Statutory laws enacted or amended after the passage of Proposition 209 offer clarity on what must still be done to achieve racial diversity. For instance, California Government Code Section 7400 explicitly creates an obligation to engage in focused outreach. This statutory requirement applies to all public entities, including community colleges, and even provides examples of focused outreach such as outreach efforts with women publication and minority conferences. Another example specific to community colleges is Title 5, Sections 53024.1 and 53001(b) which state that "[e]stablishing and maintaining a richly diverse workforce is an on-going process" and defines "diversity" to mean "a condition of broad inclusion in an employment environment that offers equal employment opportunity for all persons. It requires both the presence, and the respectful treatment, of individuals from a wide range of ethnic, racial, age, national origin, religious, gender, sexual orientation, disability and socio-economic backgrounds (emphasis added)." Such legal requirement makes it clear that the state finds racial and ethnic diversity among community college employees a compelling interest.
In the aftermath of the two milestone decisions of the United States Supreme Court ending affirmative action in higher education as we know it, it is essential for policymakers, educators and leaders of all communities to come together to address—albeit with more limited tools—America’s unachieved goals of equal educational opportunity. Thuy Nguyen’s report is an essential roadmap to craft strategies and programs in a time where legal uncertainty matches the educational imperative to close still persistent gaps in academic performance and educational outcomes.

While research and debates will ensue over the breadth and impact of the U.S. Supreme Court decisions and the direction courts may go next to dismantle these and potentially other programs that have sought to address race and national origin as barriers to success, Thuy Nguyen’s report is a recipe for action, particularly for leaders in California who have the double challenge of reconciling the 2023 decisions with Proposition 209 requirements enacted in 1996 that prohibit the University of California and other state entities from using race, ethnicity or sex as criteria in public employment, public contracting and public educational opportunity. We must focus on what we can do and what the new state of the law permits rather than decry what cannot be done.

Thuy Nguyen’s decades of experience as legal counsel at the system-wide and campus levels as well as campus president give her particular insights into how best to navigate the crossroads of civil rights law and educational policy. People of all backgrounds who continue to care to close persistent gaps in our society and are committed to action that is consistent with the law can use this guidance when addressing the extent to which, if at all, demographic factors can be utilized as legitimate proxies individually or in combination to guide student recruitment or faculty hiring and make programmatic or budgetary decisions on targeted efforts by higher educational institutions—both public and private—to promote diversity, address historic inequities or prepare students in the 21st century to “form a more perfect union.”

John Trasviña
Immediate Past Dean,
University of San Francisco School of Law
Immediate Past President/General Counsel,
Mexican American Legal Defense & Educational Fund (MALDEF)

A Message From John Trasviña
Executive Summary

The unexamined life is not worth living, as the Socratic saying goes. Likewise, the unexamined system is not worth perpetuating. Higher educational institutions like California's community colleges must examine themselves and continuously improve in how our colleges truly serve all students (versus perpetuating, knowingly or unknowingly, persistent racial inequities).

As institutions examine their policies, procedures, programs, practices, people, and power structures, honest conversations and courageous actions need to occur to advance racial equity for students. To advance racial equity and close racial equity gaps requires, by definition, a consciousness of the racial dynamics in our policies, procedures, programs, practices, people, and power structures: race consciousness.

How does one meet the legal limitations set by Proposition 209 and the United States Supreme Court while being race conscious in advancing racial equity, especially when there is 1) a general belief that race cannot be considered at all due to Proposition 209 in California, and 2) race considerations that are allowed under narrow, strict circumstances within U.S. Equal Protection Clause jurisprudence are constantly being legally challenged oftentimes inexact analytical lens surrounding the term “affirmative action.” What's far more useful to policymakers in California, and other states, is to make race consciousness a fundamental principle in how public colleges and universities examine their policies, procedures, programs, practices, people, and power structures.

This report seeks to incorporate into a legal framework several advances in scholarly anti-racist work that have moved the parameters of what's lawful and what's prohibited beyond the oftentimes inexact analytical lens surrounding the term “affirmative action.” What's far more useful to policymakers in California, and what this report seeks to establish, is a principle that moves anti-racist policy work related to the state's public education forward without running afoul of published court rulings, by identifying what is already legally allowed under Proposition 209.

This report focuses on community colleges in California (though many of the concepts are applicable to other public institutions in California). The report advances a conceptual framework – the “Equitable Protection Principle” – to explain both the legal and policy possibilities of race-conscious, racial equity work in California. The term is designed to invoke the familiarity of long-established civil rights doctrines related to Equal Protection, while directing analytical attention to the methods by which state courts in California scrutinize local equity policies against the constitutional prohibitions codified by Proposition 209, to ensure they are narrowly tailored to compelling state interests around achieving equity.

