Steps That Government Agencies Can Take to

Ensure Equal Opportunity in Public Contracting, Education and Employment

Prop 209

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Authored by Jeffrey Bleich and Todd Gluth
with the assistance of Barni Rothman and R. Timothy Slattery

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In November 1996, the California electorate adopted Proposition 209, which amended the California Constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I § 31(a).

In the decade since the initiative went into effect, California municipalities and state and local agencies have expressed widespread confusion about the meaning and scope of Proposition 209. Notwithstanding strong state and federal antidiscrimination laws that predate the initiative, some have argued that Proposition 209 requires governmental entities to revert to previous policies that limited access for minorities and women. The California courts have put this confusion to rest, confirming that state law still permits, and sometimes requires, careful consideration of race and gender in our public institutions.

I. Practices Considered "Preferential" Under Proposition 209

Consistent with the language of Proposition 209, courts have struck down only those affirmative action practices that clearly discriminate or grant preferential treatment on the basis of race or sex, and that are not mandated by federal law.

For example, in the leading case interpreting Proposition 209, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000), the California Supreme Court invalidated a public contracting program that required city officials to reject "out of hand" all bids from contractors who failed to either (a) utilize a specific percentage of minority and women subcontractors or (b) undertake and document prescribed efforts to include such subcontractors. *Id.* at 562. The Court stressed that the first option "authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least race and sex-conscious numerical goals," *id.* at 562, and that the second option imposes different notice, bid solicitation, and negotiation obligations on the sole basis of the race and sex of subcontractors. *Id.* at 564. In addition, the City put forth no evidence that would have shown that such a race- and gender-conscious program was required under federal law. *Id.* at 568-69.

All of the affirmative action policies deemed preferential under Proposition 209 have similarly imposed quota-like numerical goals, *see Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 50, 55, 59-60, 61 (2001); *Neighborhood Sch. for Our Kids v. Capistrano*, No. 05CC07288, slip op. at 3-4 (Cal. Super. Ct. Aug. 25, 2006) (unpublished minute order), compelled the selective dissemination of information, *see Coral Const., Inc. v. City of San Francisco*, 149 Cal. App. 4th 1218, 1228-29 (2007);[1] *C & C Constr.*,

[1] The California Supreme Court granted review of *Coral Const., Inc. v. City of San Francisco*, 149 Cal. App. 4th 1218, 1228-29 (2007) on August 22, 2007. Thus, the case, while significant,

Inc. v. Sacramento Mun. Util. Dist., 122 Cal. App. 4th 284, 295 (2004); *Connerly*, 92 Cal. App. 4th at 51, 61, or otherwise mandated different requirements on the basis of race and sex.

One can find examples of such preferential practices in all three of the fields addressed by Proposition 209. In the contracting context, public entities cannot use a proscribed classification as the determinative trigger for beneficial presumptions, *Connerly*, 92 Cal. App. 4th at 47-48, bidding protections, *id.* at 51-52, or eligibility for discounts and credits. *Coral Const.*, 149 Cal. App. 4th at 1228; *C & C Constr.*, 122 Cal. App. 4th at 294. Public employers cannot restrict recruiting or change the qualifications for job openings on the basis of the race or sex of applicants. *Connerly*, 92 Cal. App. 4th at 61; *Kidd v. State*, 62 Cal. App. 4th 386, 393 (1998). Finally, public schools cannot establish different transfer criteria for students, or determine their eligibility for educational programs, "solely on the basis of their race." *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1284 (2002); *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.* (*ACRF*), No. RG0692139, slip op. at 17-18 (Cal. Super. Ct. April 6, 2007) (unpublished).

A. Exception For Programs Required By Federal Law

However, courts have also made clear that even practices deemed "preferential" may still be permissible, and even mandated, under certain circumstances. Proposition 209 permits any action that is necessary to comply with federal law or the United States Constitution. *See* Cal. Const. art. I § 31(h); *Hi-Voltage*, 24 Cal. 4th at 569. As repeatedly acknowledged by the California courts, the Fourteenth Amendment may require race-based remedial programs to rectify the results of intentional discrimination. *See, e.g.*, *Hi-Voltage*, 24 Cal. 4th at 568; *Coral Constr.*, 149 Cal. App. 4th at 1246-50; *Connerly*, 92 Cal. App. 4th at 57. In the words of the United States Supreme Court, "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-81 (plurality opinion). Hence the State has a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Id.* at 291 (O'Connor, J., concurring); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); *Croson*, 488 U.S. at 518 (Kennedy, J., concurring).

The recent California Court of Appeal decision in *Coral Construction* demonstrates the continuing vitality of this principle. In that case, plaintiffs challenged the City of San Francisco's contracting program, which shared many elements with the contracting program invalidated in the *Hi-Voltage* case. However, unlike the City of San Jose, the City of San Francisco compiled extensive evidence of discrimination in its

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cannot be cited as precedent in court proceedings. *See* California Rules of Court Rule 8.1105(e), Rule 8.1115, and Rule 8.1120.

contracting system, *see Coral Constr.*, 149 Cal. App. 4th at 1227-30, and "argued vigorously" that this record justified its program under federal law. *Id.* at 1250. The trial court ruled that the City's evidence of discrimination and exclusion "does not appear relevant" to a Proposition 209 challenge, and accordingly granted summary judgment for the plaintiffs. *Id.* at 1246. The Court of Appeal reversed and remanded, ruling that the trial court should have evaluated the City's evidence and determined whether the City's program "is mandated by the federal Constitution as a narrowly tailored remedial program to remedy ongoing, pervasive discrimination . . . ." *Id.* at 1226. As the Court of Appeal stated, "the [trial] court assumed that [Proposition 209] is the last word. It is not. The federal equal protection clause is the last word." *Id.* at 1247.

The *Coral Construction* opinion does not address whether the City of San Francisco compiled a sufficient record of intentional discrimination to justify its preferential program. *See id.* at 1250. Nevertheless, governmental entities would do well to compile the types of evidence proffered by the City in *Coral Construction*. For example, the court cited a study that revealed a statistically significant underutilization of minority-owned business enterprises ("MBE's") and women-owned business enterprises ("WBE's") in City contracting. *Id.* at 1229; *see also id.* at 1249 (stressing the importance of using "the relevant statistical pool for showing discriminatory exclusion"). The City additionally conducted internal investigations, compiled hearing testimony, and made legislative findings that detailed specific instances where MBE's and WBE's suffered deliberate exclusion and disparate treatment at the hands of city officials and prime contractors. *See id.* at 1228-30.

The *Coral Construction* opinion also does not address whether the City of San Francisco's preferential program is "narrowly tailored." *See id.* at 1250. The court does, however, indicate that public entities should document their "consideration of alternative, race-neutral ways to increase minority participation" before enacting preferential programs. *See id.* at 1249.

B. Exception For Programs Required To Maintain Federal Funding

A similar exception to Proposition 209's ban on preferential treatment exists for any "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." Cal. Const. art. I § 31(e). "[B]efore imposing race-based measures" pursuant to this exception, a state governmental agency "need not obtain a federal adjudication that race-based discrimination is necessary to maintain federal funding." *C & C Constr.*, 122 Cal. App. 4th at 298. On the other hand, "the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination." *Id.*; *see also Coral Constr.*, 149 Cal. App. 4th at 1233-34.

II. Race- and Gender-Conscious Practices Not Considered "Preferential" Under Proposition 209

In addition, California's state and local government entities have wide latitude to promulgate programs that, while race- and gender-conscious, are not considered preferential. As used in Proposition 209, the term "preferential treatment" means "a giving of priority or advantage to one person over others." *Hi-Voltage*, 24 Cal. 4th at 560 (citation and alteration omitted). Not all race- and gender-conscious programs give such a "priority or advantage." As the California Court of Appeal recently noted, one can have a statute that "involves race consciousness" and yet "does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681 (2006) (rejecting an equal protection challenge to the California Voting Rights Act of 2001, which "gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system").

