Issue Paper on Initiative 200

INTRODUCTION

Initiative Measure No. 200 was filed as an initiative to the Legislature in 1997. Petitions in support of the measure were filed in proper form, timely, and in sufficient number to qualify the measure for certification to the 1998 session of the Legislature. The Legislature took no action on the measure, so it will appear on the 1998 general election ballot. If a majority of the voters approve it, the Initiative will be adopted as a new state statute, effective 30 days after the election. The text of the Initiative is Attachment A to this paper.

The purpose of this memorandum is to identify the primary legal issues raised by the Initiative (called "the Initiative" or "Initiative 200")that our clients and the attorneys who represent them need to prepare to address. This memorandum discusses, but does not answer, the questions that are raised. Only the courts can finally decide the meaning of the Initiative, and the courts may well interpret its language in light of the public debate about the measure during the next two months. In that sense, the legislative history of the measure is not yet written. However, we have prepared this memorandum with a preliminary discussion because state agencies have asked for assistance in making adequate preparation to administer various laws and programs in case the measure is approved. [1] We will continue to work together to coordinate state government's approach to the major legal issues that would arise if the measure were adopted.

This memorandum discusses those legal issues which would likely affect many different agencies. Individual agencies and institutions will no doubt have additional issues, specific to their activities, to examine if the Initiative is approved. We will caution the state agencies and officers that, as requested, our advice and analysis is intended to assist them state agencies and officers to carry out their duties, and not to influence public debate take a position on the Initiative.

ISSUE NO. 1

Interpreting The Language Of The Initiative, Particularly

"Discriminate" And "Preferential Treatment"

A. The Prohibition On "Discrimination" Overlaps Existing Law.

The heart of Initiative 200 depends on the interpretation of two terms found in section 1(1): "discriminate " and "preferential treatment." The first of these terms "discriminate" has a history of statutory and case law interpretation. RCW 49.60 is designated as the "law against discrimination" (RCW 49.60.010), and RCW 49.60.030 preserves "[t]he right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service animal by a disabled person". RCW 49.60.010 explicitly covers "employment," and the chapter may by implication cover some examples of public education and contracting as well. As to "discrimination" then, the Initiative at least partly overlaps current statutory law. [2]

B. The Prohibition On "Preferential Treatment" Is Not Defined In

The Initiative And Does Not Have A Well-Established Meaning.

The other term, "preferential treatment", is not defined in the statute and does not have a historical legal use or "well-accepted, ordinary meaning" which would be used in judicial construction. See Washington State Coalition for the Homeless v. Department of Social and Health Services, 133 Wn.2d 894, 906, 949 P.2d 1291 (1997). The term is essentially new to Washington jurisprudence and the courts would have to construe the term and decide what practices constitute "preferential treatment".

Little guidance is provided by the use of this term in other contexts. "Preferential treatment" and a related term, "preference", appear in a few Washington laws and opinions, but in different contexts and with little discussion of the meaning of the terms. [3] Similarly, these terms have been used in United States Supreme Court opinions, but with little discussion of their meaning. [4] Case law developing under California's Proposition 209 [5] may interpret language similar to Initiative 200, but Proposition 209 is very new, and the California courts are not very far along in interpreting its terms. Furthermore, as noted below, there are important differences between the California laws and the proposed Washington Initiative, which may limit the relevance of California case law. [6] Most significantly, Proposition 209 amends the California Constitution and, therefore, overrides any conflicting statutes. Initiative 200 would become a Washington statute on an "equal footing" with existing statutory law. As discussed below, the courts employ various rules of statutory construction to determine how the enactment of a new law affects the operation of older provisions.

Since neither the Initiative nor the courts have defined "preferential treatment", it is difficult to evaluate how it will be read and what effects Initiative 200 will have on existing state laws and programs. However, the following discussion should provide a starting point for that evaluation by identifying the principles used in statutory construction, existing statutory provisions potentially affected, and possible approaches to application of the Initiative in the areas of public employment, education and contracting. [7]

ISSUE NO. 2

HARMONIZING INITIATIVE 200 WITH

CURRENT STATUTORY LAW

A. Principles Of Statutory Construction Would Have To Be Applied

To Determine The Effect Of The Initiative On Existing Statutes.

A number of existing statutes mandate "affirmative action" or direct agencies to enhance opportunities for women and for racial and ethnic minorities in certain fields, including public employment, public education, and public contracting. The Initiative does not expressly repeal or amend any of these statutes. One the most significant initial questions of interpretation, if the

Initiative were approved, would be how to square the "no discrimination or preferential treatment" language with older statutes requiring agencies to consider the needs of particular groups, some of which are the same categories mentioned in the Initiative. Principles of statutory construction would have to be applied to determine whether: (1) Initiative 200 impliedly repeals an existing statute; (2) whether the existing statute and Initiative 200 can read in a way to harmonize and give effect to both; or (3) whether a more specific statute would prevail over the more general terms of Initiative 200. We discuss these principles and list some of the existing statutes but cannot, at this point, state an opinion on how the principles would be applied in a particular context. As noted above, the legislative history of the Initiative, including the statements in the Voters Pamphlet, has yet to be written.

B. Courts Will First Attempt To Harmonize Multiple Statutes Touching On The

Same Subject, But May Find Implied Repeal If There Is A Direct Conflict.

Repeals by implication are strongly disfavored. Where there are multiple statutes on the same subject, courts will attempt to harmonize new and existing statutes to give effect to both. Vashon Island Comm. for Self-Gov't v. Washington State Boundary Review Bd. for King Cy., 127 Wn.2d 759, 903 P.2d 953 (1995) (construing petition to incorporate rural island in light of statute requiring boundary review board to exclude "non-urban" territory in from areas proposed to be incorporated); Gilbert v. Sacred Heart Med. Ctr., 127 Wn.2d 370, 900 P.2d 552 (1995) (construing an amendment to the tort laws concerning hospital liability for injuries to minors in light of a pre-existing tolling statute); and Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 858 P.2d 503 (1993) (adopting a reading of a later statute which did not result in the implied amendment of an older law, where both readings were plausible from the language of the newer amendment). Therefore, in interpreting Initiative 200, courts would likely look at individual provisions of the Initiative and of current statute and would, first, try to interpret the language in Initiative 200 in such a way as to preserve the force of any pre-existing statute to the maximum extent possible. As in Tollycraft, the courts may, to the extent there is any ambiguity in the Initiative, choose the reading that does not imply the amendment or repeal of the older statutes.

There might, however, be areas in which the courts would find a definite, direct conflict between the provisions of an existing statute and the provisions of Initiative 200. Where this happens, the courts use two rules of statutory construction, often blended together in the case law: (1) more specific language prevails over more general; and (2) later prevails over earlier. The courts cite both of these rules alternatively, and rarely deal with the potential conflict between them: that is, what if the more specific statute is also the earlier one? A case which does discuss the issue is Spokane Cy. Fire Protec. Dist. 9 v. Spokane Cy. Boundary Review Bd., 97 Wn.2d 922, 652 P.2d 1356 (1982). The Court, analyzing prior case law, appears to conclude that when the two conflicting laws are enacted in the same session (as was true in the Fire Protection District case itself), the more specific controls, even if earlier enacted. However, the courts will enforce a later, more general, statute over an earlier, more specific, one where the legislative intent is sufficiently clear. Id., at 925-26, citing Wark v. Washington Nat'l Guard, 87 Wn.2d 864, 557 P.2d 844 (1976). [8] A reading of the case demonstrates above all, however, how resistant the courts are to finding direct conflicts between statutes. The general attitude seems to be reflected in this restatement of the rules of construction:

In a long line of cases we have held that a statute is impliedly repealed by a later legislative enactment if certain conditions are present in the later enactment. The conditions are (1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.

