

CANNABIS SOCIAL EQUITY:  
AN OPPORTUNITY FOR THE REVIVAL OF AFFIRMATIVE ACTION  
IN CALIFORNIA

REBECCA BROWN

INTRODUCTION

In her dissent in *Fisher v. University of Texas at Austin*, Justice Ginsberg discussed the irony of the Court insisting on the usage of race neutral means to achieve race conscious goals: “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious . . . the vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.’ . . . It is race consciousness, not blindness to race, that drives such plans.”<sup>1</sup> Ginsberg’s constant frustration at the Supreme Court’s requisite of race neutral methods in a society that is far from race neutral reflects the tension surrounding California’s Proposition 209, both in jurisprudence and legislation.<sup>2</sup>

Proposition 209, which was passed through a ballot measure entitled the California Civil Rights Initiative in 1996, states 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

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<sup>1</sup> *Fisher v. U. of Texas at Austin*, 570 U.S. 297, 335 (2013) (Ginsberg, R., dissenting).

<sup>2</sup> *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

operation of public employment, public education, or public contracting.”<sup>3</sup> This means that in the state of California, any such discrimination or preferential treatment is illegal, regardless of whether it could be justified under strict scrutiny. Proposition 209 forces governmental institutions and agencies to facially act as though race were irrelevant or non-existent in administering programs with a specific racially anticipated outcome to an even more severe extreme than the federal standard of strict scrutiny for racial classifications. This creates a confusing terrain that must be navigated for any hopes of enacting race-conscious remedies in California.<sup>4</sup>

In the twenty years since the implementation of Proposition 209, the California state court has shifted toward relaxing the legal constraints on race-conscious affirmative action while still leaving many details of Proposition 209 unclear.<sup>5</sup> Against this legal backdrop, eight California cities and one county have presented the opportunity for further define and narrow Prop 209

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<sup>3</sup> CAL. CONST. art. 1 § 31.

<sup>4</sup> It is interesting to note that some anti-affirmative action advocates too are frustrated with the Supreme Court’s call for race-neutral alternatives. See Michael Rosman, *The Quixotic Search for Race-Neutral Alternatives*, 47 U. MICH. J. L. REFORM 885 (2014). Rosman echoes Ginsberg’s frustration with using race-neutral means to achieve race-conscious goals. Although Rosman is conservative and against race-based affirmative action, it is interesting that he still agrees with this rather liberal perspective. Rosman ultimately argues that while race-conscious means are the most effective for reaching race-conscious goals, we should not be striving towards race-conscious goals in the first place. This article shows that not just pro-affirmative action legal scholars are frustrated by the charade of pursuing race-neutral systems when race is the driving force behind them.

<sup>5</sup> See *Connerly v. State Personnel Board*, 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 2001); *American Civil Rights Foundation v. Berkeley Unified School Dist.*, 90 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009) [hereinafter ACRF].

with the development of cannabis social equity programs.<sup>6</sup> The first of their kind in the country, these programs all aim “to promote equitable business ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities and address the disproportionate impacts of the war on drugs in those communities.”<sup>7</sup> While the language of these programs does not explicitly mention race, there is a clear correlation between the targeted communities of the social equity programs and race due to the racially disparate impact of the War on Drugs.<sup>8</sup> Considering that here in California, residents officially consume 2.5 million pounds of marijuana annually and produce more than 13 million pounds, and that the state’s cannabis industry is already valued at a projected \$7 billion, these programs have the potential to make a significant financial impact.<sup>9</sup>

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<sup>6</sup> *Local Equity Information*, BUREAU OF CANNABIS CONTROL [https://www.bcc.ca.gov/licensees/local\\_equity.html](https://www.bcc.ca.gov/licensees/local_equity.html) (last visited Nov. 11, 2019).

<sup>7</sup> Oakland, Cal., Ordinance No. 13425, § 2 (2017).

<sup>8</sup> Arwa Mahdawi, *America’s Lucrative New Weed Industry Should Compensate the Black Victims of the Country’s War on Drugs*, THE GUARDIAN, (Aug. 27, 2017 8:00 PM), <https://www.theguardian.com/commentisfree/2017/aug/27/americas-lucrative-new-weed-industry-should-compensate-the-black-victims-of-the-countrys-war-on-drugs>.

<sup>9</sup> Donnell Alexander, *Golden State Green Rush: Is Cannabis Equity Reparations for the War on Drugs?*, CAPITAL & MAIN (Apr. 18, 2018), <https://capitalandmain.com/golden-state-green-rush-is-cannabis-equity-reparations-for-the-war-on-drugs-0418>; Matt Ferner, *California’s Marijuana Legalization Aims to Repair Damage from the War on Drugs*, HUFFINGTON POST (Jan. 2, 2018), [https://www.huffingtonpost.com/entry/california-marijuana-legalization-war-on-drugs\\_us\\_5a3c1303e4b025f99e15b738](https://www.huffingtonpost.com/entry/california-marijuana-legalization-war-on-drugs_us_5a3c1303e4b025f99e15b738). The illegal market is estimated to be nearly five times larger than the legal marketplace. See Alexander, *supra* note 9.

Due to the recent nature of the legalization of recreational marijuana in California and the development and roll out of the California social equity programs, only minimal existing legal scholarship addresses these topics.<sup>10</sup> Recent scholarship focuses primarily on racially disparate access to participation in the legal cannabis market due to factors such as criminal background restrictions,<sup>11</sup> access to capital,<sup>12</sup> and zoning laws.<sup>13</sup> This literature does not explore in depth the role of social equity programs in this discourse, with one article stating that “Whether [social equity] programs . . . will be enough to balance the equities will be an open question for several years.”<sup>14</sup>

In *The Colors of Cannabis: Race and Marijuana*, Steven W. Bender examines the history of racialization of cannabis prohibition and regulation in the United States.<sup>15</sup> He argues that “despite that legalization, marijuana usage continues to disproportionately impose serious consequences on racial minorities, while white entrepreneurs and white users enjoy the early fruits

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<sup>10</sup> In November of 2016, voters approved Proposition 64, or the Control, Regulate and Tax Adult Use of Marijuana Act, in 2016, which legalized recreational marijuana use. Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64 (Cal. 2016).

<sup>11</sup> Maya Rahwanji, “Hash”ing Out Inequality in the Legal Recreational Cannabis Industry, 39 NW. J. INT’L L. & BUS. 333 (2019).

<sup>12</sup> Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789 (2019).

<sup>13</sup> Alexis Holmes, *Zoning, Race, and Marijuana: The Unintended Consequences of Proposition 64*, 23 LEWIS & CLARK L. REV. 939 (2019).

<sup>14</sup> Vitiello, *supra* note 12, at 820.

<sup>15</sup> Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016).

of legalization.”<sup>16</sup> In conjunction with supporting widespread legalization of cannabis, Bender advocates for expungement of past marijuana possession convictions and further criminal justice reforms to begin to truly address the devastating impact cannabis enforcement has had on minority communities.<sup>17</sup>

In his follow-up piece *The Colors of Cannabis: Reflections on the Racial Justice Implications of California’s Proposition 64*, Bender discusses the racial implications and initiatives surrounding Proposition in 64 in California.<sup>18</sup> Bender applauds California’s “conscious influence” of racial justice “in the designing and ongoing implementation of drug reforms.”<sup>19</sup> California is the first state to successfully campaign for the legalization of recreational marijuana as a racial justice issue.<sup>20</sup> Proposition 64 includes various measures rooted in racial justice and aimed at redressing the impact of the War on Drugs, including reducing penalties for minors, expunging past

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<sup>16</sup> *Id.* at 690.

<sup>17</sup> *Id.* at 705.

<sup>18</sup> Steven W. Bender, *The Colors of Cannabis: Reflections on the Racial Justice Implications of California’s Proposition 64*, 50 U.C. DAVIS L. REV. ONLINE 11 (2018).

