Beyond Federal Law:
Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions

Produced as part of the NSF-Funded AAAS Diversity and Law Project

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This publication has been produced as part of the American Association for the Advancement of Science [AAAS] Diversity and Law Project, in which the Association of American Universities participates. More specifically, it has been produced as part of the second phase of this project that focuses on science, technology, engineering and math [STEM]-related access and diversity-related law, policy, and programmatic issues. Focused on providing institutions of higher education with in-depth legal analysis and guidance tied to program models, this second phase of work will facilitate the development and implementation of key strategies and approaches in STEM (and other) fields that can be successful because they are both effective and legally sustainable.

AAAS leads the second phase of this project with the participation of several national organizations that serve a wide range of higher education institutions, including: The American Council on Education, the Association of American Medical Colleges, the National Association of College and University Attorneys, the College Board, the American Association of Community Colleges, the Institute for Higher Education Policy, the Thurgood Marshall College Fund, the Association of Public and Land-Grant Universities, and the primary funder of phase one of the project, the Alfred P. Sloan Foundation. The Association of American Universities continues as an inaugural participant.

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The Handbook and other project resources are available for free downloading at http://php.aaas.org/programs/centers/capacity/publications/complexlandscape. Project resources may be copied and adapted for internal use by public and tax-exempt private institutions of higher education.

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Background and Overview

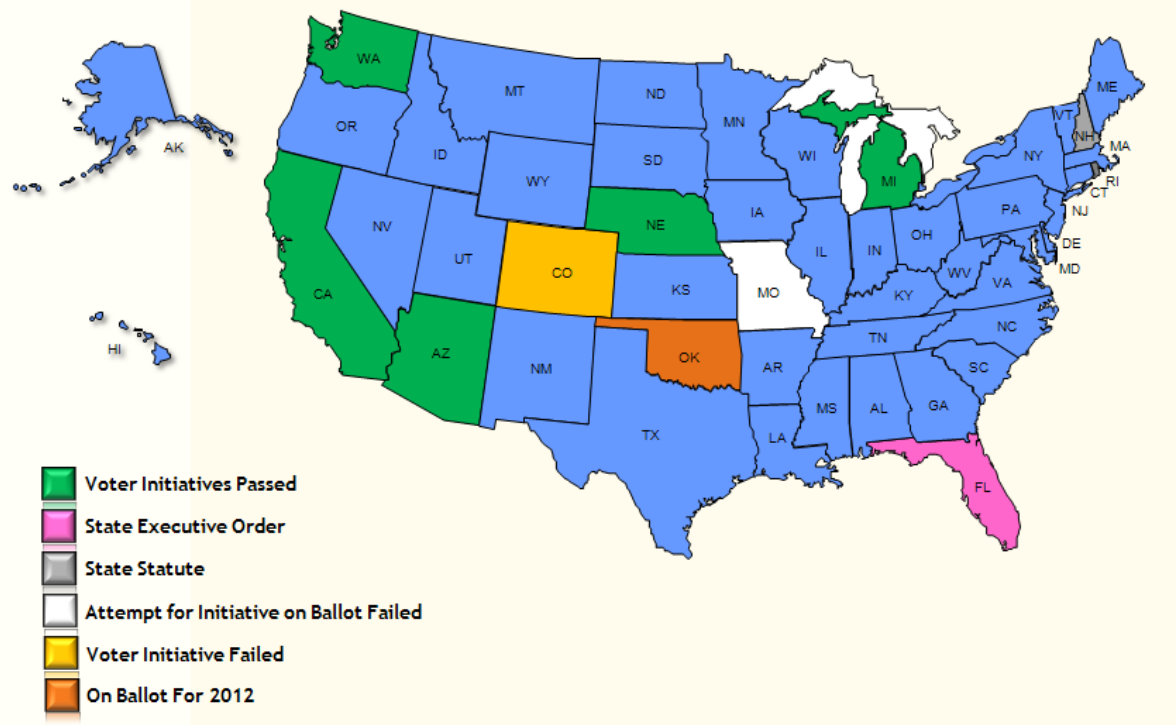
When higher education leaders address issues of access and diversity in higher education, they are inevitably confronted with questions of law, just as they address questions of educational soundness as a matter of policy and program development. With the objective of providing some clear and important guidelines with respect to key legal issues, which should inform that policy and program development, this paper addresses significant *state law* (and related federal court) developments over the course of the past fifteen years on the topic of race-, ethnicity- and sex-related preferences among public education institutions.[1] This guidance provides a framework for assessing access- and diversity-related policies and programs at public colleges and universities in light of these state developments.

Since 1996, voters in five states have passed ballot initiatives that prohibit the consideration and use of race, ethnicity, and sex in public programs.[2] In a sixth state, an Executive Order, subsequently reflected in state regulation, also has limited the consideration of race, ethnicity, and sex in public programs. And most recently, the legislature in a seventh state passed a similar ban. These prohibitions affect policies among public (or state) education institutions (among others). They raise a number of challenging questions regarding the future of race-, ethnicity- and sex-conscious student enrollment and faculty employment practices.

[1] With a more comprehensive legal analysis of relevant state laws and court opinions, this publication expands upon Coleman et al., *From Federal Law to State Voter Initiatives: Preserving Higher Education's Authority to Achieve the Educational, Economic, Civic, and Security Benefits Associated with a Diverse Student Body* (College Board, March 2007), which was published as part of the College Board's Access and Diversity Collaborative to focus on policy and advocacy principles associated with state voter initiatives. Segments of this paper are also derived from and expand upon, Palmer et al., *Advancing Diversity at the University of California, Berkeley Under Proposition 209* (Warren Institute on Race, Ethnicity and Diversity, 2006) (unpublished).

[2] While the analysis in this paper is most relevant to officials in affected states, similar prohibitions have been and are being contemplated in other states. The Oklahoma Affirmative Action Ban Amendment has been certified for the 2012 ballot. The Colorado Civil Rights Initiative made the ballot in 2008, and was rejected, garnering 49% of the vote. To date, similar or identical initiatives have failed to reach the ballot in Florida (2000), Oklahoma (2008), and Missouri (2008).

The State Law Landscape



Source: Adapted with permission from College Board (2011).

To address those questions, this guidance: 1) Describes the key elements of the state bans; 2) Provides key analytical principles emerging from these bans, which can serve as a basis for evaluating access- and diversity-related policies of public education institutions; and 3) Raises questions for further consideration, including those associated with current federal law conflicts regarding the overall constitutionality of the state law bans.

To achieve these aims,

- Section I examines the relationship between federal nondiscrimination law and the state law prohibitions on the use of race, ethnicity, and sex, all as a foundation for a more in-depth analysis of the similarities and differences among relevant state law bans.
- Section II analyzes the court rulings and state attorney general opinions interpreting relevant state laws and regulations and outlines a series of key principles of law derived from court opinions relevant to those state bans.
- Section III examines conflicting federal appellate rulings on the constitutionality of the state law bans.

In addition, Appendix A provides the text of all relevant state laws and regulations; Appendices B and C offer summary analyses of relevant court and attorneys general opinions. Finally, Appendix D offers a list of additional resources that may be helpful to higher education counsel and institutional leadership.

I. Clear Foundations: Federal Law Baselines

A significant body of federal law, based on the U.S. Constitution, as well as federal statutes and regulations, guides the development of education policies and practices pursuant to which students and employees may receive benefits or opportunities conditioned (at least in part) on their race, ethnicity, or sex.[3] To assess the legality of a state program or policy that classifies individuals in such a manner, federal courts applying constitutional and certain statutory principles employ different standards of review (legal tests) depending on the type of classification implicated. As a matter of constitutional law, classifications based on race or ethnicity are "inherently suspect" and therefore trigger the most rigorous standard, strict scrutiny;[4] sex classifications trigger intermediate scrutiny;[5] and most other classifications trigger the lowest level of scrutiny, rational basis review.[6]

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[3] *See* U.S. CONST. amend. XIV ("[N]o state…shall deny to any person…the equal protection of the laws.). Additionally, Congress has passed statutes that advance the purpose of the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance); 42 U.S.C. § 2000e (Title VII of the Civil Rights Act, prohibiting discrimination on the basis of race, color, sex, religion, or national origin in employment; applies to private employers with 15 or more employees and to public employers); 20 U.S.C. § 1681 *et seq.* (Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex in education programs that receive federal financial assistance); 42 U.S.C. § 1981 (prohibits discrimination on the basis of race in making and enforcing contracts, including employment contracts).

As discussed thoroughly in AAAS's *Handbook on Diversity and the Law: Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education* (2010), the legal principles and applications of constitutional law (under the Fourteenth Amendment) and Titles VI and IX are fairly coextensive. *See id.* at 45-52, 77-83, 95-96. Title VII raises similar but distinct questions, based on the particulars of the statutory and regulatory scheme. *Id.* at 83-95.

[4] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978). *See also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

To meet strict scrutiny, educational policies that treat students differently on the basis of race or ethnicity must be *narrowly tailored* to achieve *compelling government interests*. For a program or policy to be *narrowly tailored*, the means used must precisely fit the ends, with race or ethnicity considered only in the most limited manner possible. Courts will examine several interrelated criteria when determining whether a program is narrowly tailored, including the following:

- The *necessity* of considering race or ethnicity. Institutions must first consider the extent to which alternative, race-neutral programs would be effective in achieving their compelling interests. Race must only be used to the extent necessary to further these interests. Thus, in cases under federal law, courts must look to whether institutions made good-faith efforts to consider race-neutral alternatives to their challenged race-conscious policies. *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003).

- The *flexibility* of the use of race or ethnicity. Race or ethnicity is more properly used as one factor among many, and individuals should be evaluated as individuals, not as members of a group. Programs which utilize a quota system or use rigid numerical processes (e.g., using the same weight for all members of the same race) will be found unlawful. *Bakke*, 438 U.S. 265; *Gratz v. Bollinger*, 539 U.S. 244 (2003). The same criteria should be used to evaluate all applicants, and the process should not separate applicants from consideration with others based on race or ethnicity.

The heightened standard of strict scrutiny (as well as the slightly lesser but still stringent standard implicated in sex-based preferences) is not inherently fatal to all relevant preferences. In fact, beginning with *Bakke* in 1978, and as recently as the *Grutter* and *Gratz* decisions in 2003, the Supreme Court has recognized that colleges and universities may consider and use race and ethnicity, within a carefully prescribed framework, when selecting student applicants for admission to achieve the educational benefits of diversity. A less settled and mostly older (but no less) robust body of federal case law on employment related decisions also addresses the circumstances in which outreach, recruiting, and hiring preferences may include considerations of race, ethnicity, and sex.[7]

- The *burden on nonbeneficiaries* of the racial or ethnic preference. Nonbeneficiaries should not be significantly disadvantaged or directly affected by the consideration of race or ethnicity. Programs will be more likely to pass legal muster if the disadvantages to nonbeneficiaries are insignificant and diffuse. Programs that allow non-minorities and men to compete – and thus are not exclusive to a particular race or gender – are, as a general rule, more likely to survive scrutiny.

- The *existence of an endpoint* and *periodic review* of the program tied to achieving the compelling objective. To be narrowly tailored, race-conscious policies must be regularly reviewed to ensure that their use remains necessary. Race- and ethnicity-conscious policies may not be perpetual. *Grutter*, 539 U.S. at 342.

Moreover, even where a policy is neutral on its face (does not expressly implicate race or ethnicity), a court will apply strict scrutiny analysis where the policy predominately was motivated by racial or ethnic factors, using a "proxy" to mask this intent. *See, e.g., Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down a facially race-neutral law with racially disproportionate effects after finding the law had been motivated by racial considerations).

