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Inclusiveness, Interrelatedness, and the Affirmative Action Debate in California - Introduction to the GGU School of Law Symposium on Race Relations in America

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INTRODUCTION

INCLUSIVENESS, INTERRELATEDNESS, AND THE AFFIRMATIVE ACTION DEBATE IN CALIFORNIA — INTRODU- TION TO THE GGU SCHOOL OF LAW SYMPOSIUM ON RACE RELATIONS IN AMERICA

BY DAVID B. OPPENHEIMER*

It is commonly asserted that California leads the nation in political movements, with our state initiative campaigns defining the themes and paving the way for national campaigns. The most frequently invoked recent examples are the taxpayer revolt, led by Proposition 13 in 1978, and the anti-immigration movement, led by Proposition 187 in 1994. The question of the hour is whether California will again form the leading edge of a national movement against affirmative action. Proposition 209, known as the California Civil Rights Initiative [CCRI], which seeks to amend the California Constitution to eliminate affirmative action, will be on the November 1996 ballot. Already more than a dozen other states are considering measures based on the California proposal.

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The CCRI, whether it passes or fails, can be expected to contribute further to public discussion of race relations here in California and throughout the nation. In this respect, it is one of a number of recent California events that have sharpened discussions of race relations on our state. It follows on the heels of the civil unrest resulting from the state court acquittals of the officers who beat Rodney King, and the marked differences between blacks and whites in responding to the acquittal of O. J. Simpson.

After the O. J. verdict, and as the CCRI qualified for the ballot, the Helzel Family Foundation decided to underwrite a series of speeches at Golden Gate University School of Law on the subject of "Race Relations in America." These speeches, sponsored by the Helzel Family Foundation, the Bar Association of San Francisco, and the GGU Black Law Students Association, brought to GGU some of the most important voices in the American legal academy on the topic of racism and race relations. Three of those speeches are reprinted here.

The speeches reproduced were delivered by Elaine R. Jones, Director/Counsel of the NAACP Legal Defense Fund (LDF), Eva Jefferson Paterson, Executive Director of the Lawyers Committee for Civil Rights of the Bay Area, and Erwin Chemerinsky, Lex Legion Professor of Law at the University of Southern California Law Center. Also reproduced is the introduction of Ms. Jones by United States District Court Judge Thelton Henderson, Chief Judge of the Northern District of California, a former Professor of Law at GGU.

The pendency of the affirmative action vote is the unifying theme of all three speeches, and all three speakers strongly oppose the measure. But each raises distinct issues regarding the focused question of affirmative action and the larger question of race relations in America. Each in turn supports the argument made explicit by Ms. Paterson — that we are at a crossroads today in race relations in America.

Ms. Jones places us on the road that has brought us to where we are by reciting a part of the history of the LDF. Once the legal arm of the NAACP, it became a separate organization when it came under attack by Southern politicians following

its great victory in *Brown v. Board of Education*. Under the leadership of LDF's first Director/Counsel Thurgood Marshall, it became and remains the most active civil rights law firm in the country, in part through its policy of inclusiveness.

Sounding a theme reiterated in the speeches that follow, Ms. Jones argues that the great lesson of the early work of the LDF is the need to see all civil rights struggles as interrelated. Thus, she points out, the LDF proudly litigated the first Title VII sex discrimination in employment case heard by the Supreme Court, and last year litigated a major age discrimination case there. In both these cases the plaintiffs were white women: the issues transcended race.

Turning from interrelatedness to inclusiveness, Ms. Jones defines the mission of the LDF as putting the "We" into "We The People." She explains how affirmative action works, at the LDF and throughout the society, to achieve the goal of finishing the work begun by the "founding fathers."

Professor Chemerinsky carries forward the themes of interrelatedness and inclusiveness, focusing on why affirmative action addresses the dual problems of race and sex discrimination, and what it would mean if affirmative action were eliminated. He begins by identifying three prevalent myths about affirmative action that direct the debate: (1) that discrimination against women and people of color is no longer common; (2) that affirmative action programs are widespread, with quotas rampant and the selection of unqualified candidates common; and (3) that the Constitution requires government to be color-blind. He sets forth illustrative data to establish: (1) that race and sex discrimination is endemic, and is rarely practiced against white men; (2) that affirmative action programs are closely regulated, with quotas and selections of unqualified candidates prohibited, and preferences limited by the Equal Protection Clause's strict scrutiny test; and (3) that the Constitution permits race-conscious remedies when necessary to correct the effects of prior discrimination, and that the very concept of equality demands such remedies.

Turning to the question of what we can expect if CCRI passes, Professor Chemerinsky again points to three concerns:

(1) that diversity at colleges and universities will be dramatically reduced (he points to studies predicting that the percentage of Latino students at the University of California will drop from eighteen to six, while the percentage of black students will drop from seven to two); (2) that programs essential to ending discrimination in public contracting, employment and education will be eliminated, resulting in a license to discriminate in those areas; and (3) that the prohibition of sex discrimination now found in the California Constitution will undergo a major transformation, eliminating what now amounts to a court-adopted Equal Rights Amendment requiring strict scrutiny in governmental sex discrimination cases.

The last of the three speeches is the most explicitly political and personal discussion of interrelatedness and inclusiveness in the affirmative action debate. Ms. Paterson points out that the CCRI (which she describes as the Civil Wrongs Initiative) is a brainchild of presidential candidate Patrick Buchanan, who recommended over two years ago that it be placed on the November 1996 ballot, so that it could serve as a wedge issue, dividing middle class white men from the rest of the Democratic party. As a campaign device, she suggests, it should be called "Willie Horton goes to College." Ms. Paterson, a black woman, explains that she takes the affirmative action debate personally because she was admitted to UC Berkeley's Boalt Hall law school because of affirmative action. Regarding the complaint that affirmative action stigmatizes its recipients she replies: "stigmatize me, give me that degree." As she has demonstrated in her brilliant legal career, no one could fairly argue that she was unqualified. Nonetheless, absent affirmative action she would not have been admitted to UC.

Ms. Paterson discusses the kind of campaign that will be needed to defeat CCRI. If the initiative is seen as concerning only issues of race, she explains, it is likely to pass. But if its impact on all underrepresented groups is understood, it can be defeated. A major question about the campaign, then, is whether it can successfully communicate a message of interrelatedness and inclusiveness — whether all who benefit from affirmative action can recognize their own self-interest, and whether a majority of California voters will agree that affirmative action remains a necessary remedy.

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These three speeches make a substantial contribution to the debate over affirmative action. We at GGU are proud to have sponsored them, and are delighted to publish them in this symposium issue of the GGU Law Review.