The report first lays out the legal landscape in California and nationally, and then applies these legal parameters to the community colleges in California. As to the legal frame of the Equitable Protection Principle, California courts, in sum, have provided guidance on what could still be done to achieve racial diversity, even under Prop 209:

- Prop 209 does not prohibit race-conscious policies, upholding a school district’s ability to integrate its schools by considering the racial composition of the students to achieve diversity in the schools.
- Prop 209 does not prohibit race-based remedial measures, as long as the public entity shows: (1) the public agency’s purposeful discrimination against a certain group; (2) that the purpose of the program was to remedy that particular discrimination; (3) that the policy is narrowly tailored and (4) that a race-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.

Within the policy frame of the Equitable Protection Principle, this report proposes the need for public policy examinations of barriers and levers at the structural, cultural, and individual level. This report also provides examples of each: structural, cultural, and individual barriers and opportunities from Assembly Bill 1725 Academic Senate laws.

The report then focuses on one topic area as an example of how to apply the Equitable Protection Principle legal and policy framework: faculty racial diversity to close racial equity gaps in student success. Statewide, 37% of California community college faculty are people of color; while almost inversely, 63% of the state population and 70% community college student population are people of color. If community colleges want to narrow racial student success gaps, one of the most effective strategies as research shows is faculty racial diversity. To achieve faculty racial diversity requires race conscious strategies. However, how does one meet the legal limitations set by Proposition 209 while advancing race conscious policies in the hiring of a more racially diverse faculty? The Equitable Protection Principle provides a framework to do so.
Advancing Racial Equity in the California Community Colleges

To advance racial equity and close racial equity gaps requires, by definition, a consciousness of the racial dynamics in our policies, procedures, programs, practices, people, and power structures: race consciousness. Perhaps the clearest summary of Proposition 209 and the best data-based illustration of its profound policy impacts over the past twenty-five years is laid out in an August 2022 “friend of the court” amicus brief filed by the President and Chancellors of the University of California in the U.S. Supreme Court cases against UNC and Harvard. Specifically, the brief details the troubling impacts on racial equity that the UC System witnessed firsthand over the past 25 years since Proposition 209 was codified into the State Constitution. The UC brief summarizes that Proposition and its immediate effects: “After Proposition 209 barred consideration of race in admissions decisions at public universities in California, freshmen enrollees from underrepresented minority groups dropped precipitously at UC, and dropped by 50% or more at UC’s most selective campuses.” It continues: “Yet despite its extensive efforts, UC struggles to enroll a racially diverse to attain the educational benefits of diversity. The short-fall is especially apparent at UC’s most selective campuses, where African American, Native American, and Latinx students are underenrolled and widely report struggling with feelings of racial isolation.”

Although it has not been quite 25 years since Justice O’Connor’s ominous statement in Grutter, it has nevertheless been more than 25 years since the passage of Proposition 209. And what have we learned in California?

To advance racial equity and close racial equity gaps requires, by definition, a consciousness of the racial dynamics in our policies, procedures, programs, practices, people, and power structures: race consciousness.

The ability to implement proactively race conscious strategies is believed to be outright prohibited by a statewide ballot initiative called Proposition 209 in 1996. “Affirmative action,” for instance, is deemed to have been completely banned in California by Prop 209.

At the federal level, “affirmative action” cases in education have been constantly challenged and were addressed recently by SCOTUS in the UNC/Harvard admissions case. The ability to implement proactively race conscious strategies is believed to be outright prohibited by a statewide ballot initiative called Proposition 209 in 1996. “Affirmative action,” for instance, is deemed to have been completely banned in California by Prop 209.

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Although it has not been quite 25 years since Justice O’Connor’s ominous statement in Grutter, it has nevertheless been more than 25 years since the passage of Proposition 209. And what have we learned in California?
A New Era for California Policymakers to Consider

Proposition 209 is generally believed to be a proposition that eliminated "affirmative action" in California, and the recent SCOTUS decision is believed to have eliminated "affirmative action" in college admissions in the country. Yet even the allowances for the use of race in the Michigan's Grutter decision then that was later challenged in the UNC/Harvard SCOTUS cases could arguably (like California) not have been applied in Michigan. After proponents of affirmative action won the Grutter case, Michigan subsequently passed an anti-affirmative action initiative similar to California's Proposition 209.

During oral arguments in the UNC/Harvard cases and in the SCOTUS majority opinion, the term "affirmative action" was seldom used (if at all). Affirmative action was a program created by President Lyndon Johnson in the 1960s. It has been about 60 years, and yet, we still use the term "affirmative action," and the debate often gets simplified down to issues around quotas and choosing a person of color with perceived lesser qualifications. What we have learned about institutional racism, unconscious neurological racial bias, and structural barriers have evolved significantly since then – not to mention the rapidly changing demographics of our country’s population. Even some proponents of "affirmative action" do not argue for a desire to implement similar programs in the 1960s including racial quotas.