Strict scrutiny also requires that a state has a sufficiently compelling interest to justify the consideration of race. This standard calls for an examination of the ends that must be established to support race- or ethnicity-conscious polices that confer benefits to students based on race or ethnicity. The Supreme Court has found that the benefits of a diverse student body in higher education are substantial – including in preparing students to join the workforce and participate fully as citizens in an increasingly diverse and global society; serving national economic and workforce needs; and addressing national security needs – and can be a legally-recognized, compelling interest. *See Handbook on Diversity and the Law*, *supra* note 3, at 24-25 and Appendices II-III, *infra* (key legal opinions); Coleman and Palmer, *Admissions and Diversity after Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006).

[5] To satisfy the slightly less rigorous standard of intermediate scrutiny, a program and policy that considers sex as a factor in conferring benefits or opportunities must show that the program bears a *substantial relationship* to achieving *an important governmental interest*. *Craig v. Boren*, 429 U.S. 190 (1976). To be considered an important governmental interest, the rationale for a sex-conscious program must provide an "exceedingly persuasive justification," "must be genuine . . . [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[5] *United States v. Va.*, 518 U.S. 515, 533 (1996); *see Handbook on Diversity and the Law*, *supra* note 3, at 25.

[6] Generally, other classifications are examined using rational basis review, which requires only that the government policy or program be *rationally related* to a *legitimate government* interest. *See United States v. Carolene Products Co.*, 304 U.S. 144, 194 n.4 (1938); *see also Handbook on Diversity and the Law*, *supra* note 3, at 25.

[7] *See Handbook on Diversity and the Law*, *supra* note 3, at 77-126.

As the cases surveyed in this paper make clear, federal law is not the exclusive source of rules that may affect student and employee preferences in education. Despite the headlines that most often attach to major federal litigation on such issues, it is important to recognize that federal law establishes a "floor" upon which state law, in appropriate circumstances, may "build." In other words, in the context of mission-focused, voluntary actions by higher education institutions that consider race, ethnicity, and sex in enrollment- and employee-related decisions, federal courts may *permit* the consideration of race, ethnicity, or sex in certain situations (as in *Grutter,* where race- and ethnicity-conscious admissions policies were sanctioned), but such action in no way *mandates* those preferences constitute part of a higher education's policy framework.

In short, so long as federal laws (including duly enacted federal statutes) are not violated, states are not limited from setting additional rules affecting higher education policy. Some states, therefore, have taken steps to further restrict the use of race or sex through state constitutional, statutory, or regulatory provisions that forbid the consideration of race, ethnicity, and sex in public higher education. These actions have raised significant questions about the overall federal constitutionality of such voter bans—key issues discussed in Section III.[8]

[8] *See Coal. to Defend Affirmative Action et al. v. Regents of the Univ. of Mich. et al.*, 2011 WL 2600665 (6th Cir., July 1, 2011) (holding that Michigan's constitutional amendment violates the Fourteenth Amendment under the political restructuring theory). Section III, below, includes an analysis of the mixed decisions among federal circuits on the question of the constitutionality of these state bans.

II. State Law Bans: Overview and Analysis

A. Overview and History of State Law Bans

Of the seven states that have some form of law or policy that bans consideration of race, ethnicity, and sex when public actors confer education benefits and opportunities, five state bans are the result of voter initiatives that share nearly (but not completely) identical language and structure. This consistency over the course of a decade and a half is to be expected, given that the original California amendment proposed by Ward Connerly, then a Regent of the University of California, served as the foundation for other successful campaigns for similar initiatives in the other four states (as well as several campaigns that were unsuccessful).[9]

The language of the five voter initiatives includes:

- A general prohibition on discrimination or preferential treatment by the state on the basis of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting; [10]

- An allowance for bona fide sex-based qualifications which are reasonably necessary to the normal operation of public employment, education, and contracting;[11] and

- Clauses exempting from prohibition actions that are necessary to maintain eligibility for federal funds and actions required by existing court orders.

Additionally, with the exception of Arizona's ban, the voter initiative states provide that federal law will control in the case of any state-federal law conflict. These severability clauses note that if a provision of the ban, or a certain application of the provision, is found to run afoul of federal law, the remaining provisions or applications of the state ban remain in force. Prior to 2011, no court or state attorney general reviewing the bans had found that the state policy violated or conflicted with federal law, and legal opinions in California and Michigan have cited to the state bans' severability clauses for finding that the state bans do not violate federal

[9] For example, Connerly led a campaign to get an initiative on the 2000 ballot in Florida. Governor Jeb Bush instead adopted his Executive Order in 1999. *See also supra* note 2.

[10] *See* Appendix A *infra* for the full text of all state bans.

[11] Bona fide sex-based qualifications would include, for example, separate restrooms for each sex and different medical treatment. *See, e.g.*, CAL. CONST. art. I, § 31 ("Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."); R.C.W. 49.60.400(4) (Washington) ("This section does not affect otherwise lawful classification that: [i]s based on sex and is necessary for sexual privacy or medical or psychological treatment; or [i]s necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or [p]rovides for separate athletic teams for each sex.").

law.[12] Thus, to date, no provisions have been struck from the text of the state policies as they originally were enacted.

Notably, none of the state bans defines "discriminate" or "preferential treatment." The meaning of those terms instead have come from judicial and attorneys general opinions in California, Washington, and Michigan.[13]

[12] *See, e.g.*, *Hi-Voltage Wire Works, Inc.* v. *City of San Jose*, 24 Cal. 4th 537, 569 (2000) (relying in part on Proposition 209's severability clause to hold that the state ban was not preempted by federal nondiscrimination law).

Like the court in *Hi-Voltage*, the Michigan Attorney General relied on the state initiative's severability clause to find that the state ban did not violate federal law. *See* Gen. Op. No. 7202, n.20 (2007) (noting that "Section 26 also specifies that federal law or the federal Constitution prevails over any part of [the state ban] in conflict with those laws"). Federal courts interpreting the Michigan ban relied on its funding provision (the clause exempting from prohibition actions that are necessary to maintain eligibility for federal funds) as a basis for finding the initiative did not violate federal law. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 251-52 (6th Cir. 2006) ("Proposal 2 eliminates any conflict between it and federal-funding statutes like Title VI [by stating that it] 'does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state'"); *Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan*, 539 F. Supp. 2d 924, 958-59 (E.D. Mich. 2008). A Sixth Circuit decision in 2011, upon which a new hearing with en banc review has been granted, overturned these opinions on other grounds, holding that the Michigan ban violated the Equal Protection Clause of the Fourteenth Amendment because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities." *Coalition to Defend Affirmative Action v. Brown*, 2011 WL 2600665 (6th Cir. July 1, 2011).

[13] *See* Sections II and III and Appendices B and C for additional discussion of legal opinions.

Overview of Initiatives Prohibiting Race, Ethnicity, and Sex in Higher Education[14]							
	Arizona 2010	***Nebraska 2008***	***Michigan 2006***	***Washington 1998***	***California 1996***	***Florida 1999***	***New Hampshire 2011***
Action resulting in ban	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Administrative regulation (implementing Executive Order)	State statute
Percent of voters approving initiative	60 percent	58 percent	58 percent	58 percent	54 percent	Not applicable	Not applicable
Type of action resulting in ban	State constitution	State constitution	State constitution	State statute	State constitution	Administrative regulation	State statute
Applies to all operations in public institutions of higher education	✓	✓	✓	✓	✓	✓	✓

Reflecting key points in the chart above, the following summaries provide state-specific background on each state law ban:

California Proposition 209…

was the first voter initiative to restrict governmental action based on race, ethnicity, and sex. Approved in **November 1996** by California voters, Proposition 209 amended the California Constitution to prohibit the state and its subdivisions from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, or public contracting." The constitutional amendment was implemented by fall 1998, following an unsuccessful federal court challenge.[15]

Washington I-200…

was approved in **November 1998**, and resulted in the enactment of a statute prohibiting the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting. Although largely modeled after Proposition 209, Washington's initiative was enacted into law as a statute, rather than a

[14] Chart adapted from Coleman et al., *From Federal Law to State Voter Initiatives*, *supra* note 1.

[15] *Coal. for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997); *see also* Section III, *infra*.

constitutional amendment. Consequently, it is subject to, and must be interpreted under, the state constitution's provisions regarding education.

The Washington statute also contains an additional subsection (unique among other state law bans) explicitly stating that it does not affect non-discriminatory actions.[16] The Washington Supreme Court, noting this difference, found that "the language of I-200 is strikingly different from the language of [California's] Proposition 209."[17] This difference, coupled with ballot language in the Washington voter pamphlet that advised voters that "Initiative 200 does not end all affirmative action programs," led the state Supreme Court to a less restrictive interpretation of the state voter initiative (when compared to the California courts' construction of Proposition 209).

The One Florida Initiative…

was adopted in **November 1999**, when Florida Governor Jeb Bush issued Executive Order No. 99-281, requesting that the then-Florida Board of Regents, which oversaw the state higher education system, implement a policy prohibiting the use of race, sex, creed (including religion), color, and national origin in state university admissions. In a separate section, the Executive Order prohibits the use of such considerations in executive agency employment and contracting.[18]

In early 2000, regulations were added to Florida's administrative code pursuant to the executive order. The Board of Regents has since been abolished, with oversight for state universities transferred to a Board of Governors,[19] and these policies continue in the form of the ***Board of Governors Regulations*** and any university board of trustees regulation. The Board of Governors regulation now mandates that, for state

[16] "This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin." R.C.W. 49.60.400(3).

[17] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P. 3d at 166. Washington law also expands upon the permitted classifications language found in the other initiatives, allowing classifications for undercover law enforcement; film, video, audio, or theatrical casting; and separate athletic teams for each sex. *Id.* at 165.

[18] Florida state universities are part of the executive branch of government, but they are not executive agencies for all purposes and report to an oversight board that establishes system-wide policies and regulations, previously the Board of Regents and now the Board of Governors. State colleges are overseen by another authority, the State Board of Education.

[19] Florida's higher education system was restructured in 2002, when a voter initiative amended the constitution to create and authorize a Board of Governors to oversee the state university system and establish policies for state universities. *See* FL. CONST. art. IX, sect. 7. Each university is governed locally by a Board of Trustees, which is the body corporate of the university, and is bound by the regulations established by the Board of Governors. See Bd. of Governors Reg. 1.001(1). At its inception in 2003, the Board of Governors adopted the relevant regulations that correspond to the One Florida Initiative.

universities, "admissions criteria must not include preferences in the admission process for applicants on the basis of race, color, national origin, disability, or sex."[20]

Meanwhile, state colleges are overseen by a separate authority, the State Board of Education, and are considered political subdivisions of the state, responsible for establishing admissions, personnel, and contracting policies, within parameters established by the Board of Education.[21] The State Board of Education's regulation provides that colleges "shall not base admissions decisions on race, sex, national origin, marital status, or handicap….If it has been empirically demonstrated that a selection criterion which has an adverse impact is predictive of success…and that there has been a reasonable search for equally valid criteria which do not have a disproportionate adverse impact, or if the criterion is required by law, then the criterion shall not be considered discriminatory."

Thus, Florida's prohibition relating to state universities is housed in administrative regulations[22] governing admissions decisions at Florida universities.[23] The Board of Trustees at each university can craft its own admissions policy, so long as it conforms to the Board of Governors admissions regulation prohibiting race, ethnicity, and sex preferences.[24]

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[20] Fl. Bd. of Governors Reg. 6.001.

[21] See FL. ADMIN. CODE, ch. 6A-14; 6A-19.002. State colleges are distinct political subdivisions (like municipalities) and are not state agencies that report to the Governor.

[22] For state universities, these are the regulations of the Florida Board of Governors and each university's Board of Trustees. For state colleges, these are the regulations of the State Board of Education and each state college's Board of Trustees.

