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REPORT

PROPOSITION 209, PREFERENCES AND FEDERAL FINANCIAL ASSISTANCE
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PROPOSITION 209, PREFERENCES AND FEDERAL FINANCIAL ASSISTANCE

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I. Introduction.

In 1996, California voters passed Proposition 209, which provides, "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." Section (e) of Proposition 209 provides, however, "Nothing in this section shall be interpreted as prohibiting 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. ○ This report examines the impact of this ○ federal funds exception ○ to Proposition 209.

II. Background: The Interaction of Federal and State Laws. Proposition 209 and current federal law potentially conflict. Under the first clause of Proposition 209, preferences in public employment, contracting and education based on race, sex, color, ethnicity or national origin are absolutely prohibited. Under the federal constitution and existing legislation, preferences based on race, color and ethnicity are permitted, if they are narrowly tailored to achieve a compelling governmental purpose, such as eradicating discrimination. Preferences based on sex are permitted, under the federal constitution, if they are closely related to an important governmental interest.

If federal law required California to grant preferences based on race or gender, California law would have to permit preferences. Under the federal constitution's Supremacy Clause, federal laws prevail in the event of a conflict. Acting under its power to enforce the Fourteenth Amendment or its power to regulate commerce, Congress could probably require the state, in limited circumstances, to permit or engage in affirmative action.

Generally speaking, however, federal law does not require states to engage in affirmative action in public education, employment or contracting. In public employment and public education, federal law prohibits discrimination and *permits*, but does not require, affirmative action.¹ In public contracting, unless federal funds are involved, federal law simply prohibits discrimination. Thus, one of the key issues in the ongoing litigation over Proposition 209's constitutionality is whether Proposition 209 is invalid because by prohibiting actions that federal law permits, it impermissibly undermines Congress's attempts to eliminate discrimination.



III. Federal Funding and Affirmative Action.

Some federal statutes, however, do require affirmative action. In many cases, when the federal government has made funding available to state and local governments, it has attached, as a condition to the funding, a requirement that the recipient engage in some form of affirmative action to assure minorities equal treatment under the law. Any recipient of federal financial assistance is prohibited from discriminating by race or gender, and is required to take affirmative steps to eliminate the effects of past discrimination, by Title VI of the Civil Rights Act of 1964. Further, under the regulations implementing Executive Order 11246, any contractor working in connection with a federally assisted construction project must take affirmative steps to assure that specified minorities are afforded equal opportunity to participate in the project. Also, most federal agencies require institutions of higher education and hospitals, whether public or private, to take positive steps to use minority and women owned businesses in their procurement contracts. Finally, many statutes providing funding for specific projects impose affirmative action

requirements.

A. Title VI, Equal Opportunity, and Affirmative Action.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in any program or activity receiving Federal Financial assistance. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities receiving federal financial assistance.² Under these laws, if any part of a department, agency, or other state or local government entity, or if any part of a public system of higher education, receives federal financial assistance, the entire department, agency or institution is prohibited from discriminating.³

Under Title VI and Title IX, federal agencies that dispense federal financial assistance are required to issue regulations to prevent discrimination.⁴ While the regulations can vary from program to program, they share the same pattern. The regulations: 1) prohibit recipients of aid from discriminating, 2) require recipients to take affirmative steps to overcome the effects of prior discrimination in their program, and 3) permit recipients to take further affirmative steps to overcome under-representation by minorities in the program being administered.⁵ They also require applicants to file written assurances that they will not discriminate, and to file compliance reports that demonstrate that no discrimination is occurring.

Proposition 209 only permits preferences when they are required by federal law. Titles VI and IX only require affirmative action when there has been prior discrimination. Therefore, unless there has been prior discrimination, Title VI and Title IX would not provide grounds for invoking Proposition 209's section (e).

There are three exceptions, however. The regulations governing federal financial assistance administered by the Office of Personnel Management under the Intergovernmental Personnel Act provide that even in the absence of prior discrimination, a recipient [of federal financial assistance under the Act]. . . *shall* take affirmative action as required by OPM to overcome the effect of conditions which resulted in limiting participation by persons of a particular race, color or national origin.⁶ Programs administered by the Department of Labor are subject to an identical regulation.⁷ Section (e) of Proposition 209 would permit California state or local agencies receiving funds from programs administered by these two agencies to take whatever steps are necessary to comply with this requirement.

