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Diversity and the Law: 2021

Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions[1]

2nd Edition

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I. Background and Overview

The foundation for higher education policies that seek to advance diversity, equity and inclusion in science, technology, engineering, mathematics, and medical fields, among all other fields, is each institution's and discipline's mission and associated educational goals and societal roles. While mission is the driver, federal laws and, state laws, must inform policy design to ensure that policies are both effective and legally sustainable. This resource provides guidance on a set of state-imposed legal design parameters that create more restrictions on race-, ethnicity- and sex- conscious education and employment policies than would otherwise apply under federal law, while addressing what *can still be done* to advance diversity and equity in states where restrictions apply.[2] This guide:

1) describes the key elements of state laws that ban racial, ethnic and sex "preferences" in public higher education (among other public programs);

2) analyzes key design principles emerging from these bans, which can serve as a basis for designing and evaluating education and employment access- and diversity-related policies of public education institutions in ban states; and

3) addresses considerations for public institutions in ban states and by any other public or private institution that is evaluating so-called "neutral" strategies to satisfy federal requirements that apply to all public and private institutions that receive federal funding.

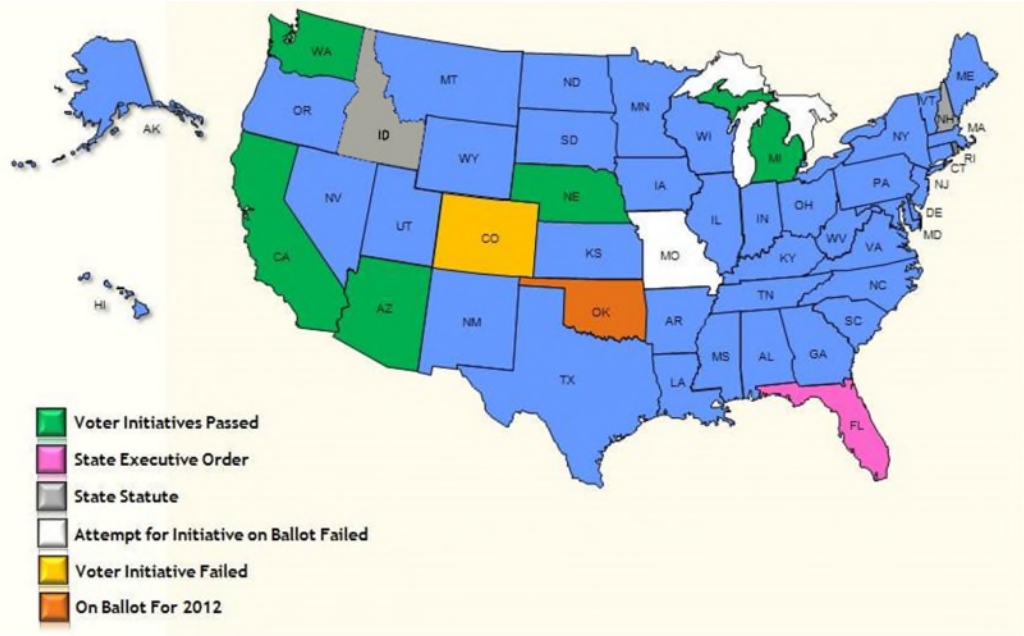
As a threshold matter, it is important to recognize that federal law in no way *mandates* the use of race-, ethnicity- or sex- conscious policies as the *means* to achieve educational diversity or employment equal opportunity policy objectives. Indeed, federal law establishes a "floor" upon which state law, in appropriate circumstances, may "build" additional restrictions. Consequently, while state laws may not violate federal law's non-discrimination **requirements**, state laws may prohibit application of at least some federal law **exceptions** that would otherwise **permit** consideration of individuals' race, ethnicity and sex when conferring benefits in education, employment and contracting in some circumstances. (See the first text box below in this section.)

Since 1996, nine states have implemented significant state constitutional amendments, statutes and regulations, or executive orders that ban race-, ethnicity- and sex-related "preferences" at public education institutions. Voters in six of these states passed ballot initiatives that impose so-called "voter bans" in public programs, one, in the form of a state statute, and five, as state constitutional amendments.[3] In the seventh state, an executive order, subsequently codified in state regulation imposes

[2] *See also The Playbook: Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals*, (The College Board, Education Counsel, 2d ed., 2019) at https://professionals.collegeboard.org/pdf/playbook-understanding-race-neutral-strategies.pdf.

[3] While the analysis in this paper is most relevant to institutions in affected states, similar prohibitions have been contemplated in other states. The Colorado Civil Rights Initiative made the ballot in 2008, and was rejected, but garnered 49% of the vote. To date, similar or identical initiatives have failed to reach the ballot in Florida (2000) and Missouri (2008). However, Florida adopted an Executive Order that has a similar effect. And in one state that adopted a ban in a ballot initiative– the State of Washington – subsequent legislation that was scheduled to take effect in 2019 would have revised the law to authorize consideration of the following factors in public employment, public education, and public contracting, subject to some limitations that avoid over-weighing them: race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status. However, a voter initiative to reject that law and resurrect the prior ban was adopted in a very close vote on November 5, 1919. The voter initiative campaign appears to have subsided—at least for now. However, the

a ban. And the legislature in the eighth and ninth states enacted a similar ban by statutes. These prohibitions affect education, employment and contracting policies at public education institutions, among other public entities.



Source: Adapted with permission from College Board (2021).

Federal and state court decisions amplify the meaning of the state bans under state law and rule on their federal constitutionality.[4] While constitutional challenges to some voter bans were initially made, the Supreme Court in 2014 issued a decision related to Michigan's ban, Proposal 2, which upholds the bans' constitutionality.[5]

Federal law generally prohibits discrimination in education and employment on the basis of race, ethnicity and sex by public institutions of higher education under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and by public and private institutions of higher education that receive federal funding under federal statutes. However, where certain legally recognized objectives of importance can't be achieved without considering race, ethnicity and sex—these factors may be voluntarily considered in limited ways in admitting or conferring other educational benefits on students or in hiring, conferring benefits of employment on, or taking certain other employment actions respecting, faculty. See **Brief Legal Overview** **https://www.aaas.org/programs/diversity-and-law** for further background information**.**

fact that the only serious effort to reverse a ban failed, demonstrates the power of the political process, effective communication, and the court of public opinion in the hands of opponents to race and sex conscious diversity efforts.

[4] In addition to updating and expanding upon the 1st Edition of a publication of the same name published in 2012, and with a more comprehensive legal analysis of relevant state laws and court opinions, this publication expands upon Coleman et al., *From Federal Law to State Voter Initiatives: Preserving Higher Education's Authority to Achieve the Educational, Economic, Civic, and Security Benefits Associated with a Diverse Student Body* (College Board, March 2007). Segments of this paper are also derived from and expand upon, Palmer et al., *Advancing Diversity at the University of California, Berkeley Under Proposition 209* (Warren Institute on Race, Ethnicity and Diversity, 2006).

[5] The federal appeals court decision, *Coal. to Defend Affirmative Action et al. v. Regents of the Univ. of Mich. et al.*, 2011 WL 2600665 (6th Cir., July 1, 2011) (holding that Michigan's constitutional amendment violates the Fourteenth Amendment to the U.S. Constitution, under the political restructuring theory), was overturned and the constitutionality of Michigan's constitutional amendment was upheld in *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equal. By Any Means Necessary*, 572 U.S. 291 (2014). Section III, below, includes an analysis of these cases.

Perspective: The Court of Public Opinion

Insights regarding the effect of the "court of public opinion" on education and employment diversity efforts at all institutions of higher education, and those lessons are particularly salient in the context of voter bans.

State voter bans emphasize the power of the court of public opinion. They demonstrate the importance of correcting public misunderstanding of what is true about race-, ethnicity- and sex- based educational (and other) inequities; what is at stake if we do not address them; and why equitable participation in high quality higher educational programs delivered through a broadly diverse student body and faculty are beneficial for everyone.

Effective and regular communication to public and court audiences about three fundamental interests associated with diversity of the student body and faculty at colleges and universities is critical:

- Higher education's role in recognizing, effectively communicating about, and—through the content of curricular and co-curricular programs and the compositional diversity in which students experience these programs—preparing future generations well, to understand and work to eliminate, race-, ethnicity- and sex- based systemic societal inequities.

- The fulsome meaning of "meritorious" contributions in academia reflective of the qualities and experiences of individuals and breadth of diversity that are necessary to contribute to excellent educational outcomes for all students, effective teaching, and high-quality scholarship, and associated contributions to society-at-large.

- The fairness, rigor and calibration of student enrollment and faculty employment policies that may involve limited, contextual consideration of race, ethnicity, or sex of individuals with evidence of need.

Associated with these interests is elevating understanding of the fallacy of race- and sex- based "preferences" and misuse of the term "affirmative action," with their connotation of giving people of color or women an "unfair advantage" over others. Seeking the educational benefits of diversity for all students, and remedying inequity in employment opportunities has been endorsed by the Supreme Court.[6] Neither aim involves conferring a "preference" on some individuals over others, nor makes race or

[6] *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 313 n. 48 (1978) (illustrating the educational benefits associated with diversity); *Grutter v. Bollinger*, 539 U.S. 306, 325-333, 338-339, 341-343 (2003) (educational benefit to all students that accrue from a diverse student body is a compelling interest); *Gratz v. Bollinger,* 539 U.S. 244*,* 270-271 (2003) (same); *Fisher I*, 570 U.S. at 308 (2013) ("*Fisher I*")) ("The attainment of a diverse student body…serves values beyond race alone, including enhanced class-room dialogue and the lessening of racial isolation and stereotype"); *Fisher II,* 136 S.Ct. at 2210 (2016) ("The compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students." Rather, a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity. Enrolling a diverse student body promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. Equally important, student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.); and *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 492, 503-405 (1989) (a public entity can assert remediation as a compelling interest when its race-conscious program was designed to either remedy the entity's own discriminatory practices or dismantle a system of discrimination in which the entity has been a passive participant); *Wygant v. Jackson Board of Education,* 476 U.S. 267, 274-277 (1986) (applying strict scrutiny and finding that there was insufficient evidence that remedial action was necessary to remedy prior discrimination where there was no evidence the Board engaged in prior discriminatory hiring practices; societal discrimination alone is not enough).

sex alone the determinative factor for selection of any individual to receive a benefit. One involves benefiting everyone, and the other involves remedying a harm already suffered.

Beyond the law, how can consideration of an aspect of an individual's identity that society makes highly relevant to individual experience and opportunity be unfair? When we leave our homes, none of us can shed our racial, ethnic or gender identities or the effects of societal norms and attitudes associated with these identities. Major challenges befall people of all races, ethnicities, and sexes. However, overwhelming research demonstrates that race, ethnicity and sex affect our opportunities and burdens as we work to overcome life's challenges.[7] Societally-imposed identity status affects whether we are given the benefit of the doubt, or not, in many situations (i.e., whether the wind is in our face or at our backs). The fallacy of "preferences" does not reflect an aim of "color-blindness," as is sometimes suggested. It reflects a blindness to the persistence of systemic race-, ethnicity- and sex-based inequity in education and many other aspects of our society. Perpetuation of this fallacy certainly harms targeted people of color, and to an extent females, and lacks moral integrity. It also harms everyone in society-at-large, as abundant talent is excluded from opportunities to contribute, diminishing prosperity and quality of life for all.