The California courts have specifically held that the following race- and gender-conscious programs do not discriminate or grant preferential treatment within the meaning of Proposition 209:

- making formal commitments to diversity;
- collecting and reporting data concerning the participation of women and minorities;
- using such information to restructure selection processes to ensure that no groups are unfairly excluded;
- inclusive race- and gender-conscious outreach and school integration programs.

A. Stated Commitment to Diversity

Proposition 209 permits state agencies to establish policies that "generally emphasize[] the value of 'diversity' in the workplace." *L.A. County Prof'l Peace Officers Ass'n v. County of Los Angeles* (*PPOA*), 2002 WL 1354411, at *5 (Cal. Ct. App. June 20, 2002) (unpublished).[2] The California Court of Appeal deemed the diversity policy in *PPOA* permissible for the following reasons:

> Unlike specific programs or policies that have been found to violate section 31, the County's generalized Policy on Diversity does not either mandate preferential treatment or provide for racial or gender quotas and set asides. Rather than advocating the preferential treatment of a specific group or groups, the Policy on Diversity emphasizes valuing "each"

[2] Note that the California Rules of Court generally prohibit the citation of unpublished opinions from the California Court of Appeal. Cal. Ct. R. 8111.5 (2007).

> individual. The Policy on Diversity reasonably can be read to discourage discrimination *against* any particular race or gender.

Id. (internal citations omitted).

Although a permissible diversity policy cannot "mandate preferential treatment or provide for racial or gender quotas or set asides," it need not be color blind either. Indeed, the policy in *PPOA* specifically stated that the term "diversity" encompasses "race, gender, age and nationality" as well as other undefined factors. *See id*. at *5 n.3. Moreover, the policy stressed the need to "identify policies and practices that both help and hinder the inclusion of a wide range of employees and the culturally sensitive provision of services to the community." *Id.* To this end, it stated that the County "must strive for a pluralistic work force in an effort to be more responsive to the service needs of the community," and that the County "cannot ignore the changing demographics or assume they will have no impact on the way we do business." *Id.*

B. Data Collection and Monitoring

The California Court of Appeal has also held that monitoring programs that collect and report data concerning the participation of women and minorities "serve a compelling government need and may be employed without violating principles of equal protection or Proposition 209." *Connerly*, 92 Cal. App. 4th at 53. The court reasoned that "[a]ccurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action." *Id.* at 46. Moreover, "a determination of the underutilization of minorities and women in state service can serve legitimate and important purposes," such as assessing whether all persons have equal access to contracting, employment, and education. *Id.* at 56.

Since *Connerly*, the courts have unanimously upheld programs that require monitoring on the basis of race and gender. *See, e.g.*, *Harman v. City of San Francisco*, 136 Cal. App. 4th 1279, 1295 (2006); *Cheresnik v. City of San Francisco*, 2003 WL 1919111, at *11 (Cal. Ct. App. April 23, 2003) (unpublished); *PPOA*, 2002 WL 1354411, at *7.

C. Reevaluating And Modifying Selection Processes Where Under-Utilization Of Minorities And Women Exists

In addition, courts have held that public entities may – and in some cases must – use race- and gender-conscious data to flag and eliminate exclusionary practices. In the employment context, for example, the *Connerly* court made clear that such information can highlight the need to restructure the selection process:

> [s]uch a determination may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices. It may indicate the need to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude

> members of the underutilized group. And it may indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department.

Connerly, 92 Cal. App. 4th at 56.

As another panel of the California Court of Appeal has stated, Proposition 209 permits, and indeed encourages, public employers to implement policies for "removing barriers to employment that may operate to discriminate on the basis of race or ethnicity." *Cheresnik*, 2003 WL 1919111, at *11. A policy of this sort requires employers to monitor the employment of women and minorities "to direct attention to areas where personnel practices may effectively operate to favor a particular group." *Id.*; *see also Connerly*, 92 Cal. App. 4th at 56. If such monitoring reveals that minorities and women do not have equal opportunity to compete for employment or advancement, appropriate corrective measures include broadening the pool of potential applicants through outreach and revising eligibility and selection criteria.

An employer is legally required to review its selection practices to "to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group." *Id.* Proposition 209 forbids public employers from setting different selection standards based on the race or sex of applicants. *Id.* at 61; *Kidd*, 62 Cal. App. 4th at 393. At the same time, however, "before utilizing a selection procedure that has an adverse impact on minorities, [a public employer] has an *obligation* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid." *S.F. Fire Fighters Local 798 v. City of San Francisco*, 38 Cal. 4th 653, 676 (2006) (quoting *Brunet v. City of Columbus*, 1 F.3d 390, 412 (6th Cir. 1993) (alterations omitted)).

If eligibility or promotional exams "have a history of having a discriminatory impact," employers should devise new selection methods in order to "lessen reliance" on such exams and "increase reliance upon other measures of ability." *S.F. Fire Fighters*, 38 Cal. 4th at 677; *see also PPOA*, 2002 WL 1354411, at * 5 n.3 (upholding County diversity policy that called for "[a]ppreciating and encouraging nontraditional approaches to performance"). "Other measures of ability" might include

- experience,
- training,
- employment history, and
- language skills.

As noted by the California Supreme Court just last year, federal law may in fact require such changes: "discriminatory employment tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for

which candidates are being evaluated." *S.F. Fire Fighters*, 38 Cal. 4th at 675 (citation and alterations omitted).

Although much of the case law discussing the need to monitor participation rates and make appropriate changes has arisen in the employment context, the same principles readily apply in public contracting and education. *See, e.g.*, *Connerly*, 92 Cal. App. 4th at 63 (noting that "information concerning the participation of minority and business enterprises in state contracts can serve a number of important and valid legislative purposes. . . ."). For example, in the contracting context, underutilization of MBE's and WBE's could lead a jurisdiction to eliminate unreasonably high bonding requirements, which can make it impossible for MBE's and WBE's to compete for contracting opportunities. Similarly, in the education context, decreased admissions rates for minority candidates might lead a public university to consider whether it has eliminated qualified candidates by relying too heavily on standardized tests.

D. Race- and Gender-Conscious Outreach and School Integration

1. General Outreach

Even before Proposition 209 went into law, the California Court of Appeal held that the initiative would not have the effect of banning "affirmative action" efforts such as "outreach programs" that do not discriminate or grant preferential treatment. *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 442 (1996). In *Hi-Voltage*, the California Supreme Court endorsed this view:

> Although we find the City's outreach option unconstitutional under section 31, we acknowledge that *outreach may assume many forms, not all of which would be unlawful*. Our holding is necessarily limited to the form at issue here, which requires prime contractors to notify, solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids. Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification.

Hi-Voltage, 24 Cal. 4th at 565 (internal citations omitted) (emphasis added).

In a separate opinion, Chief Justice George elaborated on the narrowness of the Court's holding:

> Although this court has concluded that the two components of the city's public contracting program that are challenged in this case violate article I, section 31, this determination should not obscure the important point that this constitutional provision does not prohibit all affirmative action programs or preclude governmental entities in this state 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.

Id. at 596-97 (George, C.J., concurring in part and dissenting in part).

Both the *Hi-Voltage* majority opinion and the separate opinion of Chief Justice George refer to an outreach program from a pre-Proposition 209 case, *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1995), as an example of an affirmative action program that does not violate Proposition 209. *Hi-Voltage*, 24 Cal. 4th at 565 (majority opinion), 597 (George, C.J., concurring in part and dissenting in part). In contrast to *Hi-Voltage*, the program in *Domar* required contract bidders to undertake outreach efforts not only to MBE's and WBE's, but also to other business enterprises ("OBE's"), which the program defined as "any subcontractor which does not otherwise qualify as a Minority or Women Business Enterprise." *Domar*, 9 Cal. 4th at 166-68. In holding that this program complied with the competitive bidding requirements of the city's charter, the California Supreme Court observed:

> The program does not require bidders to contract with any particular subcontractor enterprise, nor does it compel them to set aside any percentage of a contract award to MBE's or WBE's in order to qualify for a municipal contract. And even though the Board's outreach program provides an estimate that a participation level of 1 percent by MBE's and WBE's may be anticipated by the exercise of good faith efforts, a bidder gets no advantage or disadvantage from meeting or not meeting the specified participation level. Thus, the program provides no incentive to a bidder to use MBE's or WBE's if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field.
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> . . .
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> . . . Mandatory set-asides and bid preferences work against [the] goal [of ensuring sufficient competition] by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition.

