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MEMORANDUM

To: Leadership Conference on Civil Rights

From: Ballard Spahr Andrews & Ingersoll, LLP
Lawyers' Committee for Civil Rights Under Law

Date: February 6, 2007

Re: Michigan Proposal 2006-02's Effect On Public Institutions' Ability to Strive for Racial Diversity

On November 7, 2006, Michigan voters approved a statewide ballot initiative Proposal 2006-02 (the "Michigan Proposal" or "Proposal 2"). The Michigan Proposal amends the Michigan Constitution by adding a provision that bans public institutions from discriminating against,[1] or giving "preferential treatment" to, groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education, or contracting purposes. Public institutions affected by the Michigan Proposal include State and local governments, public colleges and universities, community colleges, and school districts.

Some have argued that the Michigan Proposal prohibits any kind of race consciousness and that, as it seeks to achieve true diversity in its public education, employment,

[1] For decades, both Federal law and Michigan law have prohibited public employees from discriminating based upon these enumerated characteristics. *See* 42 U.S.C. § 2000(e) – 2(a), ("[i]t shall be an unlawful employment practice for an employer to … discriminate against any individual."). Michigan law similarly states that "an employer shall not …[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL § 37.2202 (1)(a). Accordingly, this provision does not add anything new to the legal analysis.

and contracting activities, Michigan cannot be race conscious in any form. This memorandum analyzes what Michigan can do to seek diversity, and when and how race and gender can ever be considered. Part I of this memorandum contains a general introduction and a description of the relevant legal landscape; Part II discusses practices aimed at seeking diversity that should not be affected by the Michigan Proposal; Part III briefly discusses how the application of the Michigan Proposal could be affected by Supreme Court case law allowing use of race in university admissions; and Part IV provides a conclusion. On the whole, the memorandum concludes that programs that seek to expand opportunities without disadvantaging any racial group or gender should remain permissible.

I. Introduction

To prohibit discrimination by public entities at the State level, the U.S. Constitution itself was amended for the fourteenth time in 1868. Since the landmark case of *Brown v. Board of Education*,[2] the Supreme Court has condemned racial segregation and vindicated Justice Harlan's dissenting assessment of it, as a "badge of servitude wholly inconsistent with the ... equality before the law established by the Constitution[,]" in *Plessy v. Ferguson*.[3] At the State level, public entities generally, and Michigan public institutions specifically, have attempted to redress the segregation and discrimination that followed the abolition of slavery by prohibiting discrimination, and moreover, by taking action aimed at promoting diversity among public school students and the employees of public institutions,

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2 347 U.S. 483 (1954).

3 163 U.S. 537 (1896).

through the implementation of policies that are often referred to as "affirmative action,"[4] and that have employed specific racial criteria. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, however, renders suspect or quasi-suspect racial and gender classifications even when these classifications are "benign," *i.e.*, when they aim at increasing diversity or remedying the effects of past discrimination through preference programs that promote qualified minorities and women.[5] As a result, the United States Supreme Court, while permitting race-conscious efforts, has limited its use in various contexts.[6] The United States Supreme Court's analysis of the implementation of race-conscious policies may be helpful to our discussion of what impact Proposal 2 has on Michigan's ability to employ race-conscious policies.

The logical starting point for a discussion of the Supreme Court's affirmative action jurisprudence is *Regents of the University of California v. Bakke.*[7] There, the Court first

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4 Affirmative action has been defined as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." CITIZENS RESEARCH COUNCIL OF MICHIGAN, STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT, PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE, REPORT 343, Page 3 (Summer 2006), *available at* http://www.crcmich.org/PUBLICAT /2000s/2006/rpt343.pdf [hereinafter *CRC Report*], *citing* BRIAN J. DUNN AND AMY M. ZANDARSKI, THE EVOLUTION OF AFFIRMATIVE ACTION: BACKGROUND ON THE DEBATE 18.3 (1998): 1-41. It typically seeks to expand opportunities for historically underrepresented groups such as women and racial minorities as a means to remedy the effects of past discrimination. Affirmative action ordinarily accomplishes this goal by allowing the consideration of race and gender in favor of underrepresented groups when making decisions. While some of these efforts are captured by the "affirmative action" terminology, other diversity efforts, like outreach and diversity initiatives, may be structured in a way that does not favor any particular group.

5 *See generally Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). *CRC Report* at 5.

6 *See, e.g., Croson* and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

7 438 U.S. 265 (1978).

pronounced that racial classifications are "inherently suspect" and must be reviewed with strict scrutiny.[8] In order to withstand strict scrutiny, a state program must be "narrowly tailored" to achieve a "compelling state interest."

At issue in *Bakke* was an admissions program of the University of California Medical School under which sixteen percent of the class seats were reserved for an undefined category of "disadvantaged" candidates. The Court in *Bakke* held that, although the goal of achieving a diverse student body is sufficiently compelling to justify the consideration of race in university admissions decisions under some circumstances, the admissions program was not sufficiently narrowly tailored to achieve that goal. "The diversity that furthers a compelling state interest," the Court said, "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[9] Citing Harvard's admissions program with favor, Justice Powell indicated that for a program seeking to achieve diversity via racial classification to withstand strict scrutiny, it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[10]

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8 Strict scrutiny analysis can be traced to earlier Court decisions in *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."), and *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single group are immediately suspect [and] ... courts must subject them to the most rigid scrutiny."), both of which involved challenges to the internment of Japanese Americans during World War II. Importantly, these early challenges involved discrimination that significantly injured entire classes of minorities solely because of their race.

9 *Bakke,* 438 U.S. at 315.

10 *Id.* at 317.

Recently, the Court has re-examined the use of race in the educational arena in the Michigan Cases. In *Grutter v. Bollinger*,[11] the University of Michigan Law School's admissions program was strictly scrutinized by the Court. The Law School followed the Harvard program promoted by Justice Powell in *Bakke,* which requires admissions officers to look beyond grades and test scores to "soft" variables and recognize "many possible bases for diversity admissions."[12] The Michigan Law School admissions policy explicitly states that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."[13] The Court held that: (i) the law school had a compelling interest in attaining a diverse student body; and (ii) the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus, did not violate the Equal Protection Clause.

In *Gratz v. Bollinger*,[14] however, the Court ruled that the University of Michigan's undergraduate admissions policy could not withstand strict scrutiny and violated the Equal Protection Clause. The policy at issue in *Gratz* consisted of a "selection index" system under which an applicant could score up to 150 points and would be awarded 20 points based upon his or her membership in an under-represented racial or ethnic minority group. The Court found that the policy was not sufficiently tailored to meet the compelling goal of attaining a diverse student body and, using the language of *Bakke*, found that it was not "flexible enough to

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11 539 U.S. 306 (2003).

12 *Id.* at 316.

13 *Id.* at 315.