[7] *See also* Riegle-Crumb, C., King, B., & Irizarry, Y. (2019). Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields. *Educational Researcher*, *48*(3), 133–144. https://doi.org/10.3102/0013189X19831006 ; Ong, C. W., Espinosa, L. & Orfield, G. (2011). Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics. *Harvard Educational Review, 8*1(2), 172–209. https://doi.org/10.17763/haer.81.2.t022245n7x4752v2 ; Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students, U.S. Department of Education Office of Civil Rights (June 9, 2021), available at https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf ; National Academies Reports on Diversity, Equity, Inclusion and Racism In STEMM Education and Workforce (June 2021) at file:///C:/Users/JLK/Downloads/summit%20paper%20june%202021%20(2).pdf ; L. Malcom-Piqueux, Transformation in the U.S. Higher Education System: Implications for Racial Equity, National Academies (October 2020), available at file:///C:/Users/JLK/Downloads/malcompiqueux%20symposium%20paper%20(5).pdf ; Assessing and Responding to the Growth of Computer Science in Undergraduate Enrollments, Consensus Study Report, National Academies (2018), available at https://www.nap.edu/download/24926 ; Investigating the Potential Impact of COVID-19 on the Careers of Women in Academic Science, Engineering, and Medicine, NASEM (2021), available at https://www.nationalacademies.org/our-work/investigating-the-potential-impact-of-covid-19-on-the-careers-of-women-in-academic-science-engineering-and-medicine ; Women, Minorities, and People with Disabilities in Science and Engineering, National Science Foundation (2021) at https://ncses.nsf.gov/pubs/nsf21321/report/executive-summary; Carnevale, Anthony P., Fasules, Megan L., Porter, Andrea, & Landis-Santos, Jennifer. (2016). African Americans: College Majors and Earnings. *Georgetown Center on Education and the Workforce*. Retrieved from https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors_2016_web.pdf.

II. State Law Bans: Summary and Analysis

A. History and Summary of State Law Bans

Of the nine states that have some form of law or policy that bans consideration of race, ethnicity, and sex of individuals when public actors confer education benefits and opportunities, six state bans are the result of voter initiatives and a seventh is imposed by a statute that share nearly (but not completely) identical language and structure. This consistency over the course of over two decades is to be expected, given that the original California amendment proposed by Ward Connerly in 1996, then a Regent of the University of California, served as the foundation for other successful campaigns for similar voter initiatives in the other five states (as well as several campaigns that were unsuccessful).[8]

The language of the six voter initiatives includes:

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

- An allowance for bona fide sex-based qualifications which are reasonably necessary to the normal operation of public employment, education, and contracting;[9] and

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

Additionally, with the exception of Arizona's ban, the voter initiative state bans provide that federal law will control in the case of any state-federal law conflict. These so-called "severability clauses" note that if a provision of the ban, or a certain application of the provision, is found to run afoul of federal law, the remaining provisions of the state ban remain in force. Prior to 2019 – apart from cases holding that the bans violated the 14th Amendment's Equal Protection Clause by altering the political structure for minorities to seek changes in the law (which cases have been overruled, see Appendix B)—no court or state attorney general reviewing the bans has found that they violate or conflict with federal law. Legal opinions in California and Michigan have cited to the state bans' severability clauses to find that the state bans do not violate federal law.[10] Thus, to date, no provision of these state policies has been

[8] For example, Connerly led an unsuccessful campaign to get an initiative on the 2000 ballot in Florida. Rick Bragg, *Affirmative Action Ban Meets a Wall in Florida*, N.Y. TIMES (June 7, 1999), https://www.nytimes.com/1999/06/07/us/affirmative-action-ban-meets-a-wall-in-florida.html. Governor Jeb Bush instead adopted his Executive Order in 1999. Fla. Exec. Order No. 99-281 (1999). Connerly first became involved in this initiative in his early tenure on the University of California board of regents, when he proposed abolishing UC's raced-based programs, which passed in 1996.

[9] Bona fide sex-based qualifications would include, for example, different medical treatment. *See, e.g.*, C.A. CONST. art. I, § 31 ("Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."); R.C.W. 49.60.400(4) (Wash.1998) ("This section does not affect any otherwise lawful classification that: [i]s based on sex and is necessary for sexual privacy or medical or psychological treatment; or [i]s necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or [p]rovides for separate athletic teams for each sex.").

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

stricken and the provisions of the bans remain in effect as they originally were enacted.

Notably, none of the state bans define "discriminate" or "preferential treatment." The meaning of those terms instead has come from judicial and attorneys general opinions in California, Washington, and Michigan. The Washington initiative I-1000, which sought to revise its statute RCW 49.60.400 in order to authorize affirmative action (subject to limitations), included a definition of forbidden "preferential treatment." This phrase was defined as the act of using race, sex, color, ethnicity or other protected categories "as the sole qualifying factor to select a less qualified candidate over a more qualified candidate for a public education, public employment, or public contracting opportunity."[11] However, when the voters of Washington narrowly rejected the I-1000 statute by a 1% difference of less than 20,000 votes in an election of nearly 2 million voters, and reimposed the 1998 ban on affirmative action in public education, employment, and contracting, these definitions were repealed with the statute.[12]

Like the court in *Hi-Voltage*, the Michigan Attorney General relied on the state initiative's severability clause to find that the state ban did not violate federal law. *See* Gen. Op. No. 7202, n.20 (2007) (noting that "Section 26 also specifies that federal law or the federal Constitution prevails over any part of [the state ban] in conflict with those laws"). Federal courts interpreting the Michigan ban relied on its funding provision (the clause exempting from prohibition actions that are necessary to maintain eligibility for federal funds) as a basis for finding the initiative did not violate federal law. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 251-52 (6th Cir. 2006) ("Proposal 2 eliminates any conflict between it and federal-funding statutes like Title VI [by stating that it] 'does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state'"); *Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan*, 539 F. Supp. 2d 924, 958-59 (E.D. Mich. 2008). A Sixth Circuit decision in 2011 overturned these opinions on other grounds, holding that the Michigan ban violated the Equal Protection Clause of the Fourteenth Amendment because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities." *Coalition to Defend Affirmative Action v. Brown*, 2011 WL 2600665 (6th Cir. July 1, 2011). However, in the *Schuette* case, *supra*, footnote 5, the Supreme Court reversed the Sixth Circuit and upheld the constitutionality of the Michigan ban.

[11]Wash. Initiative 1000, Washington State Diversity, Equity, and Inclusion Act §11 (passed House and Senate and signed April 2019; defeated by Referendum 88 in Nov. 2019(was to be codified at RCW 49.60.60).

[12] Wash. Sec. of State, *Nov. 6, 2019 General Election Results, Referendum Measure No. 88* (2019), https://results.vote.wa.gov/results/20191105/State-Measures-Referendum-Measure-No-88.html.

Overview of Initiatives Prohibiting Preferences Based on Race, Ethnicity, and Sex in Higher Education[13]									
	Arizona 2010	***Nebraska 2008***	***Michigan 2006***	***Washington 1998[14]***	***California 1996***	***Florida 1999***	***New Hampshire 2011***	***Oklahoma 2012***	***Idaho 2020***
Action resulting in Ban	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Voter ballot initiative	Regulation (and Executive Order)	State statute	Voter ballot initiative	State statute
Percent of voters approving initiative	60%	58%	5%	58% (50.4% in 2019 vote)	54%	NA	NA	59%	NA
Type of action resulting in Ban	State constitution	State constitution	State constitution	State statute	State constitution	Regulation	State statute	State constitution	State statute
Applies to all operations in public institutions of higher education	✓	✓	✓	✓	✓	✓	✓	✓	✓

[13] Chart adapted from Coleman et al., *From Federal Law to State Voter Initiatives*, *supra* note 4.

[14] Washington's voter referendum was significantly revised by subsequent state legislation I-1000 that authorized affirmative action, subject to limitations, but the 1998 law was reimposed by another voter referendum on November 5, 2019.

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

California Proposition 209:

was the first voter initiative to restrict governmental action based on race, ethnicity, and sex. Approved in **November 1996** by California voters,[15] Proposition 209 amended the California Constitution to prohibit the state and its subdivisions from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, or public contracting."[16] The constitutional amendment was implemented by fall 1998, following an unsuccessful federal court challenge.[17] It includes an exemption for actions that are necessary to maintain eligibility for federal funds.[18]

In January 2019 a repeal of Proposition 209 was introduced[19] in the California Assembly, which would not only have repealed Article I, Section 31 of the California Constitution, but also included a lengthy statement of legislative findings. California Proposition 16, to amend the state constitution by repealing Section 31 of Article I which had implemented Proposition 209's ban, was on the ballot on November 3, 2020. The voters rejected the repeal (56% to 44%) and the ban remains in effect.

Washington I-200:

was approved in **November 1998**, and resulted in the enactment of a statute prohibiting the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.[20] Although largely modeled after California Proposition 209, Washington's initiative was enacted into law as a statute, rather than as a constitutional amendment. Consequently, it was subject to, and had to be interpreted under, the state constitution's provisions regarding education.

The Washington statute includes an exemption for actions that are necessary to maintain eligibility for federal funds. It also contains an additional subsection (unique among other

[15] California Secretary of State, *Approval Percentages Of Initiatives Voted Into Law* 1914-2016, CAL. SEC. OF STATE. (2016) https://elections.cdn.sos.ca.gov/ballot-measures/pdf/approval-percentages-initiatives.pdf.

[16] Cal. Proposition 209, Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (enacted 1996) https://lao.ca.gov/ballot/1996/prop209_11_1996.html.

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

[18] "The measure provides exceptions to the ban on preferential treatment when necessary for any of the following reasons: To keep the state or local governments eligible to receive money from the federal government." Cal. Proposition 209, Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (enacted 1996).

[19] As of 7/15/21, the California state website reflects that on 6/25/2020, Const. Am No. 5 was "Chaptered by Secretary of State - Res. Chapter 23, Statutes of 2020." Found at Bill Text - ACA-5 Government preferences.

[20] Wash. Sec. of State, *Election Search Results, November 1998 General Election* (retrieved June 29, 2020) https://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=5&p=&p2=&y=.

state law bans) explicitly stating that it does not affect non-discriminatory actions.[21] The Washington Supreme Court, noting this difference, found that "the language of I-200 is strikingly different from the language of [California's] Proposition 209."[22] This difference, coupled with ballot language in the Washington voter pamphlet that advised voters that "Initiative 200 does not end all affirmative action programs," led the state Supreme Court to a less restrictive interpretation of the state voter initiative (when compared to the California courts' construction of Proposition 209).[23]

Washington State's I-200 legislation was significantly revised in state legislation I-1000, which was scheduled to take effect in July 2019. Among other things, I-1000 authorized preferences based on race, sex, ethnicity (and other listed, protected categories) as long as there was no quota and race, sex, or ethnicity, etc. was not the sole qualifying factor to select a lesser qualified candidate for a public education, public contract, or public employment opportunity. However, the voters of Washington adopted another referendum (Referendum 88) on November 5, 2019, that blocked I-1000 from taking effect and resurrected I-200. Of voters, 50.56% voted against the referendum, which had the effect of repealing I-1000, which never took effect, and reimposing I-200.[24] By comparison, 58.22% of Washington's voters had adopted I-200 in 1998.[25] The significant difference in Washington voters' support of the prohibition of any preferences based on race or sex, as had been provided in I-1000 – a change from 58% in 1998 to 50.4% in 2019 -- suggests the opportunity to educate the public on the fallacy of "preferences" and misuse of "affirmative action" in view of longstanding systemic inequities affecting people of color and women; the meaning of merit when conferring education, employment, and contracting opportunities; and the educational benefits of diversity for everyone.

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

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

[23] *Id.*

[24] Wash. Sec. of State, *Nov. 6, 2019 General Election Results, Referendum Measure No. 88* (2019) https://results.vote.wa.gov/results/20191105/State-Measures-Referendum-Measure-No-88.html.

[25] Wash. Sec. of State, *Proposed Initiatives to the Legislature - 1997*, (last visited June 26, 2020) https://www.sos.wa.gov/elections/initiatives/legislature.aspx?y=1997.

***The One Florida Initiative*:**

was adopted in **November 1999**, when Florida Governor Jeb Bush issued Executive Order No. 99-281, requesting that the then-Florida Board of Regents, which oversaw the state higher education system, implement a policy prohibiting the use of race, sex, creed

(including religion), color, and national origin in state university admissions.[26] In a separate section, the Executive Order prohibits the use of such considerations in Florida executive

agency employment and contracting.[27] The Executive Order does not include an exemption for actions that are necessary to maintain eligibility for federal funds.