<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 15. Legalization campaigns in Washington and Colorado did not mention race or the racial justice argument for the legalization of marijuana, but instead focused on economic and health arguments for legalization. *Id.* Advocates in other states were advised to not bring race into the legalization discussion as policy strategists feared it would weaken their arguments and legitimacy. *Id.* In California, many advocates of the Act argued that it was “necessary to help undo and repair the mass incarceration of people of color.” *Id.* Such advocates included NAACP, ACLU, Drug Policy Alliance, Jay Z, Lt. Governor Gavin Newsom. *Id.* While citing congestion of the court system with non-violent drug offenses and promotion of violent drug cartels and gangs, Proposition 64 does not directly list the racialized history of marijuana enforcement in California as a policy explanation. Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64 (Cal. 2016).

marijuana convictions, and creating community reinvestment funds from marijuana revenue.<sup>21</sup> Bender concludes that “California will serve as the largest U.S. laboratory of marijuana legalization for adults, and its racial justice effects bear watching in the years to come.”<sup>22</sup> This Article will build on Bender’s foundation and continue the discussion of the racial justice implications of Proposition 64, focusing specifically on the cannabis social equity programs.

This Article will explore the legal implications of the cannabis social equity programs, with a focus on the Oakland and Los Angeles programs, in relation to Proposition 209.<sup>23</sup> The first part outlines the rather limited jurisprudence of Proposition 209. It first analyzes *Hi-Voltage Wire Works v. City of San Jose*, where the California Supreme Court enthusiastically endorsed Prop 209 and interpreted the constitutional amendment broadly.<sup>24</sup> It then engages two subsequent cases to examine how the court’s interpretation of Proposition 209 has shifted as its reach is narrowed. It also

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<sup>21</sup> Bender, *supra* note 18, at 17-19. Penalties for marijuana convictions for minors were dramatically reduced to eliminate the possibility of incarceration, which reduces the exposure of children to the school to prison pipeline, which disproportionately targets and criminalizes low-income students of color. *Id.* at 17. The community reinvestment fund, which is comprised of legal marijuana tax revenue, is to be used to fund community based nonprofit organizations in communities most impacted by the War on Drugs. *Id.* at 19.

<sup>22</sup> *Id.* at 23.

<sup>23</sup> While cannabis social equity programs have been developed in Oakland, Los Angeles, San Francisco, Sacramento, and Long Beach, the later three programs have not yet been rolled out. *See supra* note 6.

<sup>24</sup> *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

discusses the existing ambiguities surrounding Proposition 209 and its interpretation.

Part two examines the cannabis social equity programs that currently exist in Oakland and Los Angeles and their implications for the evolving Proposition 209. Following an introduction of the Oakland and Los Angeles programs, it compares the two cannabis social equity programs to assess their legal viability under the amendment. This analysis will also shed light on the challenging and particular nature of legislating in the shadow of Prop 209. It then examines how a legal challenge of the cannabis social equity programs can in fact challenge the *Hi-Voltage* reading of Proposition 209 and continue to narrow its reach to create a legal carve out for limited race conscious remediation. Furthermore, an analysis of the programs and Proposition 209 will yield interesting implications for race neutral governmental programs with disparate racial impacts. This analysis will build the foundation for future research and analysis regarding the development of effective and legally sound cannabis social equity programs across the country as well as other forms of race conscious remediation within the context of criminal justice reform.

## I. THE EVOLUTION OF PROPOSITION 209

Affirmative action has consistently been a controversial topic in American jurisprudence.<sup>25</sup> The current federal standard of review for race-based affirmative action programs is strict scrutiny, meaning that a compelling governmental interest must exist and the program must be narrowly tailored to achieve this purpose.<sup>26</sup> With the passage of Proposition 209 in 1996, California voters further limited affirmative action programs.<sup>27</sup> Under Proposition 209, “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.”<sup>28</sup> This means that in the state of California, any such discrimination or preferential treatment is illegal, regardless of whether it could be justified under strict scrutiny.<sup>29</sup> Proposition

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<sup>25</sup> Erwin Chemerinsky, *Guidelines for Affirmative Action Programs After Proposition 209*, 24-FEB L.A. Law. 16 (2002). For example, Harvard University recently prevailed in a high-profile law suit challenging its admission policy for considering race too heavily. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 2019 WL 4786210 (D. Mass.). Since its ruling in *Brown v. Board of Education*, the Supreme Court has been grappling with constitutionality of affirmative action. 347 U.S. 483 (1954); *see e.g.*, *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Fisher v. U. of Texas at Austin*, 136 S. Ct. 2198 (2016).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> CAL. CONST. art. 1 § 31.

<sup>29</sup> On the federal level, the Supreme Court has ruled that discrimination or preference can be proven through either facial classification by gender or race, or by proof of both discriminatory intent and discriminatory effect for facially neutral laws. *Washington v. Davis*, 426 U.S. 229 (1976).



209 “makes it difficult for state or local governments to engage in affirmative action.”<sup>30</sup>

Proposition 209 withstanding, California governments may utilize race- or gender-based affirmative action if strict scrutiny is satisfied, and it is necessary to conform with federal law.<sup>31</sup> Title VI of the 1964 Civil Rights Act prohibits recipients of federal funds from engaging in practices that have racially discriminatory impacts.<sup>32</sup> Therefore, California state and local governments cannot operate programs that have racially disparate effects against minorities, and are required by law to take remedial actions if such an effect exists.<sup>33</sup>

In 2000, *Hi-Voltage Wire Works, Inc. v. City of San Jose* marked a critical decision in Proposition 209 jurisprudence.<sup>34</sup> The suit against San Jose protested a city contracting policy that required bidding companies to include a minimum number of minority-owned business or women-owned business

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<sup>30</sup> Chemerinsky, *supra* note 25.

<sup>31</sup> *Adarand Constructors, Inc. v. Peña*, 438 U.S. 265 (1978); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (holding that a University of California laboratory school could consider race in its admissions process to satisfy the compelling state interest of diversity and fulfill its mission as laboratory school).

<sup>32</sup> Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (1964); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>33</sup> 42 U.S.C. § 2000d; *Alexander*, 532 U.S. 275.

<sup>34</sup> *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000); Chemerinsky, *supra* note 25. Scholars are critical of the *Hi-Voltage* decision as the court goes beyond the scope of the question at hand to admonish race-based affirmative actions and criticize the Supreme Court’s continued holding of the legality of some affirmative action programs. Navid Soleymania, *Hi-Voltage Wire Works, Inc. v. City of San Jose: The California Supreme Court Bans Minority Outreach Programs Under Proposition 209*, 74 S. CAL. L. REV. 913 (2001).

in their bids as subcontractors, or have at least made substantial efforts to contact minority- and women-owned businesses.<sup>35</sup> Although Chemerinsky argues that “there is a strong argument that targeted outreach should not be seen as violating Proposition 209, because it does not discriminate or give a preference in that award of contracts,” the California Supreme Court found otherwise.<sup>36</sup>

The court looked to the Webster’s New World Dictionary definitions to define discrimination as “to make distinctions in treatment; show partiality (in favor of) or prejudice (against) and preferential as “giving ‘preference’ which is ‘a giving of priority or advantage to one person . . . over others.’”<sup>37</sup> It found that the city program both granted preferential treatment to minority business enterprises and women business enterprises and discriminated against non-minority or women business enterprises.<sup>38</sup> The court effectively prohibited any state classification of individuals by race or gender: “the participation component authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least race- and sex-conscious

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<sup>35</sup> *Hi-Voltage*, 12 P.3d 1068.

<sup>36</sup> *Hi-Voltage*, 12 P.3d 1068. Chemerinsky, *supra* note 25.

<sup>37</sup> *Hi-Voltage*, 12 P.3d at 1082.

