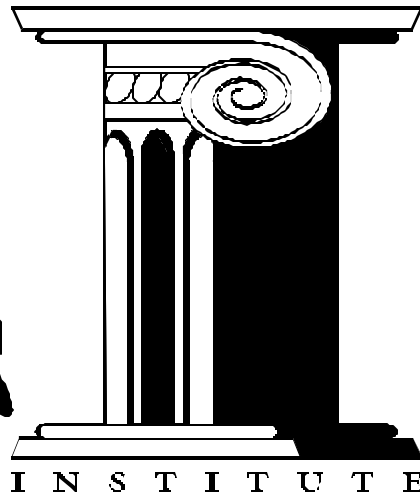


LIMITS



On Power and the Use of Power

Why Term Limits?

by Lawrence W. Reed

Early in the 1990s, a grassroots movement to limit the terms of elected officials blossomed nationwide. Term-limit ballot initiatives passed in 19 states, usually by landslide margins. The U.S. Supreme Court threw out all state-imposed term limits on federal positions in 1995, but those for state and local offices were affirmed. The term-limits movement has slowed in recent years, and in a growing number of states the political establishment is fighting back. Quietly in most cases, lawmakers are starting to talk up the idea of extending the length of terms voters chose to limit, or to repeal the restrictions altogether. But the reasons the term-limit concept caught on in the first place remain as potent as ever.

It was Benjamin Franklin who summed up the best case for term limits more than two centuries ago: "In free governments, the rulers are the servants, and the people their superiors...For the former to return among the latter does not degrade, but promote them."

In other words, when politi-

cians know they must return to ordinary society and live under the laws passed while they were in government, at least some of them will think more carefully about the long-term effects of the programs they support. Their end-all will not be re-election, because that option will not be available.

Nationally, the notion of the "citizen legislator" remains a popular vision. The public is justifiably cynical about the hollow promises of so many lifelong professional politicians who are often purchased with special-interest money. Opponents of term limits are frequently the same interests who milk government for all they can get, such as defense contractors in Washington or the teacher unions in state capitals.

Opponents charge that limits are inherently antidemocratic, that people should be free to elect to office whomever they want, and that voters inherently have the power to limit terms simply by voting incumbents out. But judging by the huge support that term limits have usually won at

the ballot box – and still enjoy in most local polls – large numbers of citizens feel that a political system without limits is a stacked deck. Any system that allows incumbents to amass so much power and attention in office that challengers can rarely win is surely in need of a corrective.

Term-limit advocates properly point out that we already place all sorts of restrictions on who can and cannot hold office, no matter how popular they may be – from age and residency requirements to two four-year terms for the president. Indeed, it isn't widely understood that term limits is an old concept. With regard to municipal offices, it dates back to at least 1851, when the Indiana state constitution imposed them for almost every elected county office.

A 1998 report from the Cato Institute offered an intriguing response to the "We don't need term limits because we can simply vote the bums out" argument. Author Einer Elhauge states, "Districts with highly senior

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legislators often impose externalities [burdens such as higher taxes] on other districts by securing the enactment of provisions the other districts dislike either on ideological grounds or because they bear the financial cost... Voting your bum out is not a solution when what you want to do is oust the other districts' bums. For that you need term limits, which oust the other districts' more senior bums and thus strongly increase equality in legislative representation."

Without long-term legislators, according to another anti-term-limit argument, "inexperienced" legislators won't be able to control the permanent bureaucracy. That's a red herring. Legislators ultimately control the purse and the power to control the bureaucrats any time they want to, and we must not overlook the unholy alliances built up between bureaucracies and long-term legislators. Surely the "experience" of living as a private citizen under the rules and taxes one voted for as a legislator is just as valuable and instructive, if not more so, than the experience of cooking up those rules and taxes in the first place.