In re Chi-Dooh Li, 79 Wn. 2d 561, 563, 488 P.2d 259 (1971).

This point is significant in analyzing Initiative 200 in light of previous statutes. Many of the earlier statutes are more specific than Initiative 200, which is a broad statement of principle. To the extent the courts find that the Initiative is clearly inconsistent with prior law, they will then have to decide if the legislative intent behind the Initiative is clear enough to supersede any pre-existing, inconsistent statutory language.

When an initiative is at issue, the “legislative intent” means the intent of the voters. Where possible, the intent of the electorate in adopting an initiative will be derived from the language; however, where that language is ambiguous, statements contained in the official Voters Pamphlet may be considered to determine the collective purpose and intent of the people. State v. Thorne, 129 Wn.2d 736, 763, 921 P.2d 514 (1996). In construing the meaning of an initiative, the language of the enactment is to be read as the average informed lay voter would read it. Western Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 424, 899 P.2d 792 (1995). If the courts find that the initiative's terms are ambiguous, or are in doubt as to the legislative intent behind the measure, the courts ordinarily look to such sources as the arguments and explanatory material in the Voters Pamphlet to find the “history” of a ballot measure. See, e.g., Lynch v. State, 19 Wn.2d 802, 145 P.2d 265 (1944).

C. Existing Statutes Potentially Affected By Initiative 200.

Here are the major examples of current statutory provisions which would have to be examined if Initiative 200 were approved:

1. State Personnel System.

RCW 41.06.150 mandates “affirmative action” in the administration of the state personnel system. The Personnel Resources Board is directed to adopt rules regarding the basis and procedures to be followed for “[a]ffirmative action in appointment, promotion, transfer, recruitment, training, and career development; development and implementation of affirmative action goals and timetables; and monitoring of progress against those goals and timetables.” RCW 41.06.150(22). RCW 41.06.020(11) defines “affirmative action” as follows:

“Affirmative action” means a procedure by which *racial minorities*, *women*, persons in the protected age category, persons with disabilities, Vietnam-era veterans, and disabled veterans *are provided with increased employment opportunities*. It shall not mean any sort of quota system.

(Italics added.) [9]

The Personnel Resources Board has adopted rules setting goals for affirmative action for the categories listed in the statute. [10] WAC 356-09. These rules require agencies to develop affirmative action plans, which are approved by the Board, and provide sanctions for failing to meet affirmative action goals. The principal method currently employed by rule is the "supplemental referral" or "plus three" system by which up to three names of persons in protected categories are certified to agencies for filling vacancies, in addition to the seven names scoring highest in the "regular" testing process. The effect of the supplemental certification is to broaden the pool of candidates from which the agency can choose. By definition, these additional people, although they passed the test, would not have been referred on the basis of their scores alone. The rules do not require that any of these "supplemental" referrals be hired for any particular opening. Agencies may select either one of the seven "regular" or one of the "supplemental" referrals. [11]

Initiative 200 would not explicitly repeal the statute providing for the adoption of affirmative action programs in the state personnel system, but provides that"[t]he state shall not . . . grant preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment". As noted above, the question of interpretation will be whether the two statutes can be harmonized, or whether Initiative 200 will be deemed to have impliedly repealed these provisions of RCW 41.06. Reading these statutes together with the initiative raises several major issues. First, a decision must be made whether affirmative action goals are themselves inconsistent with the Initiative's proscription of "preferential treatment." If so, will the courts read the explicit language of the affirmative action statutes to permit the continuation of affirmative action goals as exceptions to the more general language of the Initiative? Next, the specific mechanism for meeting the goals (the "supplemental referral" system) would have to be examined to determine if it amounted to "preferential treatment." Finally, the issue would arise whether the Initiative would allow gender or race to play any part in the final selection of a candidate for employment or promotion, again reading the Initiative together with existing statutory affirmative action requirements.

2. Office of Minority and Women's Business Enterprises.

RCW 39.19 establishes the Office of Minority and Women's Business Enterprises, with the task of increasing the participation of minority and women-owned business enterprises in state contracting and procurement. OMWBE has a broadly worded mandate to "provide the maximum practicable opportunity for increased participation by minority and women-owned and controlled businesses in participating in public works and the process by which goods and services are procured by state agencies and educational institutions from the private sector." RCW 39.19.010. To achieve this purpose, OMWBE (1) certifies businesses as minority and women-owned and controlled for the purposes of determining their eligibility for state, local, and (by contract) federal programs benefiting these businesses; (2) sets overall annual goals for the participation of minority and women-owned businesses in the state; (3) monitors and enforces compliance with the laws; and (4) conducts outreach and education to assist women and minority-owned businesses in participating in state contracts. Statutes direct OMWBE to "[e]stablish annual overall goals for participation by qualified minority and women-owned and controlled businesses for each state agency and educational institution to be administered on a contract-by-contract basis or on a class-of-contracts basis." RCW 39.19.030. Each state agency and educational

institution is required to “comply with the annual goals established for that agency or institution under this chapter for public works and procuring goods or services.” RCW 39.19.060. Several other statutes require certain agencies to invite proposals from certified minority and/or women-owned contractors. See, e.g., RCW 39.04.150 (state agencies authorized to establish small works roster); RCW 43.19.1906 (purchases and sales by sealed bid); RCW 53.08.120 (small works roster for port districts).

As noted earlier, Initiative 200 would not expressly repeal any part of RCW 39.19 or other statutes regarding participation by minority and women-owned and controlled businesses. The critical question will be the interpretation of “preferential treatment.” Will the courts find an inherent conflict between the entire OMWBE program and the language of Initiative 200, or will they attempt to preserve as much of RCW 39.19 as possible, consistent with the goal of “harmonizing” multiple statutes? OMWBE provisions might be analyzed in three categories for purposes of applying the “preferential treatment” language of the Initiative: (1) certification of businesses as minority or women-owned; (2) outreach and education for businesses owned or controlled by minorities or women; and (3) goals for participation in contracts by minority and women-owned and controlled businesses. We briefly discuss each of these categories.

a. Certification of businesses as minority or women-owned.

It is unlikely that certification of a businesses as minority or women-owned and controlled, by itself, would be construed as “preferential treatment.” Such certification simply establishes that the businesses meet certain qualifications. The continued need and viability of a certification program would depend on whether statutes and programs applicable to certified businesses [12] are affected in whole or in part by Initiative 200. In addition, the certification would continue to be relevant if used to “establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.” Initiative 200, § 1(6). State certification might be necessary to meet federal requirements for certain funding. RCW 39.19.030(10) provides that OMWBE may cooperate with the United States to carry out the purposes of the chapter.

Most questions under Initiative 200 focus on the uses of such certification for targeted outreach or for bid awards. Those issues are discussed in turn.

b. Outreach and education for businesses owned or controlled by women or minorities.

The Office of Minority and Women's Business Enterprises is directed, among other tasks, to identify barriers to equal participation in public contracts and procurement and to develop programs to provide opportunities for participation by minority and women-owned and controlled businesses. RCW 39.19.030(1)-(3). Among the programs are workshops on obtaining certification; preparation and distribution of a directory of minority and women-owned businesses to contracting agencies and prime contractors; and distribution of a newsletter providing information on OMWBE and public contracting in general.

