Louisiana’s Equal Protection Guarantee: Questions About the Supreme Court Decision Prohibiting Affirmative Action*

I. INTRODUCTION

There are measures underway in almost half the states to abolish the affirmative action programs created by state and local laws and prohibit new ones from being enacted.1 California voters started the trend in November of 1996 when they adopted Proposition 209, an amendment to the California state constitution which prohibits discrimination or preferences based on race or gender.2 Affirmative action proponents challenged the measure as a violation of the Equal Protection Clause of the Fourteenth Amendment, but the United States Court of Appeals for the Ninth Circuit held that Proposition 209 was constitutional.3

Louisiana citizens do not have any reason to follow the trend. Louisiana’s constitution, adopted in 1974, already contains a provision that prohibits any and all discrimination against a person because of race.4 In 1996, the Louisiana Supreme Court, in Louisiana Associated General Contractors, Inc. v. State,5 interpreted the state's equal protection clause as prescribing an absolute ban on affirmative action laws meant to aid minorities.6 The court also held that the

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Interestingly, in November 1997, Houston voters defeated Proposition A, a proposed amendment to the city charter which would have abolished the city’s affirmative action programs.

This paper will be limited in scope to a discussion of racial discrimination. Proposition 209 eliminated both racial and gender discrimination. The Louisiana Constitution prescribes different standards for gender and racial discrimination.

3. The Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), cert. denied, 118 S. Ct. 397 (1997). The court held that Proposition 209 does not violate the Equal Protection Clause of the Fourteenth Amendment. Id. at 709. In a footnote, the court stated that Proposition 209 affords greater protection to the citizens of California than does the federal Equal Protection Clause. Id. at 709 n.18. The court was apparently addressing the question of whether Proposition 209 violated the Supremacy Clause by failing to afford the minimum level of protection required by the Fourteenth Amendment.

4. La. Const. art. 1, § 3.

5. 669 So. 2d 1185 (La. 1996).

6. Id. at 1199.
provision does not violate the Equal Protection Clause of the Fourteenth Amendment or the Supremacy Clause. Is a state law that prohibits affirmative action constitutional? States do not have an affirmative duty to implement affirmative action programs unless mandated by court order or federal law. And it is well established that when a state does enact a voluntary affirmative action law, it must conform to the stringent requirements of the Fourteenth Amendment’s Equal Protection Clause. But does the state electorate have the power to place in the state constitution a ban on all voluntary affirmative action programs? Would the result of a constitutional challenge to a recent state constitutional amendment, like California’s Proposition 209, differ from the outcome of a constitutional challenge to Louisiana’s equal protection provision? Louisiana’s provision was adopted years ago as part of an entirely new constitution. It was not considered by voters as an anti-affirmative action measure, and was only recently interpreted to prohibit affirmative action.

There are two federal constitutional provisions at issue—the Equal Protection Clause and the Supremacy Clause. If a valid federal law mandates that the state implement an affirmative action program, then the Supremacy Clause dictates that the state prohibition of affirmative action must give way to the federal law. But, in the absence of any other federal mandate, does the Supremacy Clause require a state to allow for affirmative action as a remedy for past discrimination because the Fourteenth Amendment has been interpreted to allow for it? When a state prohibits affirmative action that would otherwise be valid under the Fourteenth Amendment, racial minorities are prevented from seeking any favorable legislation based on that minority status. The only remedy is to effect a constitutional amendment to remove the ban or to seek a remedy in court. However, any other group of similarly situated persons—handicapped persons, veterans, the elderly, homosexuals—is free to lobby its local representatives for favorable legislation. Thus, the minority person is denied the same protection under the law as other groups seeking a remedy through the local government. It can be said that the minority interest is afforded less protection than under the Fourteenth Amendment. Proponents of anti-affirmative action measures advance the argument that a nonminority racial group is also denied the right to seek

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7. Id.
8. Id. at 1196.
10. See Coalition for Economic Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997). Some federal affirmative action programs do mandate compliance by state agencies. For example, the Louisiana Department of Transportation and Development, pursuant to federal rules, has established an annual goal that 10% of its contract work will be awarded to minority and other disadvantaged business enterprises. See Disadvantaged Business Enterprise Program 24 (State Dep’t of Transp. and Dev. 1997). Assuming these federal agency requirements are constitutional, they preempt state law. See Louisiana Associated General Contractors, Inc. v. State, 669 So. 2d 1185, 1220 n.14 (La. 1996).
favorable legislation, and thus the measure is race-neutral—affecting all races alike. Proponents of affirmative action characterize this neutrality as illusory. Nonminorities do not need the protections that minorities seek to achieve through affirmative action. Indeed, the educational and employment opportunities afforded to nonminorities, and the lack thereof to minorities, constitute the equal protection violation that affirmative action is designed to remedy.

This paper will address two questions. First, was the Louisiana Supreme Court decision in *Louisiana Associated General Contractors*, interpreting Article I, section 3 as prohibiting affirmative action programs, a correct interpretation of the Article? It will be shown that the provision could have reasonably been interpreted to allow affirmative action. Second, the paper will address whether or not California Proposition 209 and Article I, section 3 of the Louisiana Constitution of 1974, as interpreted by the Louisiana Supreme Court, violate the Equal Protection Clause or the Supremacy Clause of the United States Constitution. It will be shown that both the Louisiana and California provisions seem indistinguishable from United States Supreme Court precedent holding that similar measures altered the political structure in such a way as to violate minorities' equal protection rights. Thus, both provisions are likely to be held unconstitutional.

II. BACKGROUND: AFFIRMATIVE ACTION AND THE FOURTEENTH AMENDMENT

A. The Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution guarantees that "[n]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws." The purpose of the Fourteenth Amendment, as interpreted by the United States Supreme Court in early cases, was to secure freedom for black citizens; protect them from oppressive state laws that attempted to deny them that freedom; and to afford to them "all the civil rights that [white citizens] enjoy." With this constitutional safeguard in place, the Court began and continues to strike down laws that discriminate against blacks: laws denying the right to be on a jury, those effectively preventing blacks from voting, and laws mandating racial segregation of the public school system.

B. The Civil Rights Act of 1964 and Affirmative Action

The Equal Protection Clause, used to strike down laws that discriminate against blacks, was seen by some as not a strong enough provision to combat the effects of racism. Blacks remained systematically excluded from work and educational opportunities, which resulted in a gross inequity in the standard of living between black and white citizens. Congress reacted to this problem and the growing civil rights movement by passing the Civil Rights Act of 1964. Title VII of the Act banned employment discrimination on the basis of race. The overall goal of the Act was the integration of black citizens into the mainstream of American society. The primary way that Congress intended to accomplish this was by opening up employment opportunities for blacks in occupations that had traditionally been closed to them.

However, when first enacted, compliance with Title VII was voluntary. Businesses tended to wait and see what they would be required to do rather than comply with the Act. This slow progress was one factor that prompted Presidents John Kennedy, Lyndon Johnson, and Richard Nixon to begin implementing and enforcing affirmative action programs.

The Executive Orders directed the federal government to use hiring goals and special recruitment efforts to insure fair treatment in employment. Later programs required that federal aid be given to minority businesses. Congress also began enacting affirmative action legislation. The Public Works Employment Act of 1977 was one of the first federal statutes that used an explicit racial classification to provide a preference program for minorities. The purpose of the Act was to stimulate the economy, particularly the construction industry, and alleviate unemployment by granting money to state and local governments for the development of public works. The minority business enterprise provision required that ten percent of the amount of the federal grant money be set aside for minority business enterprises. There was little debate

19. Id. at 203, 99 S. Ct. at 2727.
20. See Knight & Wing, supra note 17, at 208, 212-22; Urofsky, supra note 17, at 15-41.
21. See Knight & Wing, supra note 17, at 208, 214-15.
25. Id. at 463-64.
over the program when it was introduced in Congress. The sponsoring
representative's comments focused on the fact that, despite Congress' attempts
in the past to safeguard against discrimination in the awarding of government
contracts, minority businesses still represented a disproportionately small number
of the firms participating in the work. The purpose of the set-aside provision
was to insure that minorities would receive a fair opportunity to share in the
economic benefits of the program. States and local governments soon followed
with similar affirmative action measures.

Now the trend is for states to abolish existing affirmative action laws and
ban any future ones. But proponents of affirmative action criticize this measure
as too broad because affirmative action comprises numerous kinds of pro-
grams.

