



## **From Federal Law to State Voter Initiatives:**

Preserving Higher Education's Authority to  
Achieve the Educational, Economic, Civic, and  
Security Benefits Associated with a Diverse  
Student Body

*A Policy Paper Prepared in Conjunction  
with the College Board's  
Access and Diversity Collaborative*

**March 2007**

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### About the Access and Diversity Collaborative

The Access & Diversity Collaborative was created by the College Board in 2004—in the wake of the University of Michigan U.S. Supreme Court decisions—to assist colleges and universities in developing and implementing their diversity-related policies in light of core institutional goals and federal nondiscrimination law. The Collaborative has provided extensive training to higher education institutions nationwide. In just two years, 15 national seminars (with more than 800 representatives from 300 institutions and organizations in attendance) have been conducted; and numerous guides that address key strategic planning and policy development issues in light of federal law have been published and widely distributed. These publications may be downloaded from the Collaborative Web site at [www.collegeboard.com/diversitycollaborative](http://www.collegeboard.com/diversitycollaborative).

In addition to the College Board, four other national education organizations and more than 30 institutions of higher education are sponsors of the Collaborative. The Education Policy Team of Holland & Knight LLP, led by former U.S. Department of Education civil rights officials, provides core legal and policy services in support of the Collaborative's efforts in national seminars and through written guidance for higher education institutions. They may be reached at [www.hklaw.com](http://www.hklaw.com).

*“I believe these rulings ... will go down in history as among the great landmark decisions of the Supreme Court. And I am proud of the voice the University of Michigan provided in this important debate. We fought for the very principle that defines our country’s greatness. Year after year, our student body proves it and now the Court has affirmed it: Our diversity is our strength.”*<sup>1</sup>

—Mary Sue Coleman, President of the University of Michigan,

*“I think the end is at hand for affirmative action as we know it,” and that an “anti-affirmative action wave washing over America” will wipe out the race-based preferences used for decades to help African Americans, Latinos and other disadvantaged ethnic groups.*<sup>2</sup>

—Ward Connerly, as quoted in the *Los Angeles Times*

## Introduction

In November 2006, three-and-one-half years after the U.S. Supreme Court affirmed the legal authority of colleges and universities to consider race (or ethnicity)<sup>3</sup> as a factor in higher education admissions decisions designed to achieve the benefits of diversity, voters in the State of Michigan went to the polls and approved a state constitutional amendment that forbids the use of race, ethnicity, and gender in public education. With the voters’ decision, the Court’s action in 2003—as to the University of Michigan and other public education institutions in Michigan—was in effect nullified.

This voter judgment—the third such decision in a decade—raises a number of challenging questions regarding the future of race-conscious enrollment practices in higher education. This paper addresses some of those questions, first explaining the relationship between relevant state laws and federal nondiscrimination laws, and second, focusing on key issues that higher education institutions should address in order to deflect (and, ultimately, defeat) similar voter initiatives. Specifically, this paper addresses the following issues related to initiatives that would deprive higher education officials of their discretion when making judgments about whom to admit<sup>4</sup>:

- I. What is the History and Impact of Voter Initiatives?
- II. What’s Missing in the Public Discourse?
- III. What Strategies Might Be Pursued by Higher Education Institutions to Deflect or Defeat Voter Initiatives?

### Recommendations for Action

1. Build broad-based coalitions to inform policy development and provide support, with the right leadership (higher education, business, military, government, etc.) advocating the educational, economic, civic, and security interests advanced by diverse student bodies.
2. Convey a common sense description of what the research and experience show regarding the relative benefits and costs associated with diversity, with a focus on the benefits of diversity that inure to all individuals, as well as the rationale and need for considering race in certain cases when making admissions (and related) decisions.
3. Pursue public education campaigns associated with the benefits of diversity, focusing on the importance of higher education institutions preserving their full array of policy options consistent with federal law when making mission-driven decisions that have major institutional, economic, and societal consequences.

