



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

The State-by-State Assault on Equal Opportunity

By Melissa Hart

September 2008

**All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.**

The State-by-State Assault on Equal Opportunity

Melissa Hart*

For more than four decades, equal opportunity initiatives have been an essential component of efforts to foster true equality and ensure civil rights for women and people of color. Outreach, recruiting, training and mentoring programs that target underrepresented groups have been indispensable to tearing down barriers to opportunity and giving long-excluded communities a fair chance to achieve their full potential. Systemic discrimination remains a significant impediment to full equality, but without affirmative efforts to address persistent barriers, progress would be even more limited.

Affirmative action programs, however, have become a hotly contested aspect of civil rights law. The controversy turns on a core dispute over the meaning of equality. To some, the Constitution and civil rights laws guarantee merely a formal equality. This conception of equality demands treating every person identically and ignoring the ways in which people are situated differently. For others, the equality to which we are committed is a more substantive value. This vision recognizes a shared responsibility for the circumstances that have left some communities behind, and sees that our common fate rests in acknowledging those circumstances and ensuring equality of opportunity – not just a formality, but a true opportunity for contribution and participation in the community.

The debate between these two ideas of equality and their implications for the reach of civil rights laws has played itself out in the United States Supreme Court for the past three decades. It is one of the most closely watched areas of the Court's jurisprudence and a central focus of battles over judicial nominations. Each time the Court takes a case that calls the legitimacy of equal opportunity policies into question, the civil rights community fears the triumph of formal over substantive equality. But, thus far, the Court has taken a relatively measured middle-ground, limiting the permissible scope of affirmative action significantly, but retaining a core that acknowledges the need to remedy discrimination and the value of diversity.

A small group of well-funded opponents of equal opportunity, frustrated with the Court's continued rejection of their radical vision of formal equality, has been steadily attempting to shift the debate into the political arena. This November, voters in Colorado and Nebraska are all but certain to face ballot initiatives seeking to make affirmative action illegal under those states' constitutions. These initiatives are substantially identical to laws that have already passed in California, Washington and Michigan.¹ Each prohibits "preferential treatment" on the basis of race or gender in public education, employment or contracting. The term preferential treatment is not defined in the proposed initiatives, but the identical language has been interpreted to prohibit *any* consideration of race or gender in the covered areas. In states where these

* Associate Professor of Law, University of Colorado Law School. The author is the president of Coloradans for Equal Opportunity, a group working in opposition to the anti-equal opportunity initiative in Colorado.

¹ CAL. CONST. art. I, § 31 (passed as Proposition 209); WASH. REV. CODE § 49.60.400 (1998) (passed as Initiative 200); MICH. CONST. art. I § 26 (passed as Proposal 2).

initiatives pass, it has become effectively irrelevant what the Supreme Court says about affirmative action.

The consequence of eliminating equal opportunity programs in California – the state with the longest history under the restrictive law – has been a significant reduction in opportunities for minorities and women in education and contracting. Washington and Michigan have faced similar challenges, and in the states targeted this year, opponents of the anti-equal opportunity initiative already have identified myriad ways in which communities in each state will be harmed if the measure becomes law. Moreover, Ward Connerly, the California millionaire who started this effort twelve years ago and has bankrolled it around the country since, has said he will continue to push these ballot measures in other states in future election cycles.² The damage done by the anti-affirmative action initiative language is, of course, most significant for those states in which these laws are passed. But the impact of the initiative on public and judicial discourse about equal opportunity already has gone far beyond any single state’s boundaries.

This issue brief is primarily an effort to shed some light on the state-by-state assault on equal opportunity, to challenge the flawed assumptions on which its supporters rely and to briefly describe opposition efforts in states targeted for this election year. I conclude with some thoughts about the broader impact this effort is having on the national conversation.

I. The Deceptive Language and Characterizations of the Anti-Equal Opportunity Initiative

The anti-equal opportunity initiative being shopped around the country by conservative activists provides that “The State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”³ The sole purpose of the initiative is contained in the five words “or grant preferential treatment to,” which have been consistently interpreted to eliminate a state’s ability to maintain even the very limited equal opportunity efforts that are permissible under Supreme Court equal protection jurisprudence.

The initiative was first proposed as a constitutional amendment in California by Connerly, a protégé of then-governor Pete Wilson. After the passage of what was known as “Proposition 209” in 1996, Connerly created an organization called the American Civil Rights Institute (ACRI) to monitor compliance with the new law in California and to support the passage of identical laws in other states.⁴ The ACRI receives its funding from prominent conservative foundations and its other founders and board members include conservative activists Clint Bolick, Grover Norquist and *National Review* president Thomas L. (Dusty) Rhodes.⁵

² See, e.g., Leslie Fulbright, *Connerly Gearing Up for Wider Crusade*, SAN FRANCISCO CHRON., December 14, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/12/14/MNGR2MV3I51>. DTL.

³ See, e.g., CAL. CONST. art. I, § 31(a). The initiative includes several additional clauses, but the primary substantive provision is this single sentence. The language proposed for the ballots in the five states targeted in 2008 is identical to this language. Throughout this issue brief, I will refer to “the initiative” in the singular, given that it is the same language being pushed in different states.