<sup>38</sup> *Id.* See Neil Gotanda et al., *Legal Implications of Proposition 209- The California Civil Rights Initiative*, 24 W. ST. U. L. REV. 1 (1996) for a discussion in depth about the potential avenues for application of the constitutional amendment following its implementation (before any substantive legal ruling had been published). Gotanda questions how preferential treatment will be defined and treated in comparison to discrimination, and believes that they are two distinct actions. *Id.* Gotanda criticizes the common understanding approach that the Hi-Voltage court uses as inadequate. *Id.* at 27.

numerical goals. A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains ‘a line drawn on the basis of race and ethnic status’ as well as sex.”<sup>39</sup>

While the court held that targeted outreach to racial or ethnic minorities and women is illegal, broad-based outreach directed at minorities is not prohibited as long as it is also directed at non-minorities.<sup>40</sup> For example, a city government can advertise for jobs in newspapers in predominately minority communities, as long as it advertises in other newspapers as well.<sup>41</sup>

In her opinion, then-California Supreme Court Justice Brown outlined the history of Fourteenth Amendment and Civil Rights Act of 1964 jurisprudence in federal court and on the California state level, starting from *Dred Scott* to present day.<sup>42</sup> Justice Brown emphasized the importance of Harlan’s famous dissent in *Plessy* and his call for a color-blind approach to constitutional law.<sup>43</sup> She applauded cases that found Title VII created “an ‘obligation not to discriminate against whites,’” and heavily criticized holdings that stated that prohibiting all race-conscious affirmative action would be contradictory to the legislative intent of the Civil Rights Act of 1964

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<sup>39</sup> *Hi-Voltage*, 12 P.3d at 1084.

<sup>40</sup> *Id.*

<sup>41</sup> Chemerinsky, *supra* note 25.

<sup>42</sup> *Hi-Voltage*, 12 P.3d at 1072-81.

<sup>43</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

and the Fourteenth Amendment.<sup>44</sup> Justice Brown articulated that Proposition 209 was a necessary antidote to federal and state case law that has shifted “focus from protection of equal opportunity for all individual to entitlement based on group representation” because it only allows for “color-blind, race-blind, gender-blind” governmental policies and practices.<sup>45</sup>

As the court equated the two, it failed to acknowledge the primary distinction between affirmative action and racially discriminatory policies: “the latter were designed to subjugate minorities or to restrict their participation in civil life, whereas the former was designed to remedy years of discrimination.”<sup>46</sup> *Hi-Voltage* lay the foundation for a broad interpretation of Proposition 209. Beyond its specific ruling on targeted outreach, Justice Brown held that Proposition 209 should prohibit any governmental programs that could have a detrimental impact on whites. The court repudiated any program that attempts to remedy racial disparities, societal racial discrimination, or anything less than clearly identifiable intentional discrimination by the city.<sup>47</sup> Overall, any reliance on the listed classifications is prohibited.<sup>48</sup>

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<sup>44</sup> *Hi-Voltage*, 12 P.3d at 1075-78, discussing *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273, 280 (1976) and discussing *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

<sup>45</sup> *Hi-Voltage*, 12 P.3d at 1079, 1083.

<sup>46</sup> *Soleymania*, *supra* note 34, at 919.

<sup>47</sup> *Hi-Voltage*, 12 P.3d at 1087.

<sup>48</sup> For an in-depth critique of *Hi-Voltage*, including the Court’s interpretation of Fourteenth Amendment and Civil Rights Act of 1964 jurisprudence *see Soleymania*, *supra* note 34, at 922.

In the year following *Hi-Voltage*, the California Court of Appeal again examined the affirmative action parameters dictated by Proposition 209 in *Connerly v. State Personnel Board*.<sup>49</sup> *Connerly* challenged the legality under Proposition 209 of five state codes that pertained to state agency contracting, public employment, and public education because they had set minority and women participation goals or required practices that would facilitate and encourage minority and women participation.<sup>50</sup> Drawing heavily from *Hi-Voltage*, the *Connerly* court held that race- and gender-based goals in public entities are impermissible under 209.<sup>51</sup>

The *Connerly* court departed from the ardent colorblind approach of the *Hi-Voltage* court. The court stated that racial discrimination is not “a thing of the past which need not concern governmental entities. Governmental entities remain under a duty to eliminate the vestiges of segregation and discrimination.”<sup>52</sup> This obligation led the court to hold that the collection and reporting of data about race and gender by governmental agencies is legally permissible, as this information is needed to monitor occurrences of segregation and discrimination.<sup>53</sup>

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<sup>49</sup> *Connerly v. State Personnel Board*, 112 Cal. Rptr. 2d 5, 5 (Cal. Ct. App. 2001).

<sup>50</sup> *Id.* at 28, 32, 33.

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.* at 30.

<sup>53</sup> *Id.* at 28.

The court continued to say that “All of the justices agree that government entities may use race- and gender-neutral methods of fostering equal opportunity and that, in some instances, even race and gender specific remedies may be employed.”<sup>54</sup> In this subtle narrowing of the scope of Proposition 209, the *Connerly* court seemed to designation legal challenges to racial classifications to the Equal Protection Clause and legal challenges to discriminatory and preferential treatment to 209.<sup>55</sup> This marks a clear departure from the foundation laid by *Hi-Voltage*.

The California Court of Appeal continued its departure from the overly broad *Hi-Voltage* reading of Proposition 209 in 2008. In *American Civil Rights Foundation v. Berkeley Unified School District*, the court ruled that the defendant school district’s use of neighborhood demographic data, which included data on race, to assign students to schools and other academic programing was legal under Proposition 209.<sup>56</sup> This particular program, which was designed to achieve “socioeconomic and racial diversity,” did not explicitly use racial classifications, but took into account the neighborhoods’ average household income, education level of adult residents, and racial

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<sup>54</sup> *Id.* at 47.

<sup>55</sup> *Id.* at 46. “If the statutory scheme relies upon race or gender classifications, it must, for equal protection analysis, be subjected to strict judicial scrutiny. And if it discriminates against or grants preference to individuals or groups based upon race or gender, it is prohibited by Proposition 209.” *Id.*

<sup>56</sup> ACRF, 90 Cal. Rptr. 3d 789, 789 (Cal. Ct. App. 2009).

composition as a whole.<sup>57</sup> Every student in a neighborhood received the same placement, regardless of race.<sup>58</sup> The court did acknowledge that “the race of an individual student may be included within this composite diversity rating (along with the race of all students in the neighborhood).”<sup>59</sup>

Furthermore, through analysis of its original intent via analysis of voter intent and ballot materials, the court found that Proposition 209 was “not intended to preclude all consideration of race by government entities,” as argued by the petitioner, but only to prohibit discrimination against or preferential treatment.<sup>60</sup> This reiterates the *Connerly* distinction between racial classifications and the jurisdiction of Proposition 209.

This is the first time the court has allowed racial classifications to play any role in governmental decision making, surely to Justice Brown’s dismay. Furthermore, the court articulated a specific goal, which, in the pursuit of, race may be a consideration. This is directly contrary to *Hi-Voltage*.<sup>61</sup> This shift in reasoning suggests an acknowledgement of the difference between racially discriminatory treatment derived from racial animus and the

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<sup>57</sup> *Id.* at 793.

<sup>58</sup> *Id.* at 792.

<sup>59</sup> *Id.* at 798.

<sup>60</sup> *Id.* at 800. The California Court of Appeals looked beyond the text of the statute to find support for the limitation of its scope. *Id.*

<sup>61</sup> “Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no ‘compelling state interest’ exception; we find nothing to suggest the voters intended to include one sub silentio.” *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087 (Cal. 2000).

preservation of the racial hierarchy and affirmative action programs aimed at remedying the effects of the former.

The American Civil Rights Foundation presented the court with its first opportunity to consider the legality of a proxy for race under Proposition 209.<sup>62</sup> The Foundation argues that the school district “uses the diversity rating as a veiled substitute for a student’s race” because students from neighborhoods in a certain diversity category are more likely to be students of color.<sup>63</sup> However, a useful analysis of the legality of proxies for race is curtailed because this claim of correlation is found to be incorrect.<sup>64</sup> In fact, the court explicitly refuses to engage in such a discourse: “While it is conceivable, as the School District concedes, that some neighborhoods are so racially segregated that using demographic data could potentially serve as a proxy for a student’s race, that hypothetical possibility cannot sustain ACRF’s facial challenge to the constitutional validity of the district’s student assignment policy.”<sup>65</sup>

While it is unclear what the court intended to imply by acknowledging the possibility that neighborhood diversity scores could be serving as a proxy for race but refusing to address it fully, it does not explicitly hold that

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<sup>62</sup> ACRF, 90 Cal. Rptr. 3d 789, 798-99 (Cal. Ct. App. 2009). There has not been another such question before the California courts since.

<sup>63</sup> *Id.* at 798.

<sup>64</sup> *Id.* at 798-99.