In early 2000, regulations were added to Florida's administrative code pursuant to the Executive Order. The Board of Regents has since been abolished, with oversight for state universities transferred to a Board of Governors,[28] and these policies continue in the form of the ***Board of Governors Regulations*** and any university board of trustees regulation. The Board of Governors regulation now mandates that, for state universities, "admissions criteria must not include preferences in the admission process for applicants on the basis of race, color, national origin, disability, or sex."[29]

State colleges (previously community colleges) are overseen by a separate authority, the State Board of Education. They are considered political subdivisions of the state, responsible for establishing admissions, personnel, and contracting policies, within parameters established by the Board of Education.[30] The State Board of Education's regulation provides that colleges "shall not base admissions decisions on race, sex, national origin, marital status, or handicap….If it has been empirically demonstrated that a selection criterion which has an adverse impact is predictive of success…and that there has been a reasonable search for equally valid criteria which do not have a disproportionate adverse impact, or if the criterion is required by law, then the criterion shall not be considered discriminatory."[31]

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[26] Fla. Exec. Order No. 99-281 (1999).

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

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

[29] Fla. Bd. of Governors Reg. 6.001 (1970).

[30] *See* FLA. ADMIN. CODE, ch. 6A-14; 6A-19.002 (1984). State colleges are distinct political subdivisions (like municipalities) and are not state agencies that report to the Governor.

[31] *See* FLA. ADMIN. CODE, ch. 6A-19.002 (1984).

> Thus, Florida's prohibition relating to state universities is housed in administrative regulations[32] governing admissions decisions at Florida universities.[33] The Board of Trustees at each university can craft its own admissions policy, so long as it conforms to the Board of Governors admissions regulation prohibiting race, ethnicity, and sex preferences. The Board of Governors regulation allows lawful outreach, recruitment and other inclusive strategies that are needed to achieve a university's educational mission.[34]

Michigan Proposal 2:

> was approved in **November 2006**.[35] In the wake of the U.S. Supreme Court decisions involving the University of Michigan, which affirmed the lawfulness of the limited consideration of race and ethnicity in higher education admissions,[36] Proposal 2 amended the Michigan Constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting. The Michigan ban includes an exemption for actions that are necessary to maintain eligibility

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

[33] A separate Board of Governors regulation prohibits discrimination in other aspects of a state university's enterprise. Fla. Bd. of Governors Reg. 2.003(1)(a) (2010). Although state universities are not among the state agencies that constitutionally report to the Governor, the One Florida Executive Order influences the application of the Board of Governors nondiscrimination regulation and a general nondiscrimination statute in Florida.

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

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

The Executive Order influences the application of this regulation and the statute, as well as the regulations adopted by Boards of Trustees, which are authorized by the Board of Governors to create and administer their institutions' admissions, financial aid and recruitment programs and policies, personnel systems and policies, and procurement policies – within applicable parameters including those established in the Board of Governors' admissions and non-discrimination regulations. *See supra* note 3; Fla. Bd. of Governors Regs. 2.003(1)(a) and (b).

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

[35] Mich. Sec. of State, *2006 Michigan Election Results* (retrieved July 8, 2020) https://mielections.us/election/results/06GEN/ (confirming that 57.92% of voters voted yes and 42.08% voted no on "State Proposal - 06-2: Constitutional Amendment: Ban Affirmative Action Programs").

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

for federal funds.[37] Initially, implementation of the amendment as it applied to higher education was enjoined by a federal district court. The Sixth Circuit lifted the injunction, and Proposal 2 took effect on December 29, 2006. However, on July 1, 2011, the Sixth Circuit held that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities" in their participation in the process.[38] However, the Supreme Court reversed that decision and upheld the constitutionality of the ban in Proposal 2 in the *Schuette* case, *supra*, note 5.

Nebraska Initiative 424:

was approved in **November 2008**.[39] It amended the state constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting. It includes an exemption for actions that are necessary to maintain eligibility for federal funds.[40]

Arizona Proposition 107:

was approved in **November 2010**.[41] It amended the state constitution to prohibit the use of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting. It includes an exemption for actions that are necessary to maintain eligibility for federal funds.[42]

New Hampshire House Bill 623:

was passed by the state legislature in **June 2011**, and took effect January 1, 2012.[43] The statute prohibits "preferential treatment or discrimination… based on race, sex, sexual orientation, national origin, religion, or religious beliefs" in the operation of public employment, public education, and public contracting.[44] In sections specific to public

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

[38] *Coal. to Defend Affirmative Action et al. v. Regents of the Univ. of Mich. et al.*, 2011 WL 2600665 (6th Cir., July 1, 2011). *See* Section III. *infra* for a discussion of cases addressing the constitutionality of the state bans.

[39] Neb. Sec. of State, *Nov. 4, Official Results of Nebraska General Election - November 4, 2008* (2008) https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf.

[40] Neb. Sec. of State, *Informational Pamphlet, Initiative Measure #424 Appearing on the 2008 General Election Ballot* (2008) https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/pamphlet%20424.pdf.

[41] Ariz. Sec. of State, *State of Arizona Official Canvass of 2010 General Election, Nov. 2, 2010* (2010) https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf.

[42] Ariz. H.C.R. 2019 (passed 2009) https://apps.azsos.gov/election/2010/general/ballotmeasuretext/HCR%202019.pdf.

[43] N.H. CONST. art.44, Pt.II (amendment passed 2012 by HB623) https://legiscan.com/NH/text/HB623/2011.

[44] *Id. See* HB0623: http://www.gencourt.state.nh.us/legislation/2011/HB0623.html

colleges, universities, and community colleges, the law expressly lists the following activities as falling under its prohibition: "recruiting, hiring, promotion, or admission."[45]

The New Hampshire law provides exceptions for bona fide sex-based qualifications and for actions necessary to comply with court orders and consent decrees, but does not include an exemption for actions that are necessary to maintain eligibility for federal funds.[46]

Oklahoma State Constitution Article II, §36A:

was adopted by Oklahoma voters in November 2012.[47] It amended the state constitution to prohibit preferential treatment or discrimination based on race, sex, color, ethnicity, or national origin in the operation of public employment, public education, and public contracting. It includes an exemption for actions that are necessary to maintain eligibility for federal funds. [48]

Idaho House Bill 440, codified as Section 67-5909A of Chapter 59, Title 67 of the Idaho Code

was enacted by the Oklahoma legislature and signed into law by the governor in March 2020. It provides that the "state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment or public education." It includes exemptions for actions that are necessary to establish or maintain eligibility for federal funds, for existing court orders, and for bona fide qualifications based on sex.[49]

B. Amplifying the Meaning of State Law Bans: Court and Attorney General Opinions

Informed by a body of interpretative opinions issued by courts of law and state attorneys general, the scope and meaning of each state prohibition has evolved. Although many of the states with prohibitions lack substantive case law and legal opinions from which meaningful state-specific guidance can be found, significant case law in California, Washington, and Michigan[50] provides important indications about the scope and substance of these laws— as do a number of federal court rulings in similar contexts. Although the opinions are state-specific, the similarities among the bans, described above, raise the prospect that rulings in one state, while not binding courts in other states, may carry significant weight in states whose bans include similar provisions.

Courts in Washington and Michigan have in several instances found California case law to be

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[45] *Id.*

[46] *Id.*

[47] O.K. CONST. art. II §36A https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=468407.

[48] *Id*. *See* art. II § 36A (E) "E. Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state."

[49] Idaho Official Code, §67-5909A .

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

persuasive authority, given the similar provisions of state law that were based on the 1996 California voter initiative. For example, courts have looked to the early California cases to shed some light on what a reasonable voter would believe certain language meant when voting on the later initiatives in other states.[51]

Read as a whole, a number of general principles derived from state laws and the evolving case law and state attorney general opinions can provide guidance on the meaning of bans and proposed bans in a number of states. These state law principles could also influence courts on the meaning of "neutral" strategies when applying federal law, although court decisions interpreting state bans have not been cited to date in the main federal opinions. With respect to public education institutions, at least:

1. ***Policies that express commitments to diversity, but do not consider the race, ethnicity, and sex of individuals in deciding who does and does not receive an opportunity or benefit, are likely permissible. These commitments do not create actual preferences.***

   An institution's stated commitment to student and/or faculty diversity, reflecting general institutional goals and objectives rather than directing any specific action, is unlikely to violate the state bans.[52]

2. ***Data collection efforts that involve the identification, disaggregation and analysis of student and faculty racial, ethnic, and sex/gender demographics are likely permissible.***

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

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

[52] *See Los Angeles County Prof'l Peace Officers Ass'n v. County of Los Angeles*, 2002 Cal. App. Unpub. LEXIS 596 (2002) (finding that county agency's written policy noting a desire for a diverse workforce did not establish a sex or race preference in violation of Proposition 209); *American Civil Rights Foundation v. Berkeley Unified School District*, 172 Cal. App.4th 207 (2009) (It was not a violation of Proposition 209 that "[t]he avowed purpose of the plan" for school assignment that uses data on residential neighborhood demographics was to "promote the values of socioeconomic and racial diversity," and was founded upon a belief "that diversity in our student population enriches the education experiences of students; advances educational and occupational aspirations; enhances critical thinking skills; facilitates the equitable distribution of resources; reduces, prevents or eliminates the effects of racial and social isolation; encourages positive relationships across racial and economic lines by breaking the cycle of racial hostility to foster a community of tolerance and appreciation of students from varied and diverse backgrounds; and promotes participation in a pluralistic society.")

discrimination."[53] Another California appellate court found that data collection did not offend its state ban.[54] These data also are important for developing curricula and effective pedagogy to serve all students' educational needs and to prepare students for civic, workforce, leadership and other contributions after graduation.

3. ***Recruitment and outreach policies that stem from efforts to enhance the race, ethnicity, and sex compositions of the pool from which students or faculty are admitted or hired, but that do not consider such identity status in winnowing the pool or making decisions on who will be interviewed, advanced or selected in the process, are often deemed inclusive and therefore not subject to prohibitions against discrimination. However, it is critical that such policies do not involve separate selection processes or the conferral of consequential information or other measurable benefits to individuals of some races, ethnicities, or sex and not others. Distinctions between inclusive and exclusive recruitment and outreach lead to different court decisions.***

   Against the backdrop of federal and state laws, inclusive outreach and recruitment of students and faculty members are often not deemed discriminatory and therefore not subject to strict or heightened scrutiny standards. Inclusive outreach and recruitment generally occur when: there is no significant benefit conferred or withheld based on individuals' race, ethnicity, or sex; expenditure of resources on outreach and recruitment targeted to such identities does not result in insufficient communication of opportunities to others; both general and targeted communications ensure effective communication of the same consequential information to all audiences, albeit via some tailored design; and such identity status is not considered in winnowing the pool, determining what process applies, or making decisions on who is interviewed, advanced, or selected in the process.[55]

   In contrast, the California Supreme Court ruled that its voter ban precludes certain mandated targeted outreach and recruitment by public entities that result in differential benefits being provided on the basis of race, ethnicity, and sex. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court found that a municipality's requirement that contractors bidding on city projects utilize a specific percentage of minority and women subcontractors or document outreach efforts to include such subcontractors ("an outreach or a participation component") violated Proposition 209.[56] The court held that the program violated Proposition 209 because the outreach component

[53] *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001); *see also* Cali. Attorney Gen. Op. No. 98-304, 81 Ops. Cal. Atty. Gen. 233 (1998) (finding that state-maintained registry of women and minority representation on corporate boards of directors did not violate Proposition 209).- California community college regulations expressly authorize collection of data concerning the participation of contractors, including minority business enterprises, women business enterprises, and disabled veterans business enterprises in the award of district contracts to verify that artificial barriers to participation on the basis of race, gender, or disability do not exist. 5 CCR SS9500.

[54] *American Civil Rights Foundation v. Berkeley Unified School District*, 172 Cal. App.4th 207 (2009) (A California state appellate court upheld a lower court's ruling that a school assignment plan that used residential neighborhood demographics- including percentage of students of color which was derived from a multi-year pool of student data collected by the School District-did not violate CA's state law ban codified at Cal. Const. Art. 1, sec. 31(a)).

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

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

required subcontractors to treat minority and women subcontractors more advantageously than others by providing them with notice of bidding opportunities and soliciting their participation –actions not required for other subcontractors.[57] The California Supreme Court in *Hi-Voltage* rejected a government-mandated outreach program targeted directly to subcontractors of color and women subcontractors that provided members of these groups consequential information and a separate advantageous process that was not provided to others.