Id. at 175, 177.

Unlike the policies struck down in *Hi-Voltage*, the outreach program addressed in *Domar* neither mandates the selective dissemination of information nor imposes quota-like numerical goals. *Cf. Hi-Voltage*, 24 Cal. 4th at 562-64. Instead of granting preferential treatment, the inclusive references to MBE's and WBE's serve to "increase opportunity and participation within the competitive bidding process." *Id.* at 565 (quoting *Domar*, 9 Cal. 4th at 174); *see also id.* at 597-98 (George, C.J., concurring in part and dissenting in part).

Similarly, in the employment context, Proposition 209 forbids public employers from establishing race- and gender-based goals for hiring and promotion, *Connerly*, 92 Cal. App. 4th at 55, 59-60, and from establishing any policy that restricts recruitment to minorities and women. *Id.* at 61. On the other hand, "outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden." *Id.* at 46. Indeed, employers may "need" to undertake "inclusive outreach efforts to ensure that members of the underutilized group [e.g., minorities and women] have equal opportunity to seek employment." *Id.* at 56. For example, employers might undertake the following race- and gender-conscious outreach policies:

- Develop mentoring and professional development programs where senior employees are matched with junior employees and interested students who share a similar race, ethnicity, and interests;
- Create job preparation workshops for resume writing and interview training, and advertise these services to organizations that serve minorities and women, as well as to the general public;
- Attend recruitment fairs or receptions sponsored by minority or female groups, in addition to attending similar non-minority events;
- Disseminate information about programs and public employment at events in minority communities and in the general public;
- Work with local community and citizens groups, community service organizations, and other public service agencies that target minorities and women, as well as the general public, to facilitate recruitment.

2. Inclusive Efforts To Ensure An Integrated Learning Environment

California courts have long recognized the unique importance of an integrated learning environment for schoolchildren. While the California Supreme Court has yet to apply Proposition 209 in the education context, lower courts have drawn upon many of the same principles outlined above to delineate the permissible limits of race-conscious student integration plans.

In the first of the Proposition 209 integration cases, the California Court of Appeal invalidated a transfer policy that dictated a "one-for-one same race exchange." *Crawford*, 98 Cal. App. 4th at 1277. Under this policy, no white student could transfer from the one "ethnically isolated" high school in the district until another white student transferred in, and no non-white student could transfer into the school until another non-white student transferred out. *Id.* at 1278. The court found this policy incompatible with Proposition 209 because it was not "simply a race-conscious program that seeks to provide students with equal educational opportunities," but a "policy [that] creates different transfer criteria for students *solely* on the basis of their race." *Id.* 1283-84 (emphasis added). In so ruling, the court was careful to "stress that an 'integration plan' developed by a school board need not offend Proposition 209 if it does not discriminate or grant preferences on the basis of race or ethnicity." *Id.* at 1286.

Subsequent decisions have underscored the narrowness of the court's holding in *Crawford*. First, *Crawford* does not prohibit districts from taking *any* account of race when fashioning school assignment plans. Indeed, school districts have prevailed in a trio of recent cases involving voluntary desegregation plans that merely consider race and ethnicity as one of several diversity factors. *See ACRF*, No. RG0692139 (Cal. Super. Ct. April 6, 2007) (upholding school assignment plans that consider the racial makeup of the student's neighborhood as one of several equally-weighted factors, no one of which is determinative of any placement decision); *Capistrano*, No. 05CC07288 (Cal. Super. Ct. Aug. 25, 2006) (upholding the consideration of neighborhood ethnic composition in setting school attendance boundaries); *Avila v. Berkeley Unified Sch. Dist.*, No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. April 6, 2004) (unpublished) (upholding "controlled choice" school assignment plan that considers the student's race and ethnicity as one of several factors**).** In addition, the United States Supreme Court has recently reaffirmed that States may consider racial diversity as a compelling state interest in education. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753 (2007) ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*, 539 U.S., at 328, 123 S.Ct. 2325.")

Moreover, some of the Superior Court cases have indicated that the Equal Protection Clause of the California Constitution imposes an obligation to alleviate school desegregation regardless of its cause, and that Proposition 209 should be read in harmony with this obligation. *See ACRF*, No. RG0692139, at 9-13; *Avila*, 2004 WL 793295, at *3.

Second, the California Court of Appeal has indicated that Proposition 209 permits districts to use magnet schools to encourage the movement of students "'in a pattern that aids desegregation on a voluntary basis.'" *Crawford*, 98 Cal. App. 4th at 1286 (citing *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995)); *see also Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161, 1167 (2004) ("Magnet programs provide a race-neutral means to prevent racial or ethnic isolation by providing educational choices for district students.").

Third, Proposition 209 does not forbid the provision of supplemental funding to schools with substantial minority populations, provided that the district has race-neutral reasons for such funding. For example, following the lifting of a desegregation order, Proposition 209 does not prohibit districts from providing transitional supplemental funding to preserve educational programs at schools that were formerly identified as "racially isolated minority" schools. *Hernandez*, 126 Cal. App. 4th at 1178-79.

Finally, the Ninth Circuit has construed *Crawford* very narrowly, declaring that the decision does not even squarely control a policy that forbids any transfer that would push the ratio of whites to nonwhites at the destination school beyond a prescribed balance. *Friery v. L.A. Unified Sch. Dist.*, 300 F.3d 1120 (9th Cir. 2002). Such a policy "erects both a minimum *and* a maximum applicable to *each* racial group, such that the policy's macroscopic effect--keeping whites and nonwhites in balance--touches both groups with equal force[.]" *Id.* at 1123. The policy in *Crawford*, by contrast, "operated

in only one direction: it created a floor for whites and a ceiling for nonwhites, but not the converse." *Id.* at 1124.[3]

As far as we are aware, the California courts have yet to decide any cases that address the permissible scope of outreach in college and university admissions under Proposition 209. Nevertheless, institutions of higher education can adapt the same outreach methods deemed permissible in the context of contracting and employment. Thus, California schools may monitor the race and sex of applicants, and conduct targeted outreach so long as the program includes white males and does not give an advantage. Such race-conscious programs might include:

- Sending college applications and information to high achieving students of color as well as high achieving non-minority students;
- Attending recruitment fairs or receptions sponsored by minority or female groups in addition to receptions for general students;
- Establishing mentoring programs whereby alumni and students are matched based on similar race, ethnicity, and interests.

III. Race- and Gender-Neutral Practices

While much of the case law interpreting Proposition 209 has focused on which race- and gender-conscious policies are permissible, it is clear that a wide variety of race- and gender-neutral practices are also available to public entities to improve equal access to contracting, employment, and education.

Proposition 209 allows any preference that does not discriminate "on the basis of race, sex, color, ethnicity or national origin," Cal. Const. art. I § 31(a), even if these neutral preferences disproportionately benefit women and minorities. For example, the California Court of Appeal has declared that "[e]conomic disadvantage is a criterion that may be determined through the application of race-neutral and gender-neutral financial factors." *Connerly*, 92 Cal. App. 4th at 47.

Race- and gender-neutral policies are most effective when used to supplement, rather than supplant, race- and gender-conscious policies. For example, despite the strong correlation between race and economic disadvantage, whites outnumber minorities to such a degree that there are many more poor whites, in absolute numbers, than poor people of color. Consequently, programs that target economic disadvantage but fail to integrate race-conscious policies are generally not as effective in improving the participation of minorities.

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[3] Whether Proposition 209 permits the *Friery* transfer policy remains unresolved because the California Supreme Court denied the Ninth Circuit's request to certify the question, and the Ninth Circuit remanded the case for the purpose of making a determination of the plaintiff's standing. *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146 (2006).

