



Citizens Research Council of Michigan



Statewide Issues on the November  
General Election Ballot  
Proposal 2006-02  
Michigan Civil Rights Initiative

September 2006

Report 343

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STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT

PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE

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# PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE

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# PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE

## In Brief

On November 7, 2006, Michigan citizens will vote on a proposed constitutional amendment to ban affirmative action programs that grant preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin in public education, public employment, and government contracting.

Race has played a prominent role in American history. Slavery, although never named, was written into the United States Constitution and segregation was sanctioned by the government throughout much of our history. After passage of the Civil Rights Act of 1964, affirmative action programs were instituted by the government to help open up opportunities previously denied to women and minorities. The goal of these programs was to accelerate the process of achieving equality between the sexes and among the races. However, these programs led to charges of reverse discrimination and created a new form of racial tension.

Five landmark United States Supreme Court decisions have interpreted the vague laws regarding affirmative action, preferential treatment, and reverse discrimination. In *University of California Regents v. Bakke* (1978), the Court defined racial classifications of all types as "inherently suspect" and limited affirmative action programs in public education. *Richmond v. J. A. Croson Co.* (1989) mandated strict scrutiny of all racial classifications (benign as well as invidious) made by state and local governments. *Adarand Constructors, Inc. v. Peña* (1995) extended the requirement of strict scrutiny review to all racial classifications made by the federal government. And two University of Michigan cases, *Grutter v. Bollinger et al.* (2003) and *Gratz et al. v. Bollinger et al.* (2003), defined what is legal in regard to public university admissions policies. Minority status can be viewed by university officials as a single positive factor, among many, contributing to student-body diversity. It cannot be given a fixed number of points or be used to meet any sort of minority "quota" or "set-aside."

Four other states have experience limiting affirmative action programs in the public sector. Voters in California and Washington passed proposals similar to Proposal 2006-02, thereby limiting affirmative action preference programs in those states. Texas pub-

lic universities were unable to grant affirmative action preferences after a federal court ruled against the University of Texas in *Hopwood v. University of Texas Law School* (1996). And in Florida, Governor Bush issued his "One Florida" initiative through executive order, ending affirmative action preference programs in the public sector. The greatest impact in all of these states has been felt at the public universities. California, Texas, and Florida have all passed some form of a "percent plan" at the state or university level providing automatic public university admission to the top-performing students from each high school in the state. Public universities in all four states have also had some success in raising minority enrollment through intensified outreach and recruitment efforts.

If this amendment passes, it will not outlaw all affirmative action programs in the state. Michigan statutes contain numerous references to affirmative action and minority status or gender. Only those that grant preferential treatment to individuals or groups on the basis of minority status or gender would be invalidated by this amendment. However, determining what constitutes preferential treatment will be left to the Michigan court system. At the state's 15 public universities, the impact would be felt most strongly at the University of Michigan-Ann Arbor and in the graduate and professional programs across the state. Michigan's system of independent universities does not readily lend itself to a percent plan like those adopted elsewhere.

With respect to state and local government, recent U.S. Supreme Court decisions have already barred the use of quotas and set-asides, and have made it illegal to have an affirmative action preference program without a compelling governmental interest (i.e., remedying the effects of past discrimination). Even when a compelling governmental interest can be proved, the government must use means that are narrowly tailored to achieve that interest. The State of Michigan has a strong civil service system and competitive bidding for government contracts. It does not have a statewide affirmative action program. A review of local governments' policies yielded little evidence of affirmative action programs that grant preferential treatment on the basis of minority status or gender.



## STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT

### PROPOSAL 2006-02: MICHIGAN CIVIL RIGHTS INITIATIVE

On November 7, 2006, the citizens of Michigan will vote on an initiated proposal dealing with affirmative action and preferential treatment in public employment, public education, and government contracting. Voters will be asked to amend the Michigan Constitution to ban affirmative action programs that give preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin.

#### Ballot Initiative

This proposal seeks to amend the Michigan Constitution by adding a Section 26 to Article I. The first three sub-sections of the amendment would prevent all public entities in Michigan from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public education, employment, or contracting. The fourth sub-section allows public entities in Michigan to es-

tablish and maintain federal programs that mandate affirmative action preferences in order to keep federal funds in the state. The fifth sub-section explicitly states that the amendment would not prohibit bona fide qualifications based on sex; e.g., female prison guards at female prisons. The sixth sub-section states that there is to be no difference in response to violations of this proposal, regardless of the injured party's

#### Proposed Constitutional Amendment

If the proposal is adopted, Article I, Section 26 would be inserted into the Michigan Constitution:

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

membership in the majority or a minority group. The seventh sub-section states that the amendment is to be self-executing and it is to be implemented to the maximum extent of the law, even if some sub-sections are found to be invalidated by federal law. The eighth sub-section clarifies that this amendment would pertain only to alleged actions of discrimination that occur after its effective date. The final sub-section states that any current court orders or consent decrees would remain valid.

Amending the Michigan Constitution to add a Section 26 would not create the first reference to discrimination. Discrimination currently is prohibited in Section 2 of Article I of the Constitution:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

**Affirmative Action.** Debate over whether the term “affirmative action” should have been included in the amendment and ballot language has been heated. Proponents of the ballot proposal specifically left the term out of the proposed constitutional amendment citing the confusion it engenders. Proponents believe that affirmative action programs should lead to the equal treatment of all people regardless of minority status or gender, not to preferential treatment for women and minorities, which the amendment seeks to redress. Opponents of the proposal, however, argue that leaving out the term “affirmative action” is deceitful and an attempt to mislead voters on the proposal's true meaning and impact. An advocate of affirmative action, Dr. James Sterba of the University of Notre Dame, argues that “Affirmative Action [is] a policy of favoring qualified women and minority candidates...with the immediate goals of outreach, remedying discrimination, or achieving diversity, and the ultimate goals of attaining a colorblind (racially

just) and gender-free (sexually just) society.”<sup>1</sup> Until we reach these ultimate goals, opponents of this initiative argue that affirmative action preferences remain a vital tool.

The State Elections Director attempted to accommodate these divergent points by submitting the following ballot language to the Board of State Canvassers (this language was approved by the Board in January 2006):

A proposal to amend the State Constitution to ban 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.

The proposed constitutional 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.

Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the State Constitution already prohibits discrimination on the basis of race, color or national origin.)

Should this proposal be adopted? YES or NO

The ballot language incorporates the preferred terms of both sides of the debate: “affirmative action” and “preferential treatment.” The language explains that the proposal would ban public institutions from using affirmative action programs that grant preferential treatment and from discriminating against groups and individuals. The language also alerts voters that a separate provision of the State Constitution (Article I Section 2) already prohibits discrimination on the basis of race, color, and national origin.

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<sup>1</sup> Sterba, James P. “Defending Affirmative Action, Defending Preferences.” *Affirmative Action and Racial Preferences: A Debate*. Carl Cohen and James P. Sterba. New York: Oxford University Press, 2003. 200-202.



# Proposal 2006-02: Michigan Civil Rights Initiative

## A History of Affirmative Action in the United States

**Era of Slavery.** Race relations have been a controversial issue since before the founding of our nation. The Declaration of Independence states “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Despite this strong statement of equality, slavery was common practice before the creation of the United States of America and it was explicitly written into the U.S. Constitution (although the actual word “slavery” was not used in the Constitution until the Thirteenth Amendment, which abolished slavery, was adopted). In Article I, Section 2, “other Persons” (i.e. slaves) were counted as three-fifths of a person

when apportioning representation among the states in the House of Representatives. Article I, Section 9 of the Constitution allowed the slave trade (it was referred to as “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit”) to continue until 1808. After that point, the slave trade, but not slavery, was outlawed. Finally, Article 4, Section 2 of the U.S. Constitution held that “No Person held to Service of Labour in one State” shall be discharged from such service by escaping to another state. Even though these references to slavery have been superseded by amendments abolishing slavery, the institutionalization of discrimination and racism had repercussions that can still be felt today.

### What is Affirmative Action?

At the center of the debate is the issue of “affirmative action,” a complicated term that was first used in an executive order issued by President Kennedy in 1961. Over the years, affirmative action has come to comprise multiple meanings, often meaning different things to different people. The United States Commission on Civil Rights defines affirmative action as “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.”<sup>2</sup> “Any measure” includes programs and processes to implement and ensure fair hiring, testing, and admissions policies; outreach programs directed towards members of under-represented groups; programs that give preferential treatment to qualified individuals from under-represented groups; and outright quotas to redress blatant discrimination by a certain entity or in a specific industry.

While the impact of the proposed constitutional amendment can be anticipated, its effect will not be known in its entirety until it has been interpreted by the courts. A strict reading of the proposed constitutional amendment would prohibit the State and any of its governmental entities (including all state departments, universities, community colleges, school districts, and local governments) from instituting affirmative action programs that grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, education, or contracting.

It is important to understand which types of affirmative action programs would be affected by this proposal because affirmative action is a broad term that can encompass a variety of programs. Two other states, California and Washington, have passed comparable proposals and provide examples of what may happen if this proposal passes. An in-depth review of these two cases is provided later in this analysis. The proposed constitutional amendment should not affect programs that do not grant preferential treatment in hiring, admissions, or contracting; i.e., programs that have no impact on selection and are strictly limited to outreach and increasing minority and female applications without instituting preferences (see *Outreach Preferences in California* sidebar on page 14). It should not affect programs that do not pertain to public employment, education, or contracting; e.g., the Michigan Travel Bureau contributing money to various ethnic festivals and programs throughout the state. This proposal would not have any effect on programs that incorporate race- and sex-neutral means to increase diversity in a student body or public workforce; e.g., through using socioeconomic or geographic indicators to issue preferences. And lastly, it would not directly affect the private sector.

<sup>2</sup> Dunn, Brian J. and Zandarski, Amy M. “The Evolution of Affirmative Action: Background on the Debate.” Michigan Legislative Service Bureau, Legislative Research Division 18.3 (1998): 1-41.

**Civil War Amendments.** The end of the U.S. Civil War in 1865 and the victory of the northern “free states” led to the passage of the Thirteenth Amendment, abolishing slavery. The Fourteenth Amendment was passed shortly after; it contains what has come to be known as the “Equal Protection Clause,” which states:

All persons born or naturalized in the United States...are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This clause was meant to protect the newly freed slaves from arbitrary laws enacted by the states to discriminate against them and proscribe their freedom. Today the Equal Protection Clause is interpreted by the courts as a protection of the rights of all U.S. citizens from discrimination by state government. States may not confer or proscribe any benefits or preferences to any individuals or groups without judicial review. The final Civil War amendment passed was the Fifteenth Amendment; it was passed to secure voting rights for black males. (The Nineteenth Amendment, which gave women the right to vote, was not adopted until 1920.)

Dissent in some of the states over the abolition of slavery led to what are commonly known as “Jim Crow laws.” These were laws that restricted the new privileges granted to African Americans after the Civil War. (The name Jim Crow is believed to be derived from a character in a popular minstrel song. The name became, and remains, synonymous with racial segregation.)<sup>3</sup>

**Early Supreme Court Decisions.** Segregation was sanctioned by the U.S. Supreme Court when it upheld an 1890 Louisiana statute requiring racially segregated but equal railroad carriages in *Plessy v. Ferguson* (1896). This decision instituted the doctrine of “separate but

equal.” In this case, the Court ruled that the Equal Protection Clause of the Fourteenth Amendment dealt with political and civil rights, not social equality.<sup>4</sup> The reasoning behind this decision was that the Court can enforce equal political and civil rights for all citizens regardless of color, but it cannot make citizens view and treat others of different races equally on a social level.

By 1954, the Court changed its position and unanimously agreed “that in the field of public education the doctrine of ‘separate but equal’ has no place.” In *Brown v. Board of Education*, the Court ruled that segregated facilities violated the principle of equal protection under the law guaranteed by the Fourteenth Amendment.<sup>5</sup> This ruling effectively eliminated *de jure* segregation in public education. *De jure* segregation refers to segregation that is sanctioned by law. *De facto* segregation refers to segregation that is present in reality even if it is formally illegal. This type of segregation is caused by residential housing patterns and various other conditions rather than by law and remains today in certain sections of the country.<sup>6</sup>

**Executive Order 10925.** In March 1961, President Kennedy issued Executive Order 10925 establishing the President’s Committee on Equal Employment Opportunity. This order contained the first reference to affirmative action, mandating that government contractors and subcontractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>7</sup>

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<sup>4</sup> “*Plessy v. Ferguson*.” *The Columbia Electronic Encyclopedia*. © 1994, 2000-2005, on Infoplease. © 2000-2005 Pearson Education, publishing as Infoplease. [www.infoplease.com/ce6/history/A0839368.html](http://www.infoplease.com/ce6/history/A0839368.html). (accessed 7 November 2005)

<sup>5</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>6</sup> “*Kans. Brown v. Board of Education of Topeka*.” *The Columbia Electronic Encyclopedia*. © 1994, 2000-2005 on Infoplease. © 2000-2005 Pearson Education, publishing as Infoplease. [www.infoplease.com/ce6/history/A0809176.html](http://www.infoplease.com/ce6/history/A0809176.html). (accessed 7 November 2005)

<sup>7</sup> Kennedy, John F. “Executive Order 10925: Establishing the President’s Committee on Equal Employment Opportunity.” The White House, 6 March 1961. [www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html](http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html).

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<sup>3</sup> “Jim Crow Laws.” *The Columbia Electronic Encyclopedia*. © 1994, 2000-2005, on Infoplease. © 2000-2006 Pearson Education, publishing as Infoplease. [www.infoplease.com/ce6/history/A0826301](http://www.infoplease.com/ce6/history/A0826301). (accessed 23 May 2006)

# Proposal 2006-02: Michigan Civil Rights Initiative

## Glossary of Terms<sup>8</sup>

**Affirmative Action.** A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.

**Benign Discrimination.** This is a controversial term because many view it as a remedy to deal with social inequalities, not as a form of discrimination. A definition of benign is "harmless" or "having little or no detrimental effect."<sup>9</sup> Benign discrimination is discrimination that serves an important governmental interest, such as increasing diversity or remedying the effects of past discriminatory behavior. It has been practiced by governments in the years since the passage of the Civil Rights Act of 1964 through affirmative action preference programs to promote qualified minorities and women. It has been argued by the government to be "harmless discrimination" because its intent is not to discriminate against a group of individuals, but to help those groups that have historically been discriminated against to achieve equality.

**Discrimination.** The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap.

**Due Process.** The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. Substantive due process refers to the doctrine that the Due Process Clauses of the Fifth and Fourteenth Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective.

**Due Process Clause.** The constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property. There are two Due Process Clauses in the U.S. Constitution, one in the Fourteenth Amendment applying to the states, and one that has been interpreted into the Fifth Amendment applying to the federal government.

**Intermediate Scrutiny.** A standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective.

**Invidious Discrimination.** Discrimination that is offensive or objectionable, especially because it involves prejudice or stereotyping.

**Judicial Review.** A court's power to review the actions of other branches or levels of government; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional.

**Precedent.** A decided case that furnishes a basis for determining later cases involving similar facts or issues.

**Rational-Basis Test.** A principle whereby a court will uphold a law as valid under the Equal Protection Clause if it bears a reasonable relationship to the attainment of some legitimate governmental objective.

**Reverse Discrimination.** Preferential treatment of minorities, usually through affirmative action programs, in a way that adversely affects members of a majority group.

**Strict Judicial Scrutiny.** The standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.

<sup>8</sup> Garner, Bryan A., ed. Black's Law Dictionary. 7<sup>th</sup> ed. 1999.

<sup>9</sup> "Benign." The American Heritage Dictionary of the English Language. 4<sup>th</sup> ed. Houghton Mifflin Company, 2000.