While the controversy over the validity of anti-affirmative action measures
unfolds, the debate on the constitutionality of affirmative action itself continues.
Even though the United States Supreme Court has determined that affirmative
action may be allowed under the Equal Protection Clause, there are many
people who seem not to accept this premise. The constitutional debate over
affirmative action is evident even in attempting to define it. At the United States
Supreme Court level, Justice Blackmun, in supporting affirmative action, defined
it as a measure to bring about a society in which "persons will be regarded as
persons and discrimination will be an ugly feature of history that is instructive

1976, less than 1% of all federal procurement contracts went to minority firms though minorities
comprised 15-18% of the population. Id.
27. The Wilson court's opinion included copy from pamphlets explaining Proposition 209.
Opponents to the amendment included information about the many different types of programs that
would be affected, stating:

California law currently allows tutoring, mentoring, outreach, recruitment, and counseling
to help ensure equal opportunity for women and minorities. Proposition 209 will
eliminate affirmative action programs like these that help achieve equal opportunity for
women and minorities in public employment, education and contracting. . . . The
initiative's language is so broad and misleading . . .
Coalition for Economic Equity v. Wilson, 122 F.3d 692, 697 (9th Cir. 1997).
O'Connor stated:

[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact."
The unhappy persistence of both the practice and the lingering effects of racial
discrimination against minority groups in this country is an unfortunate reality, and
government is not disqualified from acting in response to it. As recently as 1987, for
example, every Justice of this Court agreed that the Alabama Department of Public
Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly
tailored race-based remedy. When race-based action is necessary to further a compelling
interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.
Id. at 237, 115 S. Ct. at 2117 (citations omitted). See also United States v. Paradise, 480 U.S. 149,
but that is behind us." However, Justice Scalia, in denouncing affirmative action, has referred to it as merely "intentional discrimination on the basis of race or sex" and "racial entitlements."

Affirmative action refers to policies that provide preferences based explicitly on membership in a historically disadvantaged group, such as race. The purpose is to create greater equality of opportunity in American society by distributing certain resources—government jobs and contracts and admission to public universities, for example—to groups historically denied them because of their race or gender. The affirmative action goal is seen as having at least three, not entirely independent, components. The first goal is to remedy the effects of past racist practices and attitudes; the second, to compensate for present discrimination against minorities or biases that are detrimental to them; and the third, to create a community that values racial, ethnic, and gender diversity to a point where discrimination on that basis ceases to exist.

Affirmative action is used in two main areas—employment and education. The types of programs used include set-asides for minorities in government contracting and procurement, goals and timetables aimed at encouraging the hiring and promotion of minorities, the use of minority status as a factor in job advancement and admissions to universities, and outreach and recruitment efforts to increase minority participation.

C. Standard of Review for Statutes that Classify on the Basis of Race

The United States Supreme Court has adopted strict scrutiny as the standard for reviewing a challenged statute that classifies on the basis of race and disadvantages a racial minority. It will almost surely strike the law down as unconstitutional. Strict scrutiny means that the statute is presumed unconstitu-

33. See Knight & Wing, supra note 17, at 208, 210.
34. Id. at 210, 226 n.6.
35. See Kennedy, supra note 32, at 1346 n.1.
36. See Strauder v. West Virginia, 100 U.S. (1 Otto) 303 (1879); Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944); Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879 (1984); Geoffrey R. Stone, *Constitutional Law* 601 (1996). The Equal Protection Clause is a general provision applicable to all laws. When a law is challenged as violating the Clause, the presumption is in favor of the validity of the law. The party challenging the law must show that the law does not advance a legitimate government interest or that the means employed is not rationally related to that end. But when the legislature discriminates on the basis of a suspect classification like race, the Court reviews it with heightened or strict scrutiny.
tional and will be struck down unless the government can show that it is narrowly tailored to further a compelling state interest. The rationale for applying heightened scrutiny to these cases is that the Constitution is color-blind; that there is no rational reason for the government to make distinctions based on race, and that the courts have a special duty to protect discrete and insular minorities against abuse by the majority because minorities cannot be assured of protection through the political process.

For some challenged laws, it is not evident on the face of the law that it discriminates on the basis of race. For these facially neutral statutes, the Court has developed a threshold test. If the effect and purpose of the law is to place a disproportionate burden on a minority group, then the law is considered as classifying on the basis of race and, therefore, is reviewed with heightened scrutiny. On the other hand, if the law has a nondiscriminatory purpose and only incidentally (unintentionally) burdens minorities, then the law is not considered to classify on the basis of race, and strict scrutiny does not apply. Proposition 209 and Louisiana's equal protection provision fall into the category of facially neutral statutes. It is not obvious from the wording of the constitutional provisions that a particular racial group is singled out for treatment different from other racial groups.

When the courts are faced with a challenge to an affirmative action law, they apply the same strict scrutiny test as they do for laws that place burdens on minorities. If it is shown that the law was implemented for compelling reasons and the means are narrowly tailored, it will be held constitutional. The courts have recognized that remedying the effects of past racial discrimination

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38. Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 1146 (1896) (J. Harlan dissenting). This premise, that our Constitution is colorblind, originated with Justice Harlan in this opinion, and is repeated in almost every case in which an affirmative action program is challenged. However, it is interesting to note the context in which this premise was founded. In Plessy, a Louisiana statute requiring railroad companies to provide separate but equal accommodations for white and black races was upheld as constitutional. In dissent, Justice Harlan stated:

The white race deems itself to be the dominant race in this country.... But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind,... In respect of civil rights, all citizens are equal before the law.... The law... takes no account of his... color when his civil rights as guarantied by the supreme law of the law are involved.

Id. When placed in context, arguably, Justice Harlan's statement that the "constitution is color-blind" would not preclude remedial race based legislation. However, later cases have cited it for the proposition that race should not be a factor in laws for any reason.

41. Id.
is a compelling interest. The narrowly tailored requirement means that the law must not unnecessarily or unduly burden the rights of nonminority parties.

III. LOUISIANA'S PROHIBITION OF AFFIRMATIVE ACTION

A. Background: Article I, Section 3 is Adopted

In 1974, Louisiana's citizens adopted a new constitution. Article I, section 3 of the new constitution was entitled "Right to Individual Dignity." This provision marked the first time that Louisiana citizens were guaranteed equal protection of the laws by their state constitution. Article I, section 3 of the Louisiana Constitution of 1974 reads in pertinent part, "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race . . . ."

At the time that the Louisiana constitution was adopted, affirmative action programs were in place across the country. However, during the two days of discussion on Article I, section 3 at the constitutional convention, held on August 29 and 30, 1973, there was no mention of affirmative action and whether or not it was to be allowed. So, quietly and without debate or opposition, just as affirmative action programs were beginning to be implemented throughout the country, Louisiana's constitution was armed with the mechanism to defeat them.

Before 1985, Louisiana courts ignored the unique wording of Article I, section 3 and followed federal equal protection precedent. The Louisiana Supreme Court first interpreted the state equal protection guarantee independently of the federal jurisprudence in 1985, in Sibley v. Board of Supervisors. The

44. Id. at 283, 106 S. Ct. at 1852.
46. La. Const. Art. 1, § 3.
48. Ironically, there was practically no debate on the national level when affirmative action programs were instituted, nor was there any debate in Louisiana when, in the same time period, the constitution was being altered to prohibit them.
49. See Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1386 (La. 1978) (holding that Article I, section 3 of the state constitution was intended only as a restatement of the federal Equal Protection Clause).
50. 477 So. 2d 1094 (La 1985).
case involved an equal protection challenge to a statutory cap on medical malpractice awards. The supreme court, in establishing the framework for equal protection analysis under the state constitution, stated in dictum that when a law classifies individuals by race, it shall be repudiated completely.51

B. Louisiana Associated General Contractors v. State: Article I, Section 3 is Interpreted

In 1996, the Louisiana Supreme Court was called on for the first time to interpret the state's equal protection clause in the context of a challenge to a state affirmative action law. In *Louisiana Associated General Contractors, Inc. v. State of Louisiana*,52 (LAGC), plaintiff, a contracting association, filed suit against the State challenging the constitutionality, under Louisiana's equal protection clause, of the Louisiana Minority and Women's Business Enterprise Act (MBE Act).53 The MBE Act required that each state agency and educational institution in the state set aside up to ten percent of all contracts54 for the construction of public works and procurement of goods and services for exclusive bidding by minority-owned businesses. In addition, a preference program was established for construction contracts totaling less than $200,000. If a minority-owned business submitted a bid that was within five percent of the lowest bid, the contract would be awarded to the minority-owned business.55