# I. The History and Impact of Voter Initiatives

## A. Federal Law

Beginning with Justice Powell's opinion in *Bakke* in 1978, and as recently as the decisions in *Grutter* and *Gratz* in 2003, the United States Supreme Court has recognized that when evaluating applicants for admission, colleges and universities throughout the country may use race and ethnicity, within a prescribed framework, in order to achieve the educational benefits of diversity. Those federal court rulings, however, *do not mandate or require* that higher education institutions use race or ethnicity in their admissions programs. Rather, they *permit* institutions to use race and ethnicity in limited ways in admissions decisions when they have concluded that educational benefits associated with racial and ethnic diversity (among other kinds of diversity) are compelling, mission-driven interests of the institution.<sup>5</sup>

## B. State Law

To the extent that voter initiatives or state laws legitimately dictate higher education policy, then nothing in the Court's diversity opinions prohibits the enactment of state constitutional, statutory, or regulatory provisions that forbid the use of race or ethnicity in public higher education. In short, federal law establishes a "floor" upon which state law may, in appropriate circumstances, "build." In several states, voter (or executive) initiatives have given effect to a policy preference that forbids higher education's consideration of race or ethnicity when pursuing diversity-related goals.

**Michigan Proposal 2**, entitled the Michigan Civil Rights Initiative, proposed amending the state constitution by banning preferential treatment of groups or individuals based on race, sex, color, ethnicity, or national origin in the operation of public education, employment, or contracting. Proposal 2 stated that the amendment would:

ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.<sup>6</sup>

As a result of the passage of the ballot initiative (with 58 percent of the vote), Article I, Section 26 of the Michigan Constitution was to become effective on December 23, 2006.<sup>7</sup> After the ballot initiative vote, however, Michigan public universities requested a preliminary injunction that would have delayed the implementation of the state constitutional amendment until the admissions and financial aid cycle in progress was completed.<sup>8</sup> While the district court ordered that the application of Article I, section 26 to admissions and financial aid be enjoined until July 1, 2007, the decision was effectively overturned on December 29, 2006, by the Sixth Circuit Court of Appeals.<sup>9</sup> On January 10, 2007, as litigation by other parties continued, the University of Michigan announced that it would adjust its "admissions and financial aid policies such that race and gender [would] have no effect on the decision-making process."<sup>10</sup>

**California Proposition 209** was approved on November 5, 1996, by California voters and was fully implemented by the fall of 1998, following an unsuccessful federal court challenge. Proposition 209 approved a state constitutional amendment banning the use of race, sex, color, ethnicity, or national origin in the operation of employment, public education, and public contracting.<sup>11</sup>

**Washington I-200** was approved by voters in the State of Washington in November 1998, resulting in the enactment of a statute that prohibits the use of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.<sup>12</sup>

**The One Florida Initiative** was enacted in November 1999, when Florida Governor Jeb Bush issued Executive Order No. 99-281. As a result of this initiative, a regulation was added to Florida's administrative code

prohibiting the use of race, national origin, or sex in university admissions, as well as in employment and contracting.<sup>13</sup>

The overview of the initiatives in the four states, below, describes the action that led to the ban, the percent of voters approving the initiatives, the type of amendment approved, and the scope of the ban.

<b>Overview of Initiatives Prohibiting Race and Ethnicity in Higher Education</b>				
	<i>Michigan 2006</i>	<i>Florida 1999</i>	<i>Washington 1998</i>	<i>California 1996</i>
<b>Action resulting in ban</b>	Voter ballot initiative	Executive order	Voter ballot initiative	Voter ballot initiative
<b>Percent voters approving initiative</b>	58 percent <sup>14</sup>	Not applicable	58 percent <sup>15</sup>	54 percent <sup>16</sup>
<b>Type of amendment</b>	State constitution	Executive order/ Regulation adopted by Board of Regents and approved by State Board of Education	State statute	State constitution
<b>Scope of ban</b>	Applies to all operations in public institutions of higher education	Applies to admissions in public institutions of higher education	Applies to all operations in public institutions of higher education	Applies to all operations in public institutions of higher education

California, Michigan and Washington place general restrictions on the use of race and ethnicity in public higher education. The initiatives in these three states have nearly identical language regarding discrimination and preferential treatment:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.<sup>17</sup>

Despite similar ballot initiative language, Washington’s prohibition on the use of race and ethnicity may be less far-reaching than that of Michigan or California. The Washington voter pamphlet on the initiative stated that “Initiative 200 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 a state college or university.”<sup>18</sup> Also, Florida’s prohibition on the use of race and ethnicity in education only focuses on university admissions. The regulation added pursuant to Governor Bush’s executive order states:

Neither State University System nor individual university admissions criteria shall include preferences in the admissions process for applicants on the basis of race, national origin or sex.<sup>19</sup>

Given the limited scope of the prohibition, Florida institutions of higher education could, for example, consider race and ethnicity when making financial aid decisions.

