CAN MICHIGAN UNIVERSITIES USE PROXIES FOR RACE AFTER THE BAN ON RACIAL PREFERENCES?

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In 2003, the Supreme Court of the United States held that public universities—and the University of Michigan in particular—had a compelling reason to use race as one of many factors in their admissions processes: to reap the educational benefits of a racially diverse student body. In 2006, in response to the Supreme Court's decision, the people of Michigan approved a ballot proposal—called the Michigan Civil Rights Initiative ("MCRI")—that prohibits public universities in the state from discriminating or granting preferential treatment on the basis of race. Shortly after the MCRI was approved, a number of Michigan universities suggested that they were considering whether to use proxies for race in their admissions process in order to enroll racially diverse student bodies while circumventing the MCRI. These proxies include preferences for applicants who reside in heavily African American Detroit, applicants who are bilingual, and applicants who have lived on an Indian reservation. This Essay considers whether it is legal for the universities to use proxies for race like these in their admissions processes.

Historically, antidiscrimination laws have been interpreted to prohibit both explicit racial classifications and racial gerrymandering—facially race-neutral classifications that have the same purpose and effect as explicit racial classifications. This is the case because, if these laws prohibited only explicit discrimination, then they would be so easy to evade that they would be rendered toothless. Thus, for example, the Equal Protection Clause of the U.S. Constitution has long been interpreted to require strict scrutiny of both explicit racial classifications and racial gerrymandering.

Although it seems clear that racial gerrymandering in university admissions will not run afoul of the U.S. Constitution—the universities can still invoke the compelling interest of the educational benefits of diversity—it is less clear whether the MCRI will permit the universities to use proxies for race. Like most antidiscrimination laws, the text of the MCRI does not say whether it prohibits only explicit racial classifications or whether it also prohibits racial gerrymandering. Nonetheless, this Essay argues that the MCRI should be interpreted like most of these other laws to prohibit both forms of racial discrimination. Although there are a few indications in the public debate over the MCRI that the voters of Michigan did not intend the proposal to prohibit racial gerrymandering, most of the debate assumed that the MCRI would be interpreted in the same way that Proposition 209 in California has been interpreted, and both commentators and courts have interpreted Proposition 209 to prohibit *whatever the Equal Protection Clause would merely subject to*

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strict scrutiny. That is, Proposition 209 has been interpreted to do what the Equal Protection Clause does but without any of the defenses based on compelling interests. If the MCRI is interpreted in the same way, then it is likely that the universities will not be permitted to use proxies for race in their admissions process.

Last year, the people of Michigan approved a ballot proposal that, among other things, prohibits public universities in the state from using race as a factor in deciding which students to admit. The proposal, dubbed the "Michigan Civil Rights Initiative" ("MCRI"), is now part of the Michigan Constitution.[1] The MCRI mandates that state universities "shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race ...."[2] The proposal was the people of Michigan's response to the Supreme Court's decisions in *Grutter v. Bollinger*[3] and *Gratz v. Bollinger*,[4] which had allowed the University of Michigan to grant preferences to African American, Hispanic, and Native American applicants in its admissions decisions.

The universities in Michigan do not appear ready to take this bit of direct democracy lying down. The day after the MCRI was approved, Mary Sue Coleman, the President of the University of Michigan, gave a public address that many observers interpreted as a pledge to maintain the number of underrepresented racial minorities at the university by any means necessary.[5] And, indeed, in subsequent weeks it was reported that the University of Michigan and its public peers, Michigan State and Wayne State universities, were considering revising their admissions process to grant preferences to applicants who exhibit characteristics that are strongly correlated with race.[6] At Wayne State University, for example, the

1. MICH. CONST. art. I, § 26.
2. *Id.*
3. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
4. *See* Gratz v. Bollinger, 539 U.S. 244, 268 (2003).
5. *See, e.g.*, Steve Chapman, *University of Michigan vs. the People*, Chicago Tribune, Nov. 23, 2006, at 19 ("Her message was that the school would do 'whatever it takes' to delay, frustrate and circumvent the clearly expressed will of the public.").
6. *See* Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. Times, Jan. 26, 2007, at A1.

law school has already adopted a new admissions process that grants preferences to applicants who are bilingual, applicants who have lived on an Indian reservation, applicants who are from Detroit, and applicants who have experience overcoming discrimination.[7] The idea here is that applicants who exhibit these characteristics are thought more likely to be African American, Hispanic, or Native American than applicants who do not. The hope is that, by using proxies for race, the universities will be able to admit underrepresented racial minorities in something approaching the numbers the universities admitted when they considered race directly.

In this Essay, I will explore whether using proxies for race in college admissions in Michigan is legal. This is not the first time a public institution has been clever enough to try to get around antidiscrimination laws by the use of racial proxies. Indeed, we have a special term for such efforts: "racial gerrymandering." "Racial gerrymandering" is a term most often used to describe efforts by state governments to draw electoral districts using proxies for race in order to produce districts with voters of a desired racial composition,[8] but state actors have used such proxies in all sorts of other situations: drawing school district boundaries, establishing franchise qualifications, and even selecting criteria for college admissions.[9] I chronicled some of these efforts in a previous article about the Texas Ten Percent Plan, a race-neutral effort to diversify Texas universities that is similar to the efforts currently under consideration in Michigan.[10]

What is sometimes overlooked when government actors attempt to gerrymander racial results by race-neutral means is that these efforts are often no more legal than the explicit racial discrimination that they are trying to avoid. For example, for many decades, the United States Supreme Court has held that the Equal Protection Clause requires strict scrutiny not only of explicit racial classifications, but also of race-neutral classifications that are adopted with the purpose of achieving racial effects.[11] There is good reason for this: if our antidiscrimination laws

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7. *See id.*; *Affirmatively Active*, Boston Globe, Jan. 14, 2007, at D8.

8. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 544–45 (1999); Miller v. Johnson, 515 U.S. 900, 910 (1995); Shaw v. Reno, 509 U.S. 630, 640 (1993).

9. *See infra* Part I.

10. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race- Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 290 (2001). The Ten Percent Plan was not the first effort to racially gerrymander college admissions. In the 1920s, the President of Harvard wanted to limit Jewish enrollment, but, when an explicit ceiling proved unpopular, he turned to a facially-neutral "character" test. *See* MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE AND PRINCETON, 1900–1970 62 (Greenwood Press 1979).

11. *See, e.g.*, *Hunt*, 526 U.S. at 546 ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose . . . .'"); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies

prohibited only formal, facial considerations of race, it would be far too easy to evade those laws by the use of proxies for race. It is therefore unsurprising that many antidiscrimination laws in addition to the Equal Protection Clause have been interpreted to prohibit employers, governments, and others from doing indirectly through proxies what they cannot do directly through explicit classifications.[12]

In Part I of this Essay, I examine whether the proxies under consideration by the universities in Michigan might violate the U.S. Constitution. I conclude that they will not. Although I believe that these proxies should be required to satisfy the Supreme Court's strict scrutiny test, it seems fairly clear after *Grutter* that the universities would pass this test. *Grutter* upheld the use of explicit racial classifications in university admissions on the theory that universities have a compelling interest in pursuing the educational benefits of a racially-diverse student body.[13] If universities have a compelling interest in pursuing the educational benefits of racial diversity directly, then surely they also have a compelling interest in pursuing them indirectly.

But this is not the end of the matter in Michigan because the same ballot proposal that prohibits universities from using race directly might also prohibit them from using proxies for race. The MCRI's text—which prohibits "discriminat[ing] against or grant[ing] preferential treatment to any individual ... on the basis of race"[14]—is ambiguous on whether it prohibits only facially-explicit racial classifications or whether it prohibits the use of proxies for race as well. Nonetheless, in light of the fact that many other antidiscrimination laws have been interpreted to bar the use of proxies as well as explicit classifications, it would be surprising if the voters in Michigan intended a different reading of the MCRI, a reading that would permit such easy evasion of its prohibitions. Indeed, an examination of the public debate over the MCRI supports the conclusion that the MCRI should be interpreted to prohibit not only explicit racial classifications, but the use of racial proxies as well. Although it is true that

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as well to a classification that is ostensibly neutral but is [a] ... pretext for racial discrimination." (citations omitted)).

12. For example, Title VI has been interpreted to follow the same view of discrimination adopted by the Equal Protection Clause. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003)("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."). Similarly, under Title VII, one can state a claim for "disparate treatment" discrimination by alleging that a facially-neutral employment policy was adopted with the purpose to burden one race or sex more than another. *See, e.g.*, L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 368 n.109 (2005) ("If a plaintiff alleges that a facially neutral practice is unlawful because it was adopted with an intent to discriminate on the basis of sex, the plaintiff is alleging a claim of disparate treatment ....").

13. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

14. MICH. CONST. art. I, § 26.

there is very little specific evidence from the public debate that the voters intended this particular interpretation of the MCRI over another, there was overwhelming general agreement—among those on all sides of the MCRI debate—that the MCRI would be read the same way as its sister ballot proposal in California, Proposition 209, had been read. In Part II of this Essay, I show that California courts and commentators have interpreted Proposition 209 to *prohibit* the same scope of conduct subjected to *strict scrutiny* under the Equal Protection Clause—*i.e.*, that Proposition 209 is coextensive with the Equal Protection Clause but without any of the compelling interest defenses to strict scrutiny. If this reading is adopted in Michigan, then the admissions plans currently under consideration by Michigan universities may very well be illegal under the Michigan Constitution.

I. THE EQUAL PROTECTION CLAUSE

It is sometimes overlooked in the debate over what universities should do to bring about racial diversity that the U.S. Constitution is concerned not only with explicit racial classifications but with race-neutral classifications as well. That is, under the Equal Protection Clause, not only are explicit racial classifications subjected to strict scrutiny, but so are race-neutral classifications that have the same purpose and effect as the explicit ones. As the Supreme Court put it in *Personnel Administrator of Massachusetts v. Feeney*: "A racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is a . . . pretext for racial discrimination."[15]

This means that government actors may not seek to achieve indirectly through racial gerrymandering what they are prohibited from achieving directly through explicit racial classifications.[16] Thus, just as it is unconstitutional to deny African Americans the right to vote, so the Supreme Court has held it is unconstitutional to deny convicted felons the right to vote if the state does so in order to disproportionately disenfranchise African Americans.[17] Similarly, just as it is unconstitutional to assign African Americans to one public school and white students to another, so the Supreme Court has held it is unconstitutional to assign students who

15. *Feeney*, 442 U.S. at 272 (citations omitted); *accord Hunt*, 526 U.S. at 546 ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose . . .'").

16. *See generally* Fitzpatrick, *supra* note 10, at 296–313.

17. *See* Hunter v. Underwood, 471 U.S. 222, 227 (1985) (holding that a provision in the Alabama Constitution disenfranchising citizens convicted of "crimes of moral turpitude" violated the Equal Protection Clause because the state decided to disenfranchise citizens convicted of those crimes for the reason that ten times as many African Americans would be affected).

live in neighborhoods with a disproportionate number of African Americans or whites to one school or another if the state does so in order to affect the racial composition of the schools.[18] In this way, one might say that the Equal Protection Clause is concerned more with the substance of what government actors are doing than with the form.

It is, of course, always difficult to try to tease out the purpose behind government action, and the Supreme Court has spilled a great deal of ink over the years trying to lay down criteria courts can examine in order to determine whether government actors did what they did "'because of,' not merely 'in spite of'" racial effects.[19] For many years, the Supreme Court adopted something of a but-for motivation test: but for the racial effects their actions were likely to cause, would government officials have done the same thing?[20] The Court has looked to a number of factors to tease out this inquiry, including why government officials said they took a course of action and the sequence of events that gave rise to it.[21] In more recent cases, those involving gerrymandered voting districts, the Court has adopted a different test. In these cases, the Court has asked not whether the desire to cause racial effects was a but-for motivation, but, rather, whether it was a "predominant" motivation—whether non-racial motivations were "subordinated" to the racial ones.[22]

It can also be difficult to define what kinds of racial "effects" the Constitution prevents government actors from trying to cause. It seems clear that that the government cannot purposefully cause a disparate impact—that was the import of the case protecting African Americans from disenfranchisement through felon voting laws[23]—and it seems clear that the government cannot purposefully cause something approaching segregation—that was the import of the cases preventing school districts from assigning students on the basis of the racial composition of their neighborhoods.[24] But, in the more recent voting district cases, the Su-

18. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461–62 (1979) (holding unconstitutional several race-neutral actions by the school board, including the "use of optional attendance zones, discontiguous attendance areas, . . . boundary changes[,] and the selection of sites for new school construction," because they "had the foreseeable and anticipated effect of maintaining the racial separation of the schools"); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 201 (1973) (holding that "concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools" can violate the Equal Protection Clause).

19. *Feeney*, 442 U.S. at 279.

20. *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977).

21. *See id.* at 266–68.

22. *See* Hunt v. Cromartie, 526 U.S. 541, 546–47 (1999); Miller v. Johnson, 515 U.S. 900, 916 (1995); Shaw v. Reno, 509 U.S. 630, 643 (1993).

23. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

24. *See e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 452–54 (1979); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 213–14 (1973).

preme Court did not rely on either of these theories to strike down race proxies; rather the Court said that merely engineering a racial composition—moving a "significant" number of voters from one district to another—was racial effect enough.[25] How far one should take the logic of these decisions is unclear.[26]

Despite these doctrinal difficulties, it is important to see that some form of the rule against race proxies is necessary to put any teeth in antidiscrimination law. It is all too easy to evade formal, facial constraints because there will always be some characteristics other than skin color and ethnic background which African Americans, whites, Hispanics, and Asians exhibit in different proportions. For example, many of the Jim Crow laws in the South were facially-neutral laws designed to disproportionately burden African Americans;[27] the formalist view of antidiscrimination law would have upheld those laws.[28] And this is true not just for racial discrimination, but for any other sort of discrimination. It would be all too easy for employers to evade laws against firing women, for example, simply by firing instead employees with hair longer than the shoulder. If we are going to have meaningful antidiscrimination laws, then those laws must focus not only on form, but on substance as well. It is therefore unsurprising that many antidiscrimination laws have been interpreted to prohibit not only facial classifications, but also neutral classifications that were adopted to serve as proxies for the facially-prohibited one.[29]

One of the implications of all of this is that any effort by universities in Michigan to admit applicants through the use of proxies for race could

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25. *See Miller*, 515 U.S. at 916–17.

26. The voting district cases would seem to cast doubt on *any* effort by the government to engineer a particular racial outcome, whether it is the product of a disparate impact or not. For example, the logic of these cases would even seem to cast doubt on allocating government benefits by lottery if the lottery was selected in order to produce a particular racial distribution of benefits. This would essentially conflate the "racial effects" requirement of the inquiry into the "racial purpose" requirement, creating a tension with *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it.").

27. *See, e.g.*, Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1525 (2003) (noting that many Jim Crow laws, such as "[p]oll taxes, grandfather clauses, and property tests" were "ostensibly race-neutral").

28. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 948 (1989) ("If explicit racial classifications are unlawful, it makes little sense to allow a government that is subtle enough to use an ostensibly neutral surrogate for race to get away with maintaining the Jim Crow regime. In this sense, the principle of *Brown* had to extend beyond explicit racial classifications. *Brown* had to stand at least for the principle that government decisions, whatever their explicit language, must not in fact be based on race.").

29. *See supra* note 12.

very well violate the U.S. Constitution unless the universities can satisfy strict scrutiny. The Supreme Court has already said that using racial classifications in university admissions—even for the purpose of increasing applicants admitted from historically underrepresented racial groups—must satisfy strict scrutiny.[30] In light of the precedents discussed above, it is not hard to see how using race-neutral criteria to achieve the same purpose would meet with the same scrutiny. Many of the race-neutral criteria the universities are looking to exploit—bilingualism, residency in Detroit or on an Indian reservation, experience overcoming discrimination—are likely to produce a disparate impact by selecting a disproportionate number of African American, Hispanic, and Native American applicants. Moreover, although the universities might have room to contest whether the new admissions criteria were adopted with the "predominant" purpose of producing racial effects,[31] it will be hard for them to argue that racial effects are not at least the "but-for" motivation for the new criteria. If the new criteria had some value to the universities apart from serving as proxies for race, then presumably they would have been incorporated into the admissions process long ago.

If these factual inquiries would be resolved against the universities—that a court would find that the new admissions criteria produce racial disparate impacts and were adopted primarily or with at least the but-for motivation to achieve those impacts, something I will assume for the purposes of this Essay—then it would seem that the first legal hurdle the universities in Michigan might need to overcome if they pursue their plans to use proxies for race in admissions is strict scrutiny under the Equal Protection Clause. It was for similar reasons that I argued in a previous article that an analogous attempt to increase the number of African American and Hispanic students through race-neutral means in Texas—the Texas Ten Percent Plan—might well be unconstitutional if it cannot satisfy strict scrutiny.[32] And it is why a number of other commentators from across the political spectrum agree that race-neutral efforts to in-

30. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978).

31. For example, whether the new admissions criteria were adopted primarily for racial reasons may depend in part on how heavily the new criteria are weighted. If they are not weighted very heavily, the universities might argue that the new criteria have not, in the words of *Miller*, "subordinated" the "traditional" admissions criteria. Miller v. Johnson, 515 U.S. 900, 916 (1995).

