THE EQUITABLE PROTECTION PRINCIPLE

HOW CALIFORNIA COMMUNITY COLLEGES CAN MAKE PROGRESS TOWARD RACIAL EQUITY IN TODAY'S LEGAL CLIMATE

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A Message From John Trasviña

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 education. 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."

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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 and were addressed recently by SCOTUS in the UNC/Harvard admissions case?

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.*
- *Proposition 209 has a federal funding exception, whereby the policy must be narrowly tailored to comply with federal objectives and that a government entity need only present substantial evidence it would lose federal funding (versus obtaining a federal adjudication that the race-based remedy was necessary).*
- *Focused outreach is legal.*
- *Monitoring programs that collect and report data are legal.*

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, 65% 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. Yet, how do California community colleges 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 and were addressed recently by SCOTUS in the UNC/Harvard admissions case?

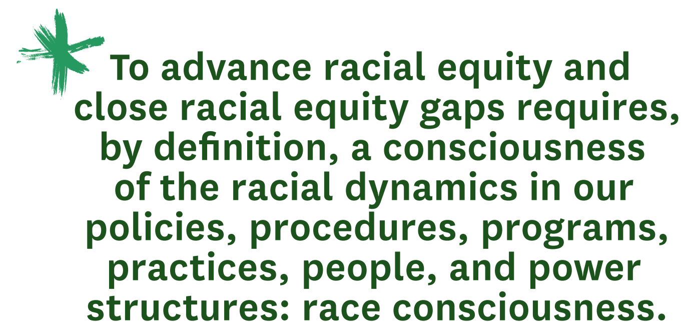
The ability to implement proactively race conscious strategies is believed to be outright prohibited by a statewide ballot initiative called Proposition 209 in 1996. "Affirmative action," for instance, is deemed to have been completely banned in California by Prop 209.

At the federal level, "affirmative action" cases in education have been constantly challenged, with Justice O'Connor writing in the Michigan's *Grutter* case:

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Grutter v. Bollinger, 539 U.S. 306 (2003)

That one line by Justice O'Connor was written 20 years ago and was the key point in the recent UNC/Harvard SCOTUS decision regarding a need for an ending point. The SCOTUS decision even had a footnote that its findings against UNC and Harvard would affect their class of 2028 – the 25th year since *Grutter*.

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?



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 student body that is sufficiently 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 underrepresented and widely report struggling with feelings of racial isolation." It was only until year 2021 (noticeably, the pandemic year admission cycle), did the UC system achieved a more racially diverse incoming student population than the racial diversity right before Prop 209 was passed.

The UC system's difficulties with enrolling a racially diverse student body at many of its campuses make it even more critical for California community colleges to be a racial diversity pipeline for the UCs. In fact, the UCs can get much of its racial diversity through the community colleges in the state. For instance, Honors programs at community colleges offer the guarantee (or near guarantee) transfer admission to most UCs, and the UCs consider these Honors programs as diversity pipeline/pathways for the UC system. This becomes even more imperative for community colleges not to have racial barriers such as admission or quasi-admission criteria that disproportionately disadvantage students based on racial lines. The more the UC system is challenged by its lack of racial diversity in its student population, the more community colleges need to prepare a racially diverse student transfer population to the UCs. That means California community colleges must close transfer and graduation racial gaps – for their own institutional mission and that of the UCs.

Many people believe that California community colleges have less concerns: a belief that SCOTUS decisions do not apply since California operates under Prop 209, and California community colleges are not as widely affected by Prop 209 because they do not have admissions policies. Both beliefs are incorrect.

[I]t has been nevertheless more than 25 years since the passage of Proposition 209. And what have we learned in California?