[23] A separate Board of Governors regulation prohibits discrimination in other aspects of a state university's enterprise. Fl. Bd. of Governors Reg. 2.003(1)(a). Although state universities are not among the state agencies that constitutionally report to the Governor, the One Florida Executive Order influences the application of the Board of Governors nondiscrimination regulation and a general nondiscrimination statute in Florida.

[24] Additionally, a general non-discrimination state statute prohibits admissions criteria that have the "effect of restricting access by persons of a particular race, ethnicity, national origin, gender, disability, or marital status." Fl. stat. sec. 1000.05(b). Similarly, in state university programs, activities, and employment, a Board of Governors regulation prohibits "discrimination on the basis of race, color, national origin, sex, religion, age, disability, marital status, veteran status, and any other basis protected by applicable state and federal law." Fl. Bd. of Governors Reg. 2.003; *see also* Fl. Stat. sec. 1000.05(a) (prohibiting discrimination in educational operations on the basis of "race, ethnicity, national origin, gender, disability, or marital status"). The same regulation clarifies that

> Nothing in this regulation prohibits a university from engaging in lawful practices aimed at achieving a broadly diverse student body, faculty, or staff if a university determines that such practices are necessary to achieve its educational, research, or service missions. Such practices include, but are not limited to, conducting targeted outreach and recruitment aimed at inclusion, creating training programs to increase capacity of diverse cohorts, and taking lawful action to remedy underutilization….Nothing in this regulation limits a university's authority to adopt non-discrimination policies that do not violate applicable law.

Michigan Proposal 2…

was approved in **November 2006**. In the wake of the U.S. Supreme Court decisions involving the University of Michigan, which affirmed the lawfulness of the limited consideration of race and ethnicity in higher education admissions,[25] Proposal 2 amended the Michigan Constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.[26] Initially, implementation of the amendment as it applied to higher education was enjoined by a federal district court. The Sixth Circuit lifted the injunction, and Proposal 2 took effect on December 29, 2006. However, on July 1, 2011, the Sixth Circuit held that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities"[27]—a decision that is now in question based upon a recent decision by the court to grant a re-hearing en banc.

Nebraska Initiative 424…

was approved in **November 2008**. It amended the state constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.

Arizona Proposition 107…

was approved in **November 2010**. It amended the state constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.

New Hampshire House Bill 623…

was passed by the state legislature in **June 2011**, and took effect January 1, 2012. The statute prohibits "preferential treatment or discrimination… based on race, sex, national origin, religion, or sexual orientation" in the operation of public employment, public

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The Executive Order influences the application of this regulation and the statute, as well as the regulations adopted by Boards of Trustees, which are authorized by the Board of Governors to create and administer their institutions' admissions, financial aid and recruitment programs and policies, personnel systems and policies, and procurement policies – within applicable parameters including those established in the Board of Governors' admissions and non-discrimination regulations. *See supra* note 23; Fl. Bd. of Governors Regs. 2.003(1)(a) and (b).

[25] *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244).

[26] Michigan's initiative lays down the general prohibition *twice* – once for the "state" and another for the "University of Michigan, Michigan State University, Wayne State University, and any other public college or university." Correspondingly, the definition of "state" is altered to remove the entities listed in the school-specific prohibition.

[27] *Coal. to Defend Affirmative Action et al. v. Regents of the Univ. of Mich. et al.*, 2011 WL 2600665 (6th Cir., July 1, 2011). *See* Section II, B. *infra* for a discussion of the current federal circuit split on the constitutionality of the state bans.

education, and public contracting. In sections specific to public colleges, universities, and community colleges, the law expressly lists the following activities as falling under its prohibition: "recruiting, hiring, promotion, or admission."

The New Hampshire law provides exceptions for bona fide sex-based qualifications and for actions necessary to comply with court orders and consent decrees, but does not include a clause exempting from prohibition actions that are necessary to maintain eligibility for federal funds.

B. The Bottom Line: What State Law Bans Mean to Public Education Institutions

Informed by a growing body of interpretative opinions, issued by courts of law and state attorneys general, the scope and meaning of each state prohibition is evolving. Although many of the states with prohibitions lack substantive case law and legal opinions from which meaningful state-specific guidance can be found, significant case law in California, Washington, and Michigan[28] provides important indications about the scope and substance of these laws—as do a number of federal court rulings in similar contexts. Although the opinions are state-specific, the similarities among the bans, described above, raise the prospect that rulings in one state may carry significant weight in others.

Courts in Washington and Michigan have in several instances found California case law to be persuasive authority, given the similar provisions of state law that were based on the 1996 California voter initiative. For example, courts have looked to the early California cases to shed some light on what a reasonable voter would believe certain language meant when voting on the later initiatives in other states.[29]

Read as a whole, a number of general principles derived from state laws and the evolving case law can guide action within states with state law bans (and inform others about prospective impact should similar laws pass). With respect to public education institutions, in particular:

1. ***Policies that express commitments to diversity that do not create actual preferences based on race, ethnicity, and sex are likely permissible.***

   An institution's stated commitment to student and/or faculty diversity reflecting general institutional goals and objectives rather than directing any specific action is unlikely to violate the state bans.[30]

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[28] Although Florida's prohibition has been in effect for over a decade, the main legal challenge has concerned the authority of the Board of Regents to enact the administrative rules. *NAACP v. Fla. Bd. of Regents*, 876 So.2d 636 (2004).

[29] *See, e.g.*, *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250-51 (6th Cir. 2006) (following *Coalition for Economic Equity* in finding that "[i]mpediments to preferential treatment do not deny equal protection"); *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 956-58 (E.D. Mich. 2008) (quoting same at length); *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 592 F. Supp. 2d 948, 951 (E.D. Mich. 2008) (citing distinction made in *Coalition for Economic Equity* between "stacked deck" and "reshuffle" programs); Michigan Attorney General Opinion No. 7202 (2007) (quoting the California Supreme Court's definitions of the terms of Proposition 209 as "persuasive[] supports"); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 690 (Wash. 2003) (looking to *Coalition for Economic Equity* and *Kidd* as possible influences on the Washington electorate).

[30] *See Los Angeles County Prof'l Peace Officers Ass'n v. County of Los Angeles*, 2002 Cal. App. Unpub. LEXIS 596 (2002) (finding that county agency's written policy noting a desire for a diverse workforce did not establish a sex or race preference in violation of Proposition 209).

2. ***Data collection efforts that involve the identification of students or faculty members based on race, ethnicity, and sex (along with disaggregation of such data in analysis) are likely permissible.***

   Because the data collection efforts of a college or university do not bestow opportunities or benefits based on race, ethnicity, or sex, but merely inform the school about the present composition of its student and/or faculty bodies, such activities are likely permissible. Indeed, a California appellate court, upholding such activity, observed that data collection concerning the participation of minorities and women "can serve legitimate and important purposes. Such a determination may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination."[31]

3. ***Recruitment and outreach policies that stem from efforts to enhance the race, ethnicity, and sex compositions of students or faculty on campus are often deemed inclusive and therefore not subject to prohibitions against discrimination. However, the prospect of bright lines has been blurred, and such issues may be the subject of competing bodies of law.***

   Against the backdrop of federal and state laws, inclusive outreach and recruitment of students and faculty members (where specific benefits based on race, ethnicity, and sex are not conferred even as certain populations may be targeted in those activities) are often not deemed discriminatory and therefore not subject to strict scrutiny standards.[32]

   However, the California Supreme Court has ruled that its voter ban, in fact, precludes such activity by public entities in certain instances where the outreach is mandated in particular ways. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court found that a municipality's requirement that contractors bidding on city projects utilize a specific percentage of minority and women subcontractors or document outreach efforts to include such subcontractors ("an outreach or a participation component") violated Proposition 209.[33] The court held that the program violated Proposition 209 because the outreach component required subcontractors to treat minority and women subcontractors more advantageously than others by providing them with notice of bidding opportunities and soliciting their participation –

[31] *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001); *see also* Cali. Attorney Gen. Op. No. 98-304, 81 Ops. Cal. Atty. Gen. 233 (1998) (finding that state-maintained registry of women and minority representation on corporate boards of directors did not violate Proposition 209).

[32] *See* Coleman, Palmer, and Richards, *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs* 22, 31-40 (College Board, 2005).

[33] 24 Cal. 4th 537 (2000).

actions not required for other subcontractors.[34] Notably, *Hi-Voltage*, which analyzed government-mandated outreach, targeted directly to minority and women subcontractors, can be distinguished from more open-ended and broad-based inclusive recruitment and outreach policies, which are subject to strong arguments that they would not violate state law prohibitions.

4. ***Policies that are race-, ethnicity-, and sex-neutral, even where they disproportionately benefit certain subgroups, may be permissible in certain contexts*.**

   The state bans leave intact programs that do not discriminate based on race, sex, color, ethnicity, or national origin.[35] For example, student policies that consider or grant preference to race-neutral personal characteristics such as socioeconomic status, particular family status (e.g., growing up in a single parent household, first-generation college students, etc.), or strong academic performance relative to peers at low-performing schools – or employment policies that favor bilingual or multilingual applicants, individuals with ties to particular geographic areas, or individuals of any race or sex who have a record of including a broad diversity of people in their teaching, research and other work activities[36] – should not run afoul of the state bans even though preferences like these may disproportionally benefit certain racial groups. Public institutions should be able to pursue authentic mission-driven policies that have not been adopted with the primary purpose of benefiting certain racial subgroups, as long as the neutral criterion do not operate merely as a pretext or proxy for race, ethnicity, or sex.[37]

5. ***Policies in which race, ethnicity, and sex may be considered when conferring educational benefits or opportunities – but not with respect to individual consequences or determinations – may be permissible.***

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[34] The court stated, "The relevant constitutional consideration is that [contractors] are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of [Proposition 209]." *Id.* at 562. The municipality also required contractors to negotiate with female and minority subcontractors for their services and justify rejection of their bids, action not required for other subcontractors. *Id.* at 565.

[35] *See, e.g.*, California Ballot Pamphlet (Argument in Favor of Proposition 209) ("Proposition 209…allows any program that does not discriminate, or prefer, because of race or sex."); Rebuttal to Argument Against Proposition 209 ("Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED.").

[36] *See Handbook on Diversity and the Law*, *supra* note 3.

[37] *E.g.*, California Ballot Pamphlet (Rebuttal to Argument Against Proposition 209) ("Note that Proposition 209 doesn't prohibit consideration of economic disadvantage…The state must remain free to help the economically disadvantaged, but not on the basis of race or sex to continue."). *See also Hernandez v. N.Y.*, 500 U.S. 352, 375 (1991) (holding that it is not national origin discrimination to classify based on whether one knows a particular language).

In California, an appellate court upheld a school policy that considered a composite score based on the average income, adult education level, and racial diversity of neighborhoods as one element for assigning students to schools. Because the policy dissociated the consideration of race from any individual student, the court found that it did not violate Proposition 209.[38]

6. ***Policies that include race-, ethnicity-, or sex-conscious tiebreakers among equally-qualified individuals, that apply tiebreakers evenly to all groups in the relevant pool, and that ultimately do not exclude any individuals from participation in the public program may withstand review under state bans.***

   In Washington, for example, the state supreme court held that a school district's use of a race-conscious tiebreaker between equally-qualified students in school assignment was not a violation of the statute; because the tiebreaker applied evenly to all races, it did not to grant preferences based on race.[39] In the context of school assignment, all applicants were enrolled in a district school; in a context in which only some individuals ultimately receive a public benefit (e.g., college admission, public employment), a racial tiebreaker likely will face greater judicial skepticism under the state laws.

