1999

Proposition 209: A New Civil Rights Revolution?

Richard Frankel

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylpr/vol18/iss2/8

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law & Policy Review by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Proposition 209: A New Civil Rights Revolution?

Richard Frankel†

On November 5, 1996, California voters chose to end racial preferences by the state in public employment and higher education by passing Proposition 209. This statewide ballot initiative was the first initiative in which state citizens spoke out on the issues of preferences and affirmative action.1 Passing with almost fifty-five percent of the vote,2 the result was seen as a triumph of direct democracy reflecting the voice of the people in calling for an end to affirmative action.

Supporters of Proposition 209 lauded the result as the beginning of the end of affirmative action across California,3 while opponents claimed that the Proposition, titled “The California Civil Rights Initiative,” would set back gains made by women and minorities.4 Many claimed that the initiative did not represent the voice of the people but that it was actually carefully drafted to confuse the voters and fulfill the aspirations of a specific subgroup of the anti-affirmative action lobby. No one doubted, however, that the initiative would have a serious effect on civil rights in California.

Couched in the language of the Civil Rights Act of 1964, Proposition 209 declares 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.”5 A key difference between the initiative and the Civil Rights Act, however, is that Proposition 209 adds the phrase “preferential treatment” and prohibits discrimination against and preferences for groups rather than simply individuals. Since the initiative became law in 1996, only a handful of cases concerning Proposition 209 have come up before state and

† J.D. Candidate, Yale Law School, 2001. I would like to thank Stephen Yandle for his helpful advice and guidance and Jason Renzelmann for his valuable critiques and suggestions.


2. See Coalition of Economic Equity v. Wilson, 122 F.3d 692, 697 (9th Cir.), cert. denied, 118 S. Ct. 397 (1997). The total tally showed 4,736,180 voting in favor of the initiative and 3,986,196 voting against it. See id.


5. CAL. CONST., art. I, § 31(a).
federal courts in California. None of them have examined its overall scope in relation to the Civil Rights Act other than deciding that the Civil Rights Act does not preempt Proposition 209.6

A common assumption after passage of the initiative was that state-run affirmative action programs would come to an end, an assumption reflected by a change in admissions policies at the University of California at Berkeley and the University of California at Los Angeles (UCLA). With a new emphasis on the principles of race neutrality and formal equality seemingly demanded by Proposition 209, the University of California first used this post-209 admissions structure to choose the class entering in the fall of 1998.7 As compared to the previous year, the number of admitted African-Americans declined by fifty-six percent from 562 to 2478 and the number of admitted Hispanics dropped by forty-nine percent,9 while the new matriculating class contained six percent more Asian-Americans and seven percent more whites.10

Defenders of Proposition 209 claimed that these new policies represented the will of the people of California as expressed through their vote. Despite the conventional wisdom that the University of California's response to the passage of Proposition 209 was an appropriate one, however, supporters of the California Civil Rights Initiative should not be able to invoke the will of the people in sounding the death knell for state-sponsored affirmative action. A thorough investigation of the evidence concerning the intent of the voters reveals that the voters were in fact saying something very different when they passed Proposition 209.

The dissonance between policy changes enacted by the state and the attitudes of the voters illustrates a significant flaw in the way that courts interpret ballot initiatives. The dominant mode of ballot interpretation by the courts ignores the sources that are the most influential in forming a voter's understanding of a ballot measure. The courts' emphasis on sources like the ballot pamphlet, which few voters read,11 and exclusion of media sources, from which voters receive most of their information,12 can lead to a skewed judicial understanding of voter intent. An interpretive scheme that better captures the intent of the voters suggests a more nuanced interpretation of Proposition 209 that could be used to enhance civil rights protections rather than subvert them. That

6. See Coalition of Economic Equity, 122 F.3d. at 709-10 (holding that Proposition 209 is consistent with the Civil Rights Act and therefore is not preempted by it).
9. See id.
11. See infra text accompanying notes 43, 56.
12. See infra text accompanying notes 55-62.
Proposition 209

scheme could have a vastly different effect on California’s admissions policies than the current interpretation of Proposition 209.

This Note contends that voter intent surrounding the initiative, when properly analyzed, expresses the people’s desire for a more expansive interpretation of civil rights protections than advocated by supporters of the initiative and expressed through current judicial decisions. Specifically, voter intent indicates that voters wanted Proposition 209 to protect against preferences that are exclusionary and have a racially disparate impact even if they are not intentionally discriminatory.

How Proposition 209 should be interpreted, and how it can promote civil rights protections can be seen by analyzing the recently filed case *Rios v. Regents of the University of California*, which contests the admissions policies of University of California at Berkeley and UCLA. Although the current admissions policies appear to be perfectly consistent with conventional interpretations of Proposition 209, this Note argues that such policies should be struck down when analyzed under a more appropriate interpretive standard. Thus, Proposition 209 can promote racial equality rather than subvert it.

In Part I, I will introduce the *Rios* case. In Part II, I will examine how California courts interpret statewide ballot initiatives and how that interpretation is deficient when it comes to Proposition 209. Specifically, the courts’ refusal to look to media and other extrinsic sources gives them a skewed view of the intent of the voters adopting the initiative and leads to inaccurate interpretations of its meaning. In Part III, I will discuss the circumstances leading up to the passage of Proposition 209 and propose an alternative to the conventional interpretation, one that would invalidate admissions policies like those used by the University of California system.

I. *RIOS*

After passage of Proposition 209, the University of California at Berkeley and UCLA changed their admissions criteria to eliminate race-based preferences. Although subjective measurements may play a greater role now that mandated racial preferences are gone, numbers continue to play a central role in the admissions process. Every applicant receives an Academic Score from one to seven (one being the best). At least seventy-five percent of the Academic Score must be based on (1) the applicant’s “uncapped” grade point average, (2) the applicant’s scores on the SAT or ACT test, and (3) the applicant’s performance in college preparatory courses. In addition to counting, as an independent criterion, the number of college prep courses an applicant takes,
Berkeley and UCLA also factor an applicant's performance in these courses into her grade point average. Although schools grade almost all courses on a four point scale, advanced placement courses are graded on a five point scale. A student who receives a C in an advanced placement course will have the same grade point average as a student achieving a B in a nonadvanced course, and a student who receives an A in an advanced placement course will receive a 5.0 for that course instead of a 4.0. The result is that the traditional four point grading scale more closely approaches a five point grading scale.

Distressed by the decreased numbers of minority admissions following the passage of the initiative, a group of civil rights organizations filed suit in the U.S. District Court for the Northern District of California on behalf of a class of African-American, Pilipino and Latino students, claiming that the University of California's admissions policies have a racially disproportionate impact, thereby violating the Civil Rights Act and the Fourteenth Amendment. The universities' use of an adjusted grade point for advanced placement courses came under particular attack. More than half of the public high schools in California offer no advanced placement courses, and many of those schools have large minority populations. This means that many minority students, already disadvantaged for not taking college preparatory classes, face the additional obstacle of being unable to raise their grade point averages above the four point ceiling. According to the plaintiffs' lawyers, white students are thirty percent more likely to have opportunities to take advanced placement courses. These facts seem to ensure that the University of California's admissions system will have a disproportionately negative impact on minority applicants.

The Rios plaintiffs have significant evidence to show a disparate impact violation has occurred. First, the percentages of admitted blacks and Latinos declined sharply after racial preferences were banned while the percentage of admitted whites and Asians rose. Secondly, just over three percent of the 1998 freshman class at the University of California at Berkeley is African-American and just over seven percent of the class is Hispanic. These numbers are well below the percentages of African-Americans and Hispanics in the state. Another indication of disparate impact is that a higher percentage of minorities attend schools that do not offer advanced placement classes. These students are placed at a distinct disadvantage by the 4.0 grade point ceiling on advanced placement courses. Because of the competitive admissions system at Berkeley, a grade point average of 4.0 or better is increasingly necessary for admittance.

16. See Burdan, supra note 8.
17. See Complaint, supra note 7.
19. See id.
Proposition 209

Not only did many students whose grade point averages fell below 4.0 fail to gain admittance to Berkeley or UCLA, but more than one quarter of denied applicants at Berkeley had a grade point average exceeding 4.0. Even if one does not accept those statistics, the plaintiffs would still likely be able to show a disparate impact simply by showing a disparate impact in advanced placement availability. Advanced placement classes give some students a concrete advantage in the admissions process, and those students tend to be white rather than African-American, Latino, or Pilipino.

On its face, the University of California's admissions standards seem perfectly consistent with the spirit of Proposition 209. An applicant's racial or ethnic background plays no role in the determination of her Academic Score. The admissions standards exhibit the type of race neutrality that is allegedly mandated by Proposition 209. Any racially disparate outcome is ancillary to the university's admissions policies and does not derive from any discriminatory motive. Thus, such admissions practices do not appear to "discriminate against, or grant preferential treatment to, any [applicants] on the basis of race" as prohibited by Proposition 209. But Proposition 209 was passed as both an anti-discrimination and anti-preferential treatment law, and it may be that the language and intent of Proposition 209 provides an affirmative civil rights mandate that calls for more than mere color-blindness. Neither state courts nor federal courts have had an opportunity to give definition to the initiative's scope, however, since few cases have come through the system claiming violations of Proposition 209. Thus, the possibility of using this "Civil Rights" initiative to promote racial equality has not been foreclosed by the courts.