Just like how "affirmative action" was coined and advanced by U.S. presidents, policymakers such as the Governor, the State Legislature, and local governing boards in California may want to develop a new framework - a coherent, uniform next-generation of race conscious policies for higher education in California – a sort of affirmative action 2.0 – in the era of Proposition of 209 and the relentless legal challenges in the U.S. Supreme Court.

This could include developing a new conceptual name such as the “Equitable Protection Principle” that is akin to the Equal Protection Clause in the U.S. Constitution, yet recognize it is not only about protecting people equally under the law, but doing so equitably. The Equitable Protection Principle could serve as a conceptual legal and policy framework for California higher education. The legal framework is based on what California courts have already opined that are allowable under Proposition 209. The policy framework is based on what must be done to advance the state’s compelling interest in racial equity and anti-racism work at the structural, cultural, and individual levels. Such principle could also help affirm the legalities of – and maybe even further guide – statewide efforts such as Equal Employment Opportunities, the Student Centered Funding Formula, and the Vision for Success initiative.

What we have learned about institutional racism, unconscious neurological racial bias, and structural barriers have evolved significantly since then – not to mention the rapidly changing demographics of our country’s population.
The courts preserved the ability to do collection and reporting of data based on race and gender. In Connerly v. State Personnel Board (2001) 92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, the court struck down several affirmative action programs that gave preference in hiring and contracting based on race and gender. However, the court upheld monitoring programs that collected and reported data concerning the participation of women and minorities in government programs. The court noted that “government has a compelling need for such information in order to address lingering discrimination and to develop appropriate legislative and administrative actions, such as ‘race-neutral and gender-neutral remedies.’” Government programs that collect racial data do not implicate Proposition 209 so long as they do not discriminate against or grant preference to any individual or group based on race or gender. This allowance also means colleges could analyze and discuss racial data — an important legal ability as some people incorrectly believe inquiring on racial identification and tracking them is not permissible under Prop 209.

California courts have also provided a legal framework that, in some instances, has some resemblance to the Strict Scrutiny standard of review for federal cases. This legal allowance provides anti-racism practitioners at the colleges with the ability to advance anti-racism work. Those court cases address two types of scenarios: 1) race-conscious policies that do not discriminate against or grant preferential treatment on the basis of race, and 2) race-based policies that are remedial measures to rectify a particular discrimination.

The courts found in this case that SMUD’s outreach programs did not obtain a federal adjudication that race-based discrimination was necessary. The court found in this same case that SMUD’s outreach policies were more discriminatory than necessary to meet the conditions for receipt of federal funding. Although it struck down the policy, the court nevertheless provided a framework for the federal funding exception to Proposition 209. It determined that a government entity need only present substantial evidence that it would lose federal funding and that the policy was narrowly tailored to comply with federal objectives. Few community colleges, if any, in California have exercised this exception to Prop 209; though it may be worth it for colleges to seek legal counsel to explore such possibilities for certain federal programs that colleges currently have or would like to expand.

COLLECTION AND REPORTING ON RACIAL DATA

Our “Why”
Race-Neutral

Race-Based that violates Prop 209

Race-Based that violates Equal Protection Clause “Strict Scrutiny”


Proposition 209 is a statewide ballot measure that amended the California Constitution, in part, that “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (Cal. Const., art. I, § 31, subd. (a).) The courts have consistently held that state and local public agencies’ policies and procedures that give special scoring advantage to minority and women applicants in employment and contracting violate Proposition 209. They also nullified policies that set hiring goals and timetables for minorities and women (also known as race and gender quotas).

Nevertheless, the California courts have also provided guidance on what could still be done to achieve racial diversity.

Compelling Interest
Race-Neutral

Race-Based

Race-Based that violates Equal Protection Clause “Strict Scrutiny”

FOCUSED OUTREACH BASED ON RACE

Statutory laws enacted or amended after the passage of Proposition 209 offer clarity on what must still be done to achieve racial diversity. For instance, California Government Code Section 17400 explicitly creates an obligation to engage in focused outreach. This statutory requirement applies to all public entities, including community colleges, and even provides examples of focused outreach such as outreach efforts with women publication and minority conferences. Another example specific to community colleges is Title 5, Sections 53041.1 and 53001(b) which state that “[e]stablishing and maintaining a richly diverse workforce is an on-going process” and defines “diversity” to mean “a condition of broad inclusion in an employment environment that offers equal employment opportunity for all persons. It requires both the presence, and the respectful treatment, of individuals from a wide range of ethnic, racial, age, national origin, religious, gender, sexual orientation, disability and socio-economic backgrounds (emphasis added).” Such legal requirement makes it clear that the state finds racial and ethnic diversity among community college employees a compelling interest.

In addition, case law has also provided guidance on what could still be done to achieve racial diversity.