In his separate opinion in *Hi-Voltage*, Chief Justice George noted that "the numerous additional features of the public contracting outreach program that the city recently has put in place, and that have not been challenged in this proceeding, provide ready examples of just a few of the many forms of affirmative action that clearly are consistent with the provisions of article I, section 31." *Id.* at 597. The unchallenged outreach programs include:

- Expanding advertising of public contract bidding opportunities in newspapers of general circulation and special trade journals;
- Establishing public contract hotlines, and creating Web sites to disseminate information to previously nonparticipating subcontractors in order to facilitate the submission of proposals to prime contractors who are contemplating submitting a bid on a project.

Id. at 597.

On the basis of the Court's rationale in *Hi-Voltage*, other likely "permissible means by which a governmental entity may attempt to expand the pool of persons to whom public contracts are awarded," *id.*, include:

- Dividing large public contracts into smaller segments in order to facilitate participation by new or more modest enterprises;
- Creating a new preference based on the percentage of work performed by small businesses and micro-businesses;
- Creating a new preference based on the percentage of work to be performed by subcontractors and consultants from the local business area;
- Requiring good faith outreach to small businesses and consultants from the local business area.

A variety of race- and gender-neutral steps may also be undertaken in the employment context. In addition to using advertising, hotlines, and websites as suggested in *Hi-Voltage*, employers might undertake the following inclusive outreach policies:

- Developing partnerships with the Employment Development Department, Department of Social Services, and local welfare agencies to target economically disadvantaged persons who do not otherwise have access to employment opportunities;
- Recruiting and favoring applicants with ties to the geographical area served by the position;
- Recruiting and favoring applicants with language skills that correspond to the communities served by the position.

Moreover, schools may use preferences based on factors other than those proscribed by Proposition 209. For example, schools might:

- Employ a comprehensive application review process that looks at tests and grades as well as other factors such as economic background, special talents, and success in overcoming hardships;
- Give admission preferences based on neutral classifications such as low-income, first generation to attend college, single-parent household, and low-performing secondary school (test scores, eligibility for post-secondary institutions, or participation rates for post-secondary education);
- Offer academic support programs and financial aid services for students based on these neutral classifications;
- Develop and expand after-school assistance programs at low-performing elementary and secondary schools;
- Improve preparation for vocational careers and college by promoting academic counseling and mentoring at low-performing secondary schools;
- Undertake extra outreach in communities with low application rates due to unequal access to information;
- Recruit students for professional schools from communities and populations that are underserved by that profession;
- Implement automatic eligibility programs for students graduating near the top of their high school class and students attaining a specified degree of achievement in community colleges.

V. Conclusion

As these thoughtful court decisions show, neither the law nor public policy considerations mandate absolute color blindness, with the devastating results that often follow. Careful consideration of race in our public institutions is not only still permitted, but is sometimes necessary to secure equal opportunity and a vibrant economy.

APPENDIX OF CASES REGARDING PROPOSITION 209

I. Public Contracting Cases

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

The City of San Jose's construction contract program required it to reject "out of hand" all bids from contractors who failed to utilize a specific percentage of minority and women subcontractors or document efforts to include such subcontractors. In holding that the program violated Proposition 209,[1] the California Supreme Court stressed that the "participation" component of the program encouraged what amounted to discriminatory quotas or set-asides, and that the "outreach" component compelled prime contractors to selectively provide notice to, solicit bids from, and undertake negotiations with, subcontractors on the basis of race and sex. The Court limited its holding to the form of the outreach program at issue and acknowledged that some forms of outreach are lawful. The Court declared that voters plainly intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification, but expressed no opinion regarding the permissible parameters of such efforts.

B. *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16 (2001)

The Court of Appeal considered whether five statutory programs that fell within the general rubric of "affirmative action" violated Proposition 209 and state and federal principles of equal protection. Since the programs involved both public contracting and public employment, the Appendix discusses *Connerly* in both this Section and Section II, *infra*.

(1) The State Lottery Statute

The state lottery statute imposed upon the California State Lottery Commission and its director an "affirmative duty" of maximizing the level of participation of "socially and economically disadvantaged small business concerns" in the Commission's procurement programs regarding the advertising or awarding of any contract for the procurement of goods and services exceeding $500,000. The statute expressly incorporated racial, ethnic, and gender classifications into the statutory meaning of "socially and economically disadvantaged." The court found that the fact that some individuals had to prove disadvantage while others were conclusively presumed to be disadvantaged based solely on race, ethnicity, and gender established impermissible race, ethnicity, and gender classifications and established preferences for persons from the favored groups. The court also found that the "absence of any identification of past discrimination by the California State Lottery, the random inclusion of groups without individualized consideration whether particular groups suffered from discrimination, the absence of any attempt to measure the recovery by the extent of the injury, the absence of any attempt to disburse the benefits of the scheme in an evenhanded manner to those who actually suffered detriment, and the absence of any geographic or temporal limits to the scheme, all serve to

[1] Some of the cases cited in the Appendix refer to "Proposition 209" and others refer to "Section 31." For purposes of consistency, the Appendix uses the term "Proposition 209" unless it is quoting the case or is otherwise necessary to refer to Section 31.

condemn it." Further, the court noted that economic disadvantage is a criterion that may be determined through application of race-neutral and gender-neutral financial factors, whereas social disadvantage is a more amorphous concept that invites reliance on racial and gender classifications.

(2) The Professional Bond Services Statute

This statutory scheme established minority and women business "participation goals" for professional bond service contracts, entitled minority and women business enterprises to special notice of the sale or intention to issue bonds, extended protections of the Subletting and Subcontracting Fair Practices Act to minority and women subcontractors but not to other subcontractors, and required an awarding department to establish a method of monitoring adherence to its participation goals. The court held that the statutory scheme violated Proposition 209. It also held that the statutory scheme did not arguably withstand strict scrutiny where there was: (1) no specific finding of identified prior discrimination in this contracting; (2) no effort to measure the remedy against the consequences of identified discrimination; (3) no effort to limit recovery to those who actually suffered from prior discrimination; (4) no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered; (5) no limit to the scheme's duration; and (6) no limit to its reach except for its limitation to citizens and lawfully admitted aliens. The court did sever and uphold the reporting portion that required each awarding department to make an annual report regarding the level of participation by minority and women business enterprises in these contracts.

(3) The State Contracting Statute

The court held that this statute, which concerned minority and women business participation goals for state contracts, was invalid under principles of equal protection. However, it severed and upheld the reporting provisions since information regarding the participation of minority and women business enterprises in state contracts could serve a legislative interest separate from the substantive provisions of the scheme.

C. ***Kohrs & Fiske v. Kwalwasser*, 2003 WL 22026618 (Cal. Ct. App. 2003) (unpublished)**

This case involved a Caucasian-owned law firm's claim of race discrimination in violation of 42 U.S.C. Section 1981 ("Section 1981") and Proposition 209 because it was not included on two of the Los Angeles Unified School District's litigation panels even though it was the third highest scoring firm while a fourth ranked minority firm was included despite receiving a lower qualification score. The Court of Appeal affirmed the trial court's judgment in favor of defendants based on its finding that the law firm had not produced sufficient evidence, under the totality of the circumstances, to allow a reasonable fact finder to infer that the District's selection of law firms was motivated by discriminatory animus or racial preference. The court also noted that its research did not disclose any published cases involving a claim that an adverse employment action violated Proposition 209, but that neither party had suggested that a methodology different from the one traditionally used for evaluating employment discrimination claims under Section 1981 and California law should be applied to the law firm's Proposition 209 claim.