In August 1994, the Louisiana Health Care Authority advertised for bids on a project to renovate the Perdido Clinic of University Hospital in New Orleans. It was designated as a project on which only minority-owned contracting companies would be allowed to bid.56 LAGC filed suit claiming that the MBE Act was unconstitutional under Article I, section 3 of the Louisiana Constitution because it discriminated on the basis of race in the selection of contractors.57 The Supreme Court of Louisiana held that Article I, section 3 absolutely prohibits race-based discrimination, regardless of the justification for the preference.58 Since the MBE Act awards some contracts on the basis of race, the Act was held invalid.59

51. *Id.* at 1107.
52. 669 So. 2d 1185 (La. 1996).
54. *Id.*
56. *LAGC*, 669 So. 2d at 1189.
57. *Id.* at 1190.
58. *Id.* at 1198.
59. The court noted, however, that its holding did not mean that an act that mandates set-asides for women-owned business enterprises would automatically be deemed unconstitutional. Article I, section 3 "gives less protection to classifications based on gender than it does to those based on race. Rather than providing an absolute ban on discrimination as it does for race, Article I, section 3 prohibits gender discrimination only if it is arbitrary, capricious or unreasonable." *Id.* at 1202 n.16 (emphasis added).
In interpreting the constitutional provision, the court was satisfied that the language of the second sentence of Section 3 was "clear and unambiguous" and that its application did not lead to absurd results. The plain language of the provision absolutely prohibits any state law which discriminates on the basis of race. But the court proceeded to examine the framers' intent in adopting Article I, section 3. It was not written "solely to mimic the federal Equal Protection clause."60 "The textual differences between the state and federal provisions are self-evident."61 Article I, section 3 delineates three classifications and specifies the level of scrutiny each is to receive. Discrimination based on race or religion is subject to an absolute ban. Discrimination based on sex, age, culture, physical condition, birth, or political ideas is prohibited to the extent it is arbitrary, capricious, or unreasonable. A lower level of scrutiny applies to the unenumerated categories.62 The Fourteenth Amendment, however, does not specify classifications or standards of scrutiny. These interpretations have been supplied jurisprudentially by the United States Supreme Court. At the time that Article I, section 3 was written, a law that discriminated on the basis of race was presumed unconstitutional under federal analysis, but would be allowed to stand if it was shown to be necessarily related to a compelling state interest. An amendment was proposed during debate on the provision that would have conformed the language of the state equal protection guarantee to that of the Fourteenth Amendment. That amendment was defeated, indicating an "obvious intent to depart from federal jurisprudence."63 As further evidence of the framers' intent, the court noted that one of the authors of the Louisiana equal protection provision explained that it was his belief "that there is absolutely no basis for any discrimination of any sort on the basis... race."64 The court took note of one commentator's analysis which concluded that "as amended and finally adopted, the provision does not allow the traditional analysis with respect to race and religion."65 Noting that a state constitutional provision "cannot be interpreted to afford less protection than the federal Constitution because such an interpretation would violate the federal supremacy clause, [but it] can certainly

61. Id. at 716 n.135.
62. "When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest." Sibley v. Board of Supervisors, 477 So. 2d 1094, 1107-08 (La. 1985).
63. LAGC, 669 So. 2d at 1197.
64. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, at 1029 (quoting Mr. Dennery).
65. See Hargrave, supra note 45, at 8. The court noted other commentators' observations as well. "The unique language of the state guarantee of 'individual dignity' was adopted intentionally by its framers, with the specific purpose of providing expansive protection for equality interests independent of and beyond the protections provided by the federal constitution." John Devlin, Louisiana Constitutional Law, Developments in the Law, 1989-1990, 51 La. L. Rev. 295, 310 (1990). "[T]he purpose of the second sentence] is to make the state blind to both the race and religious beliefs of its citizens." Louis Jenkins, The Declaration of Rights, 21 Loy. L. Rev. 9, 17 (1975).
be intended to afford and construed as affording greater protection than its federal counterpart," the Louisiana Supreme Court concluded that Article I, section 3 was intended to provide equal protection "above and beyond" that of the federal government.\textsuperscript{66}

The State, in defense of the MBE Act, argued that the state's equal protection provision is meant to prohibit discrimination, not attempts like the MBE Act to eliminate discrimination. In responding to this claim, the Louisiana Supreme Court borrowed from federal jurisprudence deciding that strict scrutiny applies regardless of the race of the party burdened or benefitted\textsuperscript{67} and that discrimination in favor of one race is necessarily discrimination against another.\textsuperscript{68}

The defendant also argued that the state has a duty imposed by the Fourteenth Amendment to remedy the effects of past discrimination. If Article I, section 3 is interpreted to prohibit affirmative action, it is unconstitutional. The court rejected this claim, stating that not only does the United States Constitution not require states to employ affirmative action programs, it does not even allow them to unless they pass strict scrutiny.\textsuperscript{69} The Supreme Court in Croson\textsuperscript{70} distinguished the power granted Congress under Section 5 to enforce the dictates of the Fourteenth Amendment from that of the states, which are granted less deference by the courts when they write affirmative action laws.\textsuperscript{71}

The Louisiana Supreme Court also rejected the State’s claim that under a strict interpretation of Louisiana's equal protection clause, the state stands to lose federal funds, where the receipt of those funds is contingent on the state complying with federal rules requiring minority preference programs. The court responded that Article I, section 3 "does not allow for the consideration of any hypothetical loss of funds any more than it does the remedial intent behind the Act."\textsuperscript{72} The conflict can be eliminated by an amendment to the Louisiana constitution that would allow the state to continue receiving federal dollars without violating its own constitution.\textsuperscript{73}

Therefore, the supreme court held that because the set-aside and preference provisions of the MBE Act deprived some contractors of the ability to participate in the bid process solely based on their race, those portions of the Act were unconstitutional.\textsuperscript{74}

\textsuperscript{66} \textit{LAGC}, 669 So. 2d at 1198.
\textsuperscript{68} \textit{LAGC}, 669 So. 2d at 1199.
\textsuperscript{69} \textit{Id}.
\textsuperscript{70} \textit{Id}.
\textsuperscript{72} \textit{LAGC}, 669 So. 2d at 1199 (explaining the Croson Court's decision).
\textsuperscript{73} \textit{Id.} at 1200.
\textsuperscript{74} \textit{Id.} at 1201.
In dissent, Justice Johnson argued for the adoption of the strict scrutiny standard used in Fourteenth Amendment analysis. The Justice noted that “[t]he purpose of the Fourteenth Amendment . . . was to rid our nation of the last vestiges of discrimination . . . . The latest trend in American constitutional law is to use ‘equal protection’ as a concept not to eliminate discrimination, but to justify it.” In accomplishing this purpose, the United States Supreme Court has recognized that at times there may be a compelling need for government to use race-based legislation to correct past discrimination. In City of Richmond v. J.A. Croson Co., the Supreme Court held that a city government has the power to adopt race-based legislation designed to eradicate the effects of discrimination if it can establish a strong need for the remedial action and it is narrowly tailored to accomplish that goal. According to Justice Johnson, strictly interpreting Article I, section 3 to prohibit such legislation “would have the effect of denying, rather than protecting, individuals in their right to equal protection of the laws.” The result of the court’s decision is that if the state can prove that discrimination against minorities and women exists in the construction industry, it is “powerless to act to eliminate [it].”

C. Analysis of Louisiana Associated General Contractors

For more than twenty years after Article I, section 3 was written, the legislature enacted affirmative action laws and the Louisiana courts followed the federal analysis in reviewing them. This occurred even though, according to the supreme court’s interpretation, the drafters had written a provision that plainly prohibited affirmative action. However, the court’s conclusion is not fully supported by the text and the framer’s intent. A viable argument can be made that Article I, section 3 was intended to proscribe only discrimination against racial minorities.

