The Impact of the Supreme Court's Decision in *Parents Involved* on California's Anti-Affirmative Action Law and California's Constitutional Mandate to Reduce De Facto Segregation

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I. INTRODUCTION

Ten years after California amended its constitution to prohibit affirmative action[1] and more than a year after the United States Supreme Court handed down its decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,[2] California school districts and advocates for school desegregation find themselves navigating along three different legal streams in trying to address the persistence of racial isolation in public schools. Applied or analyzed separately, these streams may leave the impression that public schools in California no longer operate under a state constitutional mandate to reduce racial segregation, or that it is unconstitutional for school districts to enact race conscious policies to further that objective. Looked at together, however, these seemingly separate doctrines allow us to reach the conclusion that the goal of reducing racial isolation is required, and race conscious measures of achieving this goal are permissible.

This Article begins by analyzing the cases that make up each of these streams, and the failure, for the most part, to integrate them. The first body of law deals with California's constitutional right to education and the obligation under the state constitution for public school districts to take steps to remedy school segregation, including de facto segregation. This body of law includes not only the duty to desegregate, but it also contains guidance on methods and remedies available to school districts in their efforts to carry out their desegregation obligations. Second, a 1996 amendment to the California Constitution to prohibit affirmative action policies by state entities (Proposition 209) has given rise to a series of cases interpreting the amendment's ban on racial preferences and the continuing availability of non-preferential race conscious policies. Third, lower courts have begun to construe the application of Proposition 209 to efforts by K–12 school districts to prevent racial segregation.

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[1] *See* CAL. CONST. art I, § 31(a).

[2] 127 S. Ct. 2738 (2007).

Finally, an important theoretical contribution made in the course of this analysis is the conclusion that Proposition 1, which amended the California Constitution to limit court ordered desegregation busing to Fourteenth Amendment violations,[3] and the United States Supreme Court's interpretation of that amendment in *Crawford v. Board of Education of the City of Los Angeles*,[4] align the scope of California's equal protection clause with federal Fourteenth Amendment law. While the objective of Proposition 1 at the time of its adoption was to limit state court ordered school desegregation to instances of intentional discrimination in order to outlaw busing, its unintended impact years later may be to require California courts to rely on federal equal protection law when interpreting the application of Proposition 209 in the public school context. Federal equal protection law, most recently analyzed in *Parents Involved*,[5] establishes a definitional and doctrinal distinction between unlawful individual racial classifications and preferences, and permissible race conscious policies or practices whose aim is to reduce racial isolation in schools. The practical, significant importance of reading *Parents Involved* together with *Crawford v. Board of Education of the City of Los Angeles* ("*Crawford I*")[6] and *Crawford v. Board of Education of the City of Los Angeles* ("*Crawford II*")[7] is that California's Constitution continues to require integrated public schools, and state and federal equal protection law permits states to use race conscious measures that do not implicate racial preferences.[8]

Several lower courts in California have made this distinction between prohibited racial preferences and permissible race conscious measures in upholding voluntary race conscious school integration or diversity policies in the face of Proposition 209 challenges.[9] In reaching that conclusion they have not relied on California's Constitution Article I Section 7(a) (Proposition 1) mandate that school desegregation efforts be evaluated under Fourteenth Amendment standards; however, in *Parents Involved*, the

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[3] *See* CAL. CONST. art. I, § 7(a).

[4] 458 U.S. 527 (1982).

[5] 127 S. Ct. 2738 (2007).

[6] 551 P.2d 28 (Cal. 1976).

[7] 458 U.S. 527 (1982).

[8] *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), is not to the contrary. At issue was the application of Proposition 209 to a local contracting ordinance, not public education, and the practices explicitly involved racial and gender preferences. *Id.* at 1081–82.

[9] *See e.g.*, Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 30 (Cal. Ct. App. 2001).

plurality's Fourteenth Amendment analysis draws a distinction between unlawful racial classifications and permissible race conscious measures.[10]

II. FIRST STREAM: *CRAWFORD I* AND *II*—THE DUTY TO DESEGREGATE AND THE APPLICATION OF FOURTEENTH AMENDMENT LAW TO THAT DUTY