Additionally, the Legislature has established training and other business assistance programs for minority and women-owned businesses. For example, RCW 43.210.130 directs the small

business export finance assistance center to "provide outreach services to minority-owned businesses in Washington to inform them of the importance of and opportunities in international trade, and to inform them of the export assistance programs available to assist these businesses to become exporters." The Department of Community, Trade and Economic Development is directed to conduct entrepreneurial training courses for minority and women-owned small businesses. RCW 43.31.093.

A recurring question is whether Initiative 200 would prohibit such outreach and education programs. There is no well-accepted definition of the term "preferential treatment" which would indicate whether it encompasses targeted recruitment and outreach programs. On the national level, this lack of consensus is reflected in federal legislative proposals and in comment on Proposition 209. For example, several bills introduced in Congress in recent years would have prohibited "preferential treatment" on the basis of race, national origin, or sex, but would have expressly provided that the statute should not be construed to prohibit the government from recruiting women and minorities into the applicant pool for employment, to encourage businesses owned by women or minorities to bid for public contracts, or to recruit qualified women and minority students into the applicant pool for college admissions. [13] On the other hand, one commentator on California's Proposition 209 noted that "government-sponsored outreach and recruitment programs that target minorities and women for employment, educational, or contracting opportunities could also be interpreted as providing preferential treatment." [14] Theodore Hsien Wang, *What's Next? Campaigns and Initiatives,* 95 Ann. Surv. Am. L. 463 (1995). Yet, in dissenting from denial of a rehearing en banc, one judge expressed his individual opinion that outreach was not included in "preferential treatment" within the meaning of Proposition 209:

The court does not base its decision on California's Proposition 209, which was heard the same day and was decided prior to the issuance of the opinion here. I would comment only that, consistent with what I have said earlier, I do not believe that Proposition 209's ban on "preferences" is applicable to "outreach" programs, and thus the provision of that measure would not apply to such requirements.

Monterey Mechanical Co. v. Wilson, 138 F.3d 1270, 1279 n.14 (9th Cir. 1998) (Reinhardt, J., dissenting) (citation omitted). [15] Thus, there are differences of opinion on the general question of whether targeted outreach and recruitment would be regarded as "preferential treatment".

In constitutional challenges to government programs, court decisions have distinguished between outreach programs and establishment of goals for minority and women-owned business participation. For example, the three-judge panel decision in Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997), distinguished between a public contracting program that did not treat all contractors alike in the bid process and a "non-discriminatory outreach program, requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid". Another court noted that "affirmative marketing, outreach, and recruitment programs directed at minorities have been characterized as `race neutral' and have not been subject to strict scrutiny analysis." Raso v. Lago, 958 F. Supp. 686, 702 (D. Mass. 1997), aff'd, 135 F.3d 11, 17 (1st Cir. 1998). The Court distinguished outreach programs that are designed to ensure all racial groups in

an area have knowledge of a program and an opportunity to participate from discriminatory outreach that would create a pool of minority applicants only, or which would steer other interested applicants away from the program. Or, in the words of another court, "[t]he crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act." Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1553 (M.D. Ala. 1995). It is possible, though uncertain, that this distinction would also be made in defining "preferential treatment" in the context of Initiative 200.

c. Goals for participation by minority and women-owned and controlled businesses and awards of bids based on such goals.

A discussion of the effect of Initiative 200 on public contracting goals necessarily includes a description of existing federal constitutional limits on use of race or gender in the award of public contracts. Programs which attempt to remedy past discrimination by setting goals for participation by minority-owned businesses are subject to strict scrutiny under the equal protection clause, and therefore must be narrowly tailored to achieve a compelling government interest. In the context of public contracting, a "compelling government interest" is established where there is both statistical and anecdotal evidence of past discrimination. A program is "narrowly tailored" when goals are set only for the particular racial or other classifications, geographical areas, and types of business where discrimination has been identified and where the program first considers race- or gender-neutral alternatives for meeting the goals. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989). The remedies may include establishing goals for participation by minority and women-owned businesses. Unless continuing effects of such discrimination are demonstrated, the award of public contracts based on participation of minority or women-owned businesses violates the equal protection clause. [16] Monterey Mechanical, 125 F.3d 702.

Since federal constitutional law allows the use of race or gender in the award of public contracts only in these limited circumstances, the question becomes whether Initiative 200 would be interpreted to prohibit, as a matter of state law, the use of race or gender in the award of public contracts, even in those situations where the federal constitution would permit consideration of those factors. In City of Richmond v. J.A. Croson Co., 488 U.S. at 506-07, the Court referred to a minority contractor set-aside program, which required the prime contractor to subcontract at least 30% of the dollar amount of the contract to minority businesses, as requiring a "quota" and a "racial preference." Washington's more flexible program can be distinguished from the City of Richmond's program, but the question remains whether it would be considered "preferential treatment", and, if so, how the provisions of Initiative 200 and RCW 39.19 would be read together.

3. Human Rights Commission Statutes.

RCW 49.74, entitled "Affirmative Action," states that "[t]he legislature finds and declares that racial minorities, women, persons in protected age groups, persons with disabilities, Vietnam-era veterans, and disabled veterans are underrepresented in Washington state government employment". RCW 49.74.005. The chapter goes on to provide for enforcement measures against agencies which fail to comply with the affirmative action laws mentioned above (RCW

41.067.150 and RCW 43.43.340), including the possibility of administrative and/or judicial orders to comply. RCW 49.74.030-.050. The Human Rights Commission is given responsibility to enforce and administer this chapter. RCW 49.74.020.

The enactment of Initiative 200 would call into question the authority of the Commission or of the courts to require compliance with RCW 49.74, at least as to race, sex, color, ethnicity, or national origin. Also, because the Initiative would be codified by its own terms in RCW 49.60, the Commission could, it might be argued, become the enforcement agency for any violations of the Initiative itself. [17] The Commission could thus be under a simultaneous obligation to require agencies to comply with "affirmative action" goals but to refrain from any practice amounting to "discrimination" or "preferential treatment." If the measure were enacted, the Commission would have to carefully review its rules, policies, and guidelines in light of this simultaneous obligation.

4. Statutes Concerning Women and Racial Minority Representation

In Apprenticeship Programs - RCW 49.04.

RCW 49.04.100 mandates that any apprenticeship programs approved by the Washington State Apprenticeship and Training Council ("the Council") must demonstrate participation of women and minorities in the apprenticeship program in a ratio equal to the ratio of women and minorities in the labor force in the program sponsor's labor market area. If a program is below this ratio, then where there are women and minority candidates for apprenticeships in the applicant pool who meet the minimum requirements set for entry into an apprenticeship, sponsors are required to fill openings in their programs with women or minority candidates, regardless of their individual rank among all candidates.

The State is not the employer of the apprentices, nor does the State directly participate in the training of apprentices. There is thus an initial question whether the apprenticeship program sufficiently relates to public employment, public education, or public contracting to be affected by Initiative 200. State approval of an apprenticeship program does confer economic benefit on an employer, by way of state assistance with instructional costs and payment of the apprentices' industrial insurance premiums for their classroom instruction hours. State approval also allows an employer to pay an apprentice less than journey level prevailing wage rates on public work projects, giving contractors who use state-approved apprentices a competitive advantage on bidding for those projects. RCW 39.12.021. If a program sponsor does not meet the ratio goals set forth in RCW 49.04.100 and cannot demonstrate "genuine effort" to comply, the Department of Labor & Industries may withdraw state funding and facility support for that program. RCW 49.04.110. The Council has promulgated rules requiring program sponsors to include affirmative action plans in their apprenticeship programs. WAC 296-04-300 to -480. The Council has at times limited new registrations in some programs to individuals who will improve the sponsor's ratio for affirmative action purposes.

