EXAMINING "VOTER INTENT" BEHIND PROPOSITION 209: WHY RECRUITMENT, RETENTION AND SCHOLARSHIP PRIVILEGES SHOULD BE PERMISSIBLE UNDER ARTICLE I, SECTION 31

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I. INTRODUCTION AND STATEMENT OF THE PROBLEM

In 1996, California voters passed Proposition 209, now Article I, section 31 of the California Constitution. The pivotal portions of the amendment are contained in clause (a), which states: "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[1] Both before and after the passage of the initiative, its proponents and opponents alike explained that the new prohibition would affect entry preferences, such as in admissions, in employment and in the awarding of public contracts, which were to be distinguished from recruiting and retention efforts.[2] Nevertheless, in the *Hi-Voltage* case, the California Supreme Court determined that a specific recruiting or "outreach" program constituted an imper-

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1. CAL. CONST. art. I, § 31.

2. *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1351-53 (1997) (arguing that "neutral [outreach] programs, intended to reach as many people as possible without regard to race, sex, or ethnicity are certainly allowed" and that complicated cases will "turn[ ] on the employer's intent.").

missible preference, thus calling into question the scope of the preferences prohibited by Proposition 209.[3]

If indeed the voters, as well as the proponents of Proposition 209, intended to outlaw so-called entry, or "access" preferences, then preferences that are outside the scope of this prohibition still can be permissible. This Article posits that financial aid and scholarship programs, designed *not to obtain, but rather to retain* a diverse student body, can be structured to fall outside of the "access privilege" prohibition of Proposition 209. The argument is similar to that in favor of academic support and tutoring programs, which are used to retain students from a diversity of racial and ethnic backgrounds, and which should not implicate the access preference prohibition of Proposition 209. If so, then the public colleges and universities within the State of California can reinstate some use of diversity scholarships, as a narrowly tailored means toward achieving the *Grutter*-sanctioned compelling interest in the "benefits that flow from a diverse student body."

Part II of this Article summarizes the text of Proposition 209 and the principal cases that have defined its meaning since its passage. Part III then explores the various mechanisms for ascertaining voter intent. To demonstrate that access preferences were the focus of the proponents and the voters, Part III evaluates the voter information pamphlet arguments of the proponents and the media portrayals during the campaign. Part IV then explains how and why retention privileges fall outside the scope of Proposition 209's prohibitions. Borrowing from arguments used to justify the continuation of academic support programs, Part IV also proposes a diversity scholarship program that satisfies both the California and United States Constitutions.

II. Existing Case Law Provides Inadequate Standards for Evaluating the Scope of Constitutionally Permissible Preferences

The California Supreme Court has interpreted the scope of Proposition 209 only once in the more than ten years since the state constitutional amendment passed in November, 1996.[4] The California Courts of Appeal have issued very few decisions on Proposition 209 issues, and a number of those decisions are not published. As a result, there are some significant differences of interpretation among California courts, and little authority to guide future deliberations. Moreover, when the courts do try to interpret Proposition 209, they have a difficult time discerning

3. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 101 Cal. Rptr. 2d. 653 (N.D. Cal. 2000); discussion *infra* Part II.

4. *Hi-Voltage*, 101 Cal. Rptr. 2d. 653.

the "legislative intent" of the voters to guide their efforts. One crucial interpretation question remains. What constitutes a "preference?" One author provides a useful interpretation of the term "preferences," stating that "[p]erhaps the best way to understand the distinction between affirmative action and preferences is that in order for a person to receive a preference, another person—whether identifiable or not—must suffer discrimination."[5] Several cases have found some ambiguity in this interpretation, both in the context of public education and government contracting, and therefore went to the next step of attempting to ascertain voter intent behind the language of Proposition 209.[6]

A. *The Language of Proposition 209*

As an initiative on the California state ballot in November of 1996, Proposition 209 was referred to as the California Civil Rights Initiative, or CCRI. It was passed by the voters by a margin of 54 to 46 percent.[7] Two years later, voters in the state of Washington approved a similar measure.[8] Proposition 209 is now part of the California Constitution as Article I, section 31 and it prohibits preferences based on race, ethnicity, color and national origin,[9] which will be referred to as "RECNO" classifications.[10] The California Supreme Court has defined "preference" as "a giving of priority or advantage to one person . . . over others."[11] Proposition 209 prohibits *discriminations* based on RECNO. The California Supreme Court has defined discrimination as "to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)."[12] Presumably, non-RECNO-based discriminations are permissible. Preferences that do not discriminate based on RECNO characteristics are not prohibited by Proposition 209.

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

6. *See* Friery v. L. A. Unified Sch. Dist., 300 F.3d 1120, 1123-24 (9th Cir. 2002); *Hi-Voltage*, 101 Cal. Rptr. 2d. 653; Connerly v. State Personnel Bd., 112 Cal. Rptr. 2d 5 (Ct. App. 3d Dist. 2001); Hunter v. Regents of Univ. of Cal., No. B148799, 2001 WL 1555240 (Cal. Ct. App. 2d Dist. Dec. 5, 2001); Crawford v. Huntington Beach Union High Sch., 121 Cal. Rptr. 2d 96 (Ct. App. 4th Dist. 2002). *See also* discussion *infra* Part II.C.

7. Douglas M. Jones, *When "Victory" Masks Retreat: The LSAT, Constitutional Dualism, and the End of Diversity*, 80 ST. JOHN'S L. REV. 15, 34 n.62 (2006).

8. WASH. REV. CODE § 49.60.400 (West 2006) (prohibiting discrimination and preference based on RECNO classifications statutorily rather than constitutionally).

9. CAL. CONST. art. I, § 31.

10. Proposition 209 also prohibits gender preferences, but gender will not be the focus of this Article. CAL. CONST. art. I, § 31.

11. *Hi-Voltage*, 101 Cal. Rptr. 2d at 669. *See infra* note 42 and accompanying text.

12. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 668.

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

Although a majority of the California voters approved Proposition 209, concerned citizens immediately filed litigation to halt the enforcement of the proposition.[13] The plaintiffs in *Coalition I* argued that, by imposing an unfair political process burden on minority interests, Proposition 209 violated the Equal Protection Clause under the *Hunter* doctrine.[14] Initially, Judge Thelton Henderson of the U.S. District Court for the Northern District of California issued a preliminary injunction staying the effective date of Proposition 209 because he found there was a strong likelihood that the plaintiffs would succeed on the merits of their argument.[15]

The Interveners in *Coalition I* appealed Judge Thelton Henderson's preliminary injunction ruling to the Ninth Circuit.[16] The Ninth Circuit reversed Judge Henderson. Furthermore, the Ninth Circuit found that even a compelling interest is not sufficient to justify a race-based classification under the language of Proposition 209 because, although "the [Federal] Constitution *permits* the rare race-based or gender-based preferences[, it] hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification."[17] That court further determined that "[i]mpedi ments to preferential treatment do not deny equal protection."[18] The court explained that because preferences constituted "extra protection," permitting preferences was not necessary to guarantee "equal" protection.[19] Proposition 209 prohibited only *extra*

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13. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) ("Coalition II"); Hunter ex rel. Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999).

14. Coalition for Econ. Equality v. Wilson, 946 F. Supp. 1480, 1500 (N.D. Cal. 1996) ("Coalition I") (citing Hunter v. Erickson, 393 U.S. 385, 393-395 (1969)).

15. *Id.* at 1520.

16. *Coalition II*, 122 F.3d at 697.

17. *Id.* at 708.

18. *Id.*

19. *Id.*

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

Id. (footnote omitted).

protection according to the Ninth Circuit, and therefore, it did not violate the Equal Protection Clause.[20]

In attempting to provide some context for the discussion of the differences between preferences and non-preferences, the *Coalition II* court explained that "re-shuffle" programs are different from reverse discrimination programs, also referred to as "stacked deck" programs.[21] The denial of equal protection requires a classification that treats individuals in an unequal manner, which was present in *Washington v. Seattle School District No. 1* where "the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education."[22] In the corresponding footnote, the court recognized the difference between "stacked deck" programs that entrench on Fourteenth Amendment values in ways that "re-shuffle" programs, such as school desegregation, do not.[23] The court explained that "[u]nlike racial preference programs, school desegregation programs are not inherently invidious and do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights."[24] Singling out benefits based on race, rather than diffuse benefit-and-burden-shifting in situations that provide access for all, seemed to be the court's primary concern. This crucial difference between re-shuffle and stacked deck programs will be discussed more fully below.[25]

The Ninth Circuit eventually determined that Proposition 209 did not violate the Federal Constitution's Equal Protection Clause and dissolved the preliminary injunction.[26] After the United States Supreme Court declined certiorari,[27] the law took effect in California on August 28, 1997.[28]

C. *The California Supreme Court Interprets the "Voter Intent" in the* Hi-Voltage *Case*

In December, 2000, the California Supreme Court addressed the issue of voter intent in enacting Proposition 209 in the *Hi-*

20. *Id.*
21. *See id.* at 708 n.16.
22. *Id.* at 708.
23. *Id.* at 708 n.16 (citing Associated Gen. Contractors of Cal. v. S. F. Unified Sch. Dist., 616 F.2d 1381, 1387 (9th Cir. 1980)).
24. *Id.*
25. *See* discussion *infra* Parts II.H, III, and IV.
26. *Coalition I*, 122 F.3d at 710-11.
27. Coalition for Econ. Equality v. Wilson, 522 U.S. 963 (1997) (Coalition III) (cert. denied).
28. Alfreda A. Sellers Diamond, *Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black College or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1909 (2004).

Voltage case. Reviewing the ballot pamphlet materials to guide its reasoning,[29] this Court agreed with the interpretation of *Coalition II* in finding that section 31 of the California Constitution provides greater protection against discrimination than the Fourteenth Amendment, and also provides greater protection against preferences.[30] As stated in an earlier article, "California [has] shifted from the 'strict-in-theory-but-fatal-in-fact approach' that the federal courts follow to the simple pronouncement that race-based classifications are 'in fact fatal'."[31]

Hi-Voltage challenged the constitutionality of a city program that required contractors bidding on city projects to satisfy either a participation requirement or an outreach requirement.[32] Each requirement applied to Minority/Women Business Enterprise ("M/WBE") subcontractors, and the prime contractors were required to document outreach efforts, or to include a specified percentage of M/WBE subcontractors in their bid proposal.[33] Hi-Voltage, the plaintiff contractor, had the lowest bid, but did not make any outreach efforts or list any M/WBE participation levels.[34] When the city rejected its bid as non-responsive, Hi-Voltage brought a suit for injunctive and declaratory relief to prevent enforcement of the program.[35]

The California Supreme Court opinion used the language in the voter information pamphlets to ascertain the California voters' intent.[36] The *Hi-Voltage* court explained that "[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words."[37] The *Hi-Voltage* court defined discrimination as "to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)" and defined "preferential" as "giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others.'"[38] It was

29. *Hi-Voltage*, 101 Cal. Rptr. 2d at 685.

30. *Id.* at 675.

31. Christine Chambers Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 ALB. L. REV. 633, 639-40 (2003).

32. *Hi-Voltage*, 101 Cal. Rptr. 2d at 656-57.

33. *Id.* at 656.

34. *Id.* at 657.

35. *Id.* at 657-58.

36. *Id.* at 685.

37. *Id.* at 669 (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization 583 P.2d 1281 (1978); People ex rel. Lungren v. Super. Ct. 926 P.2d 1042 (1997)).

38. *Id.* at 669. In his concurring opinion Justice Mosk explained how the city's outreach program granted preferential treatment to "subcontracting firms . . . owned by women or members of minority groups." *Id.* at 678 (Mosk, J., concurring). He stated that the outreach program "[n]ot only . . . invite[d] those firms into the process, it also guarantee[d] that they [were] dealt with well during its course, and [would] not be ushered out without reason at its end. It [did] not do the same for others." *Id.* at 679.

clear to the court that requiring outreach to or selection of, W/MBE sub-contractors gave a priority or advantage to those sub-contractors over other Anglo/male sub-contractors who would be competing for the same jobs.[39] The W/MBE's were invited to participate in bidding, followed-up with, and selected for inclusion in the winning bid proposal, not simply based on having the lowest cost projection.[40] Thus, the contractors were doing more than making an extra effort to include W/MBE's in the bidding process. Rather, those W/MBE's who normally would not be competitive, actually were being awarded with sub-contracts solely because of the race or gender of their owners.[41]

The court went on to state that "[w]hile the language of Proposition 209 is clear, and literally interpreted does not lead to absurd results we may 'test our construction against those extrinsic aids that bear on the enactors' intent . . . .'"[42] The California Supreme Court then addressed *Coalition I* and agreed that "'the people of California meant to do something more than simply restate existing law when they adopted Proposition 209.' In taking a measure of that 'something more,' the 'historic Civil Rights Act' reference tells us the voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated [*Steelworkers v. Weber*, 443 U.S. 193 (1979).]."[43] The court further recognized that:

> The ballot arguments from-[sic] which we draw our historical perspective-[sic] make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, "to achieve equality of [public employment, education, and contracting] opportunities" and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." In short, the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: "Basing present discrimination on past discrimination is obviously not right."[44]

The *Hi-Voltage* court concluded that "[p]lainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification."[45] Nevertheless, the court found that the outreach requirement in the current case constituted an impermissible preference because it specifically

39. *Id.* at 671 (majority opinion).
40. *Id.* at 656-57.
41. *See id.* at 656-57.
42. *Id.* at 669 (citation omitted).
43. *Id.* at 670 (quoting *Coalition I*, 946 F. Supp. at 1489).
44. *Id.* at 671 (citations omitted).
45. *Id.* at 673.

targeted RECNO classifications.[46] This outreach, although pre-access, was very near the access point, because it required: initial contact, follow up contact, and an explanation of reasons why bids from minority and female-owned subcontractors were rejected. All of this attention relates to the access issue which will be addressed in Part III, below.

