Hurdles in the Minor League:
Distinguishing Access from Retention Privileges to Effectuate the Elusive "Voter Intent" on Proposition 209

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I. Introduction and Statement of the Problem

The California Supreme court has interpreted the scope of Proposition 209 only once in the ten years since the state constitutional amendment passed in November, 1996. The California Courts of Appeal have issued very few decisions on Proposition 209 issues, and a number of those decisions are not published. As a result, there are some significant differences of interpretation among California courts, and little authority to guide future deliberations. Moreover, when the courts do try to interpret Proposition 209, they have a more difficult time discerning the "legislative intent" of the voters to guide their efforts. One crucial interpretation question remains as to what constitutes a "preference."

Regardless of one's theory of interpretation for voter initiatives, there is some substantial support for an interpretation that the "intent" of Proposition 209 was to prohibit preferences that curtail *access.* For instance, in the area of public education, admissions decisions can constitute access preferences. Similarly, in the area of public employment, initial hiring decisions were the focus of the prohibition. In the area of public contracting, awarding contracts and required outreach and invitations to bid were the main subject of the preferences to be prohibited. This interpretation is consistent with the arguments made by its drafters in support of the initiative, the media portrayals and advertisements surrounding the campaign, as well as the California cases that have analyzed Proposition 209.

If indeed the voters, as well as the proponents of Proposition 209, intended to outlaw "access" preferences, then other preferences can be interpreted to be outside the scope of its prohibitions, and still may be permissible. This Article posits that financial aid and scholarship programs, designed *not to obtain, but rather to retain* a diverse student body, can be structured to fall outside of the "access privilege" prohibition of Proposition 209. If so, then the public colleges and universities within the State of California can reinstate some use of diversity scholarships, as a narrowly tailored means toward achieving the *Grutter*-sanctioned compelling interest in the "benefits that flow from a diverse student body."

Part II of this Article summarizes the text of Proposition 209 and the California cases interpreting the initiative. Part III then explores the various mechanisms for ascertaining voter intent, and evaluates the voter information pamphlet, arguments of the proponents, and media portrayals during the campaign, to demonstrate that access preferences were the focus of the proponents, and of the voters. Part IV then explains how and why retention privileges fall outside the scope of Proposition 209's prohibitions, and proposes a diversity scholarship program that therefore could be permissible in California, and which would satisfy strict scrutiny under federal law.

II. Review of the Legal Authorities

A. The Language of Proposition 209

Proposition 209 was an initiative on the California state ballot in November of 1996. The initiative was referred to as the California Civil Rights Initiative, or CCRI. Proposition 209 was passed by the voters by a margin of 54 to 46 percent**.** [1] Proposition 209 is now part of the California Constitution as article I, section 31 and it prohibits preferences based on race, ethnicity, color and national origin,[2] which preferences will be referred to as "RECNO" classifications. Proposition 209 also prohibits gender preferences,[3] but gender will not be the focus of this Article. Preference has been defined by the California Supreme Court as "a giving of priority or advantage to one person…over others."[4] Preferences that do not discriminate based on RECNO characteristics are not prohibited by Proposition 209. Voters in the state of Washington approved a similar measure. [5]

Proposition 209 also prohibits *discriminations* based on RECNO. The California Supreme Court has defined discrimination as "to make distinctions in treatment; show

[1] Douglas M. Jones, *When "Victory" Masks Retreat: The LSAT, Constitutional Dualism, and the End of Diversity*, 80 ST. JOHN'S L. REV. 15, 34 n.62 (2006).
[2] CAL. CONST. art. I, §31.
[3] CAL. CONST. art. I, §31.
[4] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 560 (2000). *See* Discussion Below.
[5] WASH. REV. CODE § 49.60.400 (West 2006). (PAREN COMPARING/CONTRASTING W/ 209)

partiality (*in favor of*) or prejudice (*against*)."[6] Presumably, non-RECNO- based discriminations are permissible.

Although a majority of the California voters approved Proposition 209, concerned citizens immediately filed litigation to halt the enforcement of the proposition.[7] Initially, Judge Thelton Henderson of the U.S. District Court for the Northern District of California issued a preliminary injunction.[8] This District Court found that, by imposing an unfair political process burden on minority interests, Proposition 209 violated the Equal Protection Clause under the *Hunter* Doctrine.[9] However, the Ninth Circuit eventually determined that Proposition 209 did not violate the federal constitution's Equal Protection Clause and dissolved the preliminary injunction.[10]

B. The Constitutional Challenge to Proposition 209 Fails: *Coalition for Economic Equity v. Wilson*

The Interveners in Coalition for Economic Equity appealed Judge Thelton Henderson's preliminary injunction ruling to the Ninth Circuit.[11] Finding that Proposition 209 did not violate the Equal protection clause, the Ninth Circuit reversed Judge Henderson. Furthermore, the Ninth Circuit found that even a compelling interest is not sufficient to justify a race-based classification under the language of Proposition 209 because, although "the [federal] Constitution *permits* the rare race-based or gender-based preferences[, it] hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification."[12] That court further determined that "[i]mpediments to preferential treatment do not deny equal protection."[13] The court explained that because preferences constituted "extra

[6] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 559 (2000).
[7] *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); Hunter ex rel. Brandt v. Regents of the University of California, 190 F.3d 1061 (9th Cir. 1999).
[8] Coalition for Economic Equality v. Wilson, 946 F. Supp. 1480, 1520 (N.D. Cal. 1996).
[9] Coalition for Economic Equality v. Wilson, 946 F. Supp. 1480, 1500 (N.D. Cal. 1996) (citing Hunter v. Erickson, 393 U.S. 385, 393-395 (1969)).
[10] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1448 (9th Cir. 1997).
[11] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431 (9th Cir. 1997).
[12] Coalition for Economic Equality v. Wilson, 110 F. 3d 1446 (9th Cir. 1997).
[13] Coalition for Economic Equality v. Wilson, 110 F. 3d 1445 (9th Cir. 1997).

protection," permitting preferences was not necessary to guarantee "equal" protection.[14] Proposition 209 only prohibited extra protection according to the Ninth Circuit, and therefore, it did not violate the equal protection clause.[15]

In attempting to provide some context for the discussion of the differences between preferences and non-preferences, the Coalition for Economic Equity court explained that that "re-shuffle" programs are different from reverse discrimination programs.[16] The court explained that the denial of equal protection requires a classification that treats individuals in an unequal manner. It stated that "in [*Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982)], the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education."[17] In the corresponding footnote, the court explained that it has recognized the difference between "stacked deck" programs that entrench on Fourteenth Amendment values in ways that reshuffle programs, such as school to segregation, do not.[18] The court continues in the footnote, "[u]nlike racial preference programs, school desegregation programs are not inherently invidious and do not 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."[19] The crucial difference between re-shuffle and stacked deck programs will be discussed more fully in sub-section H, and sections III and IV below.

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[14] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1445 (9th Cir. 1997). "Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." 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." *Id.* (footnote omitted).

[15] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1446 (9th Cir. 1997).

[16] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1445 n.16 (9th Cir. 1997) (citing *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.,* 616 F.2d 1381, 1387 (9th Cir. 1980).

[17] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1445 (9th Cir. 1997).

[18] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1445 n.16 (9th Cir. 1997) (citing Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist., 616 F.2d 1381, 1387 (9th Cir. 1980).

[19] Coalition for Economic Equality v. Wilson, 110 F. 3d 1431, 1445 n.16 (9th Cir. 1997).

C. The California Supreme Court interprets the "Voter Intent" in the *Hi-Voltage* case

In December, 2000, The California Supreme Court addressed the issue of voter intent in enacting Proposition 209 and reviewed the ballot pamphlet materials to guide its reasoning.[20] This Court agreed with the interpretation of *Coalition II* in finding that Section 31 of California Constitution provides greater protection against discrimination than the Fourteenth Amendment and greater protection against preferences.[21] As stated in an earlier article, "California [has] shifted from the 'strict-in-theory-but-fatal-in-fact approach that the federal courts follow to the simple pronouncement that race-based classifications are in fact fatal.'"[22]

Hi-Voltage involved a challenge to the constitutionality of a city program that required contractors bidding on city projects to satisfy either a participation requirement or an outreach requirement.[23] Each requirement applied to Minority/Women Business Enterprise ("M/WBE") subcontractors, and the prime contractors were required to document outreach efforts, or to include a specified percentage of M/WBE subcontractors in their bid proposal.[24] Hi-Voltage, the plaintiff contractor, had the lowest bid, but did not make any outreach efforts or list any M/WBE participation levels.[25] When the city rejected the bid as non-responsive, Hi-Voltage brought a suit for injunctive and declaratory relief to prevent enforcement of the Program.[26]

The California Supreme Court opinion sought to ascertain the California voters' intent, and used the language and the voter information pamphlets.[27] The *Hi-Voltage* court, defined discrimination as "'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)'" and defined "preferential" as "giving 'preference,' which is 'a giving of priority or advantage to one person. . .over others.'"[28] Thus, the court there concluded that the "[p]rogram is unconstitutional because the outreach option

[20] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 582 (2000).
[21] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 567 (2000).
[22] Christine Chambers Goodman, Disregarding Intent:, Using Statistical Evidence to Provide Greater Protection of the Laws, 66 ALB. L. REV. 633, 639-40 (2003).
[23] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 542-43 (2000).
[24] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 542 (2000).
[25] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 543 (2000).
[26] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 543-44 (2000).
[27] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 582 (2000).
[28] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 559-60 (2000).

affords preferential treatment to MBE/WBE subcontractors on the basis of race or sex…."[29]

The *Hi-Voltage* court explained that "'[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words.'"[30] The court went on to state that "[w]hile the language of Proposition 209 is clear, and literally interpreted does not lead to absurd results we may 'test our construction against those extrinsic aids that bear on the enactors' intent….'"[31]

The California Supreme Court then addressed *Coalition I* and agreed that "'the people of California meant to do something more than simply restate existing law when they adopted Proposition 209.' In taking a measure of that 'something more,' the 'historic Civil Rights Act' reference tells us the voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated [*Steelworkers v. Weber*, 443 U.S. 193 (1979).]."[32] The court further recognized that:

> The ballot arguments from-which we draw our historical perspective-make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, "to achieve equality of [public employment, education, and contracting] opportunities" and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." In short, the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: "Basing present discrimination on past discrimination is obviously not right." [33]

The *Hi-Voltage* court recognized that "[p]lainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and

[29] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 560 (2000) (footnote omitted).
[30] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 559 (2000) (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization 583 P.2d 1281 (1978); People ex rel. Lungren v. Superior Court 926 P.2d 1042 (1997).
[31] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 560 (2000) (citation omitted).
[32] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 561 (2000) (quoting Coalition for Economic Equality v. Wilson, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996)).
[33] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 561-62 (2000) (citations omitted).

contracting not predicated on an impermissible classification."[34] Nevertheless, the court found that the outreach requirement in the current case constituted an impermissible preference because it specifically targeted RECNO classifications.[35] This outreach, although pre-access, was very near the access point, because it required: initial contact, follow up contact, and an explanation of reasons why RECNO bids were rejected. All of this attention relates to the access issue which will be addressed in Section III, below.