7. ***The utilization or continuation of a race-, ethnicity-, or sex-conscious policy on the assumption that a loss of federal funding would occur in its absence of the continuation is likely not permissible.***

   Education institutions that attempt to justify a race-, ethnicity-, or sex-conscious policy or program by arguing that its elimination will result in a loss of federal funding must likely do more than merely cite to the federal funding provision in their state bans to justify the continuation of such a policy or program. For example, a California court examining Proposition 209 found that, in order to sustain a race-, ethnicity-, or sex-conscious policy, public entities must show not only that they considered race-neutral alternatives, but also that those alternatives were inadequate and would have resulted in a loss federal funds.[40]

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[38] *Am. Civ. Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009). Note that Supreme Court parameters on school assignment still need to be considered; the Court has not assessed the constitutionality of an assignment policy that considers racial demographic data. *See Parents Involved*, 551 U.S. 701 (examining and invalidating two race-conscious student assignment plans that considered individual students' race on the grounds that the plans in question were not narrowly tailored).

[39] *Parents Involved in Community Schools v. Seattle School District No. 1*, 72 P.3d 151, 166 (Wash. 2003). It is important to note that Washington's initiative, as a statute, is subject to Washington's constitutional provisions establishing that a core mission of public education is "to make available an equal, uniform, and enriching educational environment to all students within the district." *Id.*

[40] *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 311-12 (2004).

8. ***State law prohibitions do not cover action by private actors, including those who may – with sufficient distance – support public institutional efforts.***

   Private groups that work to advance diversity-related goals at public institutions of higher education are likely excepted from the state law bans, but only if there is sufficient distance between their efforts and those of any public institution whose efforts they support. Strong arguments subjecting private actors to the prohibitions of state laws exist where, for example: [a] a public institution assists a private actor with administering a race-, ethnicity-, or sex-conscious program (for example, the university oversees distribution of funds from a private scholarship program) – thereby creating a "close nexus between the State and the challenged action,";[41] or [b] the private actor essentially acts as an agent to the public institution or performs a function generally considered the responsibility of the public institution.[42] However, merely making information about a private program or funding available to students or faculty, to the same extent and in the same manner as information is made available about many other private opportunities, should not unduly tangle the public institution with the private activity.

The array of permissible and impermissible actions under current state laws in the affected states is synthesized in the chart below:

[41] *E.g., Jackson* v. *Metro. Ediso Co.*, 419 U.S. 345 (1974). *See also Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (state action present when state regulation gives private actor an incentive to discriminate); *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (state action present when state requires private actor to discriminate); *Lombard v. Louisiana,* 373 U.S. 267, 273 (1963) (state action present when state officially encourages private actor to discriminate).

[42] *See, e.g.*, *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334 (1998) (finding that person may be a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State").

Court and Attorney General Interpretations of State Law Bans

	Permissible Diversity-Related Policies and Programs	Impermissible Diversity-Related Policies and Programs
Data Collection	• Registry of female and minority candidates available to serve on corporate boards of directors[36] • Collection and reporting of data concerning participation of women and minorities in government programs[37]	
Public Contracting	• Hiring preferences based on tribal affiliation for specific contracts performed on Indian land[38] ○ *Contracts formed on a government-to-government basis were found to draw* political *rather than* racial *classifications.*	• Municipality goal that contractors 1) use specific percentage of minority and female subcontractors and 2) provide advantages in a) notice of bidding opportunities, b) solicitation of participation, and c) negotiations with minority and female subcontractors[39] • Preferences in the form of specific goals, timetables, and other "schemes" granting race and sex preferences in state contracting[40] • Race- or sex-based bid discounts and participation goals in public contracting program, without a showing that race-neutral measures were inadequate and would result in loss of federal funds[41]

K-12 Student Assignment	• Assignment plan's consideration of racial balance of a student's neighborhood, among other elements, but without regard to the individual student's race[42]
	• Racial and ethnic balance considered among many factors in review of attendance boundaries[43]
	• Race-based assignment in compliance with prior-existing integration court order[44]
	• Carefully controlled racial balance at a "laboratory" school[45]
	  ○ *School existing for the primary purpose of scientific research, charging tuition, and not administered by a school district found not to be "in the operation of public education."*
	• Race-conscious tiebreaker limiting equally-qualified minorities and non-minorities alike[46]
	  ○ *Statute's deference to the obligation under Washington constitution to provide integrated learning environment permitted a "nondiscriminatory" race-conscious tiebreaker*
		• "One-in, one-out" race-based transfer policy between high schools barring white students from transferring from "ethnically isolated" school until another white student transferred in, and barring non-whites from transferring in until another non-white student transferred out[47]
		• Race-conscious policy that advances a *less*-qualified over a *more*-qualified applicant[48]
		• Race-based cap limiting minority enrollment to no more than 35% at each district school[49]

Public Employment and Promotion	• Generalized diversity policy not mandating preferential treatment, quotas, or set asides[50]	• Exemption from merit requirement for female and minority candidates for promotion, allowing them to be considered without having placed in the top three on a list of eligible candidates, as required of all other applicants[51]

[36] Cal. Attorney Gen. Op. No. 98-304, 81 Ops. Cal. Atty. Gen. 233 (1998).

[37] *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (requirements of OFCCP not relevant to these analyses).

[38] The attorney general, limiting his opinion to the specific facts at hand, wrote that Proposition 209 would bar "any *general* employment practices or policies giving advantages or preferences to Native American workers or applicants on the basis of Native American ancestry." Preferences were allowed in the instant program because of heavy federal involvement and interests, the determination that the program made a "political" rather than a "racial" classification, and the unique nature of government-to-government contracts. Cal. Attorney Gen. Op. No. 07-304, 93 Ops. Cal. Atty. Gen. 19 (2010).

[39] *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000).

[40] *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001).

[41] *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (2004); Michigan Attorney General Opinion No. 7202 (2007).

[42] *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009).

[43] *Neighborhood Schs. for Our Kids v. Capistrano*, No. 05CC07288, Dept. C4 Unpub. (Orange County Superior Court, 2006); *Avila v. Berkeley Unified Sch. Dist.*, 2004 WL 793295 (Cal. Sup. 2004).

[44] *Am. Civil Rights Foundation v. Los Angeles Unified Sch. Dist.*, 169 Cal. App. 4th 436 (2008).

[45] The court found that the laboratory school provided education only to further its primary mission of research. Furthermore, the court noted that the school didn't have the typical features of a public school – it charged tuition, utilized selective admission, and was not administered by a school district. *Hunter v. Regents of the Univ. of Cal.*, No. B148799, 2001 Cal. App. Unpub. LEXIS 1009 (2001).

[46] The court found that the tiebreaker did not grant preferential treatment or discriminate based on race. Important factors in the court's decision were the primary importance placed on education by the Washington Constitution and the duty to provide integrated learning environments, in light of which R.C.W. 49.60.400 must be interpreted. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (Wash. 2003).

[47] *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002).

[48] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (Wash. 2003).

[49] *Neighborhood Schs. for Our Kids v. Capistrano*, No. 05CC07288, Dept. C4 Unpub. (Orange County Superior Court, 2006).

[50] *Los Angeles County Prof. Peace Officers Ass'n v. County of Los Angeles*, 2002 Cal. App. Unpub. LEXIS 596 (2002).

[51] *Kidd v. State of Cal.*, 62 Cal. App. 4th 386 (1998).

III. Unsettled Terrain: The Constitutionality of State Voter Bans

Federal law remains supreme in our system of federalism. Although federal law does not, as a general proposition, preclude states from acting to supplement or alter rules under federal laws that *permit* (but do not require) certain action (as most of the state bans recognize, expressly), federal law also embodies a number of mandatory principles with which states must comply.

Fundamentally disagreeing about the contours about what federal law may permit and require, two federal circuit courts have reached conflicting decisions regarding the constitutionality of the state voter bans, raising the prospect that the question regarding the lawfulness of state voter bans could reach the U.S. Supreme Court.

In 1997, the Ninth Circuit considered a challenge to the constitutionality of California's Proposition 209, the first of the voter bans to be enacted. The plaintiffs argued,[59] and the district court agreed, that the constitutional amendment impermissibly imposed a substantial political burden on the interests of minorities and women by singling out race and sex preferences for unique political burdens.[60] The Ninth Circuit, however, disagreed; and held that Proposition 209 did not violate the Equal Protection Clause by its repeal of race- and sex-based policies, given that these policies were not required under the federal constitution.[61]

The Ninth Circuit observed,

> Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.[62]

The Ninth Circuit categorized Proposition 209 as "[a] state law that prohibits classifications based on race or sex," and therefore, "a law that addresses in neutral-fashion race-related and sex-related matters." Furthermore, the court differentiated "stacked deck" programs, such as race-based affirmative action, from "reshuffle" programs, such as school desegregation: "Unlike racial preference programs, school desegregation programs are not inherently invidious, do not

[59] The United States joined the plaintiffs as amicus curiae. *Coal. for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997).

[60] *Coal. for Economic Equity v. Wilson*, 946 F.Supp. 1480 (N.D.Cal. 1996)

[61] *Wilson*, 122 F.3d 692. The court also found that although enshrining the anti-discrimination law in a state constitutional amendment restructured the political process for proponents of affirmative action, it did not burden an individual's right to equal treatment.

[62] *Id*. at 708.

work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights."[63]

In light of a subsequent federal decision in the Sixth Circuit, it is notable that the Ninth Circuit disagreed with the district court's reliance on two Supreme Court cases, *Hunter v. Erikson*[64] and *Washington v. Seattle School District No. 1*,[65] in which the Supreme Court had overturned referendums that dealt with racial issues. Instead, the Ninth Circuit observed that the Supreme Court had distinguished "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."[66] The Ninth Circuit further noted that – unlike the prohibitions in *Hunter* and *Seattle* – California's amendment prohibited *all* government agencies from considering race, ethnicity, and sex, rather than limiting the ban to a particular government area, like education.

Almost a decade later, another round of legal challenge arose—this time, to the passage of Michigan's Proposal 2. In 2006, a federal district court acknowledged that the Michigan's initiative had a disparate impact on minorities but found no evidence that it had been enacted by voters with a discriminatory intent.[67] Like the Ninth Circuit, the court drew a distinction between obtaining equal and preferential treatment, and held that Michigan could limit the ability of a distinct group to obtain *preferential* treatment without violating the Fourteenth Amendment. Lastly, the court confirmed a prior attorney general opinion[68] by holding that Proposal 2 did not conflict with and was not preempted by federal law.

However, in July 2011, the Sixth Circuit Court of Appeals, in a 2-1 opinion, reversed this decision and found that Proposal 2 impermissibly restructured Michigan's political process along racial

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[63] *Id*. at 707 n.16. The Ninth Circuit also determined that Proposition 209 was not preempted by federal anti-discrimination laws.

[64] 393 U.S. 385 (1969) (rejecting an amendment to the city charter that required an additional step of a voter referendum to change local housing laws regarding race and religion discrimination, when other changes required only a city counsel vote).

[65] 458 U.S. 457 (1982) (overturning a referendum in Washington State that effectively abolished voluntary busing plans designed to promote racial integration, as adopted by local school districts).

[66] *Crawford v. Los Angeles Sch. Bd. of Educ.,* 458 U.S. 527, 538 (1982) (upholding state constitutional amendment that prohibited state courts from mandating pupil assignment or transportation except to remedy a specific equal protection violation). The plaintiffs in *Wilson* argued that *Crawford* was not applicable because it involved a repeal of a benefit the state itself had afforded, rather than an action removing authority and discretion from local actors.

[67] *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008). See also *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006) (lifting an injunction and allowing Proposal 2 to take effect).

[68] Michigan Attorney General Opinion No. 7202 (2007).

lines.[69] Like the original California district court, the two-judge majority interpreted *Hunter* and *Seattle*[70] to counsel against a state constitutional amendment like Proposal 2, opining that the Equal Protection Clause not only guarantees equal protection under the law but "is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities."

