

PROPOSITION 54: IMPACTS ON HEALTH, LAW ENFORCEMENT,
EDUCATION AND HUMAN RIGHTS OF CALIFORNIANS

Introduction

The State of California and local governments throughout the state routinely collect information on race, color, ethnicity, or national origin of individuals in order to further laudable public policy objectives. These purposes include compliance with federal and state nondiscrimination laws, and compliance with conditions imposed for the receipt of targeted federal funds. In some instances, information is collected even when not required, such as when state government collects race-related information on students applying to state universities for admission, or when the Office of Statewide Health Planning collects data to research a variety of public health issues.

While the California Constitution does not prohibit the collection and use of race-related information, Section 31, Article I (added to the Constitution by Proposition 209 in 1996) prohibits the State and all its political subdivisions and government instrumentalities from discriminating against, or granting 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.

Proposition 54 would prohibit the state, including all levels of state and local government and perhaps private entities that are deemed an "instrumentality" of the state, from classifying individuals by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment. Additionally, it would prohibit the state from classifying individuals in other state operations unless each of the following conditions were met: (1) there is a "compelling state interest;" (2) the Legislature approves an exemption by a two-thirds supermajority vote; and (3) the Governor approves the exemption. ¹ [See discussion of the "compelling state interest" exemption in Implementation Issues 1(b) on page 8 below.]

Proposition 54 defines "classifying" as "the act of separating, sorting, or organizing by race, ethnicity, color or national origin including, but not limited to inquiring, profiling, or collecting such data on government forms." The initiative therefore apparently would prohibit the collection as well as the use of racial data. Prop 54 also contains limited exemptions to the prohibitions imposed on the gathering and use of such data. [See discussion of Implementation Issues below.]

¹ A copy of Proposition 54 and accompanying Arguments is reprinted from the Secretary of State's Website in Exhibit 1 and provided in a clean copy version in Exhibit 1A.

If enacted, Proposition 54 would be added as Article I Section 32 of the California Constitution, to take effect on January 1, 2005.

Purpose of the Hearing

This joint hearing is intended to elicit information on the impact of Proposition 54 on California citizens and the state as a whole. According to those groups that have responded publicly to the initiative measure, there are four areas that may be severely impacted by the passage of Prop. 54: health care, law enforcement, education, and civil and human rights. Thus, while Prop. 54 may raise other issues and have other unintended consequences, this joint hearing will focus on these four identified areas of concern, and the arguments proffered by those who support the initiative measure, and those that do not.

The following are the questions to be addressed by respective panels:

Issue 1: Will Proposition 54 ban data important to prevention of disease and to development of sound health care policy for the state?

Issue 2: Will law enforcement or confidence in the legal system be affected by Prop 54's ban on data collection and use?

Issue 3: Will Proposition 54 affect the ability of our schools, community colleges, and universities to serve all Californians without discrimination or preferences?

Issue 4: Will Proposition 54 affect the state's efforts to combat discrimination in housing, employment, voting, and other civil rights?

Issue 1: Will Proposition 54 ban data important to prevention of disease and to development of sound health care policy for the state?

Proponents of Proposition 54 argue that by eliminating the state's ability to classify individuals by color, race, ethnicity, or national origin, Proposition 54 will help move California towards reaching "[t]he colorblind ideal" society, where racial and ethnic categorization is irrelevant in all areas of life. "Classification systems were invented to keep certain groups 'in their place' and to deny them full rights...The government should stop categorizing its citizens by color and ancestry, and create a society in which our children and grandchildren just think of themselves as Americans and individuals."

[Argument in Favor of Proposition 54, submitted to the Secretary of State by Ward Connerly and others.]

Health care professionals contend that Prop. 54 would ban health information that is currently used “to fight cancer, heart disease, diabetes, the spread of infectious diseases and other illnesses that affect all Californians in every part of the State.” They state that the data that Prop. 54 would ban include information from birth and death certificates, hospital and laboratory reports, and disease tracking tools such as the Cancer Registry, which the Legislature authorized in 1985 for the purpose of developing health care policy for the state. [Argument Against Proposition 54, submitted to the Secretary of State by Jacqueline Jacobberger, President, League of Women Voters of California, and others.]