In *Crawford v. Board of Education of Los Angeles*,[11] the California Supreme Court held that California's constitution mandates that school boards take reasonable and feasible affirmative steps that result in progress to alleviate segregation, even if the segregation is de facto in origin and results from a facially neutral policy.[12] When the case was filed in 1968, the Los Angeles Unified School District was 50% white and 50% "minority."[13] Despite this balance in the district's student population, a substantial number of schools were either 90% or more white students or 90% or more minority students.[14] The school district conceded that its schools were segregated; at issue in the case was whether the duty to desegregate extended to de facto segregation.[15] In an earlier case, *Jackson v. Pasadena City School District*,[16] the court had held unanimously that de jure segregated education was a violation of California's constitutional right to equal protection and due process.[17] In extending its holding to de facto segregation the court reasoned that the protracted litigation created by attempting to distinguish between de facto and de jure systems would delay desegregation efforts throughout California.[18] More importantly, the court stated that the legal distinction between de facto and de jure had little significance for the students who suffered the consequences of segregation.[19]

In spite of the strong mandate issued by the court in the *Crawford I* case and the Los Angeles Unified School District consent decree, over the years California's affirmative constitutional obligation to desegregate has experienced numerous setbacks. The biggest among them—at least until Proposition 209 eliminated race conscious affirmative action—was the 1979

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[10] *Parents Involved*, 127 S. Ct. at 2751–52.

[11] 551 P.2d 28 (Cal. 1976).

[12] *Id.* at 35–36.

[13] *Id.* at 32.

[14] *Id.*

[15] *Id.* at 33.

[16] 382 P.2d 878 (Cal. 1963).

[17] *Id.* at 880–81.

[18] 551 P.2d at 41.

[19] *Id.*

amendment to the California Constitution (Proposition 1). As part of the national backlash against busing and facilitated by California's initiative process, the amendment outlawed busing and pupil reassignment with the following language:

> [N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.[20]

The proposition was introduced by State Senator Alan Robbin (Democrat-Van Nuys), and was approved by only 17% of the California electorate even though it passed with a 69% to 31% margin.[21] The Supreme Court upheld Proposition 1 on the grounds that it was not enacted with discriminatory intent in violation of the Fourteenth Amendment.[22] Instead, the Court held, it established a separate civil rights remedy for de facto school segregation.[23] While the Supreme Court's decision in *Crawford II* limited the remedies available to California courts to implement desegregation, the Court also pointed out that California's Constitution continued to place upon school boards a greater duty to desegregate than the federal Fourteenth Amendment.[24]

In spite of the protracted legal battle surrounding it, Proposition 1 ended up being largely symbolic because by the time the Supreme Court upheld the constitutionality of California Proposition 1 and its ban on bussing in 1982, the District was only 23.7% white.[25] In Los Angeles, like many other cities around the country, white flight had become permanent and the window of opportunity for successful integration presented by California's Constitution and the strong legal precedent for desegregation was lost. Despite the claims

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[20] CAL. CONST. art. I, § 7(a).

[21] *See* Public Policy Institute of California, *Special Elections in California*, http://www.ppic.org/content/pubs/jtf/JTF_SpecialElectionsJTF.pdf (last visited Oct. 30, 2008).

[22] Crawford v. Bd. of Educ. of L.A., 458 U.S. 527, 545 (1982).

[23] *Id.* at 542.

[24] *Id.* at 535.

[25] *Id.* at 530 n.1.

made by the initiative's proponents during the campaign of their commitment to public education, white students never came back to the public schools.[26]

The *Crawford* cases and their progeny illustrate the impact of Fourteenth Amendment doctrine even when California courts are interpreting California's Constitution. The Fourteenth Amendment and its federal interpretation, for better or worse, influences outcomes in California equal protection disputes, particularly as applied to public education. More concretely, for the desegregation issue at hand, *Parents Involved* and its Fourteenth Amendment interpretation will and should impact interpretations of Proposition 209's ban on racial preferences.

III. SECOND STREAM: PROPOSITION 209 AND THE DISTINCTION BETWEEN RACIAL PREFERENCES AND RACE CONSCIOUS MEASURES

In November 1996, the California electorate adopted Proposition 209, which amended the California Constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[27] In the decade since the initiative went into effect, California municipalities and state and local agencies have expressed widespread confusion about the meaning and scope of Proposition 209. Legal proponents of Proposition 209 argue that Proposition 209 requires absolute color blindness, that is to say, the mere goal or mention of diversity and integration by a state entity is a per se violation of Article I Section 31(a).[28] This interpretation of Proposition 209 ignores a basic legal tenet of standing. In this ideological legal world, rather than require harm in order to establish a violation of Proposition 209, the mere mention of race, gender, or ethnicity triggers a constitutional violation.[29]

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[26] After the Supreme Court upheld Proposition 1, Robbins and other anti-busing advocates promised to use voluntary measures to promote desegregation. Daniel Martinez-HoSang, *The Triumph of Racial Liberalism, the Demise of Racial Justice*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 288, 305 (Joseph E. Lowndes et al. eds., 2008). Most of these programs were one way programs which sent kids of color to attend schools in West Los Angeles or in the San Fernando Valley. *Id.*

[27] CAL. CONST. art. I, § 31(a).