Finally, the Department of Energy's regulations implementing Title VI select programs for compliance review based on whether there is a disparity between the percentage of minorities benefiting from the program and the percentage in the relevant population.⁸ A California aid recipient that abandoned affirmative action in the wake of Proposition 209 might, thus, find its funding challenged in a compliance review if the number of minorities participating dropped as a result.

On balance, however, Proposition 209's federal funds exception is aimed at preserving federal funds that carry with them a requirement of some form of

preference. Titles VI and IX require recipients of federal financial assistance not to discriminate, but absent prior discrimination, they do not generally require any form of affirmative action, other than assurances of nondiscrimination and compliance reports that support those assurances.



B. Executive Order 11246 and Federally Assisted Construction. Under Executive Order 11246, before a federal agency can approve any grant, loan or other funds involving a construction contract, it must require the applicant to incorporate the following language in every construction contract:

- The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. ○

The Office of Federal Contract Compliance Programs has issued detailed regulations to implement Executive Order 11246. Those regulations require contractors⁹ to adopt an affirmative action programs that is ○ a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. ○¹⁰ To be acceptable, a plan must analyze the areas in which the contractor is underutilizing minorities and women, and establish goals and timetables for correcting the deficiencies.¹¹

Despite these very specific requirements, Proposition 209 arguably does not apply to the kind of affirmative action these regulations require. Proposition 209 only bans *preferences* based on race, gender and so on. At least according to the Department of Labor, Executive Order 11246 does not require preferences, or any other form of decision-making based on race. As the Labor Department explained in a memorandum responding to the Supreme Court's decision in *Adarand Constructors Inc. v. Peña*,¹² the affirmative action plans as authorized by regulations implementing executive order 11246 are merely intended to be vehicles for self-evaluation and self-correction.¹³ While goals and timetables are used to track progress, the regulations themselves in fact prohibit quotas and preferential treatment.¹⁴ The goals are neither set-asides nor a device to achieve proportional representation, and local compliance officers are instructed to take quick, corrective action if they learn that a contractor has implemented a quota or unlawful preference.

C. Grants to Public Institutions of Higher Education and Hospitals.

Many agencies that make grants to public institutions of higher education and hospitals impose a requirement that the recipient make positive efforts to ○ utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. ○¹⁵ To that end, recipients are required to ○ ensure that small businesses, minority-owned firms, and women's business

enterprises are used to the fullest extent practicable, to publicize and time their procurement contracts to facilitate minorities' and women's participation, to consider whether firms they use intend to subcontract with minority firms and women's business enterprises, and to use the Small Business Administration and the Department of Commerce's Minority Business Development Agency to solicit small businesses, minority-owned firms and women's business enterprises.¹⁶

Agencies that require institutions of higher education and hospitals that receive grants to follow these steps include: the EPA, NASA, AID, USIA, the National Archives and Records Administration, the General Services Administration, and the Departments of Agriculture, Energy, State, Housing and Urban Development, Labor, Education, Health and Human Services, and Transportation.



IV. Specific Statutes Imposing Affirmative Action Requirements.

In 1995, after a request from Senator Robert Dole, the Congressional Research Service compiled a list of Federal laws and regulations establishing affirmative action goals or other preferences based on race, gender or ethnicity.¹⁷ This section of the report reviews that compilation, and identifies the laws and regulations that might apply to California's state and local governments. As has already been noted, Proposition 209 prohibits preferences, not affirmative action per se. There are many forms of affirmative action that may not constitute preferences and thus might not fall within Proposition 209's prohibitions. Senator Dole's request, however, tracks Proposition 209's language, and therefore the CRS compilation, to the extent it is complete, should identify the federal programs Proposition 209 would not affect.