32. *See* Fitzpatrick, *supra* note 10, at 313–26. The Texas Ten Percent Plan automatically admits all students who graduated in the top 10% from Texas high schools to the state university of their choice. *Id.* at 295. The Plan was adopted after the Fifth Circuit held that the University of Texas could no longer use explicit racial classifications in admissions. *Id.* at 294. The legislature in Texas decided to base the automatic admissions solely on high-school rank because high schools in Texas are still quite segregated by race and doing so admitted virtually the same number of African American and Hispanic students as were admitted before the Fifth Circuit's decision. *See id.* at 323–327.

crease the representation of one race relative to another—even if those who benefit are African American, Hispanic, or Native American—are presumptively unconstitutional under the Equal Protection Clause.[33]

I will consider whether the universities in Michigan can surmount this hurdle in a moment, but, before I do, I would like to discuss four significant complications with the view that I have constructed to this point. The complications are four Supreme Court precedents that encourage government actors to pursue race-neutral efforts as solutions to the constitutional problems with explicit racial classifications. In these four cases, the Supreme Court has said that one of the factors it considers in deciding whether an explicit racial classification is unconstitutional is whether the government actors first tried race-neutral means to accomplish whatever they sought to accomplish with the explicit classifications.[34] The Supreme Court said this in the context of deciding whether racial classifications are "narrowly tailored" to achieve a compelling government interest. In these cases, the Court said that one factor bearing on whether racial classifications are narrowly tailored is whether the government actors considered "race-neutral means" to achieve the compelling interests.[35]

The Court first said this in *City of Richmond v. J.A. Croson Company*, where, after holding that the City of Richmond did not prove that it had a compelling interest for using racial set asides in government contracting, the Court went on to make two "observations" about whether the plan would have, in any event, been narrowly tailored.[36] One of those observations was that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contacting."[37] If underrepresented racial groups "disproportionately lack capital or cannot meet bonding requirements," the Court said, then a

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33. *See, e.g.*, Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1791 (1996) ("The central problem is that race-neutral means still have a race-conscious motivation. . . . Any race-neutral program attempting to remedy past discrimination would necessarily have a motive to benefit the victimized race."); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After* Miller v. Johnson*: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1297 (1997)("[W]henever the Court suspects a racial motivation behind an ostensibly neutral statute, the principle against subterfuge will prohibit the government from doing covertly what it may not do overtly."); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000) ("A serious problem facing these ostensibly race-neutral efforts to increase minority representation in higher education . . . is that such efforts are themselves race-conscious state action that may violate the Equal Protection Clause." (citation omitted)).

34. *See* Parents Involved v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2760 (2007); *Grutter*, 539 U.S. at 339; Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 237–38 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

35. *See Parents Involved*, 127 S. Ct. at 2760; *Grutter*, 539 U.S. at 339; *Pena*, 515 U.S. at 237–38; *Croson*, 488 U.S. at 507.

36. *See* 488 U.S. at 507–08.

37. *Id.* at 507.

"race-neutral program of city financing for small firms would . . . lead to greater minority participation."[38]

The Court said the same thing in *Adarand Constructors, Inc., v. Pena*, where it reversed a lower court for not applying strict scrutiny to an explicit racial preference program.[39] In so doing, the Court remanded to the lower court to apply strict scrutiny in the first instance, saying that the lower court had not had the opportunity to pass on such questions as "narrow tailoring . . . by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting . . . ."[40]

These remarks are arguably difficult to square with the notion that using race-neutral means to achieve racial effects will encounter strict scrutiny.[41] The Court in these cases seems to be saying that one solution to the constitutional problems with explicit racial classifications is to use race-neutral means to achieve the same racial ends. But that is the very thing that, as I have explained, the Court has held in previous cases is no less constitutionally suspect.

If the only two opinions on the books encouraging governments to use proxies for race were *Croson* and *Adarand*, we might be tempted to dismiss what was said in those opinions simply as ill-considered dicta. In neither case did the Court's thoughts on narrow tailoring rise to the level of holding. In *Croson*, the Court, after invalidating the racial set aside on other grounds, quite explicitly said it was only making an "observation" about narrow tailoring.[42] In *Adarand*, the Court simply pointed out that the lower court had not yet had the chance to consider the question of narrow tailoring in light of *Croson*.[43] In comparison to the many decades of holdings scrutinizing the use of proxies for race just as strictly as explicit racial classifications, these three or four sentences of dicta might be seen as relatively insignificant. This is, more or less, the conclusion to which other commentators have come.[44]

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38. *Id.*

39. *See* 515 U.S. at 237–38.

40. *Id.* (citation omitted).

41. *See, e.g.*, Ayres, *supra* note 33, at 1784 ("The Court's preference for 'race-neutral means to increase minority participation' is inconsistent with narrow tailoring . . . ."); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1949–50 (1996) ("[I]t is at least oddly disparate to maintain, on the one hand, that explicitly race-conscious reasoning is permissible in justifying an economically based affirmative action program, but to insist, on the other, that race-consciousness is an evil that may not be reflected in an affirmative action program's distributive criteria.").

42. *See* 488 U.S. at 507.

43. *See* 515 U.S. at 237–38.

44. *See, e.g.*, Forde-Mazrui, *supra* note 33, at 2334, 2351 (noting that the Supreme Court's comments on race-neutral alternatives are "dicta" and the fact that the Court has "assume[d] the validity of race-neutral alternatives does not . . . mean that . . . the Court would so hold when squarely confronting them"); Eugene Volokh, *The California Civil*

As tempting as it is to dismiss *Croson* and *Adarand* as dicta, that option is not available for the other two Supreme Court precedents, *Grutter* and the Court's very recent decision in *Parents Involved v. Seattle School Dist. No. 1*.[45] In *Grutter*, the Court held point blank that "[n]arrow tailoring does ... require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[46] The Court said the same in *Parents Involved*, holding unconstitutional an explicit racial classification employed by school districts because, among other things, "[t]he districts ... failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."[47] *Grutter* and *Parents Involved* therefore raise the question whether the Supreme Court's older cases applying strict scrutiny to racial gerrymandering can somehow be reconciled with the Court's modern cases suggesting that explicit racial classifications cannot survive strict scrutiny unless race-neutral alternatives are considered.

One commentator has suggested that the way the cases should be reconciled is by abandoning the principle that the Equal Protection Clause treats as equally suspect discrimination that seeks to benefit nonwhites and discrimination that seeks to burden them. The Supreme Court has adhered to this principle for the better part of three decades, beginning with Justice Powell's opinion in *Regents of the University of California v. Bakke*, where he declared that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[48] Nonetheless, Professor Michael Dorf has argued that we need only follow this principle in cases involving *explicit* racial classifications.[49] In cases involving *proxies* for race, he has argued that, although we must apply strict scrutiny when the proxies were adopted for the purpose of benefiting whites, we are free to apply something less than that when the proxies were adopted for the purpose of

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Rights Initiative: An Interpretive Guide, 44 UCLA L. REV. 1335, 1354 n.50 (1997) ("In my view, the clear holding of *Shaw*, *Miller*, *Hunter*, *Arlington Heights*, and *Washington v. Davis* should prevail over any possible contrary hints in *Croson* and *Adarand* ...").

45. *See* Parents Involved v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2738 (2007).

46. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

47. *Parents Involved*, 127 S. Ct. at 2760.

48. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978); *accord Parents Involved*, 127 S. Ct. at 2764 ("Th[e] argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." (internal citations omitted)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) ("We thus reaffirm the view ... that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). *But see Parents Involved*, 127 S. Ct. at 2816–20 (Breyer, J., dissenting) (arguing otherwise).

49. *See* Michael C. Dorf, *Universities Adjust to State Affirmative Action Bans: Are the New Programs Legal? Are they a Good Idea?*, FINDLAW'S WRIT, Jan. 29, 2007, http://writ.news.findlaw.com/dorf/20070129.html.

benefiting historically underrepresented racial groups.[50] Under Professor Dorf's approach, race-neutral efforts by the universities in Michigan to increase the representation of African Americans, Hispanics, and Native Americans in their student bodies at the expense of whites would not be constitutionally suspect.

It is, however, hard to see how Professor Dorf's approach to reconciling the Supreme Court's cases can succeed in light of the fact that the Supreme Court has already held that using proxies for race in order to benefit underrepresented racial groups must satisfy strict scrutiny in the same way that the use of proxies in order to benefit whites must. Indeed, the Court's most recent cases on the use of racial proxies, the voting district cases, were cases where the proxies were used to the benefit of African Americans; yet, the Court applied strict scrutiny.[51] The Court noted that gerrymandering of voting districts was facially race-neutral because it formally classified voters by neighborhood,[52] but the Court nonetheless followed its previous cases and held that such efforts must satisfy strict scrutiny because they were adopted with the purpose of causing racial effects; it did not matter that the effects were to the benefit of African Americans.[53]

With due respect to Professor Dorf, there is a better way to reconcile the Supreme Court's cases in this area. The better way is simply to recognize that, even though two practices might both be constitutionally suspect, one practice might still be preferable to the other. That is, even though both explicit racial classifications and the use of proxies for race must overcome strict scrutiny, we might still prefer that government actors pursue their compelling interests through racial proxies than through explicit classifications. We might think that, although either of these courses should be pursued only a last resort, if forced to choose between the two, the use of proxies for race is less odious than the use of explicit classifications. On this view, all the Supreme Court is saying in these cases

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50. *See id.* (noting that the use of racial proxies in Michigan would be adopted "to benefit rather than to burden traditionally disadvantaged groups" (emphasis omitted) and predicting that the Supreme Court would "not subject ... to strict scrutiny" a "race-neutral program that had the purpose and effect of boosting minority enrollment"(emphasis omitted)).

51. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546 (1999); Miller v. Johnson, 515 U.S. 900, 911 (1995); Shaw v. Reno, 509 U.S. 630, 643 (1993).

52. *See, e.g.*, *Hunt*, 526 U.S. at 547 ("Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race-neutral on its face.").

53. *See, e.g.*, *Hunt*, 526 U.S. at 546 ("A facially neutral law ... warrants strict scrutiny ... if it can be proved that the law was 'motivated by a racial purpose ....' "(quoting Miller v. Johnson, 515 U.S. 900, 913 (1995))); *Shaw*, 509 U.S. at 643 (applying strict scrutiny to racial gerrymander because strict scrutiny applies "not only to legislation that contains explicit racial distinctions but also to ... statues that, although race neutral, are ... 'unexplainable on grounds other than race.' "(quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977))).

is that, if a government actor is indeed pursuing a compelling interest, then the actor ought to first determine whether it can achieve that interest through race-neutral means before turning to explicit racial classifications. If the interest is indeed compelling, then the race-neutral approach will likely survive strict scrutiny; the narrow-tailoring inquiry for racial proxies is much easier to satisfy than the one for explicit classifications.[54] This reading leaves no contradiction between *Grutter* and *Parents Involved*, on the one hand, and the earlier cases applying strict scrutiny to the use of proxies for race, on the other.

It is true, as Professor Ian Ayres has pointed out, that this approach might force government actors to use less efficient means in their pursuit of compelling interests: if the compelling interest is tied to a certain level of racial representation—as is the case, for example, with the interests in remedying past racial discrimination and generating the educational benefits of racial diversity—then forcing government actors to use proxies for race will be less efficient than permitting the use of race itself;[55] there are few proxies that are *perfectly* correlated with race. Nonetheless, it is hardly unreasonable for the Supreme Court to believe that these inefficiencies are worth enduring in order to avoid the social costs of explicit racial classifications.

Although I believe that the Supreme Court's precedents can best be reconciled in this manner, it is admittedly not clear that this is how the current members of the Supreme Court would reconcile these precedents. Four Justices in *Parents Involved*—the ones on the losing side of the case—appear ready to abandon the principle that the Equal Protection Clause treats as equally suspect both discrimination in favor of whites and discrimination against whites—not just, as Professor Dorf suggests, for the use of proxies for race, but for explicit racial classifications as well.[56] Thus, it seems apparent that these Justices would uphold the sort of racial proxies that are being contemplated by the universities in Michigan. Although the votes of these four Justices obviously do not make a majority, even Justice Kennedy's opinion in *Parents Involved* leaves doubt whether he would any longer subject racial proxies to strict scrutiny. Although Justice Kennedy concurred in the Court's holding in *Parents Involved* that it was unconstitutional for the school districts to assign students to schools on the basis of explicit racial classifications, he went on to say in dicta that the districts could use proxies for race—including "drawing attendance zones with general recognition of the demographics of

54. *See infra* text accompanying notes 66–70.

55. *See* Ayres, *supra* note 33, at 1787 ("[T]he 'overinclusion' version of narrow tailoring, if anything, points away from race-neutral subsidies.... Narrowly tailoring the beneficiary class for remedial subsidies so that it will not be overinclusive necessitates explicit racial classifications.").

56. *See* Parents Involved v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2816–20 (2007)(Breyer, J., dissenting).

neighborhoods"—to accomplish the same goal of creating "racially balanced" schools.[57]

On one view, Justice Kennedy's statement here is not extraordinary because, unlike the other members of majority who voted to strike down the explicit racial classifications, Justice Kennedy thought the school districts had a compelling interest in trying to achieve racially-balanced schools.[58] Thus, his statement that the school districts could have used race-neutral means to pursue this compelling interest follows perfectly from prior precedents as I have described them. On another view, however, Justice Kennedy's opinion could be extraordinary because he arguably went on to suggest in further dicta that proxies for race need not comply with strict scrutiny at all in order to be constitutional; he said: "These [facially neutral] mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[59]

Although I think one could read Justice Kennedy's further dicta here to suggest that he no longer thinks that the Constitution is as concerned with racial gerrymandering as it is with explicit racial discrimination, I do not think this reading is the one he intended. Not only did Justice Kennedy fail to grapple with *any* of the many cases strictly scrutinizing race proxies—many of which he authored or joined—but the only case he cited for his dicta—*Bush v. Vera*[60]—is a voting district case in which the Court *applied strict scrutiny to a race proxy* (a race proxy designed to help African Americans, no less). Rather, in my view, the meaning Justice Kennedy most likely intended was one suggesting that, if the Court adopts the "predominant" motivation standard from the voting district cases as opposed to the more traditional "but-for" motivation standard it used in other race-proxy cases,[61] then it will be harder for plaintiffs to make the necessary showing to invoke strict scrutiny. This explains his citation to *Bush v. Vera* as well as his statement that it was merely "unlikely"—as opposed to "unthinkable"—that strict scrutiny would apply to racial gerrymandering by the school districts.[62] In sum, I think the most that Justice Kennedy's opinion can be read to say is that racial gerrymandering still must overcome strict scrutiny in order to comport with the Constitution whenever, as in the voting district cases, the gerrymandering is "predominantly" motivated by race.

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57. *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).
58. *See Id.*
59. *Id.*
60. *See* Bush v. Vera, 517 U.S. 952, 958 (1996).
61. *See supra* text accompanying notes 19–22.
62. *See Parents Involved*, 127 S. Ct. at 2792.

If I am correct about Justice Kennedy's opinion in *Parents Involved*, then it would seem that—not only as a matter of Supreme Court precedent but also as a matter of the inclinations of the current Justices—the plans under consideration by the universities in Michigan to use proxies for race in admissions may need to overcome strict scrutiny in order to comport with the U.S. Constitution. I turn now to the question whether the universities can overcome this scrutiny.

In order to overcome strict scrutiny, the universities would have to show both that they have a compelling interest for the use of racial proxies and that the proxies are narrowly tailored to achieve that interest.[63] It would seem that the universities will not have much trouble passing either of these tests.

When I wrote about the use of racial proxies in Texas pursuant to the Ten Percent Plan, I argued that the Plan might fail strict scrutiny because Texas did not have a compelling reason for seeking to racially gerrymander the student bodies at state universities.[64] But that was before the Supreme Court decided the *Grutter* case and held that the University of Michigan had a compelling interest in bringing about the educational benefits of a racially-diverse student body.[65] There is no reason why the universities in Michigan will not be able to point to this same compelling interest to justify the use of racial proxies in admissions. That is, given that they have a compelling interest in pursuing racial diversity directly, surely they also have a compelling interest in pursuing it indirectly.

As a result, it seems to me that the only plausible basis under the U.S. Constitution for objecting to the universities' use of racial proxies is under the narrow-tailoring prong of strict scrutiny. But even here it is hard to make an argument against the use of proxies. The Supreme Court tends to vary the contours of the narrow-tailoring inquiry from context to context,[66] and, in the case of proxies for race, the Court has applied a somewhat watered-down narrow-tailoring test that asks only whether the use of racial proxies would "substantially address"[67] or be "reasonably

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63. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 976 (1996) (holding that, in order to survive "strict scrutiny," racial gerrymandering must be "narrowly tailored to further a compelling state interest"); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (same); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (same).

64. *See* Fitzpatrick, *supra* note 10, at 337–46.

65. *See* Grutter v. Bollinger, 539 U.S. 306, 320 (2003).

66. *See, e.g., Grutter*, 539 U.S. at 334 (adopting narrow-tailoring criteria "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education" by "tak[ing] ... 'relevant differences into account'" (quoting Adarand Constr. Inc. v. Pena, 515 U.S. 200, 228 (1995))). It is obvious that the narrow-tailoring inquiry will differ in the context of racial proxies from the context of explicit classifications because some of the factors in the latter context do not translate in the former context—e.g., the factor of whether race-neutral alternatives were considered.