The Council's authority to review and regulate apprenticeship flows largely from a federal law, the Fitzgerald Act, 29 U.S.C. § 50. The U. S. Department of Labor has recognized the State Apprenticeship Council as its agent for the purpose of reviewing and approving programs in the

state of Washington. Federal regulations mandate affirmative action as a requirement for approval of an apprenticeship program.

As noted above, the initial question is whether the apprenticeship programs are affected by Initiative 200. The State's partial funding of some training and the relationship of the apprenticeship program laws to the public works laws might give rise to arguments that this program relates to "public education" or to "public contracting." [18] Even if these arguments were accepted, further questions would arise concerning the need to maintain the affirmative action program in order to continue qualifying to administer parallel federal programs**.** See Initiative 200, Sec. 1(6) (exemption for compliance with federal requirements).

ISSUE NO. 3

INTERPRETING THE PHRASE "PREFERENTIAL TREATMENT" IN THE CONTEXT OF "PUBLIC EMPLOYMENT"

Threshold questions may arise regarding what actions are included in the term "operation of public employment". The term clearly would include the traditional employer-employee relationships and decisions, such as hiring and firing, promotions, wages, and working conditions. While issues may arise regarding whether specific situations constitute the "operation of public employment", such issues do not lend themselves to general discussion.

More general questions arise in this area concerning recruiting and hiring practices. We have already discussed the State's "supplemental referral" program at pages 8-9. Our discussion in this section will focus on the issues of targeted recruitment and outreach, and job qualifications. Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997). [19]

A. Targeted Recruitment And Outreach.

As in public contracting, a recurring question is whether Initiative 200 would ban targeted recruitment or outreach. May an agency place a job announcement in a Chinese-language newspaper? Send recruiters to colleges whose students are all women? Conduct a job fair at a convention attended primarily by members of an ethnic minority group? If those recruited must compete for open positions on an equal basis with all other candidates, do the special recruitment efforts still constitute "preferential treatment"? [20]

Again, as in public contracting, there appears to be no consensus on whether such outreach and recruitment constitutes "preferential treatment". With regard to California's Proposition 209, some have suggested that recruitment campaigns targeted at a particular group would likely be prohibited. One commentator stated "[a]n outreach program that spends money to recruit students from a particular racial or ethnic community, or an apprenticeship program that prepares citizens of a particular community for entry into the job market, both clearly fall within the plain language of the prohibitions of the CCRI [California Civil Rights Initiative]." 23 Hastings Const. L. Q. 1135, 1146 (1996). Yet, as commentators acknowledge "[o]ne can make a contrary argument: Recruiting is simply communication to the public rather than a decision being made about a particular applicant or group of applicants". 44 UCLA L. Rev. 1335, 1350 (1997).

Courts appear to view employment outreach programs as qualitatively different from the use of race or sex-conscious factors in employment decisions. For example, in Peightal v. Metropolitan Dade Cy., 26 F.3d 1545, 1557-58 (11th Cir. 1994), the Court described special recruitment efforts as “race-neutral measures”, which had been tried by a fire department before special hiring and ranking measures were adopted. These measures included “high school and college recruiting programs to provide information and to solicit applications from young minorities and women for firefighting positions” and creation of a recruitment specialist whose duties included “presentations at job fairs and career days at local colleges designed to apprise minorities and women of fire service career opportunities.” As noted above, one can distinguish between an outreach plan that excludes a particular group from applying, and an outreach plan that is directed at groups that are historically underrepresented in a program and which are aimed at overcoming inhibitions that may discourage qualified members of the targeted group from participating as fully as other groups. See Almonte v. Pierce, 666 F. Supp. 517, 527 (S.D.N.Y. 1987) (making this distinction in the context of review of marketing plan for federally funded housing project).

In keeping with these cases, one reading of the Initiative would be to permit targeted recruitment and outreach efforts that are designed to make traditionally underrepresented groups aware of programs and openings, and are not designed to exclude or discourage any other group. However, because neither the Initiative nor case law have defined “preferential treatment” or applied the term in this context, it is not possible to predict that this is how Initiative 200 would be applied to such programs.

B. Job Qualifications.

Another issue is whether an agency may set a qualification for a job (e.g., “knowledge of Cambodian”), which is legitimately related to the duties of the position in question (translating, or social work in a particular neighborhood) but may favor applicants of a particular ethnic background. In equal protection and Title VII cases, the courts have viewed factors like foreign language ability as “race-neutral” even though such factors may bear a close relationship to race or ethnicity. See, e.g., Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); Pemberthy v. Beyer, 19 F.3d 857, 870 (3rd Cir. 1994); Franklin v. District of Columbia, 960 F. Supp. 394 (D.D.C. 1997). [21]

ISSUE NO. 4

INTERPRETING THE PHRASE “PREFERENTIAL TREATMENT”

IN THE OPERATION OF “PUBLIC EDUCATION”

To some extent, the questions about “public education” parallel those about public employment. “Targeted recruiting”, for instance, is an issue in both areas. Assuming that the “core” functions of the education system are clearly covered by the Initiative—recruitment and admission of students, selection of teachers and employees (which are also “public employment” in any case)—the main definitional questions concern those functions performed by schools and educational institutions that are beyond “education” in the narrow sense.

For instance, the state's higher education institutions (and even some secondary schools) have proprietary functions, such as bookstores, coffee shops, and student housing. These are typically not funded as part of the educational institution. May a public-owned college allow students to reserve a section of a dormitory or a lounge for a particular ethnic group? Many schools and colleges allow student groups (not necessarily curriculum-related) to meet on school property or use school resources. Would the Initiative require any changes in the way schools relate to these groups? Another area is that of scholarship and awards for students. If a privately funded scholarship is available only to members of one sex or to members of a racial minority, questions arise whether a school or college may "participate" in the awarding of these scholarships, whether the school is involved in choosing the recipient or merely in publishing information about the scholarship's existence. [22] Finally, questions could arise about services a school or college provides to students. These could include tutoring, language assistance, counseling, or health care programs either specifically designed for particular groups or far more likely to be used by some groups than others (for example, rape and pregnancy counseling). [23]

A. Targeted Recruitment And Outreach.

Targeted recruitment and outreach are major issues in education, too. Colleges and universities recruit students, faculty, and staff. As with public employment, questions arise whether targeted recruitment is itself "preferential treatment." [24]

There are several statutes that provide for targeted recruitment and outreach in education programs. For example, RCW 28A.415.200 and .205 establish a minority teacher recruitment program. This program, administered by the state board of education, is designed to encourage members of targeted groups to consider a career in the field of teaching. Also, after finding that women and minority students traditionally have been discouraged from entering the fields of science and mathematics, the Legislature directed the University of Washington to establish a program to encourage students in the targeted groups to acquire skills needed for post-secondary study in mathematics, engineering or related sciences. RCW 28A.625.200-.240. More generally, the Higher Education Coordinating Board is to "[m]ake recommendations to increase minority participation, and monitor and report on the progress of minority participation in higher education." RCW 28B.80.350(11). An educational component is also included in the "state-wide health personnel resource plan", one element of which calls for "[s]trategies to increase the number of persons of color in the health professions." RCW 28B.125.010(2)(f), (6).