Proposition 54 provides an exemption for “medical research subjects and patients.” [Subdivision (f).] Health care providers and researchers however argue that much of the important health data now collected would fall outside this limited exemption, and therefore, Prop. 54 would make it harder to stop preventable disease outbreaks, premature death, and disability. For example, they cite statistics that show white women are diagnosed with breast cancer at a higher rate, that Asian Americans are at a higher risk for Hepatitis B, that Latinos are more likely to die from complications of diabetes, and that African Americans die from heart disease at a higher rate than the rest of the population.

Testimony will be presented at the hearing to provide empirical data and substantiate these claims so that the impact of Prop. 54 on future research and public policy development in the health care area may be Properly evaluated by the public and the Legislature.

Issue 2: Will law enforcement or confidence in the legal system be affected by the ban on data collection and use that Proposition 54 would impose?

Proposition 54 provides an exemption for law enforcement:

(g) Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways. Neither the Governor, the Legislature, nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the Governor, the Legislature, or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.

The plain language of this provision of Prop. 54 limits the exemption to instances when law enforcement officers (and only law enforcement officers, not any other employee of a law enforcement agency) are "describing" persons in the course of "carrying out their law enforcement duties ... in otherwise lawful ways." It specifically prohibits the state from requiring law enforcement to maintain records or track individuals on the basis of race or ethnicity – presumably even if the Legislature and the Governor approved an exception pursuant to paragraph (b) of the initiative.

According to Proponents, this exemption would allow a law enforcement officer to describe a person by his or her race, ethnicity, color or national origin where it is a permissible use, as established by Supreme Court jurisprudence (such as when a person is being arrested for a crime). Proponents also argue that while Prop. 54 prevents the state from tracking racial data, it does not prevent law enforcement agencies from voluntarily collecting racial data to combat racial profiling. [Information available at www.racialprivacy.org/faqs/rpilawenforcement.] However, it is not clear whether local governments or law enforcement agencies would have the authority to collect race data without approval of the Legislature and Governor. [See discussion of Local Control in Implementation Issues on page 9 below.] The Legislative Analyst, moreover, points out that it is unclear if the initiative allows law enforcement to "use" this information (e.g., sorting, analyzing) once it is collected, and that it is likely the courts will be called upon to interpret this vague and ambiguous language.

As a state agency, the Department of Justice (DOJ) would not be exempt from Proposition 54. The Attorney General has stated that Proposition 54 would prevent the DOJ from analyzing and reporting on various crimes, especially hate crimes. Further, the DOJ states that Prop 54 would prevent the department from including racial data in many of its annual crime reports, including reports on homicide, hate crimes, juvenile justice, "Crime in California," and any special reports.

Without this data, opponents of Prop. 54 contend, law enforcement's ability to develop effective programs to prevent and combat homicide, domestic violence, drug crimes and hate crimes and to prevent racial profiling could be eliminated or seriously curtailed. Current state law requires local law enforcement agencies to send information to the Department of Justice which, in turn, voluntarily shares it with the federal government. In Los Angeles, the Los Angeles County Commission on Human Relations shares its annual report on hate crimes with various Los Angeles law enforcement agencies and schools. Opponents argue that without understanding the larger picture of crimes in a given area, law enforcement may be unable to target educational and preventive efforts towards groups involved.

At the local level, opponents also point out, law enforcement agencies depend on local crime investigation data to design and provide culturally competent services to their communities. As an example, they point to Santa Clara County where, during a three-year period from 1994 to 1997, 34 percent of women killed in domestic violence cases were Asian American. This information assisted county law enforcement agencies to design educational programs on domestic violence specific to the Asian American community. Proposition 54 would appear to prohibit the collection and use of this type of data.

Lastly, Proposition 54 provides an exemption for the “otherwise lawful assignment of prisoners and undercover law enforcement officers.” The sponsors of Prop. 54 explain that this exemption is intended to avoid race-based prison riots.

Issue 3: Will proposition 54 affect the ability of our schools, community colleges, and universities to serve all Californians without discrimination or preferences?

The definition of “state” under Proposition 54 includes “the state itself, any city, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or government instrumentality of or within the state.” Clearly, Prop. 54 would ban the collection of data related to color, race, ethnicity, or national origin of students and faculty of all educational institutions in the state, from K-12 to the universities and community colleges. However, the measure provides a general exemption for actions (*e.g.*, classifying, sorting, organizing) “which must be taken to comply with federal law or to establish or maintain eligibility for any federal program.” [See discussion of this exemption in Implementation Issues on pages 9-10 below.]

