

**FAIR EMPLOYMENT & HOUSING COMMISSION**

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Proposition 54 Panel, Colorblind Racism Conference  
Research Institute for Comparative Studies in Race and Ethnicity  
Stanford University  
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I thank the Institute for inviting me to speak here today. It is a pleasure to share the podium with Michelle Alexander, who did such good work for the ACLU and is now at Stanford Law School, and my good friend Eva Paterson, the godmother of soul and the hardest working woman in civil rights.

I am the Executive and Legal Affairs Secretary for the California Fair Employment and Housing Commission (FEHC). I'd like to discuss two main topics today. First, the impact Proposition 54 may have on civil rights enforcement in California. Second, a recognition that racial classifications raise difficult issues that practitioners, academics, and activists have yet to resolve.

Impact of Prop 54 on civil rights enforcement: [show Prop 54 with overhead projector]

I work for the FEHC, not the Department of Fair Employment and Housing (DFEH). The DFEH and FEHC both enforce state civil rights laws, but are separate entities in state government. DFEH receives, investigates, and prosecutes discrimination cases. The FEHC adjudicates cases prosecuted before it by the DFEH, and also promulgates regulations interpreting various state civil rights laws. The separate status of the two agencies is important when considering Proposition 54, as will be seen in a moment.

Let's take a look at Prop 54. As a Constitutional amendment, Prop 54 would be binding on all governmental agencies in California, including the FEHC.

- (a) The State shall not classify any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting, or public employment.
- (b) The State shall not classify any individual by race, ethnicity, color, or national origin in the operation of any other state operations, unless the Legislature specifically determines that said classification serves a compelling state interest and approves said classification by a two-thirds majority in both house of the Legislature, and said classification is subsequently approved by the Governor.

What does "**any other state operation**" mean? Does it mean that every activity conducted by state government? California's Governors celebrate Martin Luther King, Jr. Day, Black History Month, and Asian Pacific Heritage Month. Short of a two-thirds vote in the Legislature, would Prop 54 preclude the Governor from "classifying" Dr. King or Rosa Parks as African American? Would Prop 54 preclude public school textbooks from "classifying" the 110,000 people interned

during World War II as Japanese American? Never mind his race or ethnicity, maybe Fred Korematsu was just a guy who did not want to be imprisoned by his government.

Turning specifically to the enforcement of civil rights laws, how might Prop 54 affect the FEHC, which is charged with adjudicating cases involving, inter alia, charges of race and national origin discrimination. Let us begin by reviewing a few more provisions in Prop 54.

Note that Prop 54 defines “**State**” as including, but not necessarily be limited to, “the State itself, any city, county, city and county, public university system, including University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.” (Prop. 54, subd. (k).) The FEHC, as a state agency, falls within that definition.

Note further that Prop 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.” Oddly, the word “classifying” appears only once in Prop 54, in the definition itself, although “classify” does appear several times.

Finally, note that “**individual**” is defined as “current or prospective students, contractors, or employees” and “persons subject to the state operations.”

Keep in mind that the FEHC routinely adjudicates employment and housing discrimination disputes involving private individuals (private sector employers, employees, landlords and other housing providers, tenants, business establishments and consumers).

Arguably, all of the following “individuals” in an FEHC proceeding are “persons subject to the state operations,” i.e., FEHC’s adjudicatory process: the complainant, i.e., the individual alleging that he was denied a job in a private company because of his race; the private employer who is charged with the violation; witnesses for both sides who testify at the hearing; other applicants and employees, who although not parties or witnesses in the proceeding are the subject of testimony and/or other evidence.

Taking all the above into account, in an employment discrimination case, would Prop 54 preclude the Commission (or the Courts, for that matter) from making the following findings of fact:

1. Complainant is African American.
2. Of the 20 applicants who met the qualifications for the position in question, 4 were African American, 4 were Latino/Hispanic, 4 were Asian/Pacific American, and 8 were Caucasian.
3. Of the 5 applicants actually hired, 3 were Caucasian, 1 was Latino, and 1 was African American.