14 539 U.S. 244 (2003).

consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[15]

In *Parents Involved in Community Schools v. Seattle School District No. 1,*[16] a case currently pending before the Supreme Court, the United States Court of Appeals for the Ninth Circuit found that the School District had a compelling interest in having its high schools racially integrated and that the District's use of race as one of several admissions criteria was sufficiently narrowly tailored to withstand strict scrutiny. The Ninth Circuit reiterated that racial diversity in its schools is a compelling state interest and also identified the hallmarks of a sufficiently narrowly tailored affirmative action plan: (i) individualized consideration of applicants; (ii) the absence of quotas; (iii) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (iv) that no member of any racial group was unduly harmed; and (v) that the program had a sunset provision or some other end point. Likewise, in *McFarland v. Jefferson County Public Schools*[17] (*Meredith v. Jefferson County Public Schools* on appeal[18]), the District Court cited *Gratz* and *Grutter* as precedent for the proposition that racial diversity in schools is a compelling state interest and found that "[i]n most respects the [Jefferson County Public Schools'] ... plan also meets the narrow tailoring requirement."[19] In this Louisville, Kentucky case, also pending before the Court, the Jefferson County Public Schools ("JCPS") adopted a voluntary plan designed to keep all its schools,

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15 *Id.* at 271.

16 426 F.3d 1162 (9th Cir. 2005).

17 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004).

18 416 F.3d 513 (6th Cir. 2005).

19 *McFarland, supra* at 834.

kindergarten through twelfth grade, from becoming segregated due to residential racial segregation after twenty-five years of court-ordered desegregation was lifted in 2000. Under the JCPS plan, students are assigned automatically to nearby schools, and they can apply to transfer to other schools. Transfer applications are decided based on the student's needs, the school's capacity, and race. The JCPS' goal is to keep every school between fifteen and fifty percent black. Citing the plan's three organizing principles as (i) management of broad racial guidelines; (ii) creation of school boundaries and geographic clusters; and (iii) maximization of student choice, the District Court found it sufficiently narrowly tailored. The Sixth Circuit Court of Appeals agreed. The decisions in these cases may very well be helpful for the analysis of the issues arising out of the Michigan Proposal.

Beyond education, the Supreme Court has also directly addressed the issue of race-consciousness in the context of public contracting. *Richmond v. J. A. Croson Co.*[20] set the precedent for affirmative action cases in government contracting, as *Bakke* did in education. In *Croson*, the Court mandated strict scrutiny of all racial classifications, requiring the State or local program in question to be narrowly tailored to remedy the effects of proven discrimination within its jurisdiction, as opposed to a generalized assertion of past discrimination, in order to pass constitutional muster. (Unlike in the higher education area, diversity has yet to be recognized as a compelling state interest in the contracting context.) In its 1995 decision in *Adarand Constructors, Inc. v. Pena*,[21] a majority of Supreme Court Justices went on to hold that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must

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20 488 U.S. 469 (1989).

21 515 U.S. 200, 227 (1995).

be analyzed by a reviewing court under strict scrutiny,"[22] thereby eliminating any distinction in tests applied to federal programs under the Due Process Clause and state programs under the Equal Protection Clause.[23] The strict scrutiny test requires that a policy "serve a compelling governmental interest, and ... be narrowly tailored to further that interest."[24] Strict scrutiny analysis applies to all race classifications in any governmental agency or organization in order to "smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[25] In *Adarand*, Justice O'Connor rejected claims that this test is "strict in theory, but fatal in fact."[26]

In *Wygant v. Jackson Board of Education*,[27] the Supreme Court discussed the application of the strict scrutiny analysis in the public employment context. *Wygant* involved a challenge to a school board's layoff policy, which would have favored minority teachers over

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22 *Id.*

23 *Adarand*, 515 U.S. at 226-27. The *Adarand* Court overturned those portions of *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65(1990) that suggested that federal race-based classifications were subject to a less rigorous standard. *Id.* at 225-35.

24 *Id.* at 235. The majority opinion rejected the Court's use of an intermediate standard in *Metro Broadcasting*. *See id.* at 226. The intermediate standard used in cases involving gender discrimination requires only that the government policy "serve important governmental objectives ... and [be] substantially related to achievement of those objectives." *Metro Broad.*, 497 U.S. at 564.

25 *Croson*, 488 U.S. at 493.

26 *Adarand*, 515 U.S. at 237 (quoting *Fullilove*, 448 U.S. at 519 (J. Marshall, concurring)). Justice O'Connor went on to state that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 237.

27 476 U.S. 267 (1986).

non-minority teachers, in order to support a minority hiring effort and to preserve a certain percentage of minority teachers in the school system. Several white teachers who had been terminated pursuant to the policy sued the school board, arguing that the policy violated the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the claims, holding that the policy was permissible as an attempt to remedy societal discrimination by providing role models for minority schoolchildren. The Sixth Circuit affirmed.

The Supreme Court then reversed. In its strict scrutiny analysis it looked to whether a compelling state interest was involved and whether the program was narrowly tailored to the achievement of those interests.[28] With respect to the first prong of the strict scrutiny analysis, the Court reasoned that "societal discrimination" alone is not sufficient to justify a racial classification—the governmental unit involved must show the existence of prior discrimination. However, it is clear that the government employer does need to admit unlawful discrimination as a basis for adopting a race-conscious program. As Justice O'Connor explained in her concurring opinion, "[t]his remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a *firm basis for believing that remedial action is required.*"[29]

The Court in *Wygant* did not uphold the race-based layoff program at issue because it was unpersuaded by arguments that providing role models for minority schoolchildren served a compelling government interest.[30] Further, the Court believed that the program was not

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28 *Id.* at 274.

29 *Id.* at 286.

30 *Id.* at 276-77.

sufficiently narrowly tailored because of the specific harm to the individuals actually laid off.[31] However, Justice Powell explained that "in order to remedy the effects of past discrimination, it may be necessary to take race into account,"[32] reiterating a constant theme from the Supreme Court that, in some cases, a government is mandated to take race into account.[33]

The Supreme Court has further clarified the contours of how its strict scrutiny analysis applies when addressing the issue of the use of race in government employment, in the context of court orders, and court-ordered consent decrees.[34] For example, the Supreme Court has upheld numerical goals based on minority makeup or membership as narrowly tailored to serve compelling governmental interests. Despite failing to agree on the appropriate mode of analysis,[35] a majority of Justices in *Local 28 of the Sheet Metal Workers International*

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31 *Id.* at 282-83.

32 *Id.* at 280.

33 See discussion in Section II.D.3 below.

34 The cases discussed above were decided based on Fourteenth Amendment equal protection principles. Importantly, because there are no constitutional implications with regard to private employers, strict scrutiny analysis does not apply to their voluntarily implemented affirmative action programs. The Supreme Court's decision in *Johnson v. Transportation Agency* recognizes this distinction. 480 U.S. 616 (1987). In *Johnson*, the Court observed that "Title VII ... was enacted pursuant to the commerce power to regulate purely private decision-making and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *Id.* at 627-28 n.6. The Court made clear that public employers, who are required to satisfy constitutional requirements, must remain mindful that any relevant statutory provisions may not extend as far as the Constitution does. *Id.* at 628. This reminder to public employers is an express rejection of Justice Scalia's contention in his dissent in *Johnson* "that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution." *Id.* at 649.