## II. Lessons Learned: What's Missing in the Public Discourse?

No fact better highlights the challenge of effective communication with the public regarding the need for maintaining the academic freedom of higher education institutions to use race and ethnicity in enrollment management practices than the contrast between: (1) the substantial margins by which the two most recent state initiatives passed, and (2) the success of the University of Michigan (with its broad-based advocacy partners) in the *Grutter* litigation. Clearly, the arguments that shaped the U.S. Supreme Court's recognition of the educational, economic, civic, and security benefits associated with a diverse student body, which could be pursued through the limited use of race or ethnicity in admissions, did not carry the day in the court of public opinion. Key areas to assess are, therefore, the core arguments that were successfully made before the U.S. Supreme Court and the ways they might be adapted in order to provide a better public understanding regarding admissions (and related) decisions that are designed to achieve the benefits associated with a diverse student body.

### A. Benefits: A Clear Articulation of the Benefits Associated with and Positive Impact of Diverse Student Bodies

The explanation of the University of Michigan's success in persuading the U.S. Supreme Court that there were, in fact (in the Court's words) "real" and "substantial" benefits associated with a racially and ethnically diverse class of students, centers on the benefits gained by *all* students, the institution, and society in general. Among the benefits recognized by the Court were:

- ◇ **Educational benefits**—improved teaching and learning;
- ◇ **Economic benefits**—better preparation for the workforce in an increasingly global economy;
- ◇ **Civic benefits**—preparation of students for citizenship in America; and
- ◇ **National security benefits**—preparation of a better-trained, more highly skilled military.

**Lesson Learned:** Research- and experience-based evidence that demonstrates the multifaceted benefits associated with diversity inure to *all* individuals (and not just to minority students) can change the "win-lose"/"either-or" dynamic of typical "affirmative action" arguments and establish foundations for "win-win"/"both-and" propositions—in multiple sectors. Importantly, this evidence must be framed in ways that will have resonance with target audiences.

**Key Question:** What effort has been undertaken statewide and among higher education institutions within the state to collect and analyze relevant evidence and then to clearly articulate the broad-based educational, economic, civic, and security benefits associated with diversity and the development of race- and ethnicity-conscious policies designed to advance those goals?

### B. Transparency: Transparency Regarding Enrollment Management Practices, to Illustrate that the Use of Race is Limited and to Debunk Myths Regarding Test Scores and Grades

Along with its explanation of the overwhelming evidence associating racial and ethnic diversity with core mission-related benefits at the University of Michigan, the University of Michigan also pressed several points regarding the mechanics of its admissions process in the law school setting, including:

- (1) Its consideration of race did not involve the use of quotas. In fact, the use of race was limited—sometimes operating as a permissible "tipping point" for some minority applicants but not operating to guarantee admissions to virtually all minimally qualified minority students.
- (2) The notion that test scores and grades should somehow, standing alone, define the "merit" of applicants was a complete myth—inconsistent with basic test measurement principles and sound admissions practice. To the contrary, many factors, qualities, and characteristics in addition to

test scores and grades helped define the kind of entering class that Michigan sought—including the strength of recommendations, the quality of the undergraduate institution, the rigor (and areas) of the student’s course work, travel/residence abroad, language fluency, community service, having overcome hardships, and successful careers in other fields.<sup>20</sup>

(3) Correspondingly, decisions about whom to admit were not made in isolation, with an exclusive focus on a student’s individual attributes. Rather than conceptualize the admissions process as one of just rewarding individuals for past achievements, the University sought to build a community of learning, where a diverse group of students would interact and learn from each other, in and out of the classroom. Thus, at its core, the admissions process at Michigan was *both* student-centric and school-centric—with admissions judgments being made through dual lenses.

**Lesson Learned:** A clear articulation of standards regarding baseline, academically focused student qualifications—as well as a clear statement regarding the kinds and qualities of students an institution seeks to admit—are critical bases for effectively communicating how admissions judgments are made, along with the limited role that race may play in those decisions.