⁴ See American Civil Rights Institute, *Welcome to ACRI!*, <http://www.acri.org> (last visited Sept. 5, 2008) (describing the mission of the ACRI).

⁵ Phil Wilayto, *Ward Connerly and the American Civil Rights Institute* (2000), <http://www.mediatransparency.org/personprofile.php?personID=13>.

Since 1996, the ACRI and the related American Civil Rights Coalition (ACRC) have taken nearly identical language to Washington State and Michigan. These groups also made an unsuccessful bid to include their language on the ballot in Florida,⁶ and in 2007 announced that they were exploring 10 states as possible targets for the next round of initiative efforts.⁷ Ultimately, ACRI decided that it would target Arizona, Colorado, Missouri, Nebraska, and Oklahoma for the 2008 election.⁸ The ACRI and ACRC have as their goal to achieve what litigation in the Supreme Court has not accomplished – the elimination of all equal opportunity programming – by amending state constitutions.⁹

The ACRI, and the state analogs it creates and funds to run these initiative campaigns, have been successful in their efforts to garner votes in large part by fostering confusion both about the purpose and the effects of the initiative and by hijacking the language and message of the civil rights movement. In each state where the initiative is proposed it is called the “Civil Rights Initiative,” and spokespeople for the initiative repeatedly link it to the Civil Rights Act of 1964.¹⁰ When asked about the purpose of the measure, signature collectors and spokespeople consistently say simply that it is intended to end discrimination. In Colorado, many citizens reported that, even when pressed, signature collectors denied that the measure was intended to end affirmative action.¹¹ Similar reports have come out of Nebraska and Arizona.¹² And after the Michigan campaign, a federal district court found that proponents of the Michigan Civil Rights Initiative had “engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action.”¹³

II. The Flawed Premises that Underlie the Initiative

While proponents of the anti-affirmative initiative have been successful in large part because of the misleading language and deceptive campaign strategies they have employed, they also have gained support through reliance on a set of simplistic, and very troubling, premises.

⁶ See Wilayto, *supra* note 5. The ACRI initiative did not make it to the ballot in Florida because the Florida Supreme Court concluded that the language did not meet the state’s “single-subject” requirements. *Id.*

⁷ See, e.g., Super Tuesday for Equal Rights, <http://www.supertuesday2008.org/about.html> (last visited Sept. 5, 2008) (noting that proponents of the anti-equal opportunity initiative were considering pushing initiatives in Arizona, Colorado, Missouri, Nebraska, Nevada, Oklahoma, Oregon, South Dakota, Utah, and Wyoming).

⁸ See, e.g., Bill Berkowitz, *Ward Connerly’s ‘Equal Rights’ Con*, Sept. 7, 2007, <http://www.mediatransparency.org/story.php?storyID=210>.

⁹ See, e.g., American Civil Rights Coalition, <http://www.acrc1.org/> (last visited Sept. 5, 2008) (“[W]e focus on the political influence needed to effect the elimination of preferences and classifications.”); Fulbright, *supra* note 2.

¹⁰ See, e.g., Super Tuesday for Equal Rights, *supra* note 7; Colorado Civil Rights Initiative, <http://coloradocri.org/> (last visited Sept. 5, 2008); Michigan Civil Rights Initiative, <http://www.michigancivilrights.org/> (last visited Sept. 5, 2008); Arizona Civil Rights Initiative, <http://arizonacri.org/> (last visited Sept. 5, 2008); Nebraska Civil Rights Initiative, <http://www.nebraskacri.org/> (last visited Sept. 5, 2008); Missouri Civil Rights Initiative, <http://www.missouricri.org/> (last visited Sept. 5, 2008).

¹¹ See, e.g., Cara DeGette, *Fighting Misleading Petitioners Isn’t Easy*, COLORADO INDEPENDENT, Feb. 21, 2008, <http://www.coloradoconfidential.com/showDiary.do?diaryId=3477>.

¹² See, e.g., Carrie Watters, *Woman Wants Name Off Ballot Petition*, THE ARIZ. REPUBLIC, June 30, 2008, available at <http://www.azcentral.com/community/glendale/articles/2008/06/30/20080630gl-initiative0630-ON.html>; Editorial, *Petition Drive Off to a Misleading Start*, LINCOLN JOURNAL STAR, June 10, 2008, at B5, available at <http://www.journalstar.com/articles/2008/06/10/opinion/editorial/doc484da801e03dc740239896.txt>.

¹³ *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *11 (E.D. Mich. Aug. 29, 2006).

First, opponents of all affirmative action argue that any consideration of race or gender aimed at opening opportunities is as offensive to the Constitution's Equal Protection Clause as invidious discrimination. If refusing to hire a woman because of her gender is sexist, they argue, then so are summer camps designed to encourage girls to pursue careers in engineering and math. The formal equality ideal that this belief rests on demands that the state be "color-blind" and "gender-blind," and insists that this is the best way to achieve equality.