Term limits have been approved almost everywhere they've been on the ballot because concerned citizens see them as a positive structural reform, a necessary step to change the incentives of legislators so they would think more about the good of their states and country and less about their next campaign. Those citizens want to ensure a regular supply of fresh blood and new ideas in legislative bodies. They want to open the system to more people from a variety of professions. They want to make public

officials less responsive to organized, well-heeled lobbies and more interested in serving the welfare of society at large.

But what about that paramount issue of great interest to readers of this magazine – the issue of individual liberty? Do term limits enhance or detract from its protection?

For sure, people in a free and democratic society ultimately get the government they vote for. Term limits cannot guarantee either individual liberty or good government if voters with bad ideas replace bad legislators with other bad people. Ben Franklin may have supported term limits, but he also believed, with John Philpot Curran, that in any event, "The condition upon which God hath given liberty to man is eternal vigilance."

However, the evidence suggests that at the margin, term limits are helpful to the cause of individual liberty. Elhauge's report showed that term limits lessen the influence of seniority. His research demonstrated that long-term lawmakers from both major parties vote for more bureaucracy than do lawmakers who have been in office for shorter times. Term limits lessen the ability of lawmakers to develop cozy deals with either bureaucracies or special interests that seek to get something from government at everyone else's expense.

Stephen Moore, writing for the Cato Institute, says that an examination of the voting behavior of congressmen reveals that on a wide range of liberty-related issues – "not raising the minimum wage, defunding the National Endowment for the Arts, closing

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Q: Has the passage of Proposition 209 been good for California?

YES: The racial spoils system is fading away despite the efforts of bureaucrats.

by Harold Johnson

Five years ago this coming November, voters in the Golden State said “no” to racial spoils in government programs by passing Proposition 209, the California Civil Rights Initiative. It added to the state constitution a clear and simple directive: Government “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.”

Opponents called it the “anti-civil-rights initiative,” but its language was modeled on the federal Civil Rights Act of 1964, and its spirit was straight out of Martin Luther King Jr.’s “I Have a Dream” address. The initiative’s sponsors talked of putting an end to the pigeonholing of people by race; no more government hiring or helping with an eye to someone’s ethnicity rather than a person’s merit or need; no more dividing of the population into camps defined by chromosomes or color. The goal was that of the original Civil Rights Movement: People shouldn’t be judged by their skin but by what’s beneath it.

More than a few paid a price for hoisting this anti-discrimination banner. Ward Connerly, the African-American businessman who spearheaded the Proposition 209 campaign, found himself vilified as an Uncle Tom and a Benedict Arnold to blacks. The two academics who wrote the initiative publicly were promised a mud bath. A Democratic Party hack said he would investigate whether they had “paid their taxes, inappropriately touched students or ever been involved in lawsuits.” He never hit pay dirt.

Considering the venom spewed by the foes of Proposition 209 before the election, maybe it shouldn’t be surprising that its victory at the polls didn’t halt the drive to kill it. Opponents merely turned to extralegal means. The past four-and-a-half years have called to mind Dixie’s era of “massive resistance” — the South’s energetic disobedience in

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NO: This measure only has served to stifle talent in the state’s barrios and ghettos.

by Harry P. Pachon

A good way to measure the impact of Proposition 209, the initiative that widely eliminated affirmative action in California, is to analyze the regulations the University of California (UC) adopted to mirror the proposition. The UC trustees rescinded these regulations in late May. Therefore, a look at the data from 1998 to 2000, when these regulations were in force, shows the effect of eliminating racial and ethnic preferences in college admissions and may be illustrative of the overall impact of the Proposition 209 initiative.

Across all eight UC campuses, admission rates for black and Latino students dropped by more than 25 percent. At the flagship campuses — Berkeley and UCLA — the drop was even more dramatic. Blacks experienced more than a 50 percent drop in admissions, and Latino rates fell more than 40 percent. As a result, there were 2,100 fewer black and Latino freshmen in the class of 2001 than in the class of 1997 at Berkeley and UCLA. System-wide, this number was 6,500. These drops occurred while the proportion of black and Latino high-school graduates in the applicant pool increased. For example, Latino applications to all UC campuses increased by two-thirds during the last four years.

