The Politics of Racial Preferences

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IN THEIR SUCCESSFUL drive to eliminate racial preferences in the public sector, opponents of race-based policies in California and the state of Washington turned not to the legislature but directly to the voters. That is, they organized a ballot initiative and, by that mechanism, altered state constitutions. But such referenda have their detractors. Critics argue that both California's Proposition 209 and Washington's Initiative 200 gave voters a crude up-or-down choice.[1] "The State shall not discriminate against, or grant preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting," the initiatives read. Agree or disagree? voters were asked. In contrast to a referendum, the argument runs, legislatures are arenas for negotiation and compromise—for lawmaking with greater subtlety.

The point has seeming plausibility. But faced with politically tricky issues—like that of racial preferences—a legislator's natural tendency is to go with the status quo. Legislatures are risk-adverse. Thus, without the referendum process, citizens would be severely limited in their ability to

express themselves on critical and controversial questions such as affirmative action.

From one perspective, opposition to racial and gender preferences would seem politically safe. Most Americans don't like them. And yet a close look at survey data reveals a more complicated landscape. The response of those polled depends on precisely how the question is worded. The term "quotas," for instance, elicits a very different reaction from the phrase "affirmative action." In general, questions involving race tap into considerable ambivalence. Most Americans, that is, understand the history of black oppression and are sensitive to the need to acknowledge grave wrongs; they do not think African Americans have attained full equality. But most also believe in a meritocracy that awards individual initiative and hard work. They believe in equal treatment but not race-based preferences.[2]

With respect to race-related public policy, most Americans are thus torn. And as legislators outside California and Washington know, the anti-preference initiatives in those states did not pass by large margins. Proposition 209, on the California ballot in November 1996, got only 54 percent of the vote. It is no surprise, then, that in 1998, when Senator Mitch McConnell (R-Kentucky) introduced an amendment that would have eliminated the 10 percent racial and gender set-aside embedded in a massive highway bill, he met with defeat.[3] Even though the Supreme Court, in 1995, had ruled that financial incentives to hire minority subcontractors for federal highway construction projects were unconstitutional, the Senate voted 58 to 37 against the McConnell proposal.[4] Moreover, 15 Republicans joined 43 Democrats in voting to kill the amendment. The view of those 15 was that of John McCain. "Unfortunately," the Arizona senator said, "the danger exists that our aspirations and intentions will be misperceived . . . harming our party."[5]

Members of Congress don't like bills that potentially harm their party. Their skittishness involves issues other than race, of course. On technical issues like the omnibus Communications Act of 1995 or legislation to set standards for high-density television, members delegate crucial decisions to bureaucracies; if something goes wrong, they can hold hearings and

blame the administrators. The question of high-density television (HDTV) is instructive because there were only three transmission standards to choose from: American, European, and Japanese. Because Europeans and the Japanese don't vote in American elections, it might seem obvious that the American standard was preferable—but not necessarily. In the case of VCRs, the Japanese manufacturers had beaten all other competition; if the same thing happened with HDTVs, a decision in Congress to adopt American technology could have been politically costly. The result: a legislative decision to pass the buck. The market could sort the problem out.

Legislators understand policies, but they cannot gauge with certainty the impact of a particular policy on their reelection prospects. In the debate over the Clinton health care plan in 1993 and 1994, members of Congress could not accurately predict, for instance, how managed care would affect the freedom of patients to choose a doctor. As two Democrats on the House commerce committee said at the time, "If two or three years from now, Mr. and Mrs. Smith don't have their doctor, you can bet I'll have an opponent in the primary or [the] general [election] blaming me for it."[6] Neither congressman supported the Clinton or Cooper bills.

Race is potentially an even more explosive issue. Support for legislation that abolishes racial and gender preferences—if the statutory language is framed in the wrong way—can be depicted as racially insensitive, if not positively mean-spirited. But opposing such a bill is also politically risky: supporting preferences over merit may invite opposition in the next election. Members of Congress do not want to appear as "against" civil rights, but neither are they eager to seem to be "for quotas."