This notion of equality is fundamentally flawed in its blindness to the real circumstances in which women and people of color live their lives. In America today, women still make an average of 77 cents for every dollar men make; for women of color that number drops to 67 cents.¹⁴ The median income for white families in 2006 was \$52,375; for Hispanic families \$38,747; and for African-American families \$32,372.¹⁵ Educational opportunities and employment opportunities are simply not the same for people of color as they are for whites in our society; nor do women of any color have the same opportunities that men do.

Myriad studies demonstrate the persistence of subtle discrimination in our society. In one study, for example, researchers simulated an interview process in which job candidates ranged along a spectrum from unqualified to very qualified and included both black and white applicants. When participants were asked to rank two marginally qualified candidates – one white and one black – they consistently gave the black candidate much lower rankings.¹⁶ In studies of attitudes about working mothers, the same patterns emerge: faced with identical application materials from mothers and non-mothers, the mothers were ranked as less qualified, less competent and less committed.¹⁷ Women and minorities continue to have limited access to the kinds of training programs, informal networks and mentoring opportunities that are the surest guarantors of success. Equal opportunity programs provide a check against these persistent inequalities.

Studies also increasingly point to the benefits that diversity brings to the table. A recent book by a University of Michigan professor of economics and political science, Scott E. Page, shows how organizations with diverse staffing will be stronger than homogeneous firms.¹⁸ As Professor Page explained in a recent interview:

The problems we face in the world are very complicated. Any one of us can get stuck. If we're in an organization where everyone thinks in the same way, everyone will get stuck in the same place. But if we have people with diverse tools, they'll get stuck in different places...There's a lot of empirical data to show that

¹⁴ BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS, ACS-02, INCOME, EARNINGS AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY, 13-16 (2006).

¹⁵ *Id.* at 3.

¹⁶ See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selections Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 316-17 (2000).

¹⁷ See Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 318-319 (2007).

¹⁸ See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (Princeton Univ. Press 2007).

diverse cities are more productive, diverse boards of directors make better decisions, the most innovative companies are diverse.¹⁹

While race and gender are only pieces of a larger world of “diversity,” eliminating them from consideration in composing classrooms and workplaces artificially and detrimentally ignores these important facets of diversity.

Furthermore, ignoring real differences – for example in the way that young girls are socialized about the legitimacy of careers in science and math – is not a path to equality, but a guarantee of continued inequalities. Proponents of the anti-affirmative action measure explain that the initiative will not eliminate programs for girls in science, but will simply require those programs to be open to boys as well. In this area, and in others targeted by equal opportunity outreach, training and mentoring programs, gender-neutrality defeats the very purpose of the programs, which is to acknowledge and address the ways that girls and boys are socialized to learn differently.

A second flawed premise underlying the anti-affirmative action initiative is a conviction that certain groups of people “deserve” things – particularly positions in schools and jobs – that they are being denied because some less-deserving people are getting them. The website for the Colorado Civil Rights Initiative (the group touting the ACRI initiative in Colorado) uses a startling picture at the top of its home page that illustrates this vision. In the photograph a cherubic little white boy wearing a shirt emblazoned with a lion and the word “roar” clutches an ice cream cone. Next to him, a little black girl with a ring of ice cream around her open mouth and her empty fists clenched stretches out to take another bite from his cone.²⁰

This assumption—that opportunity is a zero sum game, where the deserving might lose out to the undeserving—fundamentally misunderstands the range of factors that go into hiring and admissions decisions. In schools and workplaces around the country, decision-makers are not simply drawing lines at some numerical cut-off, with the deserving on one side of the line and the undeserving on another. Decisions about the composition and dynamics of a classroom or office are much more complicated and nuanced than this vision presumes.

The assumption also misunderstands (or misconstrues) the very limited nature of currently permissible equal opportunity programming. The Supreme Court has considered the constitutionality of race-based affirmative action plans in public education,²¹ employment,²² and contracting.²³ In each area, a race-based affirmative action program will survive constitutional

¹⁹ Claudia Dreifus, *In Professor's Model, Diversity = Productivity: A Conversation with Scott E. Page*, N.Y. TIMES, January 8, 2008, at F2, available at <http://www.nytimes.com/2008/01/08/science/08conv.html>.

²⁰ See Colorado Civil Rights Coalition, *supra* note 10. The same picture is used on the identical websites for each of the states in which the initiative has been proposed. See, e.g., Michigan Civil Rights Initiative, <http://www.michigancivilrights.org>; Arizona Civil Rights Initiative, <http://www.arizonacri.org>; Nebraska Civil Rights Initiative, <http://www.nebraskacri.org>; Missouri Civil Rights Initiative, <http://www.missouricri.org>.

²¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²² See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

²³ *Adarand v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

scrutiny only if it is supported by a compelling governmental interest and is narrowly tailored to meet its goals.²⁴ The standards for gender-based affirmative action are not as clearly developed, but gender-based classifications are also subject to heightened scrutiny.²⁵ Thus, while some limited affirmative action is constitutionally permissible, many more specific plans have been found unconstitutional than have survived the strict scrutiny applied by the Court.