67. Shaw v. Hunt, 517 U.S. 899, 915 (1996) ("Although we have not always provided precise guidance on how closely the means ... must serve the end ..., we have

necessary to" the compelling interest.[68] These are obviously vague tests, but it is doubtful that the universities would fail to satisfy them. The universities have identified a number of criteria which would appear to correlate fairly well with African American, Hispanic, and Native American applicants: bilingualism, residency on an Indian reservation or in Detroit, and experience overcoming discrimination. In light of the fact that the universities can no longer use explicit racial preferences under state law, correlations such as these are pretty much the *only* ways they can generate the educational benefits of a racially diverse student body. It is true that, as Ian Ayres has pointed out, explicit racial preferences would be *better* tailored to achieving racial diversity.[69] Nonetheless, the universities should not be punished under strict scrutiny because state law has barred them from considering race directly. As we have seen, the Supreme Court itself has made the judgment that government actors should prefer race-neutral means to achieving racial effects even though those means will be less efficient. Moreover, although it is also possible that there may be other race-neutral criteria that are better correlated with race than the criteria the universities are considering, narrow tailoring in this context has never required government actors to find the race-neutral criteria that are *best* correlated with race (no matter what their effect on other state interests).[70] Thus, it seems to me that, if the universities in Michigan end up using proxies for race in admissions, their efforts will satisfy strict scrutiny rather easily.

II. THE MCRI

The Equal Protection Clause is not the end of the matter in Michigan, however, because the universities must also comply with the ballot proposal adopted by Michigan voters. The MCRI, now a part of the Michigan Constitution, provides that, "The University of Michigan, Michigan State University, Wayne State University, and any other public

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always expected that the legislative action would substantially address, if not achieve, the avowed purpose.").

68. *E.g.*, *Vera*, 517 U.S. at 977 (holding that the " 'narrow tailoring' requirement of strict scrutiny" requires the government action to be "reasonably necessary to" and "substantially address[]" a compelling interest); Shaw, 509 U.S. at 655 ("A reapportionment plan would not be narrowly tailored . . . if the State went beyond what was reasonably necessary . . . .").

69. *See* Ayres, *supra* note 33, at 1787 ("[T]he 'overinclusion' version of narrow tailoring, if anything, points away from race-neutral subsidies. . . . Narrowly tailoring the beneficiary class for remedial subsidies so that it will not be overinclusive necessitates explicit racial classifications.").

70. *Cf. Vera*, 517 U.S. at 977 ("We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement that a 'district must have the least possible amount of irregularity in shape' . . . ." (quoting Vera v. Richards, 861 F. Supp. 1304, 1343 (1994))).

college or university . . . shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race . . . ."[71] Does "discrimination" or "preferential treatment" on "the basis of race" include the use of proxies for race? The answer to that question depends on how courts in Michigan interpret ballot language.

The overriding rule of interpreting ballot language in Michigan is to discern what the majority of voters understood the language to mean when they voted for it.[72] In order to do this, courts look first, as they often do in other contexts, to the words of the ballot. If the common understanding of those words is unambiguous, then that is the end of the matter. I do not think it is fair to say that the words "discriminate or grant preferential treatment on the basis of race" are unambiguous. On the one hand, a very straightforward reading of those words would hold that unless race is explicitly considered, then there has been no racial discrimination. That is the formal conception of discrimination, and, on that reading, the universities would be permitted to use proxies for race. On the other hand, the formal conception of discrimination is not the one we usually adopt for our antidiscrimination laws, whether constitutional[73] or statutory.[74] Although it would be somewhat surprising if the voters in Michigan did not understand the MCRI to take the same functional view of discrimination that has insulated other antidiscrimination laws from easy evasion, it cannot be said that the words of the MCRI *necessarily* embody one concept of discrimination over another.[75]

When the common understanding of the words on the ballot is ambiguous, the courts in Michigan next look to the "circumstances surrounding the adoption of [the ballot] provision and the purpose sought to be accomplished [by the provision]."[76] The most obvious circumstances

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71. MICH. CONST. art. I, § 26.

72. *See, e.g., In re* Proposal C, 185 N.W.2d 9, 14 (Mich. 1971).

73. *See supra* Part I.

74. *See supra* note 12.

75. I suppose one could also argue that "discrimination on the basis of race" in the MCRI means what it has come to mean in Title VII of the Civil Rights Act of 1964—that is, any race-neutral admissions criteria that causes a disparate impact constitutes discrimination regardless of the motivation of those who adopted it. I think this interpretation of the MCRI is implausible for a variety of reasons. First, this interpretation is fairly impractical because virtually any admissions criterion will cause a disparate impact on one race or another. Second, notwithstanding the Supreme Court's opinion in Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971), interpreting Title VII in this way, many—if not most—commentators are of the view that disparate impact discrimination is a rather unnatural explication of the concept of discrimination. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1502 n. 334 (2003). Third, there is no evidence that the voters of Michigan understood the MCRI to be interpreted in this way. Finally, neither the Washington nor California Supreme Courts have interpreted their sister ballot initiatives in this way. *See infra* Parts II.B & II.C.

76. *In re* Proposal C, 185 N.W.2d at 14.

that gave rise to the MCRI were the Supreme Court's decisions in *Grutter* and *Gratz*. The MCRI was conceived to prohibit what the Supreme Court permitted in those cases.[77] As those cases involved only explicit racial classifications, however, the circumstances that gave rise to the MCRI do not tell us very much about the use of proxies for race.

When the words of the ballot proposal and circumstances that gave rise to its adoption do not bear fruit, the courts in Michigan look to a variety of other considerations to decide what ambiguous ballot language means. These considerations include: what the drafters of the ballot proposal intended,[78] what other proponents and opponents of the proposal had to say about it,[79] and how sister courts have interpreted similar provisions in their state constitutions.[80] In this case, these considerations largely converge. As I explain below, the debate surrounding the MCRI sheds very little specific light on whether it would prohibit the use of proxies for race as a substitute for explicit racial classifications. But the one thing that is made clear in the debate is that everyone on both sides of the proposal seemed to assume that the MCRI would mean for Michigan all that its sister ballot proposal, Proposition 209, had meant for California. And one of the things that Proposition 209 has appeared to mean for California is that race proxies are against the law.

A. *The Intentions Of The Drafters, Other Proponents, And Opponents Of The MCRI*

The public debate over the adoption of the MCRI yields very little specific evidence of what voters thought the proposal would mean for government efforts to engineer racial effects through race-neutral means. Most of the debate either concerned general concepts—such as whether government should be "colorblind"[81]—or specific programs that employed only explicit racial or gender classifications (most prominently, the University of Michigan's admissions policies).[82] Neither of the discussions

77. *See, e.g.*, Dan Gershman, *Prop 2: Much Is At Stake for U-M*, ANN ARBOR NEWS, Oct. 16, 2006, at A1 ("The proposal firmly takes aim at U-M's admissions system, which considers race—and gender for men seeking entry in nursing and women in engineering—as one of many factors among applicants.").

78. *See* Durant v. Michigan, 605 N.W.2d 66, 79–80 (Mich. Ct. App. 2000).

79. *See In re* Proposal C, 185 N.W.2d at 15 n.2, 26.

80. *See id.* at 25 (following interpretation of New York courts).

81. *See, e.g.*, Dan Gershman, *supra* note 77 ("Proposal 2 supporters say it is an effort to create a color-blind society . . . ."); *Calif. Gives Idea Of MCRI's Effects, U-M Panel Says: Proposal 209 Has Changed State*, ANN ARBOR NEWS, Sept. 28, 2006, at B3 (" 'What it is doing is trying to create a color-blind society,' said Max McPhail, media relations director for MCRI.").

82. *See, e.g.*, Dan Gershman, *supra* note 77; Dawson Bell, *What Stays, Goes Is Decided In Court*, DETROIT FREE PRESS, Sept. 5, 2006, at 9A ("Admissions practices at the University

in these areas is very probative to the use of proxies for race. The notion of "colorblind" government is just as ambiguous as the notion of "racial discrimination": it could mean only that government should not formally use race as a factor when deciding who gets what, or it could mean that government should never even think about race when selecting among race-neutral options. With respect to the specific focus only on programs that used explicit racial classifications, although one could argue that this fact should be interpreted to mean that no one thought the MCRI would apply beyond explicit racial classifications, another interpretation would be that, given that explicit classifications were permitted, there was no reason for government officials to use proxies for race at that time, and, therefore, no such programs to oppose.

With all of that said, there are a handful of statements by the drafters of the MCRI, their opponents, and other observers that could be read to suggest that the voters of Michigan did *not* think the proposal would prohibit the use of proxies for race. For example, there are a number of statements by proponents and opponents alike acknowledging that the MCRI would not prohibit other types of "affirmative action," such as that for "socioeconomic disadvantage" and for graduates of "inner city schools."[83] These statements are not especially probative, however, because they do not distinguish between affirmative action of this sort for its own sake, and affirmative of this sort motivated by a desire to engineer a particular racial outcome. Thus, it is difficult to draw any inference from these statements to a sweeping conclusion about the meaning of the MCRI.