Politicians are in fact doubly vulnerable. The strange American phenomenon of democracy within a party (primary elections as the vehicle for party nominations) means that incumbents can face opposition in both primaries and general elections. There is another danger as well. The majority of voters in a district may favor an antipreference statute. But if the district is, say, 10 to 20 percent black, white Democrats who support such legislation not only risk an opponent in the primary, but they also court depressed minority turnout in the general election. They may get their

party nomination, only to find themselves stripped of needed black support. Moreover, Republicans, too, can pay a political price for supporting a legislative move to abolish set-asides and other race-based programs. Whatever position they take will invite opposition. For candidates of either party, the problem is especially acute in competitive districts; thus, the narrower the incumbent's margin of victory, the more risk-adverse he (or she) is likely to be. The politically vulnerable do not want to vote on controversial legislation.

Politicians like secure seats, and obviously don't like to cast votes for bills on issues—like that of race—that inevitably generate controversy. Racial preferences are thus an unlikely subject for legislative action; the initiative process appears to be the only means by which they can be attacked. That means, of course, that federal affirmative action statutes are safe because the Constitution does not provide for national referenda on questions of policy. A good thing, too, critics of state referenda will say. They argue that legislatures can deal with complex issues and the multiple interests that surround them. A process that simplifies the question makes for bad policy. Without a referendum process, however, politically charged policies opposed by the majority of voters, or policies about which voters are ambivalent, will remain in place—unless, of course, a court steps in, as the U.S. District Court of Appeals of the Fifth Circuit did, when it abolished racial preferences in institutions of higher education in Texas.

The story of I-200 in the state of Washington is instructive. In March 1997, state representative Scott Smith and a small business owner, Tim Eyman, filed the initiative with the legislature, which meant that if they collected enough signatures, the lawmakers would have to approve the bill or put it on the ballot in November 1998. The bill prohibited preferences based on race or gender in state employment, in the awarding of state contracts, and in the admission of students to public institutions of higher education. Indeed, the language was identical to that of Proposition 209, which had amended the California state constitution. By early January 1998, over 280,000 signatures had been submitted to the secretary of state (only 179,248 were actually needed), but, although voter approval was

running two to one in favor of the measure, the Republican-controlled legislature declined to take a stand on the issue.

Perhaps legislators knew that extraordinary support for such initiatives in the early months is a bit deceptive. In California, four months before the election (in July 1996), 59 percent of voters backed Proposition 209; in July 1998, 65 percent of the Washington electorate liked I-200. In both cases, however, as the elections drew near, the numbers went down (see Table 1). In Washington, political leadership may have been a factor; the governor and the mayor of Seattle were strong opponents. But enthusiasm also waned in California where Governor Pete Wilson campaigned for the proposition.

Women were an unknown political element, and that uncertainty could have made legislators nervous. If white and minority women came together against the measure, it would go down. As it happened, the opposition was unable to mobilize the female vote. As Table 2 shows, in California, prior to the election, 58 percent of whites and 54 percent of women favored Proposition 209; in Washington, the numbers were 55 and 59, respectively. By November, support by women had slipped somewhat but was still unexpectedly high.

I-200 opponents had argued that gender inequality was real and that

Table 1 Support for P-209 and I-200 over Time (in percents)

P-209 (Calif.)	*7/96*	*9/16/96*	*11/4/96*
For	59	60	52
Against	29	25	38
Undecided	12	15	10
I-200 (Wash.)	*7/13/98*	*9/14/98*	*10/9/98*
For	64	53	55
Against	25	34	35
Undecided	11	13	10

SOURCE: Based on data from polls conducted by the *Los Angeles Times* in California and by the *Seattle Times* in Washington state over the course of the campaigns.