## Civil Rights Act

In July 1964, President Johnson signed the Civil Rights Act of 1964, which prohibited discrimination of all kinds based on race, color, religion, and national origin. The Act explicitly prohibited discrimination in voting, education, and the use of public facilities. Title VI of the Act banned the use of federal funds for segregated programs and schools.<sup>10</sup> Early in 1965, the Voting Rights Act, which made discriminatory voting practices (e.g. literacy tests) illegal, passed as well. Ideas about civil rights and affirmative action began to change after passage of the Civil Rights Act as some proponents argued that government should take a more activist role in ensuring equality and redressing past discrimination. President Johnson adopted this activist approach, and the concept of affirmative action progressed from simply ensuring that hiring prac-

tices are free of racial bias to increasing minority employment.<sup>11</sup> President Johnson articulated the concept underlying affirmative action in a famous speech to the graduating class at Howard University in June 1965 declaring that “civil rights laws alone are not enough to remedy discrimination.”<sup>12</sup>

*Executive Order 11246.* In September 1965, President Johnson issued Executive Order 11246, which enforced affirmative action for the first time by giving the Secretary of Labor the power and duty to secure compliance by all government contractors and subcontractors in equal employment and fair hiring practices. In 1967, the order was amended to cover discrimination on the basis of gender as well.

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<sup>10</sup> “Integration: The 1964 Civil Rights Act to the Present.” The Columbia Electronic Encyclopedia. © 1994, 2000-2005, on Infoplease. © 2000-2005 Pearson Education, publishing as Infoplease. [www.infoplease.com/ce6/history/A0858852.html](http://www.infoplease.com/ce6/history/A0858852.html). (accessed 7 November 2005)

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<sup>11</sup> Guppy, Paul. “A Citizen’s Guide to Initiative 200: The Washington State Civil Rights Initiative.” Washington Policy Center, Policy Brief (1998).

<sup>12</sup> “Affirmative Action Timeline.” Infoplease. © 2000-2006 Pearson Education, publishing as Infoplease. [www.infoplease.com/spot/affirmativetimeline1.html](http://www.infoplease.com/spot/affirmativetimeline1.html). (accessed 7 September 2006)

# Proposal 2006-02: Michigan Civil Rights Initiative

## Landmark United States Supreme Court Cases

The law is not necessarily clear when it comes to affirmative action and discrimination. While the law prohibits outright discrimination, the law regarding affirmative action and preferential treatment is vague and open to interpretation by the courts. Throughout the history of affirmative action, court decisions have changed or modified applicable legal precedent making the law governing affirmative action fluid.

### *University of California Regents v. Bakke (1978)*<sup>13</sup>

**Special Admissions Program.** This case involved a white male student, Allan Bakke, trying to gain admission to the Medical School at the University of California (UC) at Davis. The Medical School had a special admissions program with the goal of increasing the representation of “disadvantaged” students in each class; however, there was no formal definition of “disadvantaged.” Applicants were asked if they wished to be considered as “economically and/or educationally disadvantaged” or as members of a “minority group.” The chairman of the special admissions committee then reviewed these applications to determine whether they reflected economic or educational deprivation. Disadvantaged whites applied to the program in large numbers, but none were offered admissions through the special program. Sixteen percent of the class seats were reserved for special admissions candidates; they were not measured against regular candidates and were not required to meet the 2.5 undergraduate grade point average (GPA) cutoff, which applied to regular candidates.

In both years that Bakke applied to the Medical School (1973 and 1974) as a regular candidate, special candidates were admitted with GPAs, Medical College Admissions Test (MCAT) scores, and benchmark scores (scores received as a result of an internal university review process) significantly lower than his. Bakke filed suit seeking mandatory, injunctive, and declaratory relief to compel his admission to the Medical School, alleging that the special admissions program operated to exclude him from the school on the basis of his race in violation of his rights under the Equal Protection

Clause of the Fourteenth Amendment; Article I, 21, of the California State Constitution; and Section 601 of Title VI of the Civil Rights Act of 1964.

**Supreme Court Decision.** When a major case such as this is decided, it sets a legal precedent that other courts (including the Supreme Court) take into consideration in subsequent similar cases. Even though this was the first major case to put limits on affirmative action programs, the division of the Court in this ruling made it difficult for lower courts to interpret the findings and apply precedent. This case produced no majority opinion. Four justices upheld the Medical School's program, four invalidated the program, and Justice Powell produced the lone opinion in the middle of the two conflicting opinions. He announced the judgment of the Court, concluding that 1) Title VI of the 1964 Civil Rights Act “proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a state or its agencies;” 2) racial classifications are “inherently suspect” requiring the “most exacting judicial scrutiny;” 3) the goal of achieving a diverse student body is sufficiently compelling to justify the consideration of race in university admissions decisions under some circumstances, but the Medical School's special program is not narrowly tailored to achieve the goal of racial diversity; and, 4) the Medical School must admit Allan Bakke since it could not meet the burden of proving that he would not have been admitted in the absence of the special admissions program.

Four justices agreed on the first and second points, but would not have struck down the Medical School's special admissions program concluding that “the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race.” The other four justices dissented on the first point arguing that Title VI applies and invalidates the program so there is no need to look at the constitutional issue of whether or not race can ever be a factor in an admissions policy. They concurred in the judgment insofar as it ordered Bakke to be admitted to the Medical School. Though this court decision led to confusion for lower courts, the general consensus was to follow Justice Powell's opinion because he articu-

<sup>13</sup> *University of California Regents v. Bakke*, 438 U.S. 265 (1978)



lated the clearest guidance about what could and could not be done in regard to affirmative action admissions policies in public universities.

The fact that Justice Powell and four other justices saw this as a constitutional issue is important and set the precedent for future cases. Section 601 of Title VI of the Civil Rights Act clearly states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” If interpreted literally, it would seem to blatantly prohibit any type of affirmative action preference program, including the special admissions program at the Medical School. According to Powell (and the four justices concurring on this point), examination of the legislative history of Title VI revealed a “congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.” He used the failure of the proponents of Title VI to define the term “discrimination” as evidence that section 601 was not intended to enact a purely colorblind scheme, but that it was intended “to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” This reasoning allowed Justice Powell and others to look beyond the statutory law to the U.S. Constitution when ruling on affirmative action cases.

The second point made by Justice Powell (joined by four other justices), that racial classifications are “inherently suspect” and require “the most exacting judicial scrutiny,” is also important. By arguing this point, he reinforced the Court’s longstanding belief that “The guarantees of equal protection...are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality...” The Court argued that the level of protection from discrimination is not dependent on a victim’s race. All racial classifications made by the state are considered suspect, even if they are declared to be remedial in nature, and require strict judicial scrutiny.

In defense of its special admissions program, the Medical School offered four different purposes served by the program: 1) “reducing the historic deficit of tradition-

ally disfavored minorities in medical schools and in the medical profession;” 2) “countering the effects of societal discrimination;” 3) “increasing the number of physicians who will practice in communities currently underserved;” and, 4) “obtaining the educational benefits that flow from an ethnically diverse student body.” Four of the justices, though not enough for a majority, would have supported the special admissions program because they saw reducing the “historic deficit” of under-represented minorities in the medical profession as a substantial and constitutionally permissible state interest. Justice Powell did not agree with this argument stating that “Preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake.” In his opinion, Justice Powell argued that attaining a diverse student body is the only “constitutionally permissible goal for an institution of higher education” (however, no other justices concurred in this portion of the opinion).

Justice Powell grounded his analysis of the importance of educational diversity in the notion of academic freedom that “long has been viewed as a special concern of the First Amendment.” The “four essential freedoms” of a university are “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” Justice Powell made it clear though that academic freedom does not give universities the right to disregard constitutional limitations protecting individual rights. Justice Powell ruled that while the Medical School had a compelling interest in achieving student-body diversity, its special admissions program was not narrowly tailored to achieve that end. “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” He used the admissions program at Harvard as an example of an admissions policy that takes race into account without the assignment of a fixed number of places to a minority group. At Harvard, race or ethnic background was deemed a “plus” in an applicant’s file without shielding that applicant from comparison with all other applicants for all available seats. To be constitutional a program must review each applicant individually and holistically and be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”



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## *Richmond v. J. A. Croson Co. (1989)*<sup>14</sup>

**Minority Business Utilization Plan.** While the *Bakke* decision set the standard for review of affirmative action cases dealing with public education, the *Croson* ruling set the precedent for affirmative action cases dealing with state government employment and contracting. In this case, the Court defined all racial classifications (benign as well as invidious) issued by state governmental entities as suspect and adopted strict scrutiny as its standard of Equal Protection Clause review. The case centered on a Minority Business Utilization Plan adopted by the City of Richmond, Virginia that required prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to "Minority Business Enterprises" (MBEs). The City would grant a waiver of this 30 percent set-aside "only upon proof that sufficient qualified MBEs were unavailable or unwilling to participate." The plan was declared by the city council to be "remedial" in nature and necessary to eradicate the effects of past discrimination in the construction industry and to promote wider participation by MBEs. J. A. Croson Co., the sole bidder on a city contract, was denied a waiver and lost its contract; it brought suit claiming that the plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.

**Supreme Court Decision.** Before this case went to the Supreme Court, the Court of Appeals ruled that the City's plan was unconstitutional because it violated both prongs of the strict scrutiny test: 1) it was not justified by a compelling governmental interest since the record revealed no prior discrimination by the City itself and 2) the 30 percent set-aside was not narrowly tailored to achieve a remedial purpose (the plan only needed to fail one prong of the test to be ruled unconstitutional). The Supreme Court affirmed this opinion. Justice O'Connor delivered the opinion of the Court stating that:

A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the City's legisla-

tive body to determine the precise scope of the injury it seeks to remedy and would allow race-based decision-making essentially limitless in scope and duration.

In the *Croson* ruling, the Court made reference to two previous opinions that helped to form this decision.

***Fullilove v. Klutznick (1980)*.**<sup>15</sup> In *Fullilove*, the Court upheld a minority set-aside contained in the federal Public Works Employment Act of 1977. Strict scrutiny was not applied in the *Fullilove* case because of Congress's broad remedial power and specific constitutional mandate to enforce the Fourteenth Amendment; state power, on the other hand, is limited by the Amendment. Also, the 10 percent set-aside in the *Fullilove* case was more flexible in its allowance for waivers. It was made clear in the *Fullilove* decision that "other governmental entities might have to show more than Congress before undertaking race-conscious measures."

***Wygant v. Jackson Board of Education (1986)*.**<sup>16</sup> *Wygant*, on the other hand, dealt with local government and "addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union." In the *Wygant* case, the Court applied the standard of strict scrutiny and ruled that the adoption of race-based measures by the school board required "some showing of prior discrimination by the governmental unit involved."

The Court ruled that the standard of strict scrutiny applied in the *Wygant* case must be applied in the *Croson* case because "The Richmond plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race." The Court reaffirmed that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by the classification. The Court made a point of noting that nothing in its ruling would preclude a state or local entity from taking action to remedy the effects of proven discrimination within its jurisdiction.

<sup>15</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980)

<sup>16</sup> *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)

<sup>14</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)

## *Adarand Constructors, Inc. v. Pena* (1995)<sup>17</sup>

**Federal Government Contracting.** In this case involving government contracting, the Supreme Court applied the standard of strict scrutiny to a benign race-based program created by Congress. While the Court had applied the strict scrutiny standard to a local government program in the *Crosby* case, it had not yet applied that standard to a federal program. In the *Crosby* case, the majority “acknowledged that Congress has a specific mandate to enforce the dictates of the Fourteenth Amendment, whereas state conduct is specifically subject to that Amendment.”<sup>18</sup> In a move from this opinion, the Court held in *Adarand* that Congressional action aimed at remedying the effects of past discrimination should be analyzed under the same standard of strict scrutiny as state action.

In this case, *Adarand Constructors, Inc.* filed suit claiming that the federal government’s practice of giving incentives to general contractors to subcontract with “socially and economically disadvantaged individuals,” whom the government identified using race-based measures, violates the equal protection component of the Fifth Amendment’s Due Process Clause. Among other things, the Fifth Amendment to the U.S. Constitution declares that “No person shall be...deprived of life, liberty, or property, without due process of law...” This wording is identical to the wording in the Fourteenth Amendment, which protects individuals from discriminatory action taken by the states. In this case, the Court interpreted the Fifth Amendment as requiring that the federal government be held to strict judicial review when enacting any legislation that would discriminate against or grant preferences to any groups or individuals on the basis of race or ethnicity. The Court held that “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” This decision overruled earlier opinions that required a less rigorous standard of scrutiny for federal programs. The case was remanded to the Court

of Appeals for further judgment as to whether the racial classifications in the federal contracting program serve a compelling governmental interest and are narrowly tailored to achieve that interest.

## *Grutter v. Bollinger et al.* (2003)<sup>19</sup>

**University of Michigan Law School Admissions.** This case revolved around the admissions policy at the University of Michigan (UM) Law School. Michigan’s Law School is ranked among the top schools in the nation and seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” When developing its admissions policy, the Law School explicitly tried to follow the example of Harvard’s admissions policy promoted by Justice Powell in the *Bakke* decision in order “to ensure that its efforts to achieve student-body diversity complied with this Court’s most recent ruling on the use of race in university admissions.” Grades and test scores are important, but admissions officials are required to look beyond these to “soft” variables, which include race and ethnic origin. The admissions policy states that a high score does not guarantee admissions and a low score does not automatically disqualify an applicant. However, it explicitly states that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.” While the policy recognizes “many possible bases for diversity admissions,” it reaffirms the School’s commitment to “racial and ethnic diversity” by attempting to admit a “critical mass” of minority students each year. According to testimony by Law School officials, “critical mass” is interpreted as “meaningful numbers” that encourage minority students to participate in the classroom without feeling isolated. This, in turn, allows racial stereotypes to “lose their force because non-minority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”

The plaintiff in this case, a white female named Barbara Grutter, filed suit after having her application rejected alleging that she was discriminated against on the basis of her race in violation of the Fourteenth Amendment, Title VI of the 1964 Civil Rights Act, and 42 U.S.C. §1981.

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<sup>17</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)

<sup>18</sup> Ravitch, Frank S. “Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of *Adarand Constructors, Inc. v. Pena*.” *Dickinson Law Review*. 101.2 (1997): 287-288.

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<sup>19</sup> *Grutter v. Bollinger et al.*, No. 02-241 (2003)

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**Supreme Court Decision.** The Court ruled in favor of the Law School by a 5-4 vote. Justice O'Connor delivered the opinion of the Court stating that "The Law School's narrowly tailored use of race in admissions decisions to further a compelling state interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause." The Court did not find it necessary to determine if Justice Powell's decision in *Bakke* was binding precedent because it endorsed his opinion that student-body diversity is a compelling state interest. The Court further upheld Justice Powell's notion of granting a degree of deference to a university in its admissions and other academic decisions, within the boundaries of the Constitution. However, it still viewed race-based government action as a highly suspect tool requiring narrowly tailored means as well as a compelling interest. The Law School's program was ruled to be flexible, using race in a non-mechanical way as a "plus" factor for racial minorities. The key to the constitutionality of the Law School's program is individualized and holistic review of applicants and the fact that race is only one factor among many that the School considers as contributing to diversity.

The Court ruled that narrow tailoring does not require the exhaustion of every possible race-neutral alternative; nor does it require a university to choose between maintaining a reputation for excellence and fulfilling a commitment to educational diversity. The Court noted, though, that "a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Therefore, it put time limits on the need for race-conscious admissions policies and stated that it expects that 25 years from now, race-based policies will no longer be necessary to achieve student-body diversity.

**Dissenting Argument.** The four dissenting justices in this case argued that they do not believe the Law School's means are narrowly tailored to meet its stated interest. They argued that the program is simply a guise to achieve racial balancing, which is "patently unconstitutional." They offered as evidence a "tight correlation" between the percentages of applicants and admittees of each under-represented race, which they believe results "from careful race-based planning by the Law School."