The California Supreme Court has taken one other opportunity to interpret Proposition 209, but did not address the voter intent issue.[36] The California Supreme Court evaluated a binding arbitration requirement when public safety officers had been unable to reach a successful outcome to a negotiation to ensure compliance with antidiscrimination laws.[37] The court recognized that the city had to "resolve the tension between remedying practices of discrimination against minorities and observing California Constitution article 1, section 31's requirement that state and local laws not favor employees on the basis of sex or race."[38] The court also acknowledged that it could not determine whether the new mechanism of evaluating testing and grouping scorers would have a substantial impact on statistical validity.[39] The court stated that "it is not certain whether Statistically Valid Grouping will reduce the adverse impact of examination scoring in the absence of explicit consideration of race and gender. But whether and to what degree it will have that effect is an empirical question that must be tested by experience."[40] The court simply held that the Commission had the authority to make amendments to the rules in an effort to comply with article I, section 31.[41]

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[34] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 565 (2000).
[35] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 566 (2000).
[36] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653 (2006).
[37] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 661 (2006).
[38] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 679-80 (2006).
[39] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 680 (2006).
[40] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 680 (2006).
[41] San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal.4th 653, 680 (2006). Furthermore, the court found that "the Commission had a reasonable basis for determining that Statistically Valid Grouping would succeed in ensuring compliance with antidiscrimination laws." *Id*. The court specifically limited its holding, stating:

> We emphasize the narrowness of our holding. We do not, of course, decide whether in fact the Commission's alternative will survive legal challenges based on antidiscrimination laws. No such challenge is before us. Nor do we decide the Commission's selection method is superior those proposed by the union. All that we determine is that the Commission has acted in amending rule 313 "to ensure compliance

D. The Second District's Interpretation of Voter Intent Limited the Scope of the Phrase "Public Education," and Indicated that Non-Remedial Programs Might be Treated Differently.

The Second Appellate District of the California Court of Appeals examined voter intent in *Hunter v. Regents of the University of California*.[42] In the California unpublished version of the case, petitioners brought suit claiming a violation of article I, section 31, where an elementary school, run as a research laboratory by a public university, used race conscious admissions to ensure a diverse mix of students upon which to conduct their educational experiments.[43] The court ruled that Section 31 was not implicated because the laboratory school was not covered by the phrase "'in the operation of public education….'"[44] The court explained that even though the entity was the University of California, and thus, fit within the definition of the "State," the court found that "section 31 does not apply in every context in which UCLA acts. Specifically, section 31 is limited to UCLA's actions 'in the operation of public employment, public education, or public contracting.' In other words, to trigger the discrimination and preferential treatment prohibitions of section 31, UCLA's conduct must constitute or relate to the operation of public employment, public education, or public contracting."[45] Thus, the question became whether a university elementary school ("UES") fell within the "operation of public education."[46]

The court examined the language of the proposition and determined that the plain meaning is ambiguous, and thus resorted to reviewing the ballot pamphlet and secretary of state summary.[47] The court determined that the proposition was not intended to extend to research conducted by a university because that would infringe on first amendment

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with anti-discrimination laws," notwithstanding the fact is that the union disputes the means of compliance chosen. As such, section A8.590-5(g)(3) explicitly provides that binding arbitration is not the means of resolving this dispute, and implicitly permits the City to implement the new rule 313 unilaterally after bargaining in good faith to impasse. *Id*. at 680-81.

[42] Hunter v. Regents of the University of California, 2001 WL 1555240 (Cal. App. 2d Dist. 2002).
[43] Hunter v. Regents of the University of California, 2001 WL 1555240, *1 (Cal. App. 2d Dist. 2002).
[44] Hunter v. Regents of the University of California, 2001 WL 1555240, *5 (Cal. App. 2d Dist. 2002).
[45] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[46] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[47] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).

academic freedom issues.[48] The court strains somewhat to explain that "in the operation of," which seems to be quite broad and include everything, is actually narrower than the petitioners hoped.[49]

In answering this interpretation question, the appellate court relied on a discussion of voter intent in *Hi-Voltage*.[50] The court also noted that the affirmative action programs, including scholarship, tutoring and outreach, were listed as potentially being eliminated.[51] The court went on to state "the fact the ballot materials fail to state that 'in the operation of public education' encompasses university research programs like UES, does not end [the] inquiry."[52] Citing *Hi-Voltage*, the court explained that the ballot arguments were not an exhaustive catalog of the specific programs and measures that would be included within the prohibitions and provisions of section 31.[53] The court then went on to examine extrinsic aids, including the ordinary meaning of the term "public education" used in California law.[54] Focusing on the "common schools" aspects of the definition, the court was able to distinguish UES because it is tuition-supported and selective admissions-based in addition to being a laboratory elementary school.[55] Thus, UES could be distinguished from other forms of public education, and therefore, could not be definitively determined to have been included within the prohibitions of section 31.[56] The court relied upon the Ninth Circuit interpretation of *Hunter* and the description of the research oriented institution there.[57] Relying upon the institution's nature, purpose, funding and administration, as well as its educational benefits, the court failed in to find that it was included within the scope of the term "in the operation of public education"[58]

In addition, the court evaluated the *Hi-Voltage* decision and its contribution it to the argument. The court also determined that *Hi-Voltage* was not controlling because

[48] Hunter v. Regents of the University of California, 2001 WL 1555240, *5 (Cal. App. 2d Dist. 2002).
[49] Hunter v. Regents of the University of California, 2001 WL 1555240, *6-8 (Cal. App. 2d Dist. 2002).
[50] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[51] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[52] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[53] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[54] Hunter v. Regents of the University of California, 2001 WL 1555240, *4 (Cal. App. 2d Dist. 2002).
[55] Hunter v. Regents of the University of California, 2001 WL 1555240, *5 (Cal. App. 2d Dist. 2002).
[56] Hunter v. Regents of the University of California, 2001 WL 1555240, *5 (Cal. App. 2d Dist. 2002).
[57] Hunter v. Regents of the University of California, 2001 WL 1555240, *5 (Cal. App. 2d Dist. 2002).
[58] Hunter v. Regents of the University of California, 2001 WL 1555240, *6 (Cal. App. 2d Dist. 2002).

there was no dispute as to whether outreach programs fell under the umbrella of "operation of public contracting."[59] Rather, the debate centered on whether outreach constituted preferential treatment.[60]

The *Hunter* court identified another point of distinction: "Proposition 209 ballot materials make clear the thrust of the initiative was to end preferential government programs designed to redress past discrimination in employment and education. By comparison, UES's alleged discriminatory/preferential admissions program was not established to remedy past discrimination. UES's admissions practices were designed, instead, to facilitate the research-oriented mission of the institution."[61] Thus, an argument can be made that the forward-looking strategy to cultivate a diverse learning environment for laboratory purposes was sufficient to distinguish the *Hi-Voltage* case and limit its application. While this case is unpublished, and therefore, not citable for this authority, the arguments are still compelling and can form the basis for an appropriate test case that may result in a published opinion. For a discussion of these arguments, see section IV D , below.

One California superior court case was consistent with the *Hunter* case, finding that a non-remedial, or forward-looking program, was permissible.[62] In *Avila*, the superior court found that a voluntary racial desegregation plan which permitted consideration of "space availability, the child's residence, the child's socio-economic situation, and race/ethnicity"[63] did not violate article I, section 31 because "it does not show favoritism. It provides for race or ethnicity as one of many criteria for the placement of children in elementary schools, to 'strive' to have each school's demographics within plus or minus 5% of the district-wide demographics."[64]

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[59] Hunter v. Regents of the University of California, 2001 WL 1555240, *7 (Cal. App. 2d Dist. 2002).
[60] Hunter v. Regents of the University of California, 2001 WL 1555240, *7 (Cal. App. 2d Dist. 2002). Thus, the court reasoned that "section 31 is inapplicable[, and therefore,] *Hi-Voltage's* analysis does not dictate the result in this case." *Id.*
[61] Hunter v. Regents of the University of California, 2001 WL 1555240, *7 (Cal. App. 2d Dist. 2002).
[62] See Avila v. Berkeley United School Dist., 2004 WL 793295 (Cal. Superior).
[63] See Avila v. Berkeley United School Dist., 2004 WL 793295, *2 (Cal. Superior).
[64] See Avila v. Berkeley United School Dist., 2004 WL 793295, *5 (Cal. Superior). Some commentators disagree with this analysis, and instead suggest that this sort of program also violates Proposition 209. *See, e.g.*, Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, 689-90 (2001).

E. In Contrast, the Fourth Appellate District Found a Desegregation Student Transfer Program Constituted a Preference in Violation of Voter Intent.