If UC rejected a higher number of minorities, Proposition 209 supporters argue that California is better off in the long run because a meritocracy has been re-established in the state’s top public universities. But a look at the reality of the UC admissions process belies the assumptions of those arguing that affirmative action subverts meritocracy.

Some, but not all California public high-school students can take advanced placement (AP) courses, which give them two advantages: (1) They increase their grade-point averages because a grade in an AP course counts one point higher than a regular course grade, and (2) they test out of selected college courses if they pass an AP examination. Therefore, it is possible for students to graduate with a grade-point

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Prop. 209 - YES: continued from page 3

the face of desegregation and civil-rights decrees during the 1950s and 1960s.

While by no means universal, obstructionism against the mandate of Proposition 209 for equality is widespread. Public officials in some of the largest jurisdictions — and in some of the smallest — are keeping their eyes tightly closed to their legal obligation to be colorblind.

They are defying not just Proposition 209 itself, but a November 2000 California Supreme Court decision — *Hi-Voltage Wire Works Inc. v. City of San Jose* — decreeing that, because of the proposition, public entities cannot treat people differently because of race or sex.

Brought by Pacific Legal Foundation (PLF), the *Hi-Voltage* case challenged San Jose's racially targeted "outreach" program. The program required bidders on city contracts to take steps to contact and recruit minority and women subcontractors but didn't require similar outreach to anyone else. The court unanimously found the policy illegal. Justice Janice Brown (who happens to be African-American) wrote the main opinion, which gave Proposition 209 a broad and forceful reading. Proposition 209 bans not just explicit quotas, she declared, but any "race-conscious governmental decision-making." It represents voters' endorsement of "equal opportunity for all individuals," as opposed to "entitlement based on group representation."

In the wake of the court's ruling — and the city's agreement to pay the victors' attorneys' fees

of \$475,000 — San Jose finally halted its open flouting of Proposition 209. Discriminatory flourishes were edited out of official hiring and contracting policies. If the revised rules are followed, any new outreach efforts in San Jose will be inclusive instead of being aimed only at certain pockets of the population based on sex or race.

But San Jose's reversal didn't exactly start a stampede in the public sector to get on the right side of the law. San Francisco, for instance, still reviews contracting bids by minority-owned firms as if they were as much as 10 percent below their real price. Instead of bringing this rigged policy into line with Proposition 209, the city is busy devising procedural objections to slow a lawsuit against it.

The Sacramento Municipal Utility District also gives bonus points to business owners of the desired color or gender. The discrimination in this case comes with a twist: in the awarding of prime contracts, preferences go to blacks and Latinos but not Asians, while in subcontracts Asians and blacks, but not Latinos, receive official favoritism. Go figure.

At the Los Angeles County Hall of Administration, the racial-preference tool of choice is a "goals and timetables" schedule for hiring nonwhites. ("Goals for minority participation for each trade — 28.3 percent; goals for female participation for each trade — 6.9 percent," reads the policy.) This might sound benign — less rigid than an outright quota — but it's a good bet the county's managers feel an incentive to honor the "goals" by letting race influence hiring and promotions. Indeed, "[a] participation goal

differs from a quota or a set-aside only in degree," wrote Justice Brown.

The Los Angeles Unified School District does its part to perpetuate racial stereotyping and discrimination by enforcing an arbitrary racial mix in teaching staffs at magnet schools. Jim Friery, a Van Nuys High School physical-education teacher, was confronted with this policy when he tried to apply for a job at a nearby magnet school a couple of years ago. Because he's white, he didn't fit the racial formula, so he wasn't even allowed to put his name in. He has responded with a lawsuit arguing that Proposition 209 prohibits the district from counting teachers by color.