**Gratz et al. v. Bollinger et al. (2003)**<sup>20</sup>

### **University of Michigan Undergraduate Admissions.**

This case, while similar to the *Grutter* case, dealt with UM undergraduate admissions. UM's Office of Undergraduate Admissions (OUA) considered a number of factors in making admissions decisions, including, but not limited to, grades, test scores, personal achievement, and race. Beginning with the 1998 academic year, OUA began using a "selection index" system on which an applicant could score up to 150 points. Under a miscellaneous category, an applicant would be awarded 20 points based upon his or her membership in an under-represented racial or ethnic minority group. These 20 points led to "virtually every qualified...applicant" from an under-represented minority group being admitted. Admissions guidelines required that qualified minority candidates be admitted as soon as possible because the University believed that these applicants would be more likely to enroll if promptly notified of their admission. The University also had a "rolling admissions system" that allowed it to hold some seats in order to permit consideration of certain applicants later in the year. "Protected seats" were held for specific groups, including athletes, foreign students, Reserve Officers' Training Corps' candidates, and under-represented minorities.

In 1999, the University created an Admissions Review Committee (ARC) "to provide an additional level of consideration for some applications." With this new policy, counselors could "flag" an application for ARC consideration after determining that an applicant met three conditions: 1) was prepared to succeed academically at the University; 2) had achieved at least a minimum selection index score; and, 3) possessed a quality or characteristic important to the University's diversity, such as "high class rank, unique life experiences, challenges, circumstances, interests, or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography."

The petitioners filed a class-action lawsuit alleging racial discrimination and a violation of their right to equal protection of the laws under the Fourteenth Amendment, Title VI of the 1964 Civil Rights Act, and 42 U.S.C. §1981.

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<sup>20</sup> *Gratz et al. v. Bollinger et al.*, No. 02-516 (2003)

**Supreme Court Decision.** In a 6-3 decision, the Court ruled that the University's freshman admissions policy violated the Equal Protection Clause of the Fourteenth Amendment because its use of race was not narrowly tailored to achieve its stated interest in diversity. The Court rejected the petitioners' argument that diversity cannot constitute a compelling state interest (see *Grutter v. Bollinger et al.*); however, it ruled that the automatic distribution of 20 points to every under-represented minority candidate had the effect of making race the "decisive factor for virtually every minimally qualified minority applicant." The individualized consideration provided by the ARC could not save the program. Individualized review was provided after the automatic distribution of points based on minority status (making it unnecessary for most minimally qualified minority applicants) and it was undisputed by the University "that such consideration is the exception and not the rule..." The Court stated that the fact that the implementation of a program capable of providing the individualized review necessary might present administrative difficulties does not make constitutional an otherwise problematic system.

As a result of this ruling, UM instituted a new process to review undergraduate admissions candidates that is more holistic and individualized. Being so, it is also more time-consuming and costly for the University but it provides a way for UM to consider race as one of many factors contributing to diversity yet still comply with the Supreme Court rulings.

**Dissenting Argument.** The dissenting opinions began by stating that the petitioners lacked standing because both had already enrolled in other schools and neither was in the process of reapplying to UM through the freshman admissions process. Standing

requires petitioners to have a personal stake in the suit for prospective relief; precedent requires dismissal of cases without standing. Two of the justices also dissented from the majority based on the merits of the case arguing that the UM freshman admissions system was closer to what the *Grutter* case approved (i.e., the individualized consideration of race to achieve a diversity of students) than to what the *Bakke* case condemned (i.e., racial quotas or set-asides), and therefore should not be held unconstitutional. Furthermore, they argued that UM's admissions policy should be considered constitutional because the goal of its policy is not to limit or decrease enrollment of any particular racial or ethnic group, but simply to increase diversity and the presence of under-represented students.

## Summary of Court Decisions

These five major Supreme Court decisions have interpreted the law regarding affirmative action and preferential treatment in public education and public employment and contracting. In higher education, it has been ruled that minority status can be viewed as a plus factor in order to increase student-body diversity. However, minority status may not be given a set weight or be viewed as the primary factor contributing to student-body diversity. In government employment and contracting, any programs using minority status as a criterion must pass the strict scrutiny test, which requires a compelling governmental interest and means that are narrowly tailored to achieve that interest. The Court has ruled that in government hiring and contracting, a compelling governmental interest to provide preferential treatment can only be achieved with evidence of past discrimination by the governmental entity involved.



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## Experience in Other States

### California's Proposition 209

In November 1996, California voters approved Proposition 209 (by a margin of 54 to 46 percent), which amended the State Constitution to ban affirmative action programs granting preferential treatment to individuals and groups based on minority status or gender. Proposition 209 (also known as the California Civil Rights Initiative) is the model upon which the Michigan Civil Rights Initiative (MCRI) was based. Proposition 209 amended the California Constitution to include the following language: "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." The controversial initiative was delayed in the courts for almost a year before going into effect.

**Legal History of Proposition 209.** The California Senate Office of Research issued a report detailing the legal history of Proposition 209.<sup>21</sup> This report states that a common misconception about Proposition 209 is that it outlawed all affirmative action programs. The California codes contain various references to affirmative action concepts, programs, and officers. Such references violate Proposition 209 *only* if they discriminate or grant preferential treatment on the basis of race, sex, color, ethnicity, or national origin. The state legislature has taken some actions to increase diversity in public contracting legislation through race-neutral means since the passage of Proposition 209. In October 2001, the governor signed AB 1084, Chapter 882 into law, which "seeks to increase the participation of small businesses in public contracts for construction, goods, and services."

The Senate Office of Research report discussed in detail the pivotal lawsuits that have worked their way through the California court system. The court decisions provide direction on implementing the new

amendment and on the programs and policies that will not withstand constitutional review. While courts in Michigan are not beholden to California courts, they often give deference to opinions issued in other states dealing with similar subject matter; therefore, these decisions can be viewed as indicators of what to expect in Michigan. In *Coalition for Economic Equity v. Wilson* (1997), the U.S. Ninth Circuit Court of Appeals upheld Proposition 209's overall validity, ruling that the state amendment was not rendered unconstitutional by federal law or the U.S. Constitution.

Once the proposition was ruled to be constitutional, lawsuits were filed questioning the constitutionality of government programs in the State of California under the new law. In *Kidd v. State of California* (1998), the California Court of Appeals ruled that the state's supplemental certification program, which allowed minority and female applicants to be considered for positions even though they did not place in the top three ranks on the list of eligible candidates, violated Proposition 209 and the merit principle embodied in the California Constitution. In 2000, the California Supreme Court ruled that a San Jose city ordinance requiring construction contractors to solicit bids from minority- and women-owned businesses violated Proposition 209 in *Hi-Voltage Wire Works v. City of San Jose*. In a unanimous opinion, the Court invalidated "participation goals" and "targeted outreach," but acknowledged that some proactive or affirmative action outreach efforts would be considered permissible as long as they do not discriminate or grant preferences based on race, ethnicity or gender. However, the Court did not elaborate specifically on what would be considered permissible efforts and actions (see **Outreach Preferences in California** sidebar on page 14).

In *Connerly v. State Personnel Board* (2001), the California Court of Appeals, Third Appellate District, invalidated statutory affirmative action programs that required goals for hiring and promoting women and minorities in the State civil service system and in the California community college system. The ruling also nullified programs awarding a share of state contracts to firms owned by minorities or women. The Court upheld requirements for data collection and reporting for government bonds, the State civil service sys-

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<sup>21</sup> "Proposition 209 and the Courts: A Legal History." January 2002. California Senate Office of Research. [www.sen.ca.gov/sor/reports/REPORTS\\_BY\\_SUBJ/GOVERNMENT/Prop209.pdf](http://www.sen.ca.gov/sor/reports/REPORTS_BY_SUBJ/GOVERNMENT/Prop209.pdf). (accessed 17 February 2006)

## Outreach Preferences in California

### *Hi-Voltage Wire Works, Inc., et al. v. City of San Jose et al. (2000)*<sup>22</sup>

Prior to the passage of Proposition 209, the City of San Jose established a "Minority Business Enterprise (MBE)/Women Business Enterprise (WBE) Construction Program" which set participation goals and other regulations to "encourage non-discriminatory subcontracting." After the passage of Proposition 209, the City replaced its Office of Affirmative Action/Contract Compliance with an Office of Equality Assurance, and its "MBE/WBE Construction Program" became the "Non-discrimination/Non-preferential Treatment Program Applicable to Construction Contracts in Excess of \$50,000." The new program was justified by a 1990 study commissioned by the City that found a disparity in the number and dollar value of contracts awarded to MBEs and WBEs. The goal of the program was to "ensure that historical discrimination does not continue."

**Documentation of Outreach or Participation.** The new program was very similar to the previous program and required contractors to fulfill either an outreach or a participation component. The "Documentation of Outreach" option consisted of three steps. First a contractor had to maintain records of written notice to four certified MBEs/WBEs for each trade area identified in the project. Second, the contractor had to document at least three attempts to contact the MBE/WBE firms to discuss the project and determine their interest in participating. If any expressed interest, the contractor was required to "negotiate in good faith." And finally, the contractor had to specify the reasons for rejecting any MBE/WBE bids and could not do so without justification. The "Documentation of Participation" option would be met if a contractor listed a sufficient number of MBEs/WBEs in his or her bid to meet an "evidentiary presumption" of non-discrimination. The sufficient number of MBE/WBEs to meet this "evidentiary presumption" was determined by the City and based on the number of MBE/WBE subcontractors that would be expected in the absence of discrimination. If this was met, then the contractor did not have to document any outreach efforts. Any bid failing to document either outreach or participation was rejected as "non-responsive."

**California Supreme Court Decision.** Hi-Voltage Wire Works, Inc., a general contracting firm, was the low bidder on a city project. It failed to comply with the program's outreach or participation requirements because it intended to use entirely its own workforce. Therefore, the City rejected its bid. Hi-Voltage joined together with a city taxpayer, Allen Jones, and filed suit against the City claiming that the program violated Article I, Section 31 of the California Constitution (the section created by the passage of Proposition 209). The California Supreme Court concluded:

...that the City's Program is unconstitutional because the outreach option affords preferential treatment to MBE/WBE subcontractors on the basis of race or sex, and the participation option discriminates on the same bases against non-MBE/WBE subcontractors as well as general contractors that fail to fulfill either of the options when submitting their bids.

Through outreach and participation requirements, the program served to discriminate and provide preferential treatment in government contracting, which was specifically prohibited by Proposition 209. The Court found that the program violated the State Constitution because it did more than "encourage contractors to include MBEs/WBEs in soliciting subcontractor bids," it required contractors to give personal attention and consideration, and therefore preferential treatment, to MBEs/WBEs. In its ruling, the Court acknowledged that not all outreach programs would be considered unlawful, but that San Jose's program, which operated to "disseminate information on a selective basis," could not be allowed to continue under the new law.

While courts in Michigan are under no obligation to follow the rulings of the California Supreme Court, courts often give deference to previous opinions and would likely take this ruling into consideration when interpreting the new amendment, if it passes. Unfortunately, this court decision did not illuminate what forms of outreach would be considered lawful under the new law, but it did illustrate that targeted outreach programs that have the effect of granting preferential treatment to women and minorities could not pass the challenge of legal review. Outreach programs for government employment and contracting (as well as public university admissions) that are focused on minorities or women, but do not exclude non-minorities and men, would likely remain constitutional (e.g., job fairs in areas with a high minority population, but that anyone can attend, or programs aimed at increasing girls' interest in science or math, but that are still open to participation by boys).

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<sup>22</sup> *Hi-Voltage Wire Works, Inc. et al. v. City of San Jose et al.*, 24 Cal. 4<sup>th</sup> 537 (2000).



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tem, and government contracts as well as layoff procedures for the State civil service system. In its decision, the Court stated that such data “may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices.”

In *Crawford v. Huntington Beach Union High School District* (2002), the California Court of Appeals, Fourth Appellate District, ruled that the California statute allowing school districts to “retain the authority to maintain appropriate racial and ethnic balances among their respective schools at the school districts’ discretion or as specified in applicable court-ordered or voluntary desegregation plans” was invalid under Proposition 209.<sup>23</sup> The Huntington Beach Union High School District had an open transfer policy, but restricted transfers at “ethnically isolated” schools based on race. The Court did not agree with the District’s argument that the transfer policy was required under the Equal Protection Clause of the U.S. Constitution ruling that while the U.S. Constitution clearly “prohibits a school district from acting to segregate schools, there is no federal constitutional mandate necessitating the implementation of a proactive program of integration.” The important distinction is between what is required by the federal Equal Protection Clause and what may be permitted by it. If something is permitted, but not required, by federal law or the U.S. Constitution, then state law (i.e. Proposition 209) is the determining factor.

In *Coral Construction, Inc. v. City and County of San Francisco et al.* (2004), the California Superior Court, County of San Francisco, ruled that the City and County ordinance that granted preferences in contracting to Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) solely on the basis of “race, sex, color, ethnicity, or national origin” was invalid under Proposition 209.<sup>24</sup> The Court ruled that the goals and requirements of the ordinance were similar to those struck down in the *Hi-Voltage* case. The City (and County) argued that its policy of granting preferential treatment to MBEs and WBEs was valid because 1) the International Convention on the Elimination of All Forms of Racism (“Race Convention”) preempts Proposition 209 and 2) the Equal Protection Clause of the U.S. Constitution allows the City’s race-conscious policy. The “Race Convention” refers to a human rights treaty ratified by Congress in 1994. The Court noted that the treaty was ratified by the U.S. Senate “subject to reservations, which make it clear that the treaty cannot override the protections against discrimination and preferential treatment provided by the United States Constitution and Proposition 209.” The Court also rejected the City’s argument that applying Proposition 209 to invalidate the ordinance would violate the Equal Protection Clause of the Fourteenth Amendment ruling that Proposition 209’s validity and consistency with the U.S. Constitution has already been evaluated in the *Coalition for Economic Equity* case. As recognized in that case, Proposition 209 goes further than the Equal Protection Clause because “it provides greater protection to members of the gender and races otherwise burdened by the preference.”

*California “4 Percent” Plan.* In 2001, the University of California (UC) responded to Proposition 209 with implementation of its “Eligibility in Local Context” plan, which guaranteed admission to the top four percent of graduating students from each public and private high school in the state to one of the UC system’s eight campuses. This plan guarantees high performing students from every area of the state UC system admission, but not necessarily admission to the campus of their choice. To be eligible, students must complete 11 units of specified coursework by the end of their junior year of high school. Participating schools then submit the transcripts of the top 10 percent of their juniors to UC and UC system administrators determine student rank (this is done in order to ensure that the top four percent are correctly identified). Students that qualify for the program are required to complete four additional units of designated coursework in their senior year and college entrance exams to remain eligible. These additional requirements are considered by the individual UC institutions when deciding whom to admit. This plan has no impact on out-of-state, graduate and professional students.<sup>25</sup>

<sup>23</sup> *Crawford v. Huntington Beach Union High School District*, 98 Cal. App. 4<sup>th</sup> 1275 (2002).

<sup>24</sup> *Coral Construction, Inc. v. City and County of San Francisco et al.*, SF County Superior Court, Case No. 319549 (2004).

<sup>25</sup> Horn, Catherine L. and Flores, Stella M. “Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences.” Cambridge, MA: [The Civil Rights Project at Harvard University](#), 2003.