II. PROPOSITION 209

California courts have not fully defined the scope of Proposition 209's anti-discrimination mandate. The Ninth Circuit recently upheld the constitutionality of Proposition 209 from a challenge that the initiative violated the Fourteenth Amendment's equal protection clause. But that case, dealing with a facial challenge to the act, only evaluated it in light of its effect on the political power of minority groups to enact favorable legislation. It did not seek to analyze the text to determine which programs and policies the initiative would prohibit.

22. See id.
23. CAL. CONST., art. I, § 31(a).
25. The petitioner's main argument was that because the initiative placed the requirement of race neutrality in California's constitution, it unfairly hindered the ability of minority groups to pass favorable legislation at the local level. Even though the initiative applies to all racial groups, the petitioners maintained that minorities were uniquely singled out by virtue of their minority status. See id. at 702-09. The nature of the petitioner's facial challenge to the act did not require the Ninth Circuit to delve into the meaning of Proposition 209 in any great detail, and the panel limited its examination to "only that slice of the initiative that now prohibits government entities at every level from taking voluntary action.
On the state level, the California courts have dealt with the initiative only in specific contexts. In *Kidd v. State*, the Court of Appeal for the Third District noted in dicta that the "clear language" of Proposition 209 invalidated a "supplemental certification" program that gave advantages to women and minorities in civil service hiring programs. The court addressed the notion of preferences, declaring that "when the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or gender." This dictum indicates that programs which intentionally give advantages to people of a particular race violate Proposition 209. Another case, *Lungren v. Superior Court*, involved a challenge to the language of the Proposition 209 ballot title and summary and therefore only dealt indirectly with the scope of the initiative itself. Attorney General Dan Lungren appealed a superior court decision requiring him to use the term "Affirmative-Action" in the official ballot title and label for Proposition 209 that is provided to all voters. The court held that affirmative action and preferential treatment were not equivalent and therefore "any statement to the effect that Proposition 209 repeals affirmative action programs would be over-inclusive and hence 'false and misleading.'" The crux of the decision was that "affirmative action" and "preferential treatment" are different terms with different meanings. The court ruled that putting affirmative action in the initiative would rule out all race-conscious measures, some of which would not be considered preferential treatment. This ruling suggests that certain race-conscious measures fall outside the scope of Proposition 209's prohibitions. While these cases show that Proposition 209 has been given some significant definition and context, none of them deal with programs that harm minorities and programs that have disparate racial impacts. Because of the limited number of cases on the question, the range covered by Proposition 209 remains open for judicial interpretation.

Although the interpretative possibilities for the initiative are wide-ranging, the court's current approach to ballot initiative interpretation will result in a
Proposition 209

faulty interpretation of Proposition 209. In this Part, I argue that the court’s current framework ignores many valid and crucial sources that mold voter intent and also encourages initiative drafters purposely to mislead voters about the meaning of the initiative through strategic drafting.

A. Interpretation of Ballot Initiatives

To interpret state-wide ballot initiatives, the California courts have taken the basic standards for statutory interpretation and applied them to the initiative process. The first step is to examine the “words themselves” and to “give them their generally accepted meaning.” If the courts find the language of the initiative “clear and unambiguous,” then they will only rely on the language of the statute or initiative and will not examine other legal sources.

If the language of the ballot initiative fails to provide clear interpretive directions, the courts will examine the intent of those who enacted the initiative. Such a construction suggests that only the intent of the voters themselves should matter since it is they who pass ballot initiatives. However, courts have shown a willingness to examine the intent of both the voters and the drafters of initiatives. Because voters adopt the initiative, their intent in doing so is seen as critical to defining adequately its meaning. Although there is no “legislative history” to which courts can turn in order to determine voter intent, the courts look to a few specific sources to determine voter intent, and then use those sources as evidence of what the voters knew and by extension of what they intended by voting for the act. The courts, however, have developed an extremely narrow view of what information voters use in making their decisions.

Other than the text of the initiative, the only source of information courts will examine to establish voter intent is the ballot pamphlet. The ballot pamphlet is distributed to all voters and contains the official title and summary of

33. See Deukmejian, 755 P.2d. at 303-04 (holding that “[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent . . . of the voters”); Delaney v. Superior Court, 50 Cal. 3d 785, 798 (Cal. 1990).
35. See Board of Supervisors v. Lonergan, 616 P.2d 802, 806 (Cal. 1980); Kaiser, 58 P.2d. at 1279 (“[T]he courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it.”); Armstrong, 146 Cal. App. 3d. at 617-18 (“[C]ourts must interpret a constitutional amendment to give effect to the intent of the voters adopting it.”).
36. One such source is the ballot analysis and pamphlet, that is sent to the homes of all registered voters prior to the election. Other sources the courts will examine to discern voter intent include any previously enacted similar statutes, see In re Harris, 775 P.2d. 1057, 1060 (Cal. 1989), and any relevant contemporaneous administrative or legislative action of which the public would have been aware. See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d. 1281, 1300 (Cal. 1978).
the proposal as prepared by the Attorney General, which is supposed to be a short impartial rendering of the "chief purposes and points" of the proposal. While titles and summaries that mislead the public are invalid, courts allow substantial leeway for error by giving broad deference to the Attorney General. Thus, initiative titles and summaries can be slightly imprecise without being disallowed. Additionally, such as in the case of Proposition 209, the ballot pamphlet may contain an analysis of the initiative by a legislative analyst, who provides a short background, explains the proposal, and discusses its fiscal impact. In the case of Proposition 209, the pamphlets also contained short arguments both for and against the initiative provided by different interest groups. The use of the ballot pamphlet in interpreting voter intent is so widely accepted that it is "too well settled to require excessive citation of authority."

The crucial factor for the courts in determining voter intent is what the voters knew on election day. Unexpressed intent by initiative drafters is not a valid source, and legislative reports that undertook extensive analysis of initiatives but were never made available to voters are not to be used because the courts "cannot speculate on the extent to which the voters were cognizant of them." For these two reasons, the courts tend to be extremely skeptical of using other sources of information, such as media reports, campaign advertisements, and campaign materials. Because no one can be sure which voters read which newspapers and saw which advertisements, and because such materials can distort the true meaning of the proposal, the use of extrinsic aids, such as mass media, has been the exception rather than the rule.

37. See Amador Valley, 583 P.2d. at 1298.
39. For the contents of the Proposition 209 ballot pamphlet, see Volokh, supra note 4, at 1393-1402.
41. Taxpayers To Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1232 n.10 (Cal. 1991) (holding that unexpressed intent is not relevant because such opinions do not necessarily represent the intent of the voters).
42. See Deukmejian, 755 P.2d at 304; cf. California Teachers Ass'n v. San Diego Community College Dist., 621 P.2d 856, 861 (Cal. 1981) (holding that individual opinions of legislators do not constitute legislative intent because they "may never have been exposed to public view so that those with differing opinions as to the bill's meaning and scope had an opportunity to present their views also").
43. See Californians for Political Reform Found. v. Fair Political Practices Comm'n, 41 Cal. Rptr. 2d 606, 614 (1998); Lungren v. Superior Court, 41 Cal. Rptr. 2d 903, 909 n.6 (1995); see also AFL-CIO v. Deukmejian, 260 Cal. Rptr. 479, 484 n.4 (noting that courts look to extrinsic sources only "on occasion"); Jane S. Schachter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 YALE L.J. 107, 122 (showing that, in study of 30 decisions by the California Supreme Court regarding the interpretation of ballot initiatives, not once did the court use media sources).
B. Interpretive Problems

1. The Case for a Broader Voter Intent Inquiry

The courts’ ballot interpretation structure and their refusal to look at external sources of evidence create several problems in terms of truly understanding voter intent. The first is that the courts seem to treat the voters and the initiative drafters as the same people. In a legislative setting, the drafters and the voters are the same people. In a legislature, the authors of a bill discuss it with other legislators and those with suggestions can offer amendments to the bill and make the drafting process an organic one in which everyone can take part.\(^4\) Legislators also have easy access to their colleagues who are the authors of the legislation to inquire about the actual meaning of the language.

In a ballot initiative setting, voters and drafters are two separate and distinct groups. The voters are generally unable to meet with initiative authors and discuss the minutiae of their policies and to learn about the legal meaning of the initiative. Because that kind of access does not exist, those debates, instead of taking place in a legislative chamber, are often played out through the media and through political campaigns, as interested parties attempt to inform and educate the general public.\(^5\) But this form of debate is ignored when the courts refuse to look at mass media in evaluating voter intent.