Thus, as in other issues we have identified, the questions that must be answered include not only whether "preferential treatment" should be read to include such outreach and recruitment, but how to harmonize Initiative 200 with statutes that specifically call for such outreach and recruitment.

B. College And University Admission Processes.

Some have questioned what impact the passage of Initiative 200 would have on college and university admission processes. This is an area where it is difficult to draw parameters regarding what considerations would be deemed "preferential treatment". As in other contexts, the

Initiative does not define the term "preferential treatment" or state how it would be applied in this area.

There appear to be two possible approaches to defining "preferential treatment" in the context of public education admissions. The first, more limited definition, would be that "preferential treatment" is the reservation of seats in a college or university for which only students of a particular race or gender can compete, or a similar system where race or gender are used as admissions criteria without any individualized consideration of the applicant's background or qualifications. The second possible definition is that "preferential treatment" is accorded when there is any consideration of the race or gender of an applicant, even in the context of comparing the individual with all other candidates for the available seats to determine what student body make-up best achieves educational diversity. [25]

The terms "preferential treatment", "preference program", "preferential classification", and "preferential purpose" are scattered throughout the decisions in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). These terms are used to describe the type of admissions program then used by the medical school at the University of California at Davis, a program that reserved a specified number of seats for "disadvantaged students" and considered only applicants from designated minority groups for those seats. Id. at 276. Justice Powell refers to this admissions program as "petitioner's preference program", id. at 319, or "petitioner's preferential program", id. at 320. Similarly, Justice Brennan refers to such an admissions program as involving issues of "preferential treatment", id. at 359, and to the applicants from the designated minority groups as "the groups [the university] preferred." Id. at 359. It is noteworthy, however, that Justice Powell contrasted a system that reserves seats for minority students with a system that takes race or ethnic background into account in comparing all applicants and selecting from among them to achieve overall educational diversity, and used the terms "preferential treatment" or "racial preference" only to describe the former. See, e.g., id. at 318-19. [26]

Our courts may look to these uses of the terms "preferential treatment" and "preference" to assist in determining how the average informed lay voter would understand the meaning of Initiative 200 as applied to college and university admissions. However, as on most of these questions, we cannot be certain of how the issue would ultimately be resolved. [27]

C. Title VI And The Operation Of Public Education.

Title VI of the Civil Rights Act of 19964, section 601 provides:

No person in the United States shall, on the grounds 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.

42 U.S.C. § 2000(d).

The U.S. Supreme Court has held that the language of Title VI is coextensive with the Equal Protection Clause of the Fourteenth Amendment. University of California Regents v. Bakke, 438

U.S. at 29187. Programs based on race, color or national origin are subject to strict judicial scrutiny. This generally means that a race-based program will be upheld only if the court finds there to be a "compelling state interest" in the program, and only if the program is narrowly tailored to meet the compelling state interest. [28]

Because all public educational institutions in Washington receive federal financial assistance, every program or activity in which they engage must comply with Title VI. See, e.g., Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991); aff'd in part, vacated in part, rev'd in part, 14 F.3d 1534 (11th Cir. 1994). This includes admissions decisions and the award of financial aid.

Under this federal law, race-based "set-asides" or quotas, created to foster diversity on campus, will likely be found to violate Title VI. Bakke, 438 U.S. 265. See also, Podberesky v. Kirwan, 46 F.3d 5 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995). This is true whether the set-aside involves allocating a particular number of seats to members of a particular group in the admissions process, or whether it involves providing scholarships or financial aid awards only to members to certain groups selected on the basis of race, color or national origin. However, many courts have held that educational institutions may lawfully consider race or ethnicity as a "plus factor", or as one of many factors, when making admissions or financial aid decisions in order that they may further their legitimate interests in creating a diverse student body. Bakke, 438 U.S. 265. See also, McDonald v. Hogness, 92 Wn.2d 431, 598 P.2d 707, cert. denied, 445 U.S. 962 (1980). [29] The Office of Civil Rights, Department of Education, approves the use of race or ethnicity as a "plus factor" either to remedy the effects of past discrimination or to promote diversity within the student body. United States Department of Education, General Counsel, Letter to College and University Counsel, July 30, 1996. See also, Office of Civil Rights Final Policy Guidance (on Scholarships), 59 Fed. Reg. 8756 (1994).

It appears that the clearest forms of "preferential treatment" in education that would be covered by Initiative 200 are already inconsistent with Title VI. However, it is not clear whether those practices (such as the "plus factors" discussed above) which have been considered consistent with Title VI, would nonetheless be held inconsistent with the Initiative.

ISSUE NO. 5

DEFINITION OF PUBLIC CONTRACTING

"Public" and "contracting" are both broad words indeed. "Public" is defined in the Initiative to include essentially all state and local government agencies and entities. What about "contracting?" Does it cover all the relationships that include the essential elements of a contract, where one party is a state or local governmental unit?

Most of the discussion about public contracting in the past has been about public works and government procurement contracts. These are the contracts covered by RCW 39.19, the OMWBE statute. As a general matter, these are also the contracts let by public bid. Where contractors compete for a government contract in a formal bid process, one possible measure of "preferential treatment" is the extent to which sex or race-conscious factors are allowed to affect bid selection. For instance, in applying RCW 39.19, current state law allows agencies to take the

use of certified minority and women's business enterprises into account in ranking contractors. In areas other than public works and procurement, RCW 39.19 may not explicitly apply, but questions could still arise whether, for instance, the Initiative would allow an agency to follow a "diversity" policy in the selection of consultants, trainers, mediators, experts, and others to perform services under contract.

Another question is whether a private person performing a public contract may employ "preferential treatment" in, for instance, its choice of employees generally, or in its choice of specific employees to perform the public contract. Assuming that the contracting government played no role in the preferential treatment, has the contractor violated the Initiative because preferential treatment occurred in the "operation of public contracting"?

Some "private" contracts are supported in part or in whole by public funds. Questions arise whether such contracts would be defined as "public contracting" for purposes of the Initiative. When, if ever, can a contract to which no public entity is a party be considered "public"? Similar questions arise under the public works and prevailing statutes, but these depend on express language defining "public work." See, e.g., RCW 39.12 (state prevailing wage law), RCW 39.04.010 (definition of public work), and AGO 1996 No. 18 (suggesting that building not built at direct cost of the state may not meet the definition of a public work). But see Drake v. Molvik & Olsen Elec., Inc., 107 Wn.2d 26, 726 P.2d 1238 (1986) (Seattle Housing Authority project constructed with federal funds is public work). Many state grants or loans (which may, as noted above, be "public contracts" in themselves) finance services provided by contract. Although the argument seems strained, it might be argued that these contracts are "public" because of their financing, or because of active agency participation in the selection of a contractor or in supervising the performance of the work.

ISSUE NO. 6

CONCERNING THE EXCEPTION IN SECTION 1(4) FOR

"OTHERWISE LAWFUL" CLASSIFICATIONS OF CERTAIN KINDS

Initiative 200 provides for specific limited exceptions. In this respect it is quite different from Proposition 209, which provides exceptions for "bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." Rather, Section 1(4) of Initiative 200 states that it does not affect any "otherwise lawful" classification that is based on sex and is necessary for sexual privacy or medical or psychological treatment; undercover law enforcement work; film, audio, and theatrical casting; or provides for separate athletic teams for each sex. The term "otherwise lawful" would have to be defined in the context of a particular questioned act or practice. Some classifications might, quite aside from the Initiative, violate the state or federal constitutions.