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

The California Supreme Court has taken one other opportunity to interpret Proposition 209, but did not address the voter intent issue.[47] In addition, the California Supreme Court was presented with an opportunity to rule on whether faculty transfers in the school desegregation context amounted to preferences and it declined to address the question.[48] In this case, the Ninth Circuit certified several questions to the California Supreme

46. *Id.* at 674. Thus, the court held that the "[p]rogram is unconstitutional because the outreach option affords preferential treatment to MBE/WBE subcontractors on the basis of race or sex . . . ." *Id.* at 669 (footnote omitted).

47. S. F. Fire Fighters Local 798 v. City and County of S. F., 42 Cal. Rptr. 3d 868 (2006). It evaluated a binding arbitration requirement when public safety officers had been unable to reach a successful outcome to a negotiation that sought to ensure compliance with antidiscrimination laws. *Id.* at 870-71. The court recognized that the city had to "resolve the tension between remedying practices of discrimination against minorities and observing California Constitution Article 1, section 31's requirement that state and local laws not favor employees on the basis of sex or race." *Id.* at 885-86. Acknowledging that it could not determine whether the new mechanism of evaluating testing and grouping scorers would have a substantial impact on statistical validity, the court stated, "it is not certain whether Statistically Valid Grouping will reduce the adverse impact of examination scoring in the absence of explicit consideration of race and gender. But whether and to what degree it will have that effect is an empirical question that must be tested by experience." *Id.* at 886. The court simply held that the Commission had the authority to make amendments to the rules in an effort to comply with Article I, section 31. *Id.* Furthermore, the court found that "the Commission had a reasonable basis for determining that Statistically Valid Grouping would succeed in ensuring compliance with antidiscrimination laws." *Id.* The court specifically limited its holding, stating:

> We emphasize the narrowness of our holding. We do not, of course, decide whether in fact the Commission's alternative will survive legal challenges based on antidiscrimination laws. No such challenge is before us. Nor do we decide the Commission's selection method is superior [to] those proposed by the union. All that we determine is that the Commission has acted in amending rule 313 "to ensure compliance with anti-discrimination laws," notwithstanding the fact is that the union disputes the means of compliance chosen. As such, section A8.590-5(g)(3) explicitly provides that binding arbitration is not the means of resolving this dispute, and implicitly permits the City to implement the new rule 313 unilaterally after bargaining in good faith to impasse.

The court did not provide any evidence on the substantive issue of whether the proposed evaluation mechanism would satisfy or conflict with law.

48. *See Friery*, 300 F.3d at 1120.

Court, which denied certiorari and did not respond to those questions.[49] The most important question the Court declined to answer was whether a school district violated Article I, section 31 when it "implements a policy that forbids teachers from transferring between schools where such a transfer would push the ratio of white to nonwhite faculty at the destination school beyond a prescribed balance?"[50] The case involved faculty transfers between schools within the district and a policy, "which bars intradistrict faculty transfers that would move the destination school's ratio of white faculty to nonwhite faculty too far from the [Los Angeles Unified School District's] overall ratio."[51] The circuit court recognized that the California Supreme Court had not yet had the opportunity to apply section 31 to programs like this transfer policy and that there are very few section 31 decisions by California appellate courts.[52] The court discussed *Hi-Voltage*, *Connerly*, and *Crawford*, but concluded that this is a "sensitive question of state law that is more appropriately decided by the courts of California than by a federal court of appeals."[53]

This court recognized one important distinction which may be compelling for our purposes. In discussing *Crawford*,[54] the court explained that it "is not squarely controlling, because the Huntington Beach school district's policy operated only in one direction: it created a floor for whites and a ceiling for nonwhites, but not the converse. The California courts may treat this as a significant distinction."[55] The court further recognized that "[n]o published California decision appears to discuss whether the existence of discretion to depart from admittedly race-based standards prevents the discrimination that a program works or

49. Friery v. L. A. Unified Sch. Dist., 448 F.3d 1146, 1148 (9th Cir. 2006) (noting that the "California Supreme Court denied the request for cert."). The California Supreme Court has not received any other certified questions regarding Proposition 209 since it denied the Ninth Circuit's request for certification in *Friery*. It seems that the effect of an exercise of discretion is another question to consider. Thus, there is room to interpret reciprocal programs with similar floors and ceilings for all groups as outside the scope of *Crawford's* holding.

50. *Friery*, 300 F.3d at 1121.

51. *Id.* at 1122.

52. *Id.* at 1123-24 (citing *Hi-Voltage*, 101 Cal. Rptr. 2d at 672 (stating that *Hi-Voltage* struck "down public contracting provisions that required granting preferential treatment to businesses that were owned by minorities or women, and discriminating against businesses that were not"); *Connerly*, 112 Cal. Rptr. 2d at 34, 37, 39-40 (stating that *Connerly* invalidated "various provisions requiring the 'selective dissemination of information' to favored groups and granting minorities and women preference in hiring"); *Crawford*, 121 Cal. Rptr. 2d 96 (stating that *Crawford* found a transfer policy unconstitutional because it limited "transfers by white students *out of* a particular high school and by nonwhite students *into* that school.")).

53. *Id.* at 1126.

54. *See* discussion *infra* Part III.C.2.

55. *Friery*, 300 F.3d at 1123-24.

the preferential treatment that it grants from being done 'on the basis of race' within the meaning of Section [sic] 31."[56] This reasoning is similar to the *Grutter* Court's rationale on the narrowly tailoring issue and the need for individualized review.[57] Thus, the existence of discretion may help to legitimize programs with some racial consideration.[58] Although these questions remain unanswered by the California Supreme Court, the Washington Supreme Court has made some clarifications as to the voter intent behind its own Proposition 209, Washington's Initiative 200. Those clarifications are examined in the next section below.

E. *Interpretations of Voter Intent for the Similarly Worded Washington Initiative 200 Identify a Difference Between "Re-shuffle" and "Stacked Deck" Programs*

In 2002, the Washington Supreme Court analyzed voter intent as to its Initiative 200 (hereinafter "I-200"). The court further explained that where "a law is susceptible to multiple interpretations, the standard tools of statutory construction apply to determine the voter's intent, including resorting to extrinsic sources."[59] In examining the ballot pamphlet information, the court referred to the specific language that it "does not end all affirmative action programs. It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to state college or university."[60] Thus, the court found that the policy did not violate the statute.[61] This statement is very similar to the arguments made in the ballot pamphlet for Proposition 209.[62]

Like the Ninth Circuit's statement in *Coalition II*, the Washington Supreme Court identified a notable difference between "stacked deck" and "re-shuffle" programs.[63] The federal court

56. *Id.* at 1124. The court continued, "*Connerly* held that if a statute is facially discriminatory, the exercise of discretion in enforcing that statute cannot save it, but the court did not consider whether writing discretion directly into the challenged program would allow it to pass muster." *Id.* (citation omitted).

57. *See* Grutter v. Bollinger, 539 U.S. 306 (2003). *See also* Gratz v. Bollinger, 539 U.S. 244 (2004) (holding that automatic points given "to every single 'underrepresented minority' applicant solely because of race, [was] not narrowly tailored to achieve educational diversity.").

58. *See* discussion *infra* Part IV.C.3.

59. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 165 (Wash. 2002) ("Parents I").

60. *Id.* (citing *State of Washington Voters Pamphlet, General Election* 14 (Nov. 3, 1998)).

61. *Id.* at 166.

62. *See* discussion *infra* Part III.B.2.

63. *See Parents I*, 72 P.3d at 151.

version of this case was appealed to the United States Supreme Court on the federal constitutional issues.[64] In the state case, the Supreme Court of Washington addressed the issue of why I-200 does not prevent the use of a racial integration tiebreaker in desegregation efforts within a state school district.[65] The Court of Appeals certified the following question to the Washington Supreme Court: whether "using a racial tiebreaker to determine high school assignments . . . [constitutes] 'discriminate[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, . . . color, ethnicity or national origin in the operation of . . . public education' in violation of Initiative 200 . . . ."[66]

The Washington Supreme Court accepted certification and went on to describe the initiative process as well as the standard for interpreting initiatives.[67] It stated that:

> Initiatives [are] interpreted from their plain language, if possible. However, when an initiative is susceptible to multiple interpretations, [the court] employ[s] the standard tools of statutory construction to aid our interpretation. The words of an initiative [are] read "as the average informed lay voter would read [them]." If necessary, [the court] will consider the official voters pamphlet.[68]

The standard in the state of Washington is quite similar to that articulated by the California Supreme Court in *Hi-Voltage*. Quoting *Coalition II*, the *Parents I* court provides some outstanding language in interpreting the constitutionality of section 31:

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

64. Since the submission of this article for publication, the United States Supreme Court issued a decision in Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) ("Parents II") (holding that the school assignment plan was not sufficiently narrowly tailored to justify the use of race in student assignments to secondary high schools, and declining to hold that *Grutter* governed secondary high schools).

65. *Parents I*, 72 P.3d at 154.

66. *Id.*

67. *Id.* at 156-57.

68. *Id.* (citations omitted).

> underrepresented groups. Racially neutral programs have been referred to as "reshuffle" programs.[69]

Thus, "re-shuffle" programs did not constitute RECNO preferences in Washington. The court also discussed the difference between preference programs and other types of affirmative action programs.[70]

Continuing, the court explained how I-200, incorporated into the Washington Codes as RCW 49.60.400, "was promoted as a civil rights measure that eliminated racial preferences in public employment, contracting, and education."[71] Recognizing that the language was similar to Proposition 209, the court noted some significant differences.[72] Particularly, I-200 was a statutory change in the State of Washington and not a change to the Washington Constitution.[73] In addition, I-200 provided a converse clause specifically stating that "this section does not affect any law or government action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin."[74]

Nevertheless, the court determined that I-200 was subject to more than one interpretation and discussed the ballot pamphlet information to determine what the average voter would have been thinking.[75] The court stated:

> the average informed voter would be aware of the distinctions drawn between reverse discrimination and race neutral balancing programs sometimes referred to as the 'stacked deck' and 'reshuffle' programs. Subsection (3) of the statute suggests that some race conscious decisions or actions by the state would be permitted. We agree with the School District that the average informed voter believed that I-200 *only prohibited reverse discrimination where a less qualified person or applicant is given an advantage over a more qualified applicant.* An average informed voter would understand that racially neutral programs designed to foster and promote diversity to provide enriched educational environments would be permitted by the initiative.[76]

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69. *Id.* at 159 (2003) (citing *Coalition II,* 122 F.3d at 707 n.16).

70. *Id.* at 160. *See also Parents II, supra* note 64 at 2760 (finding the programs impermissible as insufficiently narrowly tailored to justify the use of race when race-neutral alternatives were not fully explored).

71. *Id.* at 161.

72. *Id.*

73. *Id.*

74. WASH. REV. CODE § 49.60.400 (West 2006).

75. *Parents I,* 72 P.3d at 165.

76. *Id.* (emphasis added).

F. *The Need for an Interpretative Guide*

Since the *Hi-Voltage* case in 2000, the California Supreme Court has declined to resolve the ambiguity in interpretation of the scope of Article I, section 31 by the various appellate districts within the state.[77] As the summaries above indicate, these appellate cases provide only scattered and sometimes conflicting rulings as to which preferences are permissible and which are not. Moreover, as noted above, several of the cases are not published, further limiting their usefulness as guidance to lawyers and lower courts. For these reasons, it is imperative that we develop an interpretative guide to analyze the voters' intent on the scope of prohibited preferences. The next section of this Article attempts to provide that guidance; first with an analysis of the theories of and tools for ascertaining voter intent, and then by applying those tools and theories to the elusive "voter intent" behind Proposition 209.

III. UNDERSTANDING AND EVALUATING VOTER INTENT ON ACCESS PREFERENCES

Ballot initiatives, like legislation drafted by state assemblies, can be unclear or susceptible to multiple interpretations. When the legislative enactment is ambiguous, the courts examine "legislative intent," as guidance for how to resolve ambiguities in the application of the new law. There is a hierarchy of sources for determining legislative intent.[78] Similarly, when a ballot initiative is somewhat ambiguous, the courts look for evidence of intent to resolve the ambiguity. Because the voters are technically the "enactors" of the ballot initiative, the courts will attempt to determine the "voter intent" in approving the ballot measure. The primary mechanisms for discerning voter intent is the voter information pamphlet, but other "extrinsic sources" are sometimes examined.[79] In addition, the arguments submitted in support of,

77. *See supra* note 52 and accompanying text.