Proposition 209 passed with a majority of Orange County's votes. But the Huntington Beach Union High School District, one of the county's largest, stubbornly clings to a policy that uses skin color to decide on students' requests to transfer from one high school to another. If a transfer would result in "too few" whites — or too many nonwhites — at a high school, the district can deny the transfer request under this race-obsessed calculus.

Proposition 209 opponents remain oblivious to powerful arguments in favor of the law — arguments that only have grown stronger with time. Beyond the principle of equal justice under law, there is the practical problem with trying to color-code a population as kaleidoscopic as modern California's. The state has more inter-ethnic marriages than any other state and multitudes of immigrants from every continent. How does one classify the offspring of an Iranian and a Filipino? Or an African-American

and a subcontinental Indian?

Last year, the U.S. Census Bureau announced that non-Hispanic whites are less than half — approximately 47 percent — of California's population. When every racial group is a "minority," don't race preferences have less rationale — and more potential for harm — then ever? Isn't the defining of individuals by skin color and appropriating advantages on that basis a formula for pitting people and groups against each other?

Reverse discrimination can be as ugly as the old-fashioned kind. In a lawsuit against the Sacramento Police Department in 1999, it was revealed that a departmental consultant had identified white officers as "bureaucratic barriers to change." The acronym MAWBS was used among department brass as shorthand for "middle-aged white boys." Last year, a business lecturer denied tenure at San Francisco State University was awarded \$2.75 million by a jury in his discrimination lawsuit after hearing testimony that a college dean allegedly said a white man would be hired "over my dead body."

The prosaic issue of cost offers a final argument against the quota mentality. A 1996 study by the Claremont Institute found racial favoritism by governments in California costing as much as \$677 million. To be sure, some of the edifice of discrimination has fallen since then, but racially targeted set-asides remain in place in enough localities that the overall price tag has to be steep.

One bright spot in terms of Proposition 209 compliance — at least until recently — was the University of California (UC), which eliminated race as an

admissions factor even before Proposition 209 was enacted. System-wide, Latino admissions are at a record high and African-American admissions are up significantly; if the numbers from these two groups have decreased at the two most selective campuses (Berkeley and UCLA), this suggests that students are going to schools more appropriate to their academic qualifications.

Unfortunately, this spring opponents of Proposition 209 persuaded the UC regents to take at least a symbolic step backward. The regents adopted a new admissions policy allowing race to be taken into account. Emboldened by the example of so many cities, counties and other jurisdictions openly violating Proposition 209, university bureaucrats might view the regents' action as permission for some quiet, but determined, defiance of their own.

To identify as many violations as possible, in May, PLF launched a Proposition 209 enforcement project called Operation End Bias. With a toll-free number — 1-866-END BIAS (363-2427) — it allows whistle-blowers to report policies that play favorites by sex or skin color. Tips have arrived at a rate that confirms the seriousness of the problem. No law-enforcement official at the state level is acting to ensure that Proposition 209 is obeyed. Indeed, State Attorney General Bill Lockyer argued before the state supreme court that San Jose's discriminatory contracting program was legal under Proposition 209. He has shown no sign since of understanding or wanting to uphold the law's true meaning. Therefore, it is left to private watchdogs such as PLF to stand up for justice and the voters' will.

It is clear that full compliance will come, if ever, only after additional years of courtroom battles. However, there are few more motivating goals in legal practice than ensuring equal opportunity — and forcing politicians and bureaucrats to obey the law.

Harold Johnson is an attorney with the Pacific Legal Foundation, a Sacramento-based non-profit group that focuses on property rights, environmental law, and individual rights.

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Check out our new feature — **Question of the Quarter** — on page eight. We want to know how you feel about the issues!

Prop. 209 - NO: continued from page 3

average above 4.0 and to have met some of their undergraduate course requirements. It also is not unusual for universities such as Berkeley and UCLA to turn down students who have averages higher than 4.0.