SCISSORS

RACE-CONSCIOUS AND RACE-BASED POLICIES

California courts have also provided a legal framework that, in some instances, has some resemblance to the Strict Scrutiny standard of review for federal cases. This legal allowance provides anti-racism practitioners at the colleges with the ability to advance anti-racism work. Those court cases address two types of scenarios: 1) race-conscious policies that do not discriminate against or grant preferential treatment on the basis of race, and 2) race-based policies that are remedial measures to rectify a particular discrimination.
One case that survived a Prop 209 challenge in an educational context concerned Berkeley Unified School District’s voluntary integration plan, with the Court explicitly stating that not all “race-conscious” programs are prohibited by Proposition 209. This legal doctrine emphasizes the need for race-conscious actions to be justified by a compelling interest and to be the least restrictive means to achieve that interest.

The California Court of Appeals used an analytical framework that resembles the federal court’s “Strict Scrutiny” standard of review in Title VI cases. In redeveloping its racial integration plan after Prop 209’s passage, the school district took into consideration race but went through a well-documented rigorous strict scrutiny – almost akin to a strict scrutiny review. It has a well-documented purpose for its integration plan – thereby, meeting the initial requirement of “compelling interest.” They were basically race-neutral in their approach to racial neutrality and were able to demonstrate where it landed the least restrictive alternative that did not discriminate against people’s group of people based on race, but nevertheless was race-conscious.

Plaintiff ACRE in the BUSD case argued that Prop 209 prohibits the school district from “using race” in any fashion, even when classifying neighborhoods and not individuals. The Court stated that “race-conscious actions are not unilaterally prohibited by Prop 209,” which provides that the state “shall not discriminate against, or grant preferential treatment to, any individual or group based on the race, color, *nationality, or sex of the individual or group.”

A conservative nonprofit group brought suit against the school district, arguing that Proposition 209 prohibits the school district from using a racial composition framework – to assign students to schools and academic programs while considering the racial composition of the student’s neighborhood and other geographic areas, and not the race of the individual applicant. The Court stated thatProp 209 does not preclude all consideration of race by government entities but rather preclude all consideration of race by government entities but rather against, or grant preferential treatment to, individuals or groups on the basis of race. (Italics added.) Section 31 does not say that the state shall not consider race for any and all purposes. The state shall not discriminate against, or grant preferential treatment to, any individual or group based on the race, color, *nationality, or sex of the individual or group. The constitutional provision prohibits unequal treatment of particular persons and groups of persons; it does not proscribe the collection and consideration of community-wide demographic factors. White and African-American students from the same neighborhood received the same diversity rating and the same treatment. The Court specifically stated that “race-conscious actions were meant to be eliminated – only those that discriminated against, or granted preferential treatment to, individuals or groups on the basis of that individual’s or group’s race, were prohibited.”

B. Strict Scrutiny: Standard of Review: SCOTUS Review of UNC and Harvard’s Admissions Policies

“Strict Scrutiny” is a standard of review developed in federal court cases. It is a standard that federal courts apply when governmental action utilizes race as a classification. “Strict Scrutiny” is the highest level of scrutiny that a race-neutral program can withstand. A court will find that such action violates the Constitution if the court determines that the action is “less restrictive means” to achieve that interest.

In Coral Construction Company v. City and County of San Francisco (2010) 50 Cal. 4th 315, 217 P.3d 279, 113 Cal. Rptr. 3d 279, construction companies brought suit against San Francisco for its policy of accepting female and minority contractors’ bids “below what was actually offered.” The Supreme Court of California held that San Francisco’s preferential policy was a violation of Proposition 209, even though the city argued that the policy was justified by presenting evidence of the construction industry’s long-standing pattern of discrimination against women and minorities. The Court then presented a framework for future Proposition 209 defendants to prove that race-based remedial measures are necessary by showing: (1) the city’s purposeful discrimination against a certain group; (2) that the purpose of the city’s program was race-conscious; (3) that race-conscious remedies are necessary; and (4) that a race-conscious action is necessary as the only, or at least the most likely, means of remedying the harm. While the Court emphasized that the city “crafted its diversity rating system in such a way that it would not discriminate against any individual or group based on race,” the Court ensured that the city’s policy still met the strict scrutiny standard in federal law: that is, there is a legal exception to what would be an absolute prohibition of racial preference under Proposition 209.

Yet even then, SCOTUS in the UNC/Harvard case reaffirmed the Strict Scrutiny standard and reaffirmed it as an Equal Protection Clause exception that also applies under Title VI. However, SCOTUS ruled that Harvard did not meet the “compelling interest” prong under Strict Scrutiny – thereby, arguably overturning previous court findings that deemed student body racial diversity as a “compelling interest.” SCOTUS opined that (alike other non-college admission cases where compelling interests were found) the universities did not offer sufficiently coherent evidence of the benefit of a racially diverse student body – let alone such objectives were not measurable and without an ending point.