The term "necessary" is used twice in Section 1(4): once in the phrase "necessary for sexual privacy or medical or psychological treatment" and once in the phrase "necessary for undercover law enforcement or for film, video, audio, or theatrical casting." The word leaves open the possibility that a particular decision may be challenged on the ground that while it may be

"otherwise lawful" and rational, it is not truly "necessary" and thus does not fall within the exception of subsection 1(4). For instance, it may be argued that selecting a female physician to treat inmates in a women's prison is not "necessary" in light of the fact that physicians commonly treat patients of the opposite sex, or that selecting a female officer as a prostitution "decoy" is not "necessary" because there might be some other (that is, besides using a decoy) way to combat prostitution. [30] On the other hand, the word "necessary" could be read less strictly, as having a meaning more in the sense of "appropriate." [31]

ISSUE NO. 7

THE ENFORCEABILITY OF PRE-EXISTING COURT DECREES

Section 1(5) of the Initiative provides that "[t]his section does not invalidate any court order or consent decree that is in force as of the effective date of this section." This section could give rise to interpretive issues relating to the timing or circumstances of a particular court order; the fact patterns are potentially too variable to generalize about the issue. While Section 1(5) does not contain any exception for *post*-enactment court orders or consent decrees, the measure does not explicitly purport to restrict judicial discretion. In any case, the language of the Initiative would be one issue for the court to consider in deciding an issue or in phrasing a decree.

ISSUE NO. 8

INTERPRETING THE EXCEPTION FOR MAINTAINING

ELIGIBILITY FOR FEDERAL PROGRAMS

Section 1(6) provides that the Initiative "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." Federal agencies often require states to have "affirmative action" programs, but most allow discretion in how to operate those programs. Rather than specifying requirements, the federal law will call for state agencies to submit, as part of a funding request, a proposal describing how the state would meet the general "affirmative action" program requirements. The federal agency then approves or disapproves the program. On rare occasion, federal law will vary the nature of requirements depending on whether a certain component is prohibited by state law. Thus, the interaction of federal law and Initiative 200 could be somewhat complex for agencies who must submit proposals which will satisfy federal funding requirements without overstepping any limits imposed by Initiative 200. [32] The Initiative imposes two conditions to actions "excused" under this subsection: (a) the action "must be taken" to establish or maintain eligibility for a federal program, and (b) ineligibility would result in a loss of federal funds. The limits of this exception to the Initiative's "no-preference" rule, then, depend on whether federal funds would be lost if the state agency's practice were changed. In some cases, the agency's current practices are part of a contract with a federal agency, presumably subject to enforcement under contract principles. In other cases, federal law may provide the federal government with various enforcement mechanisms, including loss of federal funds. Thus, there may be arguments about the likelihood of loss of federal funds with regard to various programs. The Initiative also raises questions as to whether state agencies should look strictly to the letter

of federal law in deciding what action "must be taken," or might also assess such factors as a federal agency's administrative interpretations of the law and the likelihood of impacts on federal funding. There may be occasions in which no federal statute explicitly requires "affirmative action" but where the administering federal agency contends that affirmative action measures are required. In such a case, the state agency must determine whether to look to the agency's policies or strictly to the letter of federal law.

For several agencies, this provision of Initiative 200 would be read in conjunction with existing statutes which authorize the agencies to take actions necessary to qualify for and receive federal funds. These statutes are usually worded more broadly than Section 1(6) of the Initiative. [33] As noted earlier, the courts would likely attempt to harmonize these statutes with Initiative 200 in defining an agency's obligations.

ISSUE NO. 9

THE RELEVANCE OF THE CALIFORNIA EXPERIENCE

Proposition 209 is certainly similar to Initiative 200, but it is not identical. Sections 1(1) (no discrimination or preferential treatment) and (2) of Initiative 200 (applies to actions after effective date) are identical to language in the California Proposition. Sections 1(5) (does not invalidate existing court orders or decrees), 1(6) (does not prohibit actions to avoid loss of federal funds), 1(7) (definition of "state" to include local governments), and 1(8) (available remedies for violations) are very similar to provisions in the California measure. However, the California measure contains no provisions equivalent to Sections 1(3) (does not affect laws or governmental actions that do not discriminate) or 1(4) (exceptions for certain classifications such as sexual privacy, theatrical casting, and separate athletic teams).

While Washington courts might look to developing California case law for guidance in interpreting Initiative 200, the differences detailed above might restrict the usefulness of the California cases. Perhaps more significantly, Proposition 209 amends the California Constitution, while Initiative 200 is a statutory amendment. Thus, for instance, the California Proposition supersedes any inconsistent state statutes on the subject. By contrast, the Washington initiative must be harmonized, if enacted, with other statutes on the same subject. Finally, as noted earlier, any ambiguities in the Washington initiative will be interpreted, if past state court practice is observed, according to the court's analysis of the understanding of the voters at the time of the election. The contents of the Voters Pamphlet, as well as the public debate, may provide the courts with legislative history to aid in interpreting the measure. Thus, even language in Initiative 200 identical to language from Proposition 209 might be interpreted differently by the courts of the two states.

CONCLUSION

The enactment of Initiative 200 would require state agencies to re-examine a number of laws and programs. Since the Initiative is phrased as a broad, general principle rather than detailing how and where it is intended to apply, the examination will necessarily involve developing working hypotheses about its intent, based on its language and the available legislative history, while

recognizing that many issues can only be finally decided by the courts. Although the Initiative is similar to a measure recently adopted in California, Initiative 200 differs in some of its text, in its legislative history, and in its constitutional status from the California measure, making California case law an uncertain guide for Washington.

Without coordination, agencies and institutions could adopt inconsistent views, leading to confusion and potentially to additional litigation. Some of the issues would arise immediately upon the approval of the measure, while others might not fully develop for several years. Therefore, it is important for agencies to work with coordinated legal advice and to set reasonable priorities as to which issues to take up first. We trust this paper will assist agencies during that process.

Footnotes

[1] We hope that by identifying the major issues raised by the Initiative and by suggesting a framework for analyzing many of those issues, state agencies and their legal advisers will be in the best possible position to apply these general analytical principles to the various laws and programs administered by state agencies and institutions. Many legal issues will involve a number of agencies. While courts ultimately decide the meaning of an initiative, we may be called upon to provide our best legal advice on the answers to the issues raised in this memorandum. We hope to resolve these with a coordinated approach involving interested attorneys throughout our office. There will also be some agency-specific matters. These, we hope, can be addressed by individual agency policy-makers and their legal advisers, using the general analytical tools we are in the process of developing.

[2] Initiative 200 would protect people from discrimination on the basis of “ethnicity.” This term does not appear in RCW 49.60.030, although the categories of race, color, and national origin would likely cover almost any example of “ethnicity” and RCW 49.60.040(8) includes “ancestry” in the term “national origin.” Initiative 200 has a narrower focus than the current law against discrimination, in that it does not cover as many categories of possible discrimination and is limited to public employment, public contracting, and public education.