D. ***C & C Const., Inc. v. Sacramento Mun. Utility Dist.*, 122 Cal. App. 4th 284 (2004)**

The Sacramento Municipal Utility District conceded that its affirmative action program which applied race-based "participation goals" and in some cases "evaluation credits" in its public contracting program discriminated in favor of women and minorities. However, it contended that its program fell within the federal funding exception to Proposition 209. The Court of Appeal concluded that before imposing race-based measures, a state governmental agency need not obtain a federal adjudication that race-based discrimination is necessary to maintain federal funding, but that it must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination. The court found that the District failed to make any effort to determine whether there was a factual predicate for its race-based measures or whether they were narrowly tailored to comply with federal regulations in the least discriminatory manner and it failed to identify any federal law or regulation that required those measures. Thus, the court affirmed the judgment in favor of the plaintiff.

E. ***Coral Const., Inc. v. City and County of San Francisco*, 57 Cal. Rptr. 3d 781 (Cal. Ct. App. 2007)**

The City of San Francisco ordinance at issue provided for a bid discount program that required City departments to give specified discounts to contract bids submitted by certified WBE's and MBE's and contained a subcontracting program requiring bidders for certain prime contractors to document their good-faith efforts to use MBE and WBE subcontractors. Some of the good faith efforts included advertising for MBE's/WBE's, notifying them of the contractor's interest in bidding on the contract, and negotiating in good faith with interested MBE's/WBE's and not rejecting bids unjustifiably. The Court of Appeal first found that the City failed to establish the federal funding exception since there was no evidence of the specific type of past discrimination that would trigger a particular regulation's requirement for race-based remedial measures like the bid discount and subcontracting programs. Next, it found that Section 31 was not preempted by the Race Convention ratified by Congress. It also found that Section 31 does not impermissibly restructure the political process in a manner that burdens the equal protection rights of racial and ethnic minorities and women. Finally, it remanded the case to the trial court for the limited purpose of adjudicating the issue, which the trial court had declined to decide, of whether the City had presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required.

II. Public Employment Cases

A. ***Kidd v. State of California*, 62 Cal. App. 4th 386 (1998)**

The affirmative action program at issue was the State Personnel Board's policy of "supplemental certification," which allowed certain minority and female applicants for positions in the state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates. The court found that the clear language of Section 31 and the clear intent of the voters was to prohibit discretionary preferential programs such as supplemental certification.

B. ***Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16 (2001)**

(1) The State Civil Service Statute

The Court of Appeal held that the statutory requirements for the establishment of goals, timetables, and corrective action to overcome identified underutilization of minorities and women violated Proposition 209. It noted that one of the problems with the use of statistical underutilization to establish hiring goals is that while it may serve as significant evidence of prior discriminatory hiring practices, it is not conclusive or in itself, proof of discrimination. However, the court also found that portions of the statutory scheme that provided for data collection and reporting did not suffer a constitutional defect because a determination of the underutilization of minorities and women in state service can serve legitimate and important purposes. Such a determination may indicate the need: (1) for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices; (2) to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group; and (3) for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department. Finally, the court found that any attempt by the State Personnel Board to implement an altered layoff and reemployment scheme in order to maintain the racial and gender composition of the affected work force would be subject to the restrictions of Proposition 209, but that the granting of authority to the Board to utilize such a scheme if appropriate circumstances should arise was not invalid on its face.

(2) The Community Colleges Statute

The court held that the statute's hiring goal that by 2005, the work force should proportionately reflect the adult population of the state was a preferential hiring scheme which violated Proposition 209; and that the requirement to seek, hire, and promote minorities and women and to make reasonable progress in doing so, with financial incentives for success and financial detriment for failure, established impermissible racial and gender preferences. The court also held that the board of governors' "outreach efforts" was a preferential recruitment and selection process where: (1) recruitment had to include "focused outreach" to women and minorities; (2) in-house or promotional only recruitment could not be used unless women and minorities had reached numerical parity in the pool of eligible employees; (3) if members of the favored groups had not applied in sufficient numbers by the time the application period closed, steps had to be taken that included reopening the application process for additional focused recruitment; and (4) after applications were screened for eligibility, the regulations specified that the process might have to be reopened again and local qualifications might have to be abandoned in order to ensure sufficient applicants from the favored groups. The court additionally held that the outreach program included the use of hiring preferences because it required additional steps if the preferential recruitment and selection process did not achieve numerical parity in a reasonable time, including (1) consideration of the race or gender of applicants in the selection process; and (2) the inclusion, in the applicant pool, of members of the favored groups who were previously screened out for failure to meet locally established desirable or preferred qualifications.

C. ***Friery v. Los Angeles Unified School Dist.*, 300 F.3d 1120 (9th Cir. 2002) (*Friery I*) and *Friery v. Los Angeles Unified School Dist.*, 448 F.3d 1146 (9th Cir. 2006) (*Friery II*)**

Friery I involved the Los Angeles Unified School District's Transfer Policy, which barred intradistrict faculty transfers that would move the destination school's ratio of white faculty to nonwhite faculty too far from the District's overall ratio. The Ninth Circuit identified an aspect of the policy that had never been addressed by the California appellate courts and thus militated in favor of certification: the policy erected both a minimum and maximum applicable to each racial group, such that the policy's macroscopic effect--keeping whites and nonwhites in balance--touched both groups with equal force, whereas its microscopic effect--denying a transfer to a teacher who would upset that balance--operated to exclude an individual from a position based on his race. In addition, the court noted that no published California decision appeared to discuss whether the existence of discretion to depart from admittedly race-based standards prevented the discrimination that a program works or the preferential treatment that it grants from being done "on the basis of race" within the meaning of Section 31.

Thus, the Ninth Circuit certified to the California Supreme Court two questions of law regarding the effect of Section 31 on the permissible use of race-conscious criteria in assigning faculty to public schools. The first question was whether a school district discriminates or grants preferential treatment on the basis of race, within the meaning of Section 31(a), when it implements a policy that forbids teachers from transferring between schools where such a transfer would push the ratio of white to nonwhite faculty at the destination school beyond a prescribed balance. There were two subparts to this question: (a) if the answer to Question 1 is "yes," is such a policy nonetheless permissible under Section 31(a) if the school district adopts it in furtherance of its affirmative duty under the California Constitution to remedy de facto segregation; and (b) if the answer to Question 1 is "yes," is such a policy nonetheless permissible under Section 31(a) if it gives a school district administrator discretion to depart from the racial balancing requirement for certain race-neutral reasons? The second question was whether a policy promulgated as part of a school district's constitutionally mandated desegregation program falls within the "court order" exception of Section 31(d) if the pertinent court order: (a) approves, with modifications, the overall segregation program as compliant with the district's constitutional duty; (b) does not mention the specific policy in question; and (c) otherwise terminates court supervision over the district's desegregation efforts. The follow-up question was: "[i]f so, do subsequent amendments to such a policy also fall within the 'court order' exception if they are promulgated unilaterally, without court instruction, imprimatur, or involvement, and ratified or re-ratified after the effective date of Section 31?"

In *Friery II*, following the California Supreme Court's denial of its request for certification, the Ninth Circuit held that it was not clear as to whether the transfer policy would have affected the plaintiff teacher, which required remand to develop the factual record regarding whether the plaintiff had standing to bring his claim.

D. ***Los Angeles County Professional Peace Officers Ass'n v. County of Los Angeles*, 2002 WL 1354411 (Cal. Ct. App. 2002) (unpublished)**

Plaintiff contended that the County of Los Angeles violated Proposition 209 by granting

preferences based on race and gender in its process of promoting sergeants to lieutenants. The Court of Appeal rejected all but one piece of the plaintiff's evidence and held that the record did not establish that there was a specific policy or program pursuant to which promotions were granted on the basis of race or gender and, thus, the County did not violate Proposition 209. The court found: (1) the County's generalized written policy on diversity did not establish a gender or race preference in the sheriff's department's promotion process because it emphasized valuing each individual and did not either mandate preferential treatment or provide for racial or gender quotas and set asides; (2) reports of general statements made by former Sheriff Block about diversity did not establish that a preferential program or policy existed in the sheriff's department mandating promotions to the rank of lieutenant based on race or gender; (3) there was no evidence that the County had a policy of requiring women and minorities to be on lists of promotion nominees, especially in light of testimony that those lists did not have to include a specified number or percentage of women or minorities and that lists failing to include them were not rejected; (4) tallying after conclusion of the recommendation process was done to collect data concerning the participation of women and minorities in governmental programs did not violate Proposition 209; (5) there was no evidence that notations identifying each candidate's race in the biographical informational sheet provided to commanders in the pre-break up meetings were utilized in order to have race or gender used for promotions; (6) the County's promotion of an African-American woman over an allegedly more qualified white male sergeant did not establish a policy of granting preferences to women where it had not been established that the woman was less qualified than the male and the male was eventually promoted; but (7) the County's promotion of all women in one group of candidates to the rank of lieutenant demonstrated that the County had violated Proposition 209.