The type of programs that do come within Proposition 209's exception fall into a number of categories. The predominant type is modeled on the federal Small Business Act, and attaches, as a condition to the receipt of funds, a requirement that affirmative steps be taken to involve minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) in the project. Another common model is to make minority involvement relevant during the compliance review stage of a grant. A third common model, particularly applicable to higher education, makes eligibility for a grant program dependent on a particular percentage of minority enrollment. Proposition 209 would affect eligibility for many of these grants indirectly, if as a result of Proposition 209, minority enrollment at particular campuses falls below the threshold for eligibility. Finally, a large number of grants encourage the use of minority-owned banks, but these seem to be hortatory in nature, and not required by federal law.¹⁸

A. Federal Financial Assistance That Requires MBE and WBE Involvement.

As discussed above, the regulations implementing Executive Order 11246 require contractors on federally assisted construction projects to take affirmative steps to ensure that they do not discriminate. The following programs go farther, establishing specific goals for MBE and WBE participation. In many cases, the statutory authority for these programs is modeled after the Small Business Act, which sets out procedures for identifying disadvantaged small businesses, and presumes that minority and women-owned businesses are disadvantaged. At least to the extent that these programs establish set-asides or preferences, the constitutionality of these programs is in doubt after the Supreme Court's decision in the *Adarand* case.¹⁹

TABLE 1: MBE AND WBE REQUIREMENTS

<u>Program Area</u>	<u>Title of Program</u>	<u>Nature of Requirement</u>
Environment	Clean Water Act Grants for construction of treatment works	Grantees shall make positive efforts to use small businesses and minority owned businesses as sources of supplies and services. ²⁰
	Clean Water Act State Water Pollution Control Revolving Fund capitalization grants	Must comply with MBE/WBE requirements established by negotiation, based upon the amount of the capitalization grant award or other State established goals.. ²¹
	CERCLA Superfund Response Actions Cooperative agreements and superfund state contracts.	Recipient must take specific steps to ensure that MBE's, WBE's and small businesses are used, in order to meet state's fair share objectives. ²²
Health and Human Services	Programs for Older Americans Grants for state and community programs on aging.	State plans must assure that special efforts will be made to provide technical assistance to minority providers of services. In several respects, evaluation of programs must include particular attention to the needs of low-income, minority elders. ²³
	Violent Crime Control Act Local Government Fiscal Assistance Fund	Not less than 10 percent of the amount paid from the Local Government Fiscal Assistance Fund shall be expended on contracts or subcontracts with

		socially and economically disadvantaged and women-owned small businesses. ²⁴
	Public Safety Partnership and Community Policing Act of 1994 ²⁵	Applicant must, to the extent practicable, seek, recruit, and hire members of racial and ethnic minority groups and women in order to increase their ranks within the sworn positions in the law enforcement agency.
	Federal Assistance to State Developmental Disabilities Councils ²⁶	State plan shall assure that affirmative steps are taken so that participation in programs reflects the diversity of the State with respect to race and ethnicity.
Transportation	<p>Financial assistance available to the public through the Department of Transportation, including funds authorized under the:</p> <ul style="list-style-type: none"> -- Urban Mass Transportation Act -- National Highway Traffic Safety Administration,  402 -- Federal Aviation Administration -- Deepwater Port Act 	Recipients must agree to an MBE program designed to maximize the opportunities available to MBEs. Recipients under some programs must file affirmative action plans that require good faith efforts to meet specified goals for MBE utilization. Set-asides may be required where permitted under state or local law. ²⁷
	<p>Surface Transportation Assistance Act of 1982</p> <p>Surface Transportation and Uniform Relocation Assistance Act of 1987.</p> <p>Airport and Airway Safety Act and Capacity Extension Act of 1987</p> <p>Urban Mass Transportation Act, Title I and Title III</p>	10% goal for Small and Disadvantaged Business utilization, unless the Administrator approves a lower goal. ²⁸
	Airport and Airway Safety, Capacity Noise Improvement	Project approval requires assurances that, to the maximum