The lack of opportunities for voter input, such as an amendment process, means that the general public cannot be a part of the drafting process. Over eight and a half million citizens voted on Proposition 209. Two people wrote it. Nothing indicates that the voters had the same ideas in their minds when they voted as the drafters did when they wrote it. But California courts still maintain that “the main object of the interpretation is to ascertain the intent of the parties who made the instrument.... The courts must interpret a constitutional amendment to give effect to the intent of the voters adopting it.”\(^6\) This statement is confusing and provides little guidance for future courts because it conflates voter intent with drafter intent, when the two can in fact be very different. The court’s statement demonstrates the failure to understand the important differences between change through legislation and change through the initiative process. Thus, the courts still seem to think that there is no difference in intent between the intent of the writers of an initiative and the intent of those

---

\(^4\) See Catherine A. Rogers & David L. Faigman, “And to the Republic for Which It Stands”: Guaranteeing a Republican Form of Government, 23 HASTINGS CONST. L.Q. 1057, 1062-63 (1996). Rogers and Faigman point out that ballot initiatives offer voters only two options: yes or no. No opportunity for reasoned discussion exists, no amendments add to or subtract from the proposal, and as a result, voters have to choose the “least bad alternative” rather than voting how they really feel. See id. at 1063.

\(^5\) See supra text accompanying notes 32-43.

who voted for it.

Although both voter intent and drafter intent are important aids for initiative interpretation, in the case of a conflict, voter intent prevails. Courts find the intent of the drafters helpful in interpreting the meaning of an initiative only to the extent that such opinions were made available to the voters and reflect their intentions. If the opinions of the drafters were not made public, and the voters were not aware of them, then they obviously had no effect on voter intent and should not be given any weight by the courts.

The ambiguities in Proposition 209's language make it difficult to discern the intent behind it from the text alone. The drafters may have one view about the meaning of the language of an initiative but may present another view to the general public. For example, the drafters of Proposition 209 might think that use of the term "preferences" will invalidate all affirmative-action programs while certain voters may think that such a term invalidates all programs where admissions are not exclusively based on some form of merit. Terms that are extremely politicized and highly charged, such as "preferences" and "affirmative action" present special difficulties, because they conjure up many competing images in people's minds. To one person, affirmative action means giving a job or university admission to someone who is completely unqualified, solely because of the applicant's race or gender. To another, it may mean only helping individuals who have been the victims of past discrimination. The same might be true for preferences. Voters do not know the legal meaning of these terms, and voting for an initiative may bring about legal consequences that voters had no desire to cause.

One standard critique of voter interpretation of ballot initiatives is that voters do not understand the technical legal jargon of a ballot initiative and therefore do not make educated decisions. While technical language does not appear to invade Proposition 209, the ambiguous nature of its language is equally problematic. Because terms like preferences and affirmative action are so freely used in the public discourse, they are easily manipulated by savvy cam-

47. See Taxpayers To Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1232 n.10 (Cal. 1991). The court wrote:

The motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters or of legislators who sponsored an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent.

Id. (internal citations omitted).

48. See Armstrong, 146 Cal. App. 3d at 618 (holding that drafter intent must be read in light of its impact on voter intent).

49. See, e.g., Mary Sanchez, California Vote Raises Questions; Affirmative Action Opponents Buoyed by Proposition 209, KAN. CITY STAR, Nov. 17, 1996, at A1 ("The courts have never used the term 'preferential treatment' . . . We don't know exactly what the proposition will do.").

Proposition 209

campaigners who can use the language of the initiative to tell voters exactly what they want to hear. In *Lungren v. Superior Court,*\(^5\) the court concluded that the label “affirmative action” was “an amorphous, value laden term”\(^\text{52}\) that is “rarely defined so as to form a common base for intelligent discourse.”\(^\text{53}\) In that case, where opponents of Proposition 209 sought to require that the official ballot title and summary contain the phrase “affirmative action,” the court denied their request, holding that “affirmative action” and “preferential treatment” were not equivalent, the terms mean different things to different people, and that “any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence ‘false and misleading.’”\(^\text{54}\) The court’s decision recognized the ease of misleading voters through word choice.

While the drafters may think that affirmative action and racial preferences are synonymous, voters may ascribe vastly different meanings to the terms. Nor do voters know to which view the drafters subscribe. Media reports, or other coverage of the initiative campaign, become a useful source of information for voters to learn what the drafters think (proponents of Proposition 209 were more than willing to publicize their views on the initiative), and will also be useful for the drafters to find out what the voters think so that they can shape their campaigns around voter opinion. Use of mass media and other extrinsic materials may be the best way to show any kind of consensus between the drafters and the voters. The courts’ current interpretive scheme, however, provides no guidance about how to reconcile differing versions of intent between drafters and voters.

The problems that naturally arise when attempting to gauge voter intent have prompted some scholars to call on the courts to look to the media and to other extrinsic sources when making their determinations.\(^\text{55}\) The idea is that because voters do not engage in the drafting of the initiative and may not understand its language, they instead rely on what they read in newspapers, what they see on television, and what they hear on the radio to inform them of the meaning of ballot initiatives. Studies show that they rely on the media to a much greater extent than they do on the initiative or the ballot pamphlet. Few voters take the time actually to read the initiative, and generally, less than a third of voters read the ballot pamphlet before voting.\(^\text{56}\) By contrast, studies

---

52. Id. at 443.
53. Id. at 442 (internal ellipses and citation omitted).
54. Id.
56. See Kara Christenson, *Interpreting the Purposes of Initiatives: Proposition 65,* 40 HASTINGS L.J. 1031, 1047 (1989) (“[O]nly thirteen to thirty-three percent of the electorate use the information in the ballot pamphlet in deciding how to vote.”); Schachter, supra note 43, at 142 n.161 (“[A]s a general rule only a minority of voters actually read [the ballot pamphlet], even when it is sent to them through
show that eighty percent of voters rely on media and campaign ads as their most important sources of information in deciding how to vote. Voters turn to the media to find out what the initiative really means and to figure out what effect it will have.

Additionally, turning to media sources leads to an outcome that is more consistent with our egalitarian notions of direct democracy that are inherent in the ballot initiative process. Direct democracy is an attempt to place decision-making powers in the hands of the people, where every person’s vote is weighted equally. By ignoring extrinsic sources in initiative interpretation, the courts undercut the egalitarian effect of the initiative process. The voters who read ballot pamphlets tend to be better educated and in higher economic classes than those who do not read ballot pamphlets. As a result, the courts end up giving the higher classes of society a disproportionate voice in ballot initiative questions, since they are the only ones who will understand the meaning of the initiative in a way consistent with the court’s understanding. In a case like Proposition 209, where voter opinion may be strongly correlated with class divisions, the focus on ballot pamphlets could squelch the voice of many who voted yes, but did so for different reasons than those expressed in the pamphlet. If the court looked to extrinsic sources, however, then it would reach a broader cross-section of society and its interpretation would better reflect the intent of a wider range of voters, rather than just focusing on a narrow band of educated elites who happened to read the ballot pamphlet.

Furthermore, voters often do not anticipate certain cases that might fall within the language of a ballot initiative. Few would doubt that the issue in many voters’ minds when thinking about Proposition 209 was preferential treatment given to minorities solely on the basis of their race and regardless of whether those preferences were “deserved.” Voters were most likely thinking about programs that were intentionally discriminatory. It is less clear that they were thinking about disparate impact claims like those in Rios when they went to the polls. However, the ballot pamphlet, because it is short and concentrates only on the text of the initiative, has too narrow a focus. To determine what a ballot initiative means in the context of an unanticipated case, judges need to have an understanding of the general principles that voters affirmed by passing the initiative. These broader issues surrounding the initiative are played out in

57. See Christenson, supra note 56, at 1047-48 (citing study showing that 80 percent of voters report that television, radio or newspapers were their most important sources of information); Schachter, supra note 43, at 131 (“The mass media emerge as the primary source of information used to develop voter attitudes on ballot measures. News and paid political advertising comprise the major sources of information voters use in casting their ballots on initiatives.”).

58. See Schachter, supra note 43, at 134.

59. See id. at 143.
Proposition 209

the media to a much greater degree than in the ballot pamphlet. For unexpected, or uncommon cases like Rios, media sources will do a better job providing a guide to the courts than will the ballot pamphlet.

Finally, while judges may be hesitant to use media sources because it requires them to make certain assumptions about what voters read and what they think, these judges should be aware that courts make these kinds of assumptions all the time when it comes to ballot initiatives. California courts have long held that "it is common knowledge that an initiative measure... is placed on the ballot and a large number of the population, not knowing what the context of the act is, rely solely upon its title as a guide to intelligent voting thereon." Judges realize that voters may not have a good understanding of what they are voting on, but they interpret an initiative as if the voters had full knowledge of its consequences. Similarly, in California, "the drafters who frame an initiative and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." Thus, the courts assume that voters understand the legal meanings of any terms used in an initiative, even if those terms have a slightly different meaning in an everyday context. One cannot expect voters to be aware of the different legal constructions of common terms. The media and campaign advertisements are clearly an imperfect source of voter intent. But the courts should not ignore them just because they would require judges to make assumptions about voter opinion. Given the assumptions that judges must make under the current standards for initiative construction, using media sources to determine voter intent may actually increase accuracy in the assumptions that courts make.