There are, however, a handful of statements that are a bit more suggestive on the question of the use of proxies for race. For example, one of the promotional brochures prepared by the sponsors of the MCRI included a "frequently asked questions" page that can be read to say a bit more than the other promotional materials on socioeconomic affirmative action.[84] One of the questions considered by the brochure was "Isn't some consideration of race needed to balance the racial, economic and other disparities that exist?"[85] The answer: "MCRI would not prevent, and indeed, *would probably result in significantly greater use of socio-economic solutions* that would benefit every 'disadvantaged' individual regardless of race."[86]

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of Michigan—the object of a six-year court battle that led directly to the ballot proposal—are the most obvious target.").

83. *See, e.g.*, The Mich. Civil Rights Initiative Comm., PROPOSAL 2 – FREQUENTLY ASKED QUESTIONS ("Wouldn't passage of this proposal mean the end of affirmative action? . . . Affirmative action (in terms of outreach programs to under-represented groups) would be permitted for such classifications as, for instance, 'inner city schools' or 'rural schools' or other measures of socio-economic disadvantage.").

84. *See id.*

85. *Id.*

86. *Id.* (emphasis added).

This exchange is interesting because it suggests that the promoters of the MCRI thought approval of the ballot proposal would result in "significantly greater" use of socioeconomic affirmative action. But why would banning preferences on the basis of race lead to the adoption of preferences on the basis of poverty? The most plausible reason would seem to be a recognition that the universities would look to other ways to maintain the racial diversity they had achieved by explicit racial classifications. The MCRI brochure can be read to approve of such efforts.

There are other statements in the public debate that confirm this interpretation of the MCRI. Perhaps the most explicit statement comes from the Citizens Research Council of Michigan, which appears to be a private organization that takes it upon itself to prepare nonpartisan reports on all Michigan ballot proposals. The Council prepared a lengthy (41-page) report on the MCRI, and, when discussing the potential reach of the proposal, did an analysis of the reach of Proposition 209 in California.[87] Based on its reading of California case law, the report concludes that the MCRI "would not have any effect on programs that incorporate race-and sex-neutral means to increase diversity in a student body or public workforce; e.g., through using socioeconomic or geographic indicators to issue preferences."[88] As I will explain in a moment, I think this reading of California case law is incorrect; nonetheless, this report gives some idea of what the voters in Michigan may have thought the MCRI might do.

Opponents, too, said things that suggest they believed the MCRI would not prohibit the use of proxies for race. Although one must always be cautious about using the words of a law's opponents to interpret its meaning, the usual caution is that opponents will exaggerate the consequences of the law;[89] in this case, however, the opponents are suggesting a *narrower* reading of the MCRI, one that would reach only explicit racial preferences. For example, administrators at the University of Michigan, vocal opponents of the MCRI, reportedly urged voters to reject the proposal not because it would ban the use of proxies for race in admissions, but because they thought the use of proxies would not be an effective way for the University to maintain the desired racial outcomes in admissions. Mary Sue Coleman, President of the University, "point[ed] to the passage of a similarly worded proposal in California to say that there are no race-neutral ways to attract diverse students."[90] One of her colleagues

87. *See* CITIZENS RESEARCH COUNCIL OF MICHIGAN, STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT, PROPOSAL 2006–02: MICHIGAN CIVIL RIGHTS INITIATIVE, Report 343 (Sept. 2006).

88. *Id.* at 3.

89. *See, e.g.*, Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1098 (Cal. 2000) (George, C.J., concurring in part and dissenting in part) (arguing that the contentions of proposition opponents "may tend to overstate or exaggerate the . . . detriments of a proposition").

90. Gershman, *supra* note 77.

testified that "'[e]vidence in California shows that 10 years of using race-neutral means to achieve diversity . . . have not resulted in the level of participation by underrepresented students that was present when universities were allowed to use affirmative action . . . .'"[91] The fact that these administrators were cool to the prospects of revising the University's race-neutral admissions criteria in order to engineer racial diversity suggests that they assumed the MCRI would permit them to attempt such engineering.

These are the strongest pieces of evidence in favor of the view that the MCRI was not intended to prohibit the use of proxies for race. In the end, however, I think they are not very compelling. Reading something significant from the cryptic language of an MCRI brochure is a bit like finding meaning in a cupful of tea leaves; the assumptions made by those who *opposed* the MCRI are not entirely reliable indications of what those who voted *for* the proposal thought they were getting; and, the prediction of the Citizens Research Council is based, as we will see, on a faulty premise.

But more than all that, these pieces of evidence are but a few sentences in volumes upon volumes of public debate. If we look to the volumes rather than to the sentences, we see the issues surrounding the MCRI framed in different way. What we see is that everyone—supporters, opponents, neutral observers—believed the MCRI would mean in Michigan what its sister proposal, Proposition 209, meant in California.[92] The public debate was literally fixated on California. Nearly every newspaper article on the proposal mentioned that the same proposal had passed in California, and whenever the consequences of the MCRI were discussed, everyone looked to what the courts in California had done with Proposition 209. Typical in the mainstream media was a piece in the largest newspaper in Michigan, the Detroit Free Press. When discussing what the MCRI would do, the article noted that "[t]he initiative's language . . . is identical to that of the California Civil Rights Initiative approved by voters there in 1996";[93] it then went on to describe in great detail four opinions from California courts that had applied Proposition 209 to strike down racial preference programs, including the 2000 California Supreme Court case of *Hi-Voltage Works v. City of San Jose*.[94]

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91. *Id.*

92. *See, e.g.*, Sarita Chourey, *Church Leaders Urge Defeat Of Proposal 2*, KALAMAZOO GAZETTE, Nov. 1, 2006, at A3 (quoting Proposal 2 campaign manager Doug Tietz describing the MCRI as "'very similar' to the approach that passed in California in 1996"); Peggy Walsh-Sarnecki & Lori Higgins, *A Lot at Stake if Ban is Passed*, DETROIT FREE PRESS, Oct. 29, 2006, at A1 (noting that "[f]oes of Proposal 2 . . . point to lawsuits filed in California" in describing what the "affirmative action ban . . . could affect").

93. Dawson Bell, *What Stays, Goes is Decided in Court*, DETROIT FREE PRESS, Sept. 5, 2006, at 9A.

94. Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000).

As I said, this is just one of countless examples of the public's understanding that the MCRI would mean in Michigan what it meant in California. For example, articles reporting that the MCRI would threaten outreach programs targeted to underrepresented racial minorities came to that conclusion on the basis of the "California experience."[95] Many other articles chronicled "what happened in California when Prop 209 passed"[96] and the "California precedent."[97] Indeed, a significant portion of the Citizens Research Council's report on the ballot proposal was devoted entirely to how Proposition 209 had been implemented in California, including pages of discussion of the half dozen most important court decisions in that state including, again, the California Supreme Court's decision in *Hi-Voltage* and an appeals court decision in *Connerly v. State Personnel Bd.*,[98] both of which I will discuss below. The essence of the public debate surrounding the MCRI is perhaps best summarized by a group of community leaders opposed to the proposal, who wrote to their local newspaper to say: "We've seen the impact in California and know this could be the reality for Michigan . . . if Proposal 2 passes."[99]

Thus, it would seem that one of the few certainties about the MCRI—one of the few things that everyone seemed to agree upon—is that the MCRI would mean in Michigan what Proposition 209 had meant in California. For this reason, in order to determine whether the MCRI bans the use of proxies for race just as surely as it bans the use of explicit racial classifications, it makes sense to look to how courts in California have interpreted Proposition 209. Indeed, this is compelled not only by what the public understood the MCRI would do, but also, as I noted above, by the canons of construction adopted by the Michigan Supreme Court, which often looks to the interpretation of similar language in the constitutions of its sister states to interpret the Michigan Constitution.[100]

Before embarking on a journey to California, however, it is worth noting that California is not the only other state that has adopted a ban on racial preferences through a ballot proposal. Washington did so as well in 1998. It is interesting, however, that the Washington experience did not figure prominently in the public debate surrounding the MCRI. Not many newspaper articles mention the Washington initiative, and, when they do, it is almost always as an afterthought. For example, in the same Detroit Free Press article discussed above, where it was noted that the MCRI was "identical" to Proposition 209 and where a detailed discussion

95. *E.g.*, Paula David, *Impact of a Successful Prop 2 Hard to Gauge*, KALAMAZOO GAZETTE, Nov. 4, 2006, at A3.

96. *E.g.*, Walsh-Sarnecki, *supra* note 92.

97. *E.g.*, Gershman, *supra* note 77.

