

Date of Hearing: April 22, 2025

ASSEMBLY COMMITTEE ON HIGHER EDUCATION
Mike Fong, Chair
ACA 7 (Jackson) – As Introduced February 13, 2025

[Note: This bill is double referred to the Assembly Judiciary Committee, where the Committee will hear it as it relates to the issues under its jurisdiction.]

SUBJECT: Government preferences

SUMMARY: Amends the California State Constitution, upon approval of the voters of California, to narrow the scope of the State’s prohibition in granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin to the areas of public employment, higher education enrollment, and public contracting. Specifically, **this Constitutional Amendment:**

- 1) Removes public education from the list of State operations which are prohibited from discriminating against or granting preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity, or national origin.
- 2) Adds “higher education enrollment” to the list of State operations which are prohibited from discriminating against or granting preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity, or national origin.
- 3) States the prohibition on discrimination and the granting of preferential treatment shall only apply to actions of the State after the section’s effective date and is limited to the areas of public employment, higher education enrollment, and public contracting.
- 4) Makes various technical and clarifying changes to the section of the California Constitution.

EXISTING LAW: *United States Constitution.*

- 1) Declares all people born or naturalized in the United States are citizens of the United States and are citizens of the state where they reside. Prohibits any state from making or enforcing any law that abridges the privileges or immunities of citizens of the United States. Prohibits any state from depriving any person of life, liberty, or property, without due process of law. Prohibits any state from denying any person within its jurisdiction the equal protection of the law (The United States Constitutions, Amendment 14, the Equal Protections Clause).

Federal law.

- 1) No person in the United States will, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except for specified circumstances including membership of fraternities and sororities (20 USC 1681-1688...Title IX).
- 2) Prohibits discrimination on the basis of race, color, or/and national origin in programs and activities receiving federal assistance (42 USC 2000d et seq...Title VI of the Civil Rights Act of 1964).

- 3) Prohibits discrimination in employment based on race, color, religion, sex or national origin and prohibits retaliation against employees who evoke their rights under Title VII of the Civil Rights Act of 1964 (42 USC 2000e...Title VII of the Civil Rights Act).

California State Constitution.

- 1) Prohibits the State, in the operation of public employment, public education, or public contracting, from discriminating against or granting preferential treatment to any individual or any group on the basis of race, sex, color, ethnicity, national origin. States the implementation is to comply with federal laws and the US Constitution and defines the “state” to include the public university system (including the University of California). Nothing in the aforementioned clause is to be interpreted as:
 - a) Prohibiting bona fide qualifications based on sex, which are reasonably necessary to the normal operation of public employment, public education, or public contracting;
 - b) 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;
 - c) Invalidating any court order or consent decree, which is in force as the effective date of the section (Section 31 of Article 1 of the California State Constitution...(Proposition 209)).

State law.

- 1) States no person is to be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or any other characteristic that is contained in the prohibition of hate crimes, as defined in subdivision (a) of Section 422.6 of the Penal Code, including immigration status. States the prohibition on the discrimination on the basis of the listed characteristics is extended to programs or activities conducted by any postsecondary education institution that receives or benefits from, state financial assistance or enrolls students who receive state financial aid (Education Code Section 66270).

FISCAL EFFECT: Unknown.

COMMENTS: *Purpose of the measure.* As described by the author, “ACA 7 seeks to provide clarity to existing legislation concerning Proposition 209, also known as Article I, Section 31 of the California Constitution. For too long, the provisions of this law have been subject to broad interpretation, leaving Californians without a clear understanding of its intended application. This measure introduces clarifying language and makes a modest adjustment to focus specifically on ‘higher education enrollment.’ These changes will help ensure a more accurate interpretation of the state constitution, allowing its provisions to be implemented as originally intended.”