Examining Proposal 2, the Sixth Circuit majority noted that no other admissions criteria (e.g., "grades, athletic ability, or family alumni connections") were affected by Proposal 2's prohibition. The majority further observed that Proposal 2, by entrenching the prohibition in the state constitution, prevented the public or institutions of higher education from revisiting the issue, short of a constitutional repeal, the type of procedural requirement that constituted "a considerably higher hurdle," as compared to the available avenue of petitioning university admissions bodies for all other admissions changes. The majority thus concluded that "Proposal 2 targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in such a way as to place 'special burdens' on racial minorities."[71]

On September 9, 2011, that decision was called into question as the Sixth Circuit granted a re-hearing en banc, with arguments anticipated in 2012.

Given these developments, whether the state voter initiatives discussed in this guidance are permissible under the federal Constitution is an unsettled question. This terrain likely will result in and be informed by additional jurisprudence, including the possibility of a Supreme Court decision to resolve the federal circuit split.[72]

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[69] *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 2011 WL 2600665 (6th Cir. July 1, 2011).

[70] *See Seattle Sch. Dist.*, 458 U.S. at 479-80 ("Before adoption of the initiative, the power to determine what programs would most appropriately fill the school district's educational needs – including programs involving student assignment and desegregation – was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. After the passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.").

[71] This summary of the July 2011 opinion was adapted, with permission, from Coleman and Lipper, *Legal Update:* Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al. *Case Summary* (College Board, 2011), available at www.collegeboard.com/accessanddiversitycollaborative.

[72] For summaries of legal opinions discussing constitutionality of state bans, *see infra* Appendix C.

IV. Conclusion

Although many of the contours of state law bans are evolving, even as the fundamental question about the intrinsic constitutionality of these laws remains in flux, a number of principles from existing law should inform careful consideration of relevant issues by public education institutions within states currently subject to state law bans—and prospectively, in states where movement to expand the reach of voter bans is underway.

Appendix A: State Laws

Arizona Constitution, Article II, Section 36:

(A) This state shall not grant preferential treatment to or discriminate against 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.

(B) This section does not:

(1) Prohibit bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education or public contracting.

(2) Prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal monies to this state.

(3) Invalidate any court order or consent decree that is in force as of the effective date of this section.

(C) The remedies available for a violation of this section are the same, regardless of the injured party's race, sex, color, ethnicity or national origin, as are otherwise available for a violation of the existing antidiscrimination laws of this state.

(D) This section applies only to actions that are taken after the effective date of this section.

(E) This section is self-executing.

(F) For the purposes of this section, "state" includes this state, a city, town or county, a public university, including the university of Arizona, Arizona state university and northern Arizona university, a community college district, a school district, a special district or any other political subdivision in this state.

California Constitution, Article I, Section 31:

(a) 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.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) 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.

(f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school

district, special district, or any other political subdivision or governmental instrumentality of or within the State.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Florida Board of Governors Regulations

2.003 Equity and Access

(1) Discrimination on the basis of race, color, national origin, sex, religion, age, disability, marital status, veteran status, or any other basis protected by applicable state and federal law against a covered individual at any university is prohibited. Covered individuals include prospective and enrolled students, prospective and current employees, and university program invitees. No person shall, on the basis of race, color, national origin, sex, religion, age, disability, marital status, veteran status, or any other basis protected by law be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any university program or activity, or in any employment conditions or practices, conducted by the university.

(a) Nothing in this regulation prohibits a university from engaging in lawful practices aimed at achieving a broadly diverse student body, faculty, or staff if a university determines that such practices are necessary to achieve its educational, research, or service missions. Such practices may include, but are not limited to, conducting targeted outreach and recruitment aimed at inclusion, creating training programs to increase capacity of diverse cohorts, and taking lawful action to remedy underutilization.

(b) Nothing in this regulation limits a university's authority to adopt non-discrimination policies that do not violate applicable law.

. . .

6.001 General Admissions

. . .

(3) The Board of Governors affirms its commitment to equal educational opportunity and to increasing student diversity in each of the state universities; however, admissions criteria must not include preferences in the admission process for applicants on the basis of race, color, national origin, disability, or sex.

(4) In the admission of students, each university must take into consideration the applicant's academic ability, and may also consider other factors such as creativity, talent, and character.

. . .

6.002 Admission of Undergraduate First-Time-in-College, Degree-Seeking Freshmen

. . .

(2) FTIC Undergraduate Admission. Students shall be considered as meeting minimum SUS eligibility requirements in one of the following ways:

(a) Standard Admission:

. . .

(b) Alternative Admission (Profile Assessment): Applicants who are not eligible for standard admissions may be considered for alternative admission. In addition to reviewing a student's GPA and test scores, a university may consider other factors in the review of the student's application for admission. These factors may include, but are not limited to, the following: a combination of test scores and GPA that indicate potential for success, improvement in high school record, family educational background, socioeconomic status, graduation from a low-performing high school, graduation from an International Baccalaureate program, geographic location, military service, special talents and/or abilities, or other special circumstances. These additional factors shall not include preferences in the admissions process for applicants on the basis of race, national origin, or sex. The student may be admitted if, in the judgment of an appropriate institutional committee, there is sufficient evidence that the student can be expected to succeed at the institution.

(1) The number of first-time-in-college students admitted through profile assessment at each university shall be determined by the university board of trustees.

(2) Each university shall implement specific measures and programs to enhance academic success and retention for students who are accepted into the institution using the alternative admissions option. The board of trustees shall review the success of students admitted under the profile assessment process to ensure that their rates of retention and graduation remain near or above the institution's average.

(c) Talented Twenty: Within space and fiscal limitations, admission to a university in the SUS shall be granted to an FTIC applicant who is a graduate of a public Florida high school, who has completed the eighteen (18) required high school units as listed in this regulation, who ranks in the top 20% of his/her high school graduating class, and who has submitted SAT Reasoning Test scores from the College Board or ACT scores from ACT, Inc., prior to enrollment. A Talented Twenty student is not guaranteed admission to the university of first choice and should work closely with a high school counselor

to identify options. The SUS will use class rank as determined by the Florida Department of Education.

Michigan Constitution, Article I, Section 26:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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.

(2) 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.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

Nebraska Constitution, Article I, Section 30:

(1) 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.
(2) This section shall apply only to action taken after the section's effective date.
(3) Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
(4) Nothing in this section shall invalidate any court order or consent decree that is in force as of the effective date of this section.
(5) Nothing in this section prohibits action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
(6) For purposes of this section, state shall include, but not limited to:
    (a) the State of Nebraska;
    (b) any agency, department, office, board, commission, committee, division, unit, branch, bureau, council, or sub-unit of the state;
    (c) any public institution of higher education;
    (d) any political subdivision of or within the state; and
    (e) any government institution or instrumentally of or within the state.
(7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Nebraska's antidiscrimination law.
(8) This section shall be self executing. If any part or parts of this section are found to be in conflict with federal law of the Constitution of the United States, this section shall be implemented to the maximum extent that federal law and the Constitution of the United States permit. Any provision held invalid shall be severable from the remaining portions of this section.

New Hampshire, HB 623 (2011) [new language in bold font]:

AN ACT prohibiting preferences in recruiting, hiring, promotion, or admission by state agencies, the university system, the community college system, and the postsecondary education commission.

Be it Enacted by the Senate and House of Representatives in General Court convened:

227:1 Department of Administrative Services; Classified Employees; Preferential Treatment or Discrimination Based on Race, Sex, National Origin, Religion, or Sexual Orientation Prohibited. Amend RSA 21-I:52, I to read as follows:

I. No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with

respect to employment in the classified service because of the person's political opinions, **religion,** religious beliefs or affiliations, age, sex**, sexual orientation, national origin**, or race. **Additionally, except as provided in paragraph I-a, there shall be no preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, sexual orientation, national origin, religion, or religious beliefs.** Nothing in this section shall require the appointment or prevent the dismissal of any person who advocates the overthrow of the government by unconstitutional and violent means. No person shall use, or promise to use directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration. No employee in the state classified service shall hold any remunerative elective public office, or have other employment, either of which creates an actual, direct and substantial conflict of interest with the employee's employment, which conflict cannot be alleviated by said employee abstaining from actions directly affecting such classified employment. Determination of such conflict shall be made by the personnel appeals board after the parties are afforded rights to a hearing pursuant to RSA 21-I:58. The burden of proof in establishing such a conflict shall be upon the party alleging it. No action affecting said employee shall be taken by the appointing authority because of such public office or other employment until after a full hearing before and approval of such action by the personnel appeals board. If an actual, direct and substantial conflict of interest, which cannot be alleviated by abstention by the employee, is found by the personnel appeals board, the board must approve any action proposed by the appointing authority; and the employee shall be given a reasonable amount of time to leave the employee's public office or other employment or otherwise end the conflict before the appointing authority initiates that action.

I-a. Notwithstanding the prohibition on preferential treatment or discrimination in paragraph I:

(a) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(b) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

227:2 **New Section**; State College and University System; Prohibition on Preferential Treatment and Discrimination. Amend RSA 187-A by inserting after section 16 the following new section:
187-A:16-a Prohibition on Preferential Treatment and Discrimination.

I. Within the state college and university system, there shall be no preferential treatment or discrimination in recruiting, hiring, promotion, or admission based on race, sex, national origin, religion, or sexual orientation.
II. Notwithstanding paragraph I:

(a) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(b) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

227:3 **New Section**; Community College System; Prohibition on Preferential Treatment and Discrimination. Amend RSA 188-F by inserting after section 3 the following new section:
188-F:3-a Prohibition on Preferential Treatment and Discrimination.

I. Within the state's community college system, there shall be no preferential treatment or discrimination in recruiting, hiring, promotion, or admission based on race, sex, national origin, religion, or sexual orientation.
II. Notwithstanding paragraph I:

(a) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(b) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

227:4 Postsecondary Education Commission; Staff; Prohibition on Preferential Treatment and Discrimination. Amend RSA 188-D:4 to read as follows:
188-D:4 Staff.

I. The commission is hereby authorized to employ such staff as may be necessary to carry out its work within the limits of its appropriation.

II. There shall be no preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, national origin, religion, or sexual orientation.

III. Notwithstanding paragraph II:

(a) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(b) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

Washington, R.C.W. 49.60.400

(1) 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.

(2) This section applies only to action taken after December 3, 1998.

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.

(4) This section does not affect any otherwise lawful classification that:

  (a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or

  (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or

  (c) Provides for separate athletic teams for each sex.

(5) This section does not invalidate any court order or consent decree that is in force as of December 3, 1998.

(6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(7) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.

(8) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Washington antidiscrimination law.

(9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington state Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Appendix B: Scope and Impact of State Laws

CALIFORNIA

Kidd v. State of California, 62 Cal. App. 4th 386 (1998).† *Kidd* involved a challenge to the State Personnel Board ("SPB") policy known as "supplemental certification." Supplemental certification allowed minority and female applicants for positions in state civil service to be considered for employment even though they did not place in the top three ranks of a list of eligible candidates—as required of all other applicants. The California Third District Court of Appeal found that the practice of "supplemental certification" violated Proposition 209 and the merit principle embodied in the California Constitution.

California Attorney General Opinion No. 98-304, 81 Ops. Cal. Atty. Gen. 233 (1998). The attorney general was asked whether a California law requiring the Secretary of State to maintain a registry of women and minorities available to serve on corporate boards of directors was rendered unconstitutional by the adoption of Article I, Section 31 of the California Constitution.