**Key Question:** Have higher education institutions clearly explained what they value when making admissions decisions in ways that debunk myths regarding the use of test scores and grades in admissions and that, at the same time, explain the important but limited role that race (like other characteristics or qualities) may play in the admissions process?

### C. Alliances: Alliances with Key Stakeholders That Can Validate the Benefits and Positive Impact of Diversity

As important as the substantive arguments (and evidence) were to the University of Michigan’s success, so too was the university’s strategy of bringing together a record number of supporting organizations and individuals who filed “friend of the court” briefs, thereby serving as external validators of several of the core points that the University of Michigan sought to press most centrally. They included:

- ◇ **Major businesses**, including Fortune 500 companies, which successfully made the case that the nation’s twenty-first century economy would be directly dependent upon a workforce with the background, experience, and capacity to work with others from different backgrounds in forging good group decisions, addressing challenges in the workplace, and more.
- ◇ **Retired U.S. military officials**, who compellingly argued that racial and ethnic diversity had been and continued to be a critical factor in the success of the military in ensuring national defense.
- ◇ **Educational researchers**, who affirmed the University of Michigan’s core contention that educational benefits associated with student body diversity contributed to enhanced teaching and learning in multiple facets of the education process.
- ◇ **Professional organizations**, such as those representing the legal and medical professions, which built upon core educational arguments to frame broader societal aims and imperatives (such as providing health care in underserved communities) that reinforced the University of Michigan’s core educational assertions.

**Lesson Learned:** Effective advocacy frequently depends on divergent interest groups coalescing in support of key points with respect to which those groups have unique (but related) histories, perspectives, and evidence.

**Key Question:** What kinds of alliances among stakeholders—including faculty, staff, students, alumni, employers, and the public— should be assembled *in advance* of voter initiatives to gauge support for and marshal evidence in support of diversity goals and the limited use of race and ethnicity (as necessary) to achieve those goals?

### III. Moving Forward: What Strategies Might Be Pursued by Higher Education Institutions to Deflect or Defeat Voter Initiatives?

A number of strategies to deflect or defeat voter initiatives like those described above (which would deprive higher education officials of the legitimate exercise of their discretion, including with respect to the limited consideration of race and ethnicity) merit consideration. They include:

1. **Coalition building.** Forming one or more coalitions among disparate groups and individuals to help inform policy development, forge consensus statements, develop and collect relevant evidence, and publish findings/conclusions should be considered. Such a strategy should be focused on developing:
  - The right leadership. Higher education leaders—public and private—are central to any effort in which the case regarding the need for student body diversity is being made. However, education leaders cannot do it alone. To reach the public broadly, business, military, government, and other leaders must be part of a core constituency that can help shape policy development on the front end, and then articulate with conviction and evidence the educational, economic, civic, and security interests that are inextricably intertwined with student diversity.
  - The right advocates at the right level. Correspondingly, to reach those whose opinions count, advocacy must move from the ivory tower and the boardroom to Main Street. Engaging local leaders, volunteers, community-based organizations, and the like is a critical facet of effective, statewide coalition building.
  - The right breadth. Given that voter initiatives may (as in Michigan) include prohibitions against gender preferences, it's important to ensure that advocates representing the full array of interests frame a coherent, unified strategy with the full complement of available substantive arguments.
2. **Clear benefit-cost articulation.** Effectively capturing the educational, economic, civic, and security imperatives of attaining racially and ethnically diverse student bodies—and the consequences of failure—remains a key ongoing element of any effective advocacy campaign. Although this effort necessarily entails pursuit of an ongoing research agenda, the challenge is as much in the translation and application of the research as it is in the framing and funding of the research at its inception.
  - The complexities and nuances of research regarding the many benefits associated with student diversity must be effectively translated into common-sense propositions that have meaning to voters. That “translation” should tell the story about the benefits that all students receive (as, indeed, society at large receives benefits) through the promotion of diverse learning experiences—but it must do more. It also must debunk the notion that the issue of “preferences” creates an unfair playing field—addressing head on the philosophy and operation of the admissions process.
3. **Public engagement.** The development of a public engagement campaign regarding the educational, economic, civic, and security imperatives of attaining racially and ethnically diverse student bodies—and the consequences of failure—should be central to discussions among higher education institutions. This involves a substantive and political focus, including a clear analysis and discussion about the precise background and agendas of those who attempt to step into the fray and deprive higher education leaders of tools that will permit them access to the full complement of strategies that may be necessary to achieve the benefits of diversity they seek.

