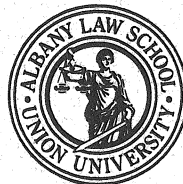


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You Can't Get There From Here:  
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on Same-Sex Marriage

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YOU CAN'T GET THERE FROM HERE:  
THE IMPACT OF CALIFORNIA'S PROPOSITION 209  
ON SAME-SEX MARRIAGE

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On Tuesday, November 5, 1996 California voters amended their state constitution by approving Proposition 209, sometimes referred to as the California Civil Rights Initiative or CCRI. The vote tally was 54.6% - 45.4%, a margin of nearly 900,000 votes. Proposition 209's first clause reads:

(a) 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>1</sup>

The words "preference" or "discriminate" are not defined in the initiative. However, the polity was well aware that the intent of the ballot measure was to dismantle race-based and sex-based affirmative action in the State of California. This was due to the fact that the proposition was championed by Ward Connerly and California Governor Peter Wilson. Connerly is the Regent of the University of California who was instrumental in the elimination of the use of race and gender in admissions decisions at the University of California. He was also the official chairman of the California Civil Rights Initiative. Wilson used his opposition to affirmative action as the centerpiece of his abortive presidential campaign.

Prior to its passage, a loud and public multimedia debate on whether Proposition 209 increased or lessened protections against sex discrimination appeared on newspaper editorial pages, the

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

Internet, television, and talk radio. Both opponents and proponents found legal scholars who supported their views on this question. The reason behind the intense debate was the realization that female voters make up a majority of California's voters and thus held the fate of the initiative in their hands. The crux of the debate was competing interpretations of clause (c) of the initiative:

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.<sup>2</sup>

A plurality of California law professors agreed with opponents of Proposition 209 that clause (c) explicitly could allow sex discrimination in particular areas. This previously was impermissible under the California Supreme Court decision in *Sail'er Inn v. Kirby*<sup>3</sup> which treats gender as a suspect classification meriting strict scrutiny.

Proponents of 209 argued that clause (c) was necessary to modify the inflexible total ban on sex discrimination articulated in clause (a) of the initiative. Flexibility was needed to ensure that, in certain scenarios, the state would be able to take gender into account for certain jobs. The common example given was that only female prison guards should be used to strip-search female prisoners. Oddly, no explanation was given as to why judges were being disempowered from evaluating which scenarios would survive strict scrutiny. Also unexplained was why sex was the only classification to have the standard of impermissible discrimination modified.

The passage of Proposition 209 is another example of "legislation by ballot box" with all its attendant complications. Words written in a legislative context can have quite a different meaning when examined in popular media. The deceptive simplicity of Proposition 209 confused many California voters. Proposition 209 was an amendment to the California State Constitution and thus carried far more weight than just another statute passed by voters. However, even people who were cognizant of this fact misconstrued its potential impact and may have foolishly aided in its passage.

In 1993, the State Supreme Court of Hawaii ruled in *Baehr v. Lewin*<sup>4</sup> that the state's practice of denying marriage licenses to same-sex couples violated the state constitutional bar on sex

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

<sup>3</sup> 485 P.2d 529 (Cal. 1971).

<sup>4</sup> 852 P.2d 44 (Haw. 1993).

discrimination. Because of this ruling, some gay activists in California actually supported the passage of Proposition 209 with the idea that in the near future a successful lawsuit, similar to the one in *Baehr*, could be filed in California with a CCRI-included state constitution in order to legalize same-sex marriages in California.

This idea was ill-conceived for many reasons. First, the likelihood of suing in California for equal marriage benefits and winning is infinitesimal. Since at least 1971,<sup>5</sup> gay and lesbian couples have been suing states for denying them marriage licenses on the basis that the denials are impermissible sex discrimination and sexual orientation discrimination by the state. Over twenty years ago, the Washington State Supreme Court, in *Singer v. Hara*,<sup>6</sup> rejected such a lawsuit even though that state's constitution had recently been amended by voters to include an explicit bar on sex discrimination. The only successful results using these arguments have been the rulings by the *Baehr* courts, and these two decisions are based only on sex discrimination, not sexual orientation discrimination.

Secondly, Proposition 209 was an assault on the equal protection rights of racial minorities and women which should have been rejected by all fairminded people, especially gay men and lesbians. The ACLU of Southern California cogently argued this point on behalf of the plaintiffs in *Coalition for Economic Equity v. Wilson*,<sup>7</sup> the lawsuit challenging the constitutionality of Proposition 209. The basic idea is that all other minorities, except for the ones listed in Proposition 209, can petition the state to extend preferences to them. For example, the University of California can give preferential admission to children of alumni, but if Latinos want to have the state consider their race in college admission decisions they will have to amend the state constitution to ameliorate the effects of Proposition 209. This is a violation of the equal protection clause of the Fourteenth Amendment.

It is stunning to think that some gay activists could actually endorse a ballot measure designed to reduce civil rights protections for minorities after facing five similarly targeted anti-gay ballot measures in recent years: Oregon (1992),<sup>8</sup> Colorado (1992),<sup>9</sup> Oregon

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<sup>5</sup> See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

<sup>6</sup> 522 P.2d 1187 (Wash. 1974).

<sup>7</sup> 946 F. Supp. 1480 (N.D. Cal. 1996).

<sup>8</sup> See OR. REV. STAT. § 260.160 (1995).

<sup>9</sup> See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that Amendment 2 violated equal protection of the law).

(1994),<sup>10</sup> Idaho (1994),<sup>11</sup> and Maine (1995).<sup>12</sup> Only Colorado's Amendment 2 was actually approved by voters but never went into effect because it was rejected by every single court which considered it, culminating with the United States Supreme Court 6-3 ruling in *Romer v. Evans*<sup>13</sup> last year. It is horrifying to think that some gay activists would try to use Proposition 209 as a shortcut towards winning equal marriage rights. Thankfully, many, many more gay and lesbian activists, especially those working for equal marriage rights, worked to defeat Proposition 209. It is interesting to think that it is possible that the victory for gays and lesbians in *Romer* may actually be used to strike down the discriminatory Proposition 209. The reasoning used by the Colorado Supreme Court to strike down Amendment 2 can also be used to invalidate Proposition 209. This is another illustration of the fact that civil rights [victories] are for everyone.

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<sup>10</sup> *Measure #13 in Oregon* (visited Sept. 23, 1997) <<http://www.qrd.org/qrd/usa/oregon/measure.13>>.

<sup>11</sup> *What the Idaho Proposition 1 Will Say* (visited Sept. 23, 1997) <<http://www.qrd.org/qrd/usa/idaho/text.of.idaho.proposition.1>>

<sup>12</sup> *The Wording of the Maine Referendum* (visited Sept. 23, 1997) <<http://www.qrd.org/qrd/usa/maine/1995.referendum.wording>>.

<sup>13</sup> 116 S. Ct. 1620 (1996).