Schools, employers and government contractors today are not rejecting more qualified applicants in favor of unqualified women and people of color. However, in times of economic uncertainty, the ACRI initiative has garnered considerable support by playing to fears that they might be.

III. The Negative Impact of the Initiative

The most obvious and harmful impact of the initiative has been in the context of public higher education. In the first year after the passage of Proposition 209 in California, the number of black students offered admission at the University of California (UC) at Berkeley dropped from 562 to 191.²⁶ The number of Hispanic students offered admission that year went from 1,266 to 600.²⁷

A decade later, California's flagship schools saw one of the worst years in their history for enrollment of African-American students. At UCLA, in the fall of 2006, only 96 African-American students enrolled in the freshman class – 2% of the 4,802 students entering that year. That was the smallest number of black entrants in 30 years.²⁸ At the University of California at San Diego that same year, only 1% of the entering class was African-American,²⁹ and at UC Berkeley, African-American students accounted for only 3.3% of the new freshmen.³⁰ From 1996 to 2006, the number of underrepresented minority freshman in the entering class at Berkeley fell 65%.³¹ At UCLA, the drop in minority enrollment in the freshman class during that same decade was 45%. The declining rates come at the same time that the population of the state is increasingly diverse.

For school administrators in California, 2006 was a wake-up call. In the following year, for example, UCLA shifted to a “holistic” or “comprehensive” review to try to address the negative effect that an over-adherence to statistical success measures was having on the diversity

²⁴ See, e.g., *Adarand*, 515 U.S. at 227.

²⁵ Gender-based classifications, while subject to “skeptical scrutiny,” *United States v. Virginia Military Institute*, 518 U.S. 515, 523-24 (1996), have not been held subject to the highest level of court review, strict scrutiny. As a practical matter, however, if race-conscious affirmative action programs are eliminated, gender-conscious programs are likely to fall by the wayside, even if they are subject to a more lenient standard of review.

²⁶ See UC Berkeley News Center, *New Freshman Total Admits by Ethnicity, 2006-07 Through 2008-09 Academic Year*, http://www.berkeley.edu/news/media/releases/2008/04/admits_archival.shtml (last visited Sept. 5, 2008).

²⁷ *Id.*

²⁸ Carmina Ocampo, *Prop 209: Ten Long Years*, THE NATION, Nov. 22, 2006, at 8, available at <http://www.thenation.com/doc/20061211/ocamp>.

²⁹ Eleanor Yang Su, *UC Ethnic Shift Revives Prop 209 Debate*, SAN DIEGO TRIB., Nov. 27, 2006, at A1, available at http://www.signonsandiego.com/uniontrib/20061127/news_1n27prop209.html.

³⁰ See Ocampo, *supra* note 28.

³¹ Office of Student Research, Univ. of Cal. Berkeley, *New Freshman Registrants by Ethnicity, Fall 1996-2006*, <https://osr2.berkeley.edu/newfroshtrend.html> (last visited Sept. 5, 2008).

of admits.³² At Berkeley, Chancellor Robert J. Birgenau announced in August 2006 the creation of a vice chancellor position for equity and inclusion.³³ The new position was created to address the need for oversight of university efforts to recruit, retain and create a welcome environment for diverse students and faculty.³⁴ Birgenau conceived the position in part as a response to the poor climate that shrinking numbers and consequent isolation had wrought for underrepresented minorities at Berkeley.³⁵ In the past two years, minority admissions have improved somewhat at both UCLA and Berkeley. Whether the schools will be permitted to maintain their renewed efforts at cultivating a diverse climate remains to be seen.

In response to the passage of Proposal 2 in Michigan, the University of Michigan increased its admissions staff, expanded weekend and evening hours in some offices and used geodemographic research to target underrepresented groups. Despite these efforts, in a year in which the University saw the highest number of applications in its history, the number of applications from underrepresented minorities declined.³⁶ This trend is consistent with patterns in California, where the hostile message sent by the anti-affirmative action initiative encouraged students of color to apply and attend elsewhere. Through their considerable and costly efforts, however, the University of Michigan was able to keep the number of underrepresented minorities in the projected freshman class at rates only slightly lower than previous years. At Michigan Law School, the percentage of minority students in the class of 2010 dropped to 25% from 31% in the class of 2008.³⁷ The admissions cycle during which Proposal 2 was first effective shows a dramatic impact from the new law; the percentage of minority applicants admitted before December 28, 2006 was 39.6%, but after the law went into effect the next business day, the percentage of admitted minority applicants dropped to 5.5%.³⁸

The impact of the ACRI initiative on education has gone well beyond the admissions numbers. The initiative has prompted the elimination of many educational opportunities, including programs designed to encourage girls interested in math and science to pursue careers in those fields and scholarships targeted to encouraging people of color to enter medical careers in underserved communities, or to become K-12 teachers.³⁹ The Michigan Civil Rights

³² Lauren Bartlett, *New UCLA Admissions Data Show High Academic Quality for Students Admitted for Fall 2007 Freshman Class*, Apr. 5, 2007, <http://newsroom.ucla.edu/portal/ucla/New-UCLA-Admissions-Data-Show-High-7826.aspx?RelNum=7826>.