Background on Proposition 209. After years of advocacy and urgency by national leaders, the Civil Rights Act of 1964 was enacted to outlaw segregation and prohibit discrimination on the

basis of race, color, religion, sex, national origin, disability, or age in various arenas of public life; including, but not limited to public education, public contracting, and public employment.¹ Heralded as the a first step in providing a free and equal society, the passing of the Civil Rights Act of 1964 was only one part of the Federal Government’s approach to guaranteeing equal treatment for every American. In addition to the passing of the landmark act, President Lyndon Johnson issued Executive Order 11246 requiring the federal government to take affirmative action to address previously discriminatory practices in the hiring and employing of marginalized individuals underrepresented in public employment.² Over the next few decades, Federal agencies and State governments introduced affirmative action policies to provide greater access to educational and employment opportunities for historically marginalized groups affected by systemic discrimination.³ The Civil Rights Act of 1964 may have provided the space for everyone to have access, but it was affirmative action, which provided the necessary supports to help make the access a reality. Affirmative action initiatives are “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.”⁴

Over the next few decades various court cases including Regents of University of California v. Bakke (1978) 438 U.S. 265, challenged the scope of affirmative action initiatives and the public discord became politically charged with many viewing affirmative action as “reverse discrimination.”³ In the wake of growing concern around the correlation between affirmative action and discrimination, the University of California (UC) Board of Regents passed the country’s first affirmative action ban in 1995, ending the practice of using race, religion, sex, color, ethnicity, or national origin as a criteria in admissions, contracting, and hiring practices at the UC.⁵ In the wake of the UC decision, California became the first state to place a proposition on the ballot to create a “prohibition against discrimination or preferential treatment by the state and other public entities.”⁶

According to the Legislative Analyst’s Office, Proposition 209 would “eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve ‘preferential treatment’ based on race, sex, color, ethnicity, or national origin.”⁵ In higher education, the proposition would impact a variety of assistance programs for students, faculty and staff that provided targeted assistance to individuals based on individuals. These targeted programs included specialized tutoring, financial aid, outreach, and counseling.⁵

Proponents of the proposition argued that, “the only honest and effective way to address inequality of opportunity is by making sure that all California children are provided with the tools to compete in our society. And then let them succeed on a fair, color-blind, race-blind, gender-blind basis. Let's not perpetuate the myth that "minorities" and women cannot compete

¹ <https://www.archives.gov/milestone-documents/civil-rights-act#:~:text=This%20act%2C%20signed%20into%20law,civil%20rights%20legislation%20since%20Reconstruction>

² <https://www.californialawreview.org/print/aa-ban-aftermath>

³ <https://www.ebsco.com/research-starters/politics-and-government/affirmative-action>

⁴ https://www.aaaed.org/aaaed/About_Affirmative_Action_Diversity_and_Inclusion.asp

⁵ <https://regents.universityofcalifornia.edu/governance/policies/4401.html>

⁶ https://lao.ca.gov/ballot/1996/prop209_11_1996.html

without special preferences. Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and zero tolerance for discrimination against, or, for any individual.”⁷

Opponents of the proposition argued, “Proposition 209 highjacks civil rights language and uses legal lingo to gut protections against discrimination. Proposition 209 says it eliminates quotas, but in fact, the U.S. Supreme Court already decided twice that they are illegal. Proposition 209's real purpose is to eliminate affirmative action equal opportunity programs for qualified women and minorities including tutoring, outreach, and mentoring.”⁸

In November 1996, Proposition 209 passed with a majority voting (54.55%) in favor of the constitutional amendment. In the intervening years, a myriad studies reported the outcomes Proposition 209 had on public contracting, public employment, and public education. In 2008, the Thelton E. Henderson Center for Social Justice published a report entitled, “Proposition 209 and Public Employment in California Trends in Workforce Diversity,” which determined:

“the State of California has provided employment opportunities for people of color and women of all races. However lingering and even increased disparity still exists, particularly for Latino Americans and women, and should be rectified.”⁹

Research on college admissions showed an almost immediate disproportionality in the admission of minority students to the UC.² However, it is unclear if this disparity can solely be attributed to the impact of Proposition 209 on admissions, as there is a “substantial difference in the share of high school students completing the college preparatory courses required for UC admission.”¹⁰

In January 2015, a study conducted by Equal Justice Society, found Proposition 209 resulted in an annual loss of \$1 billion in revenue for minority and women business enterprises due to the end of race-conscious contracting programs.¹¹