1. The Plain Meaning of Article I, Section 3

The supreme court’s interpretation of the state equal protection clause in LAGC was based in part on the plain language of the provision. It states that “[n]o law shall discriminate against a person because of race . . . .” The

75. Id at 1202-03.
77. “Even plaintiffs concede that City of Richmond allows a state to take race into account where there is a ‘compelling state interest.’” LAGC, 669 So. 2d at 1203 (Johnson, J., dissenting).
78. Id. at 1204.
79. Id. at 1203.
80. By contrast, there is no doubt that California’s Proposition 209 was intended to abolish affirmative action. That was the specific intent of those sponsoring the amendment, and the issue was publicly debated before it was adopted. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997).
81. La. Const. art. 1, § 3. (emphasis added).
court stated that this wording clearly and unambiguously prohibits absolutely any racial classification and that a law that establishes a preference for a minority group is discrimination against the non-minority group. But the term "discriminate against" arguably had more than one meaning in 1973 when the provision was drafted.

At the time the Louisiana constitution was written (and even today), the dictionary described two meanings of "discriminate"; to distinguish or differentiate and to make a difference in treatment or favor on a basis other than individual merit. This definition tends to support the supreme court's conclusion, except that the example given is to "discriminate in favor of your friends" and "discriminate against a certain nationality." This invites the question as to whether "discriminate against" as used in the example meant "discriminate against a certain nationality because of prejudice" or if it included discrimination against nonminority nationalities for benign purposes. One of the definitions listed for "discrimination" is "prejudiced or prejudicial outlook, action, or treatment."

Black's Law Dictionary from 1968 states the definition of "discrimination" as follows:

In constitutional law, the effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found.

From this definition, an argument can be made that where a distinction is made for the purpose of remedying the effects of past discrimination, it would be reasonable and, therefore, not constitute discrimination.

Therefore, a reasonable argument can be made that the phrase "discriminate against," as understood by the drafters and voters at the time, was intended to proscribe discrimination that harms racial minorities. The phrase, it would seem, is at least ambiguous.

Even today the phrase "discriminate against" still has the same connotations as it did twenty years ago. Consider the language of Proposition 209 which

83. Merriam-Webster's New Collegiate Dictionary 326, 327 (1st ed. 1973). Cf Chambers Twentieth Century Dictionary 369 (1972) (stating a meaning for "discriminate" as "treat differently because of prejudice (with against)"). A later edition of Webster's dictionary, revised in 1988, lists a meaning of "discriminate" as: "show partiality (in favor of) or prejudice (against)." The meaning of "discrimination" is listed as: "a showing of partiality or prejudice in treatment; specifically, action or policies directed against the welfare of minority groups." Webster's New World College Dictionary 392 (MacMillan 3d ed. 1988).
provides that the state shall not "discriminate against or grant preferential treatment to" any individual on the basis of race. 66 If the term "discriminate against" includes discrimination against nonminorities by granting preferential treatment to minorities, then why did the authors of Proposition 209 include the redundant language in the amendment? It is likely that the redactors included the phrase "preferential treatment" because "discriminate against" used alone connotes discrimination against minorities because of racial prejudice. Therefore, they thought they needed to add the extra language to make it unambiguous. In 1997, Houston voters rejected, by a vote of fifty-four percent to forty-six percent, a proposed amendment to the city charter that read: "Shall the charter of the city of Houston be amended to end the use of affirmative action . . . in the operation of the city of Houston employment and contracting . . . ?" 87 Supporters of the amendment claim that the way the ballot was worded—that is, as a proposal to end affirmative action instead of to prohibit discrimination against any person—cost them the victory. 88 If affirmative action implies discrimination against nonminorities in the minds of the voters, then this fixation on the exact language used would seem irrational.

2. The Framer's Intent of Article I, Section 3

Since the language of the provision is ambiguous, it is appropriate to look to the framer's intent to aid in ascertaining its meaning. 89 The LAGC court stated that it was unnecessary to examine the convention records to determine the intent of the delegates since it had found the language of the provision clear and unambiguous. 90 Nevertheless, the court did examine and rely on part of the record to support its conclusion that the state equal protection provision was

86. Cal. Const. art 1, § 31(a) (emphasis added).
   Houston Mayor Bob Lanier strongly opposed the proposed affirmative-action ban. He insisted on ballot language that described the measure as ending affirmative action rather than banning preferences for . . . minorities.
   Edward Blum, a stockbroker who led the fight for the initiative, said his group is asking a state court to set aside the results, charging the ballot language was illegal. "The field was tilted," he said. "We were swindled."
89. See Succession of Lauga, 624 So. 2d 1156, 1165 (La. 1993); New Orleans Firefighter Ass'n v. Civil Service Comm'n of New Orleans, 422 So. 2d 402, 407 (La. 1982).
90. Louisiana Associated General Contractors, Inc. v. State of Louisiana, 669 So. 2d 1185, 1196-98 (La. 1996). Justice Johnson, as the only dissenter in LAGC, would have focused on the purpose of the state's equal protection provision in light of historical racial discrimination. Id. at 1202. This approach seems to be appropriate since the language is ambiguous. The irony is worth noting, as Justice Johnson does, that Article I, section 3 is the state's first equal protection provision, LAGC is the first case in which the Louisiana Supreme Court uses the provision to strike down a law that classifies on the basis of race, and the stricken law is an affirmative action measure.
intended to prohibit affirmative action. The court was persuaded by Delegate Dennery's statement that "[t]he authors believe that there is absolutely no basis for any discrimination ... on the basis of ... race." But, when the record is read as a whole, it is impossible to conclude positively that the authors intended to prohibit affirmative action. The record of the debate is silent on the issue of affirmative action. In support of Mr. Dennery's comments, Delegate De Blieux stated, "There is no law that can change the race, but we can, by our laws, equalize those rights of race in comparison, one to the other." This comment, as well as those made by other delegates, could be interpreted as being compatible with the concept of affirmative action. The presumption was that the guarantee of no race discrimination, being incorporated into the state constitution for the first time, was to inure to the benefit of black people. According to Mr. De Blieux, the rights of black citizens were the ones that needed to be "equalized." In a law review article written in 1975, then Governor Edwin Edwards described the Declaration of Rights, which includes the equal protection clause, as welcoming a "new era of racial attitudes." "Embodied in the Constitution's pages are not mere neutral postulates, but positive declarations of minority rights: an equal protection clause; a prohibition against laws discriminatory because of race ... and a freedom from discrimination clause concerning access to public ... facilities."

The source of Article I, section 3 is listed as new, but Montana's 1972 constitution was listed as a reference. Montana's equal protection provision is entitled "Individual Dignity," similar to Louisiana's provision. It prohibits the state from discriminating against any person in the exercise of his civil or political rights on account of race. This supports the contention that the framers were primarily concerned with providing protections for black citizens. Because of the concern, it does not seem that it was the framer's intention to prohibit affirmative action.

There is evidence in the record of the constitutional convention, not mentioned in the LAGC opinion, that does support the supreme court's conclusion. The committee report of July 6, 1973 commented that:

91. Id. at 1196-98.
92. Id. at 1198 n.11 (quoting the remarks of Mr. Dennery from VI Records of the Louisiana Constitutional Convention of 1973 Verbatim Transcripts, at 1029).
94. Id. at 1015-30.

Section 4. Individual Dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.
The purpose of Article I, section 3 is to prohibit direct state action which unreasonably discriminates against any person because of birth, race, sex. [T]his provision is intended . . . to prohibit . . . new forms of "reverse discrimination" such as the imposition of quotas. Its only purpose is to insure that the State of Louisiana will treat each person within its jurisdiction as an individual who will be judged solely according to his own merit and worth.97

Louis Jenkins was co-author of the Bill of Rights. In a law review article, written in 1975, he explained that the purpose of the second sentence of Article I, section 3 was to prohibit the imposition of quotas, and make the state blind to the race of its citizens.98 There are several reasons why this comment in the report does not provide conclusive proof that affirmative action is proscribed by the Article. First, the delegates should have been aware of the comment and the intent it purported to impart on the Article. The lack of discussion regarding this controversial subject indicates that this may not have been the understanding of all of the delegates.99 Second, the electorate would not have had access to this interpretation.100 Third, use of quotas was probably not constitutional under the federal Equal Protection Clause either. Therefore, the question remains open as to whether affirmative action programs that pass the federal strict scrutiny test were intended to be proscribed.