preferences were in their interest. "The biggest beneficiaries of affirmative action in Washington State are white women, and women know that discrimination still exists. The problem is that people still don't know what this deceptive initiative is about," Kelly Evans, the manager of the NO! 200 Campaign said a month before the election.[7] And perhaps there was indeed some confusion. A month earlier, a survey indicated that half the voters in the state favored affirmative action, while almost 60 percent intended to vote for I-200. Those were simply incompatible positions, as the pollster who conducted the poll stated: "It's clear that some voters don't know exactly what this initiative is going to do."[8]

When the actual wording of I-200 was read to respondents, 53 percent supported the initiative, 34 percent were opposed, and the rest were undecided. When asked in a separate question how they felt about affirmative action, 50 percent said they were in favor. Given the ambivalence of most Americans on issues related to race, the precise wording of the question matters. About half the electorate in that survey registered support for some sort of special consideration for disadvantaged groups, but more than half disagreed with the notion of granting preferences. Race is still the American dilemma—acknowledged as such—but there is no agreement over what the political response should be. Legislative action thus remains politically risky.

At the end of the day, however, the initiatives won comfortably in both

Table 2 Preelection Racial and Gender Gaps on P-209 and I-200 (in percents)

	P-209 (CALIF.)		I-200 (WASH.)	
Category	*For*	*Against/DK*	*For*	*Against/DK*
White	58	42	55	45
Nonwhite	29	71	37	63
Male	67	33	70	30
Female	54	46	59	41

SOURCE: Based on data from polls conducted by the *Los Angeles Times* and the *Seattle Times*.

states, with 54 percent of the vote in California and a 58 percent majority in Washington. The victory in Washington was especially striking: the political and media establishment was opposed, and the proponents were outspent three to one. Nevertheless, exit polls showed that 66 percent of men and 80 percent of Republicans supported the initiative. Surprisingly, 62 percent of the Independents and 54 percent of union members also voted yes. Women divided evenly on the issue, while over 40 percent of Democrats cast their ballots in favor.[9] In California, as Table 3 shows, support for the measure came from whites (63 percent), political moderates (52 percent), conservatives (77 percent), and males (61 percent). Less than half of women (48 percent) and about a quarter of the liberals (27 percent) voted for it. As expected, blacks, Latinos, and Asians, in decreasing magnitude, were also opposed, although their support did not drop below 25 percent in either state. Their opposition had more impact in California (where minorities make up half the population) than in Washington (84 percent white).

The leadership in the initiative drives interpreted the final tally as an

Table 3 The Vote for Proposition 209 (in percents)

	Yes on 209	*No on 209*	*% of all voters*
All voters	54	46	100
Race			
White	63	37	74
Black	26	74	7
Latino	24	76	10
Asian	39	61	5
Ideology			
Liberal	27	73	21
Moderate	52	48	47
Conservative	77	23	32
Gender			
Male	61	39	47
Female	48	52	53

SOURCE: Based on polls conducted in California by the *Los Angeles Times*.

antipreferences vote. Thus, Ward Connerly, who led the movement in California and played a very important role in Washington, saw the American people as "beginning to rethink the whole question of race and affirmative action." He went on, "The three main rationales for affirmative action—compensation for the discrimination of the past, current discrimination, and diversity—aren't acceptable to people any more."[10] Opponents, on the other hand, blamed the allegedly misleading and confusing language of the two initiatives for their defeat. Washington's governor, Gary Locke, described opponents' effort as "always an uphill battle because the ballot title was motherhood and apple pie." People asked themselves, "How can I disagree with that?" and thought, "I very much support an end to discrimination." Sue Tupper, the chief consultant for NO! 200, said, "We really had to work day and night to clarify what kinds of programs would go away if this initiative passed."[11]

Which side was right? Did voters know what they were doing—declaring their opposition to racial and gender preferences—or were they confused by "motherhood and apple pie" rhetoric? Perhaps the question should be put slightly differently: Did supporters understand that signing on a measure that prohibited discriminatory policies of every sort (including those that distributed benefits on the basis of race or gender) would mean an end to "affirmative action," as commonly practiced? The rhetoric was appealing because it did indeed embrace basic American values, as I-200 opponents lamented. Did the majority of voters mean to reaffirm those values?