“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.”
Why CA Community Colleges Need to Pay Attention to Proposition 209 and SCOTUS Cases?

Community colleges, being an open access system, often do not believe Proposition 209 affects them, unlike the UC and CSU systems since community colleges do not have admissions policies. However, California community colleges do have admissions-type programs within its institutions such as Honors programs, nursing and other allied health programs, and baccalaureate programs. This is in addition to the fact that Prop 209 also affects public employment and public contracting—both are operational functions in the California community colleges.

There are also many reasons why California community colleges should also pay attention to the SCOTUS decisions in the UNC and Harvard cases. One reason is the potential chilling effect that SCOTUS decisions may have on community colleges that are doing anti-racism work, even if such work is clearly valid under Proposition 209. When Proposition 209 was initially passed and arguably even after two decades since its passage, some people are under the false impression that Proposition 209 prohibited even the use of the words “diversity” and “race” in policies and procedures—let alone intentional efforts to achieve racial diversity. One way to minimize the chilling effects of the U.S. Supreme Court decision and still make progress toward anti-racism work in California community colleges is to reframe the conversation to inoculate any backlash caused by the recent UNC, Harvard, SCOTUS decision (or even future SCOTUS decisions).
The “Equitable Protection Principle” is that new conceptual name akin to the Equal Protection Clause in the U.S. Constitution, yet is a framework that covers anti-racism, race-conscious, race-based policy efforts that are already legally allowable under California’s Proposition 209. And analogous to the Strict Scrutiny standard of review under the U.S. Constitution’s Equal Protection Clause, California’s Equitable Protection Principle has a strict(er) scrutiny standard of review that follows all the court cases on Proposition 209 in California.

To a great extent, many federal courts have invalidated the original structuring of “affirmative action” programs. Universities like UNC and Harvard say that they do not give special scoring advantage – and yet, some people still call these programs “affirmative action.” Affirmative action programs have evolved throughout the years, in large part due to courts invalidating racial quotas and other programs like it. Yet, even in everyday debates on affirmative action today, there’s still the dated argument about selecting a perceived lesser qualified person of color to meet a certain numerical quota.

Just like how affirmative action was coined and advanced by U.S. presidents, policymakers such as the Governor, the State Legislature, and local governing boards in California could consider creating a new framework – a coherent, uniform, the next-generation of race conscious policy for higher education in California – a sort of affirmative action 2.0 – in an era of Proposition of 209 and the relentless legal challenges to affirmative action programs in the U.S. Supreme Court. The framework would propose that it is not only about protecting people equally under the law as advanced by the Equal Protection Clause, but to do so equitably - recognizing implicit and explicit racial bias in society and racial barriers within higher educational institutions while promoting the educational and societal benefits of racial diversity and student success for all, regardless of race.

A New Framework

PROPOSITION 209

One- “Why”
Race-Neutral
Race-Conscious
Race Based
Race Based that Violates Prop 209

Anti-Racism Policy:
Structural
Cultural
Individual

Equitable Protection Principle

This Equitable Protection Principle establishes a conceptual legal and policy framework. The legal framework is based on what California courts have already opined that are allowable under Proposition 209. The policy framework is based on what needs to be done to advance the state’s compelling interest in racial equity and anti-racism work at the structural, cultural, and individual level.

A. The Legal Frame of the Equitable Protection Principle

One way to understand this proposed Equitable Protection Principle is that Proposition 209 is analogous to federal Title VI which prohibits racial discrimination in education. The Equal Protection Clause in the 14th Amendment of the U.S. Constitution upholds these laws as prohibiting discrimination, but federal courts have enabled a narrow exception under the Strict Scrutiny standard-of-review jurisprudence.

Similarly, California courts have created a narrower exception akin to the federal courts’ Strict Scrutiny exception under the U.S. Equal Protection Clause, without calling it “strict scrutiny.” One could even call this California narrower exception as a “strict( er) scrutiny” standard under Proposition 209 and categorize the lineage of California court cases on Prop 209 as the legal frame of the Equitable Protection Principle. More importantly, even if SCOTUS goes to the extreme and completely invalidates the longstanding precedence of the Strict Scrutiny standard entirely (which it did not in the UNC/Harvard decision), California’s so-called “strict(er) scrutiny” standard may still survive due to its already stricter requirements under Proposition 209. Thus, the Equitable Protection Principle framework may even help inoculate California public institutions from the SCOTUS decisions in UNC/Harvard and possibly future SCOTUS decisions.