E. ***Cheresnik v. City and County of San Francisco*, 2003 WL 1919111 (Cal. Ct. App. 2003) (unpublished)**

The Court of Appeal noted that under the more stringent standards of Proposition 209 as interpreted by the *Hi-Voltage* court, the express policy of creating a workforce reflecting the racial and ethnic diversity of the larger labor market inevitably involves prohibited racial discrimination and preferences. Thus, the San Francisco Airport's former diversity staffing plans were inconsistent both with the evolving concepts of equal protection and Proposition 209 to the extent that they established the objective of remedying the underrepresentation of minorities in occupational categories. However, the court found that the Airport's extant policy of removing barriers to employment that may operate to discriminate on the basis of race or ethnicity was consistent with Proposition 209. It also stated that the propriety of the approach to equal employment in which the employment of minorities is monitored solely to direct attention to areas where personnel practices may effectively operate to favor a particular group remains beyond question. Further, it rejected the plaintiffs' contention that the Airport's change of policy was a litigation tactic to secure dismissal of the plaintiffs' claims since the policy was adopted approximately one year before the Airport filed its motion for summary judgment and clearly reflected the evolving legal standards of employment discrimination. In addition, a month after the *Connerly* decision, the Airport issued a memorandum to all managers and supervisors calling their attention to the 2001 equal employment opportunity plan and affirming a policy that "all Airport employment decisions shall be made on the basis of merit and fitness, without regard to the race, ethnicity or gender of applicants or employees."

III. Public Education Cases

A. *Crawford v. Huntington Beach Union High School Dist.*, 98 Cal. App. 4th 1275 (2002)

The Court of Appeal invalidated Huntington Beach Union High School District's open 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. The court found that the policy created different transfer criteria for students based solely on their race and thus, held that the policy violated Proposition 209. However, the court also stated that it "was not our intention to suggest that there cannot be any 'integration plans' under Proposition 209. We stress that an 'integration plan' developed by a school board need not offend Proposition 209 if it does not discriminate or grant preferences on the basis of race or ethnicity." The court further noted that some courts have cited the benefits of the development of magnet schools. For example, in one case, the court stated that "[m]agnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis." Another court's version of an "integration plan" was a program that would assign only a very small geographic area for a student's home school, and fill remaining places in that school's class by an unweighted random lottery.

B. *Hunter v. The Regents of University of California*, 2001 WL 1555240 (Cal. Ct. App. 2001) (unpublished)

This case involved the issue of whether Proposition 209 applied to Corinne A. Seeds University Elementary School ("UES"), a laboratory elementary school on the UCLA campus that focused almost exclusively on educational research, and whose students were admitted to the school based on a set of research criteria which, while discriminatory in certain respects, was essential to UES's primary research function. The Court of Appeal first noted that Proposition 209 did not define the phrase "operation of public education," that the phrase was not clear and unambiguous, and that the ballot measures did not resolve the issue. Thus, it looked to the ordinary meaning of "public education" as used in California law. Based on its analysis of several cases, the court employed the following definition of "public education": "an educational system of 'common schools,' free of charge, 'open on equal terms to all,' and administered by the local school districts within one 'Public School System' created by the Legislature and funded by the 'State School Fund.'" The court then found that this description of "public education" excluded UES because it: (1) did not have the typical features of a "common public school"; (2) was not free of charge; (3) was not "open on equal terms to all"; (4) was not administered by a local school district; and (5) did not have the primary goal of providing an education for the students. Instead, it was a tuition-supported, selective admission-based, laboratory elementary school, established and administered by UCLA. Thus, the court held that Proposition 209 did not apply to UES. Two other relevant points that the court made were: (1) the fact that UES's research was for the benefit of public education did not *a fortiori* convert the education UES offered into "public education"; and (2) UES's alleged discriminatory/preferential admissions program was distinguishable from the programs addressed by Proposition 209 because it was not established to rectify past discrimination.

C. ***Hernandez v. Board of Educ. of Stockton Unified School Dist.*, 126 Cal. App. 4th 1161 (2004)**

In this school desegregation case, the Court of Appeal rejected the Interveners' contention that the terms of a court-approved settlement agreement providing funding to existing magnet schools without a finding of a current Fourteenth Amendment violation ran contrary to Proposition 209 because the school district was no longer suffering from the vestiges of racial discrimination. The court found that the Interveners 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 to receive funding. Since the schools were currently racially balanced, the selection of one of them over another could not constitute a preference of one or a discrimination against the other based on race. In addition, the evidence showed that the choice of these schools was based on the desire to preserve their educational programs and the immediate cutoff of funding threatened to put those programs into turmoil. Thus, the decision to allow the schools an orderly transition period in which to secure alternative funding for these programs was not a preference or discrimination based upon race.

D. ***Avila v. Berkeley Unified School Dist.*, 2004 WL 793295 (Cal. Super. Ct. 2004)**

This case involved a demurrer to a complaint alleging that a voluntary desegregation plan which required all parents, regardless of race, to choose three schools they preferred their child to attend violated Proposition 209. In light of the parents' choice, the Berkeley Unified School District applied several factors to assign the child to one of the chosen schools, including space availability, the child's residence, the child's socio-economic situation, and race/ethnicity. The plan also directed that the District use such factors to assign students in a manner that "strives" to have a school's demographics for each grade level reflect the District's demographics for that grade level, at least for any racial group that made up at least 25% of the District's population. The Superior Court found that the plan did not discriminate against, or provide preferential treatment to, any student based on race, but merely considered race and ethnicity as one of several factors to achieve desegregated schools for all students; was not a quota; did not provide for special notice; and did not show favoritism. Thus, it held that the plan did not on its face violate Proposition 209 and sustained the first two causes of action for declaratory and injunctive relief without leave to amend. It also stated that "[a]lthough Proposition 209 specifically applies to public education, its test does not mention voluntary desegregation plans or otherwise indicate that prohibited discrimination or preferential treatment includes a race-conscious school assignment plan that seeks to provide all students with the same benefit of desegregated schools." However, the court sustained the third cause of action, which was in essence an "as applied" challenge, with leave to amend based on its finding that plaintiff may have been able to allege facts supporting his contention that the District had applied the plan in a manner that discriminated against, or granted preferential treatment to, students based on race, color, ethnicity, or national origin.

E. ***Neighborhood Schools for Our Kids v. Capistrano*, No. 05CC07288 (Cal. Super. Ct. Aug. 25, 2006) (unpublished minute order)**

This case involved the Capistrano School District's policy, which stated in pertinent part: (1) the Board "shall regularly review school attendance boundaries, taking into account . . . racial and ethnic balance"; (2) "[f]actors which may influence boundary decisions include: neighborhood ethnic composition"; and (3) a factor to be taken into consideration in developing guidelines is "[a]voiding boundary adjustments resulting in schools becoming racially, ethnically, and socio-economically identifiable." The Superior Court found that the policy did not violate Proposition 209, even though it clearly was "race conscious," because the mere "consideration" or "taking into account" of racial/ethnic composition or of ethnic balance in setting attendance boundaries did not necessarily seem to "discriminate" or grant "preferences" based on race or require the school district to make decisions about which school any particular child or even neighborhood group of children would attend based solely on race (unlike the policy in *Huntington Beach*). On the other hand, the Superior Court held that the plan, whose "general guiding principle" was that no school shall have a "minority" population greater than 35%, violated Proposition 209 because it limited the number of positions available at each high school for members of different ethnicities and, thus, utilized race in developing attendance boundaries for the high schools within its district in order to achieve racial balance.