Certainly, many other findings of fact are seen in discrimination cases, but those above are typical. Consider that both the plaintiff-applicant and the defendant-employer will be trying to establish such facts. Would Prop 54 preclude the Commission and the courts from making such findings? Does it matter whether a party or witness self-identified him- or herself? What if some of the witnesses did not self-identify, can a court or the FEHC “impute” a racial or ethnic classification to that witness? What if some of the findings were based on racial/ethnic data maintained by the employer?

Some of you may be thinking, “Yes, but there’s a civil rights exemption in Prop 54.” That is true. Let’s look at the exemption. Prop 54 declares:

“The Department of Fair Employment and Housing (DFEH) shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002.” “DFEH-conducted classification” is not defined, and it is unclear why March 5, 2002, is designated.

The exemption expires after 10 years. Moreover, notwithstanding the exemption, Prop 54 provides that “DFEH shall not impute a race, color, ethnicity, or national origin to any individual.” “Impute” is not defined in Prop 54, but the dictionary definition is “to lay the responsibility or blame for: charge; to credit to a person or a cause: attribute.”

Finally, and most importantly, note that Prop 54 provides no exemption at all for the FEHC. Query whether that was purposeful or a drafting oversight? What does it mean that the investigative and prosecutorial part of the state’s civil rights enforcement system is (temporarily) exempted (albeit partially and temporarily) but the adjudicatory and regulatory part is not exempted at all?

In summary, Prop 54 raises difficult problems of interpretation and implementation. With specific respect to civil rights enforcement, it is unclear how the oddly drawn DFEH exemption would affect the investigation, prosecution, and adjudication of discrimination cases.

#### Racial classifications: who decides, and by what criteria?

Prop 54 raises once again American society’s most vexing issue – race. Whether it was the enslavement of Africans, the usurpation of Native American lands, the 3/5ths rule in the original Constitution, the annexation of Mexican territory, the 14<sup>th</sup> Amendment, Jim Crow laws, Chinese Exclusion Acts, immigration policy, the annexation of Hawaii, Puerto Rico, and the Phillipines, internment of Japanese Americans, the expulsion of Mexican American citizens from Los Angeles during WWII, the civil rights movement, resistance to Hawaiian statehood because it would create a majority non-white state, the FEHA in 1959, 1964 Civil Rights Act, the rise and fall of affirmative action, Bakke to Grutter, post-9/11 suspicion against Arabs, Muslims, and South Asians, Propositions 187, 209, and now 54, the examples are endless, race is always in the mix.

Whether or not Prop 54 passes, here are some thoughts on work that still needs to be done among practitioners, academics, journalists and activists who seek social justice.

First, let us acknowledge that difficult problems don't go away by ignoring them. A number of proponents and opponents agree that we seek a colorblind society. I'm not so sure about that. At a hearing my Commission held on Proposition 209, an opponent of Prop 209 said, given the choice, most minorities would choose not to be minority, and thus to avoid the problems of racism. I remember thinking, no, that's absolutely not how I feel. I am proud of who I am, and what my history is, including all the struggles with race my family dealt with. Moreover, I do not want to be blind to your color; I want to know about you, who your people are, what your history and struggles are.

Second, let us acknowledge that, even as most people in this room would support both the collection and affirmative use of racial and ethnic data, there likely would be a lot of debate on questions such as: How many different racial, ethnic, and national origin categories should the government track? How do we define those categories? Do we rely on self-identification, or should schools, employers, or the government decide how individuals should be classified? Is there such a thing as "racial fraud" or inauthenticity? Is there an appeals process for individuals who do or do not want to be classified in a particular way?

One of my favorite law review articles is: "Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice" by law professors Gabriel Chin, Sumi Cho, Jerry Kang, and Frank Wu. They note the difficulty of defining racial/ethnic classifications. It is not a precise biological categorization, but more a **"social, cultural, and political construction that is anything but precise."**

And that is precisely the problem. How does the state – whether it be the Legislature, a public university or a civil rights enforcement agency – implement laws, admission policies, or regulations tracking applicant flow and workforce composition data, in a way that makes sense, is neither underinclusive nor overbroad, and can withstand constitutional analysis?