	and Intermodal Transportation Act of 1992 ²⁹	extent practicable, at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns. . . owned and controlled by a socially and economically disadvantaged individual.
	Airport and Airway Improvement Act of 1982 ³⁰	Sponsors of airport improvement projects must establish an overall goal for the participation of DBE's as concessionaires, usually 10 per cent. Set-asides shall be used as necessary, unless state or local law prohibits them.
	Airport and Airway Development Act. ³¹	All grantees, sponsors, or state planning agencies, with 50 or more aviation employees, who participate in projects which receive federal airport aid funds are required to maintain affirmative action plans containing goal and timetables derived by comparing the percent of minorities and women in the employer's present aviation workforce . . . with the percent of minorities and women . . . in the surrounding area's total workforce.
Health and Human Services	Programs for Persons with Developmental Disabilities: Protection and Advocacy of Individual Rights ³²	To receive an allotment, the State must have in effect a system to protect and advocate the rights of individuals with developmental disabilities, which can pursue appropriate steps to protect the rights of the disabled, ○with particular attention to members of ethnic and racial minority groups.○
	Services for Migrant and Seasonal Farm workers ³³	Work force in State employment agencies administering Services for Migrant and Seasonal Farm workers should be representative of the racial and ethnic

B. Proportional Representation and Compliance Review.

Recipients of federal financial assistance are periodically reviewed to see if they are complying with the law's prohibition on discrimination. Under several regulatory schemes, compliance is determined by examining the disparity between the number of minorities and women being served, and the number eligible under the program. There is an indirect, but important connection between compliance reviews and Proposition 209. Federal funding can be lost if a review reveals noncompliance, so a program that is under-serving minorities or women would have to take affirmative steps, probably guided by numerical goals, if a compliance review revealed a disparity.

Programs that expressly call for a study of disparities at the compliance review stage are: programs administered by the Department of Energy;³⁴ housing preservation grants administered by the Department of Agriculture;³⁵ and grants awarded under the Criminal Justice Improvement Act.³⁶

C. Federal financial assistance that requires minority participation for eligibility.³⁷

Two other forms of federal financial assistance in which race and gender are a factor need to be considered to understand Proposition 209's implications. In one form, eligibility for a grant is conditioned on the recipient targeting minority populations or women. Under section (e) of Proposition 209, a recipient could presumably adopt preferences in order to meet the conditions of the grant.

The second form of assistance focuses on educational institutions.³⁸ In these programs, eligibility is limited to institutions that enroll a particular percentage of minority people or women. If Proposition 209 were to result in decreased enrollment by minorities and women, institutions could lose eligibility for these programs. While the connection is quite indirect, at least arguably Proposition 209 would permit an institution to adopt otherwise legal preferences in order to qualify for this funding.



TABLE 2: TARGETED FUNDING

The following programs require that the recipient direct the benefits of a program to minorities or women especially:

Program	Eligibility criteria
Older Americans Act ³⁹	Department of Health and Human Services shall carry out, directly or through grants or contracts, special training programs and technical assistance designed to improve services to minorities.

<p>Technical and Supervisory Assistance Grant (Housing)</p>	<p>Considers in determining applicant's eligibility, "the estimated number of low income and low income minority families the applicant will assist in obtaining affordable adequate housing. ^o C^a</p>
<p>Sea Grant Matching Fund Program⁴¹</p>	<p>A "factor considered" in the approval of proposals under the Sea Grant Matched Funding Program "will be the potential of the proposed program to stimulate interest in marine related careers among those individuals, for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest."</p>
<p>Health Professions Education Student Loans: Federally Supported Student Loan Funds⁴²</p>	<p>Federal capital contribution to loan fund contingent on institution carrying out a program for recruiting students from disadvantaged backgrounds, including racial and ethnic minorities, and minority faculty, and on entering arrangements with health clinics serving individuals from disadvantaged backgrounds, including members of minority groups.</p>
<p>Dwight D. Eisenhower Mathematics and Science Education Act⁴³</p>	<p>A portion of state allotment of critical skills improvement funds to be distributed for various purposes, including recruitment or retraining of minority teachers to become mathematics and science teachers.</p>
<p>Educational Research and Improvement: National Research Institutes⁴⁴</p>	<p>Department of Education "shall establish and maintain initiatives and programs to increase the participation" of "researchers who are women, African- American, Hispanic, American Indian and Alaskan Native, or other ethnic minorities" in the activities of various authorized educational institutes.</p>
<p>Training Personnel for the Education of Individuals with Disabilities -- Grants for Personnel Training⁴⁵</p>	<p>Training minorities and "minority institutions" are among several optional funding priorities under special education training program.</p>
<p>National Health Service Corps Scholarship and Loan Repayment Programs: Grants for State Loan Repayment Programs⁴⁶</p>	<p>Among factors considered in making certain State loan repayment grants to State applicants is "[t]he extent to which special consideration will be extended to medically underserved areas with large minority populations."</p>
<p>The Public Health Service Health Professions Education: Students from Disadvantaged Backgrounds⁴⁷</p>	<p>Institutional eligibility for faculty fellowship program based on "ability to . . . identify, recruit and select individuals from under represented minorities in the health profession" with potential for teaching and educational administration.</p>