Strong arguments would support the position that inclusive outreach would not violate state law prohibitions. In fact, California legislation applying Proposition 209 to public employment includes findings that Proposition 209 does not prevent government agencies from engaging in inclusive public sector outreach and recruitment programs that, as a component of general recruitment, may include, but not be limited to, focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer. Calif. Govt. Code §7400(a)(1)(2017). Public employment includes employment of faculty at a public institution of higher education. The statute gives examples of types of allowable job announcements for public employment opportunities, including general circulation newspapers, radio and television; local and regional community newspapers, newspapers and radio and television stations that provide information in languages other than English and whose primary audience is residents of minority and low income communities or women; recruitment booths at job fairs or conferences oriented to both the general market and the economically disadvantaged and at events drawing significant participation of minorities or women. *Id*., §7400(e). The statute includes parallel provisions for outreach and recruitment related to public contracting. The statute does not include parallel legislative findings relating to the admission of or other benefits for students at public educational institutions. However, such findings logically would apply to public education since the same provisions barring preferences in public employment and public contracting in Proposition 209 bar preferences in public education.[58]

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[57] The court stated, "The relevant constitutional consideration is that [contractors] are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of [Proposition 209]." *Id.* at562. The municipality also required contractors to negotiate with female and minority subcontractors for their services and justify rejection of their bids, action not required for other subcontractors. *Id.* at 565.

[58] *See also* University of California Office of the General Counsel, *Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209*, (July 2015) (addressing the permissibility of outreach and recruitment activities under Proposition 209). These guidelines provide that as part of a comprehensive program of outreach, the University may target or make special efforts to reach particular groups based on race, ethnicity, or sex, where the program's benefits are available broadly to other groups, and the special efforts are needed to reach the targeted group effectively and therefore to "level the informational playing field." The Guidelines give as an example that some campuses may work with community organizations serving particular groups to share information about the application process and attract applications from that population. The Guidelines also endorse targeting outreach to potential applicants based on a wide range of non-racial characteristics that may increase the diversity of the applicant pool, including residency in certain geographic areas; attendance at particular high schools; participation in community-based organizations with a specific racial/ethnic focus; socio-economic disadvantage; residency in public housing; single-parent home; farm worker parents; and former foster children. A guide on Proposition 209 published by California State University similarly provides that its schools may target demographic groups with low college attainment, but may not target groups solely by the race, sex, color, or ethnicity of students, and no preferences are granted based on these factors. It provides as an example that presentations at particular churches in targeted neighborhoods may reach a largely African-American community but all attendees at the church, of whatever race or ethnicity, receive the information. (Office of the General Counsel, the California State University, *Proposition 209 Handbook*, 2016).

4. ***Policies that favor race-, ethnicity- and sex- neutral attributes or experience of individuals may be permissible if they are authentically important to the institution, even if they also increase the racial, ethnic or sex diversity of the student body or faculty as a welcome ancillary matter.***

The state bans permit programs that do not discriminate based on an individual's race, sex, color, ethnicity, or national origin and that serve authentic institutional purposes other than increasing the racial, ethnic or sex compositional diversity.[59] For example, student policies that consider as a plus factor in decision-making "neutral" (in court parlance) personal characteristics such as childhood socioeconomic or other family experience (e.g., growing up in a single parent household, being a first-generation college student, experiencing homelessness, etc.), or strong academic performance relative to peers at under-resourced schools, should not run afoul of the state bans, if providing access to education for and including in the student body individuals with such experiences is important to the institution's mission. That should be the case even if such criteria also result in an increase in racial and ethnic diversity. Similarly, employment policies that value bilingual or multilingual skills, individuals with meaningful experience living, studying or working in particular geographic areas, or individuals of any race or sex who have a record of including a broad diversity of people in their teaching, research and other work activities should not run afoul of the state bans if these qualities reflect the institution's needs for employees and no individual's race, ethnicity or sex is considered in conferring opportunities or benefits.

The fact that certain neutral criteria may result in an increase in (or benefit to) individuals of certain races, ethnicities or sex, more than others, should not cause the criteria to be characterized as prohibited preferences under the state bans (or as outside of neutral parameters, triggering strict or heightened scrutiny standards under federal law), so long as two conditions are met. First, the neutral strategies are not being pursued as proxies for race, ethnicity, or sex, but rather for authentic institutional needs. Second, there are no alternative neutral criteria that would achieve the institution's educational or employment needs with less disparate effect on individuals of some races, ethnicities, or sex.[60] When neutral criteria are used for authentic aims, they are rarely replaceable by other neutral

[59] *See, e.g.*, California Ballot Pamphlet (Argument in Favor of Proposition 209) ("Proposition 209…allows any program that does not discriminate, or prefer, because of race or sex."); Rebuttal to Argument Against Proposition 209 ("Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED."). *See, also* Michigan Attorney General Opinion No. 7308, 2018 WL 6982363, holding that the State of Michigan's Housing Development Authority could direct contractors and subcontractors to engage in affirmative action, so long as those activities do not result in the preferential treatment of individuals or groups based on race, sex, color, ethnicity, or national origin. The opinion specifically endorsed outreach efforts not predicated on an impermissible classification and the provision of incentives to employ individuals who demonstrate disadvantage not dependent on race or sex.

[60] *E.g.*, Cal. Sec. of State, California Ballot Pamphlet, *Rebuttal to Argument Against Proposition 209*, (retrieved June 29, 2020) http://vigarchive.sos.ca.gov/1996/general/pamphlet/209.htm ("Note that Proposition 209 doesn't prohibit consideration of economic disadvantage…The state must remain free to help the economically disadvantaged, but not on the basis of race or sex to continue."). *See also Hernandez v. N.Y.*, 500 U.S. 352, 375 (1991) (holding that it is not national origin discrimination to classify based on whether one knows a particular language); *Pierce v. Regents of the University of California,* 2016 WL 892015 (not officially published, Calif. Court of Appeal, 2016)(holding that UCLA Medical School requirement that applicants have proficiency in the Spanish language was not an unlawful racial or ethnic preference and was not a proxy for race or ethnicity subject to strict scrutiny).

criteria because the aim is so specific. (E.g. if a scholar in African American history or students with experience of homelessness are sought, it is hard to imagine other criteria that would serve the need.) Public institutions should be able to pursue authentic mission-driven policies that have not been adopted with the substantial purpose of preferring individuals of certain races, ethnicities, or sex over others.[61]

5. Policies with an aim of increasing the racial, ethnic, and sex compositional diversity of the student body or faculty, but which do not consider any individual's race, ethnicity, or sex in deciding who receives (or does not receive) a benefit may be permissible. The law is not as well developed on this point, though.

In California, an appellate court upheld a school policy that considered a composite score based on the average income, adult education level, and racial diversity of neighborhoods as one element for assigning students to schools. Because the policy dissociated the consideration of race from any individual student, the court found that it did not violate Proposition 209.[62] The U.S. Supreme Court has noted in dicta that such criteria may not be considered to be "neutral" under federal law when their purpose is to increase compositional diversity. The Court has not ruled (one way or the other) on the status of such criteria or whether federal strict or heightened scrutiny standards would apply when an individual's race, ethnicity or sex is not considered as a preference in conferring a benefit.[63] While there is a logical similarity, courts have not expressly addressed whether there is a difference between "neutral" under federal law and the absence of a "preference" under the state bans. However, a Michigan Attorney General Opinion[64] and a decision of the Court of Appeal of the State of California implicitly equate race or sex neutral policies to an absence of preferences prohibited under the state law bans. The Michigan AG Opinion, for example, indicated that policies to pursue equal opportunity

[61] *Am. Civ. Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009). Note that Supreme Court parameters on school assignment still need to be considered; the Court has not assessed the constitutionality of an assignment policy that considers racial demographic data. *See Parents Involved*, 551 U.S. 701 (examining and invalidating two race-conscious student assignment plans that considered individual students' race on the grounds that the plans in question were not narrowly tailored and did not serve a compelling interest. *See Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 264-68 (1997) (finding where a facially neutral government action produces a racially disparate impact, without evidence of discriminatory intent, equal protection is not offended and strict scrutiny does not apply. Considerations for determining discriminatory intent include: historical background and legislative history for the decision showing an invidious purpose; process, action and substantive anomalies in the decision, particularly if they led to a decision that is different than what would have been expected had norms been followed; and contemporaneous reports or statements of those involved in the decision-making process); *Columbus Bd. Of Educ. v. Penick*, 443 U.S. 449, 464 (1979) (stating "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation…even if there is a foreseeable disparate racial impact, if the decision is made 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group"); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (finding a hiring policy giving veterans a preference had an overwhelmingly positive impact on men and adverse impact on women, due to well-known demographics of the military. However, the policy was not subject to strict scrutiny and reflected a legitimate purpose.); *Dayton Bd. Of Ed. v. Brinkman*, 443 U.S. 526, 536 n. 9 (1979) (holding awareness of a racially disparate effect, while relevant, is not dispositive of intent).

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

[63] *Fisher II*, 136 S.Ct. at 2213 (2016); *Fisher I* 570 U.S. at, 335 (2013) (Ginsburg, dissenting) *Parents Involved in Community Schools v. Seattle School District et al.,* 551 U.S. 701, 788-789 (2007) (Kennedy, concurring)

[64] Michigan AG Opinion No. 7308, 2018 WL 6982363.

through race- and sex-neutral means such as outreach and dissemination of information on opportunities, as well as employment incentives for individuals who demonstrate economic disadvantage, did not result in preferential treatment of individuals based on race, sex, national origin, or ethnicity.

6. The utilization or continuation of a race-, ethnicity-, or sex-conscious policy on the mere assumption that a loss of federal funding would occur in its absence (as opposed to an express provision dictating loss of funding in the circumstances) is likely not permissible.

Education institutions that attempt to justify a race-, ethnicity-, or sex-conscious policy or program by arguing that its elimination will result in a loss of federal funding must likely do more than merely cite to the federal funding provision in their state bans to justify the continuation of such a policy or program. There likely must be an express federal statutory or contractual provision imposing a loss of federal support, or a court decision interpreting a federal statute or contract to impose such a result. For example, a California court examining Proposition 209 found that, in order to sustain a race-, ethnicity-, or sex-conscious policy, public entities must show not only that they considered race-neutral alternatives, but also that those alternatives were inadequate and would have resulted in a loss of federal funds.[65]

Federal statutes do not generally require race-, ethnicity-, or sex-conscious means to be used in the pursuit of diversity aims and impose rigorous conditions on voluntary race, ethnicity-, and sex- conscious policies. However, there may be circumstances in which federally prohibited discrimination can only be remedied through such identity-conscious action (because evidence demonstrates that neutral means are inadequate) and there is an explicit federal contract, consent agreement or statutory provision that dictates the loss of federal funds. An example of evidence of the inadequacy of neutral policies would be their robust use over some time, without sufficient effect. While not yet addressed by the courts, other evidence, which generally should be appropriate in non-ban states to justify limited race-, ethnicity-, or sex- conscious policies under federal law, and may be adequate to justify such policies under state law in some ban states, is robust modeling of the effects of neutral policies. That involves evaluating data from a prior selection process—or from a hypothetical but representative selection process—to demonstrate the effects of using neutral strategies alone or in combination with race-, ethnicity, or sex- conscious strategies.

In the ban states, it is unclear whether demonstrating that neutral policies alone are insufficient is enough, where a federal statute authorizes (but does not mandate) revocation of federal funding or contracts as a remedy for unresolved discrimination. Title VI (prohibiting racial and ethnic discrimination against students), Title IX (prohibiting sex discrimination against students, faculty and staff in education programs) and the Office of Federal Contract Compliance regulations (prohibiting discrimination and requiring good faith efforts to remedy underutilization of employees on the basis of race, ethnicity or sex by federal contractors) provide that authority, without a mandate.[66]

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

[66] Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d(1) and 34 CFR Part 108 (with respect to Title VI and the Department of Education); Title IX of the Education Amendments of 1972, 20 U.S.C. 1682 and 34 CFR 106.71, with respect to Title IX and the Department of Education; and with respect to OFCCP's enforcement authorities, Executive Order 11246 § 209, as amended, and 41 CFR §§60.1.26-.28 and 60.1.31.