The attorney general found that Section 31 "does not purport to apply to every distinction made on the basis of race, sex, color, ethnicity, or national origin, but only to discrimination or preferences in the operation of public employment, public education, or public contracting." Further, the court found that the registry was created for the use of corporations seeking candidates to serve as directors, and had "no role in facilitating public employment, contracting, or education." Therefore, the attorney general concluded that the law requiring the registry was not rendered unconstitutional.

Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000).† In *Hi-Voltage*, the California Supreme Court was asked to decide whether San Jose's program requiring contractors bidding on city projects to utilize a specific percentage of minority and women subcontractors or document efforts to include such subcontractors violated Proposition 209. The court held that the program violated Proposition 209 since the outreach plan required subcontractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services – none of which was required for non-MBE's/WBE's. The court also held that Proposition 209 did not require the city to violate any federal statutory or constitutional provision since a state is always allowed to provide its citizens with greater protection against discrimination than federal law provides. (The court did not address the requirements of the Office of Federal Contract Compliance Programs with which federal contractors must comply.)

Connerly v. State Personnel Board, 92 Cal. App. 4th 16 (2001).† In *Connerly*, the California Third District Court of Appeal unanimously invalidated five California laws under Proposition 209. The

statutes pertained to racial classifications and preferences in state contracting, state civil service, the sale of state bonds, the California Lottery, and the 108-campus community college system. Reversing a lower court decision, the Court of Appeal struck down preferences in the form of goals, timetables, and other "schemes" that treated persons differently on the basis of race or sex. The court also held that the collection and reporting of data concerning the participation of minorities and women in government programs did not violate equal protection principles or Proposition 209. (The court did not address the requirements of the Office of Federal Contract Compliance Programs with which federal contractors must comply.)

Hunter v. Regents of the University of California, No. B148799, 2001 Cal. App. Unpub. LEXIS 1009 (Cal. Ct. App., Dec. 5, 2001). The mother of a child who was denied admission to University Elementary School (UES) challenged the constitutionality of the admissions policy. UES was located on the campus of UCLA and operated by the UCLA Graduate School of Education and Information Studies as a "laboratory" school. The primary purpose of the school was not to educate its students, but rather to conduct research into elementary education methods. So that its research would be scientifically credible, researchers at UES carefully controlled certain variables of the student body, including race, ethnicity, and sex. The plaintiff alleged that the policy violated the prohibition against racial discrimination and preferences in Article I, Section 31 of the California Constitution. UCLA demurred to the mother's Section 31 claim, challenging the legal sufficiency of the claim; the trial court sustained the demurrer; and the mother appealed.

The state appeals court noted that Section 31 did not apply to every action taken by the state, but only those "in the operation of public employment, public education, or public contracting." The court found that "UES provide[d] an education *only* because it facilitate[d] . . . research; absent the research mission, UES would not perform education functions." The court noted that UES didn't have the typical features of a public school – it charged tuition, it utilized selective admission, it operated as a laboratory environment, and it was not administered by a school district. The court therefore concluded that UES was not "in the operation of public education" under Section 31, and that Section 31 was therefore inapplicable.

Los Angeles County Professional Peace Officers Association (PPOA) v. County of Los Angeles, 2002 Cal. App. Unpub. LEXIS 5596 (2002).[†] The Los Angeles County Professional Peace Officers Association alleged that the County of Los Angeles gave preferences to women and minority sergeants in making promotions to the rank of lieutenant in violation of Proposition 209. The trial court held that the evidence demonstrated that the sheriff "let it be known that he wanted diversity of race and sex in the Sheriff's Department and that some of the commanders might have been influenced by [the] Sheriff to favor minorities and women." Nevertheless, according to the trial court, no evidence was presented that demonstrated the existence of preferences in promotions based upon race or sex. The California Second District Court of Appeal affirmed the trial court's ruling, holding that the County's written policy on diversity did not establish a sex or race preference in the Sheriff's Department promotion process. Furthermore, the court

stated that there was "nothing inconsistent between this Policy on Diversity and [Proposition 209]. Unlike specific programs or policies that have been found to violate [Proposition 209], the County's generalized Policy on Diversity [did] not either mandate preferential treatment or provide for racial or sex quotas or set asides."

Crawford v. Huntington Beach Union High School District, 98 Cal. App. 4th 1275 (2002).† In *Crawford,* the California Court of Appeals for the Fourth District invalidated under Proposition 209 a district transfer policy that prohibited a white student from transferring from the one "ethnically isolated" high school in the district until another white student transferred in and prohibited a non-white student from transferring into the high school until another non-white student transferred out of the school. The court ruled that this plan discriminated against individual students and conferred preferences for other individual students based solely on race, in violation of Proposition 209. In response to the argument that a separate provision of the California Constitution required districts to take steps to reduce segregation, the court held that Proposition 209, as the later-enacted provision, controlled.

C&C Construction, Inc. v. Sacramento Municipal Utility District, 122 Cal. App. 4th 284 (2004).† In *C&C Construction*, the Sacramento Municipal Utility District ("district") conceded that its affirmative action program that applied race-based "participation goals" and in some cases "evaluation credits" in its public contracting program discriminated in favor of women and minorities. The district argued, however, that its program fell within the exception of Proposition 209 for measures required to maintain eligibility for the receipt of federal funds. The California Third District Court of Appeal reviewed the federal regulations that required affirmative action to remediate past discrimination and noted that affirmative action could be either race-based or race-neutral. Therefore, the district could not impose race-based affirmative action without a showing that race-neutral measures were inadequate, and would result in loss of federal funds.

Furthermore, the court held that legislation purporting to define the term "discrimination" for the purposes of Proposition 209 was unconstitutional, as it was an attempt to amend the California Constitution without conforming to the procedures for amendment.[73]

Hernandez v. Board of Education of Stockton Unified School District, 126 Cal. App. 4th 1161 (2004).† In *Hernandez,* a group of students, parents, and taxpayers ("Intervenors"), challenged an order from the Superior Court of San Joaquin County that approved a settlement agreement in a school desegregation case upon a finding that respondent school district was no longer

[73] California Government Code § 8315 attempted to define "discrimination" to be consistent with the definition of "racial discrimination" adopted by the United Nations in 1965. As the UN definition allowed for an exception for "special measures" to "secur[e] adequate advancement of certain racial or ethnic groups," the court found it to be in conflict with the California Supreme Court's plain-language definition of "discrimination" in *Hi-Voltage*. Because the bill was passed by a simple majority vote and was never submitted to the electorate, the court found that the state legislature acted "manifestly beyond their constitutional authority."

segregated. The Intervenors also argued that the continued funding of the existing magnet schools without a current finding of discrimination was contrary to Proposition 209 and was a race-based preference. The California Third District Court of Appeal affirmed the trial court, holding that the continued funding of magnet schools after the dismissal of the school desegregation case did not constitute a preference or discrimination based upon race, within the meaning of Proposition 209, given that the Intervenors had failed to demonstrate how the school district discriminated against or granted preferential treatment on the basis of race in the decision to favor the magnet schools chosen in the settlement agreement to continue receiving public funds. Since the schools in question were no longer racially isolated minority schools (*i.e.,* the schools were racially balanced), the selection of one racially balanced school over another could not constitute a preference or discrimination based on race.

Avila v. Berkeley Unified School District, 2004 WL 793295 (Cal. Superior 2004).[†] The Superior Court for Alameda County, in *Avila*, upheld a district voluntary desegregation plan that provided for controlled choice of schools by all students, with racial impact at the school/grade compared to the district/grade as a whole as one of several factors to be taken into account by the district in assigning students among their three school choices. In addition to holding that districts have an obligation under the California Constitution to alleviate school segregation regardless of its cause, and that Proposition 209 should be read in harmony with this obligation, the court held that, unlike the plan in the *Huntington Beach* case, Berkeley's plan did not establish preferences solely on the basis of race, nor did it favor one race over the other, but merely considered race and ethnicity as one of several factors to achieve desegregated schools for all students.

Neighborhood Schools for Our Kids v. Capistrano, unpublished; case no. 05CC07288 (Dept. C4, 2006).[†] The Superior Court for Orange County, in *Capistrano,* ruled that a race-conscious policy providing for the district to review school attendance boundaries, taking into account racial and ethnic balance, among other factors, did not necessarily discriminate or grant preferences based on race in violation of Proposition 209. The court expressly contrasted the policy to that addressed in the *Huntington Beach* case. However, the court went on to hold that a specific plan adopted by the district did facially violate Proposition 209 by limiting minority enrollment at each school to no more than 35%, effectively discriminating based on race.

American Civil Rights Foundation v. Los Angeles Unified School District, 169 Cal. App. 4th 436 (2008). Pursuant to a 1981 court order, the school district implemented and adhered to an integration plan that used busing and race-based admission to magnet schools. An interest group challenged the constitutionality of the integration plan under Article I, Section 31 of the California Constitution. It was undisputed that the 1981 final order was never reversed, overruled, vacated, revoked, modified, or withdrawn. Subdivision (d) of Section 31 exempts existing court-ordered integration plans from its purview. Therefore, the trial court found the programs to be exempt from the prohibitions in Section 31. The interest group appealed,

arguing that the 1981 final order terminated court supervision of the integration plan and did not require the use of race. The state appeals court found that the 1981 order "approved a forward-looking plan" which "did require the District to consider race." Therefore, the court found that the district was under a court-ordered integration plan in 1996 when Proposition 209 was approved, and the integration plan was exempt under Section 31.

American Civil Rights Foundation v. Berkeley Unified School District, 172 Cal. App. 4th 207 (2009). An interest group challenged the constitutionality of the school district's student assignment policy, which considered each student's "diversity score," a factor computed based on the average income, adult education level, and racial diversity of the student's neighborhood,[74] as one element for assigning students to schools or to academic programs within schools.[75] Under the district policy, each student within a given neighborhood received the same diversity score, regardless of his or her individual race.

Under the assignment policy, the entire school district was divided into three attendance zones,[76] and the distribution of diversity scores within each zone was calculated. Under the plan, each school's student body had to approximately (within 5-10 percentage points) reflect the zone-wide distribution of diversity scores for its attendance zone. Parents submitted a ranked list of three schools they would prefer their child to attend. Students were placed in one of six priority categories.[77] Moving through students in priority order, a software program assigned students to schools, keeping in mind their diversity scores. If possible, students were assigned to their parents' first-choice school, but students were assigned to other schools if necessary to meet the required diversity distribution for each school. The plan generally placed

[74] For the purposes of this policy, the school district was divided into 445 planning areas. These were strictly geographic divisions typically between four and eight city blocks in size.

[75] The school district had only two middle schools and one high school. Middle school assignment was based on residence within each school's respective geographic zone. Assignment to one of the six academic programs at Berkeley High School follows the same model as elementary school assignment. A few minor differences in the high school program assignment policy are briefly mentioned in the case, but the court treats it as identical to the elementary school assignment policy.

[76] The school district was divided into three geographic attendance zones (Northwest, Central, and Southeast). Each attendance zone contained three or four elementary schools; the boundaries of an attendance zone were defined by the combined boundaries of the elementary schools it contained. The attendance zones were drawn with the goal that each zone reflect the racial diversity of the district as a whole. The establishment of attendance zones based on communitywide racial demographics was not challenged.

[77] The priority rankings were as follows: (1) students currently attending the school who live within that school's geographic attendance zone; (2) students currently attending the school who live outside the zone; (3) siblings of students currently attending the school; (4) school district residents not attending the school who live within the zone; (5) school district residents not attending the school who live outside the zone; and (6) nonresidents seeking an interdistrict transfer.

students according to their parents' choices; only 7% of students were assigned to a school not ranked as a top-three choice.[78]

The state appeals court held that the policy did not violate Article I, Section 31 of the California Constitution (Proposition 209) because it did not show partiality, prejudice, or preference for any individual on the basis of that individual's race. To the extent that preferences were shown, they were not made on the basis of an individual student's race, but rather on the basis of several factors relating to the collective composition of the student's neighborhood.[79] Therefore, the court concluded that Section 31 did not prohibit the collection and consideration of communitywide demographic factors for use in the otherwise race-neutral policy.[80] Because the court found the school district's policy to be race-neutral with respect to the race of an individual student, it did not engage in further analysis of whether the school district had considered race-neutral alternatives. The California Supreme Court denied ACRF's petition for review.