35 In *Paradise*, 480 U.S. 149 (1987), the Justices were divided on whether the same analysis should apply to court-ordered programs and policies implemented by other governmental bodies. Justice Powell asserted that "[b]ecause racial distinctions are inherently suspect whether they are imposed by a legislature or a court, we have never measured court-

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Association v. EEOC[36] and a plurality in *United States v. Paradise*[37] concluded that the affirmative action policies at issue in those cases would have satisfied the strict scrutiny test.[38] In *Sheet Metal Workers*, the Court upheld a court-ordered remedial affirmative action plan that set a specific goal for minority membership in a union.[39] The Court's opinion noted that, in contrast to *Wygant*,[40] there were repeated findings by lower courts that the government had a compelling interest in trying to remedy "egregious violations of Title VII."[41] Five Justices also

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ordered, affirmative-action remedies against a less demanding standard." *Paradise*, 480 U.S. at 187 n.2. In contrast, Justice Stevens argued that the Court should review all judicial decrees under the same standard and that district courts should have "broad and flexible authority" to issue remedial measures after a finding a violation. *Id.* at 190. Justice Stevens asserted that Justice O'Connor's quotation from *Wygant* in her dissent in *Paradise*, in which the word "governmental" is substituted for "state" serves as evidence of her effort to extend strict scrutiny to judicial decrees. *Id.* at 190 n.1. Notably, in *Adarand*, Justice O'Connor used broad language when she suggested that "all racial classifications, imposed by *whatever* federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227 (emphasis added).

36 478 U.S. 421 (1986).

37 480 U.S. 149 (1987).

38 In *Paradise*, the plurality stated that "the relief order satisfies even strict scrutiny analysis," 480 U.S. at 167, while in his concurrence, Justice Stevens evaluated the policy on a less demanding abuse of discretion standard without addressing whether the policy would have satisfied strict scrutiny. *Id.* at 195 & n.1. Four Justices in *Sheet Metal Workers* concluded "that the relief ordered in this case passes even the most rigorous test – it is narrowly tailored to further the Government's compelling interest in remedying past discrimination." 478 U.S. at 480. Justice Powell concurred separately but likewise concluded that the policy served a compelling governmental interest and was narrowly tailored. *See id.* at 485.

39 478 U.S. at 483.

40 476 U.S. 267 (1986).

41 *Sheet Metal Workers*, 478 U.S. at 480-81, 485 (Powell, J., concurring in part and concurring in the judgment).

concluded that the plan was narrowly tailored because the district court had considered other remedies, the membership goal was temporary, and the plan had "only a marginal impact on the interests of white workers."[42]

In *Paradise*, the Supreme Court upheld an order requiring the Alabama state troopers to promote one African-American trooper for each Caucasian trooper promoted.[43] The state troopers had failed to comply with various consent decrees, and the Court determined that that there was a compelling governmental interest in remedying their "pervasive, systematic, and obstinate discriminatory conduct."[44] The Court concluded that it was "doubtful" whether other effective remedies were available to the District Court,[45] and that the one-for-one requirement was narrowly tailored because it "was flexible, waivable, and temporary in application,"[46] and because the "relationship between the numerical relief ordered and the percentage of nonwhites in the relevant work force"[47] was not arbitrary but rather the result of "a delicate calibration of the rights and interests of the plaintiff class, the Department, and the white troopers."[48] In

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42 *Id.* at 481.

43 480 U.S. at 185-86.

44 *Id.* at 167. In her opinion in *Adarand*, Justice O'Connor noted that in *Paradise*, every Justice had agreed that the discrimination of the Alabama state troopers justified a race-based remedy." 515 U.S. at 237. The Court disagreed, however, on whether the remedy adopted was narrowly tailored. *See Paradise*, 480 U.S. at 198 (O'Connor, J., dissenting) (asserting that the one-for-one remedy imposed was not narrowly tailored because there was no rational relationship between the percentage of minority workers to be promoted and the percentage of minority group members in the total relevant work force).

45 480 U.S. at 177.

46 *Id.* at 178.

47 *Id.* at 179.

48 *Id.* at 181-82.

addition, the Court noted that in contrast to the policy involved in *Wygant*, where the Court believed the policy only addressed societal discrimination and directly affected a person, the requirement in *Paradise* only postponed Caucasian promotions and did not require the layoff of any Caucasian employee.[49]

Consent decrees involving affirmative action represent a hybrid between private and governmental action. As the Supreme Court has recognized in *International Association of Firefighters v. City of Cleveland*, consent decrees "have attributes of contracts and of judicial decrees."[50] However, in that case, the Court stated that "there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation."[51] As a result, some would argue that consent decrees involving government employers must satisfy strict scrutiny, while those involving private employers should be subject to the same Title VII analysis as voluntary private affirmative action plans.

It is against this constitutional backdrop that some have argued that any affirmative action is a form of racial and gender discrimination against the predominant group

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49 *Id.* at 182-83.

50 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975)). Parties to an employment law dispute may resolve contested issues through a consent decree, which is essentially a written settlement agreement approved by a court. Although its objective is to end litigation, consent decrees are subject to interpretation, modification, collateral attack, and dissolution. Therefore, a consent decree contains elements of both a contract and a court order. 45C AM. JUR. 2D *Job Discrimination* § 2360 (2004).

51 *Firefighters*, 478 U.S. at 517.

and have attempted to use State law as a means to limit or end its influence.[52] One of the now-favored tools of these groups is the ballot referendum. The first such initiative was in California where voters adopted Proposition 209 in November 1996, which added Section 31 to Article I of the California Constitution.[53] Proposition 209 served as the model for the Michigan Proposal, and they are substantially similar. Also, in Washington state, Initiative 200 became law in November 1998 as a new section under Chapter 49.60 of the Revised Code of Washington. Initiative 200 is also modeled on Proposition 209, but it was enacted as an amendment to Washington's statutory code rather than its Constitution. Because of this and because there has been very little case law from Washington courts interpreting Initiative 200, this memorandum, where particularly relevant, will draw upon California case law for guidance regarding the impact of the Michigan Proposal.[54]

II. Michigan Diversity Activities Are Unlikely To Be Impacted By Proposal 2

As a general proposition, diversity programs that seek to expand education, employment, or other economic opportunities without disadvantaging any racial groups or men should remain permissible even if they take race or gender into account. These programs fit mainly into one of the following three categories: 1) diversity activities that, when properly

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52 *See generally* Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, March 14, 2006 [hereinafter *Glater*].

53 *See Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 15 (Cal. Ct. App. 2001). The text of the Proposition 209 is attached as Attachment B.

54 Also, case law from Washington may be misleading because under the Washington Constitution, education is the state's highest priority. *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 157 (Wash. 2003). This apparently helped Washington keep certain education-related affirmative action programs that may not have survived a constitutional amendment.

analyzed, employ no racial preference; 2) residual rights unlikely to be impacted because they are not within Proposal 2's reach; and 3) programs mandated by Federal law, or which are required under current Federal law to redress past discrimination.