[3] A search of Washington statutes revealed two uses of the phrase “preferential treatment.” In RCW 19.27.020, one of the stated purposes of the State Building Code is to “eliminate . . . unwarranted preferential treatment to types or classes of materials or products or methods of construction.” RCW 19.27.020(4). In RCW 39.35C.040, a statute relating to the sale of conserved energy, the Legislature provided that “[s]tate agencies and school districts shall not receive preferential treatment”. The courts have occasionally used the term to describe a practice under consideration, but have not had occasion to describe what preferential treatment is. For instance, in De Funis v. Odegaard, 82 Wn.2d 11, 507 P.2d 1169 (1973), judgment vacated 416 U.S. 312 (1974), and on remand 84 Wn.2d 617, 529 P.2d 438 (1974), the Supreme Court upheld a University of Washington Law School's minority admissions policy that, at the time, provided for full admissions committee review of all minority applicants with low rankings, but gave the chair of the committee the discretion to either reject or place before the full committee non-

minority applicants with low rankings. The majority opinion, which upheld the program, refers to the program as “preferential”, but places the word in quotation marks (see discussion in 82 Wn.2d at 27). Thus, it may have been referring to plaintiff's characterization. The dissent felt the program granted “preferences” because of race or ethnic origin. De Funis, 82 Wn.2d at 51, 62 (Hale, C.J., dissenting). Neither opinion adopts “preferential treatment” as a term of art or attempts to define it. In Lindsay v. City of Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976), a Seattle city employee challenged the City's “selective certification” practice wherein it considered only minority applicants for the first of every three vacancies in its engineering department as a means of overcoming historic discrimination. The Court used the term “preferential treatment” in a general discussion noting: “The thorny problem created by the use of temporary quota relief is that this type of preferential treatment may tend to become permanently institutionalized”, id., at 707 (emphasis in original deleted), and that “A goal, as opposed to an absolute quota or preference, does not subject an employer to sanction [under federal contract compliance policies].” Id. at 711. See also, Johnson v. Central Valley Sch. Dist. 356, 97 Wn.2d 419, 645 P.2d 1088 (1982) (effect of employment preference in federal Indian Education Act). Our own office has used the phrase “preferential treatment” once or twice in opinions. In AGLO 1977 No. 14, we used the term to describe the terms of proposed legislation designed to make it easier for certain Washington residents who had attended medical schools in foreign countries to obtain accreditation or clinical training at the University of Washington. None of these statutes or opinions actually defines the term “preferential treatment,” nor do they use the term in a context likely to help in defining the phrase as used in the Initiative.

[4] As discussed below, the terms “preferential treatment” and “preference” have been used in Supreme Court opinions to describe college admissions programs that reserve seats for minority applicants, or to describe contract set-aside programs. Other cases discuss Title VII, 42 U.S.C. § 2000e-2(j), which provides that an employer is not required to grant “preferential treatment” to any group to maintain a balanced workforce. Since that statute neither prohibits nor requires “preferential treatment”, the courts have not been called upon to define the precise parameters of the statutory term. See International Bd. of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

[5] Voters in California passed Proposition 209 on November 5, 1996, enacting it into law as part of California's Constitution.

[6] Courts sometimes look to the dictionary definition of a term on an initiative to determine the ordinary meaning of a term. See Gerberding v. Munro, 134 Wn.2d 188, 949 P.2d 1366 (1998). Webster's II New Riverside University Dictionary 927 (1988), defines “preferential” as “1. [o]f, having, providing, or securing advantage or preference...2. [d]emonstrating or originating from partiality of preference.” The same source defines “prefer” as “[t]o choose as more desirable: like better....” The word “prefer” comes to the English language from Latin through French, and derives from a Latin word meaning “to bear before.” It is difficult to turn these definitions into a precise notion of what “preferential treatment” would be in the context of Initiative 200.

[7] One commentator offered the following definition of “preferential treatment” as that term is used in the California measure: “ `[P]referential treatment' is just the other side of the discrimination coin: Giving preferential treatment to one person equals discriminating against

another.” Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide,* 44 UCLA L. Rev. 1335, 1341-42 (1997). This definition does not offer much help in determining how to apply the term. Professor Volokh's observations about the meaning of Proposition 209 are noted in this memorandum, but since he was legal adviser to the pro-California Civil Rights Initiative Campaign (Proposition 209) (id. at n.2), his comments should be considered in light of his advocacy.

[8] Although Wark states the general rule for which the later cases cite it, the Wark Court actually decided the issue before it in favor of the specific rather than the general statute, and in all of the cases cited by Wark, the courts likewise followed an earlier, more specific statute over a later, more general one. Thus, it does not appear that our highest court has yet had occasion to follow the rule as stated.

[9] The Washington State Patrol has an even more explicit “affirmative action” provision in its statute. RCW 43.43.340(3) directs the chief to refer additional names of protected groups for consideration to fill vacancies, when the vacancy is covered by the patrol's affirmative action plan.

[10] The Initiative contains no reference to persons in the protected age category, persons with disabilities, or Vietnam-era veterans. We will assume that current programs could be continued as to these categories, but we will not specifically analyze the issue.

[11] The California Court of Appeals has held that a “supplemental referral” procedure violates the ban on “preferential treatment” in California's Proposition 209. Kidd v. State , 62 Cal. App. 4th 386, 72 Cal. Rptr.2d 758 (1998). However, Proposition 209 is a constitutional provision and supersedes any California state statutes. Initiative 200 would be a statute equal in “rank” to existing state statutes on the subject. Several other factors considered by the Kidd Court are unique to California. The Court considered not only Proposition 209, but also a separate California constitutional provision that required selection in civil service to be based on merit ascertained by competitive examinations. Also, the Court looked at the California “ballot pamphlet” to determine the intent of the voters in enacting Proposition 209. The California Ballot Pamphlet had stated: “The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state and local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions.” *Id.* 62 Cal. App. 4th at 407 The Washington Voters Pamphlet contains a statement by the committee in support of Initiative 200 that “Initiative 200 does not end all affirmative action programs. It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university.“ The committee's rebuttal statement in the Voters Pamphlet states: “[T]he government should not use race or gender to treat applicants for employment or education opportunities differently.”

[12] For examples of other statutes that apply to certified minority and women-owned businesses, see RCW 43.168.050 and .150 (Washington State Development Loan Fund Committee programs), RCW 43.172 (Washington State Small Business Assistance Program), and RCW 43.86A.060 (linked deposit program).

[13] See, e.g., the Dole-Canady "Equal Opportunity Act of 1995", S. 1085, 104th Cong., 1st. Sess. (1995) and the "Civil Rights Act of 1997", S. 952, 105th Cong., 1st. Sess. (1997).

[14] This characterization of Proposition 209 is based in part on the California Ballot Pamphlet, which listed "outreach" as one of the education programs that would be affected by the initiative. Theodore Hsien Wang, *What's Next? Campaigns and Initiatives, 95 Ann. Surv. Am. L.* 463 (1995) This article notes the conflicting public statements made by Proposition 209 proponents regarding whether that initiative would allow recruitment and outreach to minorities. Id. at n. 67. When Proposition 209 was on the California ballot, the author observes, both the proponents and the opponents of the measure appeared to agree that the measure would eliminate "outreach" programs, as reflected in their voters' pamphlet statements. The Voters' Pamphlet on Initiative 200 is not yet published.

[15] The Monterey Mechanical case, discussed at several points in this paper, was a challenge by an unsuccessful bidder on a state university construction project to a California statute requiring general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or to demonstrate good faith effort to do so. The initial Ninth Circuit decision, reported at 125 F.3d 702, was a panel decision unanimously finding the statute unconstitutional because there was no evidence that the State of California had discriminated in the past against the groups benefited by the statute. The language in the main text on this page is from a dissent to an Order denying a request for a rehearing en banc.