Enrollments of blacks and Hispanics in the UC system dropped after passage of Proposition 209. They remain near or below pre-Proposition 209 levels (see *Appendix 2* on page 35). During this same time period, enrollments of white students have declined as well, while enrollments of Asian students and students whose ethnic origin is unknown have risen. At the state's two most selective universities, UC Berkeley and UCLA, minority enrollments remain well below their pre-Proposition 209 levels. Even before Proposition 209 was adopted, blacks and Hispanics were under-represented in the UC system while Asians were over-represented compared to their percentage of the population.<sup>26</sup>

A report issued by the UC Office of the President states that the experience of UC since the passage of Proposition 209 "indicates that in a highly selective institution, implementing race-neutral policies leads to a substantial decline in the proportion of entering students who are African American, American Indian, and Latino."<sup>27</sup> The report states that the provisions of Proposition 209 have been interpreted somewhat broadly to outlaw race-conscious outreach and financial aid. Declines in under-represented students at UC have been partially alleviated by "programs designed to increase enrollments of students from low-income families, those with little family experience in higher education, and those who attend schools that traditionally do not send large numbers of students on to four-year institutions." UC strategies to increase outreach and recruitment of all students, especially under-represented students, include: 1) expansion of outreach to, and partnerships with, K-12 schools, which is designed to increase preparation for all students and to address the achievement gap between students from different backgrounds; 2) expansion of the criteria UC employs to define academic achievement to include qualitative factors such as improvement in academic performance; 3) expansion of the "supplemen-

tal" criteria considered by the University to encompass a broader range of personal talents and achievements; 4) expansion of enrollment of community college transfer students, combined with enhanced outreach to students enrolled in community college; and, 5) implementation of a comprehensive review admissions policy, which encourages campuses "to broaden the conception of merit embodied in their selection policies and to more fully review each applicant."

Even though Proposition 209 has been construed broadly according to UC administrators to outlaw race-conscious recruitment and outreach, student groups at UC-Berkeley have worked on recruiting under-represented students and the admissions office has held recruiting events targeted at specific groups. Additionally, the University offers several scholarships aimed at attracting under-represented students through focusing on eligible under-represented high schools and socioeconomic status.<sup>28</sup> Public universities have also been able to collaborate with private nonprofit groups that provide programs targeted at specific groups (provided that the university is not granting preferential treatment through the collaboration). For example, UC-Berkeley provides students and alumni to serve as role models for Techbridge, a nonprofit organization that organizes after school and summer programs designed to encourage girls in technology, science and engineering (since this is run by a private organization, the programs are legally able to be offered exclusively to females).

*Faculty Diversity at the University of California.* Female faculty in the UC system did drop initially after passage of Proposition 209, but the numbers have fluctuated somewhat over the years since passage and have risen to approximately the same level that they were at in 1995-96 (approximately 35 percent female faculty university-wide). Under-represented minority faculty also dropped slightly after passage of Proposition 209; however, their numbers were not very high

<sup>26</sup> See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."

<sup>27</sup> University of California – Office of the President, Student Academic Affairs. "Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies." March 2003. [www.ucop.edu/sas/publish/aa\\_final2.pdf](http://www.ucop.edu/sas/publish/aa_final2.pdf). (accessed 6 September 2006)

<sup>28</sup> See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."

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to begin with (see *Appendix 3* on page 36).<sup>29</sup> In 2000, the California State Auditor released a report entitled “University of California: Some Campuses and Academic Departments Need to Take Additional Steps to Resolve Gender Disparities Among Professors.” This report detailed steps the University could legally take to attempt to increase female faculty. In 2002, the UC Office of the President released a report on affirmative action guidelines for the recruitment and retention of faculty.<sup>30</sup> This report begins by discussing the federal affirmative action requirements that the University must meet as a federal contractor, which include quantitative analyses of employment numbers, setting placement goals for under-represented groups (however these placement goals “serve as reasonably attainable objectives or targets that are used to measure progress toward achieving equal employment opportunity,” they “do not provide a justification to extend a preference to any individual on the basis of gender, race, or ethnicity”), and identifying where impediments to equal opportunity exist.

The report found that the under-representation of female and minority faculty happen for different reasons. The data regarding female faculty reflect substantial numbers of qualified females in the labor pool, they are just not proportionately entering the faculty ranks at UC. In these areas, the University aims to identify and eliminate barriers that prevent females from obtaining faculty appointments. The data regarding minority faculty reflect an under-representation of minorities pursuing doctoral degrees. In these areas, the University aims to work to expand the number of minorities entering and graduating from doctoral programs. To address these challenges, “the University of California may engage in a variety of voluntary practices that, although not strictly required by Federal

affirmative action regulations, promote values of equal employment opportunity and are consistent with the State Constitution and University policy. These types of non-preferential affirmative action programs are important vehicles for expressing the University’s commitment to diversity, equal opportunity, and academic freedom.” These programs and policies involve composing search committees, developing position announcements, advertising, encouraging proactive informational outreach (i.e., specifically inquiring about promising female and minority candidates), analyzing the applicant pool to ensure that it is sufficiently diverse, and monitoring the selection process to ensure equal opportunity. The report also promotes programs to mentor and develop junior faculty and to monitor pay equity. The University and departments are legally able to encourage faculty to conduct research on topics such as race, ethnicity, gender, and multiculturalism as a method to increase diversity.

### Washington’s Initiative 200

In November 1998, Washington voters passed Initiative 200, known as the Washington State Civil Rights Initiative. It did not amend the State Constitution, but simply became law as a new section under Chapter 49.60 of the Revised Code of Washington. It was modeled on Proposition 209 in California and had the effect of ending preferential treatment based on “race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

*Washington State Affirmative Action Plan.* When this initiative passed, Washington had a fairly strong statewide affirmative action program granting preferential treatment in state employment to members of certain “protected groups,” including women, racial and ethnic minorities, disabled people, Vietnam-era veterans, disabled veterans, and people over 40 years of age. Every state agency was required to have an “Affirmative Action Plan” and to update it every year. The goal of the plans was “to achieve parity for every job group of employees within each agency.” The state’s Supplemental Certification (“Plus 3”) Program was implemented to improve the hiring chances of individuals from these groups. For every position, the top seven candidates (based on test scores) would be certified to be considered, as well as three more candi-

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<sup>29</sup> University of California – Office of the President. “University of California: New Appointments of Ladder Rank Faculty, 1984 -85 through 2004 -05.” [www.ucop.edu/acadadv/datamgmt/welcome.html](http://www.ucop.edu/acadadv/datamgmt/welcome.html). (accessed 25 August 2006)

<sup>30</sup> University of California – Office of the President, Academic Advancement. “University of California Affirmative Action Guidelines for Recruitment and Retention of Faculty.” 2 January 2002. [www.ucop.edu/acadadv/fgsaa/affirmative.pdf](http://www.ucop.edu/acadadv/fgsaa/affirmative.pdf) (accessed 6 September 2006).

## Current Events at the Federal Level

On June 5, 2006, the U.S. Supreme Court announced that it will rule on two cases pertaining to race-conscious admissions policies in public education. In the *Grutter* and *Gratz* cases, the Court ruled on the legality of race-conscious admissions policies and diversity as a compelling state interest in higher education, but “this would be the first time it has addressed the ‘diversity rationale’ as it affects the country’s 48 million public elementary and secondary students.”<sup>31</sup> The two cases center on the integration policies of public school districts in Louisville, Kentucky and Seattle, Washington. In Louisville, the school district is 34 percent minority and has struggled with segregation for a long time. It operated a court-ordered busing system to integrate its schools from 1975 to 1984. In 2001, the district voluntarily adopted a plan that requires all schools, including magnet schools, to have a minimum minority enrollment of 15 percent and a maximum of 50 percent.<sup>32</sup> The Seattle School District has never had problems with *de jure* segregation, but adopted an open choice plan to help mitigate the problem of *de facto* segregation caused by residential housing patterns. The Seattle public school population is 40 percent Caucasian and 60 percent minority. Students in the Seattle School District are allowed to attend the school of their choice provided that there is sufficient availability at the school and it is not “oversubscribed.” The district established four “tie breakers” to assign students to the oversubscribed schools. One tie breaker deals with student race. If an oversubscribed school deviates more than 15 percent from the overall demographic make-up of Seattle students (i.e., is more than 75 percent minority or less than 25 percent Caucasian), then either minority or white students will be assigned to the school until it reflects the overall student population within 15 percent. This tie breaker accounts for approximately 10 percent of student assignments and is no longer used once racial balance is achieved.<sup>33</sup>

Citizens of the State of Washington passed Initiative 200 in 1998, which prohibited the state from discriminating against, or granting preferential treatment to, “any individual or group on the basis of race, sex, color, ethnicity, or national origin. . . .” Before going to the U.S. Supreme Court, the Seattle plan had to pass legal challenge in Washington courts. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2003), the Washington Supreme Court concluded that RCW 49.60.400 (Washington law created by I-200) “prohibits some, but not all, race-cognizant government action.” It ruled that affirmative action programs that advance a less qualified applicant over a more qualified applicant are impermissible; however, programs that are racially neutral remain lawful. The Seattle plan was ruled to be racially neutral because the tie breaker is applied equally to members of all races, limiting and benefiting minorities and non-minorities alike. Part of the reason that this plan (with the racial tie breaker) was upheld in Washington is the result of the State Constitution’s unique treatment of education, which is declared to be the state’s “highest priority.” Initiative 200 was adopted as statutory law; therefore it is interpreted under Washington’s unique constitutional law. Also, a subsection of RCW 49.60.400 states that “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.” This language, which was viewed by the Washington Supreme Court as allowing some race-cognizant government action, is not included in the MCRI proposal.

Argument before the U.S. Supreme Court for the two cases will take place in December 2006, and the Court will render its decisions by July 2007. These rulings could be very significant to the affirmative action debate at the national level; however, their impact in Michigan is not likely to be as momentous. If Proposal 2006-02 passes, it will restrict the use of race-conscious policies in the state more than federal law and court rulings limit the use of affirmative action policies, regardless of the Supreme Court’s decisions in the two current cases. If Proposal 2006-02 does not pass, the Supreme Court ruling would not likely change any current policies at school districts in Michigan.

<sup>31</sup> Lane, Charles. “Justices to Hear Cases of Race-Conscious School Placements.” *The Washington Post*. 6 June 2006. [www.washingtonpost.com/wp-dyn/content/article/2006/06/05/AR2006060500367.html?sub=AR](http://www.washingtonpost.com/wp-dyn/content/article/2006/06/05/AR2006060500367.html?sub=AR).

<sup>32</sup> See Lane. “Justices to Hear Cases of Race-Conscious School Placements.”

<sup>33</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, Docket Number 72712-1 (2003).



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dates from the “protected groups.” If one of the “protected” candidates was chosen, then the agency could count it toward fulfilling its affirmative action goal. If one of the other seven candidates was chosen, then the supervisor making the hiring decision had to explain that decision in writing.<sup>34</sup>

*Office of Minority and Women's Business Enterprises (OMWBE).* OMWBE was created to oversee the state's affirmative action policies in government procurement and contracting. It accomplished this in two ways. First, it ran a certification program, which identified qualified minority- and women-owned businesses. Second, it operated a reporting system to monitor State agencies and ensure that they were making progress toward their affirmative action goals. While the certification process could be quite cumbersome for businesses, it often provided companies with “a competitive advantage when doing business in the public sector” (e.g., one advertisement for a \$15,000 state contract for public relations services specified that it would only consider responses “from firms certified as Minority Business Enterprises”).<sup>35</sup>

*Impact of Initiative 200.* Since the law went into effect in 1998, it has dismantled the state's affirmative action programs with regard to minority status and gender, but there have been no lawsuits regarding state and local government hiring and employment since implementation. The problems have largely been related to education. The Seattle School District has an open choice plan allowing students to attend their preferred school. However, some schools are “over-subscribed” and the district has explicitly retained race as one of the four “tie breaker” factors it considers in assigning students to a school. As a result, some parents filed a lawsuit on the legality of the school's policy; the policy has been upheld by the Washington Supreme Court and is currently before the U.S. Supreme Court (see *Current Events at the Federal Level* sidebar on page 18).<sup>36</sup>

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<sup>34</sup> See Guppy. “A Citizen's Guide to Initiative 200: The Washington State Civil Rights Initiative.”

<sup>35</sup> See Guppy. “A Citizen's Guide to Initiative 200: The Washington State Civil Rights Initiative.”

<sup>36</sup> Guppy, Paul. “Impact of Initiative 200.” Email to Jill Roof. 14 February 2006.

The University of Washington (UW) implemented the law, but claimed that it would have a negative effect on minority applications and admissions. Minority admissions did drop initially but have increased to pre-Initiative 200 levels (see *Appendix 4* on page 38). UW achieved the increase in minority applications and admissions through extensive outreach and recruitment programs targeted to members of under-represented groups. One new outreach program funded by the State uses UW student ambassadors to reach out to prospective students in certain Washington public schools with high minority populations.<sup>37</sup> UW also changed its admissions process by encouraging schools and departments to consider factors such as cultural and life experiences, and educational, economic, and personal disadvantage in their application processes. Some critics argued that this is simply a way to continue affirmative action preferences in disguise, but it has passed legal challenges. UW also modified its policies so that all university events and programs are open to all students and employees, regardless of race, ethnicity, or gender; however, programs can still be aggressively targeted to certain groups. According to UW Student and Employment Policies, the University may still aggressively recruit and outreach to targeted members of under-represented groups to increase student and employee applicants.<sup>38</sup>

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<sup>37</sup> Baker, Mike. “Outreach Offsets I-200 Decline.” *The UW Daily*. 9 December 2004.

<sup>38</sup> “Interim I-200 Student Policies” and “Interim I-200 Employment Policies.” *UW Information Navigator*. 4 November 2004. University of Washington. [www.washington.edu/diversity/archive/policies/students.html](http://www.washington.edu/diversity/archive/policies/students.html) (accessed 14 February 2006) and [www.washington.edu/diversity/archive/policies/employ.html](http://www.washington.edu/diversity/archive/policies/employ.html) (accessed 14 February 2006); and Guppy, Paul. “Impact of Initiative 200.” Email to Jill Roof. 14 February 2006.

## Texas

The State of Texas has a long history of segregation in its higher education institutions. In 1978, the U.S. Department of Health, Education and Welfare, through its Office of Civil Rights, threatened legal action against Texas if it did not work to integrate its system of higher education. In response, the Texas Higher Education Coordinating Board created the "Texas Plan," which introduced goals for minority enrollment in higher education. In 1994, it adopted a new voluntary, six-year plan to increase minority graduation rates, minority graduate and professional students, minority faculty and staff, and minority and female representation on the governing boards of public higher education institutions.<sup>39</sup>

### *Hopwood v. University of Texas Law School (1996)*

The admissions policy at the University of Texas (UT) School of Law set different standards for minority versus majority students in an effort to increase minority enrollment. A separate admissions subcommittee reviewed minority applications, which were not measured against applications from the majority, and recommended to the full committee a sufficient number of minority candidates to meet the enrollment targets set in the Texas Plan. This dual-admissions program was challenged successfully in the *Hopwood* case. The Fifth U.S. Circuit Court of Appeals struck down the admissions program ruling "that it amounted to illegal reverse discrimination." The Court's ruling broadly challenged the use of affirmative action policies other than those narrowly tailored to remedy a clear case of discrimination. Even though the Law School's dual-admissions program likely would not have been found constitutional using Justice Powell's reasoning in the 1978 *Bakke* decision, the Appeals Court took its analysis further and rejected Justice Powell's argument that diversity was a legitimate and compelling state interest. According to the Court, the only policies that would be considered constitutional are those that remedy past discrimination. The Supreme Court allowed the ruling to stand. (However, the Court's 2003 ruling in *Grutter v. Bollinger et al.* invalidated *Hopwood*.)<sup>40</sup>

<sup>39</sup> Barr, Rita. "Should Texas Change the Top 10 Percent Law?" House Research Organization Report 79-7 (2005): 1-8.

<sup>40</sup> See Barr. "Should Texas Change the Top 10 Percent Law?"