Since 1996, there have been four legislative attempts to either repeal or reduce the scope of Proposition 209 on public contracting, public education, and public employment. Of the four attempts only one has made it onto the ballot. In 2020, ACA 5 (Weber), Chapter 23, Statutes of 2020 or Proposition 16 sought to repeal the provisions of Proposition 209. Proposition 16 was heralded as an opportunity for California to reintroduce affirmative action which “level[s] the playing field by allowing policymakers to consider race and gender—without quotas—when making decisions about contracts, hiring and education to eliminate systemic discrimination and remedy past harm.”¹² Opponents to Proposition 16 maintained the rhetoric that the repeal of Proposition 209 was prejudicial by nature because, “only by treating everyone equally can a state

⁷ <https://vigarchive.sos.ca.gov/1996/general/pamphlet/209yesarg.htm>

⁸ <https://vigarchive.sos.ca.gov/1996/general/pamphlet/209yesrht.htm>

⁹ <https://www.law.berkeley.edu/wp-content/uploads/2016/07/Proposition-209-and-Public-Employment-Workforce-Diversity.pdf>

¹⁰ https://www.ppic.org/blog/affirmative-action-and-higher-education-in-california/?utm_source=rss&utm_medium=rss&utm_campaign=affirmative-action-and-higher-education-in-california?utm_source=ppic&utm_medium=email&utm_campaign=blog_subscriber

¹¹ <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf>

¹² <https://law.pacific.edu/sites/default/files/users/user242/proposition-16-cir20.pdf>

as brilliantly diverse as California be fair to everyone.”¹³ Proposition 16 failed with the majority of Californians voting to uphold the existing ban on discrimination and preferential treatment in State operations of public employment, public contracting, and public education.

ACA 7 implications on public education. ACA 7 (Jackson) would provide an opportunity for voters to re-examine the scope of Proposition 209 and to align the California Constitutional Article with a recent U.S. Supreme Court decision for collegiate admissions. In 2023, the U.S. Supreme Court determined the admissions programs at Harvard College and the University of North Carolina violated the equal protections clause of the 14th Amendment of the U.S. Constitution when colleges considered race as a criteria in admission decisions.¹⁴ The decision effectively ended affirmative action in admissions across the United States; except for in California, where Proposition 209 already prohibited the public university system from using race as a criteria for admissions.

Currently, Proposition 209 applies to more than just admissions and enrollment in higher education. The prohibition on discriminatory practices and preferential treatment based on race, sex, color, ethnicity, or national origin includes every aspect of higher education operations funded by the State. Since the enactment of Proposition 209, public higher education institutions have sought to comply while also providing for a diverse student population through the creation of diversity, equity, and inclusion programs. Examples of diversity, equity, and inclusion program programs created to encourage a diverse student population include: Umoja, Puente, the Asian American, Native Hawaiian, and Pacific Islander Student Achievement Program, and the Native American Student Support and Success Program. Each of these programs receive state funds and provide additional supports to marginalized student groups; however, these programs are not perceived as violating Proposition 209 as the programs are not exclusionary in who they support. Additionally, admission officers at the California State University (CSU) and UC have also practiced applying diversity, equity, and inclusionary practices to admissions in order to avoid Proposition 209 violations. Both university systems have adopted a holistic approach, which considers the applicants full history taking into account systemic barriers a student may have encountered and overcome.

ACA 7 (Jackson) removes public education from the list of State operations expressly prohibited by the California Constitution from discriminating against or providing preferential treatment based on certain characteristics; however, it would not remove the legal obligation for public education entities to comply with State and Federal Civil Rights Laws. Proposition 209 is not an isolated law in its prohibition against discriminatory practices. Even if, ACA 7 (Jackson) were to pass the Legislature and the voters of California were to affirm the language, the measure would not result in discriminatory practices or preferential treatment for individuals based on race, sex, gender, ethnicity, or national origin in the operations of public education. Nor would the measure result in the return of affirmative action programs to K-12 local education agencies or public higher education agencies.

¹³ <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>

¹⁴ <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/>

By removing the term “public education” from Proposition 209, ACA 7 (Jackson) may have the unintended consequence of removing all the existing diversity, equity, and inclusion programs currently offered in California public education system. On February 14, 2025, the United States Department of Education Office for Civil Rights issued a “Dear Colleague Letter” stating the following:

“Relying on non-racial information as a proxy for race, and making decisions based on that information, violates the law. That is true whether the proxies are used to grant preferences on an individual basis or a systematic one. It would, for instance, be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity.

