# ADVANCING DIVERSITY
## AT THE
# UNIVERSITY OF CALIFORNIA, BERKELEY
## UNDER
# PROPOSITION 209

*Authored in Conjunction With:*

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The University of California, Berkeley
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# FOREWORD

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The importance of diversity and inclusion to higher education was the focus of intense legal and social scientific analysis in the decisions of the United States Supreme Court concerning affirmative action at the University of Michigan.[2] The leadership of higher education and several other sectors of society offered overwhelming support, and a significant amount of evidence, for the proposition that student diversity – specifically the racial and ethnic diversity there at issue – is a compelling interest. The academic leaders of the University of California have similarly concluded that inclusion is central to its mission, and at Berkeley, Chancellor Robert J. Birgeneau has made it among his chief priorities. The immediate challenge is how to secure this dimension of institutional mission despite the constraints on means thought to be created by Proposition 209, which in 1996 amended California's constitution to prohibit most forms of voluntary public sector affirmative action, denominated "preferences."

The direct effect of Proposition 209 on student body composition was dramatic, and the decrease in the presence of underrepresented minorities continues.[3] Is everything that *can* be done, within the limits of state and federal law, in fact *being* done? More precisely, leaders must be confident that the limits on inclusion strategies are defined, as they should be, by:

- informed judgments of institution leaders about acceptable legal risk, built on legal analysis that eschews politicized constraints and gives maximum scope to policy discretion;
- evidence-driven judgments about program effectiveness and promising practices; and
- careful resource allocation decisions, both across diversity-related initiatives, and as between diversity and other institutional priorities.

This report, the first Warren Institute effort within a broader undertaking concerning the consequences and future of Proposition 209 in higher education, tackles two key conceptual tasks. The first is principally legal. Given the state of federal and state antidiscrimination law, including court decisions and inferences therefrom, what are the important principles and unsettled questions for decision makers in California higher education? Relatedly, how should we characterize the frontier of legally permissible policy choices, so that decision makers have a rich sense of how program design choices map onto a scale of litigation risk? The second is programmatic. What framework—what concepts—would order the messy universe of inclusion-related programs at U.C. Berkeley or a comparable institution? In particular, how can that universe be ordered both with regard to the "pipeline" or life-cycle of students and with regard to the legal risks of various programs?

These two central questions – the parameterization of legal risk and the array of program options – are the underpinnings of a strategy for advancing the goals of inclusion and diversity. The premise of this report is that the best leadership in higher education follows a polestar defined by mission. It plots the course by reference to research and informed deliberation. And it acknowledges that politics has its place, while striving to enforce boundaries on that place.

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[2] *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[3] *See* the appended bibliography.

This report, intended for those leaders, offers some answers, but in comparable measure it raises further questions. This mix reflects not only the complexity of the problem, but also the reality that our society's struggles over difference will never be done. This will be the continuing challenge of leaders and successful communities, because our differences will always sow seeds of division that must be transmuted into sources of strength and cause for celebration. Nowhere is this more important than in higher education.

## I. INTRODUCTION

The purpose of this brief report is to provide an analytical framework for evaluating diversity-related programs at the University of California-Berkeley in light of federal legal principles and applicable state law to help ensure that these programs effectively advance institutional goals, appropriately balance legal risk, and protect the rights of all persons.

This report includes:

- A summary and analysis of the prevailing federal and state legal standards applicable to the use of race in the higher education context, including Proposition 209[4]; and

- A framework for cataloging and analyzing current and potential diversity-related programs with respect to their potential impact on diversity and their level of legal risk.

This report was prepared for the Chief Justice Warren Institute on Race, Ethnicity and Diversity at the University of California-Berkeley by Scott Palmer, Femi Richards, and Steve Winnick of the law firm of Holland & Knight, LLP, on a consulting basis, as a part of the firm's *pro bono* support for the Institute's education-related work.

[4] Although Proposition 209 implicates preferences based on sex, the focus of this brief report is primarily race- and ethnicity-related programs.

## II. LEGAL ANALYSIS OF THE CONSIDERATION OF RACE AT THE UNIVERSITY OF CALIFORNIA-BERKELEY UNDER FEDERAL AND STATE LAW

This section examines the basic legal framework appropriate for evaluating race-conscious programs at the University of California-Berkeley under federal and state law. As articulated in many court decisions, federal law establishes that distinctions based on race or ethnicity in the provision of benefits by a public entity or a private institution that receives federal financial assistance are "inherently suspect" and subject to heightened judicial review. Importantly, this does not mean that all considerations of race are unlawful. Rather, the consideration of race is subject to "strict scrutiny" by the courts to ensure that such efforts are narrowly tailored to support compelling interests.[5] In addition, even where federal law permits the consideration of race under these standards, states or other actors generally have latitude to further restrict the use of race beyond what is permitted under federal law through enactments such as Proposition 209.

### A. An Overview of Federal Law Regarding the Consideration of Race in Higher Education

When analyzing the consideration of race in higher education under federal law, courts look to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution (applicable to public entities) as well as Title VI of the Civil Rights Act of 1964 (applicable to public and private entities that receive federal funds).[6] These provisions establish the minimum protections guaranteed to all citizens to be free of discrimination on the basis of race and national origin.