78. One author notes that:

> Judges also display widespread agreement over the relative importance of different sources of legislative history. At the top of the hierarchy are committee reports, which receive the most citations and the greatest weight. In the middle are statements by representatives, which receive less weight, unless made by a drafter or sponsor. At the bottom are media accounts — press releases, advertising, and newspaper articles — which are seldom cited.

William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. L. REV. 629, 668 (2001) (footnotes omitted).

79. Just prior to the publication of this article, the California Supreme Court used ballot pamphlet information to support its interpretation of the intent behind a different proposition. *See, e.g.*, In re Marriage Cases, — Cal.Rptr.3d ——, 2008 WL 2051892 (Cal. Sup. Ct. May 15, 2008) (stating that "in view of the thrust of the measure as explained in the ballot arguments supporting the proposed initiative and

and against ballot measures are "a permissible aid to interpretation, but are often inconclusive due to their typically simplistic and always partisan nature."[80] Reliance on the ballot pamphlet alone leads to some pitfalls. Most notably, such reliance privileges the interpretations and intent of the more educated because those voters are disproportionately the ones who actually read, and potentially understand, the ballot pamphlet materials.

A review of the ballot pamphlet, media portrayals and advertisements for the November, 1996, election shows a clear, but not exclusive, focus on prohibiting what this Article refers to as "access preferences."[81] Access preferences are preferences that not only open the door to an individual, but walk them through that door by granting them a "position on the team." Access preferences bring students into universities, bring employees into the workforce, and bring businesses into the market of providing products and services for the state government.

A. *Which Intent Should Courts Seek to Ascertain?*

It is truly a legal fiction to attempt to ascertain a common intent from the millions of people who vote in favor of a particular ballot measure that passes with a majority of votes. So which "intent" should the court be seeking? Some voters may have one intent—for instance, to change existing law dramatically. Other voters may have a different intent, such as to keep the status quo with only a minor modification. The intent of each individual voter will depend upon which arguments that voter agreed with and even to which arguments that voter was exposed.

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rebutting the arguments against it, it would be unreasonable to conclude that the measure intended (and should be interpreted) to leave the Legislature free to revise California law to authorize the marriage of same sex couples" and quoting portions of the ballots pamphlet materials to support this conclusion. *Id.* at *20. Other extrinsic sources include "(1) previously enacted similar statutes, (2) 'the ballot summary and analysis presented to the electorate in connection with [the] particular measure,' and (3) contemporaneous administrative and legislative construction of the initiative. With few exceptions the courts have declined to consult other extrinsic sources such as analyses, reports, or advertisements found in the newspapers or on television." Stephen Salvucci, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 875-876 (1998) (footnotes omitted).

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

81. *See Hi-Voltage*, 101 Cal. Rptr. 2d. at 698-701.

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

Because voters may be persuaded based on various external sources and because voters may rely upon different sources with sometimes conflicting analyses of the proposed ballot measure, one author suggests that the only thing the voters "have in common is a 'yes' vote and some threshold agreement with the initiative that prompts their affirmative vote."[82] The author explains that this threshold agreement "is the intent the courts should be looking for when they interpret an initiative."[83] This minimum threshold agreement is what we call the intent of the "least change" voter.

Examining the intent of the least change voter recognizes that at a minimum all "yes" voters wanted some change, however small, in the existing law, and that small change "is the only intent that we can attribute to all voters. Furthermore, only a rule of narrow construction acknowledges and addresses one of the most problematic deficiencies of the initiative process, drafting difficulties."[84] One way to examine the least change would be to consider arguments that the proposed initiative would change the law too dramatically. In the context of Proposition 209, one student note analyzed the arguments about the effect of clause (c) on gender discrimination and explained that "the proponents of the CCRI, in response to a concern raised by the opposition, promised the voters that protection for women would not be set back."[85] Thus, even though Proposition 209 would change then-existing civil rights laws, the least change voter was led to believe that it would not change the existing protections for women.

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82. Salvucci, *supra* note 79, at 884 (noting "[t]he only valid inquiry that 'jealously guards' the people is this threshold agreement").

83. *Id.* The author further explained that:

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

Id. (footnote omitted).

84. *Id.* at 885.

85. *Id.* at 890. The note further explains:

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

Id.

This "promise" that the initiative would not diminish women's rights could be considered an explicit agreement on the interpretation of the initiative, despite the arguments of its opponents that such a reduction was possible based on the language of the initiative. Thus, according to the least change theory of interpretation, the voter who was persuaded by this promise, the voter who wanted the least amount of change to women's rights yet still voted yes on Proposition 209, should be the voter whose intent is recognized and enforced by the courts.

Ascertaining the intent of the least change voter is an interesting approach, but individual voters would not be available to explain their minimum expectations for change. Furthermore, some courts do not allow inquiries into voter motivations,[86] even if the information were available. Nevertheless, efforts to ascertain the intent of the least change voter will not be adequate without an examination of extrinsic sources as well.

Professor Schacter proposes a rule of construction that is similar to the "least change voter" or "threshold agreement,"[87] which is referred to by a later author as "the Narrowing Rule."[88] Schacter explains that when the risk of abuse, through "length, complexity, confusing wording, obscurity about the effect of an affirmative vote, heavy advertising (especially when coded with race-based or similar symbols), and propositions explicitly or implicitly targeted at socially subordinated groups[,]"[89] the court "should be reluctant to construe ambiguous words in [the] initiative law [ ] expansively."[90]

Schacter's rule of interpretation could be effective by giving the benefit of the doubt to the narrowest interpretation, without the need for ascertaining the intent of the "least change voters."

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86. *See, e.g.*, Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 405 (2003) (stating that "[e]ven if it were possible to determine the subjective intentions of thousands of individual voters, a number of lower courts have barred judicial inquiry into their motivations"). *See also* Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981) (agreeing that "an inquiry 'into the motives of voters may very well constitute an unwarranted and unconstitutional undermining of one of the most fundamental rights of the citizens under our constitutional form of government . . . .'"); Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) (holding that "the policies underlying the 'secret ballot' prevent courts from inquiring into the votes of the electorate.").

87. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 159 (1995).

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

89. Schacter, *supra* note 87, at 159. Schacter further criticizes the attempts to discern voter intent as "circular when the very question at issue is what purpose the voters had in passing a law. Shifting the inquiry to purpose does not solve so much as restate the basic problem by shifting the indeterminacy to a higher level of abstraction." *Id.* at 146.

90. *Id.* at 157.

However, external sources would need to be evaluated in order to determine what that narrow interpretation should be. The major extrinsic source used by courts is the ballot pamphlet,[91] but it will not necessarily be useful in determining the minimum expectation for change simply because so few voters read, let alone rely upon, the ballot pamphlet. Similarly, the ballot pamphlet may not be the best source for the narrowest interpretation because the Legislative Analyst summaries are written to show the *potential* for change, not necessarily the minimum change that an initiative could impose. Moreover, as discussed below, the arguments by proponents and opponents presented in the ballot pamphlet are not always accurate predictions of future court interpretations.[92]

It is troubling that the courts are most likely to use the ballot pamphlet materials, and least likely to use media depictions, in interpreting the intent behind voter initiatives. If the courts are attempting to determine the voters' intent, then there is an argument that the courts' analysis should be based upon what the voters actually use. Many voters do not read the ballot pamphlet materials; they rely on the media through print, television and radio stories and advertisements. Schacter examines the use of ballot pamphlet information, and concludes that "most voters do not use ballot pamphlets."[93] Others agree that because few voters read the text of ballot measures, it is not clear that courts should consult that source when ascertaining voter intent.[94]

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

Let us now focus on using extrinsic sources to ascertain the intent of the "least change voter" in favor of Proposition 209.[95] In determining this "least change" voter's intent, we must be mindful of voter misinterpretation, both before and during the

91. *See, e.g., Hi-Voltage,* 101 Cal. Rptr. 2d, 669; *Crawford*, 121 Cal. Rptr. 2d 96; *Hunter*, 2001 WL 1555240.

92. *See* discussion *infra* Part III.B.2.

93. Schacter, *supra* note 87, at 142-43 (footnotes omitted). She continues, "[s]ome studies are more optimistic, placing the percentage between thirty percent and sixty percent of those who vote. In either event, it would appear that some substantial percentage of voters do not read the material." *Id.*

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

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

Id. at 954.

95. Salvucci, *supra* note 79, at 884.

voting process. For instance, one chart notes that support for Proposition 209 diminished when people were told that it "discouraged women and minority businesses from competing," even more when told it "outlawed affirmative action for women and minorities," and when it was explained that "it discouraged programs to help women and minorities achieve equal opportunities."[96] Thus, the least change voter likely did not want to curtail equal opportunity programs for women or people of color. Yet, according to the ballot pamphlet, a "yes" vote on Proposition 209 would do just that. One author suggests that initiatives should be subjected to a higher level of scrutiny when challenged because "as a result of miscast votes, the outcome of initiatives may reflect the will of only a very small number of the people."[97] Some voters likely voted *in favor* of Proposition 209 when the outcome they desired would have been served by voting *against* it.

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

> the mass media derive substantial power from their "capacity to determine the content of public concerns, to 'set the agenda' for public discussion." In the context of campaigns, this agenda-setting function means that the media often identify the defining questions and set the boundaries of legitimate debate about the issues. As part of this process, political advertising and the issues covered by the news media influence one another in reciprocal ways.[98]

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96. Lou Harris, *Support for Proposed CCRI shrinks when impact on affirmative action is known, by Sex* (California Survey 1995) (on file with author).

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

> Rather than ascribing a presumption of validity to the initiative, courts would assume that the lack of the legislative filter and the lack of accountability to a concrete entity resulted in a significantly lower degree of deliberation of the initiative compared to a statute. This reduced deliberation, in addition to the lack of a voter oath to uphold the constitution, should be deemed to negatively affect the legitimacy of the initiative. Under this approach, any initiative would be viewed as suspect unless and until it has withstood a high level of scrutiny.

Id. at 261-62.

98. Schacter, *supra* note 87, at 132 (footnotes omitted). Schacter explains that there are "informational deficits," such as jargon and legalese, and "informational asymmetries" which include heavy spending, targeting of marginalized groups, and subliminally directed advertising. *Id.* at 155-57. In critiquing Schacter's theory and proposal for change, Judge Landau determines that the flaws she identifies with the initiative process are flaws that also apply to the legislative process. Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 489-90 (1998). These flaws, however, are not pertinent to the analysis in this Article. Judge Landau recognizes that the "proposals may justify or call for a re-examination of some larger issues

If the real and substantial influence of the media is omitted from the courts' evaluation of the voters' intent, then a true information deficit[99] is in operation and the reasoning of the court will necessarily reflect only a partial understanding of the voters' motivations for enacting the initiative.

Reviewing media sources is not without additional interpretation challenges, however. In determining voter intent on Election Day, it is important to consider the material voters actually used, because voters cannot rely upon material that they never encountered.[100] For this reason, some argue that the media is too haphazard and random to justify a decision that all or most voters actually relied upon any particular media portrayal, advertisement, or argument in making their decision.[101] One author explains that "[t]he crucial factor for courts in determining voter intent is what the voters knew on Election Day,"[102] and "[b]ecause no one can be sure which voters read which newspapers and saw which advertisements, and because such materials can distort the true meaning of the proposal, the use of extrinsic aids, such as mass media, has been the exception rather than the rule."[103]

Media portrayals suggest that Proposition 209 was intended to prohibit exclusionary policies in the area of access, not retention. A review of commercials and media advertisements at the time also show some focus on prohibiting privileges that get

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concerning interpretation generally, but they do not justify the application of specialized interpretive rules for the construction of initiatives particularly." *Id.* at 532.

99. Schacter, *supra* note 87, at 132.

100. This proposition is well established in the doctrine of estoppel. *See* 4 Am. Jur. Proof of Facts 2d § 641 (West 2006).

> As a general rule, it is essential to the doctrine of estoppel, whether equitable or promissory, that the representation of the party to be estopped shall have been believed by the party claiming the estoppel, and that he shall have relied thereon to his detriment. The representation of the party to be estopped must have been communicated to the party claiming estoppel, and thus it follows that no estoppel can arise in favor of one who was ignorant of the fact that any representation was made, since it is obvious that one cannot rely on that which he does not know or be misled by something of which he is not informed.

Id. (footnote omitted).

101. *See, e.g.*, Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431 (2000); Sutro, *supra* note 94.

102. Frankel, *supra* note 101, at 438. The note continues:

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

Id.

103. *Id.*

someone in the door. For instance, one popular television commercial stated: "You needed that job and you were the best qualified, but they had to give it to a minority because of a racial quota. Is that really fair?"[104] This statement identifies an access privilege in the employment area.

Another advertisement sponsored by the proponents of Proposition 209 began with an excerpt of Dr. Martin Luther King, Jr.'s famous "I Have a Dream" speech.[105] Dr. King's voice was dropped from the commercial amidst a threat of copyright infringement litigation by his estate.[106] Once edited, the advertisement began with a "montage of faces," then showed the face of then-President Bill Clinton, and ended with an Anglo female stating "[w]e should be judged on merit, not by gender or the color of our skin. Job quotas and preferences are wrong. Proposition 209 ends quotas and special treatment," and later, "Let's end all discrimination."[107] This commercial's reference to "job quotas" again implicates the access preference issue, because employment quotas, which may actually be goals and timetables, generally operate at the time of initial hiring. While some such goals and timetables may apply at the promotion and layoff stage,[108] the message suggests that the access point is crucial.