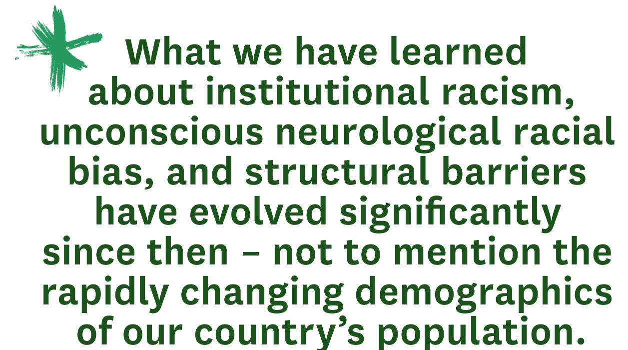
A New Era for California Policymakers to Consider

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.



STATE AND FEDERAL LEGAL LANDSCAPE

PROPOSITION 209
Our "Why"
Race-Neutral
"Race-Conscious?"/ "Race-Based?"
Race-Based that violates Prop 209

SCOTUS
Compelling Interest
Race-Neutral
Race-Based
Race-Based that violates Equal Protection Clause "Strict Scrutiny"

A. Proposition 209: California Courts Provide Guidance on How Public Entities Could Still Have Race-conscious and Race-based Remedial Policies

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 racial and gender quotas).

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

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

COLLECTION AND REPORTING ON RACIAL DATA

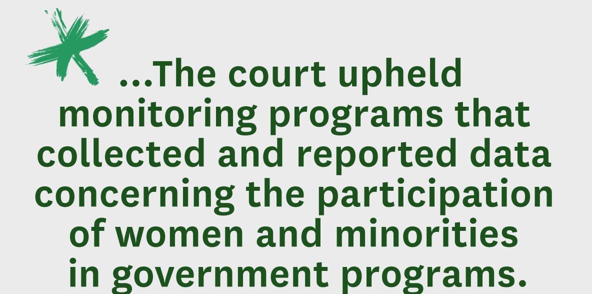
The courts preserved the ability to do collection and reporting of data based on race and gender. In *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, the court struck down several affirmative action programs that gave preference in hiring and contracting based on race 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.

EXCEPTION FOR LOSS OF FEDERAL-FUNDS

Another California court also provided the legal standard for the federal-funding exception to Proposition 209. Proposition 209 prohibits racial and gender preference, unless compliance with Proposition 209 would result in the loss of federal funding: "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." Cal. Const. art. I, § 31. In *C & C Construction Incorporated v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, a construction company brought suit against SMUD for its policy of outreach to and preference of minority contractors. The Third District Court of Appeals held that to justify race-based discrimination under the maintaining of federal funding exception to Proposition 209, a state governmental agency need not obtain a federal adjudication that race-based discrimination was necessary. The court found in this 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.

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.



1. *Race-conscious* Policies that Do Not Discriminate Against or Grant Preferential Treatment on the Basis of Race

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 allowance for race-conscious policies offers an opportunity for practitioners and decision-makers at the community colleges to deliberately design instructional, student services, employment, and business programs that promote racial diversity – without violating Prop 209.

In *American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207, 90 Cal.Rptr.3d 789, a California appellate court opined, "[T]he [Proposition 209] ballot pamphlet materials reinforce our view that section 31 was not intended to preclude all consideration of race by government entities but rather was intended to prohibit only those state programs and policies that discriminate against or grant preferential treatment to any individual or group on the basis of race."

A conservative non-profit group brought suit against the school district, arguing that Proposition 209 prohibits the school district from using a student's residential neighborhood demographics – which include consideration of the neighborhood's racial composition – to assign students to schools and academic programs. The voluntary-integration policy expressly considered the racial composition of the student's neighborhood and other socioeconomic and education-related factors to achieve diversity in schools. The plan focused on geographically-based preference that was drawn based on racial and economic demographics of different geographic areas, and not the race of the individual applicant. This resulted in racial integration. The school district won in Superior Court and at the appellate level. The Court of Appeals upheld the school district's integration policy, and clarified that voters did not intend Proposition 209 to preclude all consideration of race by government entities.