³³ Robert Birgenau, Chancellor, Univ. of Cal., Berkeley, Remarks on Diversity Initiatives (Aug. 23, 2006), available at http://berkeley.edu/news/media/releases/2006/08/23_press_rjb.shtml.

³⁴ Janet Gilmore, *Gibor Basri Selected as New Vice Chancellor for Equity and Inclusion*, July 19, 2007, http://www.berkeley.edu/news/media/releases/2007/07/19_basri.shtml.

³⁵ Birgenau, *supra* note 33.

³⁶ Univ. of Mich. News Service, *Applications to U-M Ann Arbor Reach Historic High*, June 12, 2008, <http://www.ns.umich.edu/htdocs/releases/story.php?id=6609>. While total applications increased 8.5%, minority applications decreased by 2%. *Id.*

³⁷ Univ. of Mich. Law School, *Law School Facts*, <http://www.law.umich.edu/newsandinfo/Pages/facts.aspx#students> (last visited Sept. 5, 2008).

³⁸ Inside Higher Ed., *Now and then: Minorities and Michigan*, June 19, 2007, <http://www.insidehighered.com/news/2007/06/19/michigan>. These numbers are likely particularly dramatic because of public awareness about Proposal 2. The Law School encouraged students to apply before the law's effective date, and tried to get as much of its admissions cycle completed before that date as it could. *Id.*

³⁹ See, e.g., Press Release, Governor's Office, *Wilson Unveils List of 30 Offending Statutes* (Sept. 9, 1997) (released by former Cal. Governor Pete Wilson), available at <http://aad.english.ucsb.edu/docs/wilson.9-97.html>.

Commission conducted a study evaluating measures in the state that might be the subject of post-Proposal 2 challenges, including programs such as tutoring for at-risk elementary school girls.⁴⁰

It is more difficult to assess the impact of the anti-affirmative action amendment on contracting opportunities for women and minorities, but the minimal data that is available suggests significant harm. For example, the city of Grand Rapids, Michigan is one of the few cities in the state that maintains documentation of city projects awarded to minority- or women-owned businesses. Data from Grand Rapids show startling effects from Proposal 2. In the year and a half after its passage, the dollar volume of construction projects in the city increased by 45%, or more than \$20 million. Construction project dollars going to minority-owned business enterprises (MBEs) declined by 45%, or \$1.18 million and the amount going to women-owned business enterprises (WBEs) dropped by 70%, or \$582,118.⁴¹ Moreover, in Washington state, following the passage of I-200, public contracts awarded to minorities and women decreased by more than 25% in Seattle.⁴² The share of minority contracts awarded in the state fell from 10.8% to 3.1%.⁴³ A California study showed a 25% drop in the dollar value of public transportation contracts awarded to minority-owned businesses between 1996 and 2006.⁴⁴

Many of the programs potentially at risk from the anti-affirmative action initiative are outside of the areas traditionally considered subjects of affirmative action. For example, in the wake of the passage of Proposal 2, a report by the Michigan Civil Rights Commission identified 18 different programs that “may not violate proposal 2” and nine that “appear to violate proposal 2.”⁴⁵ Among the many programs at risk in Michigan are community health programs like a smoking prevention program that gives priority to pregnant women and women with young children; certain foster care and adoption programs that provide special incentives and benefits based on the ethnicity of the child; and programs that offer grants to minority college students planning to go into K-12 teaching careers or to minority medical school students who commit to work in underserved communities.⁴⁶

To a significant extent, the effect of the anti-affirmative action initiative in a particular state will be dependent on the responses of government actors in that state. In California, for example, Proposition 209’s effects were extremely far-reaching because then-governor Pete Wilson was himself dedicated to ending affirmative action. He therefore took steps in the wake of the amendment’s passage to eliminate many programs that another governor might have made efforts to preserve.⁴⁷ That different approach is apparent in Michigan, where passage of Proposal 2 led Governor Jennifer Granholm to direct the Michigan Civil Rights Commission to undertake

⁴⁰ MICH. CIVIL RIGHTS COMM’N, “ONE MICHIGAN” AT THE CROSSROADS: AN ASSESSMENT OF THE IMPACT OF PROPOSAL 06-02 (2007), http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf.

⁴¹ B. Candace Beeke, *Construction Contracts up in G.R., but not for Minorities*, BUS. REV. W. MICH., April 23, 2008, http://blog.mlive.com/wmbr/2008/04/construction_contracts_up_in_g.html.

⁴² Alex Fryer, *Private Jobs Elude Black Contractors*, SEATTLE TIMES, Aug. 13, 2002, at A1, *available at* <http://community.seattletimes.nwsourc.com/archive/?date=20020813&slug=contractor13m>.

⁴³ African-American Policy Forum, *Focus on Affirmative Action*, <http://www.aapf.org/focus/episodes/oct26.php> (last visited Sept. 5 2008).