The fourth appellate district reached a different result when it examined voter intent in *Crawford v. Huntington Beach Union High School Dist.*,[65] on the issue of racial balancing and whether a student transfer policy violated section 31.[66] The court examined cases addressing Proposition 209, including *Connerly* and *Hi-Voltage*, and explained the policy.[67] The court stated that:

> [u]nder the policy, White student open enrollment transfers out of school and non-White student transfers into the school are limited to a one-for-one basis. The imposition of these restrictions is inconsistent with the freedom of choice the voluntary programs provide. And more importantly, the policy creates different transfer criteria for students solely on the basis of their race. A White student may not transfer from Westminster High School to a different school until a White student chooses to transfer in and fills the void. A non-White student must wait to transfer into Westminster High School until a non-White student transfers out thereby creating essentially a "non-White opening."[68]

The court then determined that this constituted racial and ethnic balancing, and therefore, violated Section 31.[69] The court stated:

> [w]e do not dispute the evils of segregated schools and we recognize the potential benefits of attending a racially and ethnically diverse school, but the people have spoken. California Constitution, article I, section 31 is clear in its prohibition against discrimination or preferential treatment based on race, sex, color, ethnicity or national origin. Thus, the racial

[65] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275 (2002).
[66] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1277 (2002).
[67] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1279-83 (2002).
[68] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1284 (2002).
[69] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1284-85 (2002).

> balancing component of the district's open transfer policy is invalid under our state Constitution.[70]

In dicta, the court stated that "[i]t is not our intention to suggest that there cannot be any 'integration plans' under Proposition 209. We stress that an 'integration plan' developed by a school board need not offend Proposition 209 if it does not discriminate or grant preferences on the basis of race or ethnicity."[71] The court then discussed the benefits of magnet school programs, geographic limitations, and a random lottery as potential options that may not violate proposition 209.[72] This statement is consistent with the reasoning of another fourth appellate district case.[73] In evaluating voter intent, the court recognized that the ballot pamphlet indicated that voluntary school desegregation plans could be affected, and thus suggested that the voters were aware that Proposition 209 could render plans like the one at issue impermissible.[74]

F. In the Third Appellate District, Continuing Funding to a Desegregated Magnet School did not Violate Article I, section 31.

In contrast, in *Hernandez*, California's Third Appellate District Court held that "the selection of one racially balanced school over another cannot constitute a preference of one or a discrimination against the other based on race."[75] The parties had been in an

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[70] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1287 (2002).
[71] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1286 (2002).
[72] Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1286-87 (2002).
[73] *See* Board of Education v. Superior Court, 71 Cal.Rptr.2d 562 (Ct. App. 4th Dist. 1998). The Fourth Appellate District examined the issue of whether integration funding would be lost when it was no longer necessary to compel compliance with constitutional obligations.[73] *Id*. at 563. The court determined that the interpretation of Section 31 of the California Constitution was not implicated and that the issue was neither briefed or actually presented to the court.[73] *Id.* at 566. Rather, the issue was that of "propriety of the court's decision to advance the end of its supervisory jurisdiction by [eighteen months.]"[73] *Id*. Because the District Court had simply acknowledged that Section 31's adoption "did not conclude the section compelled it to modify its previous order," Section 31 was not implicated.[73] *Id*. at 568. Therefore, the Fourth District was able to avoid answering this question.[73] *Id*.
[74] Crawford, at 103. The Court addressed the Equal Protection issues, and explained that "[t]he distinction between what is required by the federal equal protection clause, and what may be permitted by it, is critical in this context. The Ninth Circuit recognized in the absence of de jure segregation there is no constitutionally required obligation to order desegregation." Id. at 103. For further discussion of how school desegregation does not fit within the prohibitions of proposition 209, *see*, *e.g*., Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, 676-84 (2001).
[75] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 13 (App. 3 Dist. 2004).

desegregation battle for over 30 years and finally entered into a settlement agreement with the stipulation that unitary status had been achieved. The settlement agreement provided an authorization "for the school district to continue to use TIIG funds to fund the magnet school programs created under its prior desegregation plan."[76] The court explained that "magnet programs provide a race neutral means to prevent racial or ethnic isolation by providing educational choices for district students."[77] The court further found that the "desire to preserve these educational programs…[was] not a preference or discrimination based upon race."[78]

The interveners argued that the "terms of the settlement agreement providing funding to the existing magnet schools violate[d] section 31 of article I of the California Constitution"[79] on the grounds that the district is no longer "suffering from the vestiges of racial discrimination. Any program adopted, enforced, or promoted to benefit the district's school children in the future must necessarily be neutral and not directed to schools that were once 'racially isolated,' as the current 'settlement' provides."[80]

However, the court found that the "[i]nterveners [had] failed to demonstrate error"[81] because the "interveners [ ] demonstrated no violation of section 31."[82] The court further determined that the decision to continue funding (instead of threatening an immediate cut off once the desegregation order no longer was in effect) did not constitute a preference or discrimination based on race. This decision was an opportunity to avoid decimating the program in the interim until alternative funding could be secured.[83] Funding the program, therefore, did not violate article I, section 31.

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[76] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 12 (App. 3 Dist. 2004).
[77] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 4 (App. 3 Dist. 2004).
[78] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 13 (App. 3 Dist. 2004). The educational programs desired were magnet programs that had succeeded in moving schools from being racially isolated minority schools to racially balanced schools, by allowing "them an orderly transition period in which to secure alternative funding…" *Id.*
[79] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 12 (App. 3 Dist. 2004).
[80] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 12 (App. 3 Dist. 2004).
[81] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 12 (App. 3 Dist. 2004).
[82] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 13 (App. 3 Dist. 2004). The court's rationale was based on the fact that the "schools [were] now racially balanced and all vestiges of discrimination in them [had] been eliminated. Thus, the selection of one racially balanced school over another cannot constitute a preference of one or discrimination against the other based on race." *Id*.
[83] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 13 (App. 3 Dist. 2004).

G. The California Supreme Court has not Resolved the Appellate Court Ambiguity and Declined to Address the Issue of Whether Desegregation Transfers Constitute Preferences.

The California Supreme Court was presented with an opportunity to rule on whether faculty transfers in the school desegregation context amounted to preferences and it declined to address the question.[84] In the this case the Ninth Circuit certified several questions to the California Supreme Court, which denied certiorari and did not respond to those questions.[85] The most important question the Court declined to answer was whether a school district violated article I, section 31 when it "implements a policy that forbids teachers from transferring between schools where such a transfer would push the ratio of white to nonwhite faculty at the destination school beyond a prescribed balance?"[86] The case involved faculty transfers between schools within the district and a policy, "which bars intradistrict faculty transfers that would move the destination school's ratio of white faculty to nonwhite faculty too far from the [Los Angeles Unified School District's] overall ratio."[87] The court recognized that the California Supreme Court had not yet had the opportunity to apply section 31 to programs like this transfer policy and that there are very few section 31 decisions by California appellate courts.[88] The court discussed *Hi-Voltage*, *Connerly*, and *Crawford*, but concluded that this is a "sensitive question of state law that is more appropriately decided by the courts of California than by a federal court of appeals."[89]

This court recognized one important distinction which may be compelling for our purposes. In discussing *Crawford*,[90] the court explained that it "is not squarely

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[84] *See* Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120 (9th Cir. 2002).
[85] Friery v. Los Angeles Unified School Dist., 448 F.3d 1146, 1148 (noting that the "California Supreme Court denied the request for cert." citing S109751) (9th Cir. 2006). It seems that the effect of an exercise of discrection is another question to consider. Thus, there is room to interpret reciprocal programs with similar floors and ceilings for all groups as outside the scope of *Crawford's* holding.
[86] Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1121 (9th Cir. 2002).
[87] Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1122 (9th Cir. 2002).
[88] Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1124-26 (9th Cir. 2002).
[89] Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1126 (9th Cir. 2002).
[90] *See* supra, notes _ and accompanying text

controlling, because the Huntington Beach school district's policy operated only in one direction: it created a floor for whites and a ceiling for non-whites, but not the converse. The California courts may treat this as a significant distinction."[91] The court further recognized that "[n]o published California decision appears to discuss whether the existence of discretion to depart from admittedly race-based standards prevents the discrimination that a program works or the preferential treatment that it grants from being done 'on the basis of race' within the meaning of Section 31.[92]

H. Interpretations of Voter Intent for the Similarly Worded Washington Initiative 200 Identifies a Difference Between Re-shuffle and Stacked Deck Programs

The Washington Supreme Court analyzed voter intent as to its Initiative 200 (hereinafter "I-200") and found a notable difference between stacked deck and re-shuffle programs.[93] The federal court version of this case is on appeal to the United States Supreme Court on the federal constitutional issues.[94] The state court case by the Supreme Court of Washington addressed the issue of why I-200 does not apply to prevent the use of a racial integration tiebreaker in desegregation efforts within a state school district.[95] The Court of Appeals certified the following question to the Washington Supreme Court: whether using a racial tiebreaker to determine high school assignments constitutes discriminating against or granting preferential treatment to any group or individual on the basis of race color and ethnicity or national origin in violation of initiative 200.[96]

The Washington Supreme Court accepted certification and went on to describe the initiative process as well as the standard for interpreting initiatives.[97] The standard in the state of Washington is similar to that articulated by the California Supreme Court in

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[91] Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1123-24 (9th Cir. 2002).
[92] *Connerly* held that if a statute is facially discriminatory, the exercise of discretion in enforcing that statute cannot save it, but the court did not consider whether writing discretion directly into the challenge program would allow it to pass muster." Friery v. Los Angeles Unified School Dist., 300 F. 3d 1120, 1124 (9th Cir. 2002) (citation omitted).
[93] *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151 (2002).
[94] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 126 S.Ct. 2351 (2006).
[95] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 154 (2003).
[96] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 154 (2003).
[97] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 156-57 (2003).