California Attorney General Opinion No. 07-304, 93 Ops. Cal. Atty. Gen. 19 (2010). The attorney general was asked to opine on the Article I, Section 31 constitutionality of the Tribal Employment Rights Ordinances (TERO) used by the California Department of Transportation. TERO granted hiring preferences to Native Americans as part of the DOT's contracts for highway construction and maintenance performed on Native American tribal lands. Importantly, the hiring preferences were granted only to "enrolled members of Indian tribes and not persons merely of Indian ancestry."

Finding that the contracts were formed on a government-to-government basis, the attorney general opined that this particular scheme should properly be treated as making a "political," rather than "racial," classification for the purposes of Section 31. Therefore, the TERO preferences were found not to be barred, but the attorney general was careful to confine this determination to the particular facts. It was emphasized that Section 31 would bar "any *general* employment practices or policies giving advantages or preferences to Native American workers or applicants on the basis of Native America ancestry."

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[78] For 2008-2009 kindergarten enrollment, 76% of families received their first choice school, 8% received their second choice, 9% received their third choice, and 7% were assigned to a school they did not rank. The school district asserted that all students in priority categories (1) through (3) were admitted to their first choice school, and that diversity scores only affected placement in categories (4) through (6). The record was unclear on this point, however, so the state court of appeals assumed *all* students were subject to the diversity considerations.

[79] The court was careful to distinguish this case from prior cases in which race-based policies were struck down: "The policy challenged here does not consider an individual student's race when assigning the student to a school, and thus presents a far different situation from those found unlawful."

[80] The appeals court cited *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court's first opinion interpreting Proposition 209. In *Hi-Voltage*, the court found that it was not the purpose of Proposition 209 to eliminate all race-conscious actions by the state, but rather to prohibit only those policies that discriminate against or grant preferential treatment to any individual or group on the basis of race.

Coral Construction, Inc. v. City and County of San Francisco, 50 Cal. 4th 315 (2010). In *Coral Construction*, the plaintiff construction company brought suit against the city and county of San Francisco, challenging the constitutionality of the city's Minority/Women/Local Business Utilization Ordinance under Proposition 209. The ordinance required city departments to give specified percentage discounts to bids submitted by certified minority business enterprises (MBEs), woman business enterprises (WBEs), local business enterprises, and joint ventures with appropriate levels of participation by these enterprises. In addition, bidders for certain types of prime city contracts had to demonstrate their good faith efforts to provide certified MBEs and WBEs an equal opportunity to compete for subcontracts. As part of its defense, San Francisco argued that its program was necessary to maintain federal funding, and therefore was excepted from Proposition 209.

The court found that federal regulations requiring "affirmative action to ensure that no person is excluded from participation" did not mandate, but simply permitted, race-based remedies. Therefore, for the ordinance to survive, the court required a showing of "federal compulsion": (1) a history of purposeful or intentional discrimination; (2) that the city ordinance was a remedy for such discrimination; (3) that the ordinance was narrowly-tailored; and (4) that a race- or sex-conscious remedy was necessary. The case was remanded to decide the federal compulsion issue.

MICHIGAN

Michigan Attorney General Opinion No. 7202, 2007 Mich. AG LEXIS 6. The attorney general was asked whether a city's construction policy that provided bid discounts on the basis of race or sex was constitutional under Article I, Section 26 of the Michigan Constitution (Proposal 2). The attorney general determined that the terms of Section 26, which were "not ambiguous and can be understood in a common sense," precluded the type of policy under review:

> To "discriminate against" means to "make a difference in treatment" that is unfavorable to the person or group. "Preferential treatment" may be defined as "showing preference" in the treatment of a person or group … Thus, the term "preferential treatment" as used in art 1, § 26 can be understood as the act or fact of giving a favorable advantage to one person or group over others based on race, sex, color, ethnicity, or national origin. By using the terms "discriminate against" and "grant preferential treatment to," art 1, § 26 prohibits both the prejudicial treatment of a person and its counterpart – the favorable treatment of a person or group – on account of these classifications. The meaning of this language is clear; therefore, there is no need to examine the circumstances surrounding the adoption of this constitutional provision or the purpose sought to be accomplished. . . . Consequently, insofar as the policy provides a bid

> discount based on the DBE[81] status of subcontractors, the City's policy . . . violates the plain language of art 1, § 26 and is unconstitutional.

Additionally, the attorney general opined that Section 26 was in harmony with both federal and state Equal Protection Clauses.

WASHINGTON

Parents Involved in Community Schools v. Seattle School District No. 1, 72 P.3d 151 (Wash. 2003). A group of Seattle parents whose children had been denied admission to their preferred high school challenged the school district's "open choice" student assignment plan in federal court. The district's motion for summary judgment was granted. On review, the Ninth Circuit certified a question to the state supreme court asking whether the school district's use of a race conscious tiebreaker violated R.C.W. 49.60.400.

Housing patterns in Seattle were sufficiently segregated by race that strict geographic assignment to high schools would have resulted in largely segregated schools. Recognizing this, the school board instituted its "open choice" plan, which sought to ensure integrated schools while allowing rising ninth grade students to rank however many schools they wished in order of preference. If a student's first-choice school was undersubscribed, the student would be enrolled. If the chosen school was oversubscribed, a series of four tiebreakers was used to allocate seats at the oversubscribed schools.[82] The second tiebreaker was based on race, and gave preference to students whose race would bring the school nearer to a representative distribution of races. This "integration tiebreaker" was only triggered when a school's student body was either less than 25 percent "white" or more than 75 percent "nonwhite."[83] The tiebreaker would be switched on or off as a school's distribution moved outside or within these

[81] A DBE is a "disadvantaged business enterprise," which is "defined in terms of [the] race, sex, ethnicity, and national origin" of its owner(s).

[82] The school district applied the following four tiebreakers, in order:

- Sibling tiebreaker: Students with a sibling already attending the school would be assigned to their preferred school first.
- Integration tiebreaker: Seats would be allocated with the goal of providing a racially diverse education environment.
- Proximity tiebreaker: Remaining seats were allocated according to distance from the preferred school, with those nearest receiving preference.
- Lottery: Remaining seats determined by lottery.

[83] The overall demographic makeup of Seattle public school students was approximately 40% white and 60% nonwhite. The school district allowed deviation of up to 15% from this composition, and therefore "switched on" the integration tiebreaker only when a school's population was either less than 25% white or more than 75% nonwhite.

limits during the assignment process. About 10% of high school assignments were attributable to the integration tiebreaker.[84]

The Washington Supreme Court held that the school board's use of a racially conscious tiebreaker did not violate R.C.W.49.60.400, finding that the statute prohibits only government action where race, sex, color, ethnicity, or national origin is used as the basis to discriminate against or grant preferential treatment. The court found that the tiebreaker applied equally to members of all races, minorities and non-minorities alike, and did not grant preferences based on race. The court determined that although the tiebreaker was race conscious, it furthered a core mission of public education by making available an "equal, uniform and enriching educational environment to all students within the district." The opinion made clear, however, that a program that advanced a less qualified applicant over a more qualified applicant based on race would be impermissible.[85]

[†] Case summary adapted, with permission, from Palmer, Richards, and Winnick, *Advancing Diversity at the University of California, Berkeley Under Proposition 209* (Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, 2006).

[84] For the 2000-2001 school year, approximately 15-20% of assignments were determined by the sibling tiebreaker, approximately 10% by the integration tiebreaker, and approximately 70-75% by the proximity tiebreaker. The lottery round was rarely reached as a practical matter. 80.3% of students were assigned to their first-choice school. Without the integration tiebreaker, 80.4% of students would have received their first-choice school.

[85] Subsequently, the U.S. Supreme Court held that the school district's use of racial classifications denied students equal protection under the Fourteenth Amendment of the U.S. Constitution. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

Appendix C: Constitutionality of State Voter Initiatives

CALIFORNIA

Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), cert. denied 522 U.S. 963 (1997).† In *Wilson*, a coalition representing the interests of women and minorities filed suit against Governor Pete Wilson and Attorney General Daniel Lungren facially challenging Proposition 209 on the grounds that it violated the Equal Protection Clause. The district court issued a preliminary injunction preventing the implementation of Proposition 209, holding that it "restructure[d] the political process to the detriment of the interests of minorities and women." The Ninth Circuit reversed the trial court, holding that Proposition 209 was not unconstitutional because it did not create any impermissible legislative classifications or restrict the rights of women and minorities. Furthermore, because women and minorities together constitute the state majority, they could not restructure the political process against themselves to effectively breach their Equal Protection rights.

Coral Construction, Inc. v. City and County of San Francisco, 50 Cal. 4th 315 (2010). In *Coral Construction*, discussed above in Appendix B, the plaintiff construction company brought suit against the city and county of San Francisco, challenging the constitutionality of the city's Minority/Women/Local Business Utilization Ordinance under Proposition 209. San Francisco argued that Proposition 209 violated the federal equal protection clause by restructuring the political process so as to unduly burden minorities and invoked two Supreme Court cases, *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

The California Supreme Court concluded that "the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender, and other similar classifications." In its analysis, the court clarified that "[S]ection 31 prohibits race- and gender-conscious programs the federal equal protection clause *permits* but does not *require*," and followed the Ninth Circuit in distinguishing between "preferential treatment" and "equal protection."[86] The court then found that "[n]othing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." The court held that Proposition 209 does not violate the Fourteenth Amendment under the political structure doctrine.

Justice Carlos Moreno wrote a dissent in which he contended that Proposition 209 was unconstitutional because it was race-conscious and established a "steep hurdle" for minorities and others seeking preferential treatment based on race and sex.

[86] *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

Coalition to Defend Affirmative Action v. Schwarzenegger, No. 10-641 SC, 2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010). An interest group challenged the constitutionality of Article I, Section 31 of the California Constitution (Proposition 209), alleging violation of the Fourteenth Amendment's Equal Protection Clause. The plaintiffs argued that use of standardized test scores and weighted GPAs favoring honors students disadvantaged minority students, given "the separate and distinctly unequal elementary and secondary education [system]." The plaintiffs asserted that if race could not be taken into consideration, the University of California could not effectively remedy these allegedly prejudicial effects.

The federal district court determined that the Ninth Circuit previously had rejected these claims in *Coalition for Economic Equity v. Wilson* (1997). The plaintiffs, however, argued that the Supreme Court's opinion of *Grutter v. Bollinger* (2003) overruled *Wilson*. The court found that although *Grutter* permitted the use of race as a factor in admissions decisions, it did not require it. Therefore, the federal district court held that *Wilson* was not overruled by *Grutter*. Although the plaintiffs "tr[ied] to wrench inconsistencies out of Wilson's dicta," the court wrote that "[s]uch inconsistencies do not so poison Wilson's logic as to free this Court from its duty to apply the precedent set by its reviewing court." The action was dismissed with prejudice.

In June 2011, the plaintiffs appealed to the Ninth Circuit.[87]

MICHIGAN

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006). An interest group alleged that Article I, Section 26 of the Michigan Constitution (Proposal 2) violated the First and Fourteenth Amendments of the U.S. Constitution, and was preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. At the stipulation of all parties involved, the federal district court temporarily enjoined enforcement of the law to allow Michigan universities to complete the year's admissions and financial aid cycles. Desiring Proposal 2 to take immediate effect, an applicant to a Michigan law school intervened, appealed the injunction, and petitioned for a stay of the injunction.