## Conclusion

Not unlike the short-lived decision in *Hopwood v. Texas* in 1996, in which the Fifth Circuit Court of Appeals ruled that the educational benefits of diversity were not a compelling interest under federal law, the passage of Proposal 2 in Michigan has generated a clarion call to higher education leaders about the need to lead—to forge coalitions around a rapidly developing research agenda that affirms the benefits of diversity in multiple ways; to promote more transparency in the development of policies that benefit all students; and to ensure that, in the end, the issues of access and diversity are not relegated to the back burner and taken for granted. The good news is that the kind of commitments that need to be made in order to ensure the development and implementation of educationally sound and legally defensible access and diversity policies<sup>21</sup> (also a mark of strong institutional leadership) are precisely the kinds of commitments that can provide the basis for public education, in an effort to preserve the necessary discretion of higher education officials to select a student body that furthers their mission and the interests they serve by maintaining diversity on our nation’s campuses.

Indeed, along with the recommended strategies described above, the imperative that higher education leaders continue their efforts to improve educational outcomes for all students—and to do so in ways that satisfy core federal legal standards—merits emphasis. In particular, it is important that higher education leaders not lose sight of the issues and challenges associated with access, opportunity, and diversity in the twenty-first century throughout the education pipeline. Thus, attention to longer term investments (such as support for pipeline-building programs) and shorter term strategies (such as rigorous evaluation and pursuit of all available avenues—race-conscious and race-neutral—likely to advance institutional goals) can frame a comprehensive and coherent action agenda that is compelling in the court of law, just as it is in the court of public opinion.

## ENDNOTES

1. <http://www.umich.edu/news/Releases/2003/Jun03/comments.html>.
2. Richard Paddock, “Affirmative Action Era Is Over, Longtime Foe Says: Former UC Regent Ward Connerly, Buoyed By Success of Michigan Measure, Is Eyeing New Targets.” *Los Angeles Times*, November 26, 2006.
3. The terms “race” and “ethnicity” are used interchangeably in this document, as they are in federal nondiscrimination law.
4. The U.S. Supreme Court for decades has recognized the First Amendment-related principles affirming that colleges and universities are entitled to the discretion to determine, on academic grounds, who may be admitted to study, which is “one of the ‘four essential freedoms’ of a university.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result), cited with approval in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) and in *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003). For analysis of this legal principle in light of federal nondiscrimination laws, see Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006) at [www.collegeboard.com/diversitycollaborative](http://www.collegeboard.com/diversitycollaborative). Notably, the recommendations set forth in this publication, designed to help higher education institutions preserve the full panoply of options available under federal law when working to achieve their access and diversity goals, are not grounded in the notion that race-conscious practices should be preserved in all cases and at all costs. To the contrary, race-conscious policies should be periodically evaluated, “with the goal of ultimately eliminating the use of race...when institutional goals can be met and sustained without such policies.” *Id.* at 13.
5. The Court’s framework of “strict scrutiny” focuses on whether the use of race and ethnicity advances a compelling interest and is narrowly tailored to achieve that interest. In *Grutter v. Bollinger*, the Supreme Court held that achieving the educational benefits of diversity is a compelling interest that can justify the use of race and ethnicity as a “plus” factor in the admissions process. In that case, Michigan’s law school evaluated each applicant individually and considered race, as well as other characteristics and qualities, as plus factors when evaluating candidates. None of the characteristics or qualities, by themselves, guaranteed admission.

In contrast to the law school policy, the undergraduate policy rejected by the Court in *Gratz v. Bollinger* automatically assigned 20 points to all underrepresented minorities. The Court ruled that the undergraduate policy was not sufficiently flexible and did not allow for individualized, holistic review of applicants. Correspondingly, the point system essentially guaranteed admissions to virtually all minimally qualified minority applicants. As a consequence, it was not narrowly tailored to achieve the compelling interest of promoting the educational benefits of diversity.

6. [http://www.michigan.gov/documents/Statewide\\_Bal\\_Prop\\_Status\\_145801\\_7.pdf](http://www.michigan.gov/documents/Statewide_Bal_Prop_Status_145801_7.pdf).