Hi-Voltage. Quoting *Coalition II*, the *Parents* court provides some outstanding language in interpreting the constitutionality of Section 31. The *Parents* court states:

> Attempts to desegregate our nation's schools, businesses and institutions have sometimes led to claims of reverse discrimination. Historically, courts have distinguished between reverse discrimination and racially neutral programs. For our purposes, reverse discrimination refers to programs that grant a preference to less qualified persons over more qualified persons based upon race. Reverse discrimination has sometimes been referred to as the "stacked deck" approach to achieve racial balance. Racially neutral programs treat all races equally and do not provide an advantage to the less qualified, but do take positive steps to achieve greater representation of underrepresented groups. Racially neutral programs have been referred to as "reshuffle" programs.[98]

Thus, "re-shuffle" programs did not constitute preferences in Washington state. The court then went on to discuss the difference between preference programs and other types of affirmative action programs.[99]

Continuing, the court explained how I-200, incorporated into the Washington Codes as RCW 49.60.400, "was promoted as a civil rights measure that eliminated racial preferences in public employment, contracting, and education."[100] The court recognized that the language was similar to Proposition 209, but notes some significant differences.[101] Particularly, I-200 was a statutory change in the State of Washington and not a change to the Washington Constitution.[102] In addition, I-200 provided a converse clause specifically stating that "this section does not affect any law or government 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."[103]

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[98] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 159 (2003) (citing Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 707 n.16 (9th Cir.1997)).
[99] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 160 (2003).
[100] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 161 (2003).
[101] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 161 (2003).
[102] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 161 (2003).
[103] WASH. REV. CODE § 49.60.400 (West 2006).

Nevertheless, the court determined that I-200 was subject to more than one interpretation and discussed the ballot pamphlet information to determine what the average voter would have been thinking.[104] The court states:

> the average informed voter would be aware of the distinctions drawn between reverse discrimination and race neutral balancing programs sometimes referred to as the 'stacked deck and 'reshuffle' programs. Subsection (3) of the statute suggests that some race conscious decisions or actions by the state would be permitted. We agree with the School District that the average informed voter believed that I-200 only prohibited reverse discrimination where a less qualified person or applicant is given an advantage over a more qualified applicant. An average informed voter would understand that racially neutral programs designed to foster and promote diversity to provide enriched educational environments would be permitted by the initiative.[105]

The court further explained that where "a law is susceptible to multiple interpretations, the standard tools of statutory construction apply to determine the voter's intent, including resorting to extrinsic sources."[106] In examining the ballot pamphlet information, the court referred to the specific language that it "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 applicants for public job, contracts or admission to state college or university."[107] Thus, the court found that the policy did not violate the statute.[108] This statement is very similar to the arguments made in the ballot pamphlet for Proposition 209 which will be discussed in Section III below.[109]

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[104] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 165 (2003).
[105] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 165 (2003).
[106] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 165 (2003).
[107] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 165 (2003) (citing *State of Washington Voters Pamphlet, General Election* 14 (Nov. 3, 1998)).
[108] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 166 (2003).
[109] *See* discussion below.

I. The California Court Decisions Provide Inadequate Guidance

Since the *Hi-Voltage* case in 2000, the California Supreme Court has declined to resolve the ambiguity in interpretation of the scope of article I, section 31 by the various appellate districts within the state. As the summaries above indicate, these appellate cases provide only scattered and sometimes conflicting interpretations as to which preferences are permissible and which are not. Moreover, as noted above, several pf the cases are not published, further limiting their usefulness as guidance to lawyers and lower courts. For these reasons, it is imperative that we develop an interpretative guide to analyze the voters' intent on the scope of prohibited preferences. The next section of this article attempts to provide that guidance, with an analysis of the theories of and tools for ascertaining voter intent, and then by applying those tools and theories to the elusive "voter intent" behind Proposition 209.

III. Voter Intent on Access Preferences

A. Sources for Voter Intent

Ballot initiatives, like legislation drafted by state assemblies, can be unclear or susceptible to multiple interpretations. When the legislative enactment is ambiguous, the courts examine "legislative intent," as guidance for how to resolve ambiguities in the application of that bill. There is a hierarchy of sources for determining legislative intent.[110]

Similarly, when a ballot initiative is somewhat ambiguous, the courts look for evidence of intent to resolve the ambiguity. Because the voters are technically the "enactors" of the ballot initiative, the courts will attempt to determine the "voter intent" in approving the ballot measure. The primary mechanisms for discerning voter intent is

[110] "Judges also display widespread agreement over the relative importance of different sources of legislative history. At the top of the hierarchy are committee reports, which receive the most citations and the greatest weight. In the middle are statements by representatives, which receive less weight, unless made by a drafter or sponsor. At the bottom are media accounts, -- press releases, advertising, and newspaper articles -- which are seldom cited." William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. L. REV. 629, 668 (2001) (footnotes omitted).

the voter information pamphlet, but other "extrinsic sources" are sometimes examined.[111] In addition, the arguments for and against ballot measures are "a permissible aid to interpretation, but are often inconclusive due to their typically simplistic and always partisan nature."[112]

The first inquiry must be whether the text of article I, section 31 is ambiguous or unclear. Specifically, we will focus on the language of clause (a) which states: "[t]he 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."[113] Although preferences can be defined in several ways, the California Supreme Court has provided its definition.[114] Therefore, the ambiguity is not in that phrase, but may be in the scope of the interpretation of that phrase. One author provides a useful definition of preferences, stating that "[p]erhaps the best way to understand the distinction between affirmative action and preferences is that in order for a person to receive a preference, another person--whether identifiable or not--must suffer discrimination."[115] Several cases have found some ambiguity in interpretation, both in the context of public education and contracting, and therefore went to the next step of attempting to ascertain voter intent.[116]

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[111] The extrinsic sources include "(1) previously enacted similar statutes, (2) 'the ballot summary and analysis presented to the electorate in connection with [the] particular measure,' and (3) contemporaneous administrative and legislative construction of the initiative. With few exceptions the courts have declined to consult other extrinsic sources such as analyses, reports, or advertisements found in the newspapers or on television." Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 875-876 (1998) (footnotes omitted).

[112] Lew Hollman, *Feature: An Indiscriminate Measure*, 21 L.A. LAW 40, 42.n.5 (1998) (citing *Delaney v. Superior Court*, 50 Cal. 3d 785, 803 (1990) (noting arguments relevant but inconclusive); *Lundberg v. Alameda*, 46 Cal. 2d 644, 652 (1956) (noting arguments inconclusive)).

[113] CAL. CONST. art. I, §31.

[114] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 560 (2000).

[115] *The Constitutionality of Proposition 209 as Applied*, 111 HARV. L. REV. 2083, 2084 (1998) (arguing that busing does not confer a preference).

[116] Hunter v. Regents of the University of California, 2001 WL 1555240, (Cal. App. 2d Dist. 2002);.*See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537 (2000).

B. An Intent to Prohibit Access Preferences Emerges

1. From the Ballot Pamphlet Materials

Assuming *arguendo* that some ambiguity exists, the next step is to examine the voters' intent. The primary source that courts use for this inquiry is the ballot pamphlet, which includes the text of the initiative; the ballot summary; and legislative analysis.[117] Reliance on the ballot pamphlet leads to some pitfalls. Most notably, such reliance privileges the interpretations and intent of the more educated because those voters are disproportionately the ones who actually read, and potentially understand, the ballot pamphlet materials. Jane Schacter explains that "several studies suggest a demographic skew, with more highly educated and more affluent voters reading the ballot material at the highest rates."[118] She continues, "[t]his is not surprising, given lingering readability problems with pamphlets. Even though state laws requiring pamphlets have generally been part of an effort to make ballot questions more comprehensible and accessible to voters, the results have been mixed."[119] Nevertheless, the ballot pamphlet remains the most common source of voter intent in court decisions.

A review of the ballot pamphlet for the November, 1996 election shows a clear, but not exclusive, focus on prohibiting what this Article refers to as "access preferences."[120] Access preferences are preferences that not only open the door to an individual, but walk them through that door by granting them a "position on the team." Access preferences bring students into universities, bring employees into the workforce, and bring businesses into the market of providing products and services for the state government.

The most common access preferences are university acceptance letters, employment offers, and government contract procurement. As a review of the ballot pamphlet demonstrates, the Proposition 209 supporters tailored their campaign around *unqualified* people receiving the benefit of *undeserved* access opportunities. For

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[117] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537 (2000); Discussion in Section II.
[118] Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy,* 105 YALE L.J. 107, 143 (1995).
[119] Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy,* 105 YALE L.J. 107, 143 (1995) (footnote omitted).
[120] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 600-03 (2000)..

instance, the ballot pamphlet states that "people naturally feel resentment when the less qualified are preferred.**"**[121] The argument in favor of Proposition 209 in the ballot pamphlet explicitly discusses these access preferences when it states "today, students are being rejected from public universities because of their race. Job applicants are turned away because their race does not meet some 'goal' or 'quota timetable'. Contracts are awarded to high bidders because they are of the preferred race."[122] Each of these activities is an example of an access preference. One author makes an even further distinction in pre-access preferences, finding them to be entitled to a greater presumption of fairness than others.[123]

Another pitfall of using the ballot pamphlet to ascertain voter intent is potential inaccuracies in the message conveyed. It is important to note that the ballot pamphlet material, other than the text of the initiative, is not always correct. Proponents may understate the effects of an initiative, to encourage a wider range of "yes" votes, and the opponents may exaggerate the negative impacts of the proposed initiative, in an effort to scare the electorate into voting against the measure.[124] For instance, the California Supreme Court recognized that " [w]e are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure."[125] Nevertheless, courts cite to, and apparently rely upon, statements such as these in the ballot pamphlets.

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[121] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 602 (2000)..
[122] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 602 (2000)..
[123] *See* Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 461-62 (1999).

> Outreach and aggressive recruiting efforts are categorized as weaker forms of affirmative action because they are generally used at the preselection [sic] stages of the distribution of public benefits, including preadmission, prehiring [sic], and prebidding [sic]. When employed in this manner, these efforts often improve the qualifications of applicants and insure the receipt of applications from members of targeted groups that might be best qualified for the benefits. As such, they merit a presumption of being fair, reasonable ways to accommodate the various interests and principles at stake in the affirmative action debate. *Id*. (footnotes omitted).

[124] *See, e.g.*, Legislature of the State of California v. Eu, 286 Cal. Rptr. 283, 289-90 (1991).
[125] Legislature of the State of California v. Eu, 286 Cal. Rptr. 283, 289 (1991) (citation omitted) (finding "it significant that the proponents failed to contradict the opponents' 'lifetime ban' argument"). The court then went on to discuss the lifetime ban against term limits in the California state legislature and stated that "[w]e think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served." *Id*. at 290.