⁴⁴ Tanya Schevitz, *Prop. 209 Affects State Hiring and Contracting*, SAN FRANCISCO CHRON., Oct. 30, 2006, at A12, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2006/10/30/MNGBRM2F6P1.DTL>.

⁴⁵ MICH. CIVIL RIGHTS COMM’N, *supra* note 40.

⁴⁶ *Id.*

⁴⁷ Press Release, Governor’s Office, *supra* note 39.

a comprehensive examination of state programs with the twin goals of faithfully executing the new law while continuing to promote the compelling state interest of diversity.⁴⁸

Even when state or local government officials have remained committed to maintaining diversity as a compelling goal, regular litigation by the ACRI and others has led to relatively expansive interpretation of the initiative's language, making implementation of any effective equal opportunity programming extremely difficult. The California Supreme Court's decision striking down the City of San Jose's public contracting regulations provides a good example.⁴⁹

The San Jose program required contractors bidding on city construction projects to demonstrate that they had not discriminated against or given preference to any subcontractors based on race, sex, color, age, religion, sexual orientation, disability, ethnicity or national origin. For each contract, a potential contractor could use one of two alternate methods to make this demonstration.⁵⁰ Under the first method, labeled "Documentation of Outreach," the contractor would have to send written notices, personally follow up with, and negotiate in good faith with four minority or women-owned businesses for each trade identified for the project. The contractor did not have to hire an MBE or WBE, but had to make some showing that they were not excluded from the process.⁵¹ Under the second, alternative method, identified as "Documentation of Participation," the contractor could invoke an "evidentiary presumption" of non-discrimination by including in its bid a sufficient number of minority or women-owned participants in its bid. "Sufficiency" in this context was determined by an assessment, given the available, qualified subcontractors, of the number of minority or women-owned businesses that would be expected as part of the bid "in the absence of discrimination."⁵²

In 1997, Hi-Voltage Wire Works, the apparent low bidder on a construction project, declined to satisfy the conditions set forth in the city's program, instead challenging the program as a violation of the state's new constitutional provision.⁵³ When the case reached the California Supreme Court, that court concluded that the city's Documentation of Participation rule violated Proposition 209 because it effectively operated to grant "preferential treatment" to subcontractors on the basis of race or gender. The court also concluded that the Documentation of Outreach component of the city's program was invalid under Proposition 209, finding that requiring outreach to women and people of color was a form of preferential treatment.⁵⁴

In a more recent case, the Sacramento Municipal Utility District sought to justify its affirmative action plan as required by federal agencies from which the District received funding.⁵⁵ Because the ACRI initiative includes an exception for instances where affirmative action is required as a condition for the receipt of federal funds, the District argued that its plan

⁴⁸ MICH. CIVIL RIGHTS COMM'N, *supra* note 40.

⁴⁹ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

⁵⁰ *Id.* at 1071

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1084.

⁵⁵ *C & C Const., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 717-18 (Cal. Ct. App. 2004).

did not violate Proposition 209.⁵⁶ The District pointed out that it received federal funding from the Department of Transportation, the Department of Energy and the Department of Defense, all of which include non-discrimination obligations in their regulations, and include language that a fund recipient has an obligation to remedy effects of past discrimination.⁵⁷ Based on this language, the District argued that its affirmative action plans fell within the exception to Proposition 209's ban. The California Court of Appeals rejected that argument, concluding that a state or local government would have to meet a strict standard for demonstrating that the plan was "necessary" for federal funding.⁵⁸

This kind of expansive interpretation of the anti-affirmative action initiative by the courts leaves little room for the kind of balance that, for example, Governor Granholm hopes to achieve in Michigan. If the initiative is interpreted to eliminate outreach programs, and to include only the narrowest of exceptions for federally funded state programs, the space for creative efforts to maintain diversity and counter the continued pervasive effects of discrimination begins to look quite small.

IV. Fighting Back Against the Initiative

Opponents of the ACRI efforts in Michigan in 2006 put on a strong campaign against the initiative. Opinion leaders in the state spoke out against the harmful effects the law could have on the state educational system and economy and supporters of equal opportunity worked tirelessly to educate voters about the proposed law. Despite these efforts, the ACRI campaign, which a federal judge described as "best characterized by the use of deception and connivance to confuse the issues,"⁵⁹ was successful. In the states targeted for the initiative this year, opponents started fighting back as soon as rumors surfaced that they might face this challenge. In Oklahoma and Missouri, vigorous efforts to raise awareness about the real purpose of the initiative, and to challenge the ACRI's signature collection efforts, kept the initiative off the ballot entirely.⁶⁰ In Arizona and Nebraska, anti-affirmative action groups submitted the necessary signatures for ballot consideration on July 3. Opponents filed challenges, arguing that up to 40% of the signatures submitted were invalid. In Arizona, the Secretary of State announced on August 21 that the ACRI initiative would not be on the ballot because the number

⁵⁶ *Id.* The relevant provision of the ACRI initiative, as enacted in the California constitution, provides that "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." CAL. CONST. art. I, § 31

⁵⁷ *C & C Const.*, 18 Cal. Rptr. 3d at 728–23.