1. **The Equal Protection Clause and Title VI.** The 14th Amendment and Title VI are coextensive, and both prohibit discrimination on the basis of race or ethnicity in the provision of educational benefits or opportunities. Such use of race or ethnicity triggers "strict scrutiny."

2. **Strict Scrutiny.** Based on history and longstanding legal principles, the use of racial classifications to allocate benefits and burdens to individuals raises fears of invidious purpose. Given the daunting challenge of attempting to discern between benign and pernicious intent, courts apply strict scrutiny to *all* racial classifications to "smoke out" illegitimate uses of race by assuring that the government is pursuing a goal that is important enough to warrant the use of such a highly suspect tool. Under strict scrutiny, a race-conscious program will be upheld only where the program serves a "compelling interest" and is "narrowly tailored" to achieve that interest.

   **Compelling Interest.** The compelling interest inquiry is an examination of the *ends* that must be established as a foundation for maintaining lawful race-conscious

[5] *See* Coleman, Arthur L. and Palmer, Scott R, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006).

[6] In addition, courts have also applied 42 U.S.C. § 1981 (a federal statute) in discrimination cases involving purely private conduct, irrespective of whether the entity receives federal funds.

policies that confer tangible benefits. Federal courts have expressly recognized a limited number of interests that are sufficiently compelling to justify the consideration of race. These interests may be remedial (e.g., overcoming the present effects of past discrimination) or nonremedial (e.g., promoting the educational benefits of diversity). It is important to note that while the compelling interest inquiry establishes a high bar, it is not "strict in theory, but fatal in fact."

**Narrow Tailoring.** The narrow tailoring inquiry focuses on the *means* and requires that any use of race or ethnicity be as limited as possible to achieve the given compelling interest(s), based on an examination of several factors that may be balanced differently in different contexts:

- *Necessity.* Race may be used only to the extent necessary to achieve the stated compelling interest. In other words, before an institution may use race in its admissions, financial aid, or retention policies, it must first consider the extent to which alternative, race-neutral approaches would be effective in furthering its compelling interests.[7]

- *Flexibility.* Race-conscious policies may not operate as unlawful quotas– insulating certain candidates from competition with others based on certain desired qualifications, and imposing a fixed number or percentage of students based on certain characteristics that must be attained or that cannot be exceeded.[8]

- *Burden on Nonbeneficiaries.* Race-conscious policies may not unduly burden individuals who are not members of the policy's favored racial group. As a general rule, the less severe and more diffuse the burden on individuals who do not benefit from a race-conscious policy, the more likely the policy will pass legal muster.[9]

- *Existence of an Endpoint and Periodic Review.* To ensure that race is used only to the extent necessary to further a compelling interest, an institution must regularly review its race-conscious policies to determine whether its use of race continues to be necessary, and if the policies merit refinement in light of relevant institutional developments.[10]

3. **The Michigan Cases.** In *Grutter v. Bollinger* (and *Gratz v. Bollinger*), the U.S. Supreme Court embraced Justice Powell's conclusion in *Regents of the University of*

[7] Coleman, Arthur L. and Palmer, Scott R., *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach, 2nd edition* (College Board, 2004).

[8] *Id.*

[9] *Id.*

[10] *Id.*

*California v. Bakke*[11] that a university's interest in promoting the educational benefits of diversity can justify the limited use of race or ethnicity in university admissions under federal law. The Court further held that, to be narrowly tailored in this context, any use of race in admissions must include a "highly individualized, holistic review" with "serious consideration" to "all the ways an applicant might contribute to a diverse educational environment." In reaching this decision, the Court recognized that deference was appropriate with regard to a university's core educational judgments regarding the benefits of diversity, stemming in part from the principles of academic freedom embodied in the First Amendment. The Court's opinion in *Grutter* also included language that appears to expand upon the traditional diversity rationale by focusing on access and the importance of ensuring that pathways to leadership are "visibly open" to students from all racial and ethnic groups.

4. **Federal Law Post-Michigan.** One diversity-related higher education case decided since the University of Michigan decisions affirmed the lawfulness of a law school's admissions policy pursuant to the *Grutter* and *Gratz* standards. In *Smith v. University of Washington Law School,*[12] the court upheld the use of an admissions process by which candidates for admission were designated (based on an index score) as "presumptive admits" or "presumptive denies" before their applications for admission were further reviewed, with a limited number being referred to committee for further evaluation. Factors in addition to the index score (a weighted tabulation of an applicant's undergraduate GPA and LSAT score) that were considered by the University of Washington included: (1) race and ethnicity (the "most significant factors" in the admissions decision next to the index score, with the amount of preference differing "depending on an applicant's particular race or ethnicity"); and (2) non-racial diversity factors (including cultural background, activities or accomplishments, career goals, life experiences, and special talents).

   Other cases decided after the University of Michigan decisions have extended the reach of the conclusion that the educational benefits of diversity are compelling to the elementary and secondary setting. *See Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1,*[13] (the "internal educational and external societal benefits [that] flow from the presence of racial and ethnic diversity in educational institutions" are "as compelling in the high school context as they are in higher education."); *Comfort v. Lynn Sch. Comm.,*[14] (ruling that "there are significant educational benefits to be derived from a racially diverse student body in the K-12 context" and observing that "there is significant evidence . . . that the benefits of a

[11] 438 U.S. 265 (1978).