2. The Strategic Drafting Problem in the Proposition 209 Campaign

The court's current structure for analyzing ballot proposals can also lead to perverse consequences by creating incentives for drafters to use deceptive and strategic wording. If drafters know that some form of their original intent will be considered, but that media reports of what they say to the voters will not, they have an incentive to mislead voters through media campaigns in order to generate greater support because they know such tactics will not be used to interpret the proposal. This gives initiative drafters an ever-increasing amount of authority in the ballot proposal process and effectively creates an illusory

60. See id. at 131-44.
63. See Salvucci, supra note 55, at 876 (arguing that strategic drafting results because drafters know that voters will not understand the technical meaning of ballot language). Although one court suggested that modification of drafter intent would be considered by the court, the modifications made by the drafters were only considered because they were written in the ballot pamphlet. See Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 645 (Cal. 1994) (noting that after coming under attack from initiative opponents, the framers of the initiative preferred a more flexible approach to privacy).
voter intent by allowing drafters to use strategic wording and then refusing to use extrinsic sources to try and see what voters were actually thinking. The result is that the actual wording of the initiative takes on added significance, thus linking the voter intent standard with the plain meaning standard that the courts were trying to avoid in the first place by looking to voter intent.

The circumstances surrounding the passage of Proposition 209 demonstrate the dangers of strategic drafting. The drafters and the campaign in favor of the initiative were generally farther to the right than most voters on the issue of affirmative action. They wanted the initiative to have broader authority to eliminate affirmative action programs than most voters. As a result, supporters sought to narrow the scope of the initiative during the campaign so that voters would think it was less controversial than it really was. The backers tried to make it sound as if the proposal would do less than it would really do so that they would not offend voter sensibilities and so they could win swing votes from the political center.

The California Civil Rights Initiative (CCRI), the campaign in favor of 209, used strategic drafting and campaigning to convince the voters that the scope of the initiative was narrow. Although the drafters wanted to stop affirmative action programs in higher education and government employment, they feared that using the phrase affirmative action would doom the initiative. CCRI's internal polls showed that the initiative would likely lose if the phrase "affirmative action" was used, and so CCRI chose a more appealing phrase they felt would mean the same thing. In a memorandum early in the campaign, CCRI's own political consultant stated that "[w]hat is at issue is how the debate is framed." Realizing the importance of the proposal's language, the authors used strategic drafting rather than substantive changes to sway public opinion. Most polls of voters show that a majority support affirmative action programs. Therefore, the authors replaced "affirmative action" with "preferences," a word which carried much less support in polls. Because people think of preferences as giving a person something that person did not earn, people

---

64. See Lydia Chávez, The Color Bind: California’s Battle to End Affirmative Action 245 (1998) (noting that Proposition 209 authors Tom Wood and Glynn Custred designed the initiative to end “affirmative action programs upheld by the Supreme Court”); Nicholas Lehmann, The Big Test 283 (1999) (suggesting that Wood and Custred viewed the initiative as a tool for the elimination of all affirmative action programs in California).


66. Id.

67. See, e.g., Scott Harris, Negative Semantics on Affirmative Issues, L.A. TIMES, Aug. 8, 1996, at B1 (indicating results that 75% of Americans favor “affirmative action without quotas” including 71% of whites); Sam Howe Verhovek, In Poll, Americans Reject Means, But Not Ends of Racial Diversity, N.Y. TIMES, Dec. 14, 1997, at A1 (listing results of N.Y. Times/CBS poll showing that 55% of Americans support affirmative action programs); Sam Howe Verhovek, Houston To Vote on Repeal of Affirmative Action, N.Y. TIMES, Nov. 2, 1997, at A28 ) [hereinafter Verhovek, Houston to Vote on Affirmative Action Repeal] (showing that 62% of Houston voters support some form of affirmative action).
Proposition 209

opposed preferences in much higher percentages than they opposed affirmative action. Even though CCRI may have been seeking to end affirmative action, it couched the initiative’s language in terms of preferences to increase voter support.

The plan succeeded, as the language of the initiative may have been the main reason for its passage. Polls conducted by the Los Angeles Times in the summer of 1996 show that when pollsters used the language of the initiative, fifty-four percent of voters supported it and thirty-one percent opposed it. However, when the next question asked if people realized the initiative would substantially reduce or eliminate affirmative action programs, support dropped from fifty-four percent to forty-three percent and opposition grew from thirty-one percent to forty percent. These statistics suggest that not only did the voters not understand the meaning of the initiative, but also that the drafters exploited the voters’ confusion in order to persuade them to vote for a proposal they otherwise might not have supported.

A striking example of this type of strategic drafting occurred concerning a similar ballot initiative in Houston, Texas in 1997. In 1997 businessman Ed Blum succeeded in getting an initiative onto the November ballot that sought to end affirmative action in government hiring. The wording of the Blum initiative was almost identical to Proposition 209, using the term “preferential treatment” and not “affirmative action.” Polls showed the proposal had seventy percent support. Then-Houston mayor Bob Lanier, an affirmative action supporter who opposed the initiative, changed the language so that it asked whether voters wanted “[t]o end the use of affirmative action for women and minorities” in employment and contracting. The measure failed by a 55%-45% margin. After the vote, pollsters admitted that even though the proposals would have had the same legal impact under either construction, the language

68. See, e.g., K.L. Billingsley, Californians Support Civil Rights Measure: Poll Finds 2-1 Support for Proposal to Ban Government Race and Gender Preferences, WASH. TIMES, July 25, 1996, at A7 (discussing July 1996 poll showing that 59% of California voters oppose preferences); Terry Eastland, California Roll; CCRI Struggles on Against Critics and GOP Cowardice, AM. SPECTATOR, November 1996, available in LEXIS, News Library, American Spectator File. (indicating that according to 1995 poll, 86% of whites opposed preferences).
69. See Bill Stall, Prop. 209’s Fate May Hinge on 2 Words, L.A. TIMES, Oct. 31, 1996, at A1 (noting that “the initiative was favored 54% to 31%, with 15% unsure or undecided”).
70. See id.
71. While the voters in Houston are obviously different from voters in California, the case is nevertheless illustrative of how subtle phrasing and strategic drafting played the crucial role in passing Proposition 209.
72. See Verhovek, Houston To Vote on Affirmative Action Repeal, supra note 67.
73. See Verhovek, Houston To Vote on Affirmative Action Repeal, supra note 67; Gilda R. Williams, Key Words for Equality, A.B.A. J., Feb. 1999, at 64.
74. Verhovek, Houston To Vote on Affirmative Action Repeal, supra note 67, at A28.
made all the difference.\textsuperscript{76} Although the authors believed that "preferential treatment" and "affirmative action" would have the same legal meaning, they used "preferential treatment" for purely strategic reasons—because it would resonate better with voters who considered the two to be different.

The authors and supporters of Proposition 209 also attempted to hide their true intentions for Proposition 209 by couching it in the language of racial equality and racial progress. The initiative, entitled the "California Civil Rights Initiative," adapted language from the Civil Rights Act. The official website of the Proposition 209 campaign actually displays the text from several sections of Title VI and Title VII\textsuperscript{77} as if to show that Proposition 209 is synonymous with the Civil Rights Act. Supporters of the proposal, by appropriating the language of fairness and equal opportunity, painted themselves as defenders of racial and ethnic minorities while favoring the dismantling of programs designed to help those same groups. Then-Governor Pete Wilson, in a public letter favoring Proposition 209 quoted Martin Luther King, Jr.'s famous line hoping that people "will not be judged by the color of their skin but by the content of their character."\textsuperscript{78} Radio ads said that Proposition 209 would give people "an equal chance to compete."\textsuperscript{79} Supporters stressed repeatedly throughout the campaign that "non-preferential" affirmative-action programs would be preserved without ever explaining what affirmative-action programs did not use some kind of preference.\textsuperscript{80}

It is difficult to conceive of any affirmative action program that would not be preferential. Affirmative action seems to incorporate preference at some level, which is probably why the authors thought that changing the language of the proposal would not alter its substantive meaning. An educational curriculum that focuses on the history of a certain ethnic group, a bilingual ATM, or a racial cultural house are all racial preferences of one form or another. By aligning themselves with the civil rights movement, supporters hoped that many voters would not realize how extensive the reach of Proposition 209 was and would vote to support it given the way it was presented.

The appropriation of civil rights language by supporters of Proposition 209

\textsuperscript{76} See \textit{id}. ("I simply think there is no way this would have ever been defeated with the Blum language," said Bob Stein, a political scientist and dean of the School of Social Sciences at Rice University here, who has polled extensively on the issue.").

\textsuperscript{77} See \textit{CCRI and the U.S. Civil Rights Act} (visited March 26, 1999) <http://www. publicaffairsweb.net/ccri/cract.htm> (displaying § 601 of Title VI, §§ 703(a) and (j) of Title VII, and § 704(b) of Title VII).

\textsuperscript{78} Pete Wilson, \textit{An Open Letter from Governor Pete Wilson to the People of California}, 15 St. Louis U. Pub. L. Rev. 41, 42 (1995).