Yes, postelection surveys suggest. The two main reasons voters gave for supporting I-200 were a belief that it would end preferential treatment and that it would ensure fairness and equality in the way government and public universities operate. They wanted a change in existing programs. At the same time, however, they seemed to believe that the revised law would allow some form of affirmative action. Thus, among I-200 backers, two-thirds thought the measure would not ban all minority-targeted programs. As one voter put it, "Minority goals in employment and student admissions can still be achieved under I-200. The secret is recruitment, training, and

accomplishment." In other words: help, yes; preferences, no. Only a small minority of the electorate seemed totally confused about what they voted for. Seven percent of the initiative's supporters said they wanted affirmative action programs *un*changed, while 10 percent of those opposed to prohibiting preferences said that in fact they wanted them eliminated.[12]

Identical initiatives have passed in two states, and the decision of the majority of voters will not be overturned, it appears. In California, a federal district court issued a preliminary injunction blocking implementation of the initiative, a decision that was subsequently reversed by the U.S. Court of Appeals for the Ninth Circuit. The U.S. Supreme Court declined to take the case. Student protests appear to have fallen flat. In the 1998 gubernatorial race, neither Dan Lundgren, a conservative Republican, nor Gray Davis, a former aide to the very liberal Jerry Brown, focused on the issue. Although Davis reminded congregants at black churches just prior to the election that he opposed 209 and promised that appointments to state jobs in his administration would reflect the diversity of the state, he did not say he would try to circumvent the law. "One thing I've learned in my years, of service," he said, "is when the people speak—at least on Earth—they are the final word."[13] And on 209, the people had spoken.

On the other hand, the University of California system—in keeping with the desire of most voters—is looking for alternative ways to create "diversity."

Notes

1. The best and most influential work arguing against referenda is Peter Shrag, *Paradise Lost* (New York: New Press, 1998).

2. On the public's complicated views on issues involving race, see Paul M. Sniderman and Thomas Piazza, *The Scar of Race* (Cambridge, Mass.: Harvard University Press, 1993).

3. The McConnell amendment would have eliminated the Disadvantaged Business Enterprise (DBE) program from the bill that renewed funding for the Intermodal Surface Transportation Efficiency Act, otherwise known as ISTEA (pronounced "ice-tea"). The DBE provision required that no less than 10 percent of federal highway and transportation money go to firms owned by minorities and women. Congress voted

on the ISTEA amendment eight months before the referendum in Washington on I-200, but the voters' rejection of preferences, once again, probably would not have made any difference.

4. The decision was *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

5. Helen Dewar, "Minority Set-Asides Survives in Senate," *Washington Post*, March 7, 1998, p. 1.

6. Personal interview with author.

7. "Initiative 200 Favored in Poll; Affirmative Action Ban in State Has 55 Percent Support," *Seattle Post-Intelligencer*, October 9, 1998, p. A1.

8. "Most in Poll Support I-200; But Half Defend Affirmative Action," ibid., September 14, 1998, p. A1.

9. Tom Brune, "Poll: I-200 Passage Was Call for Reform," *Seattle Times*, November 4, 1998, p. A1.

10. "Affirmative Action Rules Tossed Out by State Voters," *Seattle Post-Intelligencer*, November 4, 1998, p. A1.

11. Ibid.

12. Brune, "Poll: I-200 Passage Was Call for Reform."

13. Dan Smith and Amy Chance, "Davis Smells Victory; Lungren Sees Rebound," *Sacramento Bee*, October 26, 1998, p. A3.