In the pamphlet materials on Proposition 209, the legislative analysis likely was mistaken in the reference to some non-access preferences. For instance, the ballot pamphlet mentions that voluntary desegregation programs could be affected, including "magnet schools (in those cases were race or ethnicity on preferential factors in the admission of students to the schools)" as well as "counseling tutoring outreach student financial aid and financial aid" in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin.**"**[126] However, an unpublished court of appeal decision, *Hernandez*, does not seem to share this interpretation of magnet schools as volatile of Section 31, and decided the case in a way contrary to the legislative analyst's interpretation in the ballot pamphlet.[127] While *Hernandez* is not binding authority, it shows the courts' reasoning process is contrary to that of the legislative analyst in this instance.

The ballot pamphlet also further mentions that the University of California system has programs "such as outreach, counseling, tutoring, and financial aid," which are targeted based on RECNO classifications.[128] The opponents of Proposition 209 also contributed to this part of the conversation, stating that Proposition 209 would "eliminate tutoring and mentoring for minority and women students,"[129] as well as programs such as "counseling, tutoring, student financial aid and financial aid to select school districts where these programs are targeted based on race, ethnicity or national origin."[130] Nevertheless, some of these predictions have not been the accurate interpretation by California courts on these issues, as discussed in the cases in Section II, above. According to the media portrayals described below, the brief mention of scholarships and mentorship and tutoring programs by the secretary of state and the opponents of Proposition 209 was not a focus of the campaign.[131]

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[126] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 601 (2000).
[127] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 601 (2000).
[128] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 598 (2000).
[129] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 603 (2000).
[130] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 603 (2000).
[131] It would be worth further research to determine whether any mention was made of these issues in the media, and if so, whether the focus was on the access portion of these programs--such as mentoring to get people into college or law schools and tutoring for students of color in the weeks before the beginning of law school at UCLA Law.

2. Considering Zero-Sum Preferences

Several authors have suggested another alternative interpretation: that Proposition 209 was intended to prevent "zero-sum preferences," which are those that allocate a scarce resource based on RECNO. For instance, one commentator suggested that the CCRI supporters argued that "Proposition 209 only applies to 'zero sum' contexts, *i.e.*, those in which preferences to minorities work as a direct disadvantage to nonminority [sic] interests."[132] The author indicates that "throughout the campaign, Proposition 209 supporters drilled home the message that granting preferential treatment for one person meant discriminating against someone else. Such zero-sum equations clearly presuppose a competitive context."[133] The competitive context involves a situation where a scarce benefit or resource is being offered or denied to individuals.[134] Pager explains that this "scarcity rationale…dovetails nicely with the arguments for restricting preferential treatment in section 31 [sic] to zero-sum contexts, as in both cases the limiting factor is a scarce resource."[135] The determination of what constitutes a scarce resource may be relatively straightforward, involving some sort of acceptance and rejection of individuals. However, it seems that the acceptance or rejection involves doors of access, and does not apply to "re-shuffling" situations.

Despite the brief mention of voluntary school desegregation in the ballot pamphlet,[136] Pager argues that it was not intended to be covered by Proposition 209 because desegregation busing does not constitute a zero-sum game.[137] Permitting all students to attend school does not deny access. It 're-shuffles", by simply allocating them to different schools, without denying anyone the opportunity to attend school. Pager recognizes that the message of the proponents and opponents of Proposition 209

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[132] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 5 (1999).
[133] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 37 (1999).
[134] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 36-37 (1999).
[135] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 37 (1999).
[136] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 601 (2000).
[137] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 59 (1999).

did not make busing an issue, stating that "[n]either side had anything directly to say about voluntary desegregation in the ballot arguments. Although education is one of the three realms of state action to which CCRI applies, the Argument in Favor discussed only university admissions as being preferential."[138] Only the Legislative Analysis refers to the voluntary desegregation as an area that potentially could be affected.[139] Pager further explains that, in the context of university admissions "the consequences for nonpreferred [sic] students are not just a relative disadvantage; they are totally excluded from participation. Because of such considerations, the constitutional footing of remedial action is fundamentally different in zero-sum contexts. The allowance for proactive remedies is correspondingly diminished."[140] Thus, school busing for desegregation purposes does not involve the allocation of scarce resources in a competitive context, and therefore, does not constitute a zero-sum preference, and therefore is not prohibited by Proposition 209.

Like busing, other non-zero sum "re-shuffling" programs should be interpreted as non-preference programs, which therefore do not implicate Proposition 209's prohibitions. Pager's overall conclusion is a launch point for this analysis, stating that:

> Instead of carving out a narrow exception for voluntary desegregation, one could just as easily take the constitutionality of such programs as evidence of overall voter intent endorsing a narrow construction of preferential treatment across the board. On such an account, voluntary desegregation becomes a case study to validate the more general distinction between zero-sum and non-zero-sum programs. If so, the analysis presented in this article would seem to legitimize many other non-zero-sum programs that have similar remedial intent, including minority outreach and recruitment, 'ethnic' scholarships, and racial gerrymanders to increase minority representation in elected office.[141]

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[138] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 21 (1999) (footnote omitted).
[139] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 601 (2000).
[140] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 58 (1999) (footnote omitted).
[141] Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 59 (1999) (footnote omitted). Another author agrees. *See* Lew Holliman, *An Indiscriminate Measure*, 21 L.A. LAWYER 40, 90 (March, 1998).

Another author disagrees, stating that:

> Given the Hi-Voltage [sic] court's literal interpretation of 'preferential treatment' and the fact that the analyst also singled out voluntary school integration programs as potentially impacted, the search for an implied exception for such programs could prove to be in vain. In the end, this question will undoubtedly be decided in court.[142]

The author continues, "[g]iven the need for flexibility in light of the constitutional mandate to address racial isolation, a school district should be able to at least make a case that voluntary integration programs should be impliedly exempt from section 31."[143] The California Supreme Court has not addressed the question yet, and therefore the debate continues.

3. The Access Preference Prohibition is More Consistent with the California Supreme Court's Only Interpretation

While the zero-sum prohibition is a useful way of analyzing which preferences can be permissible and impermissible, it does not apply universally. For instance, the outreach component of the federal contract in the *Hi-Voltage* case was not a zero-sum preference, although the participation requirement was a zero-sum opportunity.[144] The participation was zero- sum because it stated that a contractor must have a certain percentage of W/MBEs, which percentage would then exclude non-W/MBEs from that percentage of the contracting work. However, that participation requirement was really the only an option because if a contractor did not satisfy the participation option, that contractor had to document extensive W/MBE outreach efforts.[145] The outreach efforts were not zero-sum because there is a difference between *informing* and *allocating* based on RECNO. For instance, the act of *informing* people of opportunities, even if the information is focused on individuals based on RECNO, does not actually *allocate* the

[142] Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, 690 (2001).
[143] Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, 690 (2001).
[144] *See Hi-Voltage* discussion in Section II above.
[145] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 589-93 (2000).

scarce resource (federal contract work) based on RECNO.[146] Selecting contractors based on RECNO would do so, but informing them of opportunities does not.

Nevertheless, the California Supreme Court, in its only interpretation of the scope of this language, determined that the outreach component also constituted a RECNO preference.[147] That ruling is inconsistent with the zero-sum preference distinction that some authors make. For that reason, the distinction between access and non-access privileges is more logical than the distinction between zero-sum and non-zero sum preferences.

One may decide that outreach preferences are not access preferences because outreach preferences only open the door to competing, rather than ensuring a place on the team. A strong argument that was made before the *Hi-Voltage* decision is that outreach preferences were still permissible in the post-209 California education, employment and contracting. However, to the extent that RECNO characteristics form the basis for any required outreach, *Hi-Voltage* laid much of that debate to rest.

Does it follow that the access/non-access distinction is inapplicable based on *Hi-Voltage*? This distinction likely survives because the specific facts of *Hi-Voltage* involve who was invited to bid on a contract.[148] Only bidders could be accepted, and those who were not "reached out to," or invited to bid, could never be awarded a contract.[149] Thus, outreach in the bidding context was a necessary first step to access, and consequently, this type of outreach could be considered much more closely tied to access than outreach in other contexts. The courts have not had occasion to test this theory on *Hi-Voltage's* limitations, but it is sound based on the California Supreme Court's analysis thus far.

[146] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, --- (2000).
[147] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, --- (2000) .
[148] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537 , --- (2000).
[149] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 542 (2000)

C. Which Intent Should Courts Seek to Ascertain?

1. The "Threshold Agreement" and Intent of the "Least Change" Voter

The question then becomes: which "intent" the court should be seeking. Some voters may have one intent—for instance, to change existing law dramatically. Other voters may have a different intent, such as to keep the status quo with only a minor modification. The intent of each individual voter will depend upon which arguments that voter agreed with and even which arguments that voter was exposed to. Thus, it is truly a "legal fiction" to attempt to ascertain a common intent from the millions of voters who vote in favor of a particular ballot measure that passes with a majority of votes. Because voters may be persuaded based on various external sources and because voters may rely upon different sources with sometimes conflicting analyses of the proposed ballot measure, one author suggests that the only thing the voters "have in common is a 'yes' and vote some threshold agreement with the initiative that prompts their affirmative vote."[150] The author explains that this threshold agreement "is the intent the courts should be looking for when they interpret an initiative."[151]

This threshold agreement, that at a minimum all "yes" voters wanted some change, however small, in the existing law, "is the only intent that we can attribute to all voters. Furthermore, only a rule of narrow construction acknowledges and addresses one of the most problematic deficiencies of the initiative process, drafting difficulties."[152] For instance, one way to examine the minimum change would be, as articulated by supporters of an initiative during debates and in response to criticisms, that the proposed initiative would change the law too dramatically. In the context of Proposition 209, one

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[150] Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 884 (1998) (noting "[t]he only valid inquiry that 'jealously guards' the people is this threshold agreement").