The California Court of Appeals used an analytical framework that resembles the federal court's "Strict Scrutiny" standard of review under the U.S. Constitution's Equal Protection Clause. 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(er) scrutiny review. It has a well-documented purpose for its integration plan – thereby, meeting the initial requirement of "compelling interest" under the Strict Scrutiny review. It went through various race-neutral plans and was able to demonstrate where it landed was the least restrictive alternative that did not discriminate against people or groups of people based on race, but nevertheless was race-conscious.

Plaintiff ACRF 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 "the argument is contrary to the plain language of section 31 [Prop 209], which provides that the state *'shall not discriminate against, or grant preferential treatment to,* any individual or group 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 constitutional provision prohibits unequal treatment of particular persons and groups of persons; it does not prohibit the collection and consideration of communitywide demographic factors. White and African-American students from the same neighborhood receive the same diversity rating and the same treatment." The Court specifically stated that *"not all 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 (*emphasis added*)."

2. *Race-based* Policies that are Remedial Measures to Rectify a Particular Discrimination

In addition to the allowance of "race-conscious" policies by the courts, California's highest court in another case even stated that "race-based" plans are not unilaterally prohibited by Prop 209 – using more explicit language that resembles the federal analytical framework of Strict Scrunty standard of review. The compelling interest in this scenario would be to remedy a particular form of race discrimination by the institution that is seeking the use of race-based measures to remedy the situation.

In *Coral Construction Company v. City and County of San Francisco* (2010) 50 Cal.4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279, construction companies brought suit against San Francisco for its policy of accepting female and minority contractors' bids as lower than 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 to remedy that particular discrimination; (3) that the ordinance is narrowly tailored and (4) that a race-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury. The language used by the California court resembles 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.

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 an exception – an allowance for the consideration of race, that would not violate the 14th Amendment Equal Protection Clause of the U.S. Constitution.

Strict Scrutiny is also an exception to federal regulations such as Title VI of the Civil Rights Act of 1964 which protects people from race discrimination at California community colleges and universities such as Harvard. Title VI states:

"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."

Yet, despite Title VI's prohibition, the United States Supreme Court has also applied the Strict Scrutiny standard to Title VI cases: 1) the policy being advanced is justified by a "compelling interest," 2) the policy is "narrowly tailored" to achieve that compelling interest (that is, it is not too overbroad or fails to address aspects of the compelling interest), 3) the institution demonstrates it has considered or used race-neutral alternatives, and 4) what was ultimately used is the "least restrictive means" to achieve that interest.

Some feared that SCOTUS in the UNC/Harvard case would interpret Title VI in absolute terms and not apply the exception that the Strict Scrutiny standard provided. The case was particularly nuanced – not only because of this newly constituted conservative court's willingness to overturn legal precedence, but also the petitioner's argument of discrimination now includes alleged reverse discrimination against Asian Americans, a racial group that has benefited from affirmative action programs.

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 UNC and 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 (unlike 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.

Yet even then, SCOTUS left open the possibility for an entity to coherently articulate such need for a racially diverse student body under the "compelling interest" prong of Strict Scrutiny, as noted for military academies. SCOTUS also opened another door that appears to allow college admission based on an applicant's personal essay about their racial experience.