A. Eliminating Barriers to Participation – Diversity Efforts Not Affected By Proposal 2 Since They Employ No Racial Preference

Outreach activities do not constitute racial classifications, nor do they inevitably impose a racially disparate impact in their effect. The Supreme Court has approved programs that are race-neutral in nature even when they may have a racially disproportionate effect,[55] and some lower courts have suggested that race-neutral outreach programs may be permissible.[56] The Michigan Proposal should not "preclude governmental entities ... from initiating a great variety of proactive steps in an effort to address the continuing effects of past discrimination or exclusion, and to extend opportunities in public employment, public education, and public contracting to all members of the community."[57] Therefore, the Michigan Proposal should not affect programs that do not grant preferential treatment in hiring, admissions, or contracting[58] (such as programs that have no impact on selection and are limited to outreach and increasing applications without instituting preferences).[59]

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55 *See generally Croson*, 488 U.S. at 507, 526; *Adarand*, 515 U.S. at 237-238 (citing *Croson*, 488 U.S. at 507, 526).

56 *See e.g. Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997).

57 *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1106 (Cal. 2000). This case is more fully discussed below.

58 *CRC Report* at 3.

59 *See Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1085 ("[T]he voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification.").

This is true even if such activities have the impact of increasing minority participation. The Supreme Court has made clear that race-neutral outreach programs that have the effect of increasing minority participation do not constitute unlawful racial discrimination.[60] Thus, even though certain such programs "may well have racially disproportionate impact ... they are not based on race."[61]

Such an interpretation is a matter of common sense. Recruiting efforts that focus generally on increasing the scope and size of the applicant pool do no cognizable harm to applicants already in the pool. As one court put it, "[t]he only harm to white males is that they must compete against a larger pool of qualified applicants."[62] Were the rule otherwise, every government measure that sought to achieve diversity in a system of allocating government rights would be subject to attack as racial discrimination and would only on the rarest occasions be upheld. Such a rule would put the government in an impossible Catch-22. Both the federal and state governments have the authority and the "constitutional duty" to determine whether a public entity's activities have the effect of breaching express provisions of federal law or of denying

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60 *Croson,* 488 U.S. at 510 (plurality opinion). *See also id.* at 526 (Scalia, J., concurring) (A state "may adopt a preference for small businesses, or even for new businesses" that would make it easier for those previously excluded by discrimination to enter the field.). The Supreme Court's openness to race-neutral "preferences" has been adopted by the majority of lower courts to consider the question whether race-neutral outreach and recruiting provisions pass constitutional muster. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571, 1583 (11th Cir. 1994); *Schurr v. Resorts Int'l. Hotel*, 16 F. Supp. 2d 537, 549 (D.N.J. 1998); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1553-54 (M.D. Ala. 1995).

61 *Croson,* 488 U.S. at 526 (Scalia, J., concurring).

62 *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997); *see also* Note, The Constitutionality of Proposition 209 As Applied, 111 Harv. L. Rev. 2081, 2084 (1998) (outreach programs "[s]eek to equalize information among individuals by focusing on those groups that are not receiving information available to others").

citizens equal protection of the law.[63] As the Supreme Court has recognized, an understanding of discrimination law that would preclude the government from preventing such violations before they occur would leave the government "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent [ ] discrimination and liability to non-minorities if affirmative action is taken."[64] Moreover, such a result has the effect of diluting the "constitutional responsibilities of the political branches [by saying] they must wait to act until ordered to do so by a court."[65]

Some permissible education-related outreach and recruitment efforts could probably include 1) expansion of outreach to, and partnerships with, K-12 schools to increase preparation for all students and address the achievement gap between students from different backgrounds;[66] 2) expansion of the criteria employed to define academic achievement to include qualitative factors such as improvement in academic performance;[67] 3) expansion of the criteria to encompass a broader range of personal talents and achievements;[68] 4) expansion of enrollment of community college transfer students, combined with enhanced outreach to students enrolled in

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63 *Associated Gen. Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987). See Section II.D.3 below for a more detailed discussion.

64 *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986).

65 *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

66 *See* Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 230 (1999) [hereinafter *Anderson*]; *CRC Report* at 16.

67 *See Anderson* at 229, *CRC Report* at 16.

68 *See Anderson* at 229, *CRC Report* at 16.

community college;[69] 5) dissemination of college applications and information to high achieving minority students as well as high achieving non-minority students; 6) implementation of a comprehensive review admissions policy that encourages broadening the concept of merit embodied in selection policies and a more full review of each applicant;[70] 7) improved preparation for college through the promotion of academic counseling, mentoring, and character education in high schools;[71] and 9) analysis of the diversity aspect of the applicant pool and monitoring of the selection process to ensure equal opportunity.[72]

Similarly outreach activities and requirements that involve merely solicitation of minority business enterprises ("MBE's") and women business enterprises ("WBE's"), as well as solicitation of others should remain valid.[73] However, outreach requirements for contractors should be applied in a way that does not pressure contractors to hire minority subcontractors because such pressure could constitute a racial preference[74] and could be viewed as invalid under

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69 *CRC Report* at 16.

70 *See Anderson* at 229, *CRC Report* at 16.

71 *See Anderson* at 230, *CRC Report* at 16.

72 *See Connerly*, 112 Cal. Rptr. 2d at 30 ("[M]onitoring programs which collect and report data concerning the participation of women and minorities in governmental programs" remain valid.).

73 *Safeco Ins. Co. of Am. v. City of White House*, 191 F.3d at 690 (*citing Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992) (A program requiring only good-faith solicitation efforts and not requiring particular set-asides is not objectionable.)).

74 *Safeco Ins. Co. of Am. v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (A program requiring that the contractor not only solicit MBEs but also utilize them may constitute an improper preference.).

the Michigan Proposal.[75] Examples of programs that are not implicated by the Michigan Proposal for employment and contracting outreach include: 1) expanding advertisement of employment and contracting opportunities in newspapers of general circulation, special trade journals and ethnic radio and television;[76] 2) establishing informational hotlines regarding employment and contracting opportunities and creating websites to disseminate information to previously nonparticipating groups;[77] 3) requiring every prime contractor to engage in reasonable, good-faith outreach to all types of subcontracting enterprises in a community;[78] 4) collecting data on women and minorities in employment and contracting compared to others, and publishing reports with this data;[79] 5) strengthening and expanding small business programs; 6) using quantitative analyses of employment/contracting numbers and setting goals for under-represented groups (however these goals serve as reasonably attainable objectives or targets that are used to measure progress toward achieving equal employment opportunity, they do not provide a justification to extend any preference);[80] 7) developing equal opportunity policies

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75 If incentives are offered to contractors who hire minority subcontractors and are withheld from those who hire non-minority subcontractors, this could arguably constitute an impermissible racial preference.

76 *See* Eryn Hadley , DID THE SKY REALLY FALL? TEN YEARS AFTER CALIFORNIA'S PROPOSITION 209, 20 BYU J. Pub. L. 103, 109 (Any program, whether labeled affirmative action or outreach, that does not single out individuals because of their race or sex, should be left intact.).