\textsuperscript{80} See \textit{Ballot Pamphlet}, supra note 4, at 1402 (citing argument in ballot pamphlet claiming that "Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED"); Annie Nakao, \textit{Opponents Say Wording on 209 Is Misleading}, S.F. EXAM., Oct. 27, 1996, at B1.
Proposition 209 was critical to the initiative's passage. Many voters who supported the measure did not associate it with the end of measures designed to help members of racial minorities. One California poll showed that forty-eight percent of affirmative action supporters in the state also supported Proposition 209.\(^8\) Even more striking, a Los Angeles Times exit poll on the day of the vote showed that twenty-seven percent of voters who voted for Proposition 209 thought their votes were votes for affirmative action and not the other way around.\(^8\) Even if just half of those voters had changed their vote, the measure would have failed with fifty-three percent voting against it.\(^8\)

As the campaign wore on, CCRI continued to reassure voters that the initiative would have only a minimal impact. While in 1995, backers claimed that Proposition 209 would be "the end of affirmative action as we know it," in the weeks before the election, supporters were claiming the proposal had "nothing to do with affirmative action."\(^8\) Further, radio ads claimed the initiative would lead to "equal opportunity without quotas," even though quotas had been illegal long before Proposition 209.\(^8\) Once the initiative passed, however, supporters such as Pete Wilson came out of their shells and once again vowed to end affirmative action in the state.\(^8\) While the initiative's status was in doubt, campaigners limited its scope. Once it passed, they expressed their true intentions.

Even though a substantial number of voters did not know the meaning of the proposal they voted on, the evidence demonstrating their lack of knowledge, and therefore, a mistaken conception of voter intent, would not even be considered by a court attempting to interpret Proposition 209. Polls and other extrinsic sources demonstrate that a significant amount of voter confusion existed and also that the intent of the drafters did not reflect the intent of the voters. But because such sources are not used as interpretive guides, drafters do not have any reason to be honest in drafting their language.

The courts have used the threat of strategic drafting as a rationale for avoiding examination of media sources for determining voter intent. The courts' bias against media sources is based on the theory that "reliance thereon could encourage misleading interpretations being advanced in campaign literature designed to skew future interpretations."\(^8\) That reasoning may make sense when campaigners seek to expand or broaden the scope of an initiative to

---

81. See Billingsley, supra note 68.
83. See id.
84. Anson, supra note 65, at 14.
85. See id.
87. See Lungren v. Superior Court, 41 Cal. Rptr. 2d 903, 909 n.6 (1995).
give it more bite. But campaigns like Proposition 209 turn that reasoning on its head when an initiative’s supporters use the campaign to try to convince fence-sitting voters that the initiative would not be as far reaching as the language suggested. If voters were swayed by those materials, rather than forming an opinion based on his or her own independent legal analysis of the initiative’s text, then those materials more truly reflect voter intent than the language or the intent of the drafters. It is precisely because supporters used the media and campaign literature to skew voters’ conceptions of the initiative that those materials should be used as interpretive aids by the court. Because the interaction between the drafters and the voters took place in the media rather than in the language of the initiative or in its ballot summary and title, extrinsic sources, such as news reports, polls, and advertisements should be used to determine voter intent for Proposition 209.

The problems associated with strategic drafting provide an independent reason for using media sources in determining voter intent. Even if one does not think that extrinsic sources can measure voter intent accurately, those sources should still be used as a way of preventing strategic drafting. An important component of strategic drafting is the gathering of voter support through deceptive media tactics. By taking supporters at their word through the use of media sources, courts would force them to be honest to the voters about their intentions, or they would end up with an initiative that has very limited reach. But by ignoring the media, the courts simply encourage strategic behavior because supporters know that their misleading statements to the public will be followed at the polls and ignored in the courtroom.

If ballot initiative writers and supporters engage in strategic drafting so they can tell the public that the initiative means one thing when it really means another, they should be held accountable for the message they reflect to the public. If the drafters knew that their public messages would be used to interpret the initiative, then they would take greater care to present an accurate message to the public, rather than focusing on subtle semantic differences that are defined by polling results. In taking greater care to maintain accuracy, initiatives would avoid ambiguous terms and their clarity would improve, thereby limiting confusion and perhaps leading to better lawmaking and a more productive and more representative initiative process.

At the same time, if courts did resort to the media to determine voter intent, then initiative opponents may engage in strategic campaigning and presenting a version of the initiative that is consistent with what they would like to see it do. This concern about strategic campaigning by opponents, however, is likely overblown. Often, an initiative opponent’s best campaign tactic would be to

88. See supra text accompanying notes 54-56.
89. Many authors have criticized the ability of writers to draft initiatives strategically so as to mislead the public into supporting them. See, e.g., Salvucci, supra note 55, at 885; Schachter, supra note 43.
Proposition 209

make overly broad claims about what the initiative will do, as a way of trying to scare voters into opposing it (in contrast to supporters of Proposition 209’s tactics of seeking to narrow its scope in the press). But if the court will use those statements as evidence of voter intent, then opponents will be wary of making such statements because they do not want those statements to turn into law. Although opponents would thus hope for an exceedingly narrow interpretation of Proposition 209, such as the initiative will have limited or no impact on state hiring, because such statements would negate the effectiveness of their opposition campaign. Thus, using media sources can stop strategic campaigning on the part of opponents as well as supporters and may encourage both sides to be honest in their communication with voters.

Use of media and other extrinsic information also promotes accuracy and accountability because it forces supporters and opponents alike to clarify their messages and appeal to terms that voters can understand. Even the authors of Proposition 209 admitted that terms like affirmative action and preference are confusing and create different meaning for different people. Unfortunately, ballot pamphlets do not delve into great detail; they do not force supporters and opponents to answer questions about their stances. Instead the pamphlets simply recite the arguments as the campaigners choose to write them. Thus, they are just as likely to contain the same deceptive language as the initiative itself. The use of extrinsic sources would enable the courts to look behind the term “preferences” to see to which principles supporters were truly appealing when they used the terms, and to see what ideas those terms conjured in the minds of voters. If the courts were able to grasp the values underlying nebulous phrases like “affirmative action” and “preferences,” then they might have a more accurate picture of voter intent.

III. WHAT SHOULD PROPOSITION 209 MEAN?

How should Proposition 209 be interpreted? While the initiative is generally regarded by the people and the courts as an anti-affirmative action measure, an analysis of its passage that truly examines voter intent suggests that voters called for a more nuanced type of civil rights reform that would eliminate preferences that merely reward group membership regardless of individual circumstances, and instead promotes fair programs that evaluate persons based on individual characteristics, such as merit and personal background. Furthermore, because the voters appeared more concerned with the discriminatory effect of preferential programs rather than their intent, courts should construe Proposition 209 to outlaw state-run programs that have a disproportionate im-

---

90. See, e.g., supra text accompanying notes 37-43.
pact on specific racial groups. In the context of higher education, use of extrinsic sources to determine voter intent would compel courts to construe Proposition 209 to invalidate the admissions practices used by Berkeley and UCLA.

A. Proposition 209 Under the Current Interpretive Standard

The plain language of the initiative text is anything but clear and calls for an examination of voter intent to determine what the initiative really means. The Supreme Court has held that the language of Title VI, and discrimination specifically, is ambiguous, indicating that the interpretation of any ballot initiative using such language would require an examination of voter intent. The language of Proposition 209 derives from Title VI. If Title VI is ambiguous, then the courts will probably construe Proposition 209 to lack the necessary clarity as well. The term “preferential treatment,” although not in the language of Title VI, is also ambiguous because it has never before been subject to judicial interpretation in California. Also, the polling data already presented shows that simple word changes affected people’s views of the proposal, suggesting that the language of the initiative was chosen in order to hide its true meaning. It further suggests that the language of the initiative has no clear meaning, because voters have vastly different ideas about what inherently ambiguous terms like “preferences” and “affirmative action” mean.

Part of the ambiguity expressed by subsection (a) of the initiative is that it does not state whether it prohibits only intentional preferences and discrimination or whether it prohibits discriminatory effects as well. The term preference is extremely broad. Any action that requires someone to make a choice between two competing options is inherently an expression of preference for one over the other. Non-preferential outreach is an example of the kind of activity that the initiative’s authors said would still be allowed, suggesting that there should be some limit to the reach of the term “preference.” Even outreach that has neutral selection criteria but targets areas with high minorities provides a preference. But this is the kind of program authors said they would protect. Common dictionary definitions are equally unhelpful in establishing clear meaning for the term “preferential treatment.” Webster’s defines “preference” as “a preferring or being preferred” as well as “a giving of priority or advantage to one person . . . .” Neither of these definitions speaks to intent and both definitions would support both a discriminatory intent interpretation and a dis-

92. See Guardians Ass’n v. Civil Service Comm’n, 463 U.S. 582, 592 (1983) (“The language of Title VI on its face is ambiguous; the word ‘discrimination’ is inherently so.”).
93. See supra text accompanying note 49.
94. See supra text accompanying notes 60-83.
95. See supra text accompanying notes 51-54.
Proposition 209

criminatory effect interpretation. The only clear point emerging from Proposition 209 is that its language is anything but clear.