Times Staff Writer Dave Lesher also described several other campaign commercials sponsored by the proponents, including another which focused on the access issue.[109] This commercial "features a San Bernardino Community College student who claims she was denied access to an English class because she is white."[110] A denial of access to a course, or course of study, similarly constitutes an access preference. Someone is not invited to

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

105. Dave Lesher, *GOP Pulls King Segment from TV Ad for Prop. 209*, L.A. TIMES, Oct. 25, 1996, at A-26. The commercial contained his voice reciting the famous line about being "judged not by the color of their skin but by the content of their character." *Id. See also California Dreaming of Last Ditch Ad Campaign*, SCOTSMAN, Oct. 27, 1996, *available at* 1996 WLNR 2334286 (page unavailable online).

106. Lesher, *supra* note 105.

107. Ken Chavez, *Looking at the GOP's Prop. 209 Ad*, SACRAMENTO BEE, Oct. 30, 1996, at A4, *available at* 1996 WLNR 5655095.

108. *See Friery*, 300 F.3d 1120; *S. F. Fire Fighters*, 42 Cal. Rptr. 3d 868.

109. In the aftermath of the cross burning ads by the opposition, to highlight former Klansman David Duke's support of Proposition 209, Ward Connerly, the chairman of the initiative campaign, and then-Regent of the University of California system, appeared in a commercial saying that "the initiative is intended to end 'unfair' preferences and to seek laws that provide 'equal treatment.'" Dave Lesher, *California Elections Initiative's Backers, GOP both Intensify Ad Campaigns*, L.A. TIMES, Nov. 1, 1996, at A3, *available at* 1996 WLNR 5077421.

110. Lesher, *supra* note 105.

play the game, or is held back from going through the door with these preferences referred to in the television commercials.

In discussing various campaign ads and materials, one student note recognizes that the proponents of Proposition 209 may have "only wanted to prohibit preferences that had an exclusionary effect, as in an admissions context, because those preferences conjure up an image of unfairness."[111] The author further explains that "[t]he difference people perceive between affirmative action and exclusion may explain why polls show such a gap between supporters of preferences and supporters of affirmative action."[112] Avoiding exclusionary practices relates to the zero-sum prohibition discussed below.[113]

Even if there were some way to determine which external sources of information most "yes" voters relied upon in making the voting decision about a particular initiative, there are other challenges for determining the intent behind those "yes" votes due to the risk of voter misunderstanding or miscast votes. After Election Day in 1996, there was evidence that some who voted for the measure believed that a yes vote meant the opposite of what it actually meant. The Yale note author explains that:

> One California poll showed that forty-eight percent of affirmative action supporters in the state also supported Proposition 209. Even more striking, a Los Angles Times exit poll on the day of the vote showed that twenty-seven percent of voters who voted for Proposition 209 thought their votes were votes for affirmative action and not the other way around.[114]

With such conflicting interpretations, examining the voters' intent is likely to lead to more confusion about the scope of the initiative. It could also lead to a finding that the "least change" actually was *no change in existing anti-discrimination law*, at least for a majority of the electorate. This "majority" group could include as many as 73% of the voters: those who voted against the initiative (46%)[115] and those who voted in favor of it based on a belief that it would not affect affirmative action opportunities for women and people of color (27%).[116] Allowing for even one-

111. Frankel, *supra* note 101, at 454.

112. *Id.* The author concludes that the admissions programs at Berkeley and UCLA, which programs provide additional weight to high school student GPAs when those students have completed Advanced Placement courses, violate Proposition 209. *Id.* at 457. Thus, the universities must show either that the "(a) their programs are not exclusionary or that (b) the preference does serve as an accurate measure of need or deservedness and therefore is narrowly tailored." *Id.*

113. *See infra* notes 152-155 and accompanying text.

114. Frankel, *supra* note 101, at 447. The author continues, "[e]ven if just half of those voters had changed their vote, the measure would have failed with fifty-three percent voting against it." *Id.*

115. *Id.*

116. *Id.* at 447.

quarter of these potentially "miscast" or "mistaken" votes in favor to be counted as votes against would reverse the margin of victory to a 53-47 margin of defeat. Of course, the "no" voters would not be considered for purposes of evaluating the *intent* of the electorate who passed the initiative, and the courts will not interpret Proposition 209 as having no effect based on the voters' misunderstanding. Given the wide array of opinions and misunderstandings, deference to the intent of the least change voter requires a narrow interpretation of Proposition 209 to prohibit access preferences only.

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

Another criticism of the use of external sources, such as the ballot arguments and the media portrayals discussed above, is that such sources indicate the intent and agenda of the initiative *drafters*, rather than the intent of the *people* who voted in favor of the initiative. One power the drafters have is that their views:

> are routinely included in the ballot pamphlets that are sent to voters and sometimes relied upon by courts in lieu of legislative history. As a result, when courts rely upon these formal legal sources to interpret the meaning of direct democratic measures, they are effectively privileging the intentions of the proponents of such measures in the name of "voter intent."[117]

Another author suggests that considering the drafters' intent is appropriate.[118] Attempts to ascertain voter intent instead may lead to the "creation" of such intent. In evaluating Schacter's proposal,[119] O'Hear explains Schacter's concern that "'highly organized, concentrated, and well-funded interests' may abuse the initiative process in ways that create a 'phantom popular intent.'

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117. Staszewski, *supra* note 86, at 433 (footnotes omitted).

118. *See* Sutro, *supra* note 94, at 973-76. The author inquisitively asks:

> given the lack of knowledge of voters and the campaigning practices of those backing initiatives, how can we say those who said "yes" to an initiative all had one common idea of what a law was meant to do? For this reason, why shouldn't courts look to the drafters of an initiative and their intent—after all, can't the initiative process be seen as the special interests taking their case to the people?

Id. at 974.

119. O'Hear, *supra* note 88, at 328. Schacter proposed that direct democracy suffered from "informational deficits." *Id.* She explained that:

> Voters often do not read proposed laws, but instead rely on media coverage that is frequently reductive. The laws and the ballot pamphlets explaining them are difficult to comprehend. The obscuring legal jargon in initiatives and the gaps in the public's knowledge about the surrounding legal context hamper voters' ability to weigh and assess proposals. Even when voters read and understand proposed laws, they may fail to anticipate or consider an issue that arises only when the initiative law is later applied to a particular set of facts.

Id. (quoting Schacter, *supra* note 87, at 155).

Initiatives may be worded intentionally so as to obscure the effect of a 'yes' vote. Proponents may then spend heavily 'on subliminally directed advertising' that focus[es] voters on abstract, visceral symbols and divert[s] them from the particulars of the proposed initiative.'"[120] This "phantom popular intent" is not an adequate representation of the popular will. To the extent the courts consider the polarizing political arguments made during the initiative campaign as evidence of the intent of the winners, the "popular will" may be subverted.

One commentator suggested that the California courts "limit interpretation of initiatives to materials officially presented to the voters in the ballot pamphlet"[121] because it would be "disingenuous" to fail to consider the material that we know was available to the voters.[122] Recognizing that there is substantial room for disagreement as to the reasons behind voter approval of ballot measures and as to whether there are any common reasons behind approval, that author proposes that the courts consider the initiative drafters' intent instead of trying to fathom what influenced the voters.[123]

Another author, Staszewski, takes this theory even farther and suggests that "the myth of popular sovereignty in direct democracy should be rejected and that ballot initiatives should no longer be romanticized as lawmaking by 'the people,' but rather should be viewed as lawmaking by 'initiative proponents' whose general objective is either ratified or rejected by the voters."[124] Staszewski then proposes that state laws that regulate direct democracy be amended to "subject the proponents of initiatives to the requirements of public deliberation and reasoned decisionmaking [sic] that presently constrain administrative agencies."[125]

Staszewski explains that "[c]ontrary to the myth of popular sovereignty in direct democracy, initiative measures do not magically become state law as a result of the 'will of the people.' Rather, such measures are conceived, drafted, sponsored, and

120. O'Hear, *supra* note 88, at 329 (explaining that Schacter finds that "direct democracy suffer[s] from 'informational deficits, [and] is also subject to . . . 'informational pathologies.'") (footnotes omitted). He continues:

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

Id. (footnotes omitted).

121. *See* Sutro, *supra* note 94, at 947.

122. *See id.* at 974.

123. *Id.*

124. Staszewski, *supra* note 86, at 399.

125. *Id.* at 401.

promoted by identifiable individuals or groups that favor a specific policy proposal."[126] His proposal is a bold one and it may help solve some of the problems identified above. The machinations of the initiative drafters create sufficient popular support for the measure to pass, but there is no room for the voters to exert their will on the initiative language. Rather, the only power the voters have is in what messages resonate for them, because that will be the message that will become the focus of the advertisements and debates. A more inclusive review of the media surrounding the initiative, beyond the ballot pamphlet, would support the conclusion that the voters' intent in passing Proposition 209 focused on the prohibition of access preferences.[127]

B. *An Intent to Prohibit Access Preferences Emerges*

1. *Definitions of Access Preferences*

For purposes of this Article, "access preferences" occur when an entity of the state grants a benefit that ushers an applicant through a door of opportunity to admission to a school, to employment, or to a public contracting job. A preference that merely opens that door of opportunity, without walking the person through it, is not an access preference; rather, it is an out-

126. *Id.* at 420 (footnotes omitted). The author identifies these groups as "typically represent[ing] particular special interests and increasingly multimillionaires who seek to influence public policy on their pet issues." *Id.* at 421. Additionally:

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

Id. (footnotes omitted). He continues:

> The proponents engage in a variety of activities to promote their measure during a typical initiative campaign. These activities include behind-the-scenes work of negotiating with state officials over the initiative's title and official summary, as well as lobbying interested individuals and groups for financial and electoral support . . . As those who live in initiative states well know, the proponents and their financial backers typically lobby the electorate directly by engaging in extensive print, radio, and television advertising on behalf of their measures. The proponents sometimes appear on talk radio programs and in other public forums [sic] to gain support for their policy proposals.

Id. at 427-28.

127. *Id.* at 432 (footnotes omitted). The author goes on to state that:

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

Id. at 432-33.

reach preference. This Article posits that Proposition 209 should be interpreted to limit only "access preferences." The most common access preferences are university acceptance letters, employment offers, and government contract procurements.

Some California courts, including the California Supreme Court, have found "targeted outreach" to constitute an impermissible preference under Proposition 209. This finding complicates the analysis. The question then becomes how to reconcile the court's statement prohibiting "targeted RECNO outreach" with the voter intent to prohibit those preferences that actually provide an access preference. In *Hi-Voltage*, the targeted outreach was to subcontracting companies owned by people of color, or by white females.[128] The targeted outreach requirement included soliciting bids from W/MBEs, making follow-up contacts to encourage them to bid, negotiating with them, and justifying the rejection of bids from M/WBE subcontractors.[129] The *Hi-Voltage* court determined that this requirement violated section 31 because a contractor could "only prove it does not discriminate against minorities and women by discriminating or granting preferences in their favor."[130] The Court explained that an outreach requirement that included all subcontractors would be permissible.[131]

The targeted outreach component of the program at issue in *Hi-Voltage* shares more characteristics with an access privilege than an outreach privilege for two important reasons. First, the program required that the prime contractor negotiate with the W/MBE subcontractors, regardless of whether their bids were remotely competitive.[132] A requirement that one negotiate with a particular party prior to entering into a contract is similar to an access privilege because it goes farther than opening the door of opportunity (which the informational outreach does), and begins to walk the person through the door by providing extra attention in the pre-contract negotiations. Many of these bids may have been ignored or rejected out of hand, and the program required a second look, follow up, and some additional pursuit of the W/MBE.

Second, because the program required an explanation justifying the rejection of any W/MBE bid,[133] the negotiating position

128. *Hi-Voltage*, 101 Cal.Rptr.2d at 656.

129. *Id.*

130. *Id.* at 672.

131. *Id.* at 673 (stating that "the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification").

132. *See supra* note 38 and accompanying text.

133. *Hi-Voltage*, 101 Cal.Rptr.2d at 656.

of those particular W/MBE subcontractors was improved vis-à-vis other non-W/MBE subcontractors. While the prime contractors might otherwise have been free to ignore outlandish bids by non-W/MBE subcontractors, such bids received attention and consideration when submitted by W/MBEs. Similarly, other programs involve "invitation-only" bidding.[134] In such programs, those who are invited to bid are in effect walked through the door to the smaller room, where the winning bid will be selected. Thus, an argument can be made that this type of assistance through the door constitutes an access preference because it admits the organization into the "club" of business eligible to compete for the ultimate outcome: the contracting job. When the outreach is not targeted, or not invitation-only, it does not constitute an access preference, but rather is simply reaching out to include more in the competition pool.