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

Private groups that work to advance diversity-related goals at public institutions of higher education are likely excepted from the state law bans, but only if there is sufficient distance between their race-, ethnicity- or sex- conscious efforts and any public institution's diversity efforts. Strong arguments subjecting private actors to the prohibitions of state laws exist where, for example: [a] a public institution assists a private actor in administering a race-, ethnicity-, or sex-conscious program (for example, the university helps to design or administer, or oversees distribution of funds from, a private scholarship program) – thereby creating a "close nexus between the State and the challenged action,";[67] or [b] the private actor essentially acts as an agent of the public institution or performs a function generally considered the responsibility of the public institution.[68] However, merely making information about a private program or funding available to students or faculty, to the same extent and in the same manner as information is made available about many other private opportunities or benefits, should not unduly entangle the public institution with the private activity.[69]

The array of permissible and impermissible diversity-enhancing actions under current state law bans in the affected states is synthesized in the chart of court and state attorneys general opinions below:

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

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

[69] Note, however, that federal law may still apply to a private organization or institution, whether or not it receives federal funds. Section 1985(3) prohibits contracting to violate civil rights. See generally **Diversity and the Law Handbook** at https://www.aaas.org/programs/diversity-and-law.

Court and Attorney General Interpretations of State Law Bans

	Permissible Diversity-Related Policies and Programs	Impermissible Diversity-Related Policies and Programs
Data Collection	• Registry of female and minority candidates available to serve on corporate boards of directors.[70] • Collection and reporting of data concerning participation of women and minorities in government programs.[71]	
Public Contracting	• Hiring preferences based on tribal affiliation for specific contracts performed on Indian land.[72] o *Contracts formed on a government-to-government basis were found to draw* political *rather than* racial *classifications.*	• Municipality goal that contractors 1) use specific percentage of minority and female subcontractors and 2) provide advantages in a) notice of bidding opportunities, b) solicitation of participation, and c) negotiations with minority and female subcontractors.[73] • Preferences in the form of specific goals, timetables, and other "schemes" granting race and sex preferences in state contracting.[74] • Race- or sex-based bid discounts and participation goals in public contracting program, without a showing that race-neutral measures were inadequate and would result in loss of federal funds.[75]
K-12 Student Assignment	• Assignment plan's consideration of racial composition of a student's neighborhood, among other elements, without considering any individual student's race.[76] • Racial and ethnic composition considered among many factors in review of attendance boundaries.[77] • Race-based assignment in compliance with prior-existing integration court order.[78]	• "One-in, one-out" race-based transfer policy between high schools barring white students from transferring from "ethnically isolated" school until another white student transferred in, and barring non- whites from transferring in until another non-white student transferred

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

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

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

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

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

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

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

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

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

	Permissible Diversity-Related Policies and Programs	Impermissible Diversity-Related Policies and Programs
	• Carefully controlled racial balance at a "laboratory" school."[79] *School existing for the primary purpose of scientific research, charging tuition, and not administered by a school district found not to be "in the operation of public education."* • Race-conscious tiebreaker limiting equally-qualified minorities and non-minorities alike.[80] • Statute's deference to the obligation under Washington constitution to provide integrated learning environment permitted a "nondiscriminatory" race-conscious tiebreaker, but did not meet strict scrutiny standards under the U.S. Constitution's Equal Protection Clause so could not be sustained.[81]	out.[82] • Race-conscious policy that advances a *less*-qualified over a *more*- qualified applicant.[83] Race-based cap limiting minority enrollment to no more than 35% at each district school.[84]
Public Employment and Promotion	• Generalized diversity policy not mandating preferential treatment, quotas, or set asides.[85] • Policies to ensure non-discrimination and equal opportunity through race- and sex-neutral means, such as outreach and information on employment opportunities and incentives to hire economically disadvantaged individuals.[86]	• Exemption from merit requirement for female and minority candidates for promotion, allowing them to be considered without having placed in the top three eligible candidates, as required of all other applicants.[87]

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

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

[81] *Parents Involved in Community Schools v Seattle School District No. 1*, 127 S.Ct. 2738 (2007).

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

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

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

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

[86] Michigan Attorney General Opinion No. 7308, 2018 WL 6982363.

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

III. The Constitutionality of State Voter Bans

Federal law is supreme in the U.S. system of federalism, as most state bans expressly recognize. Federal law does not, as a general proposition, preclude states from supplementing or imposing more restrictions than apply under federal laws that *permit* (but do not require) certain action. However, federal law also embodies a number of mandatory principles with which states must comply.

In a now-governing opinion, the U.S. Supreme Court ultimately resolved the conflict between the decisions of two first-level federal appeals courts (called "circuit courts of appeal") regarding the constitutionality of the state voter bans.

In 2014, the U.S. Supreme Court upheld Michigan's ban, which had been imposed by state constitutional amendment, in *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN),* 572 U.S. 291 (2014). The Supreme Court rejected the "political process" doctrine as grounds to invalidate Michigan's ban, and held that Michigan's ban did not violate the U.S. Constitution's Equal Protection Clause. In so doing, the Supreme Court rejected the argument that state governments lack authority to use political processes to enact constitutional amendments that make it more difficult for certain minorities to achieve legislation that is in the state's interest. The Supreme Court distinguished its prior decisions on access to the political process as involving voter-initiated state actions that had the purpose, or at least the serious risk, of causing specific injuries to individuals based on their race. The Supreme Court reasoned that Michigan's ban did not inflict specific race-based, individual injury, opining:

"What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. . . .This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution . . .or in the Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."[88]

IV. Conclusion

Many of the contours of state law bans on so-called racial, ethnic and sex "preferences" have been evolving since 1996, with the most recent ban imposed in Idaho in 2020 and two recent attempts to repeal bans failing in Washington State in 2019 and California in 2020. Court and state attorneys general interpretations of the state law bans suggest principles that inform the application and effect of the bans, as well as guiding public institutions in those states on how best to advance diversity in the ban states. Prospectively, the avenue exists to expand the reach of voter bans, raising the question of what institutions might do to minimize that possibility. At least in part the answer lies in paying due attention to the court of public opinion by communicating effectively to many audiences about the mischaracterization of diversity aims and efforts as "preferences" and their universal benefits, equity and imperative. This wisdom applies as well to private institutions. All institutions of higher education—public and private, wherever located—also can learn from the experience of institutions in

[88] *See also Lot Maintenance of Oklahoma, Inc. v. Tulsa Metropolitan Utility Authority,* 16 F. Supp.3d 1316 (N.D. Okla., 2014) (referencing the section of the Oklahoma Constitution prohibiting the State of Oklahoma from granting preferential treatment in public contracting to "any individual or group on the basis of race, color, sex, ethnicity, or national origin." O.K.. CONST. art. II, §36A. The Court stated, "The Supreme Court has recently answered the question of 'whether . . . voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions' in the affirmative (citing the *Shuette* decision").

the ban states about neutral strategies of promise and ways of evaluating their necessity to achieve an institution's overall diversity mission.

APPENDIX A: TEXT OF STATE BANS

Arizona Constitution, Article II, § 36 (2010):

(A) This state shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(B) This section does not:

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

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

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

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

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

(E) This section is self-executing.

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

Added by Laws 2009, H.C.R. 2019, § 1, Prop. 107, approved election Nov. 2, 2010, eff. Dec. 14, 2010.

California Constitution, Article I, §31 (1996):

(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

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

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

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree

which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

(f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.

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

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

Sec. 31 added Nov. 5, 1996, by Prop. 209. Initiative measure

California Government Code §7400 (2017)

(a)(1) The Legislature finds and declares that subdivision (a) of Section 31 of Article I of the California Constitution prohibits state and local government agencies from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, ethnicity, or national origin in the operation of public employment, public education, and public contracting. The Legislature finds that this prohibition does not prevent governmental agencies from engaging in inclusive public sector outreach and recruitment programs that, as a component of general recruitment, may include but not be limited to focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer.

(2) The Legislature also finds and declares that increasing the number of businesses that participate in the bidding process in public contracting results in more vigorous competition, and thus assists state and local agencies in obtaining the desired quality of work at a lower cost.

(3) It is the intent of this section that all governmental agencies shall engage in general recruitment and outreach programs to all individuals, including persons who are economically disadvantaged.

(b) For purposes of this section, underrepresentation shall be determined by comparing the minority group or the number of women at the governmental agency with that group's representation in the current civilian labor force in the jurisdiction of the governmental agency.

(c) State government employment shall use current state civilian labor force data to implement this section.

(d) It is the intent of this section to allow public sector employers to conduct outreach efforts with a goal of supplementing word-of-mouth recruitment that should result in increasing diversity of the public sector workforce.

(e) The type of recruitment activities allowed would include, but not be limited to, placement of job announcements in the following media instruments:

(1) General circulation newspapers, general circulation publications, and general market radio and television stations, including electronic media.

(2) Local and regional community newspapers.

(3) Newspapers, publications, and radio and television stations that provide information in languages other than English and whose primary audience is residents of minority and low-income communities.

(4) Publications, including electronic media, that are distributed to the general market and to newspapers, publications, and to radio and television stations whose primary audience is comprised of minority groups or women.

(5) Recruitment booths at job fairs or conferences oriented to both the general market and the economically disadvantaged as well as those events drawing a significant participation by minorities or women.

Added by Stats. 2016, Ch. 870, Sec. 2. (SB 1442) Effective January 1, 2017.)

California Government Code, §7401 (2017)

(a) The Governor's Task Force on Diversity and Outreach, in its August 1, 2000 report, concluded that data on minority business participation is not currently available, and that lack of useful data on minority business participation in state contracting is an overarching issue to be addressed.

(b) In contracting for and procuring goods, services, information technology, construction, architecture, and engineering consulting, and other consulting services, state and local departments and agencies are authorized to engage in focused outreach activities in addition to general outreach, for purposes of increasing participation by California's small business sector and increasing diversity in the state's contracting and procurement activities.

(c) Outreach activities may include, but are not limited to, the following:

(1) Invitations to bid distributed by state and local departments and agencies to state and local small business and trade associations and chambers of commerce, including ethnic chambers of commerce and other business and professional associations, including professional minority, women, and disabled veteran-owned businesses and professional groups and associations, as appropriate.

(2) Publication of advertising concerning state and local contracting and procurement opportunities in trade papers and other publications focusing on small business enterprises, including publications and newspapers in languages other than English and those whose primary readership is minority, women, or disabled veteran-owned businesses.

(3) Outreach by small business advocates in each state and local government department or agency to state and local small business and trade associations and chambers of commerce, including ethnic chambers of commerce, and other business and professional associations, including professional minority, women, and disabled veteran-owned businesses and professional groups and associations, as appropriate.

Added by Stats. 2016, c. 870, **§** 2. (SB 1442). Effective January 1, 2017.

Florida Board of Governors Regulations

(1) 2.003 Equity and Access (2010) Discrimination on the basis of race, color, national origin, sex, religion, age, disability, marital status, veteran status, or any other basis protected by applicable state and federal law against a covered individual at any university is prohibited. Covered individuals include prospective and enrolled students, prospective and current employees, and university program invitees. No person shall, on the basis of race, color, national origin, sex, religion, age, disability, marital status, veteran status, or any other basis protected by law be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any university program or activity, or in any employment conditions or practices, conducted by the university.

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

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

. . .

6.001 General Admissions (2019). . .

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

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

6.002 Admission of Undergraduate First-Time-in-College, Degree-Seeking Freshmen (2020)

. . .

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

(a) Standard Admission:

. . .

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

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

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

(c) Talented Twenty: Within space and fiscal limitations, admission to a university in the SUS shall be granted to an FTIC applicant who is a graduate of a public Florida high school, who has completed the eighteen (18) required high school units as listed in this regulation, who ranks in the top 20% of his/her high school graduating class, and who has submitted SAT Reasoning Test or redesigned SAT scores from the College Board or ACT scores from ACT, Inc., prior to enrollment. A student must be eligible for college-level work per Board of Governors Regulation 6.008 in order to be eligible for Talented Twenty consideration. A Talented Twenty student is not guaranteed admission to the university of first choice and should work closely with a high school counselor to identify options. The SUS will use class rank as determined by the Florida Department of Education.