During the debate on Section 3 held August 29 and 30, 1973, there was no discussion about reverse discrimination, affirmative action, or quotas. Section 3, as first proposed, did not contain a sentence that would absolutely prohibit race-based discrimination.101 Most of the discussion on the first day of debates focused on whether the clause should contain an enumeration of the groups that are to be especially protected or instead simply read the same as the Fourteenth

98. Jenkins, supra note 65, at 17.
99. Alphonse Jackson was chairman of the Bill of Rights Committee. He stated recently in a telephone interview that affirmative action was not discussed at all during the constitutional convention, nor was it reported in the newspapers in connection with the new constitution. He said that he had not contemplated that measures such as affirmative action, meant to remedy past inequities, would be prohibited by the Article. Telephone interview with Alphonse Jackson, Chairman of the Bill of Rights Committee (Feb. 27, 1998). Post hoc rationalizations by individual framers, delegates, or voters are not persuasive in determining the purpose of a provision. However, it does indicate that the language used in the Article is at least ambiguous, and that it is likely that voters attached to the language the commonly understood meaning of "discriminate against minorities."
100. In interpreting a constitutional provision, courts should consider how the voters would have understood the terms used. Therefore, words should be assigned their popular meaning. Records of legislative history should not be used to assign meanings to the words of which the voters would not have been aware. See Succession of Lauga, 624 So. 2d 1156 (La. 1993); Zapata Haynie Corp. v. Larpenter, 583 So. 2d 867 (La. App. 1st Cir. 1991).
Amendment. In either case, it appears that some of the delegates assumed that analysis of a challenged law was to be the same as that used by the United States Supreme Court, so that a law that discriminated according to race could be upheld if it met the required standard of scrutiny under the federal Constitution. But, in an overnight meeting after the first day of debate on the provision had closed, the second sentence was added. The only discussion the following day before final passage of the provision affirmed that the purpose of the provision was to disallow discrimination of "any sort on account of race."

The term discrimination could have meant invidious discrimination against minorities. Racial discrimination was referred to numerous times during the discussion on the meaning and purpose of the equal protection clause. Each time the context clearly implied that the speaker was referring to invidious discrimination against black people. The delegates who spoke of discrimination were concerned with protecting black citizens from the unequal treatment that the law had afforded them in the past. For example, Delegate Gravel advocated using language that would clearly and concisely state "that there shall be no discrimination against those who have been discriminated against."

Affirmative action would be compatible with this concept of discrimination.

The United States Supreme Court, in interpreting a section of the Civil Rights Act of 1964 with wording similar to Louisiana's equal protection clause, concluded that "discriminate against" meant discriminate against minorities. In 1979, in United Steelworkers of America v. Weber, the Court was called upon to interpret Title VII of the Act. The section of the Act at issue made it an unlawful employment practice for an employer to discriminate against an individual in hiring and job training because of his race. The Court held that

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102. See Hargrave, supra note 45, at 8.
104. Id. at 1026.
105. The facts of the case were as follows: In 1974, Brian Weber, a white male, employed by Kaiser Aluminum & Chemical Corporation in Gramercy, Louisiana. Kaiser implemented a voluntary affirmative action on-the-job training program that year designed to eliminate a conspicuous racial imbalance in its almost exclusively white craft-work force. Weber sued his employer when a black employee with less seniority was chosen over him for the program because he was black. Weber alleged that this preference given to the black worker constituted discrimination against him because of his race and thus violated Title VII. The Court did not agree. United Steelworkers of America v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 2724 (1979).
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
Title VII does not prohibit race-conscious affirmative action plans. The Court reasoned that Title VII must be "read against the background of the legislative history . . . and the historical context from which the Act arose." To forbid affirmative action would be completely inconsistent with the goal of the Civil Rights Act, which was to open employment opportunities for blacks in occupations which had been traditionally closed to them. Therefore, it can be implied from the Weber court's interpretation that the phrase "discriminate against" was primarily intended to mean discriminate against minorities, that is, those who had been and are being discriminated against.

In Weber, the Supreme Court determined that Congress did not intend to prohibit affirmative action even though the language of Title VII proscribed discrimination against a person. The decision was in 1979, so the framers of Article I, section 3 did not have the benefit of the Court's interpretation. But if Congress did not think that they were prohibiting affirmative action with Title VII, it is possible that the framers of the Louisiana equal protection provision did not think they were either.

However, there is an important difference to consider between the canons of construction used by the United States Supreme Court and those used by the Louisiana courts. In Weber, the Court used the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of the makers." By contrast, when a state constitutional provision is plain and unambiguous, the court cannot resort to the history to determine if the framers meant something different.

The dissent in Weber thought that the language of Title VII explicitly prohibited any distinctions based on race. The majority seemed to be admitting that affirmative action was prohibited by the plain language of the provision by using the canon of interpretation that allowed it to look to the spirit of the law. However, there are two arguments to refute the conclusion that the majority also thought that the language plainly prohibited affirmative action. First, the Court did not decide the question of plain meaning; it just assumed it in order to invoke the rule. If it had determined that the language was

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(emphasis added in text and footnote).

108. The LAGC court concluded differently. "Although defendants assert the instant Act does not discriminate against anyone but only discriminates in favor of certain races to remedy past discrimination, discrimination in favor of one race is necessarily discrimination against members of another race." Louisiana Associated General Contractors, Inc. v. State of Louisiana, 669 So. 2d 1185, 1199 n.12 (La. 1996).


110. See Succession of Lauga, 624 So. 2d 1156, 1165 (La. 1993); Aguillard v. Treen, 440 So. 2d 704, 707 (La. 1983).

ambiguous, it would have looked to the legislative history anyway. Therefore, a determination of the plain meaning was not necessary. Second, the Court relied on the fact that if Congress had wanted to prohibit affirmative action it could have added language to the Act explicitly stating that affirmative action would not be permitted.\textsuperscript{112} Opponents of Title VII had argued that the bill would not only allow employers to implement affirmative action programs, but it would also require them to do so. Congress responded by adding language to the bill that stated that nothing in the Act required an employer to adopt affirmative action plans. However, Congress did nothing to change the language to explicitly prohibit affirmative action.\textsuperscript{113} Congress was aware that there were some who understood the language to allow for affirmative action, but chose to enact the law with the phrase "discriminate against" and no clarifying remarks. It is more reasonable to infer that Congress agreed that the language allowed for affirmative action, than that they intended it to be prohibited and enacted a bill that they knew, was misleading. It is also reasonable to think that the drafters and voters of Louisiana’s equal protection provision may have shared Congress’ understanding of the phrase “discriminate against.”\textsuperscript{114}

3. Was the Louisiana Supreme Court’s Interpretation of Article I, Section 3 Correct?

The Louisiana Supreme Court was convinced that the language of Article I, section 3 clearly and unambiguously prohibited absolutely any state law which discriminates on the basis of race.\textsuperscript{115} However, there is ample evidence that the meaning of the phrase “discriminate against” is susceptible of two meanings: The one ascribed to it by the court—that preference for minorities necessarily constitutes discrimination against nonminorities; and another that can be inferred from Weber and the records of the constitutional convention—that a valid affirmative action law does not discriminate against nonminorities.

Since the provision was susceptible of more than one meaning, it was appropriate and necessary for the court to examine the history of the provision to determine its meaning.\textsuperscript{116} The committee report supports the conclusion of the supreme court. However, the record of the debates and the Weber decision support the conclusion that the phrase “discriminate against” was understood to

\textsuperscript{112} Id. at 205, 99 S. Ct. at 2728.
\textsuperscript{113} Id.
\textsuperscript{114} Justice Brennan later noted that Congress had not amended the statute to reject the Court’s construction, and therefore it could be assumed that the interpretation was correct. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 629 n.7, 107 S. Ct. 1442, 1450 n.7 (1987).
\textsuperscript{115} Louisiana Associated General Contractors, Inc. v. State of Louisiana, 669 So. 2d 1185, 1196 (La. 1996).
\textsuperscript{116} See New Orleans Firefighter Ass’n v. Civil Service Comm’n of New Orleans, 422 So. 2d 402 (La. 1982).
mean "discriminate against minority interests." This, too, was possibly the meaning understood by the voters, since they did not rely on the committee report to explain the provision. A viable argument can be made for both meanings.