2. *The Ballot Pamphlet Materials Focus on Access Preferences*

As a review of the ballot pamphlet demonstrates, the Proposition 209 supporters tailored their campaign around the issue of *unqualified* people receiving the benefit of *undeserved* access opportunities. For instance, the ballot pamphlet states that "people naturally feel resentment when the less qualified are preferred."[135] The argument in favor of Proposition 209 in the ballot pamphlet explicitly discusses access preferences when it states "[t]oday, students are being rejected from public universities because of their RACE [sic]. Job applicants are turned away because their RACE [sic] does not meet some 'goal' or 'timetable.' Contracts are awarded to high bidders because they are of the preferred RACE [sic]."[136] Each of these activities is an example of an access preference in university acceptance, employment offers, or government contracting.

Relying on the ballot pamphlet materials privileges the interpretation of those who read these materials, and thus results in a skewed view of the intended consequences of the ballot measure. Jane Schacter explains that "several studies suggest a demographic skew, with more highly educated and more affluent voters reading the ballot material at the highest rates."[137] She continues, "[t]his is not surprising, given lingering readability problems with pamphlets. Even though state laws requiring pamphlets have generally been part of an effort to make ballot questions more comprehensible and accessible to voters, the results

134. *See supra* note 38 and accompanying text.
135. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 700.
136. *Id.*
137. Schacter, *supra* note 87, at 143.

have been mixed."[138] Nevertheless, the ballot pamphlet remains the most common source of voter intent in court decisions.

Thus, if the drafters' intent governs, there is still a focus on access preferences based on the ballot pamphlet materials. This analysis should not rely upon the mention of voluntary desegregation, financial aid, and outreach because those topics were not a part of the proponents' arguments, but rather, were comments made by the opponents and the Legislative Analyst.[139]

For instance, Proponent Tom Wood, in a *Dateline* interview, stated, "what the California Civil Rights Initiative will do is simply extend civil rights protection to absolutely everybody in the population."[140] Wood also stated, "we don't deny that there are individual instances of discrimination. Our position is that it is a mistake to assume, as our opposition tends to do, that racists and sexists are everywhere."[141] His view suggests that a presumption of discrimination is inappropriate and that justifying preferences in advance necessarily relies on such a presumption. This is consistent with other statements that were available on the CCRI website. For example, the website stated that CCRI is needed "[t]o end the regime of race- and sex-based quotas, preferences and set-asides now governing state employment, contracting and education due to years of court decisions and bureaucratic regulations."[142] Quotas were already illegal under existing law prior to Proposition 209,[143] but the proponents likely meant race-based targets and goals for admissions, hiring, and contractor set-asides. Each of these specific examples constitutes an access preference, and thus provides further evidence that the proponents of Proposition 209 focused on access preferences. If we rely solely on the arguments of the proponents, the intent to prohibit access preferences alone is clear.

Another pitfall of using the ballot pamphlet to ascertain voter intent is potential inaccuracies in the message conveyed. Other than the text of the initiative, the material is not always correct. For instance, proponents may understate the effects of an initiative, to encourage a wider range of "yes" votes, and the opponents may exaggerate the negative impacts of the proposed initiative, in an effort to scare the electorate into voting against

138. *Id.* (footnote omitted).

139. *See Hi-Voltage*, 101 Cal. Rptr. 2d at 698-701.

140. *Dateline: Affirmative Reaction* (NBC television broadcast Jan. 23, 1996).

141. *Id.*

142. Facts About the California Civil Rights Initiative, http://www.ccri.com (answering the question "why is CCRI needed ?") (on file with author).

143. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (subjecting all racial classifications to strict scrutiny, regardless of whether they are enacted by Congress or other bodies).

the measure.[144] The California Supreme Court has recognized that "[w]e are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure."[145] Nevertheless, courts frequently cite to, and apparently rely upon, statements such as these in the ballot pamphlets.

In the pamphlet materials on Proposition 209, the legislative analysis likely was mistaken in the reference to some preferences that would be prohibited, even though those preferences would not fit the definition of access preferences that is discussed above. For instance, the ballot pamphlet mentions that voluntary desegregation programs could be affected, including "'magnet' schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools)" as well as "counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin."[146] However, *Hernandez* does not share this interpretation of magnet schools as violative of section 31, even though racial preferences were used to desegregate the schools on the grounds that the schools currently are racially balanced.[147] While *Hernandez* is not binding authority throughout California, it shows the court's reasoning process is somewhat contrary to that of the Legislative Analyst in this instance.

The ballot pamphlet also further mentions that the University of California system has programs "such as counseling, tutoring, outreach, . . . and financial aid . . ." which are targeted based on RECNO classifications.[148] The opponents of Proposition 209 also contributed to this part of the conversation, stating that Proposition 209 would "eliminate tutoring and mentoring for minor-

144. *See, e.g.*, Legislature v. Eu, 286 Cal. Rptr. 283, 289-90 (1991).

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

146. *Hi-Voltage*, 101 Cal. Rptr. 2d at 699.

147. *See* Hernandez v. Bd. of Educ. of Stockton Unified Sch. Dist., 25 Cal. Rptr.3d 1 (Ct. App. 3d Dist. 2004) (holding "the selection of one racially balanced school over another cannot constitute a preference of one or a discrimination against the other based on race.").

148. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 699.

ity and women students,"[149] as well as programs such as "counseling, tutoring, student financial aid and financial aid to select school districts where these programs are targeted based on race, ethnicity or national origin."[150] Nevertheless, some of these predictions have not been the accurate interpretation by California courts on these issues, as discussed in the cases in Part II, above.[151] Based on the media portrayals described above, the brief mention of scholarships, mentorship, and tutoring programs by the Secretary of State and the opponents of Proposition 209 was not a focus of the campaign.

3. *Considering Zero-Sum Preferences*

Several authors have suggested another alternative interpretation: that Proposition 209 was intended to prevent "zero-sum preferences," which are those that allocate a scarce resource based on RECNO. For instance, one commentator suggested that the CCRI supporters argued that "Proposition 209 only applies to 'zero sum' contexts, *i.e.*, those in which preferences to minorities work as a direct disadvantage to nonminority [sic] interests."[152] The author indicates that "throughout the campaign, Proposition 209 supporters drilled home the message that granting preferential treatment for one person meant discriminating against someone else. Such zero-sum equations clearly presuppose a competitive context."[153] The competitive context involves a situation where a scarce benefit or resource is being offered or denied to individuals.[154] Pager explains that this "scarcity rationale . . . dovetails nicely with the arguments for restricting preferential treatment in section 31 to zero-sum contexts"[155] where limited resources or benefits are distributed. The determination

149. *Id.* at 701.

150. *Id.*

151. *See Hunter*, 2001 WL 1555240 (holding section 31 was not implicated because the laboratory school was not covered by the phrase "in the operation of public education"); *Hernandez*, 25 Cal. Rptr.3d 1 (holding "the selection of one racially balanced school over another cannot constitute a preference of one or a discrimination against the other based on race"); Avila v. Berkley United Sch. Dist., No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. Apr. 6, 2004) (holding that a voluntary racial desegregation plan which permitted consideration of "space availability, the child's residence, the child's socio-economic situation, and race/ethnicity [sic]" did not violate Article I, section 31).

152. Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 5 (1999) (citing *Coalition I*, 946 F. Supp. at 1502) (explaining defendant's argument that "Proposition 209 is distinguishable from the initiatives in [*Parents*] and *Hunter* because it only interferes with 'zero-sum' antidiscrimination efforts—those that help minorities, but do so at the expense of nonminorities [sic]."). *See also The Constitutionality of Proposition 209 as Applied*, *supra* note 5, at 2084 (arguing that busing does not confer a preference).

153. Pager, *supra* note 152, at 37.

154. *Id.* at 36-37.

155. *Id.* at 37.

of what constitutes a limited resource may be relatively straightforward, involving some sort of acceptance and rejection of individuals. However, it seems that the acceptance or rejection involves doors of access and should thus be limited to access preferences. Relying on the distinction between "stacked deck" and "re-shuffle" programs, this zero-sum restriction would not apply to "re-shuffling" situations.

Despite the brief mention of voluntary school desegregation in the ballot pamphlet,[156] Pager argues that it was not intended to be covered by Proposition 209 because desegregation busing does not constitute a zero-sum game.[157] Permitting all students to attend school does not deny access. It "re-shuffles," by simply allocating them to different schools, without denying anyone the opportunity to attend school. Pager recognizes that the message of the proponents and opponents of Proposition 209 did not make busing an issue, stating that "[n]either side had anything directly to say about voluntary desegregation in the ballot arguments. Although education is one of the three realms of state action to which CCRI applies, the argument in favor discussed only university admissions as being preferential."[158] Only the legislative analysis refers to the voluntary desegregation as an area that potentially could be affected.[159] Pager further explains that, in the context of university admissions "the consequences for nonpreferred [sic] students are not just a relative disadvantage; they are totally excluded from participation. Because of such considerations, the constitutional footing of remedial action is fundamentally different in zero-sum contexts. The allowance for proactive remedies is correspondingly diminished."[160] School busing for desegregation purposes does not involve the allocation of scarce resources in a competitive context, because all students get to enroll in and attend a school, and no one is denied access to the school system.[161] Therefore, it does not constitute a zero-sum preference, and is not prohibited by Proposition 209.

Like busing, other non-zero-sum "re-shuffling" programs should be interpreted as outside the scope of the access prefer-

156. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 699.

157. Pager, *supra* note 152, at 59.

158. *Id.* at 21 (footnote omitted).

159. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 699.

160. Pager, *supra* note 152, at 58 (footnote omitted).

161. One could argue that the University of California system and California State systems together are not zero-sum because all students can obtain a spot in the system as long as they satisfy the prerequisites. However, school exclusivity and acceptance rates make particular schools within that system (e.g. UCLA & UC Berkley) more desirable. For these schools at least, there is competition and admission slots are a scare resource.

ence prohibition of Proposition 209. Pager's overall conclusion is a launch point for this analysis, stating that:

> Instead of carving out a narrow exception for voluntary desegregation, one could just as easily take the constitutionality of such programs as evidence of overall voter intent endorsing a narrow construction of preferential treatment across the board. On such an account, voluntary desegregation becomes a case study to validate the more general distinction between zero-sum and non-zero-sum programs. If so, the analysis presented in this article would seem to legitimize many other non-zero-sum programs that have similar remedial intent, including minority outreach and recruitment, *"ethnic" scholarships*, and racial gerrymanders to increase minority representation in elected office.[162]

Another author is less optimistic, stating that:

> Given the Hi-Voltage [sic] court's literal interpretation of 'preferential treatment' and the fact that the analyst also singled out voluntary school integration programs as potentially impacted, the search for an implied exception for such programs could prove to be in vain. In the end, this question will undoubtedly be decided in court.[163]

The author continues, "[g]iven the need for flexibility in light of the constitutional mandate to address racial isolation, a school district should be able to at least make a case that voluntary integration programs should be impliedly exempt from section 31."[164] The California Supreme Court has not addressed the question yet, and therefore the debate continues.

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

While the zero-sum prohibition is a useful way of analyzing which preferences can be permissible and impermissible, it does not apply universally. For instance, while the outreach component of the federal contract in the *Hi-Voltage* case was not a zero-sum preference, the participation requirement was a zero-sum opportunity,[165] because it stated that a contractor must have a certain percentage of W/MBEs, which percentage would then exclude non-W/MBEs from that percentage of the contracting work. If a contractor did not satisfy the participation option, that contractor had to document extensive W/MBE outreach ef-

162. Pager, *supra* note 152, at 59 (footnote omitted) (emphasis added). Another author agrees. *See* Lew Holliman, *An Indiscriminate Measure*, 21 L.A. LAWYER, Mar. 1998, at 40, 90.

163. Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, 690 (2001).

164. *Id.*

165. *See supra* Part II.C.

forts.[166] The outreach efforts were not zero-sum because there is a difference between *informing* and *allocating* based on RECNO.[167] For instance, the act of *informing* people of opportunities, even if the information is focused on individuals based on RECNO, does not actually *allocate* the scarce resource (federal contract work) based on RECNO.[168] Selecting contractors based on RECNO would do so, but informing them of opportunities does not. Thus, based on the zero-sum analysis, the outreach program should be permissible and the participation option should be impermissible. Nevertheless, the California Supreme Court, in its only interpretation of the scope of this language, determined that both components, outreach and participation, constituted a RECNO preference.[169] That ruling is inconsistent with the zero-sum preference analysis.[170]

The distinction between access and non-access privileges is more useful than the distinction between zero-sum and non-zero-sum preferences, in reconciling our conceptions of outreach with the *Hi-Voltage* decision. One common argument is that outreach preferences are not access preferences because outreach preferences only open the door to competing, rather than ensuring a place on the team. Prior to the *Hi-Voltage* decision, *Domar* made a strong argument that outreach preferences were still permissible in post-209 California education, employment and contracting.[171] However, to the extent that RECNO characteristics form the basis for any required outreach, *Hi-Voltage* laid much of that debate to rest.

Does it follow that the access/non-access distinction is inapplicable based on *Hi-Voltage*? This distinction likely survives be-

166. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 690-94.

167. For further discussion of why outreach is permissible, *see* David Benjamin Oppenheimer, *The Legality of Promoting Inclusiveness: Why the University of California Should use Race or Ethnicity as Factors in Applicant Outreach*, 27 CHICANA/O-LATINA/O L. REV. — (forthcoming 2008) (this Essay is included in this volume).

168. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 673. The *Hi-Voltage* court limited its holding to the specific issue in the case, "which require[d] prime contractors to notify, solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids." *Id.* The court further explained it was obvious that "the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." *Id.* (citing analogously Domar Elec., Inc. v. City of L. A. 36 Cal. Rptr. 2d 521 (1994) ("pre-Proposition 209 decision upholding city requirement 'mandating reasonable good faith outreach to all types of subcontractor enterprises,' not just MBE's and WBE's, that sought 'to increase opportunity and participation within the competitive bidding process.'")).

169. *Id.* at 672-673.

170. *See* Pager, *supra* note 152; Hyytinen, *supra* note 163.

171. *See Domar*, 36 Cal. Rptr. 2d 521 (holding an "outreach program that involves no bid preferences, set asides or quotas" did not violate a city charter that required "contracts subject to competitive bidding [to] be awarded to the 'lowest and best regular responsible bidder'").

cause the specific facts of *Hi-Voltage* involve who was invited to bid on a contract.[172] Only bidders could be accepted, and those who were not "reached out to," or invited to bid, could never be awarded a contract.[173] Moreover, the subcontractor specialties and bid specifications necessarily limited the pool of potential bidders, and amounted to a prerequisite, of sorts, for bidding.[174] Thus, outreach in the government contract bidding context was a necessary first step to access, yet this type of outreach is much more closely tied to access than outreach in other contexts. The courts have not had occasion to test this theory on *Hi-Voltage's* limitations, but it is sound based on the California Supreme Court's analysis thus far.

C. *The Appellate Districts Have Conflicting Interpretations of the Extent of the Prohibition*

Cases in the second, third, and fourth appellate districts provide different interpretations of the scope of the RECNO prohibitions, and how it applies in various contexts. The sections below examine several of these (published and unpublished) opinions.

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

The Second Appellate District of the California Court of Appeal evaluated the voter intent in *Hunter v. Regents of the University of California*.[175] In the California unpublished version of the case, petitioners brought suit claiming a violation of Article I, section 31, where an elementary school, run as a research laboratory by a public university, used race conscious admissions to ensure a diverse mix of students upon which to conduct their educational experiments.[176] Because the laboratory school was not covered by the phrase "in the operation of public education,"

172. *See Hi-Voltage*, 101 Cal. Rptr. 2d. at 656-59.

173. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 656. *See also supra* note 38 and accompanying text.

174. *Hi-Voltage*, 101 Cal. Rptr. 2d. at 656 ("To qualify as a 'responsible bidder,' a contractor had to . . . document[ ] written notice to at least four MBE's/WBE's soliciting them for the project, follow-up [ ] to determine their interest in bidding, and [give] written reasons justifying rejection of an MBE's or WBE's low bid."). *See also supra* note 38 and accompanying text. *Cf. Domar*, 36 Cal. Rptr. 2d at 530 ("[R]equiring 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.").

175. *Hunter*, 2001 WL 1555240 (unpublished opinion).

176. *Id.* at *1.

the court ruled that section 31 was not implicated.[177] It explained that even though the entity was the University of California, and thus, fit within the definition of the "State," the court found that "section 31 does not apply in every context in which UCLA acts. Specifically, section 31 is limited to UCLA's actions 'in the operation of public employment, public education, or public contracting.' In other words, to trigger the discrimination and preferential treatment prohibitions of section 31, UCLA's conduct must constitute or relate to the operation of public employment, public education, or public contracting."[178] Thus, the question became whether the operation of this particular university elementary school ("UES") fell within the "operation of public education."[179]

The court examined the language of the proposition and determined that the plain meaning was ambiguous, and thus resorted to reviewing the ballot pamphlet and Secretary of State summary.[180] It decided that the proposition was not intended to extend to research conducted by a university because that would infringe on first amendment academic freedom issues.[181] The court strains somewhat to explain that "in the operation of," which seems to be quite broad and include everything, is actually narrower than the petitioners had hoped.[182] There is some ambiguity remaining on this point in the second district, and the second and third districts appear to disagree somewhat on this point.[183]

In answering this interpretation question, the appellate court relied on a discussion of voter intent in *Hi-Voltage*.[184] The court also determined that *Hi-Voltage* was not controlling because there was no dispute as to whether outreach programs fell under

177. *Id.* at *5.

178. *Id.* at *4.

179. *Id.*

180. *Id.* (stating that the term "operation of public education" was ambiguous because it was not "expressly defined" in section 31).

181. *Id.* at *5 (discussing how inquiry into research methodology and protocols could chill progressive research).

182. *Id.* at *6-8.

183. *Compare* Kidd v. State, 72 Cal. Rptr. 2d 758 (Ct. App. 3d Dist. 1998) (finding a "program [that] allowed minorities and women to have their names added to a list of eligible applicants for civil service positions even though they had not scored within the top three ranks on a competitive examination" violated Proposition 209), *with* L. A. County Prof'l Peace Officers Ass'n v. County of L. A., No. B151737, 2002 WL 1354411 (Cal. Ct. App. 2d Dist.) (finding that a policy emphasizing "the value of 'diversity' in the workplace" did not violate Proposition 209 because the policy did not "establish a gender or race preference in the sheriff's department's promotion process.").

184. *Hunter*, 2001 WL 1555240, at *4 (stating that "[c]ourts discern the intent of the voters from the language of the proposition as well as the analysis and arguments contained in the official ballot materials.").

the umbrella of "in the operation of public contracting."[185] Rather, the debate in *Hunter* centered on whether outreach constituted preferential treatment.[186] Noting that certain affirmative action programs including scholarship, tutoring and outreach, were listed as potentially being eliminated,[187] the court stated "the fact the ballot materials fail to state that 'in the operation of public education' encompasses university research programs like UES, does not end [the] inquiry."[188] Citing *Hi-Voltage*, the court explained that the ballot arguments were not an exhaustive catalog of the specific programs and measures that would be included within the prohibitions and provisions of section 31.[189] The court then went on to examine extrinsic aids, including the ordinary meaning of the term "public education" used in California law.[190] Focusing on the "common schools" aspects of the definition, the court was able to distinguish UES because it is tuition-supported and selective admissions-based in addition to being a laboratory elementary school.[191] Thus, UES could not be definitively determined to have been included within the prohibitions of section 31.[192] The court relied upon the Ninth Circuit interpretation of *Hunter* and the description of the research oriented institution there.[193] Analyzing the institution's nature, purpose, funding and administration, as well as its educational benefits, the court failed to find that it was included within the scope of the term "in the operation of public education."[194]

The *Hunter* court identified another point of distinction:

> Proposition 209 ballot materials make clear the thrust of the initiative was to end preferential government programs designed to redress past discrimination in employment and education. By comparison, UES's alleged discriminatory/preferential admissions program was not established to remedy past discrimination. UES's admissions practices were designed, instead, to facilitate the research-oriented mission of the institution.[195]

Thus, an argument can be made that the forward-looking strategy to cultivate a diverse learning environment for laboratory purposes was sufficient to distinguish the *Hi-Voltage* case and

185. *Id.* at *7.
186. *Id.* Thus, the court reasoned that "section 31 is inapplicable [, and therefore,] *Hi-Voltage's* analysis does not dictate the result in this case." *Id.*
187. *Id.* at *4.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at *5.
192. *Id.*
193. *Id.*
194. *Id.* at *6.
195. *Id.* at *7.

limit its application. While *Hunter* is unpublished, and therefore, not citable for this authority, the arguments are still compelling and can form the basis for an appropriate test case that may result in a published opinion.[196]

One California superior court case was consistent with the *Hunter* case, finding that a non-remedial, or forward-looking program, was permissible.[197] In *Avila*, the superior court found that a voluntary racial desegregation plan which permitted consideration of "space availability, the child's residence, the child's socio-economic situation, and race/ethnicity"[198] did not violate Article I, section 31 because "it does not show favoritism. It provides for race or ethnicity as one of many criteria for the placement of children in elementary schools, to 'strive' to have each school's demographics within plus or minus 5% of the district-wide demographics."[199] The program was not considered remedial because it was voluntarily adopted rather than mandated by the court.[200] This trial court decision is not an adequate precedent for future cases, but the United States Supreme Court's decision in the *Parents II* case did not address forward-looking programs and did not provide guidance on this issue, but rather focused on the lack of narrow tailoring.[201]

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

The Fourth Appellate District reached a different result when it examined voter intent on the issue of racial balancing and whether a voluntary desegregation effort made by means of a student transfer policy violated section 31.[202] After examining cases addressing Proposition 209, including *Connerly* and *Hi-Voltage*, and the policy,[203] the court stated that:

> [u]nder the policy, White student open enrollment transfers out of school and non-White student transfers into the school are limited to a one-for-one basis. The imposition of these re-

196. *See infra* Part V.
197. *See Avila*, 2004 WL 793295.
198. *See id.* at *2.
199. *See id.* at *5. Some commentators disagree with this analysis, and instead suggest that this sort of program also violates Proposition 209. *See, e.g.*, Hyytinen, *supra* note 163, at 689-90.
200. *See Avila*, 2004 WL 793295, * 5.
201. *Parents II*, *supra* note 64, at 2755 (reiterating that racial balancing cannot be an end in itself, and striking down the student assignment plans because "the plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits").
202. *Crawford*, 121 Cal. Rptr. 2d at 97.
203. *Id.* at 98-102.

> strictions is inconsistent with the freedom of choice the voluntary programs provide. And more importantly, the policy creates different transfer criteria for students solely on the basis of their race. A White student may not transfer from Westminster High School to a different school until a White student chooses to transfer in and fills the void. A non-White student must wait to transfer into Westminster High School until a non-White student transfers out thereby creating essentially a "non-White opening."[204]

The court determined that the terms of this transfer policy constituted racial and ethnic balancing, and therefore, violated section 31,[205] stating:

> [w]e do not dispute the evils of segregated schools and we recognize the potential benefits of attending a racially and ethnically diverse school, but the people have spoken. California Constitution, article I, section 31 is clear in its prohibition against discrimination or preferential treatment based on race, sex, color, ethnicity or national origin. Thus, the racial balancing component of the district's open transfer policy is invalid under our state Constitution.[206]

In dictum, the court clarified that "[i]t is not our intention to suggest that there cannot be any 'integration plans' under Proposition 209. We stress that an 'integration plan' developed by a school board need not offend Proposition 209 if it does not discriminate or grant preferences on the basis of race or ethnicity."[207] The court then discussed the benefits of magnet school programs, geographic limitations for school enrollment, and a random lottery as potential options that may increase diversity without violating Proposition 209.[208] This statement is consistent with the reasoning of another Fourth Appellate District case.[209] In evaluating voter intent, the court recognized that the ballot pamphlet indicated that voluntary school desegregation plans could be affected, and thus suggested that the voters were aware

204. *Id.* at 102.
205. *Id.* at 103.
206. *Id.* at 104.
207. *Id.*
208. *Id.*
209. *See* Bd. of Educ. v. Super. Ct., 71 Cal. Rptr. 2d 562 (Ct. App. 4th Dist. 1998). The Fourth Appellate District examined the issue of whether integration funding would be lost when it was no longer necessary to compel compliance with constitutional obligations. *Id.* at 563. The court determined that the interpretation of section 31 of the California Constitution was not implicated and that the issue was neither briefed or actually presented to the court. *Id.* at 566. Rather, the issue was that of "propriety of the court's decision to advance the end of its supervisory jurisdiction by [eighteen months.]" *Id.* Because the District Court had simply acknowledged that section 31's adoption "did not conclude the section compelled it to modify its previous order," section 31 was not implicated. *Id.* at 568. Therefore, the Fourth District was able to avoid answering this question. *Id.*

that Proposition 209 could render plans like the one at issue impermissible.[210]

3. *In the Third Appellate District, Continuing Funding to a Desegregated Magnet School did not Constitute a RECNO Preference*

In yet another contrast, California's Third Appellate District Court, in *Hernandez*, held that "the selection of one racially balanced school over another cannot constitute a preference of one or a discrimination against the other based on race."[211] The parties had been in a desegregation battle for over thirty years and finally entered into a settlement agreement with the stipulation that unitary status had been achieved, and they officially were "desegregated."[212] The settlement agreement provided an authorization "for the school district to continue to use TIIG [Targeted Instructional Improvement Grant] funds to fund the magnet school programs created under its prior desegregation plan."[213] The court explained that "magnet programs provide a race neutral means to prevent racial or ethnic isolation by providing educational choices for district students."[214] The court further found that the "desire to preserve these educational programs . . . [was] not a preference or discrimination based upon race."[215]

The interveners argued that the "terms of the settlement agreement providing funding to the existing magnet schools violate[d] section 31 of Article I of the California Constitution"[216] on the grounds that the district is no longer "suffering from the vestiges of racial discrimination. Any program adopted, enforced, or promoted to benefit the district's school children in the future must necessarily be neutral and not directed to schools

210. *Crawford*, 121 Cal. Rptr. 2d at 104. The Court also addressed the Equal Protection issues, and explained that "[t]he distinction between what is required by the federal equal protection clause, and what may be permitted by it, is critical in this context. The Ninth Circuit Court of Appeals recognized in the absence of de jure segregation there is no constitutionally required obligation to order desegregation." *Id.* at 103. For further discussion of how school desegregation does not fit within the prohibitions of Proposition 209, *see, e.g.*, Hyytinen, *supra* note 163, at 676-84.