Idaho Code, Chapter 59, Title 67, Section 67-5905A (2020)

…

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment or public education.

(2) The provisions of this section shall apply only to action taken after the effective date of this section.

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

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

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

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of this chapter; provided, however, that any remedies available for violations of this section regarding public contracts shall be determined as otherwise provided by state law.

(7) Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds to the state.

(8) If any part or parts of this section are found to be in conflict with the United States Constitution, the section shall be implemented to the maximum extent that the United States Constitution permits. Any provision held invalid shall be severable from the remaining portions of this section.

Idaho Code, Chapter 28, Title 67, Section 67-2802A (2020)

… Political subdivisions of the state of Idaho in their procurements governed by this chapter shall not discriminate against, or grant preferential treatment to, any individual or group on the basis

of race, sex, color, ethnicity, or national origin unless permitted by an exception described in section 67-5909A, Idaho Code.

Michigan Constitution, Article I, § 26 (2006):

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

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

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

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

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

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

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

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

Enactment ratified Nov. 7, 2006, Eff. Dec. 23, 2006.

Nebraska Constitution, Article I, § 30 (2008):

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

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

(3) Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(4) Nothing in this section shall invalidate any court order or consent decree that is in force as of the effective date of this section.

(5) Nothing in this section prohibits action that must be taken to establish or maintain eligibility for any federal program if ineligibility would result in a loss of federal funds to the state.

(6) For purposes of this section, state shall include, but not be limited to:

(a) the State of Nebraska;

(b) any agency, department, office, board, commission, committee, division, unit, branch, bureau, council, or sub-unit of the state;

(c) any public institution of higher education;

(d) any political subdivision of or within the state; and

(e) any government institution or instrumentally of or within the state.

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

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

Neb. Const. art. I, § 30 (2008); adopted 2008, Initiative Measure No. 424.

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

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

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

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

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

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

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

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

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

187-A:16-a Prohibition on Preferential Treatment and Discrimination.

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

II. Notwithstanding paragraph I:

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

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

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

188-F:3-a Prohibition on Preferential Treatment and Discrimination.

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

II. Notwithstanding paragraph I:

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

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

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

188-D:4 Staff.

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

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

III. Notwithstanding paragraph II:

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

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

HB 623, amending N.H. RSA 21-I:52 (2011)

Oklahoma Constitution, Article II, § 36A (2012):

§ 36A. Prohibition of special treatment or discrimination based on race or sex in public employment, education, and contracts

A. The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
B. This section shall apply only to action taken after the effective date of this section.
C. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
D. Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.
E. Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
F. For the purposes of this section, "state" shall include, but not be limited to, the state itself or an agency, institution, instrumentality, or political subdivision of the state.
G. The remedies available for violations of this section shall be the same, regardless of the injured party's race, color, sex, ethnicity, or national origin, as are otherwise available for violations of the antidiscrimination laws of this state.

Added by State Question No. 759, Legislative Referendum No. 359, adopted at election held Nov. 6, 2012.

Washington, R.C.W. 49.60.400 (I-200) (1998) (Amended language highlighted**)**

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

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

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

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

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

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

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

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

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

(7) Nothing in this section prohibits schools established under chapter 28A.715 RCW from:

(a) Implementing a policy of Indian preference in employment; or

(b) Prioritizing the admission of tribal members where capacity of the school's programs or facilities is not as large as demand.

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

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

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

Washington, Washington State Diversity, Equity, And Inclusion Act, 2019 Wash. Legis. Serv. Ch. 160 (I.M. 1000) (effectively repealed by a 2019 voter referendum).[89]

PART I

TITLE AND INTENT

NEW SECTION. Sec. 1. This act may be known and cited as the Washington state diversity, equity, and

[89] Washington's I-1000 (2019) – the Washington State Diversity, Equity, and Inclusion Act quoted here (through section 8) was in effect repealed by voters on November 5, 2019, which also reestablished the ban imposed by the 1998 I-200 voter initiative.

inclusion act.

NEW SECTION. Sec. 2. The intent of the people in enacting this act is to guarantee every resident of Washington state equal opportunity and access to public education, public employment, and public contracting without discrimination based on their race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status. This is accomplished by: Restoring affirmative action into state law without the use of quotas or preferential treatment; defining the meaning of preferential treatment and its exceptions; and establishing a governor's commission on diversity, equity, and inclusion.

PART II

PROHIBITION OF DISCRIMINATION AND PREFERENTIAL TREATMENT

Sec. 3. RCW 49.60.400 and 2013 c 242 s 7 are each amended to read as follows:

<< WA ST § 49.60.400 >>

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status in the operation of public employment, public education, or public contracting.[90]

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

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status.

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

(a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or
(b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or

[90] Initiative 200, which was approved by voters in 1998, effectively banned any form of affirmative action in the state. In April 2019, the Washington Legislature passed Initiative 1000, ending the I-200 ban on affirmative action. However, in the November 2019 election, Referendum 88 was on the ballot. Voting yes on Referendum 88 would allow Initiative 1000 to go into effect, thereby expressly allowing the state to implement affirmative action policies without the use of preferential treatment (as defined) or quotas (as defined) in public employment, education, and contracting.

Voting no on Referendum 88 supported blocking I-1000 from going into effect, thereby continuing to restrict the state from implementing certain affirmative action policies in public employment, education, and contracting.
Although very narrow (less than 1% difference), voters rejected Referendum 88, which ultimately blocked Initiative 1000 from going into effect and upheld the state ban on affirmative action. Source: Wash. Sec. of State, *Nov. 6, 2019 General Election Results, Referendum Measure No. 88* (2019) https://results.vote.wa.gov/results/20191105/State-Measures-Referendum-Measure-No-88.html.

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

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

(6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if the director of the office of financial management, in consultation with the attorney general and the governor's commission on diversity, equity, and inclusion, determines that ineligibility will result in a material loss of federal funds to the state.
(7) Nothing in this section prohibits schools established under chapter 28A.715 RCW from:
(a) Implementing a policy of Indian preference in employment; or
(b) Prioritizing the admission of tribal members where capacity of the school's programs or facilities is not as large as demand.
(8) Nothing in this section prohibits the state from remedying discrimination against, or underrepresentation of, disadvantaged groups as documented in a valid disparity study or proven in a court of law.
(9) Nothing in this section prohibits the state from implementing affirmative action laws, regulations, policies, or procedures such as participation goals or outreach efforts that do not utilize quotas and that do not constitute preferential treatment as defined in this section.
(10) Nothing in this section prohibits the state from implementing affirmative action laws, regulations, policies, or procedures which are not in violation of a state or federal statute, final regulation, or court order.
(11) For the purposes of this section:

(a) "State" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state;

"State agency" means the same as defined in RCW 42.56.010;
"Affirmative action" means a policy in which an individual's race, sex, ethnicity, national origin, age, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status are factors considered in the selection of qualified women, honorably discharged military veterans, persons in protected age categories, persons with disabilities, and minorities for opportunities in public education, public employment, and public contracting. Affirmative action includes, but shall not be limited to, recruitment, hiring, training, promotion, outreach, setting and achieving goals and timetables, and other measures designed to increase Washington's diversity in public education, public employment, and public contracting; and
"Preferential treatment" means the act of using race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate for a public education, public employment, or public contracting opportunity.
(12) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Washington antidiscrimination law.
(13) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington state Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Sec. 4. RCW 43.43.015 and 1985 c 365 s 4 are each amended to read as follows:

<< WA ST § 43.43.015 >>

For the purposes of this chapter, “affirmative action” means, in addition to and consistent with the definition in section 3 of this act, a policy or procedure by which racial minorities, women, persons in the protected age category, persons with disabilities, Vietnam-era veterans, honorably discharged military veterans, and veterans with disabilities are provided with increased employment opportunities. It shall not mean any form of quota system.

PART III

CREATION OF THE GOVERNOR'S COMMISSION ON DIVERSITY, EQUITY, AND INCLUSION

NEW SECTION. Sec. 5. A new section is added to chapter 43.06 RCW to read as follows (April 28, 2019):

<< WA ST § 43.06 >>

(1) There is created the governor's commission on diversity, equity, and inclusion. The commission is responsible for planning, directing, monitoring, and enforcing each state agency's compliance with this act. The commission may propose and oppose legislation and shall publish an annual report on the progress of all state agencies in achieving diversity, equity, and inclusion in public education, public employment, and public contracting.
[Additional provisions address staffing and funding of the commission, list its members, and provide for their terms and appointments.]

PART IV
MISCELLANEOUS

NEW SECTION. Sec. 6. Within three months following the effective date of this section, the office of program research and senate committee services shall prepare a joint memorandum and draft legislation to present to the appropriate committees of the legislature regarding any necessary changes to the Revised Code of Washington to bring nomenclature and processes in line with this act so as to fully effectuate and not interfere in any way with its intent. In preparing the memorandum and draft legislation, the office of program research and senate committee services shall consult with the sponsors of this initiative, the governor's committee on diversity, equity, and inclusion and the state human rights COMMISSION.
NEW SECTION. SEC. 7. IF ANY PROVISION OF THIS ACT OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, THE REMAINDER OF THE ACT OR THE APPLICATION OF THE PROVISION TO OTHER PERSONS OR CIRCUMSTANCES IS NOT AFFECTED.
NEW SECTION. SEC. 8. FOR CONSTITUTIONAL PURPOSES, THE SUBJECT OF THIS ACT IS “DIVERSITY, EQUITY, AND INCLUSION.”

THE WASHINGTON STATE DIVERSITY, EQUITY, AND INCLUSION ACT, INITIATIVE 1000, REPEALING INITIATIVE 200 (PASSED 2019 BUT REPEALED IN 2019 BY REFERENDUM 88)

APPENDIX B: COURT AND ATTORNEY GENERAL DETERMINATIONS OF SCOPE AND IMPACT OF STATE LAWS

ARIZONA

Loncar v. Ducey, 244 Ariz. 519 (Ariz. Court of Appeals, 2018) Loncar involved suit by an unmarried female in a heterosexual domestic partnership claiming violation of state and federal constitutions under state statute that allowed state employees in same-sex domestic partnerships to claim their partners as dependents eligible for employee benefits, but denied that benefit to employees in unmarried heterosexual partnerships. The Court ruled that the statute did not violate the Arizona Constitution's prohibition against preferential treatment to, or discrimination against, any individual or group on the basis of sex (or the Equal Protection Clause under the 14th Amendment). It held that the state's action was not based on the biological sex of either person in the couple, but rather was based on the distinction of marriage eligibility. At that time, same sex couples were not eligible to marry. The court indicated that the couple's sexual orientation determined their eligibility to marry and obtain benefits, but sexual orientation was not a protected class under the preferential treatment clause of the Arizona Constitution.

CALIFORNIA

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

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

The attorney general found that Section 31 "does not purport to apply to every distinction made on the basis of race, sex, color, ethnicity, or national origin, but only to discrimination or preferences in the operation of public employment, public education, or public contracting." Further, the attorney general found that the registry was created for the use of corporations seeking candidates to serve as directors, and had "no role in facilitating public employment, contracting, or education." Therefore, the attorney general concluded that the law requiring the registry was not rendered unconstitutional.[91]

Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000).† In *Hi-Voltage*, the California Supreme Court was asked to decide whether San Jose's program requiring contractors bidding on city projects to utilize a specific percentage of minority and women subcontractors or document efforts to include such subcontractors violated Proposition 209. The court held that the program violated Proposition 209 since the outreach plan required subcontractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and

[91] https://oag.ca.gov/system/files/opinions/pdfs/98-304.pdf. According to the California Dept. of Justice website, "As the chief law officer of the state, the California Attorney General provides legal opinions upon request to designated state and local public officials and government agencies on issues arising in the course of their duties. The formal legal opinions of the Attorney General have been accorded "great respect" and "great weight" by the courts."

negotiating for their services – none of which was required for non-MBE's/WBE's. The court also held that Proposition 209 did not require the city to violate any federal statutory or constitutional provision since a state is always allowed to provide its citizens with greater protection against discrimination than federal law provides. (The court did not address the requirements of the Office of Federal Contract Compliance Programs (OFCCP) with which federal contractors must comply.)