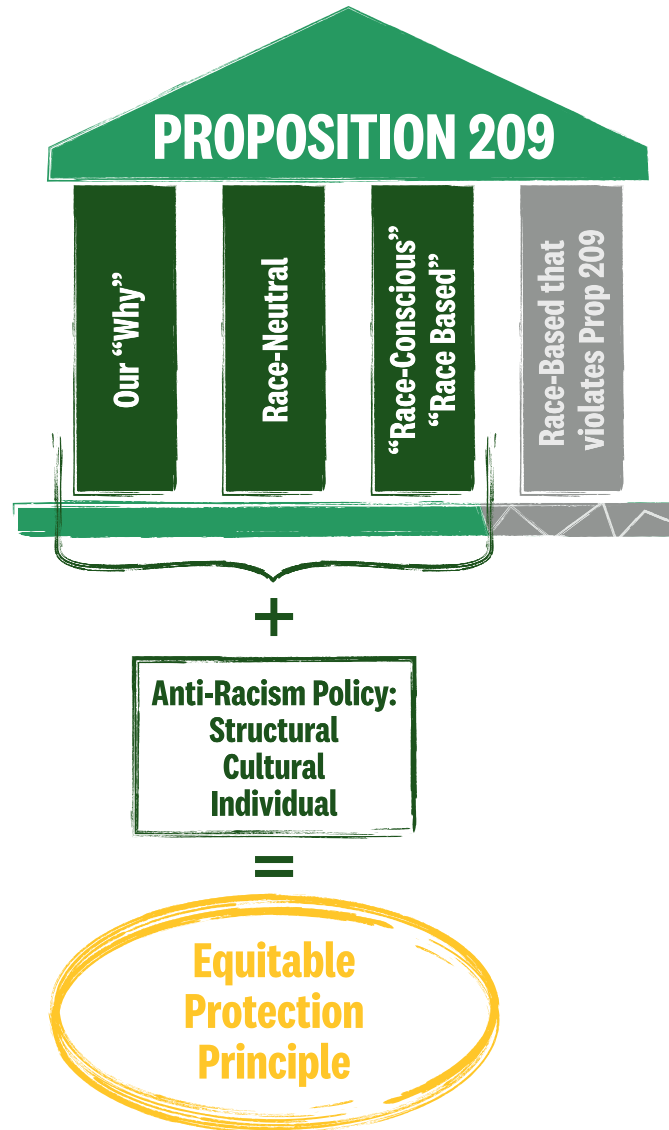
Why CA Community Colleges Need to Pay Attention to Proposition 209 and SCOTUS Cases?

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

A New Framework



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 to 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.

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<u>er</u> 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.*

- *Provided a Strict Scrutiny-like legal framework for future Proposition 209 challenges, that race-and gender-based remedial measures (beyond data collection and outreach) are necessary by showing: (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-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.*
- *Provided a framework for the federal funding exception to Proposition 209, stating that the policy must be narrowly tailored to comply with federal objectives and that a government entity need only present substantial evidence it would lose federal funding (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.*

A proposed Strict(er) Scrutiny standard of review under the *Equitable Protection Principle* 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 is compelling (including to remedy past purposeful discrimination) 2) the policy is "narrowly tailored" to achieve that compelling interest (that is, it is not too overbroad or fails to address aspects of the compelling interest) 3) the institution demonstrates it has considered or used race-neutral alternatives, and 4) what was ultimately used is necessary as the only, or at least the most likely and "least restrictive means" to achieve that interest.

B. 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/Harvard cases, testifying to the negative effects of Proposition 209 on the student racial diversity of its campuses. It specifically speaks to the limitations of race-neutral alternatives like socio-economic status, admission of the top ten percent from every high school in California, and its highly funded outreach programs. Furthermore, "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.

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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.

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?

1. Structural Examination: Faculty Primacy under AB 1725

One key aspect to antiracism work is to examine the legal structures, from re-examining state laws to conducting legal reviews of local college district board policies and administrative procedures with an antiracism lens.

One possible area for anti-racism structural examination is California's Assembly Bill 1725 which requires that "the advice and judgment of the academic senate will be primarily relied upon whenever [the policies of the college] involve an academic or professional matter." Passed in 1988, Assembly Bill 1725 (known as "10+1" rights) is a seminal piece of legislation in California. The 10+1 rights refer to ten topical areas where the Academic Senate must be primarily relied upon. For example, one of the ten areas is that the college must rely upon the Academic Senate for processes for institutional planning and budget development. At many community college campuses across California, AB 1725 has been interpreted to grant the Academic Senate (the association that represents all faculty at a college) the most power and privilege over all other constituency groups on campus.