98. Connerly v. State Personnel Bd., 112 Cal. Rptr.2d 5 (Ct. App. 2001).

99. Letter to the Editor, KALAMAZOO GAZETTE (Nov. 1, 2006).

100. *See, e.g.*, *In re* Proposal C, 185 N.W.2d 9, 25 (Mich. 1971).

of California case law was expounded, all the article had to say about Washington was "[V]ote.s in the state of Washington approved a statutory version of the preferences ban in 1998."[101] The Citizens Research Council's report did discuss the Washington ban in some detail, but, again, it paled in comparison to the focus on California. What explains the discrepancy? I think there are two explanations. First, there are some differences in the nature and wording of the Washington proposal, on the one hand, and the Michigan and California proposals, on the other. Unlike the Michigan and California proposals, the Washington proposal did not amend the state Constitution, but, rather, was enacted into law with the force of an ordinary statute.[102] Moreover, the Washington proposal is worded differently than the California and Michigan proposals. As I will explain shortly, these differences led the Washington Supreme Court to read its proposal differently than California courts have read their proposal. Second, unlike California, there is virtually no case law on the Washington proposal; indeed, I believe there is only one published opinion from the courts in that state interpreting the proposal. Thus, not only was the nature and wording of the California proposal more probative, but there was simply more guidance available in California than there was in Washington.

B. *How The Courts In California Have Interpreted Proposition 209*

It is not surprising that the public debate surrounding the MCRI assumed that the MCRI would be interpreted by the courts in Michigan in the same way Proposition 209 had been interpreted by the courts in California. Proposition 209 is, for all intents and purposes, identical to the MCRI. Proposition 209, which, like the MCRI, was added to the state constitution, provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race.... in the operation of public employment, public education, or public contracting."[103] It goes on to define "State" as, among other things, any "public university system, including the University of California ...."[104] This language is identical to the MCRI, with only the difference that the MCRI combines into one sentence what the California language says in two: "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university ... shall not discriminate against or grant preferential treatment to, any individual or

101. Bell, *supra* note 93.

102. *Compare* CAL. CONST. art. I, § 31, *with* WASH. REV. CODE § 49.60.400 (West 2002).

103. CAL. CONST. art. I, § 31(a).

104. *Id.* at § 31(f).

group on the basis of race .... in the operation of public employment, public education, or public contracting."[105]

There are now a number of opinions interpreting Proposition 209, and, as I noted above, many of these opinions figured prominently in the debate over the MCRI. But there are two opinions in particular that both figured prominently in the debate and have something to say on the question considered here: whether Proposition 209 prohibits government officials from using not only explicit racial classifications, but also proxies for race designed to engineer desired racial effects. In my view, both of these cases can be read to say that government officials may not use proxies for race, and, indeed, one of these cases appears to hold that directly.

The first of these cases, the California Supreme Court's opinion in *Hi-Voltage Wire Works v. City of San Jose*,[106] did not involve race-neutral state action. Rather, it involved an explicit racial classification; the case considered a requirement that state contractors hire a certain number of subcontracting companies owned by underrepresented racial minorities or, if they did not, to jump through a number of bureaucratic hoops.[107] The court struck down the requirement, and, in the process, the court discussed more generally whether it was permissible for government officials to pursue "race-and sex-conscious numerical goals."[108] The Court said no: "A participation goal differs from a quota or set-aside only in degree ... such a goal plainly runs counter to the express intent ... of Proposition 209."[109] Although the passage is a bit cryptic, it is not difficult to read it to cast legal doubt on any government action in California that is taken pursuant to "race-conscious goals," including, perhaps, using proxies for race in order to achieve racial diversity.

The second case fleshes out this dicta and appears to converts it into a holding. In this case, *Connerly v. State Personnel Bd.*,[110] the California Court of Appeals considered a variety of affirmative action programs, some of which used explicit race preferences, and some of which appeared to use only race-neutral means but with the purpose of engineering racial diversity. In an important passage, the court interpreted Proposition 209 to *prohibit* the same government action that is *subjected to strict scrutiny* under the Equal Protection Clause; that is, the court construed Proposition 209 to be coextensive with the Equal Protection

105. MICH. CONST. art. I, § 26.

106. *See* High-Voltage Wire Works v. City of San Jose, 12 P.3d 1068 (Cal. 2000).

107. *See id.* at 1071–72.

108. *Id.* at 1084.

109. *Id.*; *see also* Cheresnik v. City and County of San Francisco, 2003 WL 1919111, *10 (Cal. App. 1 Dist. 2003) (noting that merely "the express policy of creating a workforce reflecting the racial and ethnic diversity of the larger labor market" could violate Proposition 209).

110. *See* Connerly v. State Personnel Bd., 112 Cal. Rptr.2d 5, 15–16 (Ct. App. 2001).

Clause *but without any of Equal Protection's compelling interest defenses.* The court said:

> It can be seen that Proposition 209 overlaps, but is not synonymous with, the principles of equal protection .... Under equal protection principles, all state actions that rely on suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.[111]

In other words: "Proposition 209 contains no compelling interest exception."[112]

This passage is important because, as we have seen, the Equal Protection Clause subjects to strict scrutiny even facially race-neutral government programs if those programs were adopted with a purpose to engineer racial effects. Thus, if Proposition 209 prohibits whatever the Equal Protection Clause subjects to strict scrutiny, then it would prohibit programs that attempt to use proxies for race in order to achieve a desired racial outcome. Although, as I explained above, I no longer think the Equal Protection Clause prohibits the use of racial proxies in university admissions because *Grutter* held that there is a compelling interest exception for the educational benefits of diversity, as Proposition 209 does not recognize any compelling interest defenses, this exception becomes irrelevant under Proposition 209.

The passage I quoted above refers to the Equal Protection principles applicable to "suspect classifications"; one might wonder whether the court intended to incorporate by that passage Equal Protection principles applicable to the use of racial proxies. Any doubt on that point is dispelled elsewhere in the opinion. The Court added that, although "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of the prohibition of the equal protection clause,"[113] "facially neutral but race-conscious legislation is not immune from strict scrutiny."[114] Rather, it is only that a "more detailed showing ... is required before strict scrutiny is applied" to race-neutral state action;[115] in particular, an

111. *Id.* at 27.

112. *Id.* at 28; *accord* C & C Constr., Inc. v. Sacramento Mun. Util. Dist., 18 Cal. Rptr.3d 715, 719 (Ct. App. 2004).

113. *Connerly*, 112 Cal. Rptr.2d at 28.

114. *Id.* at 30 n.7.

115. *Id.*

"inquiry into legislative purpose is necessary when the racial classification [does not] appear[] on the face of the statute."[116]

Indeed, not only did the court *say* that facially-neutral government programs can run afoul of Proposition 209, the court appeared to *strike down* just such a program in its opinion. One of the programs the court had before it was an effort by state community colleges to diversity their faculties and staffs.[117] The program established a "goal" of hiring at least 30% of new staff from underrepresented racial groups.[118] The program appeared to employ largely race-neutral means to reach this goal: using outside recruiting agencies until the goals were met, reopening the job application periods, and relaxing local qualification standards.[119] Nonetheless, the court struck down the entire program because it was adopted with the "goal of assuring participation by some specified percentage of a particular group . . . ."[120]

After *Connerly*, there is a good argument that Proposition 209 prohibits government officials from using proxies for race in order to engineer racial diversity. Indeed, scholars from across the political spectrum seem to agree that Proposition 209 prohibits such programs. For example, Professor Eugene Volokh has argued that that Proposition 209 should be read to prohibit the same facially-neutral government programs that the Equal Protection Clause would subject to strict scrutiny.[121] He thinks it would "clearly" violate Proposition 209 for a university to "send additional recruiters to particular schools . . . precisely . . . because those schools have more students of a particular [racial] group," or for an employer to put "ads in magazines with overwhelming male readership

116. *Id.* at 28.

117. *See id.* at 39–42.

118. *Id.* at 40.

119. *See id.* at 41.

120. *Id.* at 40. This interpretation of *Connerly* was not followed in a very recent opinion from a trial court in California holding that a school district could evade Proposition 209 by assigning students to schools on the basis of the racial demographics of the neighborhoods in which students lived rather than on the basis of the race of the students themselves. *See* American Civil Rights Foundation v. Berkeley Unified School District (Cal. Sup. Ct., Apr. 06, 2007) (No. RG06292139). The trial court emphasized that, in the context of secondary education, Proposition 209 had to be harmonized with another provision of the California Constitution, Art. II, § 7, which says that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan . . . ." Thus, the trial court's interpretation of Proposition 209 might be limited to the context of secondary education, and, even then, it is unclear whether it will be upheld on appeal. Even more to the point, however, this decision came well after Michigan voters ratified the MCRI, and, accordingly, could not have figured in the debate over the meaning of the ballot proposal. Nonetheless, this decision does suggest that it is still not entirely clear what the meaning of Proposition 209 will be in the context of using proxies to accomplish racial ends.

121. *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1353, n.50 (1997).

because the employer wants to get male applicants."[122] Professor Erwin Chemerinsky has come to the same conclusion. He has acknowledged that, under Proposition 209, universities may "use factors that correlate with race and gender during the admissions process" only if their "purpose is not to discriminate."[123] That is, he acknowledges that using a "facially neutral [admissions factor] can be found to discriminate" if "the university chose the factor because of a desire to benefit people of that race or gender."[124]

Thus, it would seem, that, if the MCRI is to do for Michigan what Proposition 209 has done for California, then the MCRI may prohibit the universities in Michigan from turning to proxies for race in order to maintain the same racial outcomes they achieved with explicit racial preferences.