[12] 392 F.3d 367 (9th Cir. 2004), *cert. denied*, 126 S.Ct. 334 (2005).

[13] 377 F.3d 949, 964 (9th Cir. 2004) vacated and reh'g granted, 395 F.3d 1168 (2005), *different results reached on reh'g* , 426 F.3d 1162 (9th Cir. 2005), *cert. granted,* 126 S.Ct. 2351 (2006)

[14] 2005 U.S. App. LEXIS 11755 at 37, 34 (1st Cir. 2005) (*en banc*), *cert denied*, 126 S. Ct. 798 (2005).

racially diverse school are more compelling at younger ages"). *See also, McFarland v. Jefferson County Pub. Schs.*[15]

## B. An Overview of State Law Regarding the Consideration of Race in Higher Education

While federal anti-discrimination provisions establish a "floor" of minimum protections, states and other actors are free to restrict the use of race beyond federal requirements, as long as they do not contravene those rights established under the Constitution and federal law.

1. **Overview of Proposition 209.** Proposition 209 in effect embodies a policy choice by the people of California to restrict the consideration of race by public agencies beyond the limits delineated under federal law. It became effective on November 6, 1996, as the result of a ballot initiative and amended the California Constitution (Cal. Const. art I, § 31) to prohibit the state and its political subdivisions from "discriminat[ing] against, or grant[ing] 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" (except in instances where race-based governmental action is necessary to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds to the State).[16]

2. **Cases Under Proposition 209.** Several cases have dealt with the application of Proposition 209, including *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997), which upheld the law as written. In particular, in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000), the California Supreme Court gave an expansive interpretation with regard to what constitutes preferential treatment prohibited under Proposition 209. In *Hi-Voltage*, the court struck down a city ordinance requiring prime contractors bidding on city projects to utilize a specific percentage of minority and women subcontractors or document efforts to engage in targeted outreach to minority- and women-owned subcontractors. The court based its holding in part on the belief that Proposition 209 reflects an intent to "adopt the original construction of the Civil Rights Act," which requires that state action be "color-blind."[17] (See attached summary of key cases involving Proposition 209.)

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[15] 330 F. Supp 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert granted, Meredith v. Jefferson County Bd. of Educ*., 126 S.Ct. 2351 (2006).

[16] The language of Proposition 209 explicitly provides remedies for victims of any type of discrimination. Article I, section 31(g) states: "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."

[17] According to the Proposition 209 ballot pamphlet, the intent behind the law was to return to the virtues of the historic Civil Rights Act where "real affirmative action meant no discrimination and sought to provide opportunity." The initiative's proponents further argued that "anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act." *See Proposition 209 Ballot Pamphlet*, P. 32. *See also Hi-Voltage*, 24 Cal. 4th 537, 555-57 (citing a number of cases to

3. **Proposition 209 v. Initiative 200.** It is useful to compare Proposition 209 to Initiative 200 in the State of Washington, which became effective on December 3, 1998, as result of a ballot initiative. Initiative 200 states that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, or national origin in the operation of public employment, public education, or public contracting." But Initiative 200 differs from Proposition 209 in several ways: (1) Initiative 200 is a statute, rather than a constitutional amendment, and must be reconciled where possible with other statutes; (2) Initiative 200 contains additional language expressly stating that "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"; and (3) the official ballot statement accompanying Initiative 200 included language emphasizing that it "does not end all affirmative action programs" but "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant." Noting these differences, the Washington Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 72 P.3d 151 (2004), adopted a more liberal reading of Initiative 200, holding in that case that the Seattle School District could consider race as a tie-breaker in student assignment (A three-judge panel of the U.S. Ninth Circuit Court of Appeals subsequently ruled that, although there was a compelling interest in racial diversity, the Seattle plan was not narrowly tailored and therefore violative of the Equal Protection Clause, but the plan was more recently upheld as narrowly tailored by the Ninth Circuit in an en banc rehearing.[18] The U.S. Supreme Court has granted certiorari to hear the constitutional issue.[19])

## C. Analysis of the Consideration of Race-Conscious Policies at the University of California-Berkeley Under Federal and State Law

To determine what programs and policies the University of California-Berkeley may use to promote diversity, it is critical to address the overlay of Proposition 209 on federal law and to understand what policy choices are permissible, impermissible, and

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describe the Supreme Court of California's jurisprudential shift from the "protection of equal opportunities for all individuals to entitlement based on group representation."). The court cited to the following cases in support of its original emphasis on "equal opportunities": *Perez v. Sharp*, 32 Cal. 2d 711 (1948), *aff'd*, 339 U.S. 460 (1950) (striking down the state's anti-miscegenation statute as inimical to civilized society); *Hughes v. Superior Court*, 32 Cal. 2d 850 (1948) (upholding a judgment of contempt against picketers who were protesting to compel a supermarket to hire African American employees in proportion to the number of African American customers that frequented the store); *Bakke v. Regents of University of California*, 18 Cal. 3d 34 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978) (finding a denial of equal protection in the medical school's admission policy of reserving 16% of the admission opportunities in each year's class for minority students). The *Hi-Voltage* court then highlighted its decisions focusing on "entitlements": *Price v. Civil Service Com.*, 26 Cal. 3d 257 (1976), *cert. dismissed*, 449 U.S. 811 (1980) (approving a race-conscious hiring program that required the appointment of minority applicants on a preferential basis until the appointing agency attained a certain percentage of minority employees); *DeRonde v. Regents of University of California*, 28 Cal. 3d 875 (1981), *cert denied*, 454 U.S. 832 (1981) (rejecting an equal protection challenge to racial preferences accorded to a law school admissions program).