After analyzing the factors to be considered, the Sixth Circuit determined that its decision ultimately would turn on the plaintiffs' likelihood of success on the merits of their claims.[88]

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[87] *Coalition to Defend Affirmative Action v. Brown*, Nos. 11-15241, 11-15100.

[88] When reviewing a motion for a stay pending appeal, the court "balances together" four factors:

- The likelihood that the party seeking the stay will prevail on the merits of the appeal
- The likelihood that the moving party will be irreparably harmed absent a stay
- The prospect that others will be harmed if the court grants the stay
- The public interest in granting the stay

The court concluded that irreparable harm would "befall one side or the other of the dispute no matter what we do," and that the "'public interest lies in a correct application' of the federal constitutional and statutory provisions upon which the claimants have brought this claim." This left the first factor as weighing most heavily on the outcome.

The court looked to *Grutter* for guidance on the claim that Proposal 2 infringed on universities' First Amendment right to academic freedom. The *Grutter* Court stated that affirmative action programs may not exist in perpetuity and suggested that lessons could be learned from states that had prohibited racial preferences. The Sixth Circuit determined that the Supreme Court had thereby tacitly allowed state laws banning racial preferences. Furthermore, because First Amendment rights exist in perpetuity and "race-conscious admissions policies must be limited in time,"[89] the Sixth Circuit found that universities were not entitled to affirmative action programs as a First Amendment right.

The court was skeptical of the Equal Protection challenge, noting that Proposal 2 "would seem to be an equal-protection virtue, not an equal-protection vice." The court found that Proposal 2 created an equal protection standard higher than the minimum required by the Fourteenth Amendment, and that states were free to implement policies ending the use of racial preferences. The court concluded that the plaintiffs had "little likelihood of establishing that Proposal 2 violates the federal constitution."[90] The court lifted the injunction, and Proposal 2 took effect.

Coalition to Defend Affirmative Action v. Regents of University of Michigan, 539 F. Supp. 2d 924 (E.D. Mich. 2008). A group of faculty, college students, and high school students who planned to apply to the University of Michigan challenged the constitutionality of Article I, Section 26 of the Michigan Constitution (Proposal 2) as it applied to higher education. A second set of plaintiffs, composed of interest groups and individuals connected with other state universities, alleged that Proposal 2 violated the U.S. Constitution and federal law. The district court consolidated the two cases.

The plaintiffs first alleged that Proposal 2 violated the university's First Amendment right to academic freedom.[91] The court found that this right belongs to the university itself, and that

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[89] *Grutter*, 539 U.S. at 342.

[90] The Sixth Circuit distinguished this case from successful "political process equal protection" claims by noting that Proposal 2 does not burden minority interests alone. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Romer v. Evans*, 517 U.S. 620 (1996). Furthermore, the court found that Proposal 2's fail-safe clause successfully eliminated any conflict between itself and Title VI or Title IX.

[91] Justice Frankfurter, concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), summarized the academic freedom of a university:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

the plaintiffs lacked third-party standing to assert the school's rights. The First Amendment claim was dismissed due to lack of standing.[92]

The plaintiffs' next argument was a conventional equal protection challenge. Although Proposal 2 was racially neutral on its face, the court acknowledged that it had a disparate impact on minorities. However, there was no evidence that it was enacted by the electorate with a discriminatory intent. Therefore, the court rejected the first equal protection challenge.[93]

A second equal protection challenge alleged that Proposal 2 restructured the political process, placing an undue burden on the ability of minorities to bring about changes in university admissions policies. Before Proposal 2, minority groups could petition university officials to implement affirmative action programs. After the enactment of Proposal 2, minority groups would first have needed another constitutional amendment voiding, at least in part, Proposal 2. The plaintiffs characterized this as a heavy burden that violated their right to equal access to the political process. The court, however, drew a distinction between laws that distance minority groups from obtaining *preferential* treatment and those that distance them from *equal* treatment. The court held that Michigan could limit the ability of a distinct group to obtain an *advantage* without violating the Fourteenth Amendment.[94]

Finally, the plaintiffs alleged that Proposal 2 was preempted by Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. The court determined that Proposal 2 was not subject to preemption because neither Title VI nor Title IX was so pervasive as to occupy its entire field. Furthermore, Proposal 2 contained a fail-safe clause stating that it did not prohibit any action required to maintain eligibility for federal funding. The court determined that this language successfully resolved potential conflicts in favor of federal law. Therefore, it held that Proposal 2 did not conflict with federal law and was not preempted by federal law.

Having disposed of all of the plaintiff's arguments, the federal district court granted the attorney general's motion for summary judgment.[95]

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[92] Additionally, on the standing issue, the court opined that students have no personal right to a diverse student body.

[93] The court wrote that to have succeeded with this claim, the plaintiffs would had to have shown that "Proposal 2 was enacted 'because of, not merely in spite of, its adverse effects upon an identifiable group'" (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

[94] The court noted that had plaintiffs established that preferential treatment was necessary to attain *equal* treatment, their claim could have survived.

[95] Subsequently, the plaintiffs challenged the court's distinction between a law that prohibited "preferential" treatment and one that denied "equal" treatment as inconsistent with precedent, and therefore erroneous. On review, analysis of Supreme Court precedents revealed that desegregation is, in some instances, constitutionally required. However, affirmative action has never been held to be required. Furthermore, the court opined that

Coalition to Defend Affirmative Action v. Regents of University of Michigan, 2011 WL 2600665 (6th Cir. July 1, 2011).Φ A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit held 2-1 that Michigan's voter-initiated ban on the consideration of race and sex in public university admissions and government hiring violated the Equal Protection Clause because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities."

Under the political restructuring theory of the Fourteenth Amendment, the court considered whether Proposal 2 impermissibly restructured Michigan's political process along racial lines. The court examined two cases – *Hunter v. Erickson*[96] and *Washington v. Seattle School District No. 1*[97] – in which the Supreme Court overturned referendums that dealt with racial issues. In *Hunter*, the Court rejected an amendment to the city charter that required an additional step of a voter referendum to change local housing laws regarding race and religion discrimination, where other changes required only a city council vote. In *Seattle*, the Court overturned a referendum in Washington State that effectively abolished voluntary busing plans designed to promote racial integration, as adopted by school districts.

Applying these cases, the two-judge majority explained that the Equal Protection Clause not only guarantees equal protection under the law but "is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities." Examining Proposal 2, the majority noted that no other admissions criteria (e.g., "grades, athletic ability, or family alumni connections") were affected by Proposal 2's prohibition. The majority further observed that Proposal 2, by entrenching the prohibition in the Michigan constitution, prevented the public or institutions of higher education from revisiting the issue, short of a constitutional repeal, the type of procedural requirement that constituted "a considerably higher hurdle," as compared to the available avenue of petitioning university admissions bodies for all other admissions changes. The majority thus concluded that "Proposal 2 targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in such a way as to place 'special burdens' on racial minorities."

The majority rejected the Michigan Attorney General's argument that Proposal 2 did not have a "racial focus" because it also addressed sex preferences, finding that the political restructuring theory requires only that the law targets policies that minorities *may* consider in their interest. The majority further noted that its decision was "not impacted by the fact that increased representation of racial minorities in higher education also benefits students of other groups

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"*Grutter* made clear that [affirmative action] is barely tolerated" by the Supreme Court. Therefore, the district court's distinction was found to be useful in interpreting the scope of existing case law. Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 592 F. Supp. 2d 948 (E.D. Mich. 2008).

[96] 393 U.S. 385 (1969).

[97] 458 U.S. 457 (1982).

and our nation as a whole," expressly accepting the compelling interest asserted by advocates of race-conscious admissions policies.

The majority also rejected the Attorney General's distinction between enactments that burden racial minorities' ability to obtain protection from discrimination through the political process ("discrimination") and policies that burden racial minorities' ability to obtain preferential treatment ("preference"). The Attorney General largely relied on the Ninth Circuit's analysis of California's comparable Proposition 209 in *Coalition for Economic Equity v. Wilson*[98], which distinguished "preferential treatment" from "equal treatment." The Michigan district court decision, which the Sixth Circuit was reviewing, as well as an earlier Sixth Circuit decision – *Coalition to Defend Affirmative Action v. Granholm*[99], cited *Wilson* to find that although Proposal 2 had a racial focus and burdened minorities, the Equal Protection Clause was not violated because it created a burden to obtaining preferential treatment; the district court had found that *Hunter* and *Seattle* should be interpreted to apply only to burdens affecting "equal treatment," and not to "preferential treatment."

The Sixth Circuit majority rejected this interpretation, notably couching the relevant terminology as "discrimination" and "preference" (rather than "equal treatment" and "preferential treatment"). Specifically, the majority found that the Attorney General's position would make superfluous the governing political process theory, which was created to address state action that is constitutionally permissible (rather than constitutionally mandated under the traditional equal protection analysis). The majority observed that *Seattle* most clearly involved constitutionally-permissible state action, namely a voluntary, ameliorative effort to reduce the impact of *de facto* segregated housing patterns. The majority concluded, "[W]hat matters is if racial minorities are forced to surmount procedural hurdles in reaching [a process-based right] over which other groups do not have to leap."

Judge Gibbons dissented from the court's conclusion that Proposal 2 impermissibly restructured the political process to burden the ability of minorities to enact beneficial legislation. She noted the limiting language in *Grutter* that cautioned that race-conscious measures are "a highly suspect tool" and that such measures be limited in time. Noting that the Supreme Court acknowledged state-law prohibitions on the use of racial preferences in admissions in California, Florida, and Washington, Judge Gibbons contended that the Equal Protection Clause was not violated where race-related policies, not required by the U.S. Constitution, are repealed.

Judge Gibbons further distinguished the Supreme Court opinions in *Hunter* and *Seattle* in which lawmaking authority was reallocated from a politically accountable legislative body to a more complex government structure: "these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and

[98] 122 F.3d 692 (9th Cir. 1997).

[99] 473 F.3d 237, 248-49 (6th Cir. 2006).

Seattle. The most crucial and overarching difference, of course, is that the faculty admissions committees and individual faculty members are not politically accountable to the people of Michigan." (The majority opinion characterized the dissent as arguing that "political process" requires an electoral component and disagreed with this position, noting "the abundance of language to the contrary in those [Supreme Court] cases." Further, even if the political restructuring theory requires an electoral connection, the majority opinion identified the connection between the admissions processes at the Michigan universities and Michigan's electorate political process.)

The majority did not reach the "traditional" argument under the Fourteenth Amendment that Proposal 2 violates the Equal Protection Clause by impermissibly classifying persons on the basis of race, but Judge Gibbons's opinion found that Proposal 2 was constitutional under this analysis.

In late July, Michigan's attorney general filed a petition to request a rehearing en banc before the full, 15-member Sixth Circuit. On September 9, the Sixth Circuit agreed to grant a re-hearing en banc, and arguments are expected in 2012.

† Case summary adapted, with permission, from Palmer, Richards, and Winnick, *Advancing Diversity at the University of California, Berkeley Under Proposition 209* (Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, 2006).

Φ Case summary reproduced, with permission, from Coleman and Lipper, *Legal Update:* Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al. *Case Summary* (College Board, 2011).

Appendix D: Additional Resources

- Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008).

- André Douglas Pond Cummings, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 IND. L.J. 1277 (2010).

- Melvin Butch Hollowell, *In the Wake of Proposal 2: The Challenge to Equality of Opportunity in Michigan*, 34 T. MARSHALL L. REV. 203 (2008).

- Michael E. Rosman, *Challenges to State Anti-Preference Laws and the Role of Federal Courts*, 18 WM. & MARY BILL RTS. J. 709 (2010).

- Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives*, 13 MICH. J. RACE & L. 461 (2008).