Before we leave California, it is worth considering how the Citizens Research Council of Michigan might have come to the opposite conclusion about what Proposition 209 has meant for the use of race proxies. As I said, the Council, based on its view of Proposition 209, concluded that the MCRI "would not have any effect on programs that incorporate race-and sex-neutral means to increase diversity in a student body or public workforce; e.g., through using socioeconomic or geographic indicators to issue preferences."[125] I think the Council's contrary conclusion can be explained in two reasons. First, the Council did not perform a very close reading of California case law; it did not grapple with any of the language I quoted from *Connerly*, or notice that some of the programs struck down in *Connerly* appeared to be facially neutral; nor did it realize that scholars from across the political spectrum agree that Proposition 209 prohibits some facially neutral programs. Second, more than a reading of California case law, the Council appeared to base its conclusion on its observation that some universities in California have turned to proxies for race in the wake of Proposition 209.[126] I think there is some truth to this

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122. *Id.* at 1353.

123. Erwin Chemerinsky, *Guidelines for Affirmative Action Programs After Proposition 209*, LOS ANGELES LAW., Feb. 2002, 16.

124. *Id.*

125. Citizens Research Council of Michigan, *supra* note 87, at 3.

126. *See id.* at 13 ("The [California] legislature has taken some actions to increase diversity in public contracting legislation through race-neutral means since the passage of Proposition 209."), *see also* 14 ("Outreach programs for government employment and contracting (as well as public university admissions) that are focuses on minorities or women, but do not exclude non-minorities and men, would likely remain constitutional (e.g., job fairs in areas with a high minority population, but that anyone can attend, or programs aimed at increasing girls' interest in science or math, but that are still open to participation by boys)."), *see also* 16 ("Declines in under-represented students at UC have been partially alleviated by 'programs designed to increase enrollments of students from low-income families, those with little family experience in higher education, and those

observation,[127] and I think it should not be entirely ignored in deciding what the MCRI might and might not allow. I do not, however, think what California universities are doing in this regard is a very compelling piece of evidence on the meaning of Proposition 209 because no one has challenged the racial proxies the universities have begun using. One might say that is because no one in California thinks those programs are illegal, but that is hard to believe in light of *Connerly* and the views of Professors Volokh and Chemerinsky. Rather, it might be because no one has thought to challenge these programs, or perhaps those who might challenge them have been going after more egregious violations of Proposition 209 first.[128]

C. *How The Courts In Washington Have Interpreted Initiative 200*

The citizens of Washington have also enacted a ban on racial preferences through a ballot proposal, dubbed Initiative 200. As I have said, I do not think the Washington experience is very probative to the meaning of the MCRI. Not only did the Washington experience figure much less prominently in the debate surrounding the MCRI, but the nature and wording of Initiative 200 are different from both the California and Michigan proposals.

Nonetheless, it is worth noting that it seems fairly clear that Washington will not follow California in prohibiting government officials from using race-neutral means to engineer racial outcomes. Although there is only one published opinion in Washington interpreting Initiative 200, the opinion comes from the Supreme Court and the language of the opinion is hard to read in any other way but to say that *any* race-neutral program—no matter what its purpose and effect—is safe under Initiative 200.

The one published opinion is an earlier stage of *Parents Involved in Community Schools v. Seattle School District, No. 1.*[129] In this case, the Washington Supreme Court considered whether the Seattle policy that prohibited students from transferring from one public school to another if the latter school already had too many matriculates of the student's race constituted "discrimination" or "preferential treatment" on the basis of

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who attend schools that traditionally do not send large numbers of students on to four-year institutions.").

127. For a comprehensive summary of the lengths to which California universities have gone to preserve the desired racial compositions of their student bodies, *see* Heather MacDonald, *Elites to Affirmative Action Voters: Drop Dead, The University of California has Spent a Decade Wiggling Around Proposition 209*, CITY JOURNAL (Winter 2007), at Http://www.cityjournal.org/printable.php?id=2127.

128. Indeed, supporters of Proposition 209 have only recently initiated these challenges. *See supra* note 120.

129. Parents Involved v. Seattle Sch. Dist. No. 1, 72 P.3d 151 (Wash. 2003).

race under Initiative 200.[130] Although the policy employed explicit racial classifications, the Court held that it was not racial discrimination because students of every race could be either benefited or burdened depending on the school to which they wanted to transfer.[131] As one of the justices explained, "[s]ometimes . . . an African American student will prevail in a particular tie breaker situation, and sometimes . . . a Caucasian or Asian, or other racially classified individual will prevail. No particular race is singled out for preferential treatment and no particular race is discriminated against."[132]

Although this case did not involve facially-neutral proxies for race, the logic and language of the opinion leave little doubt that the Washington Supreme Court would permit the use of such proxies. For example, the court noted that a "racially neutral plan, which gives no race an advantage over another, [i]s not a preference . . . ."[133] This appears to be the case even if it is motivated by the purpose of burdening students of one race more than those of another: "racially neutral programs designed to foster and promote diversity . . . would be permitted by the initiative."[134] As the court explained, "[i]f the School District used a random selection process as a tie breaker (a flip of the coin, for example), we would not, in common parlance, describe the selection as a 'discrimination' or 'preference' " because such tie breakers "*may* limit minorities and nonminorities alike."[135]

The Washington Supreme Court refused to follow the jurisprudence from California interpreting Proposition 209, and the court gave two principal reasons for this refusal. First, the court noted that, unlike Proposition 209 (and the MCRI), Initiative 200 had only the force of a statute.[136] This means that it had to be construed to be consistent with the state's Constitution. The Washington Constitution establishes "the paramount duty of the state to make ample provision for the education of all children,"[137] and the court appeared to suggest that a statute barring public schools from trying to fully desegregate might conflict with this duty.[138] Second, and this seemed to be the most important distinction, the court noted that the language of Initiative 200 was different from the language

130. *See id.* at 154–55.

131. *See id.* at 164 ("Because the School District's open choice tie breaker applies equally to members of all races, it may limit minorities and nonminorities alike, and it cannot be said to be preferential based on race.").

132. *Id.* at 167 (Madsen, J., concurring).

133. *Id.* at 164.

134. *Id.* at 165.

135. *Id.* at 164 (emphasis added).

136. *See id.* at 166.

137. WASH. CONST., art IX, § 1.

138. *See Parents Involved*, 72 P.3d at 166.

of Proposition 209 (and the MCRI).[139] Although, like Proposition 209, Initiative 200 provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race . . . in the operation of public employment, public education, or public contracting,"[140] unlike Proposition 209 (and the MCRI), Initiative 200 goes on in a neighboring provision to say that "[t]his section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race . . . ."[141] Although one could argue that this neighboring provision simply restates what the first provision says, the Washington Supreme Court, noting that a common canon of interpretation is to avoid rendering any words of a statute superfluous, chose instead to read the provision to mean "that some government action within the subject area of the initiative would not be affected, . . . that some race conscious action by the government is permissible."[142]

It therefore seems fairly clear that government actors in Washington will be able to use proxies for race in order to engineer desired racial outcomes. It also seems clear, however, that Initiative 200 is somewhat inapposite to the MCRI, both because of its language and because it was largely disregarded during the debate in Michigan. Thus, although the Washington experience should not be ignored in interpreting the MCRI, it also should not trump the California experience, which has been quite different.

III. CONCLUSION

Our antidiscrimination laws would not have much teeth to them if they prohibited only explicit racial classifications. It is much too easy to do indirectly through proxies for race what cannot be done directly through explicit classifications. One needs to look no further than the Jim Crow laws of the South to see that. The question that will confront the courts in Michigan is whether the voters in that state intended the MCRI to be an antidiscrimination law with teeth, or an antidiscrimination that could be evaded through formalisms. It is always difficult to discern the intent of millions of people, but, it does seem that, if the voters of Michigan intended anything by the MCRI, they intended it to do for Michigan what Proposition 209 had done for California. An examination of Proposition 209 in California reveals that courts and commentators there have interpreted it to *prohibit* the same government action that the Equal Protection Clause *subjects to strict scrutiny*. Moreover, as we have seen, the

139. *See id.*

140. WASH. REV. CODE 49.60.400(1).

141. *Id.* at 49.60.400(3).

142. *Parents Involved*, 72 P.3d at 164.

Equal Protection Clause strictly scrutinizes not only explicit racial classifications, but also the use of racial proxies designed to evade its prohibition on explicit classifications. Thus, if the MCRI is interpreted in the same way in which Proposition 209 has been interpreted, then the MCRI may cast doubt on the efforts by universities in Michigan to try to maintain racial diversity through admissions preferences for applicants who exhibit characteristics correlated with desired racial and ethnic backgrounds.