<sup>65</sup> *Id.*



qualifications or characteristics serving as proxies for race is illegal. This can be viewed as a strategic decision to prevent setting a precedent that would ban any and programs with a strong racial correlation. In his 2002 work analyzing the implications of Proposition 209 on affirmative action in California, legal scholar Chemerinsky argues that “to exclude from consideration those experiences that are predominately based on race or gender would in itself violate Proposition 209.”<sup>66</sup> He states that prohibiting a government entity from “using any factor that is disproportionately experienced by a particular racial or gender group would be to discriminate against experiences based on race or gender.”<sup>67</sup> This grey area presents a unique opportunity for such programs and future litigation to protect them.

In fact, the court says its role is to not apply policy to a particular circumstance, but to assess its constitutionality as a whole.<sup>68</sup> This is an interesting approach as affirmative action programs have been challenged historically on the federal and state level through an individual perspective.<sup>69</sup>

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<sup>66</sup> Chemerinsky, *supra* note 25. Chemerinsky questions the legality of governmental decision makers using criteria that strongly correlates with race or gender, without explicitly using race or gender as a decision-making factor. *Id.* Using the Supreme Court’s ruling in *Personnel Administrator of Massachusetts v. Feeney*, he highlights that a state employment criteria that was 98% male, was not found to be gender discrimination because there was no intent to disadvantage women. *Id.* (discussing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979)). In this case, the Court stated that “‘Discriminatory purpose’ . . . implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” Chemerinsky, *supra* note 25 (discussing *Feeney*, 442 U.S. 256).

<sup>67</sup> Chemerinsky, *supra* note 25.

<sup>68</sup> ACRF, 90 Cal. Rptr. 3d 789, 799 (Cal. Ct. App. 2009).

<sup>69</sup> *See e.g.*, *Fisher v. U. of Texas at Austin*, 570 U.S. 297 (2013); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

The court applies a high standard: “petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with . . . section 31.”<sup>70</sup> The standard of total and fatal conflict is a limiting of the power and scope of Proposition 209. It suggests that any programs that may lie in a grey area be considered legally permissible.<sup>71</sup>

The above discussed case law reflects this odd nature of legislating and litigating race with a forced veil of colorblindness. To attract racially diverse businesses, employees, or students, a governmental entity cannot set specific goals nor can it advertise or conduct outreach to those specific groups it hopes to attract.<sup>72</sup> It can however advertise to all racial groups through specific means, hoping that enough people from the desired group will respond to achieve racial diversity.<sup>73</sup> Governmental agencies can also pursue the goal of racial diversity through utilizing racial demographic data of neighborhoods, so long as the race of individuals is not considered.<sup>74</sup> Using group or location racial data to make programmatic decisions, including the assigning of school districts, is not considered discrimination or preferential treatment.<sup>75</sup>

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<sup>70</sup> *ACRF*, 90 Cal. Rptr. 3d at 799.

<sup>71</sup> This shift towards limiting the scope of Proposition 209 and hesitation to fully embrace is an interesting contrast to the sentiment of the court in *Hi-Voltage*. See *Soleymania*, *supra* note 30.

<sup>72</sup> *Hi-Voltage*, 12 P.3d 1068; *Connerly v. State Personnel Board*, 112 Cal. Rptr. 2d 5 (Cal. Ct. App. 2001).

<sup>73</sup> *Hi-Voltage*, 12 P.3d at 1085.

<sup>74</sup> *ACRF*, 90 Cal. Rptr. 3d at 792.

<sup>75</sup> *Id.*

Another critical grey area exists in contemporary Proposition 209 case law- the lack of an intent/impact standard to determine violations of the amendment.<sup>76</sup> Existing cases have shown that a violation of Prop 209 can be found from just intent, but the court has not ruled whether disparate impact alone would establish a violation.<sup>77</sup> Critical race scholar Neil Gotanda theorized that a disparate beneficial impact upon a Proposition 209 listed category, including race and ethnicity, may be prohibited by the amendment.<sup>78</sup> In his analysis, which hinges on labeling preferential treatment a distinct cause of action from discrimination, Gotanda uses the example of an income- and neighborhood-based affirmative action system that especially benefits one racial or ethnic group “whose average income level was low or who lived predominantly within the chosen geographical area.”<sup>79</sup>

While Gotanda’s work was written in 1996, before the California state courts had the opportunity to rule on any Proposition 209 claims, it is important to note that the closest the court has come to proving or disproving

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<sup>76</sup> The question of an intent/impact standard has evolved over the years of federal anti-discrimination jurisprudence. Following the Supreme Court’s ruling in *Washington v. Davis*, the plaintiff has the burden of proof of establishing a disparate impact and discriminatory intent to establish a racial discrimination claim. *Washington v. Davis* 426 U.S. 229, 240-41 (1976). This standard makes it exceedingly difficult for plaintiffs to successfully establish such claims and disregards the impact of complex history of racial subordination, institutional racism, and implicit bias. See Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law*, 62 MINN. L. REV. 1049 (1978). It should also be noted that the current standard reflects the colorblind approach that the *Hi-Voltage* court fiercely advocated for. *Id.*

<sup>77</sup> See *Hi-Voltage*, 12 P.3d 1068; *Connerly*, 112 Cal. Rptr. 2d 5.

<sup>78</sup> Gotanda, *supra* note 38, at 31.

<sup>79</sup> *Id.*

his hypothesis is *American Civil Rights Foundation*.<sup>80</sup> The facts of *American Civil Rights Foundation* are similar to Gotanda's example of neighborhood and income-based affirmative action.<sup>81</sup> As previously discussed, the court abstains from explicitly ruling on the legality of pretext or proxies for race and other 209-prohibited classifications. Furthermore, the court did not, and has not yet, dictated a test for Proposition 209 or if disparate impact would be sufficient to establish a violation.

In anticipation of Part 2 of this paper which examines the California cannabis social equity programs in the context of Proposition 209 jurisprudence, it must be discussed whether city licensing structures are subject to Proposition 209. As licensing is a function of the city government, it seems intuitive that Proposition 209 would apply.<sup>82</sup> On the federal level, the Supreme Court has long held that city licensing practices, even if facially race-neutral, are subject to the Equal Protection Clause.<sup>83</sup> While Proposition 209 specifically cites its scope as "in the operation of public employment, public education, or public contracting," it is unclear if this extends to the

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<sup>80</sup> ACRF, 90 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009).

<sup>81</sup> *Id.* See text accompanying notes 52-67.

<sup>82</sup> CAL. CONST. art. 1§31 ("For the purposes of this section, 'State' shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.")

<sup>83</sup> *Yick Wo v. Hopkins* 118 U.S. 356 (1886) (holding that the denial of business permits for laundromats to Chinese-American residents violated the Equal Protection Clause, even though the ordinance requiring such permits was racially neutral).

granting of business permits by a California city.<sup>84</sup> The California State Court and Prop 209 ballot materials have used general language and referred to Proposition 209 restricting the actions of the government and governmental actors.<sup>85</sup> The amendment has often been explained as dictating that “race cannot be used as eligibility criteria for government programs.”<sup>86</sup>

## II. CALIFORNIA CANNABIS SOCIAL EQUITY PROGRAMS

Although decades old, President Nixon’s failed War on Drugs still has a lasting impact today, particularly on communities of color.<sup>87</sup> Reagan’s heavy focus on anti-drug messaging set the stage for a “political hysteria about drugs” which lead to heavy criminalization of drugs including the introduction of mandatory drug sentencing laws, escalated drug-related arrest rates, and an emphasis on incarceration of drug users.<sup>88</sup> Since the start of the War on Drugs, there has been a 53% increase in drug arrests, with a 188%

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<sup>84</sup> CAL. CONST. art. 1§31.

<sup>85</sup> See e.g., *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1083, 1089 (Cal. 2000).

<sup>86</sup> SHARON M. TSO, CANNABIS SOCIAL EQUITY ANALYSIS REPORT, 18 (2018), [http://clkrep.lacity.org/onlinedocs/2017/17-0653\\_rpt\\_CLA\\_10-20-2017.pdf](http://clkrep.lacity.org/onlinedocs/2017/17-0653_rpt_CLA_10-20-2017.pdf).