F. ***American Civil Rights Foundation v. Berkeley Unified School District*, No. RG06292139 (Cal. Super. Ct. filed Apr. 6, 2007) (unpublished)**

This case involved a demurrer to a complaint alleging that three of Berkeley Unified School District's voluntary desegregation programs violated Proposition 209 because they considered race as a factor in making assignments, or accepting applications, for those programs. The Superior Court found that the District's Elementary School Assignment Plan did not make any distinction in treatment, or give priority or advantage, based upon an individual student's race. Rather, race was a part of the assignment equation based only upon the community-wide racial makeup of students in a planning area; was only one of three equally-weighted factors that determined a diversity "score," which in turn was factored into the priorities developed by the District; and was not a determinative factor in a school assignment decision. The District simply took racial diversity into account, along with other diversity indicators, as a means of achieving its goals of integration of its schools and promoting the educational value of a diverse student body. Thus, the court held that the first cause of action did not state a facial constitutional challenge to the Elementary School Assignment Plan and sustained the demurrer to it without leave to amend. It also sustained the demurrer without leave to amend to the cause of action challenging the District's High School Small School Assignment Plan because that Plan relied on the same multi-factor diversity score system as the elementary school assignments and, thus, did not use race as a determinative factor in any assignment decision. However, the court held that the third cause of action alleging that only students who were African-American, Latino or from a low-income household were selected to the District's Academic Pathways Project, and students who were not from one of those categories were ineligible, stated a violation of Proposition 209's ban on discrimination or preference on account of race.

PROPOSITION 209 -- EXAMPLES OF IMPERMISSIBLE AND PERMISSIBLE STATE ACTION

	"[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."	Cal. Const. art. I § 31(a)

PUBLIC EMPLOYMENT

Impermissible

Legal Standard	Example	Case
Public employers cannot restrict recruiting or change the qualifications for job openings on the basis of the race or sex of applicants	State Personnel Board's policy of "supplemental certification," which allowed certain minority and female applicants for positions in the state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates	• *Kidd v. State*, 62 Cal. App. 4th 386, 393 (1998)
Statutory requirements for the establishment of goals, timetables, and corrective action to overcome identified underutilization of minorities and women	• State Civil Service Statute requirements for the establishment of goals, timetables, and corrective action to overcome identified underutilization of minorities and women • Any attempt by the State Personnel Board to implement an altered layoff and reemployment scheme in order to maintain the racial and gender composition of the affected work force, where appropriate circumstances not shown • The Community Colleges Statute hiring goal that by 2005, the work force should proportionately reflect the adult population of the state was a preferential hiring scheme which violated Proposition 209; and that the requirement to seek, hire, and promote minorities and women and to make reasonable progress in doing so, with financial incentives for success and financial detriment for failure, established impermissible racial and gender preferences	• *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 50, 55, 59-60, 61 (2001)

PUBLIC EMPLOYMENT continued

	Legal Standard	Examples	Cases
Impermissible	**Continued:** Statutory requirements for the establishment of goals, timetables, and corrective action to overcome identified underutilization of minorities and women	• Community Colleges board of governors' "outreach efforts" was a preferential recruitment and selection process where: (1) recruitment had to include "focused outreach" to women and minorities; (2) in-house or promotional only recruitment could not be used unless women and minorities had reached numerical parity in the pool of eligible employees; (3) if members of the favored groups had not applied in sufficient numbers by the time the application period closed, steps had to be taken that included reopening the application process for additional focused recruitment; and (4) after applications were screened for eligibility, the regulations specified that the process might have to be reopened again and local qualifications might have to be abandoned in order to ensure sufficient applicants from the favored groups • Outreach program required additional steps if the preferential recruitment and selection process did not achieve numerical parity in a reasonable time, including (1) consideration of the race or gender of applicants in the selection process; and (2) the inclusion, in the applicant pool, of members of the favored groups who were previously screened out for failure to meet locally established desirable or preferred qualifications	• *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 50, 55, 59-60, 61 (2001)
	Express policy of creating a workforce reflecting the racial and ethnic diversity of the larger labor market inevitably involves prohibited racial discrimination and preferences	• San Francisco Airport's former diversity staffing plans which established the objective of remedying the under-representation of minorities in occupational categories	• *Cheresnik v. City and County of San Francisco*, 2003 WL 1919111 (Cal. Ct. App. 2003) (unpublished)
Permissible	Policies that generally emphasize the value of **diversity** in the workplace are permissible.	• Generalized policy on diversity which does not either mandate preferential treatment or provide for racial or gender quotas and set asides	• *L.A. County Prof'l Peace Officers Ass'n v. County of Los Angeles (PPOA)*, 2002 WL 1354411, at *5 (Cal. Ct. App. June 20, 2002) (unpublished)
	Monitoring programs that collect and report data concerning the participation of women and minorities serve a compelling need and may be employed without violating principles of equal protection or Proposition 209	• Programs that require monitoring on the basis of race and gender to prevent or detect conscious or unconscious bias in employment decisions	• *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, at 53 (2001) • *Harman v. City of San Francisco*, 136 Cal. App. 4th 1279, 1295 (2006) • *Cheresnik v. City of San* Francisco, 2003 WL 1919111, at *11 (Cal. Ct. App. April 23, 2003) (unpublished) • *PPOA*, 2002 WL 1354411, at *7

PUBLIC EMPLOYMENT continued

Permissible

Legal Standard	Examples	Cases
Race- and gender-conscious data may be used to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group	• If eligibility or promotional exams have a history of having a discriminatory impact, employers should devise new selection methods to lessen reliance on such exams and increase reliance upon other measures of ability including nontraditional approaches to performance, experience, training, employment history, or language skills • Before utilizing a selection procedure that has an adverse impact on minorities a public employer has an obligation to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid	• *Connerly*, 92 Cal. App. 4th at 56 • *S.F. Fire Fighters Local 798 v. City of San Francisco*, 38 Cal. 4th 653, 676 (2006) • *PPOA*, 2002 WL 1354411, at * 5 n.3 • *Cheresnik*, 2003 WL 1919111, at *11
Outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden	• Develop mentoring and professional development programs where senior employees are matched with junior employees and interested students who share a similar race, ethnicity, and interests • Create job preparation workshops for resume writing and interview training, and advertise these services to organizations that serve minorities and women, as well as to the general public • Attend recruitment fairs or receptions sponsored by minority or female groups, in addition to attending similar non-minority events • Disseminate information about programs and public employment at events in minority communities and in the general public • Work with local community and citizens groups, community service organizations, and other public service agencies that target minorities and women, as well as the general public, to facilitate recruitment	*Connerly,* 92 Cal. App. 4th at 46, 56
Race- and gender-neutral practices	• Economic disadvantage is a criterion that may be determined through the application of race-neutral and gender-neutral financial factors • Advertising, hotlines, and websites as suggested in Hi-Voltage • Developing partnerships with the Employment Development Department, Department of Social Services, and local welfare agencies to target economically disadvantaged persons who do not otherwise have access to employment opportunities • Recruiting and favoring applicants with ties to the geographical area served by the position· • Recruiting and favoring applicants with language skills that correspond to the communities served by the position	• *Connerly,* 92 Cal. App.4th at 47