[28] "[T]he City must attempt race-neutral means before resorting to a race-conscious program." Plaintiff's and Respondent's Opening Brief at 7, Coral Constr., Inc. v. San Francisco, No. S152934 (Cal. 2007), *available at* 2007 WL 3390990. This is the very argument that Justice Kennedy rejected in his opinion in *Parents Involved*. *Parents Involved*, 127 S. Ct. at 2792–93 (Kennedy, J., concurring).

[29] For example, in *American Civil Rights Foundation v. Berkeley Unified School District*, No. RG0692139, slip op (Cal. Super. Ct. Apr. 6, 2007), the attorney for the

Despite the calls for color blindness, the law in California, even before *Parents Involved*, was evolving towards a distinction between race conscious policies that grant preferential treatment on the basis of race or ethnicity and those that consider race either in their mission to broaden diversity or alleviate racial isolation.

The California Supreme Court has only visited Proposition 209 once since the law went into effect in 1996. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*,[30] the California Supreme Court invalidated a public contracting program that required city officials to reject "out of hand" all bids from contractors who failed to either (a) utilize a specific percentage of minority and women subcontractors or (b) undertake and document prescribed efforts to include such subcontractors.[31] San Jose's program required outreach by general contractors only to women-owned (WBE's) and minority-owned businesses (MBE's) to inform them of sub-contracting opportunities.[32] Contractors that did not conduct this outreach were prevented from submitting bids to the city.[33] Given these facts, the California Supreme Court defined Proposition 209's "preferential treatment" as "a giving of priority or advantage to one person over others."[34]

Likewise, other government policies struck down by lower courts as impermissible under Proposition 209 have similarly had an element of preferential treatment based on race or ethnicity. Proponents of a broad definition of Proposition 209 that requires race blindness point to *Crawford v. Huntington Beach Union High School District*[35] as a case in which the court struck down a race *conscious* program that did *not* grant a preference.[36] While they may be correct about the court's equivocation on the issue of whether a cause of action under Proposition 209 requires an element of preference, the facts of the case are not ambiguous and the district's desegregation policy implicated racial preferences or disparate treatment.[37] The school district's policy at issue established racial percentages for one of

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plaintiff argued that including race and ethnicity as one of three measures in an elementary student assignment was sufficient to violate Proposition 209. *See* Pacific Legal Foundation, *Featured Case: Battling Racial Discrimination by Public Entities*, http://community.pacificlegal.org/NETCOMMUNITY/page.aspx?pid=504&srcid=272 (last visited Oct. 30, 2008).

[30] 12 P.3d 1068 (Cal. 2000).

[31] *Id.* at 1085.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1082 (alteration omitted).

[35] 121 Cal. Rptr. 2d 96 (Cal. Ct. App. 2002).

[36] *Id.* at 97–98.

[37] *Id.* at 102–03.

its high schools, Westminster High, in order to prevent the overrepresentation or underrepresentation of any one racial group in that school.[38] In order to achieve this goal, students could only transfer in or out of a school if their transfer did not affect the racial percentage set by the district.[39] In practice this meant depending on the impact on diversity, students of a certain race might be able to transfer in or out of Westminster High, while students belonging to another racial group might not qualify for a transfer.[40]

The school district argued that the plan did not violate Proposition 209 because all students, regardless of what school they attended, participated in the same educational programs.[41] The court rejected this substantive argument and instead focused on what it viewed as impermissible racial "balancing" that necessitated a process that classified students by race or ethnicity.[42] As if embarrassed by its rejection of the district's compelling argument that the transfer policy achieved desegregation without causing harm to its students, the court stressed towards the end of its decision that it was not rejecting all integration plans or ignoring the evils of segregated schools.[43] It underscored this point by citing favorably decisions that uphold the use of lotteries or magnet schools to reduce racial isolation—mechanisms that do not make distinctions between individual students based on race or ethnicity.[44]

In keeping with an interpretation of Proposition 209 that focuses on the harm to individuals, another Court of Appeal held that California can have a law that "involves race consciousness" if "it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups."[45] In *Sanchez*, the defendant challenged a California Election Code law that created a cause of action that allowed challenges to electoral systems that resulted in vote dilution through

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[38] *Id.* at 97–98.

[39] *Id.* at 102.

[40] *Id.*

[41] Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 102 (Cal. Ct. App. 2002).

[42] *Id.* at 98.

[43] *Id.* at 104.