Although California Appeals Courts referred to the “clear language” of Proposition 209 in Kidd v. State 97 and to the initiative’s “plain language” in Sistare-Meyer v. Young Men’s Christian Association 98 in deciding what kinds of preferences are ultimately outlawed, the language of the initiative is nonetheless ambiguous. The language in those cases may have been clear, but only in the limited circumstances in which the initiative was applied. In Sistare-Meyer, the court held that the text unambiguously limits the law to state actors. 99 In Kidd, the court ruled that the text also clearly prohibits race-norming programs that make minorities eligible for civil service jobs where equivalent whites would not be considered for those same jobs. 100 The program in Kidd intentionally gave women and minorities a special preference, and it did so purely on the basis of race and gender. 101 Few people involved on either side of the campaign would dispute that the initiative bans those types of programs, but neither the facts of Kidd nor those of Sistare-Meyer speak to whether or not Proposition 209 outlaws policies with a discriminatory effect. Even when courts do construe the language of an initiative as clear and unambiguous, they still sometimes look to voter intent as a way of bolstering their argument. 102 Thus, although the language of Proposition 209 appears to be ambiguous, a finding of clarity would not preclude the court from inspecting voter intent.

99. See id.
100. For state civil service jobs, every applicant takes a competitive examination. The Department of Fish and Game, when making its hiring decisions, only hired people whose test scores were in the top three ranks. Certain minorities, however, were considered for employment despite having test scores which were below the top three tiers, and which were below the scores of two white applicants who were not hired. See Kidd, 62 Cal. App. 4th at 386. Even though the court considered the language “clear” it also looked to the Proposition 209 ballot pamphlet to determine voter intent. See id. at 407. Because the ballot pamphlet said that Proposition 209 “would eliminate affirmative action programs . . . where sex, race, or ethnicity are preferential factors[,]” supplemental certification was considered to be the paradigmatic type of program the people voted to outlaw. See infra text accompanying notes 103-105 for problems with the ballot pamphlet.
101. In dicta, the court noted that “when the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race.” Kidd, 62 Cal. App. 4th at 408. This nugget suggests two things: One, that programs that intentionally advantage individuals of a particular race violate Proposition 209. Two, the programs that are problematic are those where the use of a preference harms the class of people who are not preferred. That is, where the inclusion of one leads to the exclusion of another. See infra text accompanying notes 106-112 for a discussion of why Proposition 209 voters were primarily concerned with the discriminatory effect of preferential treatment.
102. Even in cases where the court finds an initiative's language to be clear and unambiguous, it will often still look to voter intent to decide upon the correct construction of the language. See, e.g., Lungren v. Deukmejian, 753 P.2d 299, 303, 306-09 (Cal. 1988) (looking at legislative history to determine appropriate statutory construction); Delaney v. Superior Court, 50 Cal. 3d 785, 802 (Cal. 1990) (looking at ballot pamphlet to determine voter intent despite clarity of language); People v. Castro, 38 Cal. 3d 301, 309-10 (Cal. 1985); Kidd, 62 Cal. App. 4th at 407 (examining ballot pamphlet despite “clear language” of Proposition 209).
Examining the ballot pamphlet for voter intent fails to resolve the ambiguity apparent in the initiative. The Ballot Title, Label, and Summary merely mimic the language of the initiative and fail to provide any additional information to help inform voters’ choices.\(^\text{103}\) The analysis of Proposition 209 by the legislative analyst, also included in the ballot pamphlet, provides more detail but does not provide any acceptable definition of the initiative’s terms. Although supporters attempted to avoid the use of the term “affirmative action” throughout its campaign, the analysis notes that 209 “would eliminate state and local government affirmative action programs,” but only “to the extent these programs involve ‘preferential treatment’ based on race, sex, color, ethnicity, or national origin.”\(^\text{104}\) So, while the analysis does inform voters that the initiative stops affirmative action, it fails to define what represents “preferential” affirmative action prohibited by Proposition 209 and what does not. Secondly, the analysis notes that the scope and types of programs affected depend on “court rulings on what types of activities are considered ‘preferential treatment’.”\(^\text{105}\) The analyst refused to define preference or affirmative action in any way that would resolve the underlying ambiguity. For the court to rely on the legislative analysis to define the meaning of preference when the analysis states that the term has no meaning prior to judicial interpretation would create a circularity that leads to no clear definition. Thus, neither the ballot pamphlet nor the text of the initiative provides sufficient guidance for the courts. They must look to additional sources to help adduce the meaning of Proposition 209.

**B. Proposition 209 Under an Expanded Voter Intent Inquiry**

An examination of the debate surrounding the passage and subsequent interpretation of Proposition 209 reveals that voters had a more nuanced intent than the prevailing interpretation of the initiative suggests: one that focused on the results of state-run programs rather than their underlying intent and one that was capable of respecting the efforts and circumstances of individuals rather than blindly appealing to group membership.

One way of understanding Proposition 209 is that voters were more concerned about the effects of state-run programs than their intent. If supporters opposed the exclusive aspect of preferences, then it would seem that the racial effect of a program is more problematic than its intent. In an admissions con-

\(^{103}\) The Ballot Title was “Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities.” Lungren, 55 Cal. Rptr. 2d. at 692. The Ballot Summary only said that the initiative “[p]rohibits the state, local government, districts, public universities, colleges, and schools, and other governmental instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin . . . .” Id. The Ballot Label was nothing more than a shorter statement of the Ballot Summary. See id.

\(^{104}\) See Ballot Pamphlet, supra note 4, at 1394 (presenting analysis by the legislative analyst).

\(^{105}\) Id.
text, exclusivity decides who gets accepted to a school and who does not. If there were an admissions program that gave preference to Blacks, but never excluded anyone of other races, then most Proposition 209 supporters might find that an acceptable preference. If people really oppose the exclusion rather than the preference, then that suggests that they are concerned with a preference’s effect and not the intent behind it.

Evidence from the Proposition 209 campaign suggests that voters oppose the exclusion that results from preferences, not the preferences themselves. That is why polls showed that people supported efforts to help minorities get ahead but opposed making admissions decisions based on race. Campaign ads contained testimonials of people describing how they could not enroll in certain education courses because the courses were for minorities only. Supporters noted that universities could continue to recruit qualified minority applicants as long as such efforts did not exclude qualified non-minority applicants from the pool. In fact, several University of California students now conduct this type of recruiting without facing any challenges under Proposition 209. The state legislature even appropriated $38.5 million to fund similar efforts at minority recruitment. Given the visibility of Proposition 209, the legislature probably would not have taken such action unless it thought the action was legal. The California Appeals Court in Kidd defined preferential treatment as something that “correspondingly disadvantages” others. If preferences are not exclusive, then there is no corresponding disadvantage to counterbalance one person’s advantage. In other words, using race to expand the pool is acceptable; using race purposefully to alter the composition of the pool is not. Similarly, a curriculum that gives special focus to a particular racial group would be allowed because everyone can take part in it, even though it may include a preference for certain subjects of study.

106. See supra text accompanying notes 67-70.
108. See generally Eastland, supra note 68.
109. See James Traub, The Class of Prop. 209, N.Y. TIMES, May 2, 1999 § 6 (Magazine) at 44. But see Ballot Pamphlet, supra note 4, at 1351-52 (arguing that recruitment programs designed to help people of particular races would violate Proposition 209.).
110. See Traub, supra note 109 at 489.
111. For example, most supporters of Proposition 209 would argue that if standardized tests were culturally biased, then they would not be allowed under Proposition 209. See, e.g., Dinesh D'Souza, Perspective on Proposition 209: Blaming Tests Won't Close the Gap, L.A. TIMES, Oct. 25, 1996, at B9. The cultural bias argument, however, is one that rests entirely on disparate impact grounds. It is unlikely that test designers intend to hurt minority groups when they write the test. Additionally, proponents of the cultural bias argument do not contend that people are disadvantaged because of their race, but because of their cultural background and where they grew up. See David M. White, Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record, 14 HARV. C.R.-C.L. L. REV. 89, 125 (1979). The classic argument is that inner city children would not be as likely to know the meaning of words used on the SAT like “regatta” or “sonata.” But that disadvantage would also affect whites who grew up in similar circumstances; therefore, the preference is not defined by race. Nevertheless, cultural bias in testing might be a kind of preference that people feel is disallowed by Proposition 209.
Although the language of the amendment closely approximates Section 601 of Title VI, which only prohibits intentional discrimination, Proposition 209 is different in several crucial respects. One is the addition of the term "preference," which complements discrimination. The inclusion of preference must add some additional or more expansive meaning to the text. But it also seems to be true that all types of preferences are not outlawed. Maybe the authors only wanted to prohibit preferences that had an exclusionary effect, as in an admissions context, because those preferences conjure up an image of unfairness.