As explained in the aforementioned section and in sum here, California courts have provided guidance in interpreting Proposition 209 on what could still be done to achieve racial diversity. The California courts have:

- Stated that Proposition 209 does not preclude all consideration of race by government entities, upholding a school district’s ability to consider the racial composition of the students and neighborhoods to achieve diversity in the schools.
A proposed Strict(er) Scrutiny standard of review under Prop 209 would create a narrower exception for the classification of race: 1) the anti-racism (race conscious or race-based) policy being advanced is justified by a “compelling interest,” and evidence is clearly articulated on how such interest for the classification of race; 2) the anti-racism (race conscious or race-based) policy being advanced is justified by a “compelling interest,” and evidence is clearly articulated on how such interest is compelling (including to remedy past purposeful discrimination); 3) the policy is narrowly tailored (versus obtaining a federal adjudication that the race-based remedy was necessary). Upheld monitoring programs that collect and report data concerning the participation of minorities and women in government programs. Found that the term “affirmative action” is not an “illegal” term. The UC System proved this point in its amicus brief in the UNC/Proposition 209 on the student racial diversity of its campuses. It specifically discusses, California community colleges can collect and report data, advance racial diversity through focused outreach programs, and even have certain race-conscious and race-based policies under Prop 209 as long as it does not discriminate against or grant preferential treatment. California community colleges should consider seeking legal counsel to help craft such anti-racism policies within this legal framework.

The Policy Frame of the Equitable Protection Principle

To close racial equity gaps in student success, one must directly address the dynamics of race in higher education. Intentional anti-racist (race conscious and race-based) policies and practices are needed to close racial equity gaps; race-neutral policies are frequently not enough to achieve that interest.

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The UC System proved this point in its amicus brief in the UNC/Proposition 209 on the student racial diversity of its campuses. It specifically discusses, California community colleges can collect and report data, advance racial diversity through focused outreach programs, and even have certain race-conscious and race-based policies under Prop 209 as long as it does not discriminate against or grant preferential treatment. California community colleges should consider seeking legal counsel to help craft such anti-racism policies within this legal framework.

**The Equitable Protection Principle: Policy and Legal Examples of Anti-Racism Efforts at the Structural, Cultural, and Individual Level in California Community Colleges**

In the context of California community colleges, the “Equitable Protection Principle” provides colleges with a framework that:

- Promotes racial equity (e.g., closing racial student success gaps) as compelling statewide and local interests in a focused, measurable manner.
- Examines the structural, cultural, and individual-level dynamics that are either barriers or conversely, strategic levers to advancing racial equity.
- Stays within the legal restrictions of Proposition 209.

Anti-racism efforts must occur at the structural, cultural, and individual levels. There are many examples that California community colleges can implement to promote racial equity in student success. One example involves faculty racial diversity.

The policy frame of the Equitable Protection Principle would push forward a policy of faculty racial diversity as an effective strategy for closing racial student success gaps, and would look at achieving faculty racial diversity at the structural, cultural, and individual level.

The legal frame of the Equitable Protection Principle would analytically present evidence as to why faculty racial diversity is a compelling interest, and analyze each of the numerous policy changes so that they are narrowly tailored to that compelling interest using a strict(er) scrutiny standard of review that California courts have suggested under Proposition 209. As previously discussed, California community colleges can collect and report racial data, advance racial diversity through focused outreach programs, and even have certain race-conscious and race-based policies under Prop 209 as long as it does not discriminate against or grant preferential treatment. California community colleges should consider seeking legal counsel to help craft such anti-racism policies within this legal framework.

**“Race-neutral” policies may seem neutral on their face but fail to recognize the racialized dynamics operating underneath – making them not neutral at all. Therefore, these “race-neutral” policies also need regular examination for any racial exclusionary effect and disproportionate impact.**

What structural-level elements at the college (e.g., laws, board policies, and administrative procedures) should be re-examined with an anti-racism lens? What aspects of the college culture are creating challenges to anti-racism work? How are people behaving at the individual-level (in their classroom, workspace, meeting space, learning space) that could promote or hinder anti-racism efforts?
In addressing systemic racism in higher education, courageous and compassionate yet often times difficult conversations about privilege, fragility, and bias are essential.

In addition to the structural and cultural challenges in doing anti-racism work posed by AB 1725, the effects of AB 1725 may also impact faculty individually. Right now, even if their Academic Senate has not addressed it, faculty at the individual level can still re-examine, for example, their pedagogy, their curriculum, their selection of textbooks, how they grade students, what they consider to be critical and how they assess students’ abilities. However, the policies for faculty professional development on these topics at the college level is a 10+1 topical area that the college must rely primarily on the Academic Senate.
Then, the legal frame of the “Equitable Protection Principle” would also lead to the urgent need for faculty racial diversity.

The next step in the Equitable Protection Principle analysis is to identify the anti-racism policy to achieve that compelling interest in faculty diversity and analyze whether it is race-neutral, race-conscious, or race-based. If it is race-neutral, then the policy would pass Proposition 209 muster. (Again, be mindful to examine even race-neutral policies to account for possible racial exclusionary effect or disproportionate impact.)

Student equity gaps closing in community colleges would result in tremendous progress for the state. Community colleges are also the first and last pipeline for Asian American, and mixed-race students constituting nearly 70% of the student population statewide — that is, five percentage point higher than even the already racially diverse state population of 65% people of color.