California’s K-12 education system collects data on student and staff characteristics, enrollment, and hiring practices, including information on race and ethnicity. Much of the data collected by the California Basic Education Data System (CBEDS) provide publicly-available demographic information on schools in California, and assist researchers in tracking high school graduation and dropout rates, monitoring honors and special education courses, and analyzing racial disparities in scores on tests such as SATs.

Further, the California school system also collects race-based data for other purposes, mainly to comply with federal requirements and to establish eligibility for continued funding of specified programs, such as those funded under the federal No Child Left Behind Act. This data would be exempt from the ban on

data collection by Proposition 54. However, educators are concerned that the data collected under these federal compliance requirements may not be used for purposes other than as prescribed by the federal government, such as to develop education policies in the state.

At the university and college level, much of the race and ethnic-based information on applicants and enrollees is gathered at the behest of the federal government. Here, again, however, the concern is that Prop. 54 would not permit the use of any data so collected, even for the purpose of ensuring the implementation of another constitutional amendment enacted by initiative, Proposition 209 (Section 31, Article 1 of the California Constitution). Ironically, some opponents of Prop. 54 contend that without the ability to collect and use race and ethnicity-based data, there may be practically no tool left to prove that preferential treatment is used in the admission of students, eligibility for programs and hiring of faculty in violation of Proposition 209.

According to a public policy paper on Proposition 54 [*The Classification of Race, Ethnicity, Color, or National Origin (CRECNO) Initiative: A Guide to the Projected Impacts on Californians*, Goldman School of Public Policy, Institute of Governmental Studies, University of California, Berkeley, May, 2003], the overall impact of Proposition 54 on higher education will depend heavily on the court's interpretation of the initiative. The study concludes that the public higher education institutions – the University of California, California State Universities and Community Colleges – will feel most of the impact of the initiative. “The passage of CRECNO will also greatly impact outreach efforts. Not having data to assess program effectiveness will greatly impact program design and a program's ability to attain private donor funding. Similarly, financial aid awards will likely be reduced, if not eliminated, for recipients of race- and ethnic-restricted aid.” [Id, supra, at 25 and 26.]

The state's public universities have also expressed concern that the prohibition on the collection and use of data targeted by Proposition 54 could infringe on academic research and the faculty's First Amendment rights to academic freedom.

Issue 4: Will Proposition 54 affect the state's efforts to combat discrimination in housing, employment, voting, and other civil rights?

Data of the type that Proposition 54 would ban are collected and analyzed by state and federal fair housing and employment agencies in the course of investigating claims made by aggrieved persons who claim discrimination and also to help determine patterns and practices of discrimination to be used in the

enforcement of anti-discrimination laws. The federal Equal Employment and Opportunity Commission (EEOC) and the state Department of Fair Employment and Housing (DFEH) are the agencies responsible for the enforcement of Title VII of the Civil Rights Act and the state's various civil rights and the Fair Employment and Housing Act, respectively.

Prop 54 specifically exempts the DFEH from the ban on race and ethnicity related data collection for a period of ten years after its effective date, if enacted. It also specifies that the DFEH will no longer be able to impute racial or ethnic descriptors for individuals who failed to include their race or ethnicity on DFEH forms, beginning on January 1, 2005. The practice of imputing racial or ethnic descriptors to replace missing values on the census is a widely accepted statistical technique developed in the 1940s. [See discussion of Implementation Issues 2(d) for a more detailed discussion of this exemption.]

According to the Goldman Institute Study, without CRECNO information, some victims of housing and employment discrimination may have increasing difficulty proving patterns or practices of discrimination, since one of the primary tools used to show discrimination has occurred is the disparate impact study. If DFEH is unable to collect this race or ethnic based information from employers, it will be unable to look into practices that have disparate impacts. Further, because state statutes are generally more expansive than similar federal statutes prohibiting housing discrimination, those who claim they are being discriminated against under the state statutes may have more difficulty proving discriminatory patterns of treatment than those who allege violations of federal law or regulation. Therefore, the study concludes that the workload for the federal agencies will increase over time.