⁵⁸ *Id.*

⁵⁹ *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *11 (E.D. Mich. Aug. 29, 2006).

⁶⁰ *See, e.g.*, Sarah Hebel, *Measure to Ban Affirmative Action in Oklahoma Fails to Make it Onto the Ballot*, CHRON. OF HIGHER EDUC., Apr. 7, 2008, <http://chronicle.com/news/article/4265/measure-to-ban-affirmative-action-in-oklahoma-fails-to-make-it-onto-the-ballot>; Sylvia Maria Gross, *Affirmative Action Ban Misses Deadline to Hand in Signatures*, May 5, 2008, http://www.publicbroadcasting.net/kcur/news.newsmain?action=article&ARTICLE_ID=1272226§ionID=1.

of valid signatures collected was insufficient.⁶¹ The ACRI initiative was certified for the ballot in Nebraska in late August.⁶²

In Colorado, opponents of the anti-equal opportunity initiative have launched challenges on several fronts. The initiative was introduced in Colorado in July 2007. Opponents of the measure challenged it before the Title Board, the administrative agency whose initial approval is necessary before any initiative can start the process of submission to the ballot. Their challenge focused on the deceptive nature of the undefined term “preferential treatment.”⁶³ Despite proponents’ refusal to define the term, the Title Board concluded that it was not unclear, and set a title for the initiative, giving its proponents the green light to start collecting the approximately 76,000 signatures they would need to have the initiative placed on the November 2008 ballot.

The signature collection process undertaken by supporters of the anti-affirmative action measure was rife with fraud and deception. Several Colorado citizens complained to the Secretary of State that they were lied to about the meaning of the proposal when they asked signature collectors for an explanation. While these individuals pursued the available administrative remedies, the “Vote No on 46” campaign filed suit in the Denver District Court, challenging the validity of over 60% of the signatures collected in support of the initiative.⁶⁴ The suit pointed to consistent violations of Colorado’s election law, including use of out-of-state petition circulators, and called into question whether the initiative actually received a sufficient number of valid signatures to be on the ballot. In late July, 2008, this litigation was dealt a near-fatal blow when the district court ruled that it did not have jurisdiction to consider claims of circulator fraud, but only challenges to the validity of individual signatures. The case has been stayed pending resolution of a similar question in a challenge to another Colorado ballot initiative.

Recognizing that challenges to the kind of misconduct engaged in by Connerly’s supporters are hard to win, opponents of the initiative in Colorado also decided to propose an alternative measure for inclusion on the November ballot. An alternative measure might have several benefits. First, by offering voters two different approaches to the same perceived problem, an alternative initiative could force voters to think about the difference between the two, and to really consider the impact the anti-affirmative action measure would have. Second, an alternative could be drafted such that, if both measures passed, the harm done by the ACRI initiative could be mitigated by language in the alternative.

With these thoughts in mind, a group of Colorado citizens ultimately proposed a counter-initiative, Initiative #82, that read:

⁶¹ Howard Fisher, *Anti-affirmative Action Initiative Fails, Shy Valid Signatures for Ballot*, ARIZ. DAILY STAR, Aug. 22, 2008, available at <http://www.azstarnet.com/metro/254008>.

⁶² See Melissa Lee, *Affirmative Action Likely on Ballot in Nebraska*, LINCOLN-JOURNAL STAR, Aug. 26, 2008, available at http://www.hispanicbusiness.com/politics/2008/8/26/affirmative_action_likely_on_ballot_in.htm.

⁶³ See Opening Brief of Petitioner at 26-27, *In re Title, Ballot Title and Submission Clause and Summary for 2007-2008 #31*, No. 07SA197 (Colo. July 16, 2007), available at http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/initiatives/2008/31/07-16-07OpeningBriefPetitioners Part1of2.pdf.

⁶⁴ David Montero, *Suit Filed over Amendment 46*, ROCKY MOUNTAIN NEWS, Apr. 24, 2008, available at <http://www.rockymountainnews.com/news/2008/apr/24/suit-filed-over-amendment-46/>.

(1) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. “Preferential treatment” means adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin.⁶⁵

This language, by using an identical first sentence to the ACRI measure, but then defining “preferential treatment” specifically and narrowly, succeeds in forcing supporters of the anti-equal opportunity measure to be much more specific about the kinds of programs their measure would outlaw. Given the role that confusion played in securing the initiative’s passage in California and Michigan, the hope was that this strategy might derail the ACRI Colorado effort.

Unfortunately, on September 3, 2008, the Colorado Secretary of State’s office announced that Initiative #82 had not garnered enough valid signatures to be on the November ballot.⁶⁶ The effort to get an alternative initiative on the ballot was hard-fought, in no small part because ACRI lawyers fought the alternative through each step of the administrative process, including in two different appeals to the Colorado Supreme Court. The delay that ACRI was able to create through this litigation put the alternative initiative in the precarious position of needing to collect more than 76,000 signatures in less than two months. Colorado opponents of the ACRI initiative are still evaluating whether next steps in the effort to oppose the measure will involve a lawsuit challenging the Secretary of State’s determination on the alternative.