<sup>87</sup> Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>; GLOBAL COMM’N ON DRUG POLICY, WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY, 2, 20 (2011), [https://www.globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/Global\\_Commission\\_Report\\_English.pdf](https://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf).

<sup>88</sup> *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Nov. 18, 2019).

increase in arrests for marijuana-related offenses.<sup>89</sup> Today, the United States has the highest incarcerated population in the world.<sup>90</sup> In 2016, there were more than 1.5 million drug arrests in the United States, of which over 80% were for possession only.<sup>91</sup> Almost 80% of people incarcerated for drug offenses in federal prison are black or Latinx, and almost 60% of people in state jails for drug offenses are black or Latinx.<sup>92</sup>

In California, between 2006 and 2016, nearly 500,000 marijuana-related arrests were made.<sup>93</sup> These statistics reflect drastic racial disparities.<sup>94</sup> In 2015, black Californians faced three and a half times the arrest rate of white Californians for all marijuana offenses.<sup>95</sup> The disparity was even greater for felony marijuana offenses.<sup>96</sup> Latinx residents too faced disproportionate marijuana arrest rates.<sup>97</sup> The impact of drug- and marijuana-related arrests

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<sup>89</sup> *The Drug War, Mass Incarceration and Race*, DRUG POLICY ALLIANCE (Jan. 25, 2018), <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Race and the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/race-and-drug-war> (last visited Nov. 18, 2019).

<sup>93</sup> *It's Not Legal Yet: Nearly 500,000 Californians Arrested for Marijuana in Last Decade*, DRUG POLICY ALLIANCE (Aug. 2016), [http://www.drugpolicy.org/sites/default/files/California\\_Marijuana\\_Arrest\\_Report\\_081816.pdf](http://www.drugpolicy.org/sites/default/files/California_Marijuana_Arrest_Report_081816.pdf)

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* “In 2015, black people were more than twice as likely as white people to be arrested for a marijuana misdemeanor and nearly five times more likely than white people to be arrested for a marijuana felony.” *Id.*

<sup>97</sup> *Id.*

and convictions extends beyond incarcerations.<sup>98</sup> Fines, legal fees, and required court dates all place financial strain on low income individuals.<sup>99</sup> State and federal marijuana convictions can prevent people from obtaining employment, access housing, and receiving government benefits.<sup>100</sup> Interaction with the criminal justice system ranging from stops to incarceration can take social and psychological tolls on individuals and their families.<sup>101</sup> Given the racial disparities in marijuana and other drug arrests and convictions, communities of color as a whole are more severely impacted by drug enforcement.<sup>102</sup>

The passage of Proposition 64 in November of 2016 ushered in relief from the harsh, lasting effects of the drug war. While the cultivation, distribution, and use of cannabis are still regulated, individuals will no longer be cited or arrested for possession under one ounce.<sup>103</sup> Presumably, Proposition 64 would curb some of the racial disparities in marijuana-related criminal enforcement, and thus lessen the disparate and long-lasting effects of marijuana enforcement. The legalization of cannabis is especially interesting as the market nature of the formerly-illegal substance allows

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<sup>98</sup> Katherine Beckett and Steve Herbert, *The Consequences and Costs of Marijuana Prohibition*, ACLU, (Dec. 8, 2009), <https://www.aclu-wa.org/docs/consequences-and-costs-marijuana-prohibition>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> L.A. MUN. CODE, § 104.

people to legally participate in the cannabis industry. What was once a multi-billion-dollar underground industry now offers regulated and taxed entrepreneurial opportunities.

Due to the recent nature of the legalization of cannabis in California, there are not yet statistics concerning demographics of participation in the legal cannabis market. In 2016, only an estimated 1% of the over 3,000 storefront dispensaries in the United States were black-owned.<sup>104</sup> The vast majority of the legal industry is made up of white men.<sup>105</sup> Prior to Proposition 64, black and Latinx Californians were disproportionately barred from operating medical marijuana dispensaries due to the restriction of licenses to those who did not have drug felonies.<sup>106</sup>

There are numerous barriers to entry into the legal cannabis market in California for those who have been impacted the most by the War on Drugs. Concerns cited in the Cannabis Social Equity Analysis Report adopted by the Los Angeles City Council include “location, financial, technical, government relations and perceptions, licensing and permitting and past criminal record.”<sup>107</sup> Additional barriers include lack of start-up capital, lack of access

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<sup>104</sup> Amanda Chicago Lewis, *How Black People are Being Shut out of America's Weed Boom: Whitewashing the Green Rush*, BUZZFEED NEWS (Mar. 16, 2016 10:01 PM), <https://www.buzzfeednews.com/article/amandachicagolewis/americas-white-only-weed-boom#.hmOwRD5Mq>.

<sup>105</sup> Bender, *supra* note 18, at 21.

<sup>106</sup> Patrick McGreevy, *New Law Could put some Medical Marijuana Dispensaries out of Business*, L.A. TIMES (May 13, 2016), <http://www.latimes.com/politics/la-pol-sac-pot-dispensary-felon-owners-20160513-story.html>.

<sup>107</sup> TSO, *supra* note 86, at 29.



to banking infrastructure, and awareness of the cannabis social equity programs.<sup>108</sup> The rescission of the Cole Memo, under which the federal government promised not to enforce federal drug laws in states with some form of legalized marijuana, may make minorities, who are “already subject to undue scrutiny by law enforcement officials” hesitant to enter the legal market.<sup>109</sup> California faces its own unique challenge- the “Emerald Triangle” which is located in Humboldt, Mendocino and Trinity counties, produces the majority of the marijuana consumed in the United States, both legal and illegal.<sup>110</sup> These counties are substantially more white than California as a whole and are known for severely racially biased law enforcement practices that discourage people of color from participating in the cannabis market there.<sup>111</sup>

In February of 2017, Oakland became the first city in California to develop a social equity program for the newly legal cannabis market that aimed to provide opportunities to communities disparately impacted by the War on Drugs. The Equity Permitting Program reserved half of the cannabis business licensing permits for those designated Equity Applicants, and allows

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<sup>108</sup> *Overview*, *supra* note 6.

<sup>109</sup> Bender, *supra* note 18, at 22.

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Id.* In Mendocino County in particular, black people are ten times more likely to be arrested for marijuana crimes than white people. Chicago Lewis, *supra* note 104. Cannabis entrepreneurs of color often avoid these counties: “If you’re black, and you go up to Humboldt, it’s just not a good idea . . . There’s a kind of Gestapo sort of vibe with the corrupt local sheriff’s departments.” *Id.*

non-Equity applicants to gain Equity status by partnering with and incubating Equity Applicants.<sup>112</sup> To qualify as an Equity Applicant, one must have an annual income at or below 80% of the city's average income and 1. have resided for ten of the last twenty years in a police precinct that experienced disproportionately high rates of cannabis-related law enforcement, or 2. have either received a cannabis arrest or conviction in Oakland.<sup>113</sup>

In October 2017, the City of Los Angeles followed suit and enacted a similar cannabis social equity program. The Los Angeles program is a tiered priority licensing system with the first two tiers reserved for those impacted by disparate marijuana law enforcement and the third reserved for applicants that partner with Social Equity Applicants in an incubator-like relationship.<sup>114</sup> A Tier 1 applicant must meet the following criteria: "1. Low Income and prior California Cannabis Conviction; or 2. Low Income and a minimum of five years cumulative residency in a Disproportionately Impacted Area."<sup>115</sup> A Tier 2 applicant must either be Low Income and lived for five years in a Disproportionately Impacted Area or lived for ten years in a Disproportionately Impacted Area.<sup>116</sup> The program also requires that Social

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<sup>112</sup> OAKLAND MUN. CODE, §§ 5.80.045, subd. (D), and 5.81.060, subd. (D)).

<sup>113</sup> OAKLAND MUN. CODE, §§ 5.80.045, subd. (D), and 5.81.060, subd. (D)).