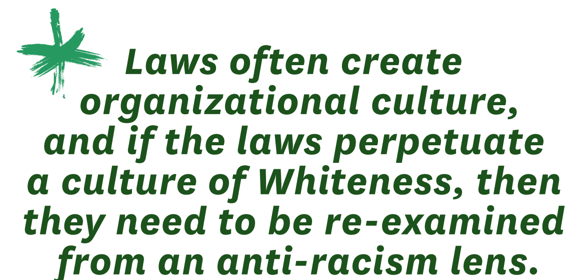
Many colleges in the United States have some version of participatory/shared governance as part of their institutional culture or laws. One immediate problem with California's AB 1725 is that it is not true shared/participatory governance. The rub is that despite efforts to be inclusive and amplify voices that are often not heard (the true meaning of shared/participatory governance), the law in California explicitly requires that the college must "rely primarily" on one voice – the Academic Senate. There are even times whereby the Academic Senate must "mutually agree" in order for any college efforts within the 10+1 subject areas to be implemented. AB 1725 gives primacy rights to faculty over other voices – and at certain times, faculty voices serve as the exclusive, superior voice.

In practice, AB 1725 sometimes even creates a chilling effect in areas not specifically delineated by 10+1 laws – yet are related enough and broadly interpreted to create an impression that faculty have primacy over the topic. The Academic Senate sometimes even believes that they must be consulted first or solely (versus primarily). The Academic Senate believes AB 1725 requires that their opinions be deem as expert opinions – often times on topics that are not even related to their area of academic discipline. The thought that faculty should be on the same level of influence as other constituency groups, including students and the community at-large, is contrary to faculty expectations of how academic culture should be. California's AB 1725 has validated these expectations for over three decades.

2. Cultural Examination: Majority-White Faculty Primacy under AB 1725

Laws often create organizational culture, and if the laws perpetuate a culture of Whiteness, then they need to be re-examined from an anti-racism lens.

Faculty in California community colleges have always been majority White since inception. What is faculty primacy and superiority under AB 1725 in California community colleges is in practice a form of systemic White primacy and superiority – or minimally, Whiteness primacy and superiority. To leave this fact unquestioned/unexamined is to reinforce the view from scholars and decades of evidence that college and university faculty largely reproduce White faculty body representation, norms, and cultures.



Laws often create organizational culture, and if the laws perpetuate a culture of Whiteness, then they need to be re-examined from an anti-racism lens.

In addressing systemic racism in higher education, courageous and compassionate yet often times difficult conversations about privilege, fragility, and bias are essential. Unfortunately, these

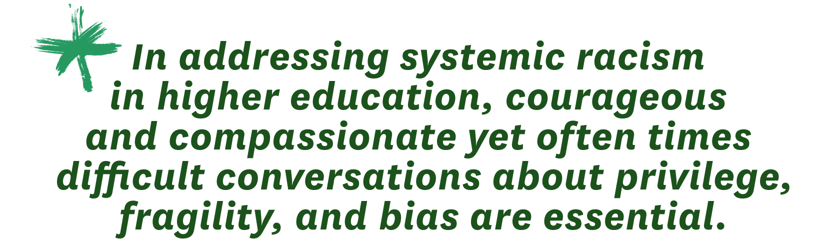
elements of privilege, fragility, and bias manifest themselves in power struggles and decision-making with the Academic Senate's legal privilege under AB 1725. Not all White faculty display Whiteness, and Whiteness can also be found in faculty of color. However, the racialized nature of the struggle may be especially noticeable when the faculty is majority White, the Academic Senate (including its leadership) is a majority White body, and their appointees to governance, hiring, and tenure committees are majority White.

The need to address privilege within the Academic Senate is essential, yet when discussed, it often creates a reaction that such privilege is in law. Privilege is blinding, especially White privilege, and fragility is often a reaction to any perceived threat to one's privilege. Too many people, often times people of color, in California community colleges speak privately about their concerns regarding AB 1725 and faculty privilege and fragility in racial equity work. Yet, they fear expressing their concerns publicly as it would affect their social belonging at work or career progression – not to mention even affecting their continued employment or re-election. AB 1725 is considered the sacred cow in California community colleges, and leaders must frequently publicly affirm their belief in honoring the sanctity of AB 1725 and the Academic Senate in order to be accepted on campus.