7. Article I, Section 26 reads:

- (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
- (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (3) For the purposes of this section “state” includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.
- (4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
- (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (6) The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan antidiscrimination law.
- (7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.
- (8) This section applies only to action taken after the effective date of this section.
- (9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

8. <http://www.vpcomm.umich.edu/diversityresources/prop2faq.html>.

9. The Court of Appeals granted a Motion for Stay of the Injunction, pending appeal of the District Court’s preliminary injunction. This reversed the decision of the District Court that would have allowed the University of Michigan to continue using race and ethnicity in admission until July 1, 2007. In making its decision, the Court of Appeals stated: “[W]e are unable to identify any tenable basis under federal law for suspending the law’s enforcement.” *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 240 (6th Cir. 2006). Although the court recognized that there were “good-faith reasons for seeking delay... none of them [were] pertinent to establishing a federal ground for suspending the law.” *Id.* at 245-246. The Court stated that “the state courts, not federal courts, have the final say on the meaning of state laws” and that “if an interim injunction should be granted in this case, it is the state courts, not the federal courts, that should grant it.” *Id.* at 253.

10. <http://www.ns.umich.edu/htdocs/releases/story.php?id=3093>.

11. California Article 1, Section 31 reads:

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (b) This section shall apply only to action taken after the section’s effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
- (f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

This state law has been construed expansively by state courts. See *Advancing Diversity at the University of California, Berkeley Under Proposition 209* (The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, October 2006) at <http://www.law.berkeley.edu/centers/ewi/research/highereducation>.

12. Statute 49.60.400 reads:

- (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (2) This section applies only to action taken after December 3, 1998.
- (3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.

- (4) This section does not affect any otherwise lawful classification that:
  - (a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or
  - (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or
  - (c) Provides for separate athletic teams for each sex.
- (5) This section does not invalidate any court order or consent decree that is in force as of December 3, 1998.
- (6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
- (7) For the purposes of this section, “state” includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.
- (8) The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Washington antidiscrimination law.
- (9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington state Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

13. The executive order that was part of Bush’s “One Florida” Plan reflected a “race-neutral” attempt to maintain or increase levels of minorities in institutions of higher education by automatically guaranteeing state admissions to the top 20 percent of each high school class. The executive order was signed after a Florida ballot initiative had been proposed by Ward Connerly. Many newspaper articles and editorials argued that Bush signed the executive order to avoid the divisiveness likely associated with a Connerly-backed initiative. The *Miami Herald* reported, for example, that the executive order “was a preemptive strike against Connerly’s proposal, which Bush called ‘divisive.’ Political unrest over race in the nation’s fourth-largest state also threatened to hurt his brother’s presidential aspirations.” Steve Bousquet, “How Bush Misread Opposition to One Florida,” *Miami Herald*. January 30, 2000.

14. <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/>.

15. Tom Brune, Joe Heim. “Initiative 200 – New Battle Begins: Interpreting Law.” *The Seattle Times*. November 4, 1998. (<http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=2782002&date=19981104&query=%22Initiative+200%22+%26+brune>).

16. Barry Bergman. “Everyone Into the Pool? As California’s Racial and Ethnic Diversity Grows, UC’s has Suffered. Now, a Decade after Proposition 209, Some Want to Open up the Admissions Pipeline.” *UCBerkeleyNews*. November 1, 2006. ([http://www.berkeley.edu/news/berkeleyan/2006/11/01\\_prop209.shtml](http://www.berkeley.edu/news/berkeleyan/2006/11/01_prop209.shtml)).

17. This language is in the California and Michigan constitutional amendments and in Washington’s statutory amendment.

18. See <http://www.smartvoter.org/1998nov/wa/state/meas/i200/>.

19. 6 FL ADC 6C-6.002(7).

20. Thus, policies clearly articulating the philosophy regarding and rationale for admitting some students and not others should explain:

- ◇ What test scores and grades do and do not mean;
- ◇ Why test scores and grades are not the sole basis for evaluating students;
- ◇ The multiple factors, attributes, and characteristics of students that are valued, and why; and
- ◇ Why the concept of merit is both student- and institution-centric.

21. See Coleman and Palmer, *supra*, n.4.