V. Conclusion

The anti-affirmative action initiative being shopped around the country by the ACRI is a serious threat to the continued vitality of equal opportunity programs. This is certainly true in the specific states in which the initiative has passed or passes in the future. But the scope of the harm done by this effort reaches beyond these states’ borders in important ways.

First, even in states where the initiative does not pass, its introduction risks changing the tone and nature of the discussion about affirmative action. Media coverage of the anti-affirmative action initiative introduces simplistic statements about race and gender relations into public discourse. For example, Connerly himself recently wrote an op-ed arguing that Barack Obama’s candidacy for the presidency was proof that affirmative action was no longer needed.⁶⁷

⁶⁵ Initiative #82 also included subsections providing that: (2) Nothing in this section shall be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program and (3) Nothing in this section shall be interpreted as invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case. This initiative was actually the *second* effort by opponents of the Connerly initiative to put a counter-measure on the ballot. An earlier proposed counter-initiative was denied a title by the Title Board. The Board decision was appealed to the Colorado Supreme Court, which ultimately ordered a title set for the original counter-measure. By the time that decision came down, however, opponents of the Connerly initiative had decided to pursue Initiative #82 instead of the earlier proposed initiative.

⁶⁶ Kevin Flynn, *One Less Initiative on Hefty Colorado Ballot*, ROCKY MOUNTAIN NEWS, Sept. 3, 2008, available at <http://www.rockymountainnews.com/news/2008/sep/03/affirmative-action-protection-measure-falls-short/?partner=RSS>.

⁶⁷ Ward Connerly, *Obama and Dr. Livingston*, MONTECITO J., Feb. 1, 2007, <http://www.montecitojournal.net/archive/13/5/706/>.

This notion has been repeated in news magazines and other popular media venues,⁶⁸ with little attention paid to the difference between one man running for president and the tens of thousands of people of color denied opportunities every day because of the color of their skin. And on a recent television debate, the Colorado spokesperson for the anti-affirmative action initiative, Jessica Peck Corry, asserted as her parting shot that the very fact that she and I were on television debating demonstrated that women had “made it” and that gender-based equal opportunity efforts were now unnecessary.⁶⁹ Again, this rhetoric seeks to substitute the experiences of a very small group with the reality of the glass ceiling.

Second, in many judicial opinions discussing the anti-affirmative action initiative, the text and intent of that amendment is discussed in parallel with the language and purpose of the Equal Protection Clause and federal civil rights laws. Both the California Court of Appeals and that state’s Supreme Court, in decisions interpreting Proposition 209, intertwined equal protection principles with the language and analysis of Proposition 209.⁷⁰ Given the way precedent develops in American jurisprudence, the risk of merging the discussion of these two very different legal standards is that future opinions will increasingly blur the distinction, allowing the anti-opportunity philosophy of the ACRI initiative subtly to infect the jurisprudence of equal protection. While this concern may seem remote, the California Supreme Court’s first decision interpreting Proposition 209 offers a concrete example. In *Hi-Voltage Wireworks*, the court’s majority gave what it called an “extended perspective” on the history of legal thinking “as to the appropriate role of government concerning questions of race.”⁷¹ The several-page history incorporates the ACRI initiative as a logical step in the development of United States race law and accepts wholesale the reinterpretation of civil rights law put forward by anti-affirmative action advocates. By adopting this revisionist tale of our nation’s civil rights history, the courts risk a shift in the meaning and importance of these well-established rights.

Perhaps the most disconcerting development in the battle over equal opportunity this year has been the sense of inevitability that the ACRI initiative has been greeted with in many quarters. Citizens in states targeted by this effort are opposed to its objectives, but they have seen it pass now in both California and Michigan. Rather than fight back, making themselves the targets of ACRI’s litigation machine, some of those who will be most affected if the initiative passes are choosing to remain relatively silent, and to start planning now for the best way to mitigate the harm when it passes. It is too early for this surrender. Connerly and the ACRI announced in 2007 that they would target up to 10 states for November 2008 ballot initiatives. They ended up pursuing their agenda in only five, and they already have failed in three.⁷² This demonstrates that with concerted political and educational efforts, supporters of equal opportunity can prevail against this misleading and destructive campaign. It will require focus and a sense of urgency, but success is eminently possible – and well worth the effort.

⁶⁸ See, e.g. Bonnie Erbe, *Barack Obama's Election Would Kill Affirmative Action*, July 16, 2008, <http://www.usnews.com/blogs/erbe/2008/7/16/barack-obamas-election-would-kill-affirmative-action.html>.

⁶⁹ See *Your Show: Oil and gas industry and Amendment 46* (www.9news.com broadcast June 29, 2008), http://www.9news.com/yourshow/article_archive.aspx?storyid=94748&catid=363.

⁷⁰ *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 2001).

⁷¹ *Hi-Voltage Wire Works, Inc v. City of San Jose*, 12 P.3d 1068, 1072 (Cal. 2000).

⁷² See *supra* notes 59-62.