[18] 426 F.3d 1162 (9th Cir. 2005)

[19] 126 S. Ct. 2351 (2006)

ripe for further analysis. Federal law and Proposition 209 serve as "dual filters" in making this assessment.

1. **What is Permissible?: "Green Light Activities"**

An examination of federal and state law yields a number of institutional activities that are clearly permissible under federal law and appear to be permissible under the limited precedents interpreting Proposition 209.

**a. Stated Commitment to Diversity.** It is likely that a stated commitment to diversity is permissible as long as it is not turned into an implicit preference or quota. In an unpublished opinion (which may not be cited as precedent), the California Second District Court of Appeal held that a county agency's written policy espousing a desire for a diverse workforce did not establish a gender or race preference that was inconsistent with Proposition 209. *Los Angeles County Professional Peace Officers Association (PPOA) v. County of Los Angeles*, 2002 Cal. App. Unpub. LEXIS 5596 (2002).

**b. Data Collection.** In *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001), the California Third District Court of Appeal 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 reasoned that actions "that provide for data collection and reporting do not suffer a constitutional defect because a determination of the underutilization 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…."

**c. Race-Neutral Programs That Do Not Have As Their Primary Purpose Furthering Race-Conscious Objectives.** Proposition 209 leaves intact any program that does not discriminate based on race, sex, color, ethnicity, or national origin, even if these neutral programs disproportionately benefit people of a particular race or ethnicity or sex.[20] Race-neutral programs that prefer low income applicants, students who performed fairly well on tests despite having gone to a low performing school, students who were raised in single-parent households, or groups defined using any other neutral classification, are untouched by Proposition 209.[21] Additional race-neutral preferences that would

[20] *See* 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."). "Any statement to the effect that Proposition 209 repeals affirmative action programs would be over inclusive and hence "false and misleading.'" *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 442, 55 Cal. Rptr. 2d 690, 694 (1996). Note, however, that under the Title VI regulations (34 CFR Part 100.3 (b)(2)) a recipient of federal funds, "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." Such actions could be subject to a disparate impact analysis under federal law.

likely be permitted include favoring applicants who speak a foreign language that will be useful in the job,[22] or individuals with ties to the geographical area that they are serving.

**d. Federal Requirements**. Proposition 209 cannot prohibit race-conscious action where such action would be necessary to comply with federal law (e.g., to remedy discrimination), and by its terms Proposition 209 does not prohibit action that "must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds." (But the California Third District Court of Appeal in *C&C Construction v. Sacramento Municipal Utility District*, 122 Cal. App. 4th (2004), recently struck down a program where the defendant could not show that it was *required* by federal law to consider race (as opposed to race-neutral alternatives) or lose federal funds.)

2. **What is Impermissible?: "Red Light Activities"**

Under federal law, race-conscious programs that confer tangible benefits are impermissible unless substantiated by a compelling interest and narrowly tailored to achieve that interest. In *Grutter* and *Gratz*, the Supreme Court distinguished between the permissible University of Michigan law school's admissions process, which evaluated each applicant holistically on a number of academic and nonacademic dimensions, and the impermissible undergraduate process, where minority applicants were awarded a fixed number of points, regardless of other factors and did not receive individualized whole-file reviews.

Under Proposition 209, state programs that provide for conferring preferences based on race, sex, color, ethnicity, or national origin are unlawful, irrespective of whether they are designed to achieve diversity or use narrowly tailored means to achieve that end.

3. **Areas for Further Analysis: "Yellow Light Activities"**

Although federal and, to a lesser extent, state law are settled with respect to certain activities that are presumptively permissible or impermissible, there exist a number of areas that are ripe for additional analysis to best achieve the University of California-Berkeley's diversity-related educational goals while appropriately balancing legal risk.[23]

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[21] *See* 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.").

[22] *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (holding that it is not national origin discrimination to classify based on whether one knows a particular language).