Other programs discriminate in less direct, but equally insidious, ways. DEI programs, for example, frequently preference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not. Such programs stigmatize students who belong to particular racial groups based on crude racial stereotypes. Consequently, they deny students the ability to participate fully in the life of a school.

The Department will no longer tolerate the overt and covert racial discrimination that has become widespread in this Nation’s educational institutions. The law is clear: treating students differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal under controlling Supreme Court precedent.

All students are entitled to a school environment free from discrimination. The Department is committed to ensuring those principles are a reality.”

As the Federal Administration continues to conflate diversity, equity, and inclusion with discrimination, it is possible by removing “public education” from Proposition 209, ACA 7 (Jackson) would remove a legal defense used by public education institutions in California to ward off attacks from the Federal Administration. When the “Dear Colleague Letter” was issued the UC provided the following statement to the Los Angeles Times, “the letter ‘provides guidance on the department’s interpretation of existing anti-discrimination laws and does not name any specific institution,’ the statement said. ‘It indicates how OCR [Office of Civil Rights] intends to enforce these legal requirements. Given the UC’s compliance with Proposition 209, we do not use race-based preferences in our practices.’”¹⁵ Given this understanding from the UC, it is possible even with the removal of “public education” from Proposition 209, the state public education system would continue to act as if it was in place.

Committee staff note there are currently three California public higher education institutions under investigation by the U.S. Department of Education for violating their interpretation of Title VI, pursuant to the Dear Colleague Letter. At the time of the publication of this analysis,

¹⁵ <https://www.latimes.com/california/story/2025-02-17/education-department-will-cut-funding-unless-schools-abolish-dei>

*there were no additional details regarding the investigations beyond the press release announcing the investigations.*¹⁶

Arguments in support. As stated by EdTrust – West, “this measure would amend the California constitution to permit use of race in public education policy, excluding higher education enrollment. As explained in our recent publication “Black Minds Matter,” (Black Minds Matter: Building Bright Black Futures) research and data on public education show significant racial disparities in opportunity and achievement. In many cases, these disparities are rooted in race. ACA 7 recognizes this and would permit targeted, research-based interventions that improve educational outcomes. Without ACA 7, we’ll continue to struggle to close opportunity and achievement gaps as no effective proxy for race has been found to target educational interventions and resources.”

Arguments in opposition. As stated by the Pacific Legal Foundation, “While ACA 7 preserves the prohibition on discrimination in higher education enrollment, it will permit the government to discriminate in all aspects of K-12 education and all other aspects pertaining to colleges and universities. This uneven and inconsistent preservation of equality and opportunity fails to fully live up to the guarantee of the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Adherence to the Fourteenth Amendment mandates that ‘[e]liminating racial discrimination means eliminating all of it.’ It is thus insufficient under our constitution that government cannot discriminate in higher education enrollment but can discriminate everywhere else. Opposing ACA 7 will uphold the promise of equality that Proposition 209 protects. Since the passage of Proposition 209, Californians have consistently given strong support to the constitutional prohibition on racial preferences and discrimination. In 2020, Californians defeated Proposition 16 in a landslide, rejecting an amendment to repeal Proposition 209. And in 2024, an attempt to permit broad exceptions to Proposition 209 was unsuccessful when the Legislature failed to pass ACA 7.”

Moving forward comment. Currently, ACA 7 (Jackson) changes the provision of the California Constitution to address the higher education operation of enrollment. Technically, enrollment is after a student is admitted to a college or university and begins to select courses for “enrollment” in a specific field of study. Admission is the process of being “admitted” to a college, university, or specified program.

Given the author’s intent to have the measure reflect the original intention of the original proposition, the author may wish to amend the language to include “higher education admissions and enrollment.”

REGISTERED SUPPORT / OPPOSITION:

Support

The Education Trust - West

¹⁶ <https://www.ed.gov/about/news/press-release/office-civil-rights-initiates-title-vi-investigations-institutions-of-higher-education-0>

Oppose

Californians for Equal Rights Foundation
Pacific Legal Foundation

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