higher Education, 1999).

Although the public, i.e. students, who are affected by affirmative action and the admissions process, have kept affirmative action policies in check via the courts, the debate in California is being set by elites (the UC Regents, Governor Wilson, Ward Connerly). If the aim of public university is to serve the public, why does the student population of the UC system not reflect the growing Latino/a American population of California? The formulators of Proposition 209 did not ask this question nor did they provide a prescription to address where minority students are falling short, such including mandatory access to advanced placement classes or free/low-cost SAT preparation. While eliminating affirmative action, they failed to protect the public's fourteenth amendment rights.

Part of the contentious nature of this debate is that it lies somewhere between a tangible problem and an issue that involves values. No one wants to believe that race and gender are still issues in 2006. While the elimination of racism and sexism should be our aim, we have yet to reach our goal. There are still gaps between students depending on what schools they attend and their ability to access services that would improve their ability to compete on a level playing field. It would be mistaken to view those few minority students who have been able to fulfill all the academic admission requirements as confirmation that the academic gap is closing. As long as gaps in services exist at the high school level, certain student will never be able to attain the necessary academic standards to apply and be accepted to university.

The changing face of the majority populations in the US, especially within the college aged bracket, demands a reform in retention programs in higher education. Increasingly, all facets of life, including education, the labor market and beyond, will be affected by people of color. Without affirmative action programs to help level the playing field, repercussions of a low

number of minority graduates will be felt. California especially, would be remiss to not address the bleak retention rates for minority students in higher education.

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