The next step in the Equitable Protection Principle analysis is to identify the anti-racism policy to achieve that compelling interest in faculty diversity and analyze whether it is race-neutral, race-conscious, or race-based. If it is race-neutral, then the policy would pass Proposition 209 muster. (Again, be mindful to examine even race-neutral policies to account for possible racial exclusionary effect or disproportionate impact.)

The reasons why California could benefit from reexamining AB 1725 also lead to the urgent need for faculty racial diversity. It would probably take many years of having a non-majority White faculty in California community colleges to undo the effects of several decades of Whiteness in academia.

Yet, the most compelling reason for faculty racial diversity is how it has been proven to directly close racial student success gaps. Let us use the Equitable Protection Principle framework to study this area of critical importance: how to promote faculty diversity in California community colleges under Proposition 209.

The policy frame of the Equitable Protection Principle would probably take many years of having a non-majority White faculty in California community colleges to undo the effects of several decades of Whiteness in academia.

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As previously discussed, California community colleges are able to collect and report racial data, advance racial diversity through focused outreach programs, have race-conscious policies and procedures as long as they do not discriminate against or grant preferential treatment, and have race-based policies as remedial measures under certain circumstances.

Therefore, reexamining the legal guidance memo as part of its larger push for its Vision for Success initiative. These are all worthy efforts to explore as colleges examine their work at the structural, cultural, and individual level. (Fairlie, R. W., Hoffman, F., Oreopoulos, P. (2014). A Community College Instructor Like Me: Race and Ethnicity Interactions in the Classroom. American Economic Review.) There are also many studies and research that show student success improve significantly for students of color, including White students in K12 schools, when taught by racially diverse teachers. Such compelling research further suggests colleges should integrate their student equity plans with the college/district’s equal employment opportunity (EEO) plans. This will create the foundational step in the Equitable Protection Principle.

Although some of these programs (if not all) may be motivated on how to do longitudinal analysis as part of its larger push for its Vision for Success initiative. These are all worthy efforts to explore as colleges examine their work at the structural, cultural, and individual level.

Next, the legal frame of the “Equitable Protection Principle” would analytically present evidence as to why faculty racial diversity is a compelling interest under strict scrutiny, and analyze each of its numerous policy and procedural changes so that they are narrowly tailored to that compelling interest using a strict(e) scrutiny standard of review that California courts have laid out under Proposition 209.

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a. Examples of Applying the Equitable Protection Principle in Faculty Diversity Efforts

To illuminate further how the Equitable Protection Principle applies, below is an example.

Once the college establishes the compelling interest that a racially diverse faculty helps close racial student success gaps by up to 51%, the college could then also identify the specific antiracism policy at structural, cultural, and individual level.

For instance, an antiracism policy at the structural level is conducting a legal audit of board policies and administrative procedures that each college district produces, particularly policies related to hiring, retention, tenure, evaluation, and dismissal of faculty. This could include the review of job descriptions to identify whether there are any racial exclusionary effects. One example of a job description that may have a racial exclusionary effect is the requirement for a doctorate degree despite Title V only requiring a minimum of a master’s degree to teach. The racial disparate impact of this requirement could be based on the already disproportionately low percentage of graduates of color from doctorate programs.

California Government Code section 7400 specifically states that Proposition 209 “does not prevent governmental agencies from engaging in inclusive public sector outreach and recruitment programs that, as a component of general recruitment, may include, but not be limited to, focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer.”

Proposition 209 does not prohibit race-conscious, race-based data collection and data analysis. In fact, California law requires analysis of adverse impact of college policies, procedures, and practices such as Title 5’s 80% rule (akin to the EEOC’s 4/5ths rule) where colleges are required to identify any “significantly underrepresented groups” (adverse impact) which exist where actual representation is below 80% of projected representation, using numerical data.

An example of an antiracism policy at the cultural level is training programs such as Courageous Conversations which is explicit about its purpose of providing professional development on how groups could talk about race courageously and effectively including during hiring, tenure, and dismissal discussions.

An important policy at the individual level is the need for every individual on the search/hiring committee to be trained on neurological, unconscious racial bias. Title V Section 53003(c) already requires search/hiring committees to be trained on the elimination of bias in hiring decisions. Title V does not explicitly state racial bias, and it does not require every individual to take the Implicit Association Test (IAT). One possible policy could be that every individual on the hiring committee must also receive training on actual strategies to lower unconscious racial bias, or to demonstrate that they have taken the IAT on racial bias. Too often, the unconscious bias training is received with responses like “yes, I know about unconscious bias, I learned about it in graduate school” to “I learned that I have unconscious bias.” However, not enough attention is placed on training committee members on actual proven strategies to lower unconscious racial bias or having committee members prove that they have practiced these strategies.