*Texas "10 Percent" Plan.* In response to the *Hopwood* court ruling and declining minority enrollments at the state's most selective universities, Texas implemented a "Top 10 Percent Plan." This plan guarantees admission to the top 10 percent of graduating students from each public and private high school in the state into the Texas public university of their choice, including the state's two flagship, and most selective, universities: UT-Austin and Texas A&M. Class rank is calculated by the school district from which the student graduated. Initially there were no specific course requirements beyond the state's minimum graduation criteria, but legislation was passed requiring all eligible students to obtain a "Recommended High School Diploma" beginning with the 2004-05 entering high school freshmen. Since implementation of the 10 percent plan, enrollments of minority students have met or surpassed their pre-*Hopwood* levels while the enrollment of white students has declined slightly (see *Appendix 5* on page 39). However, diversity on the college campuses does not even come close to matching the diversity within the larger community. Whites and Asians are over-represented on college campuses throughout Texas and blacks and Hispanics are substantially under-represented. This gap is likely to widen as the growth of minority populations outpace the growth of the majority in Texas. As in California, the increases in minority enrollment in Texas cannot be completely attributed to the 10 percent plan because it has been coupled with extensive recruitment and outreach programs. UT-Austin implemented its new Presidential Achievement Scholars program which focuses on identifying students from economically disadvantaged backgrounds in giving scholarships (before *Hopwood*, this was a race-conscious scholarship program). Both UT-Austin and Texas A&M have tied scholarships with the 10 percent plan and designated students in certain high schools as recipients.<sup>41</sup>

The goal of the plan has been to increase geographic, socioeconomic, and racial and ethnic diversity in the schools without using minority status as an admissions criterion. There has been debate about this plan simply being a proxy for minority status and unfairly limit-

<sup>41</sup> See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."



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## Affirmative Action Admissions

A study conducted by two sociologists from UC-Davis analyzed survey data collected by the College Board in the Annual Survey of Colleges between 1986 and 2003. They examined data from approximately 1,300 four-year colleges in the nation and found that during the time period studied, the percentage of public four-year colleges that considered minority status in admissions fell from over 60 percent to around 35 percent. Throughout the entire period studied, the more elite colleges (judging by factors such as average SAT scores, tuition rates, and acceptance rates) were more likely to consider minority status.<sup>42</sup> This study suggests that affirmative action programs may be on the decline and only used in the admissions processes at the more elite colleges across the nation.

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<sup>42</sup> Jaschik, Scott. "The Decline of Affirmative Action." *Inside Higher Ed*. 2 June 2005. [www.insidehighered.com/news/2005/06/02/survey](http://www.insidehighered.com/news/2005/06/02/survey) (accessed 6 June 2006)

ing admissions of highly qualified students in competitive schools that are not in the top 10 percent of their graduating class. Research findings from Princeton's Office of Population Research as part of the Texas Higher Education Opportunity Project found little evidence that students from any secondary schools in Texas, especially those from the most competitive schools, are being crowded out of Texas's most selective public institutions. However, the plan has greatly limited the discretion of the universities in whom they admit. In fall 2003, 70.5 percent of UT-Austin's freshman students were admitted automatically through the plan. There have been calls to limit the number of automatically admitted students through giving students the guarantee of admission to a public institution but not necessarily the institution of their choice (like in California). There have also been calls to end the 10 percent plan since the Supreme Court rulings in the two UM cases validated the limited use of race to achieve student-body diversity. Beginning with the 2005-06 academic year, UT-Austin added race and ethnicity to the criteria it considers for student admissions, scholarships, and fellowships in the cases where it has discretion. It implemented a holistic admissions process that complies with the Supreme Court rulings regarding admissions programs at UM.<sup>43</sup>

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<sup>43</sup> See Barr. "Should Texas Change the Top 10 Percent Law?"

## The "One Florida" Initiative

In November 1999, Governor Jeb Bush ended affirmative action preference programs in public employment, contracting, and higher education in Florida by issuing Executive Order 99-281, also known as the "One Florida" initiative. Concurrent with this initiative, Governor Bush implemented the "Talented 20" policy in the Florida State University System. This plan is similar to the plan in California. It grants systems admission to the top 20 percent of graduating students from each public high school in the state. Eligible students must complete 19 college preparatory classes, and each school determines class rank. In general, minority enrollments have been steadily increasing in the Florida university system since 1990. There have been some slight declines at the state's most selective universities since the passage of the "One Florida" initiative (see *Appendix 6* on page 40). However, once again, under-represented minorities are not enrolled in the more selective universities in parity with their presence in the population. These differences are probably understated in all the states as their student-age population tends to be more diverse than each state's population as a whole.<sup>44</sup>

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<sup>44</sup> See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."

## Implications of MCRI for Michigan

### Impact on University Admissions

#### University of Michigan-Ann Arbor

After the 2003 Supreme Court decisions, UM was forced to change its undergraduate admissions policy. It is still allowed to have a race-conscious admissions program, but the point system has been discarded and applicants are reviewed individually and holistically with race representing only one possible aspect of diversity. The new process requires admissions officials to gather more information about each applicant and includes multiple levels of highly individualized review. While academics continues to be the most important factor in admissions, non-academic factors considered in the admissions process include personal interests and achievements, alumni connections, race and ethnicity, family income, and family educational background. None of these factors has a fixed weight in the admissions process. Each application is evaluated by two people before going to a senior-level manager in OUA who makes the final decision.

If Proposal 2006-02 passes, UM will no longer be able to consider race, ethnicity, or national origin as a plus factor in the admissions process as it now does in its undergraduate and graduate admissions programs. UM will still be able to consider race-neutral non-academic factors in admissions, such as socioeconomic status, geography, and personal interests.

**University Programs.** UM has a Women in Science and Engineering (WiSE) program that operates a number of K-12 outreach programs in support of females in science and engineering disciplines. These programs emphasize gender, are targeted to girls, and promote female scientists and engineers, but they do not exclude boys that wish to apply. UM also has a Center for the Education of Women (CEW) which offers free education and employment counseling, among other things. Even though its emphasis is on women, CEW

services are available to men as well as women.<sup>45</sup> Based on the language of the proposal, it would appear that these programs could continue as long as they continue to allow male attendance. Any programs that operate to exclude males would no longer be allowed. The WiSE program at UC-Santa Barbara is able to aim its program at females as long as it does not exclude males from participating. UC-Santa Barbara's program is a student-run program that is not as well-funded as UM's program. It organizes events and activities for students, outreach to younger females is currently beyond its scope (however, it would be open to the idea with the available funds).<sup>46</sup>

UM offers pipeline programs in the health professions with the goal of eradicating health care disparities among chronically underserved populations by improving the recruitment of under-represented students. However, it appears that the programs are open to both minority and majority students (some require eligible individuals to be interested in working to eliminate health disparities or to be from an economically disadvantaged or ethnically under-represented population). If any of these programs are viewed by the courts as providing an advantage based on minority status or gender, then they will be affected by passage of Proposal 2006-02. Otherwise, they should not be affected as most appear to be open to all interested applicants.<sup>47</sup>

#### Other State Universities

The passage of this proposal will be felt most strongly at UM-Ann Arbor. Other Michigan public universities do not appear to use affirmative action preference pro-

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<sup>45</sup> "Frequently Asked Questions about the Proposed 'Michigan Civil Rights Initiative.'" [University of Michigan website: Information on U-M Admissions Lawsuits](http://www.umich.edu/~admissions/new/mbp_faq.html). 9 May 2006. [www.vpcomm.umich.edu/admissions/new/mbp\\_faq.html](http://www.vpcomm.umich.edu/admissions/new/mbp_faq.html). (accessed 24 August 2006)

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<sup>46</sup> Lester, Sarah. "UC-Santa Barbara's WiSE Program." Email to Jill Roof. 24 August 2006.

<sup>47</sup> See "Frequently Asked Questions about the Proposed 'Michigan Civil Rights Initiative.'"

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grams in making undergraduate admissions decisions.<sup>48</sup> Michigan State University (MSU), the second most selective public university in the state, has an admissions policy that states that it reviews applicants holistically and individually, but makes decisions “without regard to race, color, gender, religion, national origin, political persuasion, sexual orientation, marital status, disability, height, weight, veteran status, age or (in the case of U.S. citizens) financial need.” Many of the other universities’ websites contain an equal opportunity statement and focus on academic and extracurricular admissions criteria.

Wayne State University (WSU) has a Center for Chicano-Boricua Studies that “recruits Latino students into a two-year academic program designed to facilitate the transition between high school and college and to increase retention.” The program also provides support services for Latino students who are not formally in the program. This program may be in violation of Proposal 2006-02 because it appears to provide a benefit to Latino students that is not available to non-Latino students.

***Graduate and Professional Level Admissions.*** It is difficult to determine how admissions decisions are made at the graduate and professional level. Most universities offer general academic standards that all applicants must meet, but note that additional criteria on which a candidate will be judged vary by program. It is likely that some of the graduate programs throughout the state consider race as a factor in a holistic review of applicants. This is fairly easy to do in small graduate programs while still following the guidelines set in the *Grutter* case. The state has one other public law school (WSU Law School) and one quasi-public law school (MSU College of Law). WSU Law School appears to have an admissions program

similar to the UM Law School’s program. The WSU Law School’s admissions policy explicitly states that it considers personal qualities, such as an applicant’s racial and ethnic background, in its admissions criteria. MSU College of Law is affiliated with MSU and resides on public land and in public buildings, although it is actually a private educational institution. It was originally founded as the Detroit College of Law and it is completely financially independent of MSU and the State of Michigan, but it is academically integrated with MSU. Therefore, it is difficult to determine whether it would be considered a public institution for equal protection purposes and thereby subject to this proposal. Its admissions policy offers race-neutral criteria, but does state that admission is discretionary and that it is committed to seeking a diverse student body. Diversity is an important factor in the state’s medical school programs, and admissions policies are similar to those in the law schools.

If any specific programs at the undergraduate or graduate level provide preferences in admissions based on gender (e.g., engineering programs preferring female applicants or nursing programs preferring male applicants), they will be impacted by passage of this proposal. Any programs at public universities that operate to provide any kind of preferential treatment (through admissions, outreach, scholarships, etc.) based on minority status or gender may be affected by passage of the proposed constitutional amendment, depending on its interpretation by the courts.

***Scholarships.*** UM is concerned that diversity scholarships that consider race, gender, national origin, ethnicity, or color would be at risk.<sup>49</sup> Evidence from UC suggests that Proposition 209 was ruled to prohibit race-conscious scholarships. After passage of I-200 in Washington, UW issued a policy on financial aid, which states that the University “will continue to accept endowments and current-use gifts for awards that express a donor’s special interest as to the race, color, national origin, ethnicity or sex of the recipient.” The policy states that if a court rules that the University cannot legally administer a trust in accordance with the wishes of the donor, then the University will trans-

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<sup>48</sup> The state’s 15 public universities include: Central Michigan University, Eastern Michigan University, Ferris State University, Grand Valley State University, Lake Superior State University, Michigan State University, Michigan Technological University, Northern Michigan University, Oakland University, Saginaw Valley State University, University of Michigan-Ann Arbor, University of Michigan-Dearborn, University of Michigan-Flint, Wayne State University, Western Michigan University.

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<sup>49</sup> See “Frequently Asked Questions about the Proposed ‘Michigan Civil Rights Initiative.’”

fer administration of the financial aid to a non-University foundation or trustee. The policy also states that the University may still “seek, accept, award and administer financial aid established by the federal government and restricted on the basis of race, color, national origin, ethnicity or gender, in a manner consistent with the requirements of federal law and the specific contract.” However, the policy prohibits UW from making a preference based on race, color, national origin, ethnicity or gender when awarding financial aid from state sources.<sup>50</sup>

Therefore, it appears that privately funded scholarships restricted by minority status or gender may be permissible if the amendment passes, but similar state funded scholarships may not be allowed. Some universities outside of Michigan have already opened up formerly race-conscious scholarship and fellowship programs to students of both sexes and all races and ethnicities in response to threats or fears of litigation. Southern Illinois University recently reached a consent decree with the U.S. Justice Department to allow non-minorities and men access to graduate fellowships that were previously only open to minorities and women. Although the data remain anecdotal at this point, some universities across the nation seem to be changing programs voluntarily to avoid a legal fight that may require them to change those programs.<sup>51</sup>

**Faculty.** All universities will still be able to take any affirmative action required by the federal government (as recipients of federal aid and federal government contractors) when it comes to hiring and recruiting faculty. However, there is the possibility that passage of this proposal could reduce the attractiveness of UM and other state universities to prominent faculty members.

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<sup>50</sup> “Policy on Financial Aid, Including Scholarships, Grants and Fellowships, to Promote Student Diversity at the University of Washington.” UW Information Navigator. 4 November 2004. University of Washington. [www.washington.edu/diversity/archive/policies/finaid.html](http://www.washington.edu/diversity/archive/policies/finaid.html). (accessed 14 February 2006)

<sup>51</sup> Glater, Jonathan D. “Colleges Open Minority Aid to All Comers.” *The New York Times*. 14 March 2006.

## Michigan Percent Plan

Michigan would have a hard time adopting a percent plan similar to other states’ plans because it does not have a public university system like those in California, Texas, and Florida. Instead, Michigan has a number of independent public universities. Also, UM is significantly more selective than even the most elite public schools in Texas, Florida, and Washington, though not more selective than certain UC schools. UM was ranked as the 25<sup>th</sup> best college in 2006 by *U.S. News and World Report*. It is tied with UCLA and ranks slightly behind UC-Berkeley. UW, University of Florida (UF), and UT-Austin rank 45<sup>th</sup>, 50<sup>th</sup> and 52<sup>nd</sup>, respectively. Therefore, in order to accept the top percent of high school graduates from all schools throughout the state with no other universities to whom it could pass on the lower performing “top” students, UM would likely have to sacrifice its selectivity. If the University is unwilling to do this, it would have to rely on increased recruitment and outreach in order to maintain its diversity. The University has already intensified efforts to recruit students generally, and minority students particularly, as a result of the Supreme Court rulings and the initial drop in applications and in minority admissions that followed those rulings.<sup>52</sup>

## Impact on K-12 Education

It does not appear that passage of Proposal 2006-02 would have a strong impact on public K-12 education in Michigan. Based on evidence from California, it would likely remove the ability of public schools (including magnet schools) to use affirmative action preferences in assigning students to specific schools in order to achieve racial balance (the Seattle School District was able to do this because I-200 is statutory law and the Washington State Constitution identifies education as the State’s highest priority – see *Current Events at the Federal Level* on page 18). However, no school districts in Michigan appear to be doing this

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<sup>52</sup> Lederman, Doug. “Upturn for Minority Students at Michigan.” *Inside Higher Ed*. 7 June 2005. [www.insidehighered.com/news/2005/06/07/mich](http://www.insidehighered.com/news/2005/06/07/mich). (accessed 19 April 2006)



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currently. If Proposal 2006-02 passes, it would prohibit public schools from using any kind of preferences based on minority status or gender in hiring decisions (e.g., if any schools currently have a preference for hiring male elementary school teachers, they would no longer legally be able to maintain that preference).

**Athletic Programs.** Athletic programs in public education (at the K-12 and university level) should not be affected by passage of this proposal. Subsection four of Proposal 2006-02 states that "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." Therefore, athletic programs are protected by Title IX of the Education Amendments of 1972, which states:

No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

Title IX regulations mandate that all schools accepting federal funds must comply with this legislation. The Federal Register (Vol. 44, No. 239, 11 December 1979) interprets Title IX as it applies to intercollegiate athletics; however, this interpretation can be applied to club, intramural, and interscholastic athletic programs as well. Title IX requires that: 1) all scholarships based on athletic ability "be available on a substantially proportional basis to the number of male and female participants in the institution's athletic programs;" 2) male and female athletes "receive equivalent treatment, benefits, and opportunities;" and, 3) "the athletic interests and abilities of male and female students must be equally effectively accommodated." Title IX also applies to private educational institutions that receive federal financial assistance (Proposal 2006-02 would not apply to private institutions).

**Single-Gender Schools.** At the federal level, the ability for any district receiving federal funds to have single-gender classes and schools is conditioned by U.S. Supreme Court decisions and federal law (e.g. Title IX). The most recent Supreme Court case, *United States v. Virginia et al.* (1996) concluded that: 1) gender-based government action must be reviewed under intermediate scrutiny, which requires that the gender classification be substantially related to an

important governmental objective; 2) Virginia's exclusion of women from training at the Virginia Military Institute denies females equal protection under the Fourteenth Amendment; and, 3) separate educational opportunities provided by the state based on gender must be substantially equal.<sup>53</sup>

Existing regulations of Title IX allow single-gender classes and schools in certain instances. The Secretary of Education has proposed new rules to amend these regulations in order to expand the flexibility of federal aid recipients wishing to provide single-gender educational opportunities (these proposed rules are a result of the No Child Left Behind legislation). These regulations would allow greater flexibility than state or federal law currently allows (e.g., districts could provide single-gender schools for one gender provided that a substantially equal coeducational opportunity existed – they would not have to provide a substantially equal single-gender educational opportunity for the excluded gender).<sup>54</sup> However, these federal regulations are not requirements and state law can restrict public institutions' ability to provide single-gender education further than federal law does.