The studies showing that voters oppose preferences but favor some forms of affirmative action also suggest that voters were not necessarily advocating strict color-blindness. Although majorities of Blacks, Asians, and Hispanics all voted against Proposition 209, majorities of each group think that college admissions should be based strictly on "merit and qualifications." At the same time, when affirmative action is included in the question, as in other polls, the level of support drops by 20-30%. The decreased level of support when affirmative action is included indicates that many voters think that race-conscious programs are justified in certain settings, such as helping minorities get ahead, as the New York Times/CBS polls showed. Given that such a high number of people who voted for Proposition 209 also favor affirmative action programs, it seems that voters do not oppose racial preferences per se but oppose preferences they consider unfair, or an inaccurate proxy of some other criteria they do consider fair. That may be why the court in Lungren v. Superior Court refused to equate affirmative action with preferences. The judge's distinction suggests that preferential treatment only eliminates arbitrary classifications, but that non-exclusionary programs can still survive. The difference people perceive between affirmative action and exclusion may explain why polls show such a gap between supporters of preferences and supporters of affirmative action.

In passing Proposition 209, the voters' general intent was to change the operation of state institutions so that preferences would be awarded according to merit rather than on distinctions that they perceived to be arbitrary. The voters opposed preferences based on characteristics that were inaccurate proxies for some measure of discrimination or disadvantage. Supporters of the initiative

---

112. In constitutional and initiative interpretation, courts generally avoid interpretations that will make sections of the text redundant. See, e.g., Lungren v. Deukmejian, 755 P.2d 299, 304 (1988) ("An interpretation that renders related provisions nugatory must be avoided."); In re Quinn, 35 Cal. App. 3d 473, 482 (1973) ("Constitutional provisions must be construed to give full force and effect to every portion thereof.").

113. See Erler, supra note 1, at 18 (discussing poll showing that 68% of blacks, 78% of Hispanics, and 74% of Asians in the country believe that "merit and qualifications" should be the only admissions standards).

114. See id.

115. See supra text accompanying notes 30-31.
contended that the elimination of racial preferences would lead to the "return" of hiring and admissions decisions made on the basis of "merit." Pete Wilson, for example, one of the most ardent users of the term "merit," equated discrimination with any policy that was not "merit-based." They attempted to equate racial preferences with the fact that by judging people differently, people who did not deserve the benefits they received were hired or admitted to universities. Using merit instead of race would create a "unified standard of excellence" to which everyone would be held. Calls for merit-based practices were voiced on the California Civil Rights Initiative website, in campaign advertisements, in the newspapers, and by politicians. Thus, in calling for a return to merit, the voters wanted preferences to go only to those who deserved them.

In addition to creating a sense of fairness, voters also wanted preference programs to be narrowly tailored so that they only helped those who needed the most help. Many voters opposed certain racial preferences because they judged people according to a group characteristic, race, and failed to look at each indi-

116. See Wilson, supra note 78, at 43 ("Discrimination based on race or gender, whether well-intentioned or malign, is, by definition, discrimination. It is not recognition of individual merit. It is reward of group membership.").

117. See id.

118. See Wilson, supra note 78, at 45; Edward W. Leminen, A Fork in the Road for Race, Gender Relations, S.F. CHRON., Oct. 27, 1996, at 1 ("Advocates insist . . . that by banning preferences based on race . . . [Proposition 209] would help establish a unified standard of excellence and promote a more colorblind society."); Adam Pertman, National Battle Brewing on Rights; Calif. Vote, Suits Highlight Divisions, BOSTON GLOBE, Nov. 17, 1996, at A1 (writing that supporters seek to "create a level playing field").


120. See Larry D. Hatfield, GOP Starts TV Blitz for Prop. 209, S.F. EXAMINER, Oct. 22, 1996, at A1 (quoting ad that says "We should be judged on merit, not by gender or the color of our skin"); Pasco, supra note 107, at B5 (discussing television ad in which announcer laments that many state programs "are based not on merit or even need, but on race").

121. See Terri Hardy & Jeanne Mariani-Belding, Magnet Programs in Doubt, L.A. DAILY NEWS, Nov. 10, 1996, at N1 (quoting Manny Klausner, vice-chairman of Yes on 209 as saying, "we share the view of California voters that racial preferences are not only immoral, they undermine the principle that people should be judged based on merit rather than the color of their skin."); Nakao, supra note 80 (quoting a sociologist: "What the initiative says is 'we're for God, country, democracy and merit. Who's going to say no to that?'"); State Ballot Propositions, S.F. CHRON., Oct. 27, 1996, at 6Z1 ("Admissions to state universities or hiring in state jobs should be based on merit, not race or gender.").

122. See Wilson, supra note 78, at 47 (arguing that Proposition 209 will "replace the discredited policies of preferential treatment with a new vision based upon justice, upon individual merit, and upon the fundamental civil rights principle of equality under the law"); Christopher Goodwin, Asians on a Roll as California Ends Race Quotas, SUNDAY TIMES (London), Nov. 10, 1996 available in LEXIS, News Library, Major Newspapers File (quoting Pete Wilson upon passage of Proposition 209 as declaring, "[b]eginning today, Californians will be judged by one standard and one standard alone: individual merit"); George Radanovich, Editorial, The California Civil Rights Initiative, Pride and Prejudice: PRO: Make Opportunity Equal, Not Outcome, FRESNO BEE, Oct. 13, 1996, at B5 ("The University of California system could no longer count race as merit in determining which Californians are admitted to the university. . . . Treat each individual as an individual, respect merit, make opportunities equal, not outcomes.").
individual's particular circumstances to determine whether that individual had experienced the type of racial discrimination and corresponding disadvantage that preferences seek to rectify. A major complaint with affirmative action programs was that they helped people solely on the basis of race, so that an affluent member of a minority group who grew up with abundant societal advantages would still receive a preference over a poor white. Ward Connerly, who led the campaign to pass Proposition 209, said that enacting racial preferences means that "you don't accept individuals as individuals, and have respect for individuals as individuals." Pete Wilson argued that discrimination is "the reward of group membership," that is, the opposite of "treating every American as an individual." Supporters' sentiments on judging people individually were best captured by their latching onto the language of Equal Employment Opportunity Commission regulations which state that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to a group."

The combination of merit and individual treatment create a type of narrow-tailoring standard for racial preferences. Because of the attention given to those two characteristics, it appears that voters wanted to make sure that preferences helped those who needed them and did not go beyond that to help those who have not suffered from an unfair disadvantage.

If voter intent in passing Proposition 209 was really to outlaw unfair preferences, then Proposition 209 should prohibit some programs that cause a disparate impact. If people will not accept preferences that are exclusionary and unfair, then it does not matter whether the preference has discriminatory intent or discriminatory effect. It is the fact that the preference is an inaccurate proxy for some other qualification that makes it wrong, regardless of whether it affects only one racial group, or several racial groups. Thus, using race as a factor in college admissions upsets voters because it is seen as non-meritorious and exclusionary, while programs that help minorities overcome the effects of discrimination may be perceived by voters as more legitimate because it has a substantive basis that they accept. Therefore, even though the language of Proposition 209 appears to speak only to intentional discrimination, it seems that voters may have made a subtler distinction in their minds, one that would

123. See Volokh, supra note 4, at 1402 (Rebuttal to Argument Against Proposition 209, Ballot Pamphlet) ("Under the existing racial-preference system, a wealthy doctor’s son may receive a preference for college admission over a dishwasher’s daughter simply because he’s from an “underrepresented” race. THAT’S UNJUST.").
124. All Things Considered, (NPR radio broadcast, Jan. 15, 1997).
125. Wilson, supra note 78, at 43-44.
126. See Volokh, supra note 4, at 1375 (quoting EEOC regulations, 29 C.F.R. § 1604.2(a)(1)(ii)).
127. See Glenn Loury, Absolute California: Can the Golden State Go Color-Blind?, NEW REPUBLIC, Nov. 18, 1996, at 17 (suggesting that supporters of Proposition 209 accept race-based measures when they serve as accurate proxies for some other non-racial trait).
Proposition 209 invalidate some types of facially-neutral programs that have a discriminatory effect.128

C. California's Admissions Practices Under a New Proposition 209 Interpretation

Under the interpretation I have proposed, California courts should hold the admissions programs at Berkeley and UCLA in violation of Proposition 209. While universities can still defend the preference by showing the practice further the educational objectives of the institution, they would have to defend their policies on two levels: exclusion and narrow-tailoring. Since voters seemed to be protesting the use of exclusionary preferences that were inaccurate proxies for some other legitimate criteria, the universities can defend themselves by showing that (a) their programs are not exclusionary or that (b) the preference does serve as an accurate measure of need or deservedness and therefore is narrowly tailored. In this case, weighting grade points does have a direct, exclusionary effect because of the limited number of admission spots at the two universities. The question then comes down to whether the preference serves as an accurate proxy.