Why is this relevant to the affirmative-action debate and the impact of Proposition 209? A closer look at AP courses in California public high schools, as revealed by a Tomas Rivera Policy Institute study, highlights that while some high schools offer as many as 30 AP courses, other high schools offer only one or two of these classes. Some don't offer any AP courses. Moreover, high schools with larger proportions of minority students are less likely to offer AP courses.

Therefore, when making admissions decisions, universities place students from predominantly minority schools at an automatic disadvantage because they have neither the higher grade-point averages nor the opportunity to take courses that present the intellectual challenges of AP courses. While educational inequalities in AP courses continue to exist, UC campuses listed the "number of AP courses taken" as part of their admissions criteria until several years ago.

AP courses provide only one example of how existing educational inequities compromise merit. A similar review of college-admissions tests would reveal that "merit" also is tainted because economically privileged students can take preparatory courses to improve their SATs.

Whatever its deficiencies, affirmative action was a method college-admissions officers used

to get around the educational inequalities built into the state's public high schools. With the elimination of affirmative action through Proposition 209 the identification of and outreach to meritorious minority students was dealt a serious setback.

My identification of affirmative action with merit may be puzzling to some. The reason for this is simple. The Proposition 209 debate defined affirmative action as being linked with racial and ethnic preferences. However, there are at least five different meanings for affirmative action. To understand the affirmative-action debate, it's important to understand all these meanings:

First, affirmative action simply may mean that an employer or institution will follow nondiscrimination in regard to gender or racial bias.

Second, it may mean affirmative recruitment, in which an employer or organization makes special efforts to recruit and reach out to women and minorities.

Third, affirmative action also may mean affirmative fairness, in which the special circumstances of individuals are taken into account when they are considered for jobs or admissions.

Fourth, it also can be affirmative preference, in which, with all things being equal, preference is given to individuals from such under-represented groups as women and minorities.

Fifth, and finally, affirmative action also can stand for quotas, in which individuals who meet minimum requirements are selected over more-qualified applicants to meet numerical goals established by an institution or by government.

The fourth and, especially, fifth definitions of affirmative

action are the ones critics use to set up an easily identifiable target. Yet to what extent is affirmative action, as currently practiced by American corporations, educational institutions and the government, really affirmative fairness or affirmative recruitment?

The answer is that we simply don't know. And because we don't know, the anecdote rules the day. We hear stories of poor white students denied admission into colleges because wealthy children of wealthy black physicians receive "preference." Are these stories representative of reality?

If we follow the critics' logic, American institutions should be awash with women and minorities displacing victimized white males, while minorities receive the largest share of government contracts. Yet when supporters of affirmative action attempt to use data to show that this is not the case, their claims are dismissed. For example, when you compare the salaries of 25- to 29-year-old African-American, Latino, and women managers in the California private sector to their white male counterparts, the salary differential ranges from \$3,500 to \$8,700.

In California, for every Mexican-American male manager in private industry, there are 20 white male managers. When statistics such as these are presented, they are dismissed by critics of affirmative action as being somewhat illegitimate. Yet how do they buttress their points attacking affirmative action? They refer to statistics! Phrases such as "Seventy percent of all African-Americans drop out of college" are used. Evidently, in the current affirmative-action debate, a double standard exists. Statistics that demonstrate racial and gender under-representation

are not valid. Statistics that show failure on the part of affirmative action, however, is kosher.

Since data from either side will not settle the current debate on the positive or negative impacts of Proposition 209, let me attempt to recast it in ideological terms. Rather than viewing affirmative action as merit vs. entitlement or individualism vs. entitlement, we need to consider that affirmative action is a continuation of this country's commitment to rewarding merit — no matter what the sex or ethnic background of the individual.

Affirmative action, defined as affirmative fairness and affirmative recruitment, seeks out talented and qualified individuals among the nation's 50 million people of African-American or Latino heritage. Consider the following: Do any of us really think the qualities of intelligence are genetically different among black, Latino, or Anglo infants at birth? Aren't there outside variables that account for the fact that, after 20 years, these same African-American and Latino infants are young adults with test scores and grade-point averages lower than their white counterparts? Do standard schools and unequal employment opportunities have any role in these differences?