Until recently, state law in Michigan did not allow public schools to offer single-gender schools. On 20 July 2006, Public Act 303 of 2006 took effect and amended Public Act 451 of 1976 allowing for the establishment of "a school, class, or program within a school in which enrollment is limited to pupils of a single gender if the school district, intermediate school district, or public school academy makes available to pupils a substantially equal coeducational school, class, or program *and* a substantially equal school, class, or program for pupils of the other gender" (emphasis added).<sup>55</sup> The Act requires the availability of a "substantially equal" coeducational option because participation by stu-

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<sup>53</sup> *United States v. Virginia et al.*, No. 94-1941 (1996)

<sup>54</sup> Federal Register. "Part VII: Department of Education, 34 CFR Part 106, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rules." Vol. 69, No. 46. 9 March 2004. [www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.pdf](http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.pdf). (accessed 29 August 2006)

<sup>55</sup> Michigan Public Act 303 of 2006, MCL 380.1146

dents in a single-gender school, class, or program must be completely voluntary.

In California and Washington, single-gender schools have been implemented since passage of Proposition 209 and Initiative 200. California currently has two single-gender public schools. One is a public alternative school and is supported by a private non-profit agency. The other, however, is a middle school within a public school district. The single-gender school in Washington is within the Seattle School District (both schools provide completely single-gender classes for both genders). Based on this evidence from California and Washington and the passage of Public Act 303 of 2006, single-gender education should be allowed in Michigan even if Proposal 2006-02 passes, provided that the single-gender educational opportunities are equal (provided to both girls and boys) and optional, and therefore do not provide a benefit to one gender over the other. However, Proposal 2006-02's impact on single-gender public education would be open to interpretation by the courts.

## Impact on Government

The Supreme Court rulings in *Croson* and *Adarand* severely limited the ability of the federal and state governments to implement and enforce affirmative action programs that provide preferential treatment to minorities. These programs are always subjected to the legal standard of strict scrutiny, which is often hard to meet (discrimination and preferential treatment based on gender is subjected to the standard of intermediate scrutiny).

Analysis of government hiring and contracting policies in Michigan is based on governmental units' written policy and on discussions with governmental officials in some instances. However, it can be difficult at times to determine if actual practices reflect written policies. Just as unwritten discrimination against minorities and women occurred many years ago and may still occur today, similarly there may be unwritten policies of preferential treatment for certain groups. Systematic analysis of "unwritten policies" is beyond the scope of this paper.

## State of Michigan

**Civil Service Commission.** The State of Michigan has a four-person Civil Service Commission (CSC) that creates and enforces Civil Service Rules. There are no statutes dealing with the hiring process for state classified employees; the rules passed by the Commission have the force of law and are based on the Elliot-Larsen Civil Rights Act, which states Michigan's non-discrimination policy and provides for equal opportunity in obtaining employment, housing, and real estate throughout the state.<sup>56</sup>

The CSC rules explicitly state that the State of Michigan is an equal opportunity employer and that employment decisions are based on "merit, efficiency, and fitness." However, one section discusses "prohibited discrimination" and the "elimination of the present effects of past discrimination." This section allows an appointing authority (state department) to "adopt and carry out a plan to eliminate the present effects of past discriminatory practices with respect to religion, race, color, national origin, sex, or disability." The plan must be approved by the state personnel director and the Civil Rights Commission. It must be consistent with applicable law and can be enacted only in the event of demonstrable present effects of past discrimination. There are currently no such authorized programs being implemented in state government.<sup>57</sup> Therefore if Proposal 2006-02 passes, it should have no direct impact at the moment on state classified employment. However, if evidence of past discrimination in a state department arises, this proposal would remove the opportunity for state departments to institute affirmative action preferences to eliminate the present effects of that past discrimination.

**State Procurement and Contracting.** Procurement and contracting in state government appear to be

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<sup>56</sup> Michigan Public Act 453 of 1976, MCL 37.2101-37.2804

<sup>57</sup> An example of one such program is a Michigan State Police Department affirmative action plan that granted preferential treatment to minority and female applicants by allowing them to be considered for a position with lower test scores than their counterpart white male applicants. This program was ended in the mid-1990s and no current programs exist in state classified employment.



# Proposal 2006-02: Michigan Civil Rights Initiative

## The Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) and the Michigan Department of Transportation (MDOT)

Federal legislation (TEA-21) mandates race- and gender-based preferences in transportation contracts issued by states when using federal funds. A provision of the Act states "...not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals" (TEA-21 regulations presume that African Americans, Hispanics, Native Americans, Asians, and Women are socially and economically disadvantaged).<sup>58</sup> TEA-21 regulations do not establish a centrally administered Disadvantaged Business Enterprise (DBE) program, but delegate to each state that accepts federal transportation funds the responsibility to implement a DBE program. Regulations state that the 10 percent goal is merely "aspirational," and not a mandate. States must follow a two-step process to set a DBE utilization goal for their state that is reflective of the level of participation that would be expected in the absence of discrimination. First, each state must calculate the availability of DBEs in its local transportation contracting industry. Second, each state must "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." The final figure represents the proportion of federal transportation funding that must be allocated to DBEs. TEA-21 regulations further require states to "meet the maximum feasible portion of this goal through race-neutral means, including informational and instructional programs targeted toward all small businesses." A state is then required to use race-conscious efforts to achieve any remaining portion of its DBE utilization goal. TEA-21's race and gender-conscious measures can only be constitutionally applied in those states where there is evidence of the effects of discrimination. In *Western States Paving Co., Inc. v. Washington State Department of Transportation et al.* (2005), the U.S. Ninth Circuit Court of Appeals ruled race and gender-based TEA-21 requirements "must be limited to those parts of the country where its race-based measures are demonstrably needed." The Court invalidated Washington's DBE program stating that it conflicted with the "guarantees of equal protection" because Washington failed to show any evidence of discrimination within its own contracting industry.

MDOT operates a DBE program under federal oversight and abides by TEA-21 regulations and the *Western States Paving Co., Inc.* ruling. MDOT's program provides preferential treatment to DBEs (which include women- and minority-owned businesses) through special notices and training opportunities. It is not affected by state legislation and should not be affected by passage of Proposal 2006-02.

<sup>58</sup> *Western States Paving Co., Inc. v. Washington State Department of Transportation et al.*, United States Court of Appeals for the Ninth Circuit, No. 03-35783 (2005).

handled completely through competitive bidding procedures. The Michigan Department of Management and Budget, Purchasing Operations has programs to provide preferential treatment to Michigan-based businesses and to businesses owned by disabled veterans, but there does not appear to be any preferences for women- or minority-owned businesses in state procurement policy.<sup>59</sup> The Michigan Department of Transportation (MDOT) operates a Disadvantaged

Business Enterprise (DBE) program, but this is a state-run federal program that is required to receive federal funds (see *TEA-21 and MDOT* sidebar). State transportation dollars are maintained separately and are not used to comply with the DBE program.

**State Outreach Efforts.** State departments do practice other types of affirmative action programs, such as minority outreach programs through advertising, minority recruitment fairs, and increased recruitment and training efforts in general. These programs are limited to outreach and selection is based solely on merit. If Proposal 2006-02 passes, some of these programs may have to be revised if they operate to exclude individuals or groups based on race, gender, color, ethnicity, or national origin. However, whether or not this amendment would affect these programs would

<sup>59</sup> Any evidence of an impact on minority and women contractors in California or Washington would not be applicable in Michigan because Michigan does not currently have an affirmative action policy providing preferential treatment in state contracting.

depend on its interpretation by the courts. In California, the courts found some targeted and focused outreach unconstitutional (see *Outreach Preferences in California* sidebar on page 14).

**State Employment Trends.** A CRC report released in 2004 on employment trends in State government discussed in detail the employment trends for women and minorities in the state over the last 25 years.<sup>60</sup> From 1980 to 2003, the percentage of females in the state workforce decreased from 54 percent to less than 51 percent. However, this was because of the dramatic increase in corrections employment over that time period, which increased the number of male prison guards. When corrections positions are excluded from the calculation, female employment rose from 56 percent to 59 percent of the workforce. In 2003, females still filled a large majority of the paraprofessional positions (74 percent) and the office and clerical positions (94.5 percent). However, from 1980 to 2003, the percentage of female officials and administrators rose from 9.5 percent to almost 41 percent, and the percentage of female professionals rose from 40 percent to almost 60 percent. Over this time period, salary parity for female state employees also improved drastically. By 2001, females earned an average of \$0.92 for every dollar earned by males (this figure was \$0.76 in 1977).

Minority representation in the state workforce rose slightly between 1980 and 2003 from 21 percent to 23 percent of the workforce. This aggregate figure masks the fact that minority employment in service and maintenance positions declined while the percentage of minority professionals rose from 16 percent to almost 26 percent and the percentage of minority officials and administrators increased from 14 percent to almost 19 percent. Salary parity for minority state employees has historically been high. In 1984, minorities earned \$0.94 for every dollar earned by a non-minority employee; in 2001, that figure rose to \$0.99 for every dollar.

The findings in the CRC report on employment trends in State government show that females and minori-

ties have been making progress and increasing their numbers in state employment over the years. State hiring policy does not currently involve affirmative action preferences, therefore if Proposal 2006-02 passes, it should not have a strong impact on state government diversity (however, affirmative action policies in state government hiring in the past may have helped, at least partially, the state workforce achieve its current level of diversity).

**Department of Labor and Economic Growth.** The Office of Career and Technical Information in the Department of Labor and Economic Growth (DLEG) has a policy of encouraging K-12 districts, Regional Educational Service Agencies, or area centers that operate reimbursed wage-earning vocational education programs "to use monies to support services designed to promote successful experiences for non-traditional students." These activities include recruiting, supporting, or assuring retention of non-traditional students. Non-traditional employment is defined as occupations or fields of work for which individuals of one gender comprise 25 percent or less of the individuals employed or enrolled in the field of work (e.g., women in engineering programs or men in nursing programs). The programs offered by the Office of Career and Technology are federally-funded programs that are in effect to provide equal access to all educational opportunities to both genders. In accordance with Title IX regulations, the department monitors the number of male and female participants in career and technical educational programs, but it does not provide a preference to either gender in any program.

## Local Government

Michigan has 1,859 general purpose units of government (counties, cities, villages, and townships). The large number of local governmental entities in Michigan prohibits a review of the charters and ordinances of all local governments throughout the state. A sample of the larger local governmental entities was reviewed. An examination of the charters of many cities throughout the state showed that only a small number of cities in the state make reference to affirmative action programs in their charters.

Other policies are established in the collective bargaining agreements between local governments and

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<sup>60</sup> "Employment Trends in State Government, FY1966 – FY2003," February 2004. [www.crcmich.org/PUBLICAT/2000s/2004/rpt336.pdf](http://www.crcmich.org/PUBLICAT/2000s/2004/rpt336.pdf).

# Proposal 2006-02: Michigan Civil Rights Initiative

## Proposal 2006-02's Impact on Private Sector

Although this proposal will not have a direct impact on the private sector, some major companies have taken a stand on this issue and believe it will greatly affect them. Four amicus briefs were filed by corporations in support of UM in the *Grutter* and *Gratz* cases. The briefs were filed by General Motors Corporation (GM), 65 leading American businesses that joined together to support UM and affirmative action programs (many of these businesses have substantial presence in Michigan, some are headquartered in Michigan, and all have substantial ties to Michigan suppliers and customers), a conglomerate of media companies, and MTV Networks.

The briefs argue that a well-educated, diverse workforce is essential for American companies to be able to compete in a global economy. Maintaining affirmative action preferences at public universities is important to companies because it provides them with a more diverse group of graduates to recruit from and it gives their potential employees of all races and ethnicities exposure to diversity in a learning environment. Exposure to diversity at a young age is important because it helps students to reduce stereotypes and to develop the skills necessary to succeed in today's economy and environment, including the ability to work well with others from diverse backgrounds; the ability to "view issues from multiple perspectives;" and the ability "to anticipate and to respond with sensitivity to the cultural differences of highly diverse customers, colleagues, employees, and global business partners." Even though many corporations, including GM, provide extensive diversity training to employees, this training is designed to enhance, not replace, training and experiences received earlier in life. In its brief, GM argues that higher education has the ability to make up for educational inequities at earlier stages in life so that affirmative action programs are no longer needed after college.

their employees. With many local government workforces served by multiple collective bargaining units and no central clearing house to search through those agreements, it was not feasible to thoroughly search for affirmative action preferences established in this way. Local government programs and policies are not only determined by charters, ordinances, and collective bargaining agreements, but also by regulations and local officials' interpretations of ordinances, agreements, and policies. The multiplicity of possible sources of local government policy makes it difficult to completely understand and accurately portray that policy.

Finally, efforts were made to contact officials in many local governments. With the possible adoption of Proposal 2006-02 confronting them, local government officials appear to be unwilling to direct attention to specific programs that might be subject to legal challenge under the terms of this proposal.

What follows is an encapsulation of some local government policies in Michigan and a discussion of whether or not they are likely to be impacted by passage of Proposal 2006-02.

**City Government.** All cities have non-discrimination and equal employment policies mandating that employees and applicants are not to be discriminated

against because of race, gender, color, ethnicity, or national origin, among other things. Many cities' hiring policies are based on merit and competitive testing (testing includes, but is not limited to, written tests, performance based tests, licensure verification, background investigations, telephone and personal interviews, and evaluation of applicants' experience and training). Most cities procurement and contracting policies require selection to be made through a competitive bidding process. Some cities have policies 1) requiring contractors to file affirmative action clearances, state that they are equal opportunity employers, or employ minorities and females commensurate with their availability in the labor recruitment area; 2) establishing diversity spending objectives; or, 3) offering bid discounts to firms that increase supplier or workforce diversity.

Any city employment or contracting policies that operate to provide preferences or benefits based on an applicant's minority status or gender would be affected by passage of this proposal. Cities that have affirmative action programs to encourage equal opportunity and to increase the diversity of applicants (without providing preferences or excluding certain groups) should not be affected by Proposal 2006-02. Some examples of current practices that should still be legal if this proposal passes include: 1) equal opportu-

nity policies aimed at removing barriers to employment or contracting (barriers can include unfair tests, excessive requirements when submitting an application or bid, and mandating qualifications that are not job-related); 2) advertising to increase diversity of applicants (i.e., advertising positions and bids in multiple sources, including publications that reach out to females and minorities, as well as those that reach out to the majority); 3) targeted recruitment and outreach efforts aimed at providing increased access and opportunities to women and minorities (including minority outreach fairs, providing that those from the majority are still allowed, and invited, to attend); 4) mandating that contractors be equal opportunity employers (although a government may not mandate that contractors hire individuals from under-represented groups); 5) race- and gender-neutral recruitment and selection techniques (including competitive bidding and testing procedures); and, 6) monitoring and tracking employees and contractors and keeping data on race, ethnicity, and gender.

Some examples of current practices that may be invalidated by passage of Proposal 2006-02 include: 1) requiring city departments and contractors to take affirmative action to employ females and minorities commensurate with their availability in the labor recruitment area; 2) requiring contractors to receive affirmative action clearances or to submit contract compliance forms that mandate hiring individuals from under-represented groups; 3) policies of outright preference for employees or contractors based on minority status or gender; 4) requiring that contracts for goods and services include diversity participation objectives; 5) requiring cities or contractors to solicit bids from minority- and women-owned businesses; 6) having an affirmative action plan with goals for hiring under-represented groups (quotas are currently illegal); 7) requiring managers to consider minority status or gender in their selection process; 8) providing special notices of contracts to prospective contractors based on their minority status or gender; and, 9) bid discount programs that allow contractors' bids to be discounted by a certain percentage if they increase supplier or workforce diversity (even if the program is voluntary).