Connerly v. State Personnel Board, 92 Cal. App. 4th 16 (2001).† In *Connerly*, the California Third District Court of Appeal unanimously invalidated five California laws under Proposition 209. The statutes pertained to racial classifications and preferences in state contracting, state civil service, the sale of state bonds, the California Lottery, and the 108-campus community college system. Reversing a lower court decision, the Court of Appeal struck down preferences in the form of goals, timetables, and other "schemes" that treated persons differently on the basis of race or sex. The court also held that the collection and reporting of data concerning the participation of minorities and women in government programs did not violate equal protection principles or Proposition 209. (The court did not address the requirements of the Office of Federal Contract Compliance Programs with which federal contractors must comply.) The District Court of Appeal decision on remand was upheld on further appeal in *Connerly v. State Personnel Board*. (Calif. Rptr. 2d (2003)).

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

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

Los Angeles County Professional Peace Officers Association (PPOA) v. County of Los Angeles, 2002 Cal. App. Unpub. LEXIS 5596 (2002). † The Los Angeles County Professional Peace Officers Association alleged that the County of Los Angeles gave preferences to women and minority sergeants in making promotions to the rank of lieutenant in violation of Proposition 209. The trial court held that the evidence demonstrated that the sheriff "let it be known that he wanted diversity of race and sex in the Sheriff's Department and that some of the commanders might have been influenced by [the] Sheriff to favor minorities and women." Nevertheless, according to the trial court, no evidence was presented that demonstrated the existence of preferences in promotions based upon race or sex. The California Second District Court of Appeal affirmed the trial court's ruling, holding that the County's written policy on diversity did not establish a sex or race preference in the Sheriff's Department promotion process. Furthermore, the court stated that there was "nothing inconsistent between this Policy on Diversity and [Proposition 209]. Unlike specific programs or

policies that have been found to violate [Proposition 209], the County's generalized Policy on Diversity [did] not either mandate preferential treatment or provide for racial or sex quotas or set asides."

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

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

Furthermore, the court held that legislation purporting to define the term "discrimination" for the purposes of Proposition 209 was unconstitutional, as it was an attempt to amend the California Constitution without conforming to the procedures for amendment.[92]

Hernandez v. Board of Education of Stockton Unified School District, 126 Cal. App. 4th 1161 (2004).† In *Hernandez,* a group of students, parents, and taxpayers ("Intervenors"), challenged an order from the Superior Court of San Joaquin County that approved a settlement agreement in a school desegregation case upon a finding that respondent school district was no longer segregated. The Intervenors also argued that the continued funding of the existing magnet schools without a current finding of discrimination was contrary to Proposition 209 and was a race-based preference. The California Third District Court of Appeal affirmed the trial court, holding that the continued funding of magnet schools after the dismissal of the school desegregation case did not constitute a preference or discrimination based upon race, within the meaning of Proposition 209, given that the Intervenors had failed to demonstrate how the school district discriminated against or granted preferential treatment on the basis of race in the decision to favor the magnet schools chosen in the settlement agreement to continue receiving public funds. Since the schools in question were no longer racially isolated minority schools (*i.e.,* the schools were racially balanced), the selection of one racially balanced school over another could not constitute a preference or discrimination

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

based on race.

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

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

American Civil Rights Foundation v. Los Angeles Unified School District, 169 Cal. App. 4th 436 (2008). Pursuant to a 1981 court order, the school district implemented and adhered to an integration plan that used busing and race-based admission to magnet schools. An interest group challenged the constitutionality of the integration plan under Article I, Section 31 of the California Constitution. It was undisputed that the 1981 final order was never reversed, overruled, vacated, revoked, modified, or withdrawn. Subdivision (d) of Section 31 exempts existing court-ordered integration plans from its purview. Therefore, the trial court found the programs to be exempt from the prohibitions in Section 31. The interest group appealed, arguing that the 1981 final order terminated court supervision of the integration plan and did not require the use of race. The state appeals court found that the 1981 order "approved a forward-looking plan" which "did require the District to consider race." Therefore, the court found that the district was under a court-ordered integration plan in 1996 when Proposition 209 was approved, and the integration plan was exempt under Section 31.

American Civil Rights Foundation v. Berkeley Unified School District, 172 Cal. App. 4th 207 (2009). An interest group challenged the constitutionality of the school district's student assignment policy, which considered each student's "diversity score," a factor computed based on the average income, adult education level, and racial diversity of the student's neighborhood,[93] as one element for assigning students to schools or to academic programs within schools.[94] Under the district policy, each student within a given neighborhood received the same diversity score, regardless of his or her individual race.

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

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

Under the assignment policy, the entire school district was divided into three attendance zones,[95] and the distribution of diversity scores within each zone was calculated. Under the plan, each school's student body had to approximately (within 5-10 percentage points) reflect the zone-wide distribution of diversity scores for its attendance zone. Parents submitted a ranked list of three schools they would prefer their child to attend. Students were placed in one of six priority categories.[96] Moving through students in priority order, a software program assigned students to schools, keeping in mind their diversity scores. If possible, students were assigned to their parents' first-choice school, but students were assigned to other schools, if necessary, to meet the required diversity distribution for each school. The plan generally placed students according to their parents' choices; only 7% of students were assigned to a school not ranked as a top-three choice.[97]

The state appeals court held that the policy did not violate Article I, Section 31 of the California Constitution (Proposition 209) because it did not show partiality, prejudice, or preference for any individual on the basis of that individual's race. To the extent that preferences were shown, they were not made on the basis of an individual student's race, but rather on the basis of several factors relating to the collective composition of the student's neighborhood.[98] Therefore, the court concluded that Section 31 did not prohibit the collection and consideration of communitywide demographic factors for use in the otherwise race-neutral policy.[99] Because the court found the school district's policy to be race-neutral with respect to the race of an individual student, it did not engage in further analysis of whether the school district had considered race-neutral alternatives. The California Supreme Court denied ACRF's petition for review.

California Attorney General Opinion No. 07-304, 93 Ops. Cal. Atty. Gen. 19 (2010). The Attorney General was asked to opine on the Article I, Section 31 constitutionality of the Tribal Employment Rights Ordinances (TERO) used by the California Department of Transportation. TERO granted hiring preferences to Native

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

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

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

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

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

Americans as part of the DOT's contracts for highway construction and maintenance performed on Native American tribal lands. Importantly, the hiring preferences were granted only to "enrolled members of Indian tribes and not persons merely of Indian ancestry."

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

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

The court found that federal regulations requiring "affirmative action to ensure that no person is excluded from participation" did not mandate, but simply permitted, race-based remedies. Therefore, for the ordinance to survive, the court required a showing of "federal compulsion":

(1) a history of purposeful or intentional discrimination; (2) that the city ordinance was a remedy for such discrimination; (3) that the ordinance was narrowly-tailored; and (4) that a race- or sex-conscious remedy was necessary. The case was remanded to decide the federal compulsion issue.

Baez v. California Public Employees' Retirement System, 188 Cal. Rptr. 3d 649 (Calif. Court of Appeal, 2015). Plaintiff, an investment fund manager, filed suit challenging under Proposition 209 defendants' refusal to award a contract to plaintiff's firm to manage a retirement investment fund if plaintiff was actively involved in managing the fund, claiming this was based on his Latino ethnicity. The Court ruled that Proposition 209 did not apply to conventional discrimination against protected groups, but only to prohibit affirmative action preferences and the discrimination that is their by-product against non-protected groups (the "flip-side of the preferential treatment coin"). It ruled that the plaintiff could sue under the State Constitution's Equal Protection Clause. The court also rejected plaintiff's argument that, absent a broader reading of Proposition 209, it would be unconstitutional under the political structure doctrine.

Pierce v. Regents of University of California, 2016 WL 892015 (not officially published), Calif. Court of Appeal, 2016. Plaintiff claimed that his denial of admission to the UCLA School of Medicine violated Proposition 209 because it allegedly was based solely on his lack of proficiency in Spanish. He claimed this was an unlawful racial preference favoring Hispanics. The court affirmed judgment against the plaintiff, holding that the alleged policy is not a racial preference but rather distinguishes between candidates based on their ability to speak a certain language, and that an Hispanic applicant who lacked proficiency in Spanish was no more eligible for admission than a non-Hispanic applicant who lacked such proficiency.

Petition of Quad Knopf, Inc. dba QK to Adopt or Repeal a Petition Pursuant to Public Utilities Code S 1708.5,

Calif. Public Utilities Commission (2018 WL 1638144 (Cal. P.U.C.).

The California Public Utilities Commission denied a petition of a contractor to repeal General Order (GO) 156 on the basis that it provided preferences for minority, women, and LGBT-owned businesses, contrary to Proposition 209. The Commission ruled that the GO did not relate to public contracts and that Prop. 209 therefore was inapplicable. However, it went on to analyze the GO under Prop. 209. The GO required utilities to submit annual plans to increase procurement from women, minority, veteran, and LBGT business enterprises (including short- and long-term goals and timetables) and to report annually on their progress in implementing the plans. It held that these provisions were different from other "outreach" programs "disfavored" by the courts, because they did not permit quotas, there was no penalty for a utility if the goals were not met, utilities retained their legitimate business judgment in selecting suppliers, nothing in the GO permitted a utility to use set-asides, preferences, or quotas, and the GO required the utility to offer the same assistance to all other businesses upon request. The Commission's decision added, ". . . the Commission has made it clear that GO 156 did not permit the use of race or ethnicity as the sole criteria to determine who may be considered for a contract," raising the question whether the Commission intended to authorize the use of race or ethnicity as one of multiple criteria for the selection of suppliers.

MICHIGAN

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

> To "discriminate against" means to "make a difference in treatment" that is unfavorable to the person or group. "Preferential treatment" may be defined as "showing preference" in the treatment of a person or group … Thus, the term "preferential treatment" as used in art 1, § 26 can be understood as the act or fact of giving a favorable advantage to one person or group over others based on race, sex, color, ethnicity, or national origin. By using the terms "discriminate against" and "grant preferential treatment to," art 1, § 26 prohibits both the prejudicial treatment of a person and its counterpart – the favorable treatment of a person or group – on account of these classifications. The meaning of this language is clear; therefore, there is no need to examine the circumstances surrounding the adoption of this constitutional provision or the purpose sought to be accomplished. . . . Consequently, insofar as the policy provides a bid discount based on the DBE[100] status of subcontractors, the City's policy . . . violates the plain language of art 1, § 26 and is unconstitutional.

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

Michigan Attorney General Opinion No. 7308, 2018 WL 6982363. The Attorney General addressed the Michigan State Housing Development Authority's Equal Employment Opportunity Policy, as applied through loan agreements with developers. Under that Policy, contractors were required to implement an EEO plan approved by the Authority that included goals for contracting and employment of minority and female skilled

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

tradespeople. Contractors had to meet the approved plan's goals or alternatively take all feasible steps or make a good faith effort to achieve the goals. If a contractor failed to do this, the Policy provided that the Authority will deem the contractor "non-awardable" for up to six years, depending on the circumstances, making Authority-financed projects unavailable to the contractor.

The Attorney General opined that even though the Housing Authority's EEO Policy was developed under a Michigan statute that provided that the Authority must require contractors and subcontractors engaged in the construction of housing projects to take affirmative action to assure an equal opportunity for employment, the Constitution, including Article I, §26, controlled over conflicting statutes and prohibited preferential treatment in public contracting and prohibited the Authority's EEO Policy.

However, the Attorney General also advised that the state statute directing affirmative action in the Authority's contracts may be interpreted to authorize the Authority to direct contractors and subcontractors to engage in affirmative action so long as those activities do not result in the preferential treatment of individuals or groups on the basis of race, sex, color, ethnicity, or national origin. Thus, the Authority could pursue policies to ensure non-discrimination and equal opportunities within the contracting process through race- and sex-neutral means. Quoting from its prior opinion, OAG No. 7202 at p. 39, citing *High-Voltage, Inc.*, 12 P.3d at 1085, the opinion stated, "Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." Thus, the Attorney General ruled, the Authority could provide incentives for the employment of individuals who demonstrate economic disadvantage, which would not be dependent on race or sex.