When a constitutional provision or statute is susceptible of two meanings, the court should construe the provision in such a way as to avoid any serious doubt as to its validity.\footnote{117} Thus, if interpreting Article I, section 3 to prohibit affirmative action would raise serious questions as to its validity under the United States Constitution, the supreme court should have interpreted it to allow for affirmative action.

The supreme court did address the constitutional issue. However, it determined that if the provision were interpreted to prohibit affirmative action it would provide more protection than under the Fourteenth Amendment, and therefore not violate the Supremacy Clause.\footnote{118} The court determined that since states have no duty under the Equal Protection Clause to enact affirmative action laws, then a state ban of affirmative action is not unconstitutional.

However, this is not a complete constitutional analysis of the provision. California's Proposition 209 was challenged the year after \textit{LAGC} was decided.\footnote{119} In that case, the Ninth Circuit analyzed the validity of a state constitutional provision that prohibits affirmative action. Although the court held Proposition 209 constitutional, there are still some serious doubts as to whether the United States Supreme Court would have affirmed the decision.

IV. CALIFORNIA'S PROHIBITION OF AFFIRMATIVE ACTION

A. Background: Proposition 209 is Adopted

In November 1996, fifty-four percent of California voters passed Proposition 209, the California Civil Rights Initiative, which provides in relevant part that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."\footnote{120} Opponents of the measure got an immediate injunction enjoining the state from dismantling any of the existing affirmative action programs that gave preference to designated minorities and women. They claimed that it denied equal protection of the laws guaranteed by the Fourteenth Amendment to racial minorities and women.\footnote{121} The United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction and concluded that Proposition 209

\begin{footnotes}
\footnotetext[117]{See State v. Manuel, 426 So. 2d 140, 146 (La. 1983).}
\footnotetext[118]{\textit{LAGC}, 669 So. 2d at 1196.}
\footnotetext[119]{Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).}
\footnotetext[120]{\textit{Id.} at 696. Court ordered remedies for discrimination were excepted from the amendment.}
\footnotetext[121]{Opponents also claimed that Proposition 209 violated the Supremacy Clause because it conflicted with the Civil Rights Act of 1964. \textit{Id.} at 697.}
\end{footnotes}
does not violate the Fourteenth Amendment nor is it in conflict with federal law.\textsuperscript{122}

\textbf{B. Coalition for Economic Equity v. Wilson: \textit{Proposition 209 is Challenged as Unconstitutional}}

The issue addressed by the Court of Appeals was whether or not the state, by constitutional amendment, can prohibit state and local government from voluntarily implementing narrowly tailored race or gender-based remedies which serve compelling state interests (in other words, those that would be valid under the Fourteenth Amendment). Proposition 209 not only would eliminate all existing programs that are deemed to fall under the purview of the proposition, but would also prevent the state and local governments from implementing any such future measures without further amending the constitution.\textsuperscript{123}

"The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws."\textsuperscript{124} If the law classifies on the basis of race, it will likely be found unconstitutional. The Court of Appeals determined that "[r]ather than classifying individuals by race, . . . Proposition 209 prohibits the State from classifying individuals by race . . . [and therefore] as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."\textsuperscript{125} The court concluded that the provision was race-neutral, at least on its face, and seemed inclined to end the analysis there. However, the Court of Appeals had to address the United States Supreme Court precedent holding invalid state constitutional amendments that removed from local governing authorities the ability to deal with race-related problems. The conclusion in those cases was that "whenever the state ‘differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area [of government],’ it has utilized an impermissible ‘racial classification’ in restructuring the political process,"\textsuperscript{126} thus violating the Equal Protection Clause. In other words, the claim was that Proposition 209 distorts governmental processes by placing special burdens on the ability of minority groups to seek beneficial legislation from the state and local lawmaking bodies solely because of their race. "It ‘lodg[es] decisionmaking authority over [affirmative action] at a new and remote level of government’—the entire electorate of California."\textsuperscript{127}

\textsuperscript{122} \textit{Id. at} 711.
\textsuperscript{123} \textit{Id. at} 696.
\textsuperscript{124} \textit{Id. at} 702.
\textsuperscript{125} \textit{Id. Once the court determined that the law did not classify according to race, then rational basis scrutiny applied. If the state had a legitimate purpose in adopting Proposition 209 and if the amendment is rationally related to the purpose, then it does not violate the Equal Protection Clause.}
\textsuperscript{126} \textit{Id. at} 712 (Norris, J., dissenting from denial of rehearing of \textit{Wilson} en banc).
\textsuperscript{127} \textit{Id.}
The two United States Supreme Court cases that opponents of Proposition 209 relied on in an attempt to defeat it were Hunter v. Erickson128 and Washington v. Seattle School District No. 1.129 In Hunter, the Supreme Court addressed the constitutionality of an amendment to the Charter of the City of Akron, Ohio. The amendment prohibited the city council from enacting ordinances meant to eliminate racial discrimination in housing without approval by the Akron voters. The Court found that the ordinance utilized an explicit racial classification, "treating racial housing matters differently from other . . . matters" and that it "disadvantaged those who would benefit from laws barring racial discrimination in the real estate market . . . ".130 Finding no compelling state interest, the court invalidated the ordinance.131

In Washington, the Supreme Court found unconstitutional a Washington state initiative that prohibited the school board from assigning students on any basis other than neighborhood schools.132 The law was passed in response to the Seattle school board's voluntary adoption of a desegregation plan that utilized busing and mandatory reassignments. The initiative contained several broad exceptions which effectively operated to preclude only desegregated busing. Since the "initiative . . . restructured the State's educational decisionmaking process to differentiate 'between the treatment of problems involving racial matters and that afforded other problems . . .' [thus burdening] minority interests by 'lodging decisionmaking authority over the question at a new and remote level of government,'" it was found to violate the Equal Protection Clause.133

The proponents of Proposition 209 relied on Crawford v. Board of Education of Los Angeles,134 in which the Supreme Court upheld an amendment to the California constitution that prohibited state courts from mandating busing or student assignments unless a federal court would do so to remedy an equal protection violation. The Court found that the amendment did not employ a racial classification, stating that the mere repeal of a desegregation or antidiscrimination law, without more, has never been viewed as embodying a presumptively invalid racial classification. The Court further reasoned that once a state chooses to do more than the Fourteenth Amendment requires, it may return to the standard set by the United States Constitution and that to decide otherwise would be destructive of a state's democratic processes and its ability to experiment.135

130. Wilson, 122 F.3d at 703 (quoting Hunter, 393 U.S. at 390-91, 89 S. Ct. at 560-61).
131. Hunter, 393 U.S. at 393, 89 S. Ct. at 561.
133. Wilson, 122 F.3d at 703 (quoting Washington, 458 U.S. at 480, 483, 102 S. Ct. at 3200, 3202).
135. Id. at 538, 102 S. Ct. at 3218.
In Seattle and Hunter, the Supreme Court found an impermissible classification, but in Crawford it did not. The Ninth Circuit found Seattle and Hunter distinguishable and Crawford controlling in the Proposition 209 case. In distinguishing Seattle and Hunter, the Court of Appeals characterized Proposition 209 as a law that addresses race-related matters in a race-neutral fashion. It prohibits all race preferences. However, the challenged amendments in Seattle and Hunter prohibited only antidiscrimination laws, thus making them discriminatory on the basis of race. The Court of Appeals also found Proposition 209 distinguishable because the burden it places on minorities is different from the burden placed on minorities under the amendments in question in Seattle and Hunter. According to the court, Proposition 209 only prevents minorities from obtaining preferential treatment. “Impediments to preferential treatment do not deny equal protection.” In contrast, the Seattle and Hunter amendments burdened minorities by making it more difficult for them to achieve laws that provide equal treatment in the housing market and in the education system.

The court further distinguished Proposition 209 because it dealt with affirmative action, which was permitted but not required by the Fourteenth Amendment. The reasoning was that a state can certainly ban what is not required, especially in light of the fact that in order to justify enacting an affirmative action law, a state must prove a compelling state interest. The court also noted that “[t]o the extent Proposition 209 prohibits race and gender preferences to a greater degree than the Equal Protection Clause, it provides greater protection to members of the gender and races otherwise burdened by the preference.”