If any cities have programs currently in effect that mandate hiring or promoting individuals based on minority status or gender, those programs would definitely

be invalidated by passage of this proposal and they may be illegal under current federal and state law. The City of Pontiac recently reached an agreement with the U.S. Justice Department to end a city practice "designed to hire and promote more women and minorities in its Fire Department."<sup>61</sup> Under the policy in the fire department, one out of every three hires or promotions was required to go to a woman or minority. The lawsuit and consent decree provide evidence that policies such as this may not be able to pass current legal challenge. (Note: The City states that it signed the decree not because it believes that its policy was illegal, but because it is confronting a budget crisis and does not choose to continue this fight.)<sup>62</sup>

**County and Township Government.** Proposal 2006-02's impact on Michigan county and township government should be small. A review of some of the larger counties and townships in the state yields no evidence of affirmative action programs that would be invalidated by passage of this proposal. Most hiring policies are based on merit and civil service procedures, and most units utilize a competitive bidding process when dealing with vendors and contractors. Some units do place a high importance on cultural diversity, even though they do not have policies that grant preferential treatment to under-represented groups. County and township policies would be affected to the same extent that city policies are, therefore the guidelines for what may and may not be allowed if Proposal 2006-02 passes are the same.

It is important to remember that a review of all 83 counties and 1,241 townships was not feasible for this analysis. Plus, the review of county and township policies is limited to the available information about those policies. Therefore, it is possible that there are units that may be affected by passage of this proposal that were not identified in the analysis.

There also remain gray areas where it is difficult to assess what the impact of Proposal 2006-02 would be on local government. These include, but are not lim-

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<sup>61</sup> Egan, Paul. "Pontiac Agrees to End Hiring Quotas." *The Detroit News*. 25 July 2006.

<sup>62</sup> See Egan. "Pontiac Agrees to End Hiring Quotas."

## Proposal 2006-02: Michigan Civil Rights Initiative

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ited to, targeted outreach policies (at what point do they operate to provide a preference) and vague goals to increase diversity (e.g., a policy of encouraging contractors to develop and maintain a diverse workforce with no requirements or measures of contractor di-

versity). If any units of local government receive federal funds, then any action they must take to comply with acceptance of those funds would not be affected by Proposal 2006-02. They would still be required to adhere to federal affirmative action requirements.

### Conclusion

If Proposal 2006-02 passes, it will not outlaw all affirmative action programs in the state. Michigan statutes contain various references to affirmative action and minority status or gender (see *Appendix 1* on page 32). Only those that grant preferential treatment to individuals or groups on the basis of minority status or gen-

der would be invalidated by this amendment. However, determining what constitutes preferential treatment will be left to the Michigan court system. If Proposal 2006-02 passes, there are likely to be numerous lawsuits filed to test the boundaries of the amendment and to interpret and clarify its impact in Michigan.



## Appendix 1

### Michigan Statutes that Reference Minority Status or Gender

There are numerous provisions in Michigan law that make reference to race, ethnicity, or gender. The statutes are briefly described and analyzed below, but it is important to remember that the actual impact will be determined by the State government and the Michigan court system if the proposal passes.

#### *State Housing Development Authority Act of 1966.*

Section 125.1446 prohibits discrimination in the occupancy of housing projects and residential real property assisted under this act. It requires all contractors and subcontractors engaged in the construction of housing projects and all lending institutions engaged in making residential mortgages take affirmative action to ensure equal opportunity for employment and borrowing. This section simply prohibits discrimination. It does not mandate preferential treatment and should not be affected by passage of Proposal 2006-02.<sup>63</sup>

*Michigan Military Act (1967).* Section 32.651 lists affirmative action guidelines for membership goals in the Michigan emergency volunteers (units from within the military establishment that are activated by the governor to provide emergency assistance to the state at times when the president calls the national guard into federal service). Whether or not this will be affected by the proposal depends on whether emergency volunteers are considered to be state employees. Based on its current language, the proposal should not affect volunteers.<sup>64</sup>

*Michigan Women's Commission (1968).* This act established a Michigan Women's Commission and prescribes its powers and duties. This commission deals with issues of importance to women and women's rights in the state (e.g., it encourages study and review on the status of women in the state and it recommends methods of overcoming discrimination against women). However, it has no authority to promulgate rules and regulations, so it may not be affected by passage of Proposal 2006-02.<sup>65</sup>

*Worker's Disability Compensation Act of 1969.* Sections 418.700a-701a of this act do not require specific participation goals, but "strongly encourage" businesses to joint venture with or subcontract to minority-, women- and persons with disabilities-owned businesses when responding to privatization requests for proposals. The State Administrative Board is required to give due consideration to bidders with participation by these groups. Each prospective bidder must indicate in its proposal the amount of equity participation for each of these groups included as all or part of the bidding group. The constitutionality of this act would be questionable if Proposal 2006-02 passes. It does not require participation goals, but does give women and minorities special treatment through incentives to businesses.<sup>66</sup>

*Division of Minority Business Enterprise (1975).* This act established a division of minority business enterprise within the Department of Commerce and prescribes its powers and duties. The powers and duties of the division include providing technical, managerial, and counseling services and assistance to minority business enterprises (MBEs). This act may be invalidated by passage of the proposal if it is construed as providing advantages to MBEs when doing business with the state.<sup>67</sup>

*Elliot-Larsen Civil Rights Act (1976).* Article 2 of the Elliot-Larsen Civil Rights Act deals with the prohibited practices and responsibilities of employers, employment agencies, labor organizations, and individuals seeking employment. Section 37.2210 allows a person subject to this article to adopt and carry out an affirmative action plan to eliminate the present effects of past discriminatory practices or to assure equal

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<sup>63</sup> Michigan Public Act 346 of 1966, MCL 125.1446

<sup>64</sup> Michigan Public Act 150 of 1967, MCL 32.651

<sup>65</sup> Michigan Public Act 1 of 1968, MCL 10.71-77

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<sup>66</sup> Michigan Public Act 317 of 1969, MCL 418.700a-701a

<sup>67</sup> Michigan Public Act 165 of 1975, MCL 125.1221-1225

<sup>68</sup> Michigan Public Act 453 of 1976, MCL 37.2210

## Proposal 2006-02: Michigan Civil Rights Initiative

opportunity with respect to religion, race, color, national origin, or sex. This section may be in violation of the Constitution if Proposal 2006-02 passes.<sup>68</sup>

*Elliot-Larsen Civil Rights Act (1976).* Section 37.2402 details prohibited acts of educational institutions. One prohibited act includes attempting to elicit information concerning the religion, race, color, national origin, age, sex, or marital status of an applicant for purpose of admission, except as permitted by rule of the commission or as required by federal law, rule, or regulation, or pursuant to an affirmative action program. This section should not be affected by passage of the proposal.<sup>69</sup>

*Public Health Code (1978).* Section 333.2221 details the duties of the Department of Community Health. It is required to take appropriate affirmative action to promote equal employment opportunity within the Department and local health departments and to promote equal access to government financed health services to all individuals in the state that are in need of service. This section should not be affected by passage of the proposal.<sup>70</sup>

*Public Health Code (1978).* Section 333.2707 creates a grant program for minority students enrolled in medical schools, nursing programs, or physician's assistant programs. A condition for award of the grant is that its recipient agrees to provide, upon completion of training, full-time health care services in a health resource shortage area to which s/he is assigned by the Department for a period equal to the number of years for which a grant is accepted or two years, whichever is greater. While this does not deal with public university admissions, it does pertain to scholarships and school aid. The program may be invalidated by Proposal 2006-02 if it is construed broadly enough to include scholarship programs. If the program is invalidated, it could be restored by maintaining the grant award criteria, but opening up the process to members of all races.<sup>71</sup>

*State Procurements for Minority-Owned and Woman-Owned Businesses (1980).* This act provides that a percentage of construction, goods, and services expenditures by each state department be awarded to a specific percentage of minority-owned and women-owned businesses. Since this act deals with state contracting and grants preferential treatment to women- and minority-owned businesses, it would likely be invalidated by the passage of this proposal (even though this law is "on the books," the only preferences granted are for Michigan-based businesses and businesses owned by disabled veterans).<sup>72</sup>

*Michigan Civilian Conservation Corps Act (1984).* Section 409.306 deals with the hiring of Michigan corpsmembers. It requires that eligible minorities and equal numbers of males and females, to the extent that they apply to the program, are hired as corpsmembers (the act also requires other eligible people be hired, including single heads of households and disabled persons). It is hard to determine if this act would be affected by Proposal 2006-02. It depends whether corpsmembers are considered to be state employees.<sup>73</sup>

*Michigan Strategic Fund (1984).* This act empowers the Michigan strategic fund to certify minority venture capital companies for being eligible recipients of investments that qualify for a credit under the single business tax act. This act may be in violation of the proposal because it appears to give preference to minority venture capital companies.<sup>74</sup>

*The Management and Budget Act (1984).* Section 18.1458 specifies that the amounts authorized in a budget act for equal employment opportunity services must be used to comply with laws relative to equal opportunity employment and affirmative action programs. Passage of the proposal would not really have an impact on this section because it would only affect those laws that pertain to affirmative action preference programs.<sup>75</sup>

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<sup>69</sup> Michigan Public Act 453 of 1976, MCL 37.2402

<sup>70</sup> Michigan Public Act 368 of 1978, MCL 333.2221

<sup>71</sup> Michigan Public Act 368 of 1978, MCL 333.2707

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<sup>72</sup> Michigan Public Act 428 of 1980, MCL 450.771-776

<sup>73</sup> Michigan Public Act 22 of 1984, MCL 409.306

<sup>74</sup> Michigan Public Act 270 of 1984, MCL 125.2063

<sup>75</sup> Michigan Public Act 431 of 1984, MCL 18.1458

*Martin Luther King, Jr. • Cesar Chavez • Rosa Parks (KCP) Initiative (1986).* This initiative was passed by the Michigan legislature in 1986 with the goal of achieving parity in the graduation rates of minority students who have been traditionally under-represented in Michigan's higher education system in relation to their share of the state's population. It consists of six strategic components, including: 1) the College Day Program, which presents college preparatory and career information to sixth through eleventh grade students in the 30 Michigan school districts with the highest minority populations; 2) the Select Student Support Services Program, which competitively awards funds to universities for the development of retention programs serving academically and economically disadvantaged students; 3) the Morris Hood, Jr., Educator Development Program, which provides grants to universities to increase the number of minority students, especially males, who enroll in and complete K-12 teacher education programs; 4) the Michigan College/University Partnership Program, which partners community colleges with four-year colleges to increase the number of academically and economically disadvantaged students who transfer from community colleges into baccalaureate programs; 5) the Future Faculty Fellowship Program, which provides financial support for minority graduate students who pursue a teaching career in postsecondary education at one of Michigan's 15 public universities; and, 6) the Visiting Professors Program, which was created to address the small number of minority faculty to whom Michigan students are exposed and to provide more minority professors on Michigan campuses.

This initiative clearly has many components, but it would likely be challenged if the proposed constitutional amendment passes. The programs that focus on academically and economically disadvantaged students, without using minority status as a criterion, would pass constitutional challenge, but the programs that provide preference and aid to minority students (and to public universities for improving minority graduation rates) may be considered unconstitutional. Again, it depends on how broadly Proposal 2006-02 is interpreted.

*Community Corrections Act (1988).* Section 791.403 requires fair geographic representation on the state community corrections board and that minority per-

sons and women are fairly represented. If Proposal 2006-02 is interpreted broadly enough to include government boards and commissions, then this section would be invalidated by it.<sup>76</sup>

*Michigan Telecommunications Act (1991).* Section 484.2504 requires every telecommunications provider doing business with the state to file a small and minority-owned business participation plan. The plan must contain the entity's plan for purchasing goods and services from small and minority-owned businesses and information on programs to provide technical assistance to small and minority-owned businesses. This statute would likely be invalidated by Proposal 2006-02; however, it is already scheduled for repeal by Public Act 235 of 2005, effective December 31, 2009.<sup>77</sup>

*Natural Resources and Environmental Protection Act (1994).* Section 324.5708 deals with the small business clean air compliance advisory panel. It requires that the panel include female members and members who are minorities. The affect of Proposal 2006-02 on this section depends on whether it is read broadly enough to include members of government panels and committees, instead of simply being limited to government employees and contractors.<sup>78</sup>

*Michigan Gaming Control and Revenue Act (1996).* Section 432.204c deals with information disclosure and requires the Michigan Gaming Control Board to provide information regarding applicants' or licensees' compliance with federal and state affirmative action guidelines upon written request from any person. Section 432.205 requires applicants for a casino license to supply information to the Board regarding their compliance with federal and state affirmative action guidelines. These sections would not be affected by passage of the proposal except for the fact that it would limit state affirmative action guidelines, and therefore limit compliance with them.<sup>79</sup>

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<sup>76</sup> Michigan Public Act 511 of 1988, MCL 791.403

<sup>77</sup> Michigan Public Act 179 of 1991, MCL 484.2504

<sup>78</sup> Michigan Public Act 451 of 1994, MCL 324.5708

<sup>79</sup> Michigan Initiated Law of 1996, MCL 432.204c-205

## Appendix 2 University of California Racial Status of California Resident Freshmen Enrollment, 1995-2003

### University of California-System Wide

<u>Ethnicity</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
African American	4.30%	3.83%	3.87%	2.97%	2.91%	3.10%	2.98%	3.13%	3.24%	2.91%
American Indian	1.13%	1.02%	0.77%	0.68%	0.54%	0.60%	0.57%	0.53%	0.46%	0.51%
Asian American	28.40%	28.94%	29.17%	28.05%	29.99%	30.06%	30.32%	30.75%	30.52%	31.06%
Chicano/Latino	15.60%	13.84%	13.22%	11.85%	12.45%	12.97%	13.46%	14.11%	14.66%	14.98%
East Indian/Pakistani	2.50%	2.63%	2.87%	2.82%	2.87%	2.77%	2.98%	3.02%	2.65%	3.06%
Filipino American	5.05%	4.98%	5.07%	5.09%	5.18%	5.11%	5.37%	5.45%	5.23%	5.36%
White	37.18%	38.03%	39.91%	33.19%	37.40%	36.46%	35.65%	35.36%	34.51%	33.75%
Other	2.10%	2.26%	1.84%	1.52%	1.94%	1.90%	1.87%	1.55%	1.65%	1.72%
Unknown	3.74%	4.47%	3.27%	13.83%	6.72%	7.02%	6.79%	6.10%	7.08%	6.65%

### University of California-Berkeley

<u>Ethnicity</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
African American	6.66%	6.55%	7.84%	3.66%	3.79%	4.28%	3.89%	4.29%	4.25%	3.07%
American Indian	1.85%	1.36%	0.56%	0.39%	0.65%	0.57%	0.57%	0.33%	0.42%	0.48%
Asian American	33.26%	34.22%	35.93%	36.51%	37.38%	36.82%	37.08%	38.71%	37.50%	37.84%
Chicano/Latino	16.94%	15.69%	14.59%	7.98%	9.98%	9.57%	10.76%	12.00%	11.79%	10.22%
East Indian/Pakistani	3.39%	3.33%	3.76%	4.44%	3.60%	4.43%	3.63%	3.63%	3.44%	3.73%
Filipino American	1.81%	2.18%	2.61%	3.03%	3.88%	3.92%	4.66%	4.59%	4.55%	4.18%
White	29.53%	29.14%	28.27%	28.17%	30.52%	29.52%	28.56%	28.41%	28.37%	31.02%
Other	1.48%	1.86%	1.87%	1.26%	1.77%	1.68%	1.50%	0.97%	1.33%	1.38%
Unknown	5.08%	5.66%	4.57%	14.55%	8.42%	9.21%	9.34%	7.07%	8.35%	8.09%