A re-examination of AB 1725 is critical and would help the Academic Senate become more effective and impactful on campus – especially if we want to achieve racial equity for students. For instance, professional development is one of the "10+1" areas of Academic Senate legal primacy rights. Dr. Estela Bensimon (a scholar known for her racial equity work) along with her colleagues published a groundbreaking report that calls for, among other things, "actively decentering Whiteness" in the professional development trainings conducted by the State Academic Senate.

Faculty could benefit from realizing that they may not be the experts on racial equity as it relates to all of the 10+1 areas, and that non-faculty perspectives and expertise are essential. A college might want to rely primarily on the expertise of students (especially the lived experiences of students of color), classified professionals (who are oftentimes majority employees of color on college campuses), communities (especially communities of color), non-profit organizations that have been studying the community colleges, and even intersegmental sectors of education that extend beyond the college.

Audre Lorde has said, "[T]he master's tools will never dismantle the master's house." At minimum, the work of racial equity is iterative. A set of laws enacted in the 1980s by presumably well-intended individuals should nevertheless be open to re-examination, especially as we learn more about the pitfalls of how they have been implemented and have sometimes served as barriers to racial equity and anti-racism work. In academia accreditation-language, this is called "continuous improvement." The unexamined system is not worth perpetuating.



In addressing systemic racism in higher education, courageous and compassionate yet often times difficult conversations about privilege, fragility, and bias are essential.

3. Individual-level Examination: Individual-Faculty Under AB 1725

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 the individual level. 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 as critical prerequisites to their classes, and how their own unconscious bias may affect how they set expectations for and assess students' abilities. However, the policies for faculty professional development activities on these topics at the college is a 10+1 topical area that the college must rely primarily on the Academic Senate.

Applying the "Equitable Protection Principle" to Faculty Racial Diversity Efforts in California Community Colleges

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.

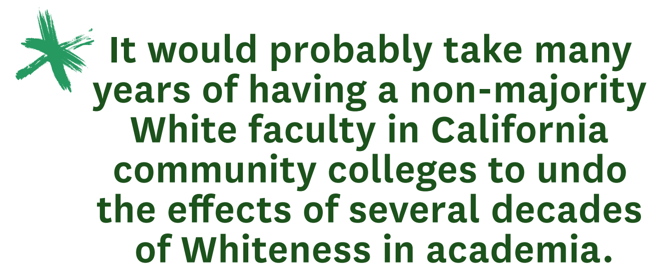
Let us use the *Equitable Protection Principle* framework to study one area of critical importance: how to promote faculty diversity in California community colleges within the context of Proposition 209.

The policy frame of the *Equitable Protection Principle* would push forward a policy of faculty racial diversity as a strategy for closing racial student success gaps, and it would look at achieving faculty racial diversity at the structural, cultural, and individual levels. Then, 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 the numerous policies and procedural changes so that they are narrowly tailored to that compelling interest using a strict(er) scrutiny standard of review that California courts have laid out under Proposition 209.

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.

1. Compelling Interest in Closing Racial Equity Gaps in California Community Colleges – Our "Why"

Research has shown that student success gaps for Black and Latino community college students narrow from 19% to 51% with racially diverse faculty, finding that Black and Latinx faculty have a positive role modeling effect on students of color and their learning experience. (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 opportunities (EEO) plans. This will create the nexus between the two plans and make a clear legal and policy case for why racial diversity hiring is a compelling interest – the foundational step in the *Equitable Protection Principle*.



Community colleges in California have a unique role in promoting racial equity in student success. Collectively, California community colleges educate approximately 2 million students with Latino, Black, Filipino, Asian American, Pacific Islanders, Native 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.