WASHINGTON

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

Housing patterns in Seattle were sufficiently segregated by race that strict geographic assignment to high schools would have resulted in largely segregated schools. Recognizing this, the school board instituted its "open choice" plan, which sought to ensure integrated schools while allowing rising ninth grade students to rank however many schools they wished in order of preference. If a student's first-choice school was undersubscribed, the student would be enrolled. If the chosen school was oversubscribed, a series of four tiebreakers was used to allocate seats at the oversubscribed schools.[101] The second tiebreaker was based on race, and gave preference to students whose race would bring the school nearer to a representative distribution of races. This "integration tiebreaker" was only triggered when a school's student body was

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

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

either less than 25 percent "white" or more than 75 percent "nonwhite."[102] The tiebreaker would be switched on or off as a school's distribution moved outside or within these limits during the assignment process. About 10% of high school assignments were attributable to the integration tiebreaker.

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

However, the decision of the Washington Supreme Court was, in effect, made moot by the subsequent decision of the U.S. Supreme Court that the school board's use of a race-conscious tiebreaker violated the Equal Protection Clause, since there was no compelling interest to justify this use of race and the use was not narrowly tailored to meet the school board's interest.

Dumont v. City of Seattle, 148 Wash. App. 850 (Court of Appeals of Washington, 2009). A white firefighter brought this action against the City of Seattle, alleging that the fire chief violated the state's statutory prohibition of preferential treatment by promoting a less-qualified African-American applicant to the position of fireboat engineer for which the plaintiff had applied. The Court of Appeals ruled that there were genuine issues of material fact that precluded the summary judgment awarded to the City by the Superior Court.

The court proceeded to analyze the elements of an employment case under the state law (I-200). It indicated that all persons in public employment are protected, regardless of race, sex, color, ethnicity, or national origin and that plaintiff, to make a prima facie case, needed to put forth evidence that he or she (1) was qualified and applied for a promotion; (2) was not promoted; and (3) a less-qualified candidate of a different race, color, ethnicity, or national origin was instead promoted. Once a prima facie case was made, the court indicated that the evidentiary burden shifted to the defendant to produce admissible evidence of a legitimate explanation for the allegedly unlawful conduct, and, if that requirement were met, the burden of proof shifted back to the plaintiff to have an opportunity to show that the stated reason for the adverse action was in fact pretext.

Office of the Attorney General, AGO 2017 No.2, 2017 WL 1115530. In a broad opinion to the Washington Department of Enterprise Services not addressed to the facts of any specific case, the Attorney General advised that Initiative 200 does not categorically prohibit all race- and sex-conscious actions in state contracting. The opinion indicates that preferences that have the effect of using race or gender to select a less qualified contractor over a more qualified contractor are prohibited, but not other race- or sex-conscious measures that do not have that effect. The opinion states, "This category of measures that is not prohibited is open to innovation, but examples could include aspirational goals, outreach, training, use of race or gender as a tiebreaker between equally qualified contractors, and similar measures that do not cause a less qualified

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

contractor to be selected over a more qualified contractor.

The opinion goes on to advise that in very narrow circumstances, I-200 may allow agencies to use preferences based on race or gender that may elevate a less qualified contractor over a more qualified contractor; for example, if there is evidence of discrimination in state contracting that cannot be resolved through race- or sex-neutral means. The opinion disclaims any intent to advise that a validated statistical disparity is necessarily sufficient to justify use of such a preference. The opinion indicates that this advice is not dependent on whether the state agency receives federal funds, but rather to give effect both to the prohibition on preferences and to other statutory provisions that require discrimination, including evidence based on a disparate impact analysis, to be remedied. The opinion indicates that agencies also may employ preferences based on race or gender when necessary to avoid losing eligibility for federal funding programs.

The opinion relies heavily on the Washington Supreme Court's decision in the *Parents Involved* case, 149 Wn.2d at 280. It discussed the possible argument for interpreting I-200 to ban any race- or gender- conscious measures, including targeted outreach and recruitment, based on California cases such as *High-Voltage*, but distinguished these cases based on language in I-200 indicating that it did not affect any law or governmental action that does not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin. (Washington, R.C.W. 49.60.400, section (3)) and the fact that California Proposition 209 amended the state constitution, whereas I-200 was statutory.

APPENDIX C: CONSTITUTIONALITY OF STATE VOTER INITIATIVES

CALIFORNIA

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

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

The California Supreme Court concluded that "the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender, and other similar classifications." In its analysis, the court clarified that "[S]ection 31 prohibits race- and gender-conscious programs the federal equal protection clause *permits* but does not *require*," and followed the Ninth Circuit in distinguishing between "preferential treatment" and "equal protection."[103] The court then found that "[n]othing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." The court held that Proposition 209 does not violate the Fourteenth Amendment under the political structure doctrine.

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

The federal district court determined that the Ninth Circuit previously had rejected these claims in *Coalition for Economic Equity v. Wilson* (1997). The plaintiffs, however, argued that the Supreme Court's opinion of *Grutter v. Bollinger* (2003) overruled *Wilson*. The court found that although *Grutter* permitted the use of race as a factor in admissions decisions, it did not require it. Therefore, the federal district court held that *Wilson* was not overruled by *Grutter*. The action was dismissed with prejudice.

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[103] *Coal. for Economic Equity v. Wilson*, 122 F.3d 692.

Coalition to Defend Affirmative Action v. Brown, 74 F.3d 1128 (9th Cir. 2012). On appeal from the District Court's *Schwarzenegger* decision, plaintiffs challenged Proposition 209 because (1) it allowed UC admissions officials to depart from the University's baseline admissions criteria for any purpose, but not for racial diversity or to address de facto segregation and inequality, thereby driving down minority admissions; and (2) it created an unequal political structure because it banned the Regents from reversing the ban on affirmative action in admissions. The court held that its prior decision in the *Wilson* case, dealt with and rejected both of these arguments.

MICHIGAN

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

After analyzing the factors to be considered, the Sixth Circuit determined that its decision ultimately would turn on the plaintiffs' likelihood of success on the merits of their claims.[104]

The court looked to *Grutter* for guidance on the claim that Proposal 2 infringed on universities' First Amendment right to academic freedom. The *Grutter* Court stated that affirmative action programs may not exist in perpetuity and suggested that lessons could be learned from states that had prohibited racial preferences. The Sixth Circuit determined that the Supreme Court had thereby tacitly allowed state laws banning racial preferences. Furthermore, because First Amendment rights exist in perpetuity and "race-conscious admissions policies must be limited in time,[105] the Sixth Circuit found that universities were not entitled to affirmative action programs as a First Amendment right.

The court was skeptical of the Equal Protection challenge, noting that Proposal 2 "would seem to be an equal-protection virtue, not an equal-protection vice." The court found that Proposal 2 created an equal protection standard higher than the minimum required by the Fourteenth Amendment, and that states were free to implement policies ending the use of racial preferences. The court concluded that the plaintiffs had "little likelihood of establishing that Proposal 2 violates the federal constitution."[106] The court lifted the

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

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

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

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

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

injunction, and Proposal 2 took effect.

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

The plaintiffs first alleged that Proposal 2 violated the university's First Amendment right to academic freedom.[107] The court found that this right belongs to the university itself, and that the plaintiffs lacked third-party standing to assert the school's rights. The First Amendment claim was dismissed due to lack of standing.[108]

The plaintiffs' next argument was a conventional equal protection challenge. Although Proposal 2 was racially neutral on its face, the court acknowledged that it had a disparate impact on minorities. However, there was no evidence that it was enacted by the electorate with a discriminatory intent. Therefore, the court rejected the first equal protection challenge.[109]

A second equal protection challenge alleged that Proposal 2 restructured the political process, placing an undue burden on the ability of minorities to bring about changes in university admissions policies. Before Proposal 2, minority groups could petition university officials to implement affirmative action programs. After the enactment of Proposal 2, minority groups would first have needed another constitutional amendment voiding, at least in part, Proposal 2. The plaintiffs characterized this as a heavy burden that violated their right to equal access to the political process. The court, however, drew a distinction between laws that distance minority groups from obtaining *preferential* treatment and those that distance them from *equal* treatment. The court held that Michigan could limit the ability of a distinct group to obtain an *advantage* without violating the Fourteenth Amendment.[110]

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

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

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

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

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

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

federal law.

Having disposed of all of the plaintiff's arguments, the federal district court granted the attorney general's motion for summary judgment.[111]

Coalition to Defend Affirmative Action v. Regents of University of Michigan, 652 F.3d 607 (6th Cir. 2011). A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit held 2-1 that Michigan's voter-initiated ban on the consideration of race and sex in public university admissions and government hiring violated the Equal Protection Clause because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities."

Under the political restructuring theory of the Fourteenth Amendment, the court considered whether Proposal 2 impermissibly restructured Michigan's political process along racial lines. The court examined two cases – *Hunter v. Erickson*[112] and *Washington v. Seattle School District No. 1*[113]– in which the Supreme Court overturned referendums that dealt with racial issues. In *Hunter*, the Court rejected an amendment to the city charter that required an additional step of a voter referendum to change local housing laws regarding race and religion discrimination, where other changes required only a city council vote. In *Seattle*, the Court overturned a referendum in Washington State that effectively abolished voluntary busing plans designed to promote racial integration, as adopted by school districts.

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

Coalition to Defend Affirmative Action v. Regents of University of Michigan, 701 F.3d 466 (6th Cir. 2012). The 6th Circuit Court of Appeals granted the Michigan Attorney General's request for rehearing *en banc* in this case before the full 15-member court. The issues were the same as those decided by a 3-judge panel of the court in this case. In this *en banc review*, the court confirmed its prior opinion that Michigan Proposal 2 violates the 14th Amendment's Equal Protection Clause by creating a structural burden that denied for

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[111] Subsequently, the plaintiffs challenged the court's distinction between a law that prohibited "preferential" treatment and one that denied "equal" treatment as inconsistent with precedent, and therefore erroneous. On review, analysis of Supreme Court precedents revealed that desegregation is, in some instances, constitutionally required. However, affirmative action has never been held to be required. Furthermore, the court opined that "*Grutter* made clear that [affirmative action] is barely tolerated" by the Supreme Court. Therefore, the district court's distinction was found to be useful in interpreting the scope of existing case law. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich*., 592 F. Supp. 2d 948 (E.D. Mich. 2008).

[112] 393 U.S. 385 (1969).

[113] 458 U.S. 457 (1982).

minorities equal access to the tools of political change. Like the prior opinion of the court, this opinion relied on the *Hunter* and *Seattle* cases to hold that Proposition 2 had a racial focus that primarily benefitted minority groups and individuals and reordered the political process in a way that placed special burdens on minorities.

Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291 (2014).

In 2014, the Supreme Court resolved the disagreement between the circuit courts regarding the constitutionality of voter-initiated state constitutional bans on preferential treatment based on race, nationality, or sex. It decided in *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN),* 572 U.S. 291 (2014) that Michigan's constitutional amendment did not violate the Equal Protection Clause. In doing so, it rejected the "political process" doctrine that government could not adopt legal processes that make it more difficult for certain minorities to achieve legislation that is in their interest, an "expansive" interpretation of *Hunter v. Erickson*, 393 U.S. 385 (1969), *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) asserted below by the Circuit Court. Instead, it distinguished these cases on the basis that they involved voter-initiated state actions that had the purpose or at least the serious risk of causing specific injuries on account of race, whereas Proposition 2, according to the Supreme Court, inflicted no specific injury on the basis of race. The Court opined,

"What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. . . .This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution . . .or in the Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters." *Id*. at 314 .[114]

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

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

[114] *See also Lot Maintenance of Oklahoma, Inc. v. Tulsa Metropolitan Utility Authority,* 16 F. Supp.3d 1316 (N.D. Okla.,2014), referencing the section of the Oklahoma Constitution prohibiting the State of Oklahoma from granting preferential treatment in public contracting to "any individual or group on the basis of race, color, sex, ethnicity, or national origin." O.K. CONST. art. II, §36A. The Court stated, "The Supreme Court has recently answered the question of 'whether . . . voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions' in the affirmative (citing the *Shuette* decision.")