<sup>114</sup> L.A. MUN. CODE, § 104.20.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Equity Applicants make a good faith effort to employ local residents, Social Equity Workers and Transitional Workers.<sup>117</sup>

Considering the severely racially disparate impact and long-lasting impact of the War on Drugs across the country and in California, if these programs operate as they are intended to, they will primarily serve people of color.<sup>118</sup> This brings the possibility of an anti-discrimination lawsuit from opponents of affirmative action who do not believe those impacted by the War on Drugs should be given an advantage in the cannabis industry. Especially in California where Proposition 209 bans any “discrimination against, or preferential treatment to, any individual or group on the basis of race,” and a standard for determining discrimination or preferential treatment, in regard to impact and or intent requirements, has yet to be set, a legal challenge is quite possible.<sup>119</sup> At the same time, as judicial interpretation of Proposition 209 has been shifting to a narrower reading, such a legal

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<sup>117</sup> L.A. MUN. CODE, § 104.20, subd. (g). (Social Equity Worker is defined as someone who is low income and either has a prior California cannabis conviction or has lived in a Disproportionately Impacted Area for at least five years, and Transitional Worker is defined as someone who lives in an economically disadvantaged area and faces at least two designated barriers to employment. L.A. MUN. CODE, § 104.20, subd. (g). Designated barriers to employment include: “(1) being homeless; (2) being a custodial single parent; (3) receiving public assistance; (4) lacking a GED or high school diploma; (5) having a criminal record or other involvement with the criminal justice system; (6) suffering from chronic unemployment; (7) emancipated from the foster care system; (8) being a veteran; or (9) over the age of 65 and financially compromised.” L.A. MUN. CODE, § 104.11, subd. (m). The Department of Cannabis Regulation is required to support the Social Equity Program through recruitment, outreach efforts, licensing and compliance assistance and other business assistance. L.A. MUN. CODE, § 104.20, subd. (j)).

<sup>118</sup> TSO, *supra* note 86, at 28.

<sup>119</sup> CAL. CONST. art. 1§31.

challenge could provide the court with an opportunity to carve out a legal space for race-conscious remedial programs.

To assess the legal viability of the Oakland and Los Angeles programs in the context of Proposition 209, the plain language of the ordinances authorizing the programs and intent behind the programs must be examined. In addition, the legal parameters set forth by the Proposition 209 case law discussed above should be considered. These include methods of outreach, the use of race based quotas, and the use of racial demographic data.

In developing California's first cannabis social equity program, the City of Oakland utilized a study and suggestions from the Department of Race and Equity and the City Administrator's Office's Special Activity Permits Division that considered racial and economic disparities.<sup>120</sup> The Oakland program specifically states that its goals are "to promote equitable business ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities and address the disproportionate impacts of the War on Drugs in those communities."<sup>121</sup> It is interesting to note that this goal was edited from that officially adopted by the City Council which specifically targeted "disparities

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<sup>120</sup> *Overview, supra* note 6.

<sup>121</sup> OAKLAND, CAL., ORDINANCE NO. 13425, § 2 (2017).

in life outcomes for marginalized communities of color.”<sup>122</sup> While nothing suggests that this reflects a changing in programmatic goals and priorities, it does suggest an apprehension or precaution against a legal challenge.

Similarly, in Los Angeles, the City Council adopted the Cannabis Social Equity Analysis Report, which was prepared by consultants.<sup>123</sup> The Los Angeles Cannabis Social Equity Program’s official purpose is similar to that of Oakland: “promot[e] equitable ownership and employment opportunities in the Cannabis industry” and “decrease disparities in life outcomes for marginalized communities and to address disproportionate impacts of Cannabis prohibition in adversely-impacted and lower income communities.”<sup>124</sup> Functionally, the two programs are designed to operate similarly. The main difference between the two programs is that Los Angeles specifically addresses those who have been adversely affected by “Cannabis prohibition,” as opposed to Oakland’s more general labeling of the War on Drugs.<sup>125</sup> The final language varies from the proposed language of “address the disproportionate impacts of the War on Drugs in those communities.”<sup>126</sup>

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<sup>122</sup> DARLENE FLYNN, EQUITY ANALYSIS AND PROPOSED MEDICAL CANNABIS ORDINANCE AMENDMENTS, 2 (Feb. 23, 2017), <https://s3.amazonaws.com/big.assets.huffingtonpost.com/OaklandReport.pdf>.

<sup>123</sup> See TSO, *supra* note 86.

<sup>124</sup> L.A. MUN. CODE, § 104.00.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*; Amec Foster Wheeler, *City of Los Angeles: Proposed Cannabis Social Equity Program* (Nov. 20, 2017), [http://clkrep.lacity.org/onlinedocs/2017/17-0653\\_misc\\_11-20-17cla.pdf](http://clkrep.lacity.org/onlinedocs/2017/17-0653_misc_11-20-17cla.pdf).

The codification of the program acknowledges the “harmful impacts of past Cannabis policies and their enforcement.”<sup>127</sup>

In the plain language of the statutes, there are no racial, ethnic, or gender classifications, and thus neither program explicitly violates Proposition 209. By opening the program up to residents of disproportionately impacted neighborhoods, both programs acknowledge that not just those who were arrested and convicted of cannabis offenses are impacted by the over-policing.<sup>128</sup> Linguistic differences between the two programs do not translate in the actual application of the statutes. Both only focus on cannabis-related convictions and specially cannabis-related law enforcement practices.<sup>129</sup>

In including language specific to the War on Drugs in the city code, Oakland symbolically recognizes and acknowledges the devastating and disproportionate harm that the War on Drugs caused. While less symbolically progressive, Los Angeles has better insulated its program from a potential Proposition 209 challenge. Los Angeles instead focuses only on the impact of cannabis law enforcement, and does not mention the War on Drugs, or acknowledge a racially or otherwise disparate impact of cannabis related law enforcement through this language.<sup>130</sup> By specifically listing “lower income

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<sup>127</sup> L.A. MUN. CODE, § 104.00.

<sup>128</sup> *Id.*; OAKLAND MUN. CODE, §§ 5.80.045.

<sup>129</sup> L.A. MUN. CODE, § 104.00; OAKLAND MUN. CODE, §§ 5.80.045.

<sup>130</sup> L.A. MUN. CODE, § 104.00.

communities” as a primary beneficiary of the program, Los Angeles frames the program as a socioeconomic-based affirmative action program, which is often promoted as an alternative to race-based affirmative action.<sup>131</sup> The changes made in the language of the Los Angeles code to cannabis-specific language make the program as narrowly tailored as possible and may result in minimized legal scrutiny.

Neither code mentions race or ethnicity as that is blatantly illegal under Proposition 209.<sup>132</sup> However, the reports adopted in both Oakland and Los Angeles that developed the codes demonstrate that race was an important factor in the creation of the social equity programs.<sup>133</sup> In Oakland, the report was prepared by the Department of Race and Equity, and “provide[d] a racial impact analysis of medical cannabis regulations” to develop the social equity program.<sup>134</sup> The 71-page report focuses primarily on race and marijuana-related law enforcement, and examines the causes of the racial disparities and barriers to racial equity.<sup>135</sup> The report specifically cites the national War on Drugs as the primary factor to explain the “deeply problematic” different cannabis arrest rates for white and black people in Oakland.<sup>136</sup>

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<sup>131</sup> *Id.* See e.g., Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997).

<sup>132</sup> L.A. MUN. CODE, § 104.00; OAKLAND MUN. CODE, §§ 5.80.045.

<sup>133</sup> TSO, *supra* note 86; Flynn, *supra* note 122.

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 3.

In Los Angeles, the Cannabis Social Equity Analysis report, which was more extensive than its Oakland counterpart, did not emphasize race as its primary focus.<sup>137</sup> Nonetheless, race remained a salient factor throughout the report. The report contains an entire section studying race in its cannabis-related arrest data and one section about race and ethnicity data for the demographic makeup of Los Angeles.<sup>138</sup> The report makes sure to clarify that “under state law, government programs cannot consider race as eligibility criteria (Proposition 209, 1996). Therefore, race and ethnicity data are provided in order to assist reviewers’ understanding of the total potential disproportionate impact of past cannabis enforcement activities on impacted communities, but are not used in determining which communities and individuals are recommended for consideration by the City for assistance under the Program.”<sup>139</sup> Furthermore, the report recommends the creation of a specific diversity program that, in the interest of being Proposition 209 compliant, would serve veterans, members of the LGBTQ+ community, and people with disabilities.<sup>140</sup>

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<sup>137</sup> TSO, *supra* note 86.