TABLE 3: ENROLLMENT CRITERIA⁴⁸

Programs that provide federal financial assistance to educational institutions with specific minority or female enrollments include:

Program	Eligibility criteria
Higher Education Resources and Student Assistance Programs Institutional Aid: Strengthening Historically Black Colleges and Universities ⁴⁹	Authorizes ED grants to specified postgraduate institutions "determined by the Secretary [of Education] to be making substantial contributions to the legal, medical, dental, veterinary, or other graduate education opportunities for Black Americans."
Higher Education Resources and Student Assistance Programs: Minority Science and Engineering Improvement Programs ⁵⁰	The Department of Education shall "carry out a program of making §3934 grants to institutions of higher education that are designed to provide and improve support programs for minority students enrolled in science and engineering programs as institutions with a significant minority enrollment (at least 10 percent)." Eligibility for such grants is limited to " minority institutions" (minority enrollment in excess of 50%) or other public or private nonprofit institutions with at least 10 percent minority enrollment.
National Science Foundation: Science and Engineering Education ⁵¹	Fifteen percent of National Science Foundation funds available for science and engineering education is to be allocated to faculty exchange and other programs involving higher educational institutions with "an enrollment which includes a substantial percentage of students who are members of a minority group."
Health Professions Education: Students from Disadvantaged Backgrounds ⁵²	"Special consideration" in scholarship grant program to be given "health profession schools that have enrollments of under represented minorities above the national average for health profession schools."
Strengthening Institutions Program ⁵³	An institution of higher education is eligible to receive a grant under the Strengthening Institutions Program even if it does not satisfy certain other generally applicable state authorization or accreditation requirements if its student enrollment consists of specified percentages of designated minority groups.
Training Personnel for the	Includes "minority institutions" among several

Education of Individuals with Disabilities: Grants for Personnel Training ⁵⁴	optional funding priorities under special education training program.
Strengthening and Improvement of Elementary and Secondary Schools, Special Programs, Secretary's Fund for Innovation in Education ⁵⁵	Program to assist local educational agencies "which have significant percentages of minority students" to conduct alternative curriculum schools which "reflect a minority composition of at least 50 percent" and contribute to school desegregation efforts.

V. Conclusion

Proposition 209's ban on race and gender preferences does not apply to actions that are necessary to establish or maintain eligibility for federal programs, if a failure to act would result in a loss of federal funds. Although federal law does prohibit discrimination by recipients of federal financial assistance, federal law does not create any general obligation to use racial or gender preferences if an entity receives federal financial assistance. There is a general obligation to make affirmative efforts to involve minority and women owned business in federally financed construction, but the administration does not interpret this obligation as requiring preferences. Many specific statutes, however, and regulations interpreting those statutes -- particularly in the area of federal funds for transportation -- do require efforts to involve specified percentages of minority and women-owned firms. To the extent that these provisions require racial preferences, the Supreme Court has suggested that they may be unconstitutional. Other statutes make funding contingent on programs targeting particular populations, which may in effect require affirmative action or even preferential treatment. If these requirements are permitted under the federal constitution, Proposition 209 would also allow them.