Judge Norris, in a dissenting opinion to the denial for rehearing in the Wilson case, criticized the appeals court for violating its “duty to follow controlling Supreme Court precedent,” meaning the Hunter-Seattle line of cases. In the judge’s view, the Hunter-Seattle doctrine stands for the proposition that any law that makes it more difficult for a racial minority to get favorable legislation passed (i.e., legislation that differentiates problems involving racial matters from others) is a discriminatory law, one characterized as setting up an impermissible racial classification. The problem with the amendment is not that it purports to invalidate all existing preference programs. The judge concedes

136. Wilson, 122 F.3d at 706.
137. Id. at 707.
138. Id. at 705.
139. Id. at 708.
140. Id. at 707.
141. Id. at 709 n.18 (emphasis added). See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 2040 (1980) (noting a state’s “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).
142. Wilson, 122 F.3d at 713. Three judges constituted the panel that heard and decided the Wilson case. The opponents requested a rehearing, which was denied. The dissenting opinions expressed here are from those judges dissenting the decision not to rehear the case.
that this would be allowed under *Crawford*. The problem is that it denies minorities the opportunity to seek favorable legislation on their behalf at a local level of government. The dissent noted that *Crawford* involved the mere repeal of a right that was above and beyond what was required by the federal Constitution. Proposition 209 is not conforming California law to the federal Constitution, but is barring remedies that are available under it. That is, in states that follow the federal interpretation of the Fourteenth Amendment, minorities have the right to have affirmative action programs implemented where they would otherwise be constitutional. The *Wilson* court had contended that affirmative action (preference) programs that have passed the Fourteenth Amendment's strict scrutiny are still inherently discriminatory and unworthy of protection. However, Judge Norris pointed out that the *Seattle* case involved a race-based remedial program which the Supreme Court had held "was entitled to the same constitutional protection that the *Hunter* Court afforded to antidiscrimination laws."¹⁴³  The challenged law in both cases was intended to benefit minorities by helping them "to 'overcome the "special condition" of prejudice' and remedy the injustices that have resulted from slavery and its legacy, racial discrimination."¹⁴⁴  

Finally, the dissent noted the anomalous result of depriving only proponents of affirmative action from access to the political process. Other groups such as veterans, the elderly, and handicapped persons can lobby their local government for laws that are beneficial to them, whereas proponents of affirmative action programs must take their case directly to the voters of California.¹⁴⁵

V. IS A STATE PROHIBITION OF AFFIRMATIVE ACTION CONSTITUTIONAL?

A. Federal Equal Protection Analysis

  1. The Seattle Doctrine—Altering the Political Structure to Burden Minorities

Both the *LAGC* court and the *Wilson* court held that it was valid for a state constitution to prohibit affirmative action. In holding that Article I, section 3, as it had interpreted it, was constitutional, the Louisiana Supreme Court relied on the fact that the federal Equal Protection Clause does not impose a duty on the states to engage in race preference programs.¹⁴⁶  The fact that affirmative action is not mandated is not dispositive in determining if Article I, section 3 affords equal protection of the law. The *LAGC* court's constitutional analysis

¹⁴³ Id. at 714. The court uses the term "antidiscrimination law" to refer to a law that is intended to protect racial minorities from discrimination that adversely affects them.

¹⁴⁴ Id.

¹⁴⁵ Id. at 712-13.

was incomplete. Since the interpretation that the court decided to give to the state’s equal protection provision was that it prohibits affirmative action, and thus places a disproportionate burden on minorities, the court should have applied the Seattle doctrine.

The Wilson court considered the Seattle doctrine, but did not find it dispositive. The court distinguished it with the following reasoning: The state constitutional amendment at issue in Seattle deprived minorities of busing programs that were intended to protect them against unequal treatment in education. Proposition 209, however, deprived minorities of affirmative action programs that were intended to grant them preferential treatment. The court opined that the Equal Protection Clause does not protect minorities from the denial of preferential treatment. In terms of the equal protection test, the court found that there was no disproportionate burden on minorities, and thus heightened scrutiny was not invoked. The Wilson court was incorrect in distinguishing Seattle on the grounds that Proposition 209 did not place a burden on minorities or that the right to preferential treatment for minorities is not protected, in some circumstances, under the Fourteenth Amendment. There are two problems with this distinction.

First, the court erred in failing to recognize the nature of the burden being placed on minorities. Both Proposition 209 and Article I, section 3 place a disproportionate burden on racial minorities. As a result of the provisions, all existing affirmative action programs in the state are invalidated and no future programs can be implemented without a change to the respective state constitutions. Since racial minorities were the beneficiaries of affirmative action, the impact from the prohibition of the programs necessarily falls on them. It is generally accepted that a state can repeal all of its voluntarily implemented affirmative action programs without implicating the Equal Protection Clause. But, by placing a prohibition on affirmative action in the constitution, racial minorities can no longer obtain protective legislation from local government. The rule established in Hunter and Seattle seems to be squarely on point. When the state restructures the political process in such a way as to remove to a higher level the authority to make decisions of a racial nature, the minority’s interests are impermissibly burdened.

147. Wilson, 122 F.3d at 708.
148. Id.
149. Women are also affected by the prohibition of affirmative action programs since they too benefited from them. However, the fact that racial minorities are not the only groups burdened by the constitutional provisions does not defeat the claim of impermissible racial discrimination. See Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916 (1985).
The Wilson court distinguished Hunter and Seattle by finding that it is not a burden to be denied the preferential treatment afforded minorities through affirmative action. This contention fails to give due consideration to the nature of affirmative action. In order for an affirmative action program to be constitutional under the Fourteenth Amendment, the state entity must have implemented the program to remedy the effects of discrimination within its jurisdiction. Consider, for example, a state agency that has an affirmative action goal to grant ten percent of its contracts to minority firms. The agency implemented this plan after finding that minorities had been denied the opportunity to compete for contracts because of the agency's own discriminatory practices. If the discrimination had not occurred, minority firms would have been allowed to compete fairly for all of the contracts. To offset the effects of the discrimination, minority firms are given a preference on a small percentage of contracts. Can the argument be seriously advanced that elimination of the right to obtain this remedial type of legislation does not constitute a burden? If the plan is disallowed, the minority firms will continue to be denied an equal opportunity to compete for contracts. The only remedies are to prove their discrimination case in court or convince the state electorate that the state constitution should be changed. Both of these options, as well as the option of doing nothing and suffering the effects of the discrimination, constitute a burden being placed solely on the minority interest, thus triggering heightened review under the federal equal protection analysis.

The second problem with the Wilson court's distinction of Seattle is in its characterization of affirmative action as suspect and disfavored. This rationale subjects an affirmative action law to what amounts to a double strict scrutiny standard. That is, in order for an affirmative action law to pass the federal test, it must meet the stringent requirements of the Equal Protection Clause. Then, the Wilson court would still presume that the law is unconstitutional in deciding if a state ban of the law is itself constitutional. Proposition 209 is not necessary to prohibit laws that are already invalid under the Fourteenth Amendment. The application of strict scrutiny to challenged affirmative action laws does not imply that once an affirmative action plan is deemed constitutional that it is disfavored. All laws that use race-based classifications are suspect, and presumed unconstitutional. But once the Court accepts as compelling the reason advanced for the law and it is proven that the means do not impermissibly burden innocent parties' rights, the law is no longer disfavored. Strict scrutiny is not used because a valid affirmative action law is disfavored. It is used to strike the delicate balance between the conflicting rights of the minority and nonminority parties involved.

152. Justice Kennedy commented that there is nothing special about preferences for minority groups. The preferences are for things taken for granted by the majority because they already have them or do not need them. Romer v. Evans, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996).
153. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997).
154. In Adarand Constructors, Inc. v. Pena, Justice O'Connor stated:
2. The Intent Requirement

In *Washington v. Davis,* the United States Supreme Court held that a law that disproportionately impacts racial minorities does not trigger heightened scrutiny unless it was enacted for a racially discriminatory purpose. In that case, unsuccessful black applicants for positions on the police force challenged the validity of the verbal skills test administered to all applicants. A disproportionate number of blacks failed the test, but there was no claim of racially discriminatory intent. This was a neutral program that only incidentally burdened minorities, and thus did not implicate the Equal Protection Clause.