<sup>138</sup> *Id.* at 11-15 (arrest data), 22 (city-wide demographics).

<sup>139</sup> *Id.* at 3. The constant acknowledgment of Proposition 209 in the Los Angeles report makes it clear that compliance with the law was a priority in shaping the program. *Id.* Compliance with Proposition 209 is mentioned 6 times throughout the report, always with a caveat mention that any of the prohibited categories were not used in the formation of the program. See *id.* at 3, 18, 20, 22, 68.

<sup>140</sup> *Id.* at 68.



As discussed above, a clear standard regarding intent and impact for determining violations of Proposition 209 has not been articulated by the California state courts.<sup>141</sup> It is possible that a 209 challenge could be brought arguing that the social equity programs intend to grant preferential treatment to black and Latinx applicants. If the court were to look to the adopted reports for intent, it appears that Los Angeles has set up better protections against a Prop 209 challenge. First, the report is not primarily about race as Oakland's is and thus racial disparities and a race conscious impact are not the primary foundation of the program. Furthermore, Los Angeles' acknowledgment of and statements that race/ethnicity is not to be considered in the creation of the program further comply with Proposition 209.

The court in *Hi-Voltage* held that under Proposition 209 the government cannot conduct racially targeted outreach.<sup>142</sup> In Oakland, the primary outreach goal "is to connect property-seeking equity applicants with general applicants."<sup>143</sup> This has been done primary through CannaEquity, a website that matches Equity and General Applicants.<sup>144</sup> Outreach is also

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<sup>141</sup> The fact that both cities' facially race neutral programs were built out of in depth racial justice analyses reflects Justice Ginsberg's confusion and frustration at the legal requirement to use race neutral methods to remedy racial disparities. Race becomes the elephant in the room in these programs, where is it heavily present, but cannot be discussed.

<sup>142</sup> *Hi-Voltage*, 12 P.3d 1068.

<sup>143</sup> TSO, *supra* note 86, at 46.

<sup>144</sup> *Overview*, *supra* note 6. In the first three months of 2018, 300 equity applicants, and approximately 600 incubator applicants were using cannaequity.org. Alexander, *supra* note 9.

conducted through partnerships with non-profit organizations, such as The Hood Incubator, “a cannabis industry incubator designed to help cannabis entrepreneurs of color.”<sup>145</sup> As long as the city partners with a variety of nonprofit organizations, and not just those that target communities of color, their outreach should be considered broad, and thus permissible under *Hi-Voltage*.

In Los Angeles, the program has been publicized through the media, neighborhood council notifications, community workshops, and legal expungement clinics throughout the city in the neighborhoods deemed Disproportionately Impacted Areas.<sup>146</sup> It is possible that outreach through legal expungement clinics in Disproportionately Impacted Areas could be considered targeted outreach. This hinges on if the use of Disproportionately Impacted Areas is deemed Proposition 209 compliant, which it likely is.<sup>147</sup>

The *Connerly* court held that race-based quotas and goals are legally impermissible under Proposition 209.<sup>148</sup> Oakland has reserved 50% of its permits for Equity Applicants for the duration of Phase 1 of the program.<sup>149</sup>

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<sup>145</sup> TSO, *supra* note 86, at 46.

<sup>146</sup> TSO, *supra* note 86, at 3. See *infra* note 149 (discussing disproportionately impacted area criteria).

<sup>147</sup> See text accompanying notes 147-49.

<sup>148</sup> *Connerly v. State Personnel Board*, 112 Cal. Rptr. 2d 5, 5 (Cal. Ct. App. 2001).

<sup>149</sup> OAKLAND MUN. CODE, §§ 5.80.045, subd. (D). The Equity Permitting Program also houses the Equity Incubator Program which allows a General Applicant (which is a non-Equity Applicant) to partner with an Equity Applicant to provide them with a 1,000 square-foot space in which to cultivate marijuana and operate their own business, rent-free, for three years. *Id.* When partnered with an Equity Applicant through the Equity Incubator

Similarly, Los Angeles gives priority to Social Equity Applicants on a three-tiered system, and ultimately restricts the total proportion of general applicants to 50%.<sup>150</sup> An analysis of these programs returns to the question of intent and impact. Oakland faces more of a potential challenge from Proposition 209 because its program is more directly framed around improving racial disparities through the reservation of 50% of cannabis licensing permits.

*American Civil Right Foundation* held that the use of neighborhood demographic data which include data on race, can be used to make neighborhood, not individual classifications.<sup>151</sup> The key link between the social equity program and the War on Drugs is the designation of Disproportionately Impacted Areas. Both Oakland and Los Angeles use neighborhood data as criteria for their Equity Applicants.<sup>152</sup> This data used to determine qualifying neighborhoods is pertains solely to the history of cannabis-related arrests and does not include race.<sup>153</sup> Under *American Civil*

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Program, the General Applicant is granted priority in the permitting process. *Id.* Furthermore, the city has designated \$3.4 million in interest-free loans for Equity Applicants. *Id.* Phase 1 is the restricted phase where no more than 50% of the permits can be issued to general applicants. Flynn, *supra* note 122, at 8. Phase 2, which does not restrict the amount of general applicant permits issued, can commence “after the Equity Assistance Program has been funded and implemented.” *Id.*

<sup>150</sup> L.A. MUN. CODE, § 104.20.

<sup>151</sup> ACRF, 90 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009).

<sup>152</sup> OAKLAND MUN. CODE, § 5.80.045; L.A. MUN. CODE, § 104.20.

<sup>153</sup> TSO, *supra* note 86; Flynn, *supra* note 122. Oakland’s qualifying police beats are those that have seen more than 150 cannabis arrests between 1998 and 2015. *Id.* Los Angeles’s qualifying zip codes are those that have seen at least a 1.5 standard deviation above the city’s average cannabis related arrest rate. L.A. MUN. CODE, § 104.20; Tso, *supra* note 86.

*Rights Foundation*, the use of this data to determine qualifying neighborhoods should be legally permissible as neighborhood wide demographic data is allowed in programmatic decision making. It is not being used to make individual determinations (if one person can qualify on the basis of their marijuana-related arrest history), and it does not include demographic data on race.

As demonstrated above through analysis of the plain language of and intent behind the programs, as well as case law comparisons, both the Oakland and Los Angeles cannabis social equity programs would likely survive a Proposition 209 challenge in court, with Los Angeles having particularly strong protections against such a challenge. As a challenge certainly is possible and arguably likely, this provides the court with a unique opportunity to continue to narrow and define Proposition 209, especially in the shadow of *American Civil Rights Foundation*.

This use of cannabis-related arrest data again brings up the interesting and challenging discussion of the use of proxies for race in governmental programming. Litigation concerning Proposition 209 compliance would likely force the court to confront this grey area. As Gotanda argued, it is possible that such data could be construed as an illegal proxy for race under Proposition 209 because it is used with the intention to benefit certain

racism.<sup>154</sup> On the other hand, it appears that *American Civil Rights Foundation* intentionally left the door open for such programs, providing the California state court with no explicit precedent to prohibit them. The court simultaneously set the “total and fatal conflict” standard, which suggests that proxies for race are legally permissible.<sup>155</sup> This provides a clear path of legal reasoning for the court to continue its momentum of scaling back *Hi-Voltage* and the scope of Proposition 209, and permit the use of proxies for race.

A Proposition 209 legal challenge to the social equity programs could also prompt a discussion and articulation of a violations standard in terms and impact and intent. As previously discussed, the court has established that Prop 209 violations can be established through intent- where programs explicitly mandate participation and inclusion of racial and gender minorities. As the question of intent here is intertwined with the discussion of the use of proxies for race, the court’s potential creation of a clear standard for intent hinges on its ruling regarding proxies. If the court were to rule that proxies are legal, it would not need to consider the legislative intent behind the programs. In the context of Oakland, this would legally allow programs to be designed specifically as race-conscious remedies, as long as they are implemented through race-neutral means, as Oakland’s program is.<sup>156</sup> Los

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<sup>154</sup> Gotanda, *supra* note 38.

<sup>155</sup> ACRF, 90 Cal. Rptr. 3d 789, 799 (Cal. Ct. App. 2009).