PUBLIC CONTRACTING

Impermissible

Legal Standard	Examples	Cases
Discriminatory quotas or set-asides, race- and sex-conscious numerical goals, or different notice, bid solicitation, and negotiations on the sole basis of the race and sex	• City of San Jose's construction contract program required it to reject "out of hand" all bids from contractors who failed to utilize a specific percentage of minority and women subcontractors or document efforts to include such subcontractors • The State Lottery Statute imposed an "affirmative duty" on the California State Lottery Commission and its director to maximize the level of participation of "socially and economically disadvantaged small business concerns" in the Commission's procurement programs, where the statute expressly incorporated racial, ethnic, and gender classifications into the statutory meaning of "socially and economically disadvantaged" and some individuals had to prove disadvantage while others were conclusively presumed to be disadvantaged based solely on race, ethnicity, and gender • Professional Bond Services Statute established minority and women business "participation goals" for professional bond service contracts, entitled minority and women business enterprises to special notice of the sale or intention to issue bonds, extended protections of the Subletting and Subcontracting Fair Practices Act to minority and women subcontractors but not to other subcontractors, and required an awarding department to establish a method of monitoring adherence to its participation goals • The State Contracting Statute concerned minority and women business participation goals for state contracts • Sacramento Municipal Utility District affirmative action program 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 contended that the program fell within the federal funding exception to Proposition 209, but the District failed to make any effort to determine whether there was a factual predicate for its race-based measures or whether they were narrowly tailored to comply with federal regulations in the least discriminatory manner and it failed to identify any federal law or regulation that required those measures	• *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) • *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 47-48, 50-52, 55, 59-60, 61 (2001) • *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 294-295 (2004) • *Coral Const., Inc. v. City of San Francisco*, 149 Cal. App. 4th 1218, 1228-29 (2007)

Permissible

Legal Standard	Examples	Cases
Practices deemed "preferential" may be permissible if **necessary to comply with federal law** or the United States Constitution	• Race- and gender-conscious hiring program permissible where mandated by the federal Constitution as a narrowly tailored remedial program to remedy ongoing, pervasive discrimination	• Cal. Const. art. I § 31(h) • *Hi-Voltage*, 24 Cal. 4th at 569 • *Coral Constr.*, 149 Cal. App. 4th at 1226
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		• Cal. Const. art. I § 31(e) • *C & C Constr.*, 122 Cal. App. 4th at 298 • *Coral Constr.*, 149 Cal. App. 4th at 1233-34
Information concerning the participation of minority and business enterprises in state contracts can serve a number of important and valid legislative purposes	• Collecting and reporting data concerning the participation of women and minorities • Using such information to restructure selection processes to ensure that no groups are unfairly excluded	• *Connerly*, 92 Cal. App. 4th at 63
Race- and gender-neutral **outreach** programs that do not discriminate or grant preferential treatment	• Expanding advertising of public contract bidding opportunities in newspapers of general circulation and special trade journals • Establishing public contract hotlines, and creating Web sites to disseminate information to previously nonparticipating subcontractors in order to facilitate the submission of proposals to prime contractors who are contemplating submitting a bid on a project	• *Hi-Voltage*, 24 Cal. 4th at 597 • *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 442 (1996) • *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1995)
Permissible means by which a governmental entity may **expand the pool** of persons to whom public contracts are awarded	• Dividing large public contracts into smaller segments in order to facilitate participation by new or more modest enterprises • Creating a new preference based on the percentage of work performed by small businesses and micro-businesses • Creating a new preference based on the percentage of work to be performed by subcontractors and consultants from the local business area • Requiring good faith outreach to small businesses and consultants from the local business area	• *Hi-Voltage*, 24 Cal. 4th at 597

PUBLIC EDUCATION

	Legal Standard	Examples	Cases
Impermissible	Public schools cannot establish different transfer criteria for students, or determine their eligibility for educational programs, "solely on the basis of their race"	• Huntington Beach Union High School District's open 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 • Cause of action alleging that only students who were African-American, Latino or from a low-income household were selected to the Berkeley Unified School District's Academic Pathways Project, and students who were not from one of those categories were ineligible, stated a violation of Proposition 209's ban on discrimination or preference on account of race	• *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1284 (2002) • *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist. (ACRF)*, No. RG0692139, slip op. at 17-18 (Cal. Super. Ct. April 6, 2007) (unpublished)
	Utilizing race in developing attendance boundaries	• Capistrano School District's school attendance boundary plan, whose "general guiding principle" was that no school shall have a "minority" population greater than 35%, violated Proposition 209 because it limited the number of positions available at each high school for members of different ethnicities and, thus, utilized race in developing attendance boundaries for the high schools within its district in order to achieve racial balance	• *Neighborhood Sch. for Our Kids v. Capistrano*, No. 05CC07288, slip op. at 3-4 (Cal. Super. Ct. Aug. 25, 2006) (unpublished minute order)
Permissible	An **'integration plan'** developed by a school board need not offend Proposition 209 if it does not discriminate or grant preferences on the basis of race or ethnicity	• School assignment plans that consider the racial makeup of the student's neighborhood as one of several equally-weighted factors, no one of which is determinative of any placement decision • Consideration of neighborhood ethnic composition in setting school attendance boundaries • "Controlled choice" school assignment plan that considers the student's race and ethnicity as one of several factors	• *Crawford*, 98 Cal. App. 4th at 1286 • *ACRF*, No. RG0692139 (Cal. Super. Ct. April 6, 2007) • *Capistrano*, No. 05CC07288 (Cal. Super. Ct. Aug. 25, 2006 • *Avila v. Berkeley Unified Sch. Dist.*, No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. April 6, 2004) (unpublished)
	Magnet programs provide a race-neutral means to prevent racial or ethnic isolation by providing educational choices for district students	• Proposition 209 permits districts to use magnet schools to encourage the movement of students "in a pattern that aids desegregation on a voluntary basis"	• *Crawford*, 98 Cal. App. 4th at 1286 (citing *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995)); see also *Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161, 1167 (2004)

PUBLIC EDUCATION Continued

Permissible

Legal Standard	Examples	Cases
Proposition 209 does not forbid the provision of **supplemental funding** to schools with substantial minority populations, provided that the district has race-neutral reasons for such funding	• Following the lifting of a desegregation order, Proposition 209 does not prohibit districts from providing transitional supplemental funding to preserve educational programs at schools that were formerly identified as "racially isolated minority" schools	• *Hernandez*, 126 Cal. App. 4th at 1178-79
Restrictions on **transfers** to maintain a prescribed balance *might* be permissible	• Policy that "erects both a minimum *and* a maximum applicable to each racial group, such that the policy's macroscopic effect–keeping whites and nonwhites in balance–touches both groups with equal force" *might* be permissible	• *Friery v. L.A. Unified Sch. Dist.*, 300 F.3d 1120, 1123-24 (9th Cir. 2002)
California schools may monitor the race and sex of applicants, and conduct targeted outreach so long as the program includes white males and does not give an advantage	• Sending college applications and information to high achieving students of color as well as high achieving non-minority students; • Attending recruitment fairs or receptions sponsored by minority or female groups in addition to receptions for general students; • Establishing mentoring programs whereby alumni and students are matched based on similar race, ethnicity, and interests	• *Grutter v. Bollinger, 539 U.S. 306 (2003)*
Race- and gender-neutral practices	• Employ a comprehensive application review process that looks at tests and grades as well as other factors such as economic background, special talents, and success in overcoming hardships • Give admission preferences based on neutral classifications such as low-income, first generation to attend college, single-parent household, and low-performing secondary school (test scores, eligibility for post-secondary institutions, or participation rates for post-secondary education) • Offer academic support programs and financial aid services for students based on these neutral classifications • Develop and expand after-school assistance programs at low-performing elementary and secondary schools • Improve preparation for vocational careers and college by promoting academic counseling and mentoring at low-performing secondary schools • Undertake extra outreach in communities with low application rates due to unequal access to information • Recruit students for professional schools from communities and populations that are underserved by that profession • Implement automatic eligibility programs for students graduating near the top of their high school class and students attaining a specified degree of achievement in community colleges	

[i]Note that the California Rules of Court generally prohibit the citation of unpublished opinions from the California Court of Appeal. Cal. Ct. R. 8111.5 (2007).
[ii]The California Supreme Court denied the Ninth Circuit's request to certify the question of what if any impact Proposition 209 might have on this understanding, and the Ninth Circuit subsequently remanded the case for the purpose of making a determination of the plaintiff's standing. *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146 (2006).