Let me put it this way, do you trust the government to designate your race and your children's race? At the same time, do you trust individuals to designate their own and their children's race? If neither government nor private individuals should be authorized to conduct this task, who should do it?

The problem is difficult enough when you are simply trying to track and compile data. The stakes are higher when government uses racial classifications to allocate resources or benefits – school admissions, jobs, or contracts.

To illustrate, let's classify this kid: [show David Owyang's picture]

Is David Chinese? His surname, Owyang, originated in China thousands of years ago. But he's a fifth generation Californian, and speaks and writes no Chinese. He does not listen to Chinese

pop music and does not watch the Jade Channel. Most of his friends are non-Chinese, non-Asian, and he wonders why his father is so interested in race and “Chinese stuff.” He has little in common with undocumented Fujianese smuggled into this country by the snakeheads. His life is very different that of impoverished Chinatown restaurant and garment workers. His life is different from kids of rich flight capital parents from Hong Kong, Taipei, and Shanghai. Indeed, his childhood was very different from his father’s; his father lived upstairs at the Pang Tai Cheong drygoods store, attended Jean Parker elementary school in Chinatown, worked in a Chinese restaurant, hung out with youth groups in Chinatown, and was the first generation in his family to attend college. He is the son of a lawyer and a banker, attended a fancy private school in San Francisco, and is now attending a small liberal arts college in Connecticut.

Is David Cuban American or Latino? He is the son of a refugee from Latin America. He can read, write, and converse fairly well in Spanish. His great-grandfather lived in Cuba for most of the 20<sup>th</sup> century, and is buried there. His grandparents Sergio and Rosa were married there. His mother Onilda, aunt Rosita and uncle Segi were born there. Dinner conversations at his maternal grandparents’ house were in a mix of Chinese, English and Spanish.

Is David “other non-white?” That’s one of the classifications used by San Francisco Unified School District before its race-based integration plan was challenged by irate Chinese American parents. Had David applied to Lowell High School when the consent decree was in force, his chances for admission would have turned on his racial/ethnic classification. If he were Chinese – he would have needed to score higher than whites and Japanese. If he were “other non-white” – he could get in with the same scores as whites and Japanese. If he were Latino/Hispanic – he could gain admission with scores lower than Chinese, whites, Japanese and ONWs. Same kid, different classifications, different results.

Is David Australian? One of his great-grandparents was born and raised in Darwin, in the Northern Territory of Australia.

Is David black? One of David’s best friends is a kid named Mereb, the son of parents from Eritrea. Mereb’s parents fought in the war with Ethiopia, eventually found their way to San Francisco, and lived on Divisadero Street in the Western Addition. Mereb has mocha skin and dark hair, not unlike David’s. Mereb’s mom told me about a conversation she had with Mereb back in the third grade. She asked Mereb if there were any other black kids in his class. Mereb declared that David was black. Consider that most of the students at David and Mereb’s school had fair skin and light hair, and we can understand why at least one African American kid thought David was black.

Is David Pilipino? A certain Ilocano friend of mine calls David the “Tsinoy.” And, years ago, we had David and his twin brother Matt in a side-by-side stroller at the K-mart in Colma/Daly City. A Pilipina clerk leaned over the counter, saying “Oo twins, one Chinese, one Pilipino!” David’s brother Matt has lighter skin and looks more “Chinese.”

Is David “local?” In Hawai’i, David is often taken as a local by the locals, while his pale and sunburned parents are regularly mistaken for Japanese tourists.

The point of all this, of course, is to illustrate the complexity of race and ethnicity. Add in the phenomena of vast diversity within the groups we think of as Asian, Black, Latino, Native American and white, the growing rate of intermarriage and multi-racial kids, and the adoption of babies from China and Korea by parents of diverse backgrounds, who may or may not seek to instill a sense of Asian ethnicity in their adopted children. How will those kids be classified, and by whom?

If Prop 54 is defeated next Tuesday, it remains to be seen if we can make sense of all this. It will take the work of academics, practitioners, journalists, activists, and even government bureaucrats to carry on the conversation. Thank you.