

1-1-2000

# A Progressive Reply to Professor Oppenheimer on Proposition 209

Martin D. Carcieri

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

## Recommended Citation

Martin D. Carcieri, *A Progressive Reply to Professor Oppenheimer on Proposition 209*, 40 SANTA CLARA L. REV. 1105 (2000).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol40/iss4/7>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## ARTICLE

### A PROGRESSIVE REPLY TO PROFESSOR OPPENHEIMER ON PROPOSITION 209

Martin D. Carcieri\*

#### I. INTRODUCTION

In the Spring 1999 issue of the *Santa Clara Law Review*, law professor and ACLU board member David Oppenheimer published a response<sup>1</sup> to an article I published in the same journal a few months earlier.<sup>2</sup> My previous article elaborated three justifications for the United States Supreme Court's refusal to review the Ninth Circuit Court of Appeals' ruling in *Coalition for Economic Equity v. Wilson*.<sup>3</sup> There, the Ninth Circuit upheld California's Proposition 209<sup>4</sup> against an equal

---

\* Assistant Professor of Political Science, University of North Florida; Adjunct Professor, Florida Coastal School of Law. J.D., Ph.D., University of California. The author wishes to thank University of North Florida's General Counsel Karen Stone, Esq. and Professors Tom Schrock and Edward Erler for their useful comments on earlier drafts of this article. The views expressed herein are the author's own.

1. See David Benjamin Oppenheimer, *Carcieri's Self-Described "Progressive" Critique of the ACLU on Proposition 209: A "Conservative" Response*, 39 SANTA CLARA L. REV. 1153 (1999).

2. See Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141 (1998) [hereinafter Carcieri, *A Progressive Reply*].

3. *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), cert. denied, 533 U.S. 963 (1997).

4. Proposition 209 is now Article I, section 31 of the California Constitution. Subdivision (a), the central focus of controversy, provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art I, § 31(a). The voters of the State of Washington followed California's lead in passing an identical initiative, and similar efforts have been

protection attack by the ACLU and other groups.<sup>5</sup> The editors of the *Santa Clara Law Review* have courteously allowed me to respond.

This article poses two basic responses to Professor Oppenheimer's article. First, he fails to respond to the bulk of my arguments. Part II of this article identifies a number of evasions and fallacies in which Professor Oppenheimer engages. Second, even when he attempts to respond to my arguments, he often distorts them as well as the effectiveness of his own arguments. Part III of this article identifies and responds to a number of particular points he raises.

Professor Oppenheimer does make some valid points and recognizes that we are in partial agreement on a number of specific issues. In a debate as contentious as affirmative action, it is important to underscore such common ground. Not only can this common ground clarify the debate's central issues, but it also provides a starting point for constructive dialogue and the forging of policy consensus. Part IV of this article elaborates on the areas of agreement.

Professor Oppenheimer fails to mention that I was a member of, and contributed to, the ACLU for years.<sup>6</sup> As a liberal and progressive, I still support its positions on many issues. Yet, as Professor Oppenheimer also fails to mention, one of my prime targets in *A Progressive Reply* was an article by Southern California ACLU Executive Director Ramona Ripston in the ACLU's official publication.<sup>7</sup> Reading Ms. Ripston's article served, to use an old phrase, to "waken me from my dogmatic slumbers" on the constitutional legitimacy of public affirmative action. I encourage all those unfamiliar with the ACLU's public stance on Proposition 209 (including Professor Oppenheimer) to read Ripston's article. Further, readers should consult not only Professor Oppenheimer's arti-

---

launched elsewhere. See Mary MacDonald & Beth Kassab, *Activist Seeks 2000 Ballot*, FL. TIMES-UNION, Mar. 16, 1999, at A1; Peter Schmidt, *Legislatures Show Little Enthusiasm for Measure to End Race Preferences*, CHRON. OF HIGHER EDUC., Mar. 13, 1998, at A44; Sam Verhovek & B. Drummond Ayres, *Voters Back End to State Preferences*, N.Y. TIMES, Nov. 4, 1998, at B2b.

5. See *Coalition for Econ. Equity*, 122 F.3d at 692.

6. See Carcieri, *A Progressive Reply*, *supra* note 2, at 181 n.165. See, e.g., Martin D. Carcieri, *Free Speech: ACLU is Right*, FL. TIMES-UNION, Oct. 31, 1999, at C2.

7. See Rowena Ripston, *Why We Don't Live in a "Mob-ocracy"*, 71 ACLU OPEN FORUM 1 (1997).

cle, to which I reply here, but also my original article, *A Progressive Reply*, as well.<sup>8</sup>

## II. THE INDIVIDUALIST PRINCIPLE AND PROFESSOR OPPENHEIMER'S FALLACIES

### A. *The Role of the Individualist Principle in Equal Protection Jurisprudence*

Professor Oppenheimer claims that *A Progressive Reply* distorts the ACLU's position.<sup>9</sup> In challenging Proposition 209, the ACLU claimed that a ban on the use of race and gender preferences in the operation of public education, employment, and contracting violates equal protection.<sup>10</sup> To violate the Equal Protection Clause, however, women and minorities must be constitutionally *entitled* to preferences in the distribution of those public benefits. Otherwise, there is no basis for the claim that California voters violated the clause by ending the preferences. In defending the ACLU's position, Professor Oppenheimer assumes that the Equal Protection Clause provides for two tiers of citizens, distinguished solely by immutable traits of race and gender: those preferred and those not preferred in the allocation of public benefits. This assumption raises the question of how to square this claim with the text of the Constitution that provides that no state shall "deny to any *person* within its jurisdiction the equal protection of the laws."<sup>11</sup> The Equal Protection Clause was part of an attempt to destroy, not perpetuate, a system of differential treatment by the government based on race.<sup>12</sup> Interpreting this clause as allowing or, in the ACLU's opinion, *compelling* the government to treat individuals differently based on

---

8. See Oppenheimer, *supra* note 1; Carcieri; *A Progressive Reply*, *supra* note 2. While I disagree with Professor Oppenheimer's response, I must say at the outset that I consider his article a high, if indirect, compliment. As a busy, intelligent man, he would never have wasted the time to write a 30-page response to an article he truly thought was so weak as to have little chance of persuading anyone who does not already agree.

9. See Oppenheimer, *supra* note 1, at 1153.

10. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996).

11. U.S. CONST. amend. XIV (emphasis added).

12. See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 506-07 (3d ed. 1996).

race or gender renders that provision, by definition, a vehicle of inequality.<sup>13</sup>

By creating two tiers of citizens, Professor Oppenheimer ignores the individualist principle. The United States Supreme Court has long upheld the principle that the government may not constitutionally punish or otherwise deprive an individual of rights based on his or her racial group membership.<sup>14</sup> Perhaps the most powerful case standing for this principle is one of the Court's most infamous. In *Korematsu v. United States*,<sup>15</sup> a civilian exclusion order under which all Americans of Japanese ancestry in certain west coast military areas were removed to internment camps was challenged on constitutional grounds. The government argued that because of the war with Japan and its belief that at least some Japanese-Americans were engaged in espionage and sabotage, the exclusion order was a military necessity.<sup>16</sup> The Supreme Court upheld the order against constitutional attack.<sup>17</sup> In so doing, Justice Black implicitly held that a compelling state interest sometimes justifies overtly racist means, and that due process and equal protection may be sacrificed in favor of such an interest.

Though it took over forty years, the United States government finally made reparations to the survivors of the internment camps