Student equity gaps closing in community colleges would result in tremendous progress for the state. Community colleges are also the racial diversity pipeline, pathway to the UCs and CSUs. While UCs and CSUs debate about the value of SATs in predicting student success, California community college students perform better than or just as well as students who started at the UCs and CSUs. Yet, they transfer to UCs and CSUs without SAT requirements.

Statewide, 37% of faculty are people of color, while almost inversely, 65% of the state population and 70% community college student population are people of color. Much effort has been made in the past few years, with large infusion of state funding to hire full-time faculty, new funding allocation for EEO, state legislative hearings on faculty diversification, statewide and local district trainings on EEO – among many efforts – have changed from approximately 20% faculty of color ten years ago to now approximately 37%. The State Legislature/Governor has allocated a significant infusion of dollars for community colleges to hire full-time faculty since 2015. A recent state audit to shed light on the accountability of those funds found that not only did college districts not hire full-time faculty accordingly, but the diversity of faculty is also still lacking – with the majority of faculty remaining White.

2. Race-Neutral and Race-Conscious Strategies Structurally, Culturally, and Individually

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.)

RACE-NEUTRAL

Some examples of race-neutral policy at a structural level are those anchored on socio-economic status such as basic needs efforts and EOPS, or initiatives such as Guided Pathways, AB 288 dual enrollment, and AB 705 transfer-level course placements. Although some of these programs (if not all) may be motivated by a compelling interest in closing racial equity gaps, these strategies themselves are race-neutral – that is, on their face, they do not identify race or require programmatic implementation based on race.

For instance, at the structural level, research has shown that dual enrollment is beneficial to Black and Latino students with the ability to narrow or close racial equity gaps (a compelling interest), even as a race-neutral strategy itself. An example of a race-neutral strategy at the cultural level is the celebration of "First-Gen" which recognizes students whose parents did not attend or complete college. An example of a race-neutral strategy at the individual level is the work around growth mindset: research shows that STEM faculty who do not have a growth mindset about themselves are more likely to have racial equity gaps in student success data in their classes.

RACE-CONSCIOUS OR RACE-BASED

However, if a policy is race-conscious or race-based, then further legal analysis is needed under the *Equitable Protection Principle*.

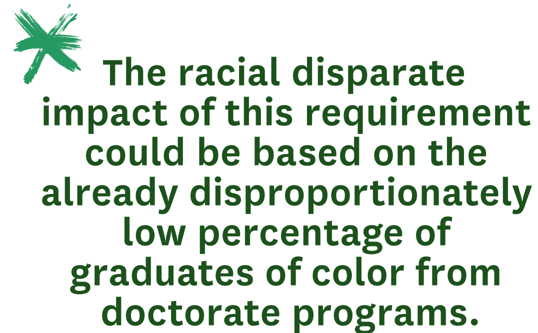
This author, when serving as Interim General Counsel for the California Community Colleges Chancellor's Office, published a legal guidance memo on faculty diversity hiring, post-hiring, and retention from an EEO perspective and how to navigate compliance with Proposition 209. Since then, the State Chancellor's Office has offered further insights and guidance, including a memo 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.

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.



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 4/5th 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 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 they 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.

Author Biography

Thúy Thị Nguyễn is a Partner at the law firm of Garcia Hernández Sawhney. Nguyen 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.

Nguyen was an adjunct instructor/lecturer teaching education law for several years at California State University, East Bay. She previously practiced school desegregation law: Nguyen 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, Nguyen 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, Nguyen 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 1725.

Nguyen 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 Proposition 209 and initiated a change in the statewide EEO funding allocation to the Multiple-Method model in order to promote diversity. Thereafter, in 2016, Nguyen was appointed President of Foothill College – becoming the first Vietnamese American college president in the country, a position she served for over five years.

Nguyen 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. Nguyen 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, Nguyen 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, Nguyen 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 Nguyen, who have helped advance society, culture, and the economy.

Nguyen 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. Nguyen is a Paul and Daisy Soros for New Americans Fellow.

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USC Race and Equity Center

USC Race and Equity Center

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