77 *See id.*

78 *See id.* ("[P]rograms providing information to all available subcontractors would not violate Proposition 209.").

79 *See Connerly*, 112 Cal. Rptr. 2d at 30.

80 *CRC Report* at 17. *But see Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1084 ("A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains 'a line drawn on the basis of race and ethnic status' as well as sex."); *Connerly*,

(continued...)

aimed at removing barriers to employment or contracting (barriers can include unfair tests, excessive requirements when submitting an application or bid, and mandating qualifications that are not job-related);[81] 8) implementing race- and gender-neutral recruitment and selection techniques (including competitive bidding and testing procedures);[82] and 9) "dividing large public contracts into smaller segments in order to facilitate participation by new or more modest enterprises."[83]

These practices are gender-neutral and race-neutral, and as such, they would not violate the Michigan Proposal. In *Grutter v. Bollinger*, the Supreme Court recognized using a lottery system and decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores as two race-neutral practices that would not trigger any special scrutiny.[84] Similarly, the practices enumerated above should not be offensive to the Michigan Proposal's bar on racial and gender preferences.

(...continued)

112 Cal. Rptr. 2d at 37 ("[R]equirements for the establishment of goals and timetables to overcome identified underutilization of minorities and women violate principles of equal protection and Proposition 209."). Therefore, if goals are used to assist the governmental agency in measuring its progress toward achieving equal opportunity by race/gender-neutral means, they should be permissible. However, if they are used to pressure contractors into hiring minorities or women (*e.g.*, by requiring contractors to have timetables for achieving specific race/gender participation percentages), they would probably be problematic.

81 *CRC Report* at 30.

82 *Id.*

83 *Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1106.

84 *Id.* at 340. "Percent plans" are also facially race-neutral. *Id.* at 369 (Thomas, J., concurring in part and dissenting in part). Percent plans provide automatic public university admission to the top-performing students from each high school in the state. California, Texas, and Florida have all passed some form of a percent plan. *CRC Report* at 15, 20, 21.

B. Residual Rights Unlikely To Be Impacted Because They Are Not Within Proposal 2's Reach

The Michigan Proposal covers *only* preferences "on the basis of race, sex, color, ethnicity, or national origin." Preferences based on any other factors are not affected by the Michigan Proposal. Thus, the Michigan Proposal does not bar preferences on the basis of religion, age, economic disadvantage, sexual orientation, or disability.[85] Incorporating race-neutral and gender-neutral means to increase diversity in a student body or public workforce may be achieved by focusing on neutral factors such as socioeconomic or geographic indicators to issue preferences.[86]

For example, recruiting events and scholarships[87] aimed at attracting underrepresented groups of students by focusing on eligible underrepresented high schools and

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85 The United States Supreme Court has held that some federal preferences for members of federally recognized Indian tribes are not based on an impermissible racial classification, but rather, because they are afforded to "members of quasi-sovereign tribal entities," are "political rather than racial in nature." *Morton v. Mancari*, 417 U.S. 535, 552 & n.24 (1974). While the Supreme Court has long upheld federal laws granting preferential treatment to members of Indian tribes, *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), neither the Supreme Court nor any federal appellate court has extended that rationale to State preferences for Native Americans and because the federal preference is grounded in Congress's power under the so-called Indian Commerce Clause to regulate Indian tribes, it is unlikely to apply at the State level.

86 *See* Marcia G. Synnott, THE EVOLVING DIVERSITY RATIONALE IN UNIVERSITY ADMISSIONS: FROM REGENTS V. BAKKE TO THE UNIVERSITY OF MICHIGAN CASES, 90 Cornell L. Rev. 463, 501 (2005).

87 It appears that privately funded scholarships restricted by minority status or gender may be permissible but similar state funded scholarships may not be. *CRC Report* at 24. Some universities outside of Michigan have already opened up formerly race-conscious scholarship and fellowship programs to students of both sexes and all races and ethnicities in response to threats or fears of litigation. *Glater.*

socioeconomic status should be permissible.[88] Also, it should be permissible to develop academic support programs and financial aid services for students from low-income backgrounds, who are first generation college students, who attend high schools with low eligibility rates for post-secondary institutions, who have a declared and proven commitment to "cross-cultural issues," and/or whose high schools have a low college and university participation rate.[89] In the case of the University of Washington, its new admissions process, which has passed legal challenges under Initiative 200, encourages schools and departments to consider factors such as cultural and life experiences and educational, economic, and personal disadvantage in their admission processes.[90]

Also, the Michigan Proposal does not affect programs that do not pertain to "public employment, public education, or public contracting." Therefore, the state should still be able to, for example, contribute money to ethnic festivals.[91] Further, any volunteering programs (*e.g.* volunteer firefighters) should not be affected because volunteers would probably not be considered "public employees."[92] Finally, the universities and departments are legally able to encourage faculty to conduct research on topics such as race, ethnicity, gender, and multiculturalism as a method to increase diversity.[93]

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88 *See Anderson* at 227 (An "alternative to race-based preferential admissions policies is class-based preferences based on economic disadvantage.").

89 *See generally Glater.*

90 *CRC Report* at 19.

91 *CRC Report* at 3.

92 *CRC Report* at 32.

93 *CRC Report* at 17.

C. Activities That Merely Collect Data Not Impacted by Proposal 2

Data collection and reporting requirements, "even those requiring the collection of information about race," are part and parcel of hundreds of federal, state, and local statutes and programs, and have never been held to impose a racial "classification" of any kind. Under Proposal 2 it is *differential* treatment on the basis of a prohibited class, not classification *per se*, that is implicated.[94] *See also Kerrigan v. State*, 909 A.2d 89 (Conn. Super. 2006). This is all Proposal 2 does. Courts have historically approved the collection of data regarding racial and gender composition[95]; the collection by the federal government of the racial composition of state employees[96]; and the collection of local census data regarding the racial and ethnic composition of public school employees.[97] Thus, data collection requirements have been described as "conscious of race but devoid of ultimate preferences,"[98] and are valid.

Similarly, to the extent that the collection of data involves looking at goals and statistical analyses to measure whether there is ongoing discrimination, the use of these goals and analyses should remain legal under Proposal 2. Courts have consistently held that similar measures were not subject to strict scrutiny and as such were not race-based classifications. As Judge Higginbotham of the Third Circuit explained, there is a strong argument that because a

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94 *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection clause does not forbid classifications. It simply keeps decision makers from treating differently persons who are in all relevant respects alike."))

95 *Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999).

96 *United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976).

97 *Caufield v. Bd. of Educ.*, 583 F.2d 605 (2d Cir. 1968).

98 *Tanoue*, 39 F. Supp. 2d at 27.