State and local government agencies demonstrate a pressing need for gathering data on the racial composition of their workforces, their voting districts, and the impacts of their policies and practices, according to Professor Erwin Chemerinsky of the UCLA School of Law, because of the liability created by the well-established principle of discriminatory impact. The principle allows for a finding of discrimination, even without proof of discriminatory intent. While plaintiffs and plaintiffs' attorneys will still be able to gather Prop. 54's banned data and file disparate impact lawsuits, the government, under Prop. 54, would not be able to gather the data that could help ensure it is in compliance with the law. "When disparate impact violations can create multi-million dollar liability, it is simply suicidal for a States' voters to prevent their government from even knowing if it has broken the law. In the midst of a fiscal crisis, this kind of exposure is the last thing that California needs." [*Why California's Proposed Racial Privacy Initiative is Not only Unwise, But Also Unconstitutional and Potentially*

Fiscally Damaging for the State," Commentary by Professor Erwin Chemerinsky, August 21, 2003, available at www.findlaw.com]

Implementation Issues

1. Will the legislatively created exception in Proposition 54 sufficiently address its vagueness and ambiguity?

a. Prop. 54 permits legislatively created exceptions only in certain areas and only in limited circumstances.

Paragraph (b) of the initiative allows exceptions to be created by the Legislature, but only in some cases, and only if a series of rigorous conditions are met. No legislative exceptions are allowed in any circumstances in the areas of public employment, education and contracting, no matter how weighty the reasons or how great the proportion of legislators voting in favor.

As to classifications in areas other than employment, education, and contracting, paragraph (b) permits the Legislature to create exemptions only when the following conditions are met: (1) the Legislature determines that there is a compelling state interest in creating the classification; (2) a two-thirds supermajority vote is obtained; and (3) the Governor signs such a measure.

b. The compelling state interest requirement may be severely restricting

The term "compelling state interest" is used in and presumably borrowed from Supreme Court jurisprudence regarding the constitutional guarantee of equal protection of the laws. As the Court recently reiterated in *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003):

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. ... We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

As the foregoing suggests, compelling governmental interests have rarely been recognized by the courts. In fact, the term has caused great

uncertainty and division in the courts. Until the *Grutter* decision this June, which accepted racial diversity among the student body in the unique setting of higher education as a compelling governmental interest, the only previously recognized governmental purpose to reach this lofty threshold has been governmental efforts to remedy past discrimination by the governmental entity itself. [See *Richmond v. J. A. Croson Co.*, *supra*, at 493 (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.")] Indeed, prior to *Grutter* remedying past governmental discrimination was the only permissible justification for race-based actions.

If Prop. 54 is construed to require the same demanding test of "compelling state purpose" as suggested by equal protection analysis, it is probable that exceedingly few Legislative exceptions would ever be ratified by the courts. Furthermore, if the state must either prove a "factual predicate" in support of the compelling state interest it identifies, [*Richmond v. J. A. Croson Co.*, *supra*, at 498] or satisfy the "narrow tailoring" requirement of the strict-scrutiny test outlined above, [see *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003)] it is safe to predict that virtually no legislatively-created exemption would pass muster.

Indeed, Prop. 54 appears to turn the long-established use of this strictest constitutional test on its head - employing it to impede traditional governmental efforts to combat discrimination, rather than to advance these efforts.

c. The two-thirds vote requirement is further restricting

Even if the compelling state interest requirement were satisfied, any exemption Proposed by the Legislature would require a two-thirds supermajority under the terms of Prop. 54. As many observers of the Legislature have commented, a two-thirds vote is frequently difficult to obtain. Achieving this near unanimous agreement on matters of race, particularly where a compelling governmental interest must be found, may be particularly difficult if not impossible. For example, the *Grutter* court recognized the importance of student-body diversity by only a one-vote margin.

d. Even if a compelling state interest were found and a two-thirds vote obtained, the legislature remarkably might not be empowered to override a Governor's veto

Paragraph (b) expressly requires not only a two-thirds vote of the Legislature but the signature of the Governor as well. In other words, the Legislature would apparently be stripped of its usual constitutional power, under Article 4, section 10, to override the Governor's veto. There is no precedent in the state constitution for such an extraordinary departure from the "checks and balances" so fundamental to the constitutional scheme of government in the United States.

e. Local control would apparently be supplanted by state power

The initiative has no provision for local governments to approve the collection or analysis of race data by any mechanism, for any reason, or by any margin of votes. Thus, any local race classification measures, such as health information or racial profiling data by local law enforcement agencies, would presumably have to be enacted by the Legislature and signed by the Governor, as set forth above.