Proposition 209 and Article I, section 3, as interpreted by the Louisiana Supreme Court, disproportionately impact minority interests and the purpose of the provisions is to produce this result; that is, the burden on minorities is not merely incidental. The requirement of intent does not mean that invidious intent must be proven. What is required is that the intent of the law be to cause the result—the banning of affirmative action—and that this result place a disproportionate burden on minorities. In *Seattle,* the Court addressed the contention advanced by appellants (proponents of the amendment) that the amendment was a neutral law having no racial overtones, and thus could not meet the intent requirement. After noting difficulty in believing that appellants seriously advanced this contention, the Court concluded that the amendment was drawn because of, not merely in spite of, its adverse effect upon busing for integration.  

3. Federalism Concerns

Proponents of the constitutional amendment, both in *Seattle* and *Wilson,* argued that the provision was valid because states have plenary authority over the local governing bodies of the state. The state electorate and legislature should be allowed to make decisions regarding affirmative action or busing, including prohibition of them, where there is no conflict with positive federal law. There is support for the view that states have authority to deviate from the federal policy on affirmative action. The United States Supreme Court’s denial of certiorari in the *Wilson* case prompted Fifth Circuit Court of Appeals Judge

The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. . . . Strict scrutiny does not “treat[ing] dissimilar race-based decisions as though they were equally objectionable,” . . . to the contrary, it evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not.

Reynaldo Garza to conclude that the Court is "reluctant to create a national, 'one size fits all' regulation on affirmative action, and is content to leave the details up to the states."\(^{158}\) In *City of Richmond v. J.A. Croson Co.*,\(^ {159}\) a case involving a challenge to a city's affirmative action plan, Justice O'Connor noted that the Court did not find in the Fourteenth Amendment a "form of federal pre-emption in the matter of race."\(^ {160}\)

However, the *Seattle* Court had rejected this proposition.\(^ {161}\) Recognizing that "States traditionally have been accorded the widest latitude in ordering their internal governmental processes,"\(^ {162}\) the Court stated simply that it must be exercised in a manner consistent with the Equal Protection Clause.\(^ {163}\)

In 1996, the United States Supreme Court reaffirmed the limitation on the state's power imposed by the Equal Protection Clause. In *Romer v. Evans*,\(^ {164}\) the Court struck down an amendment to the Colorado state constitution that would have prohibited state and local gay rights ordinances.\(^ {165}\) Justice Kennedy wrote for the Court, expressing what the limitation is:

Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance . . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.\(^ {166}\)

### B. Federal Supremacy Analysis

The Bill of Rights of the United States Constitution sets the minimum level of protection for the rights of its citizens. States are allowed to provide greater rights than this, but cannot provide less.\(^ {167}\) This "floor" model is a helpful

\(^{158}\) Messer v. Meno, 130 F.3d 130, 142 (5th Cir. 1997). However, the more likely reason that the United States Supreme Court denied certiorari was that a facial challenge to the constitutionality of Proposition 209, which had not yet been construed by California courts, did not present a concrete issue. See Respondents opposition to petition for certiorari, Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).


\(^{160}\) *Id.* at 491, 109 S. Ct. at 720.

\(^{161}\) *Seattle*, 458 U.S. at 476, 102 S. Ct. at 3198.

\(^{162}\) *Id.*

\(^{163}\) *Id.*


\(^{165}\) *Id.* at 635-36, 116 S. Ct. at 1629. The court struck down the amendment using rational basis review.

\(^{166}\) *Id.* at 633, 116 S. Ct. at 1628.

analogy to use when the Constitution is defining the limits of government power over its citizens, but offers little insight when there are competing rights of individuals involved.

The Equal Protection Clause constrains state government to enact laws that do not violate the principle of equal protection, but it also requires a balancing of competing rights between individuals; that is, under federal equal protection analysis, equal protection does not mean an absolute prohibition on race-based distinctions. Narrowly tailored affirmative action programs are allowed when there is a compelling interest. An affirmative action law that passes the strict scrutiny test is seen as providing equal protection for both the minority and nonminority interest. Affirmative action is allowed, but not compelled.

Both the Louisiana Supreme Court in *Louisiana Associated General Contractors* and the Ninth Circuit Court of Appeals in *Wilson* characterized the respective constitutional provisions as affording greater protection than the United States Constitution. While there is no doubt that the nonminority interests are protected more, can it be said that the minority interests are protected more than they would be under the Fourteenth Amendment?

According to the Louisiana Supreme Court, "[T]he Framers and citizens of this state apparently believed they were in fact insuring the evils of past discrimination would not recur by providing that there can never be any discrimination against minorities on the basis of race under the laws of this state, a protection minorities do not have under the strict scrutiny of federal equal protection analysis." Indeed, many of the delegates to the constitutional convention debates spoke of the Louisiana constitution as providing greater protection for black citizens than they had under the Fourteenth Amendment. However, the framers could have been attempting to guarantee greater protection by including race in the enumerated categories of the provision, not by the absolute prohibition of distinctions based on race. It would have been possible

168. *LAGC*, 669 So. 2d at 1199 n.12.

169. See generally State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts, August 29 & 30, 1973, at 1015-30. Consider the facts in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1945). During World War II, United States citizens of Japanese ancestry living on the west coast were ordered by military command to relocate to concentration camps. Mr. Korematsu was convicted for refusing to obey the order. Although the United States Supreme Court reviewed the law using the "most rigid scrutiny", it found the law valid. Under an equal protection guarantee that absolutely prohibits distinctions made on the basis of race, it would seem that Mr. Korematsu would have won his case. This is the only case this century in which a law was upheld that contained a race specific classification that expressly disadvantaged a racial minority. When faced with a challenge to a law made pursuant to Congress' authority under the war power, the Court simply could not "reject as unfounded the judgment of the military authorities and of Congress" that the action was necessary to secure safety in the area. However, if war is the only context in which this result could occur, and Louisiana's equal protection provision would be powerless to offer any protection in this context because of federal supremacy, then as a practical matter, can it be said that Louisiana's equal protection clause affords *more protection*? It is a trade off for minorities: extra protection against *Korematsu*-type situations or Fourteenth Amendment-type protection against discriminatory barriers to government economic and educational resources.
for the framers to include an equal protection provision that allowed for both an absolute guarantee of freedom from invidious discrimination and an allowance for affirmative action.

However, even if Proposition 209 and Article I, section 3 do not provide the minimum protection afforded by the Fourteenth Amendment, it is not likely that they would be found void under the Supremacy Clause where there is no positive legislation with which they are in conflict. 170 Affirmative action is allowed under the Fourteenth Amendment, but not mandated. The question is whether the Fourteenth Amendment requires that a state make affirmative action available to its citizens. Louisiana and California do make it available. It just requires an amendment to the state constitution to invoke the right. This additional burden in the political process is an issue of equal protection.

VI. CONCLUSION

It seems counterintuitive that a law that specifically states both in its language and purpose that there is to be no discrimination based on race would be struck down as violating the Equal Protection Clause. The federal Constitution does not require that state or local governments enact voluntary race-conscious legislation. And when a state does enact such legislation and is required to defend it in court, the task is very onerous. But, when a state is able to meet the burden of proof that affirmative action is needed in a particular case, it seems an even more compelling reason not to allow the remedy to be prohibited. Once the discrimination has been proven and affirmative action would be allowed under the Fourteenth Amendment, it is a violation of the minority group's equal protection rights to remove that remedy. It alters the political structure in a way that places a disproportionate burden on minorities; it affords minorities less protection than the Fourteenth Amendment. Supreme Court precedent has established this principle. Therefore, both Proposition 209 and Article I, section 3, as interpreted by the Louisiana Supreme Court, are unconstitutional.

When the United States Supreme Court first addressed the constitutionality of affirmative action, it had to decide if the Fourteenth Amendment mandated colorblind laws or if it allowed race-based distinctions to overcome discrimination. The Court, although establishing that the goal of the Equal Protection Clause was to achieve a colorblind government, chose the latter interpretation of the federal Constitution. The conclusion that state constitutions cannot prohibit affirmative action means that states too must adopt this policy.

170. Opponents of Proposition 209 claimed that it was preempted by the Civil Rights Act of 1964. The Court of Appeals for the Ninth Circuit held that since the Act did not mandate affirmative action, Proposition 209 was not preempted by it. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997).
Because the Louisiana Supreme Court's interpretation of Article I, section 3 would render it unconstitutional, the court should have construed the provision to allow for valid affirmative action laws. This interpretation of the equal protection guarantee is reasonably supported by its language and its purpose as expressed by the framers.

Mary Anne Wolf