MBE or WBE program "merely set[] goals and requires no action on the part of the City, this provision does not create any rights on the part of minority-owned firms or any responsibilities owed those firms by the City." He reasoned that the "provision, on its face, therefore, does not trigger strict scrutiny, in contrast to the Richmond Plan considered in *Croson*."[99]

The California Supreme Court decision in *Lungren v Superior Court*[100] supports the conclusion that a subcontractor goal is unaffected by Proposal 2. The Court listed numerous types of such "outreach" programs not affected by California's Proposition 209, including "action taken to provide equal opportunity, as in hiring or admissions, for members of previously

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99 *Contractors Ass'n v. Philadelphia*, 945 F.2d 1260, 1269 (3d Cir. 199 1) (Higginbotham, J. concurring). *See also Associated Pennsylvania Constructors v. Jannetta*, 738 F. Supp. 891, 893 (M.D. Pa. 1991) (minority and women participation objectives did not trigger strict scrutiny because "the policies do not require use of certain percentages of women and minorities but, rather, seek to ensure no current discrimination," because the "policy statements create no quota or goal system, the court finds that strict scrutiny does not apply"); *First Capital Insulation v. Jannetta*, 768 F. Supp. 121 (M.D. Penn. 1991) (holding statute which required bidder to list the amount of work MBEs and WBEs would perform on the contract was not subject to strict scrutiny); *accord Associated Penns. Constructors*, 738 F. Supp. 891. *But see Cone Corp, v. Hillsborough County*, 908 F.2d 908 (11th Cir.) (upholding county's MBE law which set MBE participation goals that could be met if the bidder made good-faith efforts, but applying strict scrutiny); *Concrete Works v. City and County of Denver*, 36 F.3d 15 13 (10th Cir. 1994) (applying strict scrutiny to ordinance establishing participation goals for public works projects that could be satisfied by good-faith efforts). With respect to public contracting, the Ninth Circuit invalidated under the Equal Protection Clause a statute requiring general contractors who bid on state contracts to meet designated subcontracting goals for participation by minority- and women-owned businesses, or to demonstrate good faith efforts to do so. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir., 1997). The Court held that the statute constituted a racial classification and failed to satisfy strict scrutiny. *Id.* The *Monterey Mechanical* decision leaves several open questions regarding the effect of Proposition 209 on affirmative action measures in public contracting. First, it did not resolve whether a measure establishing subcontracting goals constitutes a "preference" under Proposition 209. Thus, even if such a measure is subject to strict scrutiny under *Monterey Mechanical,* it nonetheless may be unaffected by Proposition 209 if it does not impose "preferential treatment" on a racial basis.

100 48 Calif. App. 4th 435 (1996).

disadvantaged groups, such as women and minorities, often involving specific goals and timetables."[101] In *Domar Electric, Inc. v. City of Los Angeles*,[102] the Court considered the constitutionality of an outreach program promulgated pursuant to California Public Contract Code section 2000. The Board of Public Works had established an outreach program that specified the percentage of MBEs and WBEs that were expected to result from the outreach efforts. The achievement of that goal was one of ten indicators of good faith, and failure to attain the goal did not by itself disqualify any bidder from consideration for a contract.[103] In the contract at issue in the case, the low bidder failed to submit the required good faith documentation code, and his bid was deemed non-responsive. The low bidder brought suit, alleging that the code and the outreach program violated the Equal Protection Clause as interpreted by *Croson*.[104]

The court held that, unlike the plan in *Croson,* "the board's outreach program seeks no more than to ensure that the playing field [was] level for all subcontractors. As such, it was] race- and gender-neutral."[105] The court noted that the percentage of MBE/WBE participation was "not a preference, quota, or set aside. Rather, it was merely an indication of

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101 *Id.*

102 41 Cal. App. 4th 810, 826 (1995).

103 *Id.* at 817.

104 *Id.* at 819.

105 *Id.* at 826.

the level of MBE/WBE subcontractor participation that might be expected if "the good-faith criteria were met."[106]

D. Diversity Efforts Affected By Proposal 2 Since They Involve A Racial Component, But Which May Remain Available

1. Outreach Activities Which Have A Racial Component But Which Do Not Constitute A Preference – All They Do Is Level The Playing Field

Race- and gender- conscious outreach should remain permissible if it includes outreach to other groups.[107] In other words, race- and gender-based outreach can be implemented if the program in question also includes white males and does not provide a tangible or apparent advantage based on gender or race.

In general, conducting targeted recruitment and outreach efforts aimed at offering increased access and opportunities to women and minorities (including minority outreach fairs, providing that those from the majority are still allowed, and invited, to attend) should remain permissible.[108] For example, sponsorship of recruitment fairs or receptions by minority or female groups in addition to receptions for others with the understanding that all fairs/receptions are open to everyone should remain valid. Indeed, interpretations of California Proposition 209 have

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106 *Id.; cf. Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1555 (M.D. Ala. 1995) (approving consent decree and holding that employment goals for the employment of women did not violate the equal protection clause so long as they did not operate as quotas or set-asides).

107 An outreach program that is focused entirely on minorities or women without any outreach for other groups could be found to constitute an improper preference under the Michigan Proposal. *See generally Hi-Voltage Wire Works, Inc.*, 12 P.3d 1068. In *Hi-Voltage Wire Works, Inc.*, the Supreme Court of California found that a program that "requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's" was contrary to Proposition 209. *Id.* at 1084.

108 *CRC Report* at 30.

confirmed the availability of this type of targeted outreach. Before Proposition 209, the California Supreme Court approved the City of Los Angeles' affirmative action program in *Domar Electric, Inc, v. City* of *Los Angeles*.[109] The outreach program in *Domar* required prime contractors to provide MBEs, WBEs, and other business enterprises ("OBEs") an equal opportunity to compete for and participate in the performance of city contracts. Even though the outreach program provides an estimate of the participation level by MBEs and WBEs that may be anticipated by the exercise of good faith offer, a bidder gets no advantage or disadvantage from meeting or not meeting the specified participation level. The court in *Hi-Voltage* cited approvingly to the *Domar* case, indicating that this type of outreach program continues to be valid after Proposition *209*. We have listed below some examples of targeted outreach which should be viable under, and in conformity with, Proposal 2.

Education

- Send college application and information to high-achieving students of color as well as high-achieving non-minority students.
- Provide recruitment fairs or receptions sponsored by minority or female groups in addition to receptions for general students with the understanding that all fairs and receptions are open to everyone.
- Establish programs where alumni and students are matched on similar race, ethnicity, and interests, in which minority alumni provide assistance with recruitment and retention of students of color and female students. Such programs would work similarly for non-minority students.
- Recruit teachers in K-12 schools based on language needs and geography.
- Race- and gender-conscious teacher or student reassignment that does not grant or take away a benefit may survive the Michigan Proposal if it does not result in an actual disadvantage to a member of the predominant group.

Employment

- Develop mentoring and professional development programs for minorities, women, and others.

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[109] 9 Cal. 4th 161 (1994).