[44] *Id.*

[45] Sanchez v. City of Modesto, 51 Cal. Rptr. 3d 821, 826, 838 (Cal. Ct. App. 2006) (rejecting an equal protection challenge to the California Voting Rights Act of 2001, which "gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though [sic] the combination of racially polarized voting and an at-large election system").

the combination of racial polarization and at-large elections.[46] They argued that the statute's attention to racial polarization was a racial preference prohibited by Proposition 209.[47] The court rejected the challenge, holding the law did not create a racial preference because *any* racial group could sue for vote dilution under the 2001 law, and the statute's attention to race, i.e. the fact that the law was explicit in its goal of preventing racial polarization and vote dilution, did not automatically establish a "preference" as defined in *Hi-Voltage*.[48]

Soon after the passage of Proposition 209, Ward Connerly, the public face of Proposition 209 and of the opposition to affirmative action, sued the state of California to halt a large set of state programs.[49] The programs included state guidelines for soliciting diverse contractors, community college hiring polices, goals and timetables established by various government agencies, and data collections policies used to track diversity in hiring and contracting.[50] The California Court of Appeal for the Third District struck down programs that it considered to create quotas and preferences, quoting extensively from the California Supreme Court's decision in *Hi-Voltage*.[51] It left in place, however, the following programs that it held did not discriminate or grant preferential treatment within the meaning of Proposition 209:

- making formal commitments to diversity;[52]
- collecting and reporting data concerning the participation of women and minorities;[53] and
- using such information to restructure selection processes to ensure that no groups are unfairly excluded.[54]

The same court elaborated that public entities may—and in some cases must—use race- and gender-conscious data to flag and eliminate exclusionary practices.[55] In the employment context, for example, the

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[46] *Id.* at 825–26.

[47] *Id.* at 826.

[48] *Id.* at 841–42.

[49] *See* Connerly v. State Pers. Bd., 112 Cal Rptr. 2d 5, 16 (Cal. Ct. App. 2001).

[50] *Id.*

[51] *Id.* at 16, 26–27.

[52] *Id.* at 38.

[53] *Id.*

[54] *Id.* at 39.

[55] Connerly v. State Pers. Bd., 112 Cal Rptr. 2d 5, 38 (Cal. Ct. App. 2001).

Connerly court made clear that such information can highlight the need to restructure the selection process.[56] The court noted:

> Such a determination may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices. It may indicate the need to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group. And it may indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department.[57]

As another panel of the California Court of Appeal has stated, Proposition 209 permits, and indeed encourages, public employers to implement policies for "removing barriers to employment that may operate to discriminate on the basis of race or ethnicity."[58] The distinction for the *Connerly* court was in the fact that "the guarantee of equal protection is an individual right."[59] It was harder to argue that information gathering treads on an individual's right to be free of discrimination.

IV. THIRD STREAM: INCLUSIVE EFFORTS TO ENSURE AN INTEGRATED LEARNING ENVIRONMENT

While the California Supreme Court has yet to apply Proposition 209 in the education context, lower courts that have visited the issue have drawn upon many of the same principles outlined above to delineate the permissible limits of race conscious student integration plans. In crucial respects, their decisions anticipate Justice Kennedy's reasoning in *Parents Involved* that drew a distinction between racial classifications of individuals which violate the Fourteenth Amendment, and permissible race conscious policies designed to reduce racial isolation that do not rely on preferences or classifications.

California's lower courts have interpreted Proposition 209 to allow racial and ethnic diversity as a permissible educational goal and they have allowed school districts to adopt diversity plans that set out to integrate their schools as long as race of an individual student is not a determinative factor in deciding acceptance into a particular school.

I discussed the first of the Proposition 209 voluntary integration cases,

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[56] *Id.*

[57] *Id.*

[58] Cheresnik v. San Francisco, No. A098415, 2003 WL 1919111, at *11 (Cal. Ct. App. Apr. 23, 2003).

[59] *Connerly*, 112 Cal. Rptr. 2d at 29–30.