[23] One area that may be suitable for further analysis involves programs related to Native Americans and Native Hawaiians. "Given the unique status and history of Native Americans and Native Hawaiians, questions have arisen (in the federal legal context) regarding the application of strict scrutiny to race-conscious admissions, financial aid, and outreach programs that benefit those two groups. As a general rule, there appear to be limited arguments supporting the exclusion of such programs

a. **Race-Neutral Alternatives.** Proposition 209 clearly applies to policies that are facially based on race or ethnicity. It could be argued, however, that Proposition 209 may not implicate race-neutral policies even where they are intended to effect race-based goals. Such "proxies," however, could implicate federal anti-discrimination principles in cases where those policies are predominantly motivated by race or ethnicity. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 229, 233 (1985) (invalidating disenfranchisement of persons convicted of crimes of moral turpitude where such a provision, enacted when a "zeal for white supremacy ran rampant," had the effect of eliminating ten times as many black as white voters from the rolls). These programs may, therefore, be subject to strict scrutiny and would have to be narrowly tailored to support the University of California-Berkeley's compelling interest in promoting the educational benefits of diversity.

b. **Private Actors and the State Action Doctrine**. Private actors are not covered by Proposition 209. This includes private colleges and universities, and likely also includes private groups operating to further diversity-related goals at public colleges and universities. But such programs could trigger Proposition 209 (and institutional liability) — as would be the case under federal law — if the institution funds, administers, or significantly assists in the private conduct.

The state action doctrine is well established in federal constitutional jurisprudence. The doctrine embodies the Constitution's guarantee that individual rights are protected only from governmental action.[24] However, state

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from strict scrutiny review. The extent to which such arguments can be pressed likely depends on whether the program actually distinguishes among students based upon race or ethnicity (and would likely be subject to strict scrutiny), or whether the program is based on political affiliations (or related and specific congressional authorization) associated with the unique status of those groups (and may not be subject to strict scrutiny). Although definitive guidance in this area does not exist, both federal court decisions and the U.S. Department of Education's ("USED") Title VI policy are instructive. First, the U.S. Supreme Court has suggested that in most circumstances Native American and Native Hawaiian classifications are likely to be viewed as racial classifications." Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Financial Aid: A Framework for Evaluating Diversity Related Programs* 26-27 (College Board, 2005). *See also Rice v. Cayetano*, 528 U.S. 495 (2000) and *Dawavendewa v. Salt River Project*, 154 F. 3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000), *cert denied*, 537 U.S. 820 (2002). In 2000, the Court concluded that voting restrictions in favor of Native Hawaiians in fact were racial classifications. In that case, the Court cited cases involving Native American classifications, concluding that such classifications could only be deemed non-racial when the classification at issue related to "members of a federally recognized tribe" (and not Native Americans, generally), and the preference at issue was directly associated with fulfilling Congress' "unique obligation toward the Indians" and "further[ing] Indian self government." Correspondingly, in its Title VI Policy Guidance, the USED stated that it had "found no legal authority for treating affirmative action by recipients of Federal assistance any differently if the group involved is Native Americans or Native Hawaiians," but acknowledged that its policy did not "address the authority of tribal governments or tribally controlled colleges to restrict aid to members of their tribe." *Id.* Extending this federal legal analysis to Proposition 209, the argument can be made that programs designed to assist members of federally recognized tribes are not race-based preferences and therefore do not implicate Proposition 209. Classifications based only on being an Indian, however, are racial; discrimination against or preference for nontribal Indians - or even for tribal Indians if the justification is their race and not their tribal status - would thus violate Proposition 209.

[24] California's due process clause (article I, section 7) is similar to the due process clause of the Fifth Amendment to the federal Constitution in that it applies to state, not private, action, even though a state action requirement was not expressly

action may be found in instances of discrimination by private institutions or individuals if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Academy v. Tennessee Secondary School* 531 U.S. 288, 295 (2001), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). We were unable to find any cases under Proposition 209 applying these state action principles. There are, however, a number of California cases applying the state action doctrine in other constitutional areas such as freedom of speech, search and seizure, and the privilege against self-incrimination.[25] For example, in *Jones v. Kmart Corp.*, Jones, the plaintiff, sued Kmart for false imprisonment, battery, negligence, and interference with his constitutional rights when store employees searched and detained him for suspected shoplifting. In finding no state action vis-à-vis the conduct of the Kmart employees, the Supreme Court of California held that "the party charged with the deprivation [of a constitutional right] must be a person who may fairly be said to be a state actor. This may be 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."[26] The analysis used in these cases to connect [or not connect] the actions of private parties with that of the state can be analogized to the Proposition 209 context.

Under federal constitutional principles, courts have essentially applied three approaches for attributing state action to an ostensibly private entity. When the private entity (1) acts as an agent of government in performing a particular task delegated to it by government (the delegated power theory); or (2) performs a function that is generally considered the responsibility of government (the public function theory); or (3) obtains substantial resources, prestige, or encouragement from its involvement with government (the government contacts theory), its actions may become state action subject to constitutional constraints.[27] For example, the government contacts theory was applied to a federal constitutional

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set forth therein. Indeed, the Supreme Court of California has held that "no tenable reason has been pointed out to us, and none appears, why a similar requirement of state action is not implicit in article I, section 7 [of the California Constitution]." *Garfinkle v. The Superior Court of Contra Costa County*, 21 Cal. 3d 268 (1978), *cert denied*, 439 U.S. 949 (1978), (finding no state action to a constitutional challenge of California's procedure for the nonjudicial foreclosure of deeds of trust on real property).

[25] California courts have applied the state action doctrine developed in the due process context to a number of constitutional issues. *E.g., TRW, Inc. v. Superior Court*, 25 Cal. App. 4th 1834, 1844-48 (1994) (applying the state action doctrine to the privilege against self-incrimination); *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013 (2001) (applying the state action doctrine to free speech); *Jones v. Kmart Corp.*, 17 Cal. 4th 329 (1998) (applying the state action doctrine to the search and seizure provision of the California Constitution).