- Create job preparation workshops for resume writing and interview training for minorities, women, and others.
- Disseminate information about programs and public employment at community-based events. For example, state agencies can attend recruitment fairs or receptions sponsored by minority or female groups, in addition to attending non-minority fairs and receptions.
- Work with local community advisory and citizens' groups, community service organizations, and other public service agencies to facilitate recruitment of economically-disadvantaged persons, and others.
- Recruit job applicants based on language needs. For example, bilingual police officers might be needed in areas with high concentrations of monolingual immigrants, for public safety reasons.

Contracting

- Conduct outreach to MBEs and WBEs, as long as OBEs are also targeted.
- Set subcontracting goals for white-male-owned companies as well as for WBEs and MBEs, based on recent disparity studies, as long as those goals are used only to measure progress and not as incentives or preferences.

2. Race-Sensitive Activities Which Are Mandated By Federal Law

The Michigan Proposal explicitly exempts programs that are necessary to "establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." There are many federal statutes and regulations which, in appropriate circumstances, require government entities to consider race. Here we highlight just a few. Title VI of the Civil Rights Act of 1964 prohibits programs and institutions receiving federal assistance from discriminating on the basis of race, color or national origin. Federal agencies have the discretion to promulgate regulations that require affirmative action where facially neutral policies have a disparate impact on women or minorities, even in the absence of intentional discrimination. These regulations could require universities and city and county departments and agencies to take affirmative action to prevent discrimination. In some instances, Title VI requires a state agency or municipality to take affirmative action to overcome the effects of past discrimination. Failure to do so may result in the loss of federal funds.

Title VII of the Civil Rights Act of 1964 provides a basis by which an employer can utilize race- and gender-conscious programs to take corrective action against discrimination. When a court has found that a race- or gender-conscious program is necessary, essential, or required to remedy a violation of Title VII, the program should not be barred by the Michigan Proposal.

Also, Title IX of the 1972 Education Amendments to the Civil Rights Act prohibits educational programs and institutions that receive Federal funds from discriminating on the basis of sex. Government agencies have the discretion to implement regulations requiring that affirmative action be taken where the director of a department's civil rights office finds that a policy has had an adverse impact on women. Therefore, gender-conscious programs required by Title IX should not be covered by the Michigan Proposal because failure to comply with Title IX could lead to the termination of federal funding.[110]

However, in the one case to interpret a comparable provision of Proposition 209, the California Supreme Court reached a different conclusion. In *C&C Construction, Inc. v. Sacramento Municipal Utility District*,[111] the court found that, if a race-neutral program can satisfy the requirements to maintain federal funding, the state should implement such a program in order to comply with both state and federal law. In *C&C Construction,* the court of appeals affirmed the trial court's decision that to satisfy the federal funding exception, a state entity had to have substantial evidence that it would lose federal funding if it did not employ race-conscious

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110 *CRC Report* at 25.

111 18 Cal. Rptr. 3d 715, 732 (Cal. Ct. App. 2004).

measures.[112] The government cannot impose race-based affirmative action unless it can establish that it cannot remedy past discrimination with race-neutral measures.[113]

3. Federal Orders and Consent Decrees Required to Redress Past Discrimination

The language of Proposal 2 also "does not invalidate any court order or consent decree that is in force as of the effective date of this section." It is clear that court orders and consent decrees entered into after the effective date of Proposal 2 should likewise be unaffected, assuming they are in conformity with, and required by, federal antidiscrimination law. These exemptions are broad and recognize first the State's inability to override federal law and likewise the State's obligations to not discriminate. It is settled that preventing and deterring unlawful discrimination – indeed, that promoting compliance with any federal law – is vitally important for any governmental unit and, in the constitutional framework, constitutes a compelling government interest. The Supreme Court has made this clear in any number of contexts, particularly those in which the government actively participates in creating conditions of

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112 Until 1993 the defendant employed race-neutral affirmative action measures. However, following a 1993 disparity study that showed the existence of disparities despite the race-neutral measures, and a subsequent 1998 study, the public utility refrained from considering race neutral remedies at all. Furthermore, there was no evidence that the applicable federal laws required defendants to use race-based remedial measures – only affirmative or remedial action to overcome the effects of past discrimination – and thus, there was no real threat to defendant's eligibility for federal funding if race-conscious measures were not used. In essence, the court made a fact-specific determination that in this instance the public entity had not actively and recently pursued race-neutral means and did not demonstrate that federal funding would cease in the absence of race-conscious measures. The holding therefore would not prevent another state entity from qualifying for the exception if there were compelling facts.

113 *C&C Constr.*, 18 Cal. Rptr. 3d at 311. *See also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78-79 (1987) (Absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only where compliance with both federal and state regulations is a physical impossibility or where the state law frustrates the purposes of the federal law.)

exclusion. Thus, as Justice O'Connor explained in *Croson*, "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[114] A history of exclusion of minorities can give state and local governments ample cause to believe deterrence and prevention of discrimination are essential. Proposal 2 cannot serve to undermine or thwart the public's federally-mandated duty to not discriminate.

As discussed, government has, in some circumstances, not only an incentive but also a duty to address past discrimination. In *Croson,* the Court recognized that there is a compelling governmental interest in remedying past discrimination if the governmental actor actively perpetrated discrimination. Justice Kennedy observed "the State has the power to eradicate racial discrimination and its effects in both public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."[115] Justice Kennedy further observed that race-conscious remedies "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause."[116] Following this logic, Kennedy reasoned that, because "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action," government should be able to take "remedial legislative action" without

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114 *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.) (noting "a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice"); *id.* at 519 (Kennedy. J., concurring in part and concurring in the judgment); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *United States v. Paradise*, 480 U.S. 149, 166 (1987); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

115 *Croson*, 488 U.S. at 518 (Kennedy, J., concurring).

116 *Id.*

waiting "to act until ordered to do so by a court."[117] Justice Kennedy's analysis that race-conscious remedies may be the only means of righting these wrongs does not appear controversial. Even the plurality in *Croson* notes that affirmative action is sometimes necessary, writing that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[118] As discussed above, Justice Powell's opinion in *Wygant* states this explicitly: "in order to remedy the effects of prior discrimination, it may be necessary to take race into account."[119]

The Court has long recognized that the states have a "constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination."[120] *Wygant* further explained that "public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court...to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious *remedial action may be necessary.*"[121] Justice O'Connor's concurrence emphasizes this point: "our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination."[122]

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117 *Id.*

118 *Id.* at 509.

119 *Wygant*, 476 U.S. at 280.

120 *Id.*.

121 *Id.* at 270 (*citing North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971) (emphasis added)).

122 *Id.* at 280.

This principle has been reaffirmed by the Court time and time again. *Green v. New Kent County School Board*,[123] emphasized the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination is eliminated root and branch." In *North Carolina State Board of Education* v. *Swann*, the Court was faced with the question of whether or not an anti-busing law was compatible with the constitutional guarantee that *de jure* discrimination not exist in schools. The Court held that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."[124]

Justice O'Connor reinforces this point when she discussed why a finding of intentional discrimination is not required in order to pursue race-based relief: "[W]here these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary."[125]

Indeed, a state or municipality, "when presented with evidence of its own culpability in fostering or, furthering race discrimination, might well be remiss if it failed to act upon such evidence."[126] This is not an abstract concern. In *L. Tarango Trucking v. County of*

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123 391 U.S. 430, 437-38 (1968).