<sup>156</sup> Again, we see Ginsberg’s contradictory nature of pursuing race conscious goals through race neutral means.

Angeles would have less of a dramatic impact in the scenario, because the design behind the program explicitly distances itself from considering race. Nonetheless, this would still open the door for race to be considered in program design.

A challenge to the cannabis social equity programs on the basis of racially disparate impact, because the majority of program beneficiaries will be black and Latinx, ushers in a unique opportunity for the court to officially acknowledge the devastation caused by the War on Drugs and racially disparate drug related law enforcement. The counter argument to this claim is that the city is remedying the effects of past discrimination, which can be easily demonstrated through data on cannabis law enforcement and race.<sup>157</sup> This is what the *Connerly* court referred to in its acknowledgement of the contemporary existence of discrimination and the government's duty to eliminate discrimination and its derivative effects.<sup>158</sup> This presents an opportunity for the court to further articulate the difference between affirmative action programs designed to remedy discrimination and discriminatory policies designed to perpetuate it.

This potential analysis and acknowledgement of the racially disparate impact of the War on Drugs and drug related law enforcement sets the stage for new legally sound race-conscious affirmative action programs. As long

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<sup>157</sup> See DRUG POLICY ALLIANCE, *supra* note 89.

<sup>158</sup> 42 U.S.C.A. § 2000d; Alexander, 532 U.S. 275.

as other programs can establish a link to a racially disparate practice, they should prevail under Proposition 209. Such affirmative action programs could continue to target the lasting impact of the War on Drugs, or expand this hypothetical holding to other racially discriminatory practices in the country such as incarceration and housing.

If the court were to use disparate racial impact to determine that the facially race-neutral social equity programs violate Proposition 209, this would disrupt many facially neutral but discriminatory policies and practices that maintain white supremacy and the racial hierarchy. Such a decision would be rooted in the argument that cannabis social equity programs disproportionately benefit black and Latinx applicants, or as others may argue- disproportionately harm white and other non-black and non-Latinx applicants. The actual intent, explicit or implicit, of the program in terms of racial impact would be irrelevant. This would set the standard that facially neutral laws with disparate impact upon protected classes are illegal.

Under this hypothetical standard, individuals and organizations could challenge state practices that are facially race neutral but produce racially disparate outcomes as unconstitutional under Proposition 209. Applied to the quintessential example of *Washington v. Davis*, where the Supreme Court held that the plaintiff has the burden of proof of establishing disparate impact and discriminatory intent, the use of a facially racially neutral written

personnel test in hiring firefighters would be found to violate Proposition 209 because black recruits failed the test, and thus were disqualified from service, at a rate four times that of the white recruits.<sup>159</sup>

Under the theory of colorblindness advocated for in legislative intent behind Proposition 209 and in the *Hi-Voltage* opinion, as long as there is no overt or explicit racially discriminatory intent behind a policy or action, racially disparate results are simply a coincidence.<sup>160</sup> This current federal standard for anti-discrimination law ignores the enduring impact of segregation, Jim Crow laws, and other forms of state sanctioned racism, as well as contemporary institutional and societal racism and bias. Rejecting this colorblind approach would force the courts, and society, to be race conscious and open the door for legal challenges to the numerous existing policies and programs that exclude or subordinate people of color through a façade of neutrality.

#### CONCLUSION

As the California Courts have begun to narrow the scope of Proposition 209, the Oakland and Los Angeles cannabis social equity programs provide a unique opportunity for the court to solidify this less-broad

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<sup>159</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>160</sup> *See Washington*, 426 U.S. 229; Freeman, *supra* note 76; Sumi Cho, *Post-Racialism*, 94 IA. L. REV. 1589 (2009).



interpretation of the constitutional amendment and pave the way for future race-conscious remediation programs in the state.

Following the 2018 midterm elections, 10 states have legalized recreational marijuana use to varying degrees, while 23 additional states have legalized medical marijuana use to varying extents.<sup>161</sup> Legalization of recreational marijuana use has also been on the national legislative radar.<sup>162</sup> Considering the rapidly growing legal cannabis industry across the country and the novelty of California's racial justice approach towards cannabis, and specifically the various social equity programs, California will serve as a model of race-conscious cannabis policy for the rest of the United States.<sup>163</sup>

Future analysis can build on this research to examine how the Oakland and Los Angeles cannabis social equity programs can be used as a model to pursue race-conscious remediation for the War on Drugs in cities across the country.<sup>164</sup> California provides a useful framework for analysis due

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<sup>161</sup> *State Marijuana Laws in 2018 Map*, GOVERNING (Nov. 7, 2018) <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

<sup>162</sup> Several factors that are making nation-wide legalization of marijuana more of a potential reality. These factors include a newly democratic house, support for legalization from many well-established republicans, and alleged insight from Anthony Scaramucci. Kyle Jaeger, *Trump Will Legalize Marijuana After Midterms*, *Anthony Scaramucci Predicts*, MARIJUANA MOMENT (Nov. 2, 2018), <https://www.marijuanamoment.net/trump-will-legalize-marijuana-after-midterms-anthony-scaramucci-predicts/>.

<sup>163</sup> Bender, *supra* note 18, at 22-23.

<sup>164</sup> This analysis can also consider many of the challenges faced on the ground with the rollout of the Oakland and Los Angeles programs. Many have regarded the Oakland social equity program an official failure. Otis R. Taylor Jr., *Oakland's Pot Equity Program Withering on the Vine*, SAN FRANCISCO CHRONICLE, (Oct. 28, 2018, 2:38 PM), <https://www.sfchronicle.com/bayarea/otistraylorjr/article/Oakland-s-pot-equity-program->

to the legal restrictions set by Proposition 209. The Los Angeles social equity program is likely to be legally viable in states such as Michigan, which recently legalized recreational marijuana use and has a constitutional amendment similar to Proposition 209.<sup>165</sup> Lessons and strategies can be taken from cannabis social equity programs to be used in the creation and implementation of race-conscious remediation in the larger criminal justice reform context. Future work will develop these recommendations from the Oakland and Los Angeles programs. The development and implementation of the Oakland and Los Angeles cannabis social equity programs within the context of the restrictive Proposition 209 demonstrate that race-conscious

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withering-on-the-13342460.php. Understaffing at the municipal level, the deeply flawed incubator system, and lack of support and resources provided to equity applicants have all contributed to barely any equity applicants successfully opening and running their own cannabis enterprises before the de facto expiration date. *Id.* The Los Angeles social equity program has faced its own challenges in getting off the ground. *See, e.g.,* Sessi Kuwabara Blanchard, *Exclusive: What Happened to Funding for LA's Cannabis Social Equity Program?*, FILTER (Mar. 29, 2019), <https://filtermag.org/2019/03/29/funding-los-angeles-social-equity/>. Due to challenges such as municipal understaffing, the Cannabis Commission severely delayed the application acceptance and processing timeline. David Wagner, *'Social Equity' Applicants are Still Waiting for the Cannabis Licenses*, LAIST (Apr. 30, 2019), [https://laist.com/2019/04/30/social\\_equity\\_applicants\\_are\\_still\\_waiting\\_for\\_la\\_cannabis\\_licenses.php](https://laist.com/2019/04/30/social_equity_applicants_are_still_waiting_for_la_cannabis_licenses.php). This delay forced many prospective legal dispensary owners underground, leading to an “eruption of illegal weed dispensaries.” *Id.*

<sup>165</sup> MICH. CONST. art. 1§26, Michigan Civil Rights Initiative; Christine Hauser, *Marijuana Embraced in Michigan, Utah, and Missouri, but Rejected in North Dakota*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/michigan-marijuana-legalization.html>. Prior to the legalization of recreational marijuana in Michigan in November 2018, there have been complaints about the lack of racial equity in the legal medical marijuana market. *See* Bill Weinberg, *No Equity When it Comes to Cannabis*, FREEDOM LEAF (Mar. 2, 2018), <https://www.freedomleaf.com/detroit-judge-overturns-initiatives/>. As of December 2018, no cannabis social equity programs have been publicly announced or established in Michigan.

remediation that directly addresses and responds to racially disparate policing and jailing is possible.