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Footnotes

1. Arguably, the federal constitution does require affirmative action in one, specific area. Where a school district has operated a segregated school system in the past, decisions of the United States Supreme Court have interpreted the Constitution to require that the district take affirmative steps to eliminate segregation, "root and branch." [return to text](#)
2. 20 U.S.C. ♦ 1682 (1996). [return to text](#)
3. 42 U.S.C. ♦ 2000d-4a (1996), 20 U.S.C. ♦ 1687 (1996). [return to text](#)
4. Following each agency's regulations in the Code of Federal Regulations is an appendix listing the programs under which that agency distributes federal funds to which Title VI and Title IX apply. The Catalog of Federal Domestic Assistance may provide a similar list. [return to text](#)
5. See, for example, 45 C.F.R. ♦ 80.5 (j) (1996). (Even though an applicant or recipient [of aid

administered by the Department of Health and Human Services] has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served.) See, also, 7 C.F.R. 15.3 (b)(6)(ii) (1996). [return to text](#)

6. 5 C.F.R. ♦ 900.404(b)(6)(ii) (1996). [return to text](#)

7. 29 C.F.R. ♦ 31.3(b)(6)(ii) (1996). [return to text](#)

8. An example would be the Department of Energy, 10 C.F.R. ♦ 1040.101(b)(1) (1996). [return to text](#)

9. In contracts with state or local governments, the government agency itself is not required to maintain a written affirmative action plan. Nonetheless, Proposition 209 potentially applies, because the government agency must require those with whom it contracts to prepare such a plan. [return to text](#)

10. 41 C.F.R. ♦ 60-2.10 (1996). [return to text](#)

11. Id. Beyond these general requirements, the regulations go on to describe how utilization should be measured and deficiencies addressed in great detail. [return to text](#)

12. ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). In *Adarand*, the Supreme Court held that whenever the federal government uses a racial classification, it must be justified as absolutely necessary to achieve some compelling purpose, such as eradicating the effects of past discrimination within a particular program. A case challenging the constitutionality of a federal program that created financial incentives for contractors to use minority subcontractors was remanded to the trial court to apply this new standard. [return to text](#)

13. Numerical Goals under Executive Order 11246, U.S. Department of Labor, Office of Federal Contract Compliance Programs, ADM Notice, Number 206 (August 2, 1995). [return to text](#)

14. See 41 C.F.R. ♦♦ 60-2.12(e), 60-2.15, 60-2.30 (1996). [return to text](#)

15. See, for example, 7 C.F.R. ♦ 3019.44 (b) (1996). [return to text](#)

16. Id. at ♦ 3019.44 (b)(1) - (3) (1996). [return to text](#)

17. Charles F. Dale, "Compilation and overview of Federal laws and regulations establishing affirmative action goals or other preference based on race, gender or ethnicity," Memorandum to Senator Robert Dole, 141 Cong. Rec. S3929-01 (March 15, 1995). [return to text](#)

18. Federal programs that "encourage" the use of minority-owned banks include: all programs administered by the Department of Agriculture, the General Services Administration, the Department of Housing and Urban Development, the Bureau of Indian Affairs, the Justice Department, the Department of Labor, the Department of Veteran's Affairs, and the Federal Emergency Management Agency, among others. [return to text](#)

19. *Adarand* involved the Surface Transportation and Uniform Relocation Assistance Act (STURAA), and the regulations under subpart D of 49 C.F.R. Part 23 (1996). [return to text](#)

20. 40 C.F.R. ♦ 35.936-7 (1996). [return to text](#)

21. 40 C.F.R. ♦ 35.3145(d) (1996). [return to text](#)

22. 40 C.F.R. ♦ 35.6580 (1996). [return to text](#)

23. 42 U.S.C. ♦ 3027 et seq. [return to text](#)

24. 42 U.S.C. ♦ 3796dd-1 (1996). [return to text](#)