The problem with weighting grade points according to advanced placement classes is that it does not serve as an accurate proxy for such goals and therefore fails to satisfy the voters' demand for tailored and merit-based programs. Many students have no opportunity to take advanced placement classes because their schools do not offer them. As a result, their applications do not receive fair treatment. Even if those students take the most difficult classes their schools offer, they can still only receive a maximum of 4.0; therefore, they are

---

128. At the same time, one could argue that many of the programs supporters said would continue are ones that are facially-neutral but have a discriminatory effect. Targeted outreach, for example, while not restricted only to minority groups, would have the effect of disadvantaging students of other races who may miss out on an opportunity to attend a university because that university failed to do outreach in those students' areas. Health care programs designed to help people with sickle-cell anemia constitute another example. The incidence of sickle-cell anemia is much higher among black children than among the children of other races, yet supporters maintained that programs such as that one would continue after Proposition 209. See Crossfire (CNN television broadcast, Nov. 17, 1996). One answer is that these programs are not exclusionary in the narrow sense that college admissions is exclusionary. While targeted outreach and health care programs are exclusionary in the sense that resources spent on those programs take away from resources spent on other programs that might help people of all races or by the fact that aiding one group of people means that everyone else is excluded from that aid (doing outreach in one area means that people in other areas are "excluded" from that outreach), the programs themselves are not exclusionary. Outreach programs may not prohibit other people who hear about the program but do not live in the targeted area from participating, and sickle-cell anemia efforts do not exclude anyone from receiving medical attention in the way that admitting someone to a university on the basis of race takes that spot away from another, possibly more qualified student. Also, in that case, the preference does serve as an accurate proxy for a non-racial trait. If the purpose of outreach is to help minorities by helping disadvantaged kids, targeting low-income minority neighborhoods will yield disadvantaged students, not all of whom may be minority students. Since low-income minority neighborhoods may be an accurate proxy for economic disadvantage, giving a preference to those students through outreach would not go against the intent of voters in adopting Proposition 209.
equated with students who had the opportunity but chose not to take advanced placement classes. In addition, schools that do not offer an honors or advanced placement track may still administer a college preparatory curriculum in their toughest classes so that the schools’ best students receive good training. Because those schools do not have the resources to offer a range of advanced placement classes, they may incorporate some of the same material into their standard courses. As a result, students who take the most difficult courses at schools that do not offer advanced placement classes may be as qualified as students who take advanced placement classes. Therefore, an admissions standard that gives a preference to students who take advanced placement classes is an unjust preference that would violate Proposition 209, even though accepting more students who take advanced placement classes would further the universities’ legitimate educational objectives.

The use of weighted grade points does not create the type of “unified standard of excellence” that proponents of Proposition 209 were calling for. Advanced placement performance can only serve as an adequate measure of ability if a student has an opportunity to take advanced placement classes. If the student attended a school that did not offer advanced placement classes, the weighting says nothing about a student’s motivation, little about the student’s academic preparedness, and little about the student’s general aptitude and ability. Instead, weighting grade points creates a two-tiered system that rewards those students who take advanced placement classes, but harms students who achieve well at schools that do not offer those classes. A truly merit-based system would eliminate the weighting system or find a corresponding way to evaluate the grade points of students in schools where advanced placement classes are not offered but where the students can be evaluated on the basis of the difficulty of their classes relative to the level of difficulty of the other classes taught at that same school. That would provide a better measure of student aptitude and would continue to reward students who challenge themselves and attempt to prepare themselves for college by taking difficult classes.

Arguing that weighting grade points on an advanced placement basis is discriminatory does not mean that grade point averages and standardized test scores are never merit-based. The critical difference between distinctions based on advanced placement and those based on unweighted grades or standardized tests is that everyone has the same structural opportunities for standardized tests and grades. In other words, everyone who attends high school is graded on at least a 4.0 scale, and everyone has an opportunity to take the SAT or the ACT. No one is barred. In an advanced placement context, almost half the public high school students in California are unable to boost their grade point through advanced placement classes because their schools do not offer them.

129. Lempinen, supra note 118, at 1.
Proposition 209

This situation is analogous to telling half the students in California that they could achieve only a maximum of 1400 points on the SAT but that California universities would continue to evaluate their test scores as though a maximum score of 1600 points had been possible. While the SAT may still be a good predictor of first year grades, putting half of the applicants at a structural disadvantage in taking the test would make this hypothetical admissions program “non-meritorious.” It is the fact that so many students are unable to take advanced placement classes that makes advanced placement weighting and performance analysis an imperfect measure of merit. Until Berkeley and UCLA find a way to compensate students who successfully completed the most challenging courses at their schools and prepared themselves for college as rigorously as possible, the standards will seem to run counter to the demand for merit-based systems made by supporters of Proposition 209.

The weighted grade point system does not adequately judge people on an individual level as Proposition 209 voters would require. It is true that each student has his or her own grade point average that is part of his or her own individual application, but the students’ grade points are partially determined based on group characteristics. Whether or not a student’s grade point can be based on a four point scale or a five point scale is determined primarily by where that student attended school. It does not matter how strong a school’s curriculum is and it does not matter how advanced the student’s classes were. That student’s grade point scale is, however, strongly affected by whether or not the school offers advanced placement opportunities. If Berkeley and UCLA truly want to treat candidates as individuals, then they should try to construct a more individualized grade point average that accounts for where students attended school and what courses those students took while at that school. If a school offered a decent college preparatory curriculum but did not offer advanced placement classes, then maybe a student from that school should have his or grade point judged on a 4.5 scale, for instance. But basing such a major component of a student’s academic score on a factor that fails to take into account that student’s individual circumstances and that lumps all students into two groups determined by advanced placement availability falls short of the standard for individual measurement set by the supporters of Proposition 209.

130. In response to Proposition 209’s enactment, Berkeley has begun to examine the quality of an applicant’s high school. Students who achieve despite attending a substandard high school may receive a preference for having overcome “educational disadvantage.” See Traub, supra note 109, at 44. Not surprisingly, minority enrollment has climbed from 10.7% in the first year after Proposition 209 passed, to 13% this year. See id. While this shows that schools are taking a student’s individual factors into account, overcoming adversity is not the same as not being offered the same opportunities. Many public high schools in California may not be considered substandard but may still offer only a limited advanced placement curriculum. Applications from those schools’ students may not receive any special weight, even though their opportunities were limited.
CONCLUSION

Although civil rights activists regarded the passage of Proposition 209 in 1996 as a step backwards, perhaps they should take heart in the fact that voters did not truly desire to decrease civil rights protections. By properly examining the intent of the voters who passed the California Civil Rights Initiative into law, civil rights activists can argue that the initiative may actually have staked out a civil rights mandate that is significantly more expansive than the conventional understanding of Proposition 209. If that is true, then an appropriate interpretation of Proposition 209 would strike down some policies that have a disproportionate racial impact, such as the admissions standards at Berkeley and UCLA that have been challenged in Rios.

To interpret the scope and meaning of Proposition 209 properly in an affirmative action context, courts should redefine their view of ballot initiatives. Because language is crucially important in affirmative action initiatives and because activists often employ campaign tactics that portray the scope of their initiatives as narrowly as possible, the courts must examine media sources in order to discern voter intent adequately. Given the court’s hesitation to look beyond the plain language and the ballot pamphlet in determining voter intent, such an interpretation is unlikely. While limiting review to these two sources in some contexts may be effective, it fails where strategic drafting enables initiative supporters to present a different message to the voting public about the meaning of the act than what is expressed in the proposal. In cases of strategic drafting, the only way to determine voter intent is to look to extrinsic sources that reveal the ideas that the initiative’s supporters actually presented to the voters.

A re-evaluation of the proper sources of voter intent would create a judicial revolution in California, where ballot initiatives are most popular. Such a change would provide a better understanding of voter initiatives, especially in the affirmative action context. It could also help to reduce the practice of strategic drafting and to encourage better lawmaking by ensuring that future initiatives would be more carefully worded and less ambiguous in their meaning. But most importantly, an examination of media sources in initiative interpretation would help the courts to recognize that people hold extremely complicated opinions about affirmative action and racial preferences. Few people oppose affirmative action in every context, and few support it in every situation. Most voters have certain fundamental principles in mind that they seek to affirm when they decide questions pertaining to affirmative action. In deciding how broadly an anti-affirmative action proposal should extend, the court must be cognizant of the principles that people want to maintain, rather than simply lumping a variety of different programs under the general rubric of affirmative action. By using extrinsic sources in their interpretive effort, courts can better discern the voters’ guiding principles than they can using vaguely worded texts.
Proposition 209

and confusing ballot pamphlets. If the courts were to accept an interpretation of Proposition 209 as this Note has proposed, they could reach a wide range of programs that have a disparate impact. Any admissions standard that is not merit-based or that lumps people together into groups where the defining characteristic is an inadequate proxy for some substantive measure of ability, would be subject to judicial scrutiny. Tests that have survived judicial scrutiny but that many believe to be culturally biased, such as the SAT, could potentially face a difficult challenge under Proposition 209. Other admission selection criteria that people view as unfair, such as giving preferences to legacies, athletes or the children of major donors, could also face attack under this interpretation of Proposition 209. Perhaps such attacks would force admissions officers to look at each application individually in order to determine an individual’s need based on that individual’s particular set of circumstances. This could include the applicant’s history of overcoming racial discrimination, that one thing affirmative action supporters have been asking for all along.