[151] Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 884 (1998). The author further explained that:

> And while many voters may have intended more change from the initiative, it is the 'least dangerous' voter who needs the most protections. It is this margin, where an argument may have convinced even just a small percentage of voters to punch 'yes' that must be given the most attention, for without that argument the initiative may have never passed. *Id* (footnote omitted).

[152] Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 885 (1998).

student this note analyzes the arguments about the effect of clause (c) on gender discrimination and explains that "the proponents of the CCRI, in response to a concern raised by the opposition, promised the voters that protection for women would not be set back."[153]

This promise that the initiative would not diminish women's rights could be considered an explicit agreement on the interpretation that the initiative, despite the arguments of its opponents that such a reduction was possible based on the language of the initiative. Thus, the voter who was persuaded by this promise, the voter who wanted the least amount of change to women's rights, yet still voted yes, should be the voter whose intent is recognized and enforced by the courts.

The "threshold agreement" is an interesting approach, but individual voters would not be available to explain their minimum expectations for change. Furthermore, some courts do not allow inquiries into voter motivations.[154] Thus, adopting the threshold agreement approach still would require an inquiry into extrinsic sources.

Schacter proposes a rule of construction that is similar to the "least dangerous voter" or "threshold agreement." Michael O'Hear discusses Schacter's conception, which he refers as "the Narrowing Rule."[155] The Narrowing Rule states that when the risk of abuse, through "length, complexity, confusing wording obscurity about the effect of an affirmative vote, heavy advertising (especially when coded with race-based or similar symbols), and propositions explicitly or implicitly targeted at socially

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[153] Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 890 (1998). The note further explains:

> After an opposition group raised a concern about the impact of ambiguous language, proponents responded in a manner that satisfied enough voters so that the initiative secured the requisite number of votes. This should be the end of the story. Proponents promised the existing protections against sex discrimination would remain unchanged. Therefore, they should remain unchanged regardless of the possible legal implication of the language chosen by the drafters. An opposition group may not be happy with the result reached by the electorate, but it can be confident that the electorate was not duped (at least in this instance) and that proponents will be help accountable for the promises they made. *Id*.

[154] *See, e.g.*, Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 405 (2003) (stating that "[e]ven if it were possible to determine the subjective intentions of thousands of individual voters, a number of lower courts have barred judicial inquiry into their motivations.").

[155] Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 329 (2003).

subordinated groups[,]"[156] the court "should be reluctant to construe ambiguous words in [the] initiative law [] expansively."[157] O'Hear decided that the narrowing rule "loses much of its force upon closer analysis."[158] And later he completely dismisses the narrowing rule.[159]

The "Narrowing Rule" could be effective by giving the benefit of the doubt to the narrowest interpretation, without the need for ascertaining the intent of the "least change voters." However, external sources would need to be evaluated in order to determine what that narrow interpretation should be. The major extrinsic source used by courts is the ballot pamphlet, but it will not necessarily be useful in determining the minimum expectation for change simply because so few voters read, let alone rely upon, the ballot pamphlet information. Similarly, the ballot pamphlet may not be the best source for the narrowest interpretation because the Legislative Analyst summaries are written to show the potential for change, not necessarily the minimum change that an initiative could impose. Moreover, as discussed above, the arguments of proponents and opponents in the ballot pamphlet are not always accurate predictions of future court interpretations.[160]

It is troubling that the courts are most likely to use the ballot pamphlet materials, and least likely to use media depictions, in interpreting the intent behind voter initiatives. If the courts really are trying to determine the voters' intent, then there is an argument that the courts' analysis should be based upon what the voters actually use. Many voters do not read the ballot pamphlet materials; they rely on the media, print, television and radio advertisements. Schacter examines the use of ballot pamphlet information, and concluded that "most voters do not use ballot pamphlets."[161] Others agree that because

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[156] Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 159(1995). Schacter further criticizes the attempts to discern voter intent as "circular when the very question at issue is what purpose the voters had in passing a law. Shifting the inquiry to purpose does not solve so much as restate the basic problem by shifting the indeterminacy to a higher level of abstraction." Id. at 146.

[157] Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 157 (1995).

[158] Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 332 (2003).

[159]Michael M. O'Hear, *Statutory interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 336 (2003). "In sum, the Narrowing Rule lacks any compelling justification." *Id*.

[160] See discussion Section III, supra notes---- and accompanying text.

[161] Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 142-43 (1995) (footnotes omitted). She continues, "[s]ome studies are more optimistic,

few voters read the text of ballot measures, it is not clear that courts should consult that source when ascertaining voter intent.[162]

2. Using the Media to Assist in Ascertaining the Intent of the "Least Change" Voter

Let us now focus on the intent of the "least change voter," or the "threshold agreement," in favor of Proposition 209.[163] In determining this "least change" voter intent, we must be mindful of voter misinterpretation, both before and during the voting process. For instance, one chart notes that support for Proposition 209 diminished when people were told that it "discouraged women and minority businesses from competing," even more when told it "outlawed affirmative action for women and minorities," and when it was explained that "it discouraged programs to help women and minorities achieve equal opportunities."[164] Thus, the least change voter likely did not want to curtail equal opportunity programs for women or people of color. Yet, according to the ballot pamphlet, a "yes" vote on Proposition 209 would do just that. One author suggests that initiatives should be subjected to a higher level of scrutiny when challenged because, "as a result of miscast votes, the outcome of initiatives may reflect the will of only a very small number of the people."[165] Some voters likely voted *in favor* of Proposition 209 when the outcome they desired would have been served by voting *against* it.

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placing the percentage between thirty percent and sixty percent of those who vote. In either event, it would appear that some substantial percentage of voters do not read the material." Id.

[162] *See* Stephen H. Sutro, Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction do not Adequately Measure Voter Intent, 34 Santa Clara L. Rev. 945 (1994). Sutro states:

> many voters do not take considerable time to study the ballot arguments and summaries in a ballot measure, and even fewer take time to read the language of a proposed initiative. When ambiguities arise in an initiative's interpretation, there is some question as to which sources the court should examine to determine the intent of the enacting body. *Id*. at 954.

50 Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 884 (1998).

[164] California Survey: *Support for Proposed CCRI shrinks when impact on affirmative action is known, by Sex*. On file with author.

[165] Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 248 (1999). The author suggests that:

> Rather than ascribing a presumption of validity to the initiative, courts would assume that the lack of the legislative filter and the lack of accountability to a concrete entity resulted in a significantly lower degree of deliberation of the initiative compared to a statute. This reduced deliberation, in addition to the lack of a voter oath to uphold the constitution, should be deemed to negatively affect the legitimacy of the initiative. Under this

Given this disconnect, perhaps our "least dangerous" or "least change" voter is one who read nothing and simply relied upon the media before casting her vote on Election day. The importance of the media in agenda-setting and issue-spotting flows from a recognition that:

> the mass media derive substantial power from their 'capacity to determine the content of public concerns, to 'set the agenda' for public discussion.' In the context of campaigns, this agenda-setting function means that the media often identify the defining questions and set the boundaries of legitimate debate about the issues. As part of this process, political advertising and the issues covered by the news media influence one another in reciprocal ways.[166]

If the real and substantial influence of the media is omitted from the courts' evaluation of the voters' intent, then a true information deficit is in operation and the reasoning of the court will necessarily reflect only a partial understanding of the voters' motivations for enacting the initiative.

Reviewing media sources is not without additional interpretation challenges, however. In determining voter intent on Election day, it is important to consider the material voters actually used, because, by definition, voters cannot rely upon material that they never encountered. For this reason, some argue that the media is too haphazard and random to justify a decision that all or most voters actually relied upon any particular media portrayal, advertisement, or argument in making their decision. One author explains that "[t]he crucial factor for courts in determining voter intent is what the voters

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> approach, any initiative would be viewed as suspect unless and until it has withstood a high level of scrutiny. *Id*. at 261-62.

[166] Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 132 (1995) (footnotes omitted). Schacter explains that there are "informational deficits", such as jargon and legalese, and "informational asymmetries" which include heavy spending, targeting of marginalized groups, and subliminally directed advertising. Id. at 155-57. In critiquing Schacter's theory and proposal for change, Judge Landau determines that the flaws she identifies with the initiative process are flaws that also apply to the legislative process. Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 489-90 (1998). These flaws, however, are not pertinent to the analysis in this Article. Judge Landau determines that the "proposals may justify or call for a re-examination of some larger issues concerning interpretation generally, but they do not justify the application of specialized interpretive rules for the construction of initiatives particularly." Id. at 532.

knew on Election day."[167] "Because no one can be sure which voters read which newspapers and saw which advertisements, and because such materials can distort the true meaning of the proposal, the use of extrinsic aids, such as mass media, has been the exception rather than the rule."[168]

Media portrayals suggest that Proposition 209 was intended to prohibit exclusionary policies in the area of access, not retention. A review of commercials and media advertisements at the time will also show a clear focus on prohibiting privileges that get someone in the door.[169] For instance, one popular television commercial stated: "You needed that job and you were the best qualified, but they had to give it to a minority because of a racial quota. Is that really fair?"[170]

In discussing various campaigns ads and materials, one student note surmises that the proponents of Proposition 209 may have "only wanted to prohibit preferences that had an exclusionary effect, as in an admissions context, because those preferences conjure up an image of unfairness."[171] The author further explains that "[t]he difference people perceive between affirmative action and exclusion may explain why polls show such a gap between supporters of preferences and supporters of affirmative action."[172] Avoiding exclusionary practices relates to the zero-sum prohibition discussed above.[173]

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[167] Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 438 (2000). The note continues:

> Unexpressed intent by initiative drafters is not a valid source, and legislative reports that undertook extensive analysis of initiatives but were never made available to voters are not to be used because the courts 'cannot speculate on the extent to which the voters were cognizant of them'. For these two reasons, courts tend to be extremely skeptical of using other sources of information, such as media reports, campaign advertisements, and campaign materials. *Id*.

[168] Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 438 (2000).

[169] The author recognizes that additional historical research is needed to further support this point, and hopes to have additional information at the time of the conference.