Crawford v. Huntington Beach Union High School District,[60] above. There the Court of Appeal invalidated a transfer policy that dictated a "one-for-one same race exchange" because it was not "simply a race-conscious program that seeks to provide students with equal educational opportunities," but a "policy [that] creates different transfer criteria for students *solely* on the basis of their race."[61]

While opponents of affirmative action that aim for a broad application of Proposition 209 argue that *Huntington Beach* stands for the proposition that *any* race conscious policies meant to desegregate violate Proposition 209, other subsequent decisions have underscored the narrowness of the court's holding. School districts have prevailed in a trio of recent cases involving voluntary desegregation plans that consider race and ethnicity as *one* of several diversity factors. In *ACRF*,[62] for example, the court upheld school assignment plans that consider the racial makeup of the student's *neighborhood* as one of several equally-weighted factors, no one of which is determinative of any placement decision. In *Capistrano*,[63] the court upheld the consideration of neighborhood ethnic composition in setting school attendance boundaries. In *Avila v. Berkeley Unified School District*,[64] the court upheld a "controlled choice" school assignment plan that considered a student's race and ethnicity as one of several factors.[65]

Moreover, some of these cases emphasize that California's Equal Protection Clause imposes an obligation to alleviate school desegregation regardless of its cause, and that Proposition 209 must be read in harmony with this obligation rather than read to implicitly repeal the obligation.[66] Along these lines, the California Court of Appeal has indicated that Proposition 209 permits districts to use magnet schools to encourage the movement of students "in a pattern that aids desegregation on a voluntary

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[60] 121 Cal. Rptr. 2d 96 (Cal. Ct. App. 2002).

[61] *Id.* at 98, 102 (emphasis added).

[62] Am. Civil Rights Found. v. Berkeley Unified Sch. Dist., No. RG0692139, slip op. (Cal. Super. Ct. Apr. 6, 2007).

[63] Neighborhood Sch. for Our Kids v. Capistrano Unified Sch. Dist., No. 05CC07288, slip op. at 6 (Cal. Super. Ct. Aug. 25, 2006) (unpublished minute order).

[64] No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. April 6, 2004).

[65] *Id.* at 3 (holding that "[t]he Court cannot conclude that any consideration of race—one of several criteria—makes the Plan unconstitutional").

[66] *See ACRF*, No. RG0692139, at 9–13; *Avila*, 2004 WL 793295, at *1 ("[S]chool districts have a 'constitutional duty under state law to undertake reasonably feasible steps to alleviate school segregation regardless of cause. In carrying out its duty [a school district] may utilize any or all desegregation techniques . . . .'" (quoting Crawford v. Bd. of Educ. of L.A., 170 Cal. Rptr. 495, 507 (Cal. Ct. App. 1981), *aff'd*, 458 U.S. 527 (1982))).

basis."[67] In keeping with the balance between the duty to desegregate and the prohibition against racial preferences, another lower court held that Proposition 209 does not forbid the provision of supplemental funding to schools with substantial minority populations, provided that the district has race-neutral reasons for such funding.[68] For example, following the lifting of a desegregation order, Proposition 209 does not prohibit districts from providing transitional supplemental funding to preserve educational programs at schools that were formerly identified as "racially isolated minority" schools.[69]

Finally, the Ninth Circuit has construed *Huntington Beach* very narrowly, declaring that the decision does not even squarely control a policy that forbids any transfer that would push the ratio of whites to nonwhites at the destination school beyond a prescribed balance.[70] In *Friery v. Los Angeles Unified School District*, the court noted that such a policy "erects both a minimum *and* a maximum applicable to *each* racial group, such that the policy's macroscopic effect—keeping whites and nonwhites in balance—touches both groups with equal force . . . ."[71] The policy in *Crawford*, by contrast, "operated only in one direction: it created a floor for whites and a ceiling for nonwhites, but not the converse."[72]

V. CONCLUSION

As these thoughtful court decisions show, neither the law nor public policy considerations mandate absolute colorblindness and the illogical results that follow from an overbroad reading of Proposition 209. Instead, it is clear that careful consideration of race in California's public institutions is not only still permitted, but sometimes necessary to secure equal opportunity and a vibrant economy.

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[67] Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 104 (Cal. Ct. App. 2002) (quoting Missouri v. Jenkins, 515 U.S. 70, 92 (1995)). *See also* Hernandez v. Bd. of Educ. of Stockton Unified Sch. Dist., 25 Cal. Rptr. 3d 1, 4 (Cal. Ct. App. 2004) ("Magnet programs provide a race neutral means to prevent racial or ethnic isolation by providing educational choices for district students.").

[68] *Hernandez*, 25 Cal. Rptr. 3d at 12–13.

[69] *Id.* at 13.

[70] Friery v. L.A. Unified Sch. Dist., 300 F.3d 1120, 1123–24 (9th Cir. 2002).

[71] *Id.* at 1123.

[72] *Id.* at 1124. Whether Proposition 209 permits the *Friery* transfer policy remains unresolved because the California Supreme Court denied the Ninth Circuit's request to certify the question, and the Ninth Circuit remanded the case for the purpose of making a determination of the plaintiff's standing. Friery v. L.A. Unified Sch. Dist., 448 F.3d 1146, 1150 (9th Cir. 2006).