211. *Hernandez*, 25 Cal. Rptr.3d at 13. *See also supra* note 147 and accompanying text.

212. *Hernandez*, 25 Cal. Rptr.3d at 5-6.

213. *Id.* at 12.

214. *Id.* at 4.

215. *Id.* at 13. The educational programs desired were magnet programs that had succeeded in moving schools from being racially isolated minority schools to racially balanced schools, by allowing "them an orderly transition period in which to secure alternative funding . . . ." *Id.*

216. *Id.* at 12.

that were once 'racially isolated,' as the current 'settlement' provides."[217]

However, the court found that the "[i]nterveners [had] failed to demonstrate error"[218] because the "interveners [ ] demonstrated no violation of section 31."[219] The court further determined that the decision to continue funding (instead of threatening an immediate cut off once the desegregation order no longer was in effect) did not constitute a preference or discrimination based on race.[220] This decision was an opportunity to avoid decimating the program in the interim until alternative funding could be secured.[221] Funding the program, therefore, did not violate Article I, section 31.

The *Hernandez* case provides an interesting launch point for a consideration of whether and when a preference is RECNO-based, and thus might implicate Proposition 209's prohibitions. Because the school was no longer segregated, a preference to that school did not prefer one race over another. Any financial benefit the school received was for the benefit of students of all colors. Applying this reasoning to a segregated school leads to a contrary conclusion. If a school is segregated, does a benefit to that school amount to a race-based preference?

As discussed above, subsequent California court decisions although there are only a few, focus on prohibiting initial access preferences to an admissions spot, a job, or a public contract.[222] Opening the door to allow potential access to the team is different from using preferences to walk someone onto the playing field.

Based on all of these sources for interpreting voter intent, including the wording of the initiative, the materials in the voter information pamphlet, the media, and the arguments of the proponents of the initiative, the least common denominator is an intent to prohibit access preferences. This intent is evident regardless of whether we evaluate the voters themselves or the drafters and proponents of the initiative.

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217. *Id.*

218. *Id.*

219. *Id.* at 13. The court's rationale was based on the fact that the "schools [were] now racially balanced and all vestiges of discrimination in them [had] been eliminated. Thus, the selection of one racially balanced school over another cannot constitute a preference of one or a discrimination against the other based on race." *Id.*

220. *Id.*

221. *Id.*

222. *See Hernandez*, 25 Cal. Rptr.3d 1; *Crawford*, 121 Cal. Rptr. 2d 96; *Hunter*, 2001 WL 1555240; *Connerly*, 112 Cal. Rptr. 2d 5; *Hi-Voltage*, 101 Cal. Rptr. 2d 653.

D. *Access Privileges that Currently Violate Article 1, Section 31*

1. *The State A-G Requirements and Advanced Placement GPA Enhancement*

Prerequisites are a basis for access, and when certain groups have greater opportunities to obtain those prerequisites, those groups may be deemed to be receiving access preferences. If this is the case, then a troubling picture emerges for University of California admissions prospects. The prerequisite of satisfying the various components of the State "A-G" College Preparatory Curriculum, in addition to the de facto prerequisite of successfully completing Advanced Placement coursework, means that only students from schools with adequate coverage of these courses will be able to enter the smaller room from which admissions decisions are made. A public high school student's opportunity to enroll in all of the A-G courses correlates strongly with the racial composition of that student's school.[223] Schools with a majority of Asian and Anglo students have significantly more A-G courses, and access to those courses is more available, whereas schools with a majority African-American or Latino enrollment have an inadequate number of the A-G courses for their graduates to satisfy the A-G prerequisite.[224] Similarly, AP coursework access is strongly correlated with attending majority Anglo/Asian schools,[225] and grades in AP courses are generally augmented by one grade point, so that an A is worth 5 points on the standard 4 point scale, and a B is worth 4 points. However, the litigation settlement in *Daniel v. California* has increased AP access at majority African-American/Latino schools in California.[226]

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223. Jeannie Oakes, et al., *Removing the Roadblocks: Fair College Opportunities for all California Students* (2006), *available at* http://www.ucla-idea.org.

224. As Jeannie Oakes, et al. conclude, "Majority White and Asian schools prepare students for college at more than twice the rates as intensely segregated African American and Latino schools. Majority White and Asian schools also have higher levels of college preparation than schools that are 50-89% African American and Latino." *Id.* at 16.

225. *Id.*

226. *See Daniel v. California*, No. B C214156 (L.A. Super. Ct. July 27, 1999); Oakes, et al., *supra* note 223, at 23 (noting that although California settled *Daniel* by establishing an Advanced Placement Challenge Grant program, "racial inequalities in access remain"). In *Daniel*, the ACLU claimed that the state constitutional rights of Black and Latino students were violated because public schools with a majority of minority students offered fewer AP courses than public schools with a majority of white students. Alan E. Schoenfeld, *Challenging the Bounds of Education Litigation:* Castañeda v. Regents *and* Daniel v. California, 10 MICH. J. RACE & L. 195, 215 (2004) [hereinafter Schoenfeld, *Challenging the Bounds of Education Litigation*]. Article 9, section 1 of the California Constitution reads: "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL.

This racial disparity in opportunities to obtain access to the necessary prerequisites for UC admissions operates as a barrier to students who attend schools that are majority African-American/Latino. On the flip side of the barrier is of course the preference that is being granted to students who attend majority Anglo/Asian schools. While the preference is not based exclusively upon the race of the individual student applicant, the "racial make-up" of that student's school has a strong correlation to the individual student's ability to obtain access to a UC education. Thus, the over reliance upon A-G and AP courses amounts to an access privilege in favor of students from majority Anglo/Asian schools. Because Proposition 209 sought to provide "greater protection" against preferences and discriminations, and the voter intent was particularly focused on access privileges, this privilege should be found to violate Proposition 209.

Similarly, targeted prerequisites also qualify as access preferences. Like an invitation to bid ushers a business through one door of opportunity and into the smaller room from which the winner will be selected, targeted prerequisites usher one group of students through a door of opportunity, to the smaller room from which the prize of admission to select UC schools will be determined. Thus, if a school implicitly requires AP classes as prerequisites for enrollment consideration, an access preference is being granted in favor of students from the racial groups that have the most access to those AP classes because they are invited into the smaller room to be considered for an admissions slot. If a prerequisite targets students based in part on a RECNO characteristic, as AP classes do, then it similarly would constitute an impermissible access privilege.

CONST. art. 9, § 1. The state agreed with the plaintiffs and the parties worked together to:

> Establish an Advanced Placement Challenge Grant program, which awards substantial grants to public high schools that attempt to improve their AP offerings. The grants support the establishment of infrastructure components—for example, professional development of AP teachers and counselors, articulation of pathways for students from middle school through high school, academic support for AP students, and parental notification of AP availability and the availability of AP exam fee waivers—in public high schools, giving preference in grant provision to those schools with the poorest AP programs.

Schoenfeld, *Challenging the Bounds of Education Litigation* at 221.

IV. WHY RETENTION PREFERENCES DO NOT VIOLATE PROPOSITION 209

A. *Retention Privileges such as Financial Aid and Scholarships can be Structured to Avoid Race-Based Preferences*

Financial aid should be permitted to help maintain a diverse learning environment, and the award of such aid would not be a preference based on one's particular race. The policy supporting diversity scholarships is focused on maintaining the diversity that has been obtained through a race-neutral admissions process. Thus, the scholarships are not race-conscious; rather, the scholarships are under-representation conscious. Once a student is selected for admission, then that already-admitted student would be considered for a diversity scholarship. Any racial or ethnic group could obtain the benefit, depending upon the critical mass needs of the institution for that group in any given year.

The ballot pamphlet suggests that *maximizing* the participation of underrepresented groups would not be prohibited by Proposition 209, when it explains that "in fact high school outreach programs that currently target race or ethnicity could be changed to target instead high schools with low percentages of UC or CSU applications."[227] This language indicates that maximizing underrepresented groups could be permissible as long as the efforts were not governed explicitly by race or ethnicity. The financial aid and scholarship assistance would not constitute an access privilege because it focuses on maintaining the diversity that the race-neutral admissions process produced. No students are walked through the door based on race.[228]

The *Hernandez* case also provides support for the argument that financial assistance designed to *maintain* diversity need not constitute a racial preference or discrimination.[229] In *Hernandez*, the court determined that continued funding to a formerly racially isolated school did not amount to a racial preference because that school now was racially integrated.[230] The continuation of funding was necessary to avoid decimating the magnet school program, and did not violate Article I, section 31. In a similar vein, diversity scholarships that provided funding to students *already admitted* to public universities in California would not constitute a racial preference because those scholarships would be based on maintaining a diverse learning environment. When the allocation is based upon the particular diversity needs of the public institution, diversity scholarships could be

227. *Hi-Voltage*, 101 Cal. Rptr. 2d at 699.
228. *See* discussion *infra* Part IV.B.
229. *See Hernandez*, 25 Cal. Rptr.3d 1; *see also* discussion *supra* Part III.C.3.
230. *Hernandez*, 25 Cal. Rptr.3d at 13.

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

This funding situation is distinguishable from the student transfer policy that was found to violate Article I, section 31 in *Crawford*.[231] The court there explicitly acknowledged a difference between magnet school programs, which could provide a race neutral mechanism of integrating schools, and the one-for-one transfer policy where race was the determinative factor in granting or denying transfer applications.[232]

Persuasive authority from the state *Parents I* case also recognizes a distinction between reverse discrimination and race neutral pie-expanding or re-shuffling programs.[233] The Washington Supreme court stated: "[r]acially neutral programs treat all races equally and do not provide an advantage to the less qualified, but do take positive steps to achieve greater representation of underrepresented groups."[234] These re-shuffling programs exist to increase or maintain diversity, not to promote or prefer an unqualified individual over another qualified person of a different race. Thus, they do not constitute reverse discrimination. As noted above, the Washington Supreme Court determined that the policy did not violate I-200, and was a permissible race neutral "re-shuffling" program.[235]

Public universities in California could design diversity scholarships that re-shuffled, instead of reverse discriminated, and thus would not grant a preference in violation of Article I, section 31. This re-shuffling would be accomplished by two means. *First,* universities would need to defer any consideration of scholarship and financial aid awards until the students are admitted to the university through the race-neutral admissions policies currently operating. *Second,* the university financial aid office could consider these admitted students for potential diversity scholarships, as long as the offices expand the criteria for diversity conscious scholarships to include all forms of diversity, including socio-economic diversity, athletic prowess and talents in the arts and fine arts. Merit, in the traditional form of SAT scores and GPAs, also would be a component of diversity.[236] Thus, diversity

231. *See Crawford*, 121 Cal. Rptr. 2d 96; *see also* discussion *supra* Part III.C.2.

232. *See Crawford*, 121 Cal. Rptr. 2d at 104.

233. *See Parents I*, 72 P.3d 151; *see also* discussion *supra* Part II.E.

234. *Parents I*, 72 P.3d at 159 (citing *Coalition II*, 122 F.3d at 707 n.13).

235. *See Parents I*, 72 P.3d 151; *see also* discussion *supra* Part II.E.

236. For more detail on a broader conception of diversity in the scholarship criteria, *see* Chris Chambers Goodman, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships from Rawls' Original Position on Justice*, 13 WASH. & LEE J. C.R. & SOC. JUST. 285, 324-45 (2007).

can be used to provide funding for students based on many different criteria.

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

B. *Retaining Critical Mass Through Diversity Scholarships That Consider Race and Ethnicity as Permissible Retention Privileges*

In an earlier article, this author proposed a diversity scholarship that considers a broad range of diversity factors, including, but not limited to RECNO factors.[237] To focus more specifically on achieving and maintaining racial and ethnic diversity, as a subset of the general Diversity Scholarships, the article proposed that universities also should offer "Critical Mass Scholarships."[238] These scholarships would involve RECNO considerations, and that article addressed post-*Grutter* diversity in universities that are not also covered by laws like Proposition 209. However, given the access-retention distinction discussed above, a court could interpret Proposition 209 to prohibit access, but not retention privileges. Then, a similar diversity and Critical Mass Scholarship program can be structured as a retention privilege and would fall outside the scope of the Proposition 209 prohibition.