[170] *Dateline: Affirmative Reaction* (NBC television broadcast Jan. 23 1996) (announcer stating that "its [sic] been the focus of campaign commercials").

[171] Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 454 (2000).

[172] Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 454 (2000). The author goes on to determine that the admissions programs at Berkeley and UCLA, which programs provide additional weight to high school student GPAs when those students have completed Advanced Placement courses, violate Proposition 209. *Id*. at 457. Thus, the universities must show either that the "(a) their programs are not exclusionary or that (b) the preference does serve as an accurate measure of need or deservedness and therefore is narrowly tailored." *Id*.

[173] See discussion infra ---

Even if there were some way to determine which external sources of information most "yes" voters relied upon in making the voting decision about a particular initiative, there are other challenges for determining the intent behind those "yes" voters due to the risk of voter misunderstanding or miscast votes. After Election day in 1996, there was evidence that some voted for a measure while believing that a yes vote meant the opposite of what it meant. The Yale Note author explains that "[o]ne California poll showed that forty-eight percent of affirmative action supporters in the state also supported Proposition 209. Even more striking, a Los Angles Times exit poll on the day of the vote showed that twenty-seven percent of voters who voted for Proposition 209 thought their votes were votes for affirmative action and not the other way around."[174]

Examining the voters' intent is likely to lead to more confusion about the scope of the initiative. It could also lead to a finding that the "least change" actually was *no change in existing anti-discrimination law*, at least for a majority of the electorate. This "majority" group would include those who voted against the initiative and those who voted in favor of it based on a belief that it would not affect affirmative action opportunities for women and people of color. The "no" voters would not be considered for purposes of evaluating the intent of the electorate who passed the initiative, and the courts will not interpret Proposition 209 as having no effect. However, the least common denominator then, seems to be access preferences.

3. Are Courts Actually Ascertaining the Drafters' and not the Voters' Intent?

Another criticism of the use of external sources, such as the ballot arguments and the media portrayals discussed above, is that what is really privileged is the intent and agenda of the initiative drafters, not the people who voted in favor of the initiative. In evaluating Schacter's proposal, O'Hear explains Schacter's concern that "'highly organized, concentrated, and well-funded interests' may abuse the initiative process in ways that create a 'phantom popular intent.' Initiatives may be worded intentionally so

[174] Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 447 (2000). The author continues, **"**[e]ven if just half of those voters had changed their vote, the measure would have failed with fifty-three percent voting against it." *Id*.

as to obscure the effect of a 'yes' vote. Proponents may then spend heavily 'on subliminally directed advertising' that focus[es] voters on abstract, visceral symbols and divert[s] them from the particulars of the proposed initiative.'"[175] This "phantom popular intent" may not be an adequate representation of the popular will. To the extent the courts consider the polarizing political arguments made during the initiative campaign as evidence of the intent of the winners, the "popular will" may be subverted.

> One additional power the drafters have is that their views:
>
> are routinely included in the ballot pamphlets that are sent to voters and sometimes relied upon by courts in lieu of legislative history. As a result, when courts rely upon these formal legal sources to interpret the meaning of direct democratic measures, they are effectively privileging the intentions of the proponents of such measures in the name of "voter intent."[176]

One commentator suggested that the California courts "limit interpretation of initiatives to materials officially presented to the voters in the ballot pamphlet"[177] because it would be "disingenuous" to fail to consider the material that we know was available to the voters.[178] Recognizing that there is substantial room for disagreement as to the reasons behind voter approval of ballot measures and as to whether there are any common reasons for approving the measure, that author proposes that the courts consider the initiative drafters' intent instead of trying to fathom what influenced the voters.[179]

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[175] Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 329 (2003) (explaining that Schacter finds that "direct democracy suffer[s] from 'informational deficits, [and] is also subject to…'informational pathologies.'") (footnotes omitted). He continues:

> The risks are particularly great, Schacter contends, when the initiative targets "socially marginalized groups." To illustrate, she offers the anti-defendant criminal justice initiatives of the 1990s: "this is an area where voters are likely to have focused heavily on broad themes and slogans about being 'tough on crime,' some of which are mixed subtly and not so subtly with coded racial messages." *Id.* (footnotes omitted).

[176] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 433 (2003) (footnotes omitted).

[177] *See* Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction do not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 947 (1994).

[178] *See* Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction do not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 974 (1994).

[179] Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction do not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 974 (1994). The comment states:

> Indeed, given the lack of knowledge of voters and the campaigning practices of those backing initiatives, how can we say those who said "yes" to an initiative all had one

Another author, Staszewski, takes this theory even farther, and suggests that "the myth of popular sovereignty in direct democracy should be rejected and that ballot initiatives should no longer be romanticized as lawmaking by 'the people,' but rather should be viewed as lawmaking by 'initiative proponents' whose general objective is either ratified or rejected by the voters."[180] Staszewski then proposes that state laws that regulate direct democracy be amended to "subject the proponents of initiatives to the requirements of public deliberation and reasoned decisionmaking [sic] that presently constrain administrative agencies."[181]

Staszewski explains that "[c]ontrary to the myth of popular sovereignty in direct democracy, initiative measures do not magically become state law as a result of the 'will of the people.' Rather, such measures are conceived, drafted, sponsored, and promoted by identifiable individuals or groups that favor a specific policy proposal."[182] He continues:

> The proponents engage in a variety of activities to promote their measure during a typical initiative campaign. These activities include behind-the-scenes work of negotiating with state officials over the initiative's title and official summary, as well as lobbying interested individuals and groups for financial and electoral support. Indeed, endorsements of an initiative measure from interest groups, elected officials, celebrities, and the media can provide useful information to the electorate in a context where other common voter cues, including a candidate's name recognition and political party, are absent. As those who live in initiative states well

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> common idea of what a law was meant to do? For this reason, why shouldn't courts look to the drafters of an initiative and their intent--after all, can't the initiative process be seen as the special interests taking their case to the people? *Id*.

[180] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 399 (2003).

[181] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401 (2003).

[182] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 420 (2003) (footnotes omitted). The author identifies these groups as "typically represent[ing] particular special interests and [ ] increasingly multimillionaires who seek to influence public policy on their pet issues." Id. at 421. Additionally:

> Not only are the proponents unelected and not sworn to uphold the Constitution, but they sometimes do not even live in the state or locality in which their measure has been proposed. Nonetheless, the initiative proponents are the driving force behind drafting direct democratic measures, qualifying them for the ballot, and leading the campaigns to convince the electorate to vote in their favor--often spending millions of dollars in the process. *Id*. (footnotes omitted).

> know, the proponents and their financial backers typically lobby the electorate directly by engaging in extensive print, radio, and television advertising on behalf of their measures. The proponents sometimes appear on talk radio programs and in other public forums [sic] to gain support for their policy proposals. Unfortunately, much of this discourse with the electorate is conducted in a simplistic, partisan and sometimes misleading fashion.[183]

This proposal is a bold one and it may help solve some of the problems identified above. The machinations of the initiative drafters create sufficient popular support for the measure to pass, but there is no room for the voters to exert their will on the initiative language. Rather, the only power the voters have is in what messages resonate for them, because that will be message that will become the focus of the advertisements and debates. This voter power does not extend to helping to determine the substantive scope and interpretation of the ballot measure.[184] But we are not there yet.

Even if the drafters' intent governs, there is still a focus on access preferences. This analysis should not rely upon the mention of voluntary desegregation, financial aid, and outreach because those topics were not a part of the proponents' arguments. Rather, the analysis should rely on comments made by the opponents and the Legislative Analyst.[185]

For instance, Proponent Tom Wood, in a *Dateline* interview, stated, "what the California Civil Rights Initiative will do is simply extend civil rights protection to absolutely everybody in the population."[186] Wood also stated, "we don't deny that there are individual instances of discrimination. Our position is that it is a mistake to assume,

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[183] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 427-28 (2003) (footnotes omitted).

[184] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 432 (2003) (footnotes omitted). The author goes on to state that:

> Although courts and commentators often accept the myth of popular sovereignty, the initiative proponents are, in fact, the real driving force behind successful ballot measures. Unlike the voters, the initiative proponents draft the language of proposed ballot measures and typically have sufficient expertise to understand the legal landscape into which their measures will fit—including such things as the canons of construction and existing legal precedent. *Id*. at 432-33.

[185] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 600-03 (2000).

[186] *Dateline: Affirmative Reaction* (NBC television broadcast Jan. 23 1996).

as our opposition tends to do, that racists and sexists are everywhere."[187] His view suggests that a presumption of discrimination is inappropriate and that justifying preferences in advance necessarily relies on such a presumption.[188] This is consistent with other statements that were available on the CCRI website. For example it states that CCRI is needed is "[t]o end the regime of race- and sex-based quotas, preferences and set-asides now governing state employment, contracting and education due to years of court decisions and bureaucratic regulations."[189] Quotas were illegal already under existing law prior to Proposition 209,[190] but the proponents likely meant race-based targets and goals for admissions and hiring. Set-asides provide a percentage of public contracts to be awarded based on a RECNO characteristic. Each of these specific examples constitutes an access preference, and thus provides further evidence that the proponents of Proposition 209 targeted access preferences.

If we rely solely on the arguments of the proponents, the intent to prohibit access preferences alone is clear. Though there are but a few, the California courts' subsequent decisions focus on prohibiting the preference of initial access to an admissions spot, a job, or a public contract.[191] Opening the door to access to the team is different from using preferences to keep someone on the playing field.

Based on all of these sources for interpreting voter intent, including the wording of the initiative, the materials in the voter information pamphlet, the media, and the arguments of the proponents of the initiative, the least common denominator is an intent to prohibit access preferences. This intent is evident regardless of whether we consider the intent of the voters themselves or the intent of the drafters and proponents of the initiative. The next question to be considered is how race-conscious financial aid programs can be structured to fall outside the definition of access preferences.