25. 42 U.S.C. ◆ 3796dd-1(c)(11) (1996). [return to text](#)
26. 42 U.S.C. ◆◆ 6022 (c)(5)(H) (1996). [return to text](#)
27. 49 C.F.R. ◆ 23.1ff (1996). In some instances, the regulations do not apply to financial assistance below a certain threshold. [return to text](#)
28. 49 C.F.R. ◆ 23.61 (a)-(b) (1996). These regulations were at issue in the *Adarand* case. The Supreme Court held that they could only be constitutional if they were narrowly tailored to achieve a compelling governmental interest, and remanded the case for the trial court to apply that legal standard. [return to text](#)
29. 49 U.S.C. ◆ 47113 (1996). [return to text](#)
30. 49 C.F.R. ◆◆ 23.89, 23.95 (1996). [return to text](#)
31. 14 C.F.R. ◆◆ 152.407, 152.409 (1996). [return to text](#)
32. 42 U.S.C. ◆◆ 6021, 6042(a)(1), (a)(2)(A)(i) (1996). [return to text](#)
33. 20 C.F.R. ◆◆ 653.111 (a), (b)(3) (1996). [return to text](#)
34. 10 C.F.R. ◆ 1040.101(b)(1) (1996). [return to text](#)
35. 7 C.F.R. ◆ 1944.671(b) (1996). [return to text](#)
36. 28 C.F.R. ◆ 42.206(c)(1) (1996). [return to text](#)

37. It is important to remember that even before Proposition 209, preferences tied to race or gender were legal under federal and state law only under extremely limited circumstances. [return to text](#)

38. An area this report does not address is the availability of funds to assist in desegregating schools. Under Proposition 209, it seems clear that state funds will no longer be available to support desegregation plans that rely on assigning students to schools based on race. [return to text](#)

The federal government, however, also supplies funds for desegregation. For example, the Sacramento Bee has reported that the Sacramento City Unified School District received current \$ 2.1 million in federal grants to support the majority of the cost of its magnet school programs. Jan B. Ferris, "Initiative has Some Services in Limbo," Sacramento Bee at B1, November 28, 1996. Funds for this purpose are administered by the Department of Education, and the regulations governing their availability are located at 34 C.F.R. 270.1 et seq. Arguably, Proposition 209(e) exempts these programs from its ban on preferences. In most cases, however, the federal funds that are available may not be sufficient to allow desegregation efforts to continue. The cost of San Francisco's court-ordered desegregation program, paid for by the state, is roughly \$30 million per year. So while Proposition 209(e) might permit state education agencies to apply for the federal funds, without state funds, the programs could not be carried out.

Of course, to the extent that particular school districts are currently operating under court-ordered desegregation plans, Proposition 209 (d) provides expressly that it does not invalidate any court order or consent decree in force at the time of the Proposition's enactment. Further, under the Supremacy Clause, Proposition 209 could not prohibit desegregation efforts that are constitutionally required. [return to text](#)

39. 42 U.S.C. ◆ 3035d(a)(2) (1996). [return to text](#)
40. 7 C.F.R. ◆ 1944.529 [return to text](#)
41. 15 C.F.R. ◆ 917.11(d) (1996). [return to text](#)
42. 42 U.S.C. ◆ 292t (1996). [return to text](#)
43. 20 U.S.C. ◆ 2986(b)(1)(B) (1996). [return to text](#)

44. 20 U.S.C. [??](#) 6031(c)(1)(D)(5), (c)(2)(H), (c)(5)(A), (1996). [return to text](#)

45. 34 C.F.R. [?](#) 318.11(a)(14)-(16), (1996). [return to text](#)

46. 42 C.F.R. [?](#) 62.57(h) (1996). [return to text](#)

47. 42 U.S.C. [?](#) 293b(3) (1996). [return to text](#)

48. There are also a number of programs of federal financial assistance available only to historically black colleges or institutions with "substantial" minority enrollment, for which state institutions of higher education presumably could not qualify. "Substantial" is generally not defined, although one statute provides federal financial assistance if the enrollment is higher than 20% Hispanic or Native American. [return to text](#)

49. 20 U.S.C. [?](#) 1063b(a)(1) (1996). [return to text](#)

50. 20 U.S.C. [??](#) 1135c, 1135d (1996). [return to text](#)

51. 20 U.S.C. [?](#) 3916(b)(1) (1996). [return to text](#)

52. 42 U.S.C. [?](#) 293a(h)(2)(B) (1996). [return to text](#)

53. 34 C.F.R. [??](#) 607.2(d), (e) (1996). [return to text](#)

54. 34 C.F.R. [?](#) 318.11(a)(15), (16) (1996). [return to text](#)

55. 20 U.S.C. [?](#) 3156(a) (1996). [return to text](#)