As discussed in Part III above, an examination of the various ways to ascertain voters' intent all lead to the same conclusion, demonstrating a clear focus on prohibiting access privileges based on RECNO. Whether we consider ballot pamphlet materials,[239] the proponents' arguments,[240] or even the media portrayals,[241] and whether we privilege the view of the least change voter[242] or the initiative drafters,[243] the conclusion is the same: access privileges were the target of Proposition 209. Applying a

237. *See id.*
238. *See id.* at Part IV.
239. *See* discussion *supra* Part III.B.1.
240. *See* discussion *supra* Part III.C.3.
241. *See* discussion *supra* Part III.C.2.
242. *See* discussion *supra* Part III.C.1.
243. *See* discussion *supra* Part III.C.3.

narrow rule of interpretation for popular initiatives,[244] the safest interpretation is that *the intent of Proposition 209 was to prohibit access privileges.* The Legislative Analyst's brief mention of scholarships, mentorships, and tutoring programs was neither a focus of the campaign nor a focus of the voters.[245]

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

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

To the extent that diversity conscious financial aid and scholarships are allocated at the retention stage, and therefore do not conflict with the voters' intent as to Proposition 209, challengers likely will claim that the race and ethnicity conscious portions of the financial aid program would violate the Fourteenth Amendment as impermissible race-based classifications. All race-based classifications are subject to strict scrutiny.[246] The strict scrutiny test requires an analysis of two prongs: (1) the classification must exist to serve a compelling government interest and (2) the means used to achieve that compelling interest must be narrowly tailored.[247] The *Grutter* case provides mandatory authority for the proposition that diversity in higher education is a compelling interest that satisfies the first prong.[248] Thus, the California public schools can use diversity in higher education as a sufficiently compelling interest to meet the first prong of the strict scrutiny test. In analyzing the second prong, the United States Supreme

244. *See* discussion *supra* Part III.C.1.

245. *See* discussion *supra* Part III.B.2.

246. *See Adarand*, 515 U.S. 200 (subjecting all racial classifications to strict scrutiny, regardless of whether they are enacted by Congress or other bodies).

247. *Id.* at 219.

248. *See Grutter*, 539 U.S. 306.

Court also found that a diversity admissions program could satisfy the narrow tailoring requirement.[249]

If the program is not covered by Proposition 209, federal law governs. Accordingly, the *Grutter* rationale would apply and permit race to be a factor in scholarship allocation, as long as the program is narrowly tailored to achieve that goal. In evaluating narrow tailoring, courts and commentators have identified six factors: (1) "individualized comparison of applicants;" (2) "the absence of a mechanistic formula;" (3) "the goal of achieving a critical mass of underrepresented minorities;" (4) "doing no undue harm to members of groups not favored by the system;" (5) "a continuing exploration of race-neutral alternatives;" and (6) "a realistic time limit."[250] A thorough analysis of the narrow tailoring factors is beyond the scope of this article, but the reader can find a detailed analysis in a recently published article by this author.[251]

1. *A Race Neutral Alternative would be Ineffective*

Many of the race-neutral policies proposed include a focus on socio-economic diversity, which many studies have determined is insufficient as a proxy to maintain or increase racial diversity.[252] This focus proved ineffective in the admissions context, and likely would prove ineffective in the retention context, because students already receive financial aid largely based on financial need. Thus, those with the lowest socio-economic status will be those with the greatest need, and therefore those who are offered the highest financial aid packages.[253] Race neu-

249. *See id.*

250. Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After* Grutter *and* Zelman, 14 S. CAL. INTERDISC. L.J. 237, 250-51 (2005). *See also* Thomas J. Graca, *Diversity-Conscious Financial Aid After* Gratz *and* Grutter, 34 J.L. & EDUC. 519, 525-26 (2005).

251. *See* Goodman, *supra* note 236, at Part IV.

252. *See* Dyson, *supra* note 250, at 250-51; Goodman, *supra* note 236, at Part II; Rick Sander, *Experimenting with Class-based Affirmative Action*, 47 J. LEGAL. EDUC. 472 (1997).

253. After Proposition 209, when socio-economic status became an important factor in admissions, more lower-income Anglos and Asians were admitted, and there was no increase in the number of African American and Latino students. Sander, *supra* note 252, at 501. *See also* Dyson, *supra* note 250, at 250-51 (stating that a race-conscious scholarship must possess six characteristics to avoid violating strict scrutiny: "individualized comparison of applicants . . . absence of mechanistic formulas . . . goal of achieving a 'critical mass' of underrepresented minorities . . . 'no undue harm' to members of groups not favored by the system . . . continuing exploration of race-neutral alternatives . . . [and a] realistic time limit"); Goodman, *supra* note 236, at Part II (identifying two corollaries on financial aid in higher education based upon John Rawls' Theory on justice: (1) "it would be 'just' to give those who need financial assistance in order to enroll in higher education whatever financial assistance they need" and (2) "regardless of financial need, those groups under-

tral means do not help California universities retain diverse classes that are as broadly diverse as their entering classes.

2. *A Less Extensive or Intrusive Use of Race Would be Ineffective*

The *Grutter* analysis requires individualized review, and the *Gratz* ruling rejects the use of a mechanistic formula. The fit between the means and ends with financial aid decisions is much closer with the Critical Mass Scholarships than it was with "race as a plus factor" admissions in these cases. Financial aid awards for retention purposes directly further the goal of retaining a critical mass. Money is awarded to ensure that the students needed to satisfy that critical mass continue to be able to attend the school, as well as to convince others to transfer into the school when needed. This limited use of race in the diversity context will provide the best information to determine which scholarships are needed to maintain and retain existing diversity levels. Any other means to ascertain which students should benefit from the financial aid awards in order to best serve the university's diversity goals would be less effective because other factors would operate solely as a proxy for diversity, and like socio-economic status as a proxy for race, will not lead directly to the desired result of maintaining diversity.

3. *The Use of RECNO Characteristics in Critical Mass Scholarships would be of Limited Extent and Duration and would be Applied in a Flexible Manner*

As discussed above, the Critical Mass Scholarships would use race and ethnicity only for a subset of the Diversity Scholarships, and only to the extent necessary to retain a diverse student body. When considering transfer applications, and their requests for financial aid, for instance, the committee can determine whether the transfer applicant belongs to an underrepresented, in terms of critical mass, RECNO group. If so, then the committee can use the incentive of a Critical Mass Scholarship to persuade the student to transfer into the university.

These Critical Mass Scholarships would have a limited duration, because they would be strictly based upon the critical mass needs of the university. Once the university is able to maintain a critical mass of students from these diverse groups without the aid of additional targeted scholarship assistance, then those

represented in higher education are entitled to additional assistance as well and . . . that the additional assistance can take many forms").

scholarship dollars will be shifted to other groups, and other needs.

The program is flexible because it permits considerations of individual circumstances as well as the ongoing institutional needs. If some students are considering dropping out of school, because of financial constraints, and the pressure of working full time while in college, then the university officials would have the opportunity to consider special financial aid awards for those students to encourage them to continue with their studies, and to continue to contribute to the university's diversity.[254] This program would not suffer from the over-inclusiveness, nor under-inclusiveness of the program struck down in *Podberesky*.[255]

4. *The California Institutions Would Re-examine the Use of Race or National Origin Regularly in Awarding Financial Aid*

The California universities would need to continually monitor critical mass and diversity levels, to ascertain how the Critical Mass Scholarships were working to retain a diverse student body. To the extent that the scholarships remained necessary and effective in achieving and maintaining that diversity, the program would continue. If the scholarships become less effective as a mechanism for retention, or become unnecessary for retention, then they could no longer be justified, and the program would have to terminate.

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254. *See* Goodman, *supra* note 236, at Part IV.

255. *See id.*

> The flexibility of this Critical Mass Scholarship program also avoids two other fatal flaws of many other diversity programs: under-inclusiveness and over-inclusiveness. The program struck down in *Podberesky* was over-inclusive because while its stated goal was to remedy past discrimination against high achieving African Americans by the university, there was no evidence that the school had discriminated against these particular high achieving African Americans in the past, nor that African Americans from outside the state of Maryland had been victims of past discrimination by this particular university. In addition, the Banekar scholarship program was under-inclusive for two reasons. First, it was not available to other groups who had been discriminated against by the university in the past. Second, it did not necessarily result in an increase in the education of *Maryland* residents because *out of state* African Americans were eligible for the scholarship also.

Id. at 340.

5. *The Burden on those who do not Receive Critical Mass Scholarships is Sufficiently Small and Diffuse That it Does Not Unduly Burden Their Opportunity to Receive Financial Aid*

The Department of Education permits only a minimal burden on students who do not qualify for race-based financial aid.[256] The Critical Mass Scholarship does not take money away from students who do not satisfy a critical mass need. Rather, it provides money to students who may no longer be students without the additional assistance.

6. *This Scholarship Program Provides Adequate Individualized Consideration*

Individualized review is necessary according to the *Grutter* and *Gratz* cases, and the Critical Mass Scholarship program provides that individualized review, by considering how a student adds value to the educational institution by fulfilling a critical mass need. Applicants are not interchangeable in this equation. Anglo applicants also have the ability to fulfill diversity goals, and therefore are not displaced as a group from the diversity financial aid program. The numerous components of diversity will ensure that each student has something to offer in terms of diversity, regardless of her race or ethnicity. This reality may in time help to lessen the stereotyping associated with diversity in general and critical mass allocations in particular.

D. *The State Action Doctrine Permits only Minimal Administration by University Officials*

The state action doctrine is implicated when a state entity provides some assistance or oversight of the actions of a private entity, in a situation where the state is prohibited from engaging in certain conduct. For instance, only state actors are bound by a state constitution.[257] The doctrine examines the extent of the state actors' involvement in the challenged action to ascertain whether the conduct is properly attributable to the state actor,

256. Department of Education, 59 Fed. Reg. 8756, 8762 n.11 (Feb. 23, 1994). The commentary states:

> [g]enerally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. However, it's not necessary to show the new student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather, the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.

Id.

257. John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 573 (2005).

and therefore prohibited by restrictions on state activities.[258] With privately or federally funded scholarships based on RECNO classifications, California public universities may be able to avoid violating Article 1, section 31.[259] There is little authority to guide a California court in determining how much involvement a state actor can have before that private conduct is imputed to the state actor.

The University of California is an entity of the state of California, and therefore, to the extent that Proposition 209 prohibits the state from granting RECNO scholarships, the University also would be prohibited from having any significant involvement in a private entity's program to award such scholarships. In one Missouri case involving a scholarship program similar to the one described in this Article, the court did not find state action despite significant university involvement.[260] The *Shapiro* case seems to be on the more lenient end of the spectrum on the issue and its rationale is not likely to be adopted by California courts. If the court determines that the retention privilege of financial aid also is included within the scope of Proposition 209's prohibitions, then the University of California likely would be prohibited from selecting to whom the scholarships would be awarded, and may even be unable to solicit or collect application material from students.[261] Therefore, any such critical mass scholarship would

258. The Supreme Court has:

> identified a host of facts that can bear on the fairness of such an attribution . . . [F]or example, [it] held that a challenged activity may be state action when it results from the State's exercise of 'coercive power,' *Blum,* 457 U.S., at 1004, 102 S.Ct. 2777, when the State provides 'significant encouragement, either overt or covert,' *ibid.,* or when a private actor operates as a 'willful participant in joint activity with the State or its agents,' *Lugar, supra,* at 941, 102 S.Ct. 2744 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an 'agency of the State,' *Pennsylvania v. Board of Directors of City Trusts of Philadelphia,* 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957) *(per curiam),* when it has been delegated a public function by the State, cf., *e.g., West v. Atkins, supra,* at 56, 108 S.Ct. 2250; *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 627-628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control,' *Evans v. Newton,* 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

Brentwood Acad. v. Tenn. Secondary Sch. 531 U.S. 288, 296 (2001).

259. For example, Berkeley's School of Law (Boat Hall) currently offers many private diversity scholarships. *See* http://www.law.berkeley.edu/students/financial_aid/scholarships/ucscholarships.html (last visited Mar. 7, 2007); http://www.law.berkeley.edu/students/financial_aid/scholarships/boaltscholarships.html (last visited Mar. 7, 2007); http://www.law.berkeley.edu/students/financial_aid/scholarships/outsideaid.html (last visited Mar. 7, 2007).

260. *See* Shapiro v. Columbia Union Nat. Bank and Trust Co., 576 S.W.2d 310 (Mo. 1978).

261. Tanya Schevitz, *UC San Diego Told Scholarships May Be Illegal Under Prop. 209,* S.F. CHRON., July 23, 2001, at A6 (stating that the school's Millennium

have to be both funded and administered by a private entity.[262] The only involvement a university could have would be to identify its critical mass needs, so that the private entity could take that into consideration in awarding the scholarships for retention purposes.

V. CONCLUSION

The California Supreme Court has declined or avoided issuing substantial rulings on the scope of Proposition 209 since the *Hi-Voltage* case, and there is some confusion among the lower courts over the extent of its prohibitions.[263] For these reasons, it is important to enter the game, playing with the interpretation of the rules proposed in this Article. If subsequent litigation challenges retention programs as violating Article I, section 31, then the courts will have the opportunity to rule on the issue. In the interest of taking a more proactive approach, progressive legal strategists may wish to set up a test case, to initiate the debate and mark the parameters of discussion over the difference between access and retention privileges. A thorough analysis of the voters' and the drafters' intent shows that access, not retention, privileges were the target of Proposition 209's prohibitions.

Scholarship "may be illegal because it is designed to attract underrepresented minority students").

262. Ruth Schubert, *Minority Scholarships Kept Alive at the UW*, SEATTLE POST-INTELLIGENCER, Apr. 17, 1999, at A1 (listing "methods for distributing sex- and race-specific aid, consistent with both I-200 and federal regulations").

263. *See* discussion *supra* Part II.D.