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[187] *Dateline: Affirmative Reaction* (NBC television broadcast Jan. 23 1996).
[188] Additional research is needed to uncover more statements by the proponents to support this point.
[189] Facts About the California Civil Rights Initiative, http://www.ccri.com (answering the question "why is CCRI needed ?").
[190] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (subjecting all racial classifications to strict scrutiny, regardless of whether they are enacted by Congress or other bodies).
[191] *See* Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1 (App. 3 Dist. 2004); Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275 (2002); Hunter v. Regents of the University of California, 2001 WL 1555240, (Cal. App. 2d Dist. 2002); Connerly v. State Personnel Bd., 92 Cal.App.4th 16 (2001); Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537 (2000);

IV. Why Retention Preferences do not Violate Proposition 209

A. Retention Privileges such as Financial Aid and Scholarships can be structured so that they do not Grant Race-Based Preferences

Retention privileges such as financial aid, similarly should be permitted to help maintain a diverse learning environment, and not because of one's particular race. Any racial or ethnic group could obtain the benefit, depending upon the critical mass needs of the institution for that group in any given year. Because the policy supporting diversity scholarships is focused on maintaining the diversity that has been obtained through a race –neutral admissions process, the scholarships need not be considered to be race-conscious; rather, the scholarships are under-representation conscious.

For instance, the ballot pamphlet shows a recognition that maximizing the participation of underrepresented groups would not be prohibited, when it explains that "in fact high school outreach programs that currently target race or ethnicity could be changed to target instead high schools with low percentages of UC or CSU applications."[192] This language suggests that maximizing underrepresented groups could be permissible as long as the efforts were not governed explicitly by race or ethnicity.

The *Hernandez* case from the Third Appellate district also provides support for the argument that financial assistance designed to maintain diversity need not constitute a racial preference or discrimination.[193] In *Hernandez*, the court determined that continuing funding a formerly racially isolated school did not amount to a racial preference because that school now was racially integrated.[194] The continuation of funding was necessary to avoid decimating the magnet school program, and did not violate article I, section 31. In a similar vein, diversity scholarships that provided funding to students *already admitted* to public universities in California would not constitute a racial preference because they would be based on maintaining a diverse learning environment, and not specially assigning students based on their race or ethnicity. Rather, the allocation is based upon the particular diversity needs of the public

[192] Hi-Voltage Wire Works, Inc. v. City of San Jose**,** 24 Cal.4th 537, 601 (2000).
[193] *See* Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1 (App. 3 Dist. 2004); discussion above in Section II, infra.
[194] Hernandez v. Bd. of Educ. of Stockton Unified School Dist., 25 Cal. Rptr.3d 1, 13 (App. 3 Dist. 2004)

institution. Thus, diversity scholarships could be awarded to students of any race or ethnicity, and no student would be precluded from competing for a diversity scholarship based on race or ethnicity.

This funding situation is distinguishable from the student transfer policy that was found to violate article I, section 21 in an earlier third appellate district case.[195] The *Crawford* court explicitly acknowledged a difference between magnet school programs, which could provide a race neutral mechanism of integrating schools, and the one for one transfer policy where race was the determinative factor in granting or denying transfer applications. [196]

Persuasive authority from the Seattle schools state court case also recognizes a distinction between reverse discrimination and race neutral pie-expanding or re-shuffling programs.[197] The Washington Supreme court stated: "[r]acially neutral programs treat all races equally and do not provide an advantage to the less qualified, but do take positive steps to achieve greater representation of underrepresented groups." [198]These re-shuffling programs exist to increase or maintain diversity, not to promote or prefer an unqualified individual over another qualified person of a different race. Thus, they do not constitute reverse discrimination. The Washington Supreme Court determined that the policy did not violate Initiative-200, and was a permissible race neutral re-shuffling program.[199] FN

Public universities in California could design diversity scholarships that re-shuffled, instead of reverse discriminated, and thus would not grant a preference in violation of article I, section 31. This re-shuffling would be accomplished by two means. *First*, universities would need to defer any consideration of scholarship and financial aid awards until the students are admitted to the university entering class, through the so-called race-neutral admissions policies currently operating. *Second*, the university financial aid office could consider these admitted students for potential diversity

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[195] *See* Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275 (2002); discussion in section II, infra.
Crawford v. Huntington Beach Union High School Dist., 98 Cal.App.4th 1275, 1286-87 (2002).
[197] *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151 (2003); discussion in Section II, infra.
[198] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151, 159 (2003) (citing Coalition for Economic Equality v. Wilson, 122 F. 3d 692, 707 n.16 (9th Cir. 1997).
[199] *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 72 P. 3d 151 (2003); discussion in Section II, infra.

scholarships, as long as the offices expand the criteria for diversity conscious scholarships to include all form of diversity, including socio-economic diversity, athletic prowess and talents in the arts and fine arts. Merit, in the traditional form of SAT scores and GPAs would also be a component of diversity.[200] Thus, diversity can be used to provide funding from students based on many different criteria.

Adding race and ethnicity to the diversity criteria obviously make it more difficult to argue that the scholarship does not grant a racial preference, and so we must analyze the extent to which a public university in California can consider racial and ethnic diversity as a factor in scholarship awards, in a non-preferential way. This analysis takes the conversation back to access. The door is not being closed to those who do not benefit from the diversity scholarship, but rather, once a student gets in the door, the schools should be able to use race in its retention strategies, in order to obtain and maintain diversity of all types.

B. If the Diversity Scholarships Consider Race and Ethnicity, then they still are Permissible because as Retention, and not Access Privileges, they were not within the Voters,' nor Drafters' Intent in Enacting Proposition 209.

As discussed in Section III, above, an examination of the various ways to ascertain voters' intent all lead to the same conclusion, demonstrating a clear focus on prohibiting access privileges based on RECNO. Whether we consider ballot pamphlet materials,[201] the arguments of the proponents,[202] and even the media portrayals of the measure[203], whether we privilege the view of the least change voter,[204] or the initiative drafters,[205] the conclusion is the same: that access privileges were the target of the Proposition 209. Applying a narrow rule of interpretation for popular initiatives[206] the safest interpretation is that *the voters intended to prohibit access privileges.* The brief

[200] For more detail on a broader conception of diversity in the scholarship criteria, see my forthcoming article, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships from Rawls' Original Position on Justice*, (at Section IV), forthcoming, spring, 2007.
[201] *See* discussion, section III, supra at---
[202] *See* discussion section III, supra at ---
[203] *See* discussion section III, supra at ---.
[204] *See* discussion, section III, supra at ---
[205] *See* discussion section III, supra at ---
[206] *See* discussion, section III, supra notes -- and accompanying text

mentions of scholarships, and mentorship and tutoring programs by the Legislative Analyst was neither a focus of the campaign, nor a focus of the voters.[207]

The diversity financial aid and scholarship program would not constitute an access privilege because it would be limited to students already admitted to the university. By the time of the financial aid consideration, each student already will have been admitted on denied enrollment, based on the race-neutral evaluation of the admissions officers. Only after the race neutral decision has been made, which deems the admitted student "qualified" such that no reverse discrimination or "stacked deck" complaint is valid, will race be a factor in *retaining* those admitted students who contribute to student body diversity in meaningful ways. Thus, the diversity scholarship for retention purposes will not constitute an access privilege, and thus will not violate the intent of Proposition 209.

C. If Retention Privileges are not Prohibited by Article I, section 31, then the California Courts May Apply the Post-Grutter Version of Strict Scrutiny.

To the extent that diversity conscious financial aid and scholarships are allocated at the retention stage, rather than the access stage, and therefore do not conflict with the voters' intent as to Proposition 209, challengers likely will argue that the race and ethnicity conscious portions of the financial aid program would violate the Fourteenth Amendment as impermissible race-based classifications. All race-based classifications are subject to strict scrutiny.[208] The strict scrutiny test requires an analysis of two prongs: first, the classification must exist to serve a compelling government interest, and second, the means used to achieve that compelling interest must be narrowly tailored.[209] The Grutter case provides mandatory authority for the proposition that diversity in higher education is a compelling interest that satisfies the first prong.[210] Thus, the California

[207] It may be worth further research to determine what types of programs existed, to see if these programs were focused on the access part of these things (such as, mentoring to get people into college/ law schools, tutoring such as the early program for UCLA Law.
[208] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (subjecting all racial classifications to strict scrutiny, regardless of whether they are enacted by Congress or other bodies).
[209] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 219 (1995).
[210] See Grutter v. Bollinger, 539 U.S. 306 (2003).

public schools can use diversity in higher education as a sufficiently compelling interest to meet the first prong of the strict scrutiny test.

In analyzing the second prong, the United States Supreme Court also found that a diversity admissions program satisfied the narrow tailored requirement.[211] The Court relied on several factors to evaluate narrow tailoring, and scholars have interpreted approximately six, including: (1) "individualized comparison of applicants"; (2) "the absence of a mechanistic formula"; (3) "The goal of achieving a critical mass of underrepresented minorities"; (4) "doing no undue harm to members of groups not favored by the system"; (5) "A continuing exploration of race-neutral alternatives"; and (6) "a realistic time limit."[212]

An analysis of the narrowly tailoring factors is beyond the scope of this article, but the reader can find a detailed analysis in a forthcoming article by this author.[213]

D. Conclusion

The California Supreme Court has declined or avoided issuing substantial rulings on the scope of Proposition 209, since the *Hi-Voltage* case, and there is some confusion among the lower courts over the extent of its prohibitions.[214] For these reasons, it is important to enter the game, playing with the interpretation of the rules proposed in this article. If subsequent litigation challenges retention programs as violating Article I, section 31, then the courts will have the opportunity to rule on the issue. In the interests of taking a more proactive approach, progressive legal strategists may wish to set up a test case, to initiate the debate and mark the parameters of discussion over the difference between access and retention privileges. A thorough analysis of voter, or drafters', intent shows that access, not retention, privileges were the target of Proposition 209's prohibitions.

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[211] See Grutter v. Bollinger, 539 U.S. 306 (2003).
[212] Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237, 250-51 (2005). *See also* Thomas J. Graca, Diversity-Conscious Financial Aid After Gratz and Grutter, 34 J.L. & EDUC. 519, 525-26 (2005).
[213] See discussion from Chris Chambers Goodman, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships from Rawls' Original Position on Justice, forthcoming, spring 2007.*
[214] *See* discussion, section II.