[26] In *Jones*, the plaintiff produced no evidence that the defendants interfered with his rights against unreasonable search and seizure. The only evidence presented showed that the defendants conducted an aggressive search and seizure. According to the court, "however rough defendants' treatment of plaintiff was, it did not interfere with his ability to assert his constitutional rights." Jones, 17 Cal 4th at 334.

[27] Kaplin and Lee, *The Law of Higher Education*, 3rd ed. (1995).

claim in *Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310, 320 (Mo. 1978), *cert denied*, 444 U.S. 831 (1979). In *Shapiro*, the court held that a state university's conduct with respect to a private men-only scholarship did not constitute sex-based state action even though the university mentioned the scholarship in its catalog, accepted and processed applications for it, and forwarded the names of qualified male students to the private trustee. (In effect, the court drew the line for state action at the point where the state becomes a "joint participant" or "so entwined" in the action that the state assumes a "position of interdependence.")[28]

Applying these state action principles to an analysis of Proposition 209, a public university would be prohibited from distributing race-exclusive scholarships to benefit a particular racial group. A private group, however, would be allowed to award such scholarships to, for instance, African American students who attend a particular state school. The university would not be allowed to *administer* the scholarship since choosing which student received the scholarship would require the university to engage in race-based discrimination among applicants, which is expressly prohibited by Proposition 209.[29] *See, e.g., 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). *See also* William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution*, 111 EDUC. L. REP. 625, 627 n. 9 (1996) ("an institutional practice of posting announcements about race-based scholarships which are administered and totally funded by private organizations probably is not state action," but "if an institutional employee has responsibility for locating privately

[28] See the court's discussion of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Evans v. Newton*, 382 U.S. 296 (1966) ("It is clear therefore that private discriminatory action is not violative of any constitutional principle and is indeed beneficial to a freedom loving society. It is only when the state 'so far' insinuates itself into a 'position of interdependence' that it becomes a 'joint participant' in the challenged activity or where private conduct becomes 'so entwined' with governmental policies that there is a violation").

[29] Although an issue of continuing debate in the federal courts, strong arguments support the extension of strict scrutiny principles to purely private conduct under 42 U.S.C. §1981. That statute applies to both public and private entities (irrespective of their status as recipients of federal funds) in cases in which they make or enforce race- and ethnicity-conscious contracts. (Several federal courts have ruled that scholarships conferred by colleges and universities are "contracts" within the meaning of §1981.) In both *Grutter* and *Gratz*, the U.S. Supreme Court ruled that the reach of 42 U.S.C. §1981 was the same as that of the Equal Protection Clause (citing *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982)). In *Gratz*, the Court observed that §1981 "proscribes discrimination in the making or enforcement of contracts against, or in favor of, any race," and that a "contract for educational services is a 'contract' for purposes of §1981." In *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir.,2005), however, a federal circuit court citing to other Supreme Court authorities applied a standard less than strict scrutiny to a non-recipient private school facing a §1981 discrimination challenge. In that case, the court reasoned that the Court's ruling in the Michigan cases suggested only that intentional discrimination was a requirement of both §1981 and the Equal Protection Clause. However, rehearing, en banc has been granted and the decision has been vacated by *Doe v. Kamehameha Schools*, 441 F.3d 1029 (9th Cir. 2006). *See generally*, Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Recruitment, Outreach, and Retention: A Framework For Evaluating Diversity-Related Programs* (College Board, 2005).

funded and administered race-based scholarships and then encouraging persons to apply for these scholarships . . . there is a stronger argument for state action.").

Given that commentators have noted that courts are more likely to find state action in race discrimination cases than in any other kind of case,[30] it is important to be aware of the potential liability stemming from the anti-discrimination provisions of both the Constitution of the State of California *and* the federal Constitution. Moreover, it is equally as important to note that, as applied by the U.S. Department of Education's Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid.[31] In such cases, that action will likely be deemed to be "within the operations of the college" and, therefore, subject to strict scrutiny. 34 C.F.R. 100.3.[32]

c. **Leveling the Playing Field With No Preferences Conferred (Distinguishing *Hi-Voltage*).** Under federal law, if a race-conscious program does not confer benefits or burdens based on race, strict scrutiny does not apply. Extending federal legal principles to an analysis of Proposition 209, an argument can be made that inclusive, race-conscious outreach measures that seek to broaden the applicant pool do not confer tangible benefits based on race and thus do not trigger strict scrutiny. However, the *High-Voltage* decision must be distinguished. Although untested in the court decisions applying Proposition 209, there is an argument that race-targeted efforts to level the playing field, or to address impediments that stand in the way of equal opportunity – not equal results – would not violate Proposition 209 if they promote inclusion and do not confer preferences based on race. In the areas of outreach and recruitment, for

[30] Kaplin and Lee, *supra*, note 22.

[31] The use of the term "significantly assist" by the Office for Civil Rights appears to have its genesis in the Supreme Court's state action jurisprudence. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (holding that "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (holding that action of corporate creditor in obtaining prejudgment attachment of debtor's property constituted state action because it was performed with significant assistance from state officials).