These policy strategies at all three levels (structural, cultural, individual) may be race-conscious on their face, but do not discriminate against or grant preferential treatment based on race and are not prohibited under Prop 209.

Conclusion

As we examine our community college system at the structural, cultural, and individual level with an anti-racism lens, we would likely need to explore policies that are race-conscious and even race-based. The Equitable Protection Principle is a proposed framework to use to advance anti-racism policies while analyzing their legality under California’s Proposition 209.

The unexamined life is not worth living. The unexamined system is not worth perpetuating. Our students and their success, regardless of their race, are worth us doing the courageous, self-reflecting, critical analysis of our policies, procedures, practices, programs, people, and power dynamics. By bravely re-examining our institutions of higher learning, we could discover untapped opportunities to redesign and rebuild our community colleges in an anti-racism manner such that students, especially students of color, feel our colleges are designed for their learning and success.
Thúy Thi Nguyễn is a Partner at the law firm of Garcia Hernández Sawhney. Nguyễn served as in-house General Counsel to the Peralta Community College District for more than 11 years. In addition to her duties as chief legal counsel, she served as Acting Vice Chancellor for Human Resources for one year and as Districtwide Strategic Planning Manager for two years.

Nguyễn was an adjunct instructor/lecturer teaching education law for several years at California State University, East Bay. She previously practiced school desegregation law: Nguyễn worked on desegregation consent decree and voluntary integration programs for school districts such as San Jose Unified School District and Berkeley Unified School District, and served on the Court Monitoring Team for the San Francisco Unified School District desegregation consent decree.

From January to June 2015, Nguyễn took temporary leave from Peralta CCD to serve as Interim President and Chief Executive Officer of the Community College League of California (a non-profit organization that represents trustees and chancellors/college presidents of the 72 community college districts in California). As interim CEO of CCLC, Nguyễn co-redesigned the statewide training program on governance (Collegiality in Action) with the State Academic Senate President and provided training, technical assistance to community colleges on governance and Assembly Bill 7725.

Nguyễn also served as interim General Counsel for the California Community College’s Chancellor’s Office where she wrote a legal guidance on Equal Employment Opportunities and Preposition 209 and initiated a change in the statewide EEO funding allocation to the Multiple-Method model in order to promote diversity. Thereafter, in 2016, Nguyễn was appointed President of Foothill College – becoming the first Vietnamese American college president in the country, a position she served for over five years.

Nguyễn has received various honors and awards throughout her career. The Mayor of Oakland named June 23, 1993 “Thuy Thi Nguyen Day” in Oakland for her service to the city. Nguyễn has been inducted into the Castlemont High School’s Alumni Hall of Fame. In 2007, she was named one of eighteen “Best Lawyers Under 40” in the country by the National Asian American Bar Association. In 2016, for her leadership in creating an unprecedented community college pathway to law school initiative, Nguyễn received the coveted Diversity Award from the State Bar of California - a statewide award given to an individual each year who has helped diversify the legal profession. In 2017, she was presented with the Trailblazer Award by the National Conference for Vietnamese American Attorneys.

Also in 2017, Nguyễn was honored as part of the Carnegie Corporation’s “Great Immigrants” tribute in the New York Times. The tribute is aimed at recognizing naturalized citizens, including former refugees such as Nguyễn, who have helped advance society, culture, and the economy.

Nguyễn earned her B.A. in Philosophy from Yale University and J.D. from the University of California, Los Angeles School of Law, where she was a member of the inaugural class of the Public Interest Law and Policy Program. Nguyễn is a Paul and Daisy Soros for New Americans Fellow. Thuy can be reached at tnguyen@ghslaw.com (www.ghslaw.com) and on Twitter: @ThuyThiTweets.

About the Center

USC Race and Equity Center
The University of Southern California is home to a dynamic research, professional learning, and organizational improvement center that serves educational institutions, corporations, government agencies, and other organizations that span a multitude of industries across the United States and in other countries. We actualize our mission through rigorous interdisciplinary research, high-quality professional learning experiences, the production and wide dissemination of useful tools, trustworthy consultations and strategy advising, and substantive partnerships. While race and ethnicity are at the epicenter of our work, we also value their intersectionality with other identities, and therefore aim to advance equity for all persons experiencing marginalization. Our rigorous approach is built on research, scalable and adaptable models of success, and continuous feedback from partners and clients.

College Futures Foundation
At College Futures Foundation, we envision a California where postsecondary education advances racial, social, and economic equity, unlocking upward mobility now and for generations to come. We believe in the power of postsecondary opportunity and that securing the postsecondary success of students facing the most formidable barriers will ensure that all of us can thrive—our communities, our economy, and our state. We believe that the equitable education system of the future, one that enables every student to achieve their dreams and participate in an inclusive and robust economy, will be realized if we are focused, determined, and active in our leadership and partnership.
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