### University of California-Los Angeles

<u>Ethnicity</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
African American	7.35%	6.28%	5.63%	3.51%	3.80%	3.74%	3.44%	4.05%	3.11%	2.88%
American Indian	1.19%	0.87%	1.06%	0.36%	0.31%	0.41%	0.30%	0.43%	0.33%	0.29%
Asian American	28.73%	29.25%	30.52%	31.57%	31.79%	33.81%	33.69%	34.31%	33.59%	32.34%
Chicano/Latino	22.42%	18.98%	15.82%	11.02%	12.60%	13.24%	14.42%	15.40%	15.87%	14.74%
East Indian/Pakistani	2.24%	2.98%	4.06%	3.68%	3.62%	2.98%	3.47%	3.67%	3.06%	3.41%
Filipino American	7.29%	4.18%	4.65%	4.78%	4.70%	4.07%	4.80%	4.18%	4.51%	4.75%
White	25.63%	30.61%	32.60%	30.00%	33.16%	32.31%	30.58%	29.85%	30.21%	32.55%
Other	1.82%	2.18%	1.54%	1.70%	2.25%	2.04%	2.04%	1.71%	1.88%	1.37%
Unknown	3.32%	4.67%	4.12%	13.39%	7.77%	7.41%	7.26%	6.39%	7.45%	7.66%

Source: University of California, Office of the President, [www.ucop.edu/news/factsheets/Flowfrc\\_9504.pdf](http://www.ucop.edu/news/factsheets/Flowfrc_9504.pdf), accessed 10 April 2006

Appendix 3  
University of California  
Gender and Racial Composition of New Appointments of Ladder Rank Faculty, 1984 -85 through 2004 -05  
All Appointments

University of California-System Wide											
	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95
Women	25%	25%	24%	23%	28%	32%	29%	29%	32%	37%	34%
Men	75%	75%	76%	77%	72%	68%	71%	71%	68%	63%	66%
American Indian	0%	0%	1%	0%	0%	0%	0%	1%	1%	0%	0%
African American	2%	2%	2%	2%	3%	4%	4%	4%	4%	3%	2%
Chicano/Latino	5%	6%	4%	6%	5%	7%	6%	5%	6%	2%	6%
Asian	12%	9%	12%	13%	9%	10%	13%	12%	16%	17%	15%
White	81%	83%	82%	78%	83%	78%	76%	78%	73%	78%	76%
University of California-Berkeley											
	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95
Women	32%	23%	29%	29%	26%	33%	25%	31%	40%	38%	32%
Men	68%	77%	71%	71%	74%	67%	75%	69%	60%	62%	68%
American Indian	0%	0%	3%	0%	2%	0%	0%	0%	2%	0%	0%
African American	2%	0%	3%	2%	6%	5%	4%	6%	8%	2%	6%
Chicano/Latino	4%	4%	4%	5%	3%	9%	6%	0%	5%	0%	8%
Asian	4%	10%	7%	7%	7%	13%	11%	8%	8%	18%	13%
White	91%	85%	82%	86%	81%	73%	78%	87%	77%	80%	74%
University of California-Los Angeles											
	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95
Women	30%	22%	24%	21%	37%	27%	31%	27%	28%	38%	23%
Men	70%	78%	76%	79%	63%	73%	69%	73%	72%	62%	77%
American Indian	1%	0%	0%	1%	0%	0%	0%	2%	0%	0%	0%
African American	0%	2%	3%	2%	3%	7%	9%	2%	2%	1%	4%
Chicano/Latino	4%	2%	4%	4%	10%	8%	5%	8%	7%	3%	7%
Asian	9%	11%	12%	17%	8%	10%	18%	15%	10%	25%	20%
White	86%	86%	81%	76%	79%	75%	69%	71%	81%	71%	69%

Source: University of California, Office of the President, [www.ucop.edu/acadadv/datamgmt/welcome.html](http://www.ucop.edu/acadadv/datamgmt/welcome.html), accessed 6 September 2006



## Appendix 3 (continued)

<u>University of California-System Wide</u>										
	<u>95-96</u>	<u>96-97</u>	<u>97-98</u>	<u>98-99</u>	<u>99-00</u>	<u>00-01</u>	<u>01-02</u>	<u>02-03</u>	<u>03-04</u>	<u>04-05</u>
Women	36%	27%	32%	27%	25%	30%	31%	36%	36%	35%
Men	64%	73%	68%	73%	75%	70%	69%	64%	64%	65%
American Indian	1%	1%	1%	0%	0%	1%	1%	0%	1%	1%
African American	5%	3%	2%	2%	3%	3%	2%	3%	3%	4%
Chicano/Latino	7%	3%	5%	6%	3%	3%	7%	4%	5%	6%
Asian	15%	16%	18%	14%	18%	17%	19%	16%	21%	16%
White	72%	78%	74%	78%	75%	76%	71%	76%	71%	73%
<u>University of California-Berkeley</u>										
	<u>95-96</u>	<u>96-97</u>	<u>97-98</u>	<u>98-99</u>	<u>99-00</u>	<u>00-01</u>	<u>01-02</u>	<u>02-03</u>	<u>03-04</u>	<u>04-05</u>
Women	30%	28%	26%	28%	22%	27%	32%	33%	48%	27%
Men	70%	72%	74%	72%	78%	73%	68%	67%	52%	73%
American Indian	2%	0%	0%	0%	0%	1%	0%	0%	0%	0%
African American	3%	1%	5%	0%	5%	3%	0%	3%	5%	5%
Chicano/Latino	12%	0%	2%	3%	5%	4%	3%	4%	4%	3%
Asian	15%	21%	12%	11%	15%	18%	17%	19%	22%	16%
White	68%	78%	81%	85%	75%	73%	80%	73%	70%	76%
<u>University of California-Los Angeles</u>										
	<u>95-96</u>	<u>96-97</u>	<u>97-98</u>	<u>98-99</u>	<u>99-00</u>	<u>00-01</u>	<u>01-02</u>	<u>02-03</u>	<u>03-04</u>	<u>04-05</u>
Women	35%	18%	27%	27%	18%	33%	20%	41%	32%	37%
Men	65%	82%	73%	73%	82%	67%	80%	59%	68%	63%
American Indian	1%	0%	0%	0%	0%	0%	0%	0%	1%	2%
African American	4%	1%	1%	2%	3%	6%	4%	3%	1%	5%
Chicano/Latino	7%	1%	6%	10%	0%	0%	4%	3%	6%	2%
Asian	16%	18%	27%	20%	21%	16%	23%	7%	17%	18%
White	71%	79%	65%	69%	75%	79%	69%	87%	74%	74%

Appendix 4  
University of Washington-Seattle  
Racial Status of Incoming Freshmen  
Enrollment, 1998-2005

<u>Ethnicity</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
African American	2.94%	1.84%	2.45%	2.23%	2.85%	2.85%	3.04%	2.41%
American Indian	1.26%	0.91%	1.00%	0.97%	1.22%	0.92%	1.27%	1.10%
Hispanic/Latino	4.65%	2.90%	2.47%	3.59%	3.67%	4.34%	4.64%	5.05%
Asian American	24.96%	24.52%	25.47%	25.33%	27.03%	29.38%	28.48%	28.45%
Hawaiian/Pacific Islander*		0.24%	0.48%	0.58%	0.47%	0.86%	0.74%	0.57%
Caucasian	54.49%	54.02%	55.15%	51.13%	54.64%	54.01%	53.90%	54.36%
Not Indicated	10.45%	14.42%	10.60%	13.40%	6.87%	5.14%	5.52%	4.88%
International	1.26%	1.15%	2.39%	2.79%	3.24%	2.49%	2.40%	3.17%

\* First two years, the number of Hawaiian/Pacific Islanders were included under Asian American.

Source: University of Washington website, 10/20/05 05-98COMPARATIVERACE.xls, <http://depts.washington.edu/reptreg/diversity/current.pdf>, Accessed 7 April 2006.

## Appendix 5 University of Texas Racial Status of First-Time Freshmen Enrollment, 1996-2005

<u>University of Texas-Austin</u> <u>Ethnicity</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
White	64.68%	66.76%	65.23%	63.17%	62.46%	60.61%	61.52%	59.08%	57.40%	55.53%
Native American	0.53%	0.51%	0.55%	0.40%	0.42%	0.46%	0.44%	0.29%	0.41%	0.48%
African American	4.14%	2.68%	2.95%	4.06%	3.85%	3.30%	3.43%	4.08%	4.55%	5.08%
Asian American	14.65%	15.95%	16.80%	17.34%	17.24%	19.26%	18.30%	17.62%	17.92%	17.25%
Hispanic	14.49%	12.59%	13.21%	13.86%	13.15%	13.96%	14.33%	16.32%	16.91%	18.00%
International	1.51%	1.51%	1.23%	1.16%	2.82%	1.89%	1.98%	2.38%	2.55%	3.41%
Unknown	0.00%	0.00%	0.03%	0.00%	0.05%	0.52%	0.00%	0.23%	0.26%	0.26%

  

<u>Texas A&amp;M</u> <u>Ethnicity</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
White	80.41%	80.46%	82.04%	82.93%	80.61%	82.01%	82.86%	82.34%	79.80%	76.62%
Native American	0.38%	0.47%	0.52%	0.49%	0.52%	0.55%	0.39%	0.40%	0.54%	0.39%
Black	3.60%	2.86%	2.68%	2.69%	2.59%	2.93%	2.62%	2.35%	3.01%	3.60%
Asian	2.77%	3.59%	3.52%	3.45%	3.75%	3.28%	3.31%	3.48%	3.78%	4.52%
Hispanic	11.16%	9.74%	9.10%	8.51%	10.01%	9.97%	9.56%	10.29%	12.24%	14.09%
International	0.70%	0.80%	0.82%	0.69%	0.70%	0.71%	0.81%	1.00%	0.57%	0.72%
Other/Blank	0.97%	2.09%	1.33%	1.24%	1.81%	0.55%	0.46%	0.15%	0.07%	0.06%

Source: The University of Texas at Austin, Top 10% Report #8, 11/23/2005, Table 1: Applicants/Admits/First-Time Freshmen, Summers and Falls Combined, 1996-2005, [www.utexas.edu/student/admissions/research/HB588-Report8.pdf](http://www.utexas.edu/student/admissions/research/HB588-Report8.pdf); Texas A&M Office of Institutional Studies and Planning, Student Related Reports, Applications, Admits, and Enrolled, [www.tamu.edu/opir/reports/student/AAE\\_Fa05.pdf](http://www.tamu.edu/opir/reports/student/AAE_Fa05.pdf), Accessed 10 April 2006

Appendix 6  
State University System of Florida  
Racial Status of Fall Student Undergraduate Enrollment, 1990-2005

System-Wide

<u>Ethnicity</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>
Asian	2.99%	3.43%	3.68%	3.83%	4.09%	4.20%	4.31%	4.33%
Black	12.60%	13.34%	13.91%	14.41%	14.66%	14.80%	15.46%	15.63%
Hispanic	8.53%	9.28%	10.17%	10.91%	11.81%	12.25%	12.46%	12.71%
Native Indian	0.14%	0.17%	0.19%	0.23%	0.27%	0.31%	0.34%	0.35%
Non-Resident Alien	2.33%	2.33%	2.40%	2.44%	2.41%	2.51%	2.60%	2.79%
White	73.41%	71.43%	69.64%	68.16%	66.71%	65.83%	64.75%	64.05%
Not Reported	0.00%	0.02%	0.01%	0.01%	0.04%	0.10%	0.08%	0.14%

Florida State University

<u>Ethnicity</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>
Asian	1.75%	2.03%	2.09%	2.16%	2.31%	2.43%	2.52%	2.36%
Black	7.08%	8.07%	8.82%	9.31%	9.88%	10.30%	10.58%	11.39%
Hispanic	4.24%	4.47%	4.84%	5.51%	6.33%	6.43%	7.12%	7.64%
Native Indian	0.21%	0.26%	0.25%	0.34%	0.35%	0.33%	0.39%	0.45%
Non-Resident Alien	0.74%	0.81%	0.84%	0.77%	0.79%	0.93%	0.99%	1.13%
White	85.99%	84.36%	83.16%	81.92%	80.34%	79.58%	78.40%	77.04%
Not Reported	—	—	—	—	—	—	—	—

University of Florida

<u>Ethnicity</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>
Asian	3.90%	4.44%	5.24%	5.68%	6.01%	5.97%	6.21%	6.22%
Black	7.09%	6.39%	6.27%	6.18%	6.22%	6.42%	6.77%	6.82%
Hispanic	5.82%	6.66%	7.52%	8.29%	9.32%	10.26%	10.51%	10.16%
Native Indian	0.13%	0.15%	0.18%	0.22%	0.27%	0.25%	0.28%	0.31%
Non-Resident Alien	1.40%	1.60%	1.63%	1.43%	1.25%	1.02%	0.87%	0.95%
White	81.66%	80.73%	79.11%	78.17%	76.80%	75.71%	75.16%	75.31%
Not Reported	0.01%	0.03%	0.05%	0.04%	0.14%	0.37%	0.20%	0.22%

Source: Board of Governors, State University System of Florida Website, Facts and Figures, Fall Student Enrollment Data, [www.flbog.org/factbook/enrollment.asp?clear=true](http://www.flbog.org/factbook/enrollment.asp?clear=true), accessed 10 April 2006

## Appendix 6 (continued) State University System of Florida Racial Status of Fall Student Undergraduate Enrollment, 1990-2005

### System-Wide

<u>Ethnicity</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
Asian	4.39%	4.39%	4.56%	4.69%	4.75%	4.71%	4.66%	4.72%
Black	16.15%	16.34%	16.24%	16.34%	16.34%	16.25%	15.92%	15.39%
Hispanic	12.71%	12.99%	13.21%	13.43%	13.95%	14.48%	15.00%	15.84%
Native Indian	0.35%	0.36%	0.43%	0.44%	0.43%	0.41%	0.38%	0.35%
Non-Resident Alien	2.97%	2.97%	2.78%	2.70%	2.41%	2.09%	2.42%	2.28%
White	63.20%	62.49%	61.84%	61.24%	60.80%	60.50%	60.16%	59.80%
Not Reported	0.22%	0.46%	0.95%	1.15%	1.33%	1.55%	1.47%	1.62%

### Florida State University

<u>Ethnicity</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
Asian	2.60%	2.62%	2.78%	2.84%	3.00%	3.00%	2.93%	2.87%
Black	12.12%	12.38%	12.03%	12.29%	12.20%	11.78%	11.65%	11.57%
Hispanic	7.60%	7.93%	8.04%	9.18%	9.95%	10.38%	10.90%	10.88%
Native Indian	0.39%	0.39%	0.41%	0.41%	0.39%	0.38%	0.36%	0.36%
Non-Resident Alien	1.24%	1.21%	1.07%	1.01%	0.88%	0.79%	0.67%	0.62%
White	76.06%	75.47%	75.19%	73.62%	72.71%	72.69%	72.11%	72.19%
Not Reported	—	—	0.47%	0.65%	0.87%	1.00%	1.37%	1.51%

### University of Florida

<u>Ethnicity</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
Asian	6.37%	6.46%	6.80%	6.93%	6.95%	7.01%	6.98%	7.36%
Black	7.10%	7.53%	8.39%	8.20%	8.59%	8.70%	8.79%	8.99%
Hispanic	10.23%	10.53%	10.82%	10.88%	11.47%	12.12%	12.23%	12.70%
Native Indian	0.32%	0.41%	0.54%	0.55%	0.54%	0.52%	0.42%	0.34%
Non-Resident Alien	1.07%	1.08%	1.03%	1.09%	0.95%	0.93%	0.92%	0.82%
White	74.72%	73.68%	71.88%	71.61%	70.69%	69.84%	69.65%	68.37%
Not Reported	0.20%	0.30%	0.54%	0.73%	0.81%	0.88%	1.01%	1.42%