2. The other exceptions provided by Proposition 54 do not adequately address its impacts on major areas of concern

a. Some actions in compliance with federal law are exempt

Paragraph (i) of Proposition 54 excludes "action which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." One possible reading of the first portion of this exception suggests that state classifications are allowable if they must be conducted in order to comply with federal law - although only if federal law expressly *requires* the classification, not if federal law simply *permits* the classification. However, it is also possible to read this provision as allowing state classifications only to comply with federal law when federal funding would be lost. This interpretation is suggested because the language regarding compliance with federal law is followed by an apparently subordinate clause regarding eligibility for federal funding. In other words, this provision may be read grammatically correctly to allow only, "action which must be taken to comply with federal law ... where ineligibility would result in a loss of federal funds to the state." Because of the patent ambiguity of this provision, it is likely this question would be settled only by the decision of a court.

b. Some actions to establish or maintain eligibility for federal programs.

In addition to actions to comply with federal law, paragraph (i) plainly also exempts "action which must be taken to ... establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." Some analysts have read this exception narrowly to allow state classifications only when failure to take the action in question would result in the state losing federal funds that it now receives. Indeed, it is possible that a narrow reading would be advocated by Prop. 54's supporters because the same language appears in Prop. 209, which the same Proponents would presumably argue should be narrowly construed. On the other hand, the exemption might also be read to apply more broadly to allow any action that is required in order for the state to become eligible or remain eligible for some type of federal funding. Under this broader reading, if the federal government were to create a new program that required the collection of racial data by the state in order for the state to be eligible to receive some type of federal funding, the state could collect the data necessary to receive those funds. Under the more narrow reading of the exemption it would be prohibited from doing so. As with the other provisions, there would be substantial uncertainty unless and until the courts resolved this question.

- c. "Valid" consent decrees and court orders in force as of January 1, 2005 are exempt.

Paragraph (j) states: "Nothing in this section shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section." Paragraph (l) states that the section becomes effective January 1, 2005. It is not clear what is meant by "valid" court decrees and orders. Interestingly, Prop. 209 did not contain this limiting modifier. *See* Cal. Const. Article I, section 31 (d). Whatever the effect on existing court orders, however, a plain reading of this provision would appear to dictate that future court orders would be affected, raising questions about whether the initiative is intended to strip courts of their existing power to recognize race in, among other things, orders to remedy discrimination.

- d. Limited and temporary exemption for the Department of Fair Employment and Housing

Paragraph (e) creates an exemption for the Department of Fair Employment and Housing (DFEH), the state agency responsible for enforcing anti-discrimination laws in employment, housing and public accommodations. Although local agencies and other state agencies may

have complementary duties, no other state or local agency is covered by this exemption.

In particular, there is no apparent exemption for the state's Fair Employment and Housing Commission, the independent entity that is responsible for, among other matters, adopting regulations implemented by the DFEH, and adjudicating disputes prosecuted by the DFEH. In the course of deciding cases, the FEHC - like the courts - routinely makes findings of fact such as, "six of the 15 applicants for the position in question were African American, and the applicant selected for the position was African American." The omission of the FEHC from the exemption in Prop. 54 leaves open to doubt whether the FEHC could continue to conduct its work, and if not, what the consequences might be.

Moreover, the DFEH exemption is limited to "DFEH-conducted classifications in place as of March 5, 2002" - that is, approximately three years before the effective date of the measure. Presumably this exemption covers data compiled by the DFEH as of March 5, 2002. However, a literal reading suggests that the DFEH would be prohibited from obtaining data after March of 2002 - or analyzing data after that date, even if the data were collected before.

Paragraph (e) goes on to state that "notwithstanding DFEH's exemption from this section, DFEH shall not impute a race, color, ethnicity or national origin to any individual." Prop. 54's Proponents explain that "impute" means that "DFEH may not assign a person declining to classify himself or herself by race." (See Racial Privacy Initiative, FAQs, at [www.racialprivacy.org/.](http://www.racialprivacy.org/)) This explanation would apparently prohibit the DFEH from making a determination about the race of an alleged discriminator - a factor that is frequently relevant in discrimination cases - if the alleged discriminator declined to state his race.

Finally, this exemption is only temporary. Unless specifically extended by the Legislature - presumably only after finding a compelling state purpose and approving the extension by a two-thirds vote and the approval of the Governor - this exemption expires ten years after the effective date of the measure.