Affirmative action, defined as affirmative recruitment and affirmative fairness, overcomes some of the institutional biases and discriminatory practices still plaguing American society. There is a wealth of talent in the barrios and ghettos of this nation tragically going untapped.

Sure, before Proposition 209, affirmative action was not perfect. Yet what program is? Moreover, as our conservative friends tell us, "the perfect should not be the

enemy of the good." Supporters of affirmative action, and those opposed to Proposition 209, however, are losing the battle of semantics. As long as they allow the debate to be framed in terms of merit vs. entitlement or unqualified preferences, they will lose.

Proposition 209, overwhelmingly passed by the California white majority electorate and overwhelmingly rejected by the state's black and Latino voters (three out of four of whom voted against the initiative), is a draconian solution. It equates affirmative action with simple and semantically loaded words such as "quotas" and "preferences." It disregards the potential of linking affirmative action with the identification of merit.

Secretary of State Colin Powell, former chairman of the Joint Chiefs of Staff, links affirmative action with merit when he says, "I benefitted from affirmative action in the Army, not because I was a quota promotion or someone said, 'He's black, move him ahead.' I benefitted from affirmative action in the Army because the Army said, 'We're all going to be equal.'"

Proposition 209, as a public policy, may be a case of throwing the baby out with the bathwater. It has not allowed a nuanced discussion of how we can overcome educational and other inequalities that are correlated with racial and ethnic status.

It is not a level playing field. It is not a colorblind society.

Harry P. Pachon, president of the Tomas Rivera Policy Institute and a professor of public policy at Claremont Graduate University, has coauthored several books on Latinos in America.

Initiative and Referendum in the States

by Amy K. Frantz

CALIFORNIA

A petition drive is underway, with behind the scenes support from many State Legislators, to place a measure on the ballot to weaken the state's term limits. The ballot measure permits Legislators to run for additional terms by collecting the signatures of 20 percent of the registered voters in the district.

OREGON

Bill Sizemore, author of several previous Initiatives in Oregon, has filed a petition to place a Constitutional Initiative on the November 2002 ballot, replacing residential property taxes with a sales tax. Oregon does not currently have a state sales tax. The proposal repeals residential property taxes, cuts business property taxes by 35 percent, and imposes a four percent sales tax, with exemptions for certain items such as food.

WASHINGTON

The state Supreme Court has heard arguments over restoring the limits on property tax growth and tax refunds approved by voters in 1999. I-722 was previously struck down by lower courts. If reinstated, local governments would have to refund millions of dollars to the state's taxpayers; however, that move appears unlikely.

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**Why Term Limits?
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down the Legal Services Corporation, and cutting taxes – junior members [are] less likely to vote to tax, spend, regulate, and otherwise stick Washington’s nose in our private affairs than [are] the old bulls.”

Term limits do not yet exist for members of Congress. Do we need a reminder that long-term pols with lots of “experience” in Washington have blessed Americans with trillions in debt and a federal government that sucks more and more from our wallets year after year after year?

It says a lot that virtually every group that lobbies for more government power and wealth redistribution opposes term limits. When they buy a lawmaker, they want him to stay bought and stick around a while.

Lawrence Reed is President of Mackinac Center for Public Policy (www.mackinac.org), a free-market research and educational organization in Midland, Michigan, and Chairman of Foundation for Economic Education’s (FEE)

Board of Trustees. This article appeared in Ideas on Liberty, published by FEE. For more information, visit its website at www.fee.org or phone (914) 591-7230.

LIMITS Question of the Quarter:

Do you think we need term limits for our elected officials in Iowa?

Send your thoughts on this issue to us at public.interest.institute@limitedgovernment.org.

We will publish some of your ideas in the next issue of *LIMITS* in December 2001 and on our web page at www.limitedgovernment.org.