124 402 U.S. at 45.

125 *Wygant*, 476 U.S. at 291.

126 *Coral Const. Co. v. King County*, 94 1 F.2d 91 0,921 (9th Cir. 1991).

Contra Costa,[127] minority businesses brought a class action lawsuit alleging defendants discriminated against them in awarding contracts in violation of the Fourteenth Amendment's Equal Protection Clause. While the plaintiffs won class certification and survived a summary judgment challenge, they were ultimately unsuccessful after a trial on the merits. However, this case is an example that supports the proposition that public entities that do not actively monitor for discriminatory practices risk liability from MBEs who are unfairly treated or excluded because of their race.

Proposal 2 by its plain language exempts any existing consent decree or court order that is in force as of the effective date of the Proposition. In addition, affirmative action programs which are "necessary," "essential" or "required" to remedy a violation of Title VII will still be valid, arguably even in the absence of court order. Certainly, where a court finds that a race- or gender-conscious program is necessary to comply with Title VII, the resulting program should not be barred by Proposal 2. For example, the Ninth Circuit has held that affirmative action was necessary to prevent a disparate impact where a company refused to remedy violations of Title VII.[128] There, the court found that a Joint Apprenticeship and Training Committee ("JATC"), a labor management organization, had been using a two-tiered selection process that had a disparate impact upon women and that an appropriate remedy should be implemented. Despite repeated decisions by the courts that the JATC needed to remedy the violations, the JATC continued to "ignore the affirmative action proposal and retain 'its

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127 181 F. Supp. 2d 1017 (N.D. Cal. 2001).

128 *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship Training Comm.*, 94 F.3d 1366 (9th Cir. 1996).

discriminatory "hunting license" program.'"[129] Finally, in light of the JATC's egregious and obstinate conduct, the court held that affirmative action was necessary and remanded with instructions to adopt a 20% affirmative action program.[130]

Similarly, in *Local 28 of Sheet Metal Workers' International Association v. EEOC*,[131] the Court held that in some instances, "it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII." Where, for example, "an employer or union has engaged in particularly long-standing or egregious discrimination [in contempt of court] ... requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force, [affirmative action] may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."[132]

Other cases have found an affirmative duty to act in the absence of such egregious conduct. One court ordered defendant to "take affirmative steps for a period of two years to attract minority tenants to his buildings" after a trial finding that defendant had failed to show available apartments to African-American renters.[133]

Finally, affirmative action programs implemented pursuant to a court-approved consent decree settlement under Title VII may be protected from a Proposal 2 challenge. Consent decrees may incorporate a duty of a defendant to take affirmative action to remedy past

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129 *Id.* at 1371.

130 *Id.* at 1372.

131 478 U.S. 421, 448 (1986).

132 *Id.* at 448-49.

133 *Cabrera v. Jakabovitz,* 24 F.3d 372, 393 n.20 (2d Cir. 1994).

violations.[134] To the extent the decree is based on a finding that the affirmative action was *necessary* to remediate the effects of past discrimination,[135] the decree may override Proposal 2. All these cases make clear that it is the government's duty, or that it is necessary, in some instances, to employ race-based programs. In other words, based upon the appropriate factual showing, these programs are mandated by federal law to address past discrimination through race-conscious relief. Proposal 2 should not, and cannot, relieve the state from these federal obligations.[136]

III. Diversity Efforts Subject to Attack Following Proposal 2

The Michigan Proposal did not change the Supreme Court's view, most recently stated in *Grutter*, that it is constitutionally permissible for universities to consider race or gender as one factor among many in university admissions. However, neither the U.S. Constitution nor federal statutory or case law *requires* universities to consider race or gender in university admissions in order to serve the recognized compelling interest of achieving diversity.

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134 *Regents of the University of California v. Bakke,* 438 US. 265, 301-02 & a41 (1978) (A consent decree may properly include provisions requiring the defendant to take affirmative action rectifying the effects of past discrimination).

135 *See, e.g., Local* 28,478 U.S. at 449-50 ("[E]ven where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's reputation for discrimination may discourage minorities from seeking available employment."); *Stuart* v. *Roache,* 951 F.2d 446 (1st Cir. 1991) (promotions which perpetuate prior discriminatory hiring may require affirmative action).

136 Of course, to the extent that the Michigan Courts would be inclined to follow the analysis of the California court in *C&C Construction, Inc. v. Sacramento Municipal Utility District*, they would be unlikely to find that race-conscious relief is mandated, absent a specific finding that race-neutral policies do not satisfy federal requirements.

Moreover, as discussed at length by the United States Court of Appeals for the Sixth Circuit in *Coalition to Defend Affirmative Action v. Granholm*,[137] while the U.S. Constitution and federal statutory and case law permit the use of inherently suspect racial classifications that are used in a manner narrowly tailored to achieve the compelling state interest in achieving a diverse student body (consistent with the standard set forth in *Bakke*), that body of law neither compels the use of race in admissions nor prohibits states from banning the use of what the Sixth Circuit describes as presumptively prohibited criteria.

As discussed above, the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1* (appealing *Parents Involved in Community Schools v. Seattle School District No. 1*)[138] and *Meredith v. Jefferson County Board* (appealing *McFarland v. Jefferson County Pub. Schs.*)[139] is currently considering the validity of race-conscious plans in public K-12 school systems. Also, as mentioned above, a group of Michigan citizens have mounted an applied challenge to Proposal 2, asserting that it "run[s] afoul of core Fourteenth Amendment principles."[140] As the outcome of these cases may affect the analysis of Proposal 2 as it relates to diversity in education, we believe it would be premature to weigh in on the impact of Proposal 2 on diversity initiatives while these cases are pending before the Court.

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137 (No. 06-2640) (December 29, 2006).

138 294 F.3d 1085 (9th Cir. 2002).

139 416 F.3d 513 (6th Cir. 2005).

140 *Cantrell v. Granholm*, Complaint filed December 19, 2006, E.D. Mich., Case 2:06-cv-15637.

IV. Conclusion

Although the definitive interpretation of the Michigan Proposal will await developments in the courts, we believe it is likely that programs that seek to expand opportunities without disadvantaging any racial group or gender should remain permissible. Specifically, preferential treatment may still be afforded to groups that are not categorized by the race or gender of their members and, as a practical matter, some of the goals of race and gender-based affirmative action may be accomplished thereby because women and racial minorities tend to be overrepresented therein. Likewise programs that simply level the playing field while providing no preference should remain viable. Finally, to the extent that race conscious relief is required under federal law to remedy identified discrimination, Proposal 2 should not be permitted to override these federal mandates.

Attachment A

The Michigan Proposal amends the Michigan Constitution by adding the following Section 26 to Article I:

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 sub-section 1.

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

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

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

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

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

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

Attachment B

California Constitution, Article I

SEC. 31. (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

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

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

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

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

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

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

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