[16] The Monterey Mechanical Court assumed that the level of scrutiny for racial preferences is different from the level for gender-based preferences. The Court stated that "[r]acial classifications are subject to `strict scrutiny,' and `are Constitutional only if they are narrowly tailored measures that further compelling governmental interests.'" 125 F.3d at 712, citing Adarand Constructors, Inc. v. Pena, 515 U. S. 200, 226 (1995). The Court found that "[c]lassifications based on sex must be justified by an `exceedingly persuasive justification,' serve `important governmental objectives' and the means must be `substantially related to the achievement of those objectives.'" Id., citing United States v. Virginia, 518 U.S. 515 (1996). The actual difference between these two standards is unclear. Two other Ninth Circuit decisions discussing the distinction in scrutiny are Coral Constr. Co. v. King Cy., 941 F.2d 910 (9th Cir. 1991), and Associated Gen. Contractors of Cal., Inc. v. City and Cy. of San Francisco, 813 F.2d 922 (9th Cir. 1987).

[17] It is not clear what the Human Rights Commission's enforcement role would be with respect to the Initiative. Although Section 3 of the Initiative directs its codification in RCW 49.60, violations of the Initiative are not specifically declared an "unfair practice." The Commission's investigative and adjudicative functions relate primarily to unfair practices. RCW 49.60.120(4). By contrast, the Commission's rulemaking and policy-making authority refers more broadly to carrying out "the provisions of this chapter [49.60]." RCW 49.60.120(3).

[18] The Voters Pamphlet Statement of the committee in support of Initiative 200 states: " No scholarships or job training programs paid for by the private sector are affected by the initiative. It applies only to government." It is not clear whether this statement relates to the mandates of RCW 49.04.100.

[19] The Initiative also covers local government, and at the local government level, there are probably a good many questions as to which governments are covered and how. Init. 200, § 1(7). These issues are beyond the scope of this memorandum, which is intended as assistance to state agencies.

[20] One Washington statute that requires special outreach is RCW 50.72.060, regarding the Youthbuild program. This statute requires applicants for program funding to describe “special outreach efforts that will be undertaken to recruit eligible young women, including young women with dependent children”. RCW 50.72.060(g).

[21] Professor Volokh expresses his view that a similar analysis is appropriate under Proposition 209: “Preferences for applicants who speak a foreign language that will be useful in the job or who have ties to the geographical area that they're supposed to serve, would likewise remain allowed. This is even true if these neutral programs end up disproportionately benefiting people of a particular race or ethnicity or sex.” 44 UCLA L. Rev. 1335, 1348 (1997) (footnotes omitted).

[22] Professor Volokh offered his opinion on how these questions might be answered under California's Proposition 209, but without much supporting analysis: “A private group would still be allowed to award scholarships to, for instance, blacks or men or Germans or Jews who go to a particular state school; the university wouldn't be able to administer the scholarship—choosing who gets it would require the university to discriminate among applicants—but it might be able to publicize the scholarship together with all other scholarships.” 44 UCLA L. Rev. 1335, 1340 (1997) (footnotes omitted). As noted above, the Voters Pamphlet statement of the committee in support of Initiative 200 states that “[n]o scholarships . . . paid for by the private sector are affected by the initiative.” However, the statement does not directly address administration of such scholarships.

[23] Still another question is the offering of courses. In this context, Professor Volokh addressed this issue in the context of Proposition 209, and concluded that exhibits, celebrations or educational courses would not violate the law so long as participation or enrollment was open to all. 44 UCLA L. Rev. 1335, 1348 (1997). However, the cases he cites stand for the proposition that purposeful discrimination cannot be inferred from the fact that the New York City Board of Education implemented a Holocaust Curriculum and an Italian Heritage Curriculum, but did not adopt a special curriculum to focus on issues of particular importance to African Americans. Grimes v. Sobol, 832 F. Supp. 704, 708 (S.D.N.Y. 1993), aff'd, 37 F.3d 857 (2nd Cir. 1994). The Court noted that to prove a federal civil rights act violation, the plaintiffs would have to show that a school adopted the curriculum with the intention of detrimentally affecting the African-American students. Under this reasoning, the case may be deemed inapplicable to the question of whether “preferential treatment” has been accorded to a group or groups.

[24] We note that RCW 28B.15.455-.470, regarding gender equity in higher education athletics, contemplates outreach and training for an “underrepresented gender class”. RCW 28B.15.460(3)(b) provides activities to be undertaken by the institution to increase participation rates of any underrepresented gender class may include such activities as “[s]ponsoring equity

conferences, coaches clinics and sports clinics". Other services and activities are not covered by any explicit statutory language.

[25] The Voters Pamphlet statement of the committee in support of Initiative 200 refers to college admissions, but does not clearly address this question. Some of the language of the statement would seem to support the first reading, since the statement asserts that "instead of ignoring race, the government uses it through the use of racial quotas, preferences and set-asides." This statement is followed by a the committee's suggestion that a student was not admitted to the University of Washington's Law School solely on the basis of her race. Other portions of the committee's "Statement For" state the initiative "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university". In the "Rebuttal of Statement Against" portion of the Voters Pamphlet the proponents of the initiative state "the government should not use race or gender to treat applicants for employment or education opportunities differently."

[26] The "Harvard College Admissions Program" description appended to the opinion of Justice Powell notes that in seeking a diverse student body where individual consideration is given to the background and qualities of each applicant, "the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." Id. at 324.

[27] Again, the "California experience" does not provide much guidance on how Initiative 200 would be interpreted and applied as a Washington statute. With regard to Proposition 209, the Ballot Pamphlet noted that the extent to which existing programs are deemed to involve "preferential treatment" would depend on court rulings, but then goes on to opine: "The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so." Secretary of State, California Ballot Pamphlet: General Election 30, 31 (1996). In light of our discussion, this conclusion does not necessarily follow from the term "preferential treatment". Further, the Regents of the University of California changed the admissions process prior to the passage of Proposition 209 to eliminate all consideration or race or ethnicity in admissions decisions, as a matter of policy and not as a matter dictated by law.

[28] See, e.g., Bakke, 438 U.S. 265; Wygant v. Jackson Bd. Of Educ., 476 U. S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986).

[29] The Fifth Circuit has held that race may not be considered at all in the admissions process. Hopwood v. Texas, 78 F.3d 932, rehearing denied, 84 F.3d 720 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996). The Office of Civil Rights in the Department of Education, however, has interpreted the case law as allowing race to be considered a "plus factor" everywhere but in the Fifth Circuit. "[O]utside of the Fifth Circuit, it is permissible for an educational institution to consider race in a narrowly tailored manner in either its admissions program or its financial aid program in order to achieve a diverse student body or to remedy the effects of past discrimination in education systems." United States Department of Education, General Counsel, Letter to College and University Counsel, July 30, 1996.

[30] In giving these examples, we do not mean to suggest that the interpreting the initiative would end the analysis of a particular practice. For instance, use of males as physicians, guards, and in various other positions in women's correctional facilities has generated a good deal of litigation under various provisions of federal constitutional and statutory law. The Initiative would not resolve any of these federal issues, of course.

[31] Perhaps the Human Rights Commission could define “necessary” pursuant to the rulemaking power granted in RCW 49.60.120(3).

[32] An example of this approach can be found in 49 C.F.R. § 23.45. This section concerns participation by minority business enterprises in United States Department of Transportation Financial Assistance Programs. It requires recipients to include certain components in a required minority business enterprise program, including such matters as “[p]roviding assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance” and establishing goals for MBE participation in contracts based on known availability of qualified MBEs. These regulations contain an example of an exception for state law, providing “Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established.”

[33] Another example from the transportation arena is RCW 47.04.050, which provides:

Acceptance of federal acts. The state of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of congress entitled: “An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,” approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the state of Washington.