[32] The Office for Civil Rights has also confirmed that "individuals or organizations not receiving Federal funds are not subject to Title VI." *See* U.S. Department of Education's 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 (February 23, 1994)) at n.12. *See generally*, Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Financial Aid: A Framework for Evaluating Diversity Related Programs* (College Board, 2005). It is important to note, however, that "OCR may examine the relationship among potential 'external' funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as 'not a good choice' a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college's 'extensive ties' to the foundation were problematic and would raise Title VI concerns." *Id*. at 32 n.15. An example of such impermissible close ties would be in the situation where the college's Student Financial Aid Committee selected the scholarship recipients for the external, private foundation. *See also In re Northern Virginia Community College*, OCR Case No. 03962088 (August 1, 1997).

example, special efforts might be made to target information to minority communities on the basis that these communities have unequal access to this information and that has resulted in lower application rates from students in these communities. Properly understood, these efforts would not confer any benefits based on race, but would be part of a broader outreach and recruitment program that reaches students of all races and would be designed to ensure that the program as a whole is equitable and does not, in effect, limit opportunities based on race. There are promising arguments to distinguish racially targeted outreach in this context from the holding in *High-Voltage*, which involved government-mandated, targeted outreach directed to minority and women subcontractors to achieve "quota-like" prescribed percentage goals.[33] Similarly, in the admissions process, an argument might be made in support of a separate review process for new immigrant students in order to bring appropriate expertise to bear on a holistic review of these applicants. (Note that an independent ground for supporting such a process would be that, if it is discrimination at all, it is based on geography and not national origin.) Providing this process would not be designed to confer a benefit or preference on these students; rather, it would be designed to ensure that they have an equal opportunity to be considered.

Several recent decisions by California courts relating to the consideration of race in student assignments at the elementary and secondary levels, read together, arguably support this interpretation of Proposition 209. In *Crawford v. Huntington Beach Union High School District*,[34] 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

[33] Federal cases are somewhat divided on the permissibility of race-targeted outreach under federal non-discrimination law. On the one hand, several federal courts have ruled that strict scrutiny principles do not apply to race- or ethnicity-conscious recruiting and outreach programs *so long as* those programs do not confer tangible benefits upon individuals based on their race or national origin, to the exclusion of other individuals. In these situations, federal courts have upheld such programs against charges of illegal discrimination, frequently characterizing such race-conscious measures as "inclusive" (and, in effect, race-neutral) rather than "exclusive." In an admissions context, for example, one federal district court stated that "racial classifications 'that serve to broaden a pool of qualified applicants and to encourage equal opportunity' " that do not confer a benefit or impose a burden "do not implicate the Equal Protection Clause." *Weser v. Glen*, 190 F. Supp. 2d 384 (E.D.N.Y. 2002), *aff'd*, 41 Fed Appx. 521 (2002). Expanding on this principle in a fair housing marketing challenge, another district court reasoned that while the recruitment of minority applicants might be "race-conscious," that action—standing alone—would not constitute a "preference" within the meaning of federal authorities on the subject. It stated: "The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion [based on race]…can only occur at the selection stage." *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), *cert. denied*, 525 U.S. 811 (1998). By contrast, a number of federal courts addressing recruitment and outreach programs have ruled that government rules that compel certain race-conscious actions in the context of limited resources of parties subject to those rules, that result in more limited information being provided to certain (non-targeted) parties based on race, or that influence ultimate selection decisions based on race are likely subject to strict scrutiny. *See generally*, Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Recruitment, Outreach, and Retention Programs: A Framework For Evaluating Diversity Related Programs* (College Board, In Press); See *also*, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *MD/DC/DE Broadcasters Assn. v. FCC*, 236 F. 3d 13 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

[34] 98 Cal. App.4th 1275 (2002).

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. By contrast, in *Avila v. Berkeley Unified School District*,[35] the Superior Court for Alameda County upheld a district voluntary desegregation plan that provided for controlled choice of schools by all students, with racial impact at the grade within the school compared to racial composition at the grade in the district 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* 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. More recently, in an unpublished opinion, the Superior Court for Orange County, in *Neighborhood Schools for Our Kids v. Capistrano*,[36] 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* case. However, it went on to hold that a specific plan adopted by the district facially violated Proposition 209 by limiting minority enrollment at each school to no more than 35%, effectively discriminating based on race.

It is unclear whether these elementary and secondary level decisions are reconcilable with each other and how these issues will play out in any future litigation in this area under Proposition 209. However, read together, these cases seem to stand for the proposition that Proposition 209 does not bar race conscious policies that benefit all students if they do not establish individual preferences based on race.

[35] 2004 WL 793295 (Cal. Superior 2004).
[36] Case Number 05CC07288, Department C4

## SUMMARY OF KEY CASES REGARDING PROPOSITION 209

- ***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.

- ***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.

- ***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.

- ***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 treat persons differently on the basis of race or gender. 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.

- ***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 gender 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 gender. 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 gender 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 gender quotas or set asides."

- ***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.

- ***Coral Construction, Inc. v. City and County of San Francisco***, 116 Cal. App. 4th 6 (2004). 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 (MBE) woman business enterprises (WBE), 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. The city argued that Coral Construction did not have standing to challenge future enforcement of the Ordinance because Coral could not identify specific facts supporting its claim that the Ordinance would cause Coral to suffer a future injury that would be both (1) concrete and particularized, and (2) imminent." The California First District Court of Appeal remanded the case for further proceedings after finding that the controversy was sufficiently concrete and definite for a judicial determination. Moreover, the company was not required to identify a contract on which it intended to bid in the near future to demonstrate standing.

- ***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 (California) that approved a settlement agreement in a school desegregation case upon a finding that respondent school district was no

longer 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.

- ***Parents Involved in Community Schools v. Seattle School District No. 1***, 72 P. 3d 151 (2003). In *Parents*, the Supreme Court of Washington was asked to decide whether the school district's use of a racial tie-breaker for school assignment purposes violated Initiative 200's prohibition against racial preferences. The court ruled that Seattle's "open choice" plan was race-neutral as it did not advance less qualified minority applicants over more qualified majority applicants. The court also distinguished I-200 from Proposition 209 in the following ways: (1) Proposition 209 was a constitutional amendment whereas I-200 was a statutory enactment; (2) Proposition 209 did not contain the same language as I-200, specifically *subsection 3* which states that "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"; and (3) the official ballot statements for Proposition 209 and I-200 were also different, specifically the I-200 ballot language emphasized that "I-200 does not end all affirmative action programs…It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant." In a subsequent proceeding, the Ninth Circuit invalidated the Seattle Plan, holding that Seattle's approach failed nearly every one of the "narrowly tailored" requirements enumerated in *Grutter* and *Gratz*. The Ninth Circuit held a rehearing *en banc* and reached a different result (*see* 426 F.33d 1162 (9th Cir. 2005). The Ninth Circuit found that the school district had compelling interests in the educational and social benefits of racial diversity and in avoiding racially-concentrated schools, and that the district's plan, including consideration of race as a "tiebreaker," was narrowly tailored to achieve those interests. The Supreme Court recently granted certiorari to review the case (*see* 126 S.Ct. 2351 (2006)).
- ***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.
- ***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

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| 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* 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***, The Superior Court for Orange County, in *Capistrano* (unpublished; case no. 05CC07288, Dept. C4), 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* 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. |

## III. MATRIX OF DIVERSITY-RELATED PROGRAMS AND CRITERIA FOR EVALUATING LEGAL RISK

Given the limits imposed by Proposition 209 on diversity-related policies and programs in the California public higher education context, the following matrix outlines a variety of approaches designed to promote the educational benefits of student diversity with a concomitant emphasis on appropriately balancing legal risk. The matrix provides a mechanism for capturing information related to discrete programs and practices. The horizontal axis outlines a range of programmatic categories for students (outreach/recruitment, admissions, financial aid, campus climate, and student support). The vertical axis contains categories of types of actions grouped by relative level of legal risk, ranging from data collection to facially race-based programs. Neither the categories of student related programs nor the criteria for evaluating legal risk are meant to be exhaustive. Rather, the matrix is designed to illustrate a method for compiling and evaluating discrete programs with a view toward informing institutional planning and policy development over time.

**Categories of Student Related Programs**

Early Awareness ⟷ Retention

**Criteria for Evaluating Legal Risk**

Decreasing Legal Risk ↓ Increasing Legal Risk

| | Outreach/Recruitment | Admissions | Financial Aid | Campus Climate | Student Support |
|---|---|---|---|---|---|
| Category 1: Information<br>• **Data Collection**<br>• **Values/Commitment**<br>• **Private Actors** | | | | | |
| | | | | | |
| Category 2: Race-Neutral<br>• **Race-Neutral**<br>• **Race -Neutral but with Possible Racial Intent (Proxy)** | | | | | |
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| Category 3: Facially Race-Conscious<br>• **Leveling the Playing Field Without Preferences**<br>• **Race-Conscious Actions** | | | | | |
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## APPENDIX A. ADDITIONAL RESOURCES

Bollinger, Lee, *Seven Myths About Affirmative Action in Universities*, 38 Willamette L. Rev. 535 (2002).

Brooks, Jennifer C., *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado About Nothing?* 48 Drake L. Rev. 567 (2000).

Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs*, (College Board, 2005).

Coleman, Arthur L., Palmer, Scott R., and Richards, Femi S., *Federal Law and Recruitment, Outreach, and Retention Programs: A Framework For Evaluating Diversity Related Programs*, (College Board, In Press).

Geshekter, Charles L., *Affirmative Action in Principle, Non Discrimination in Fact: Higher Education after Proposition 209*, 10 Stan. L. & Pol'y Rev. 205 (1999).

Paterson, Eva, *New Laws Must Counter Resegregation in Higher Education, Equal Justice Society*, http://www.equaljusticesociety.org/press_2004_june_23_dailyjournal.html.

Shea, Jennifer L., *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 Ind. L.J. 587 (2003).

Smith, Rebecca, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action*, 38 Santa Clara L. Rev. 235 (1997).

Spann, Girardeau A., *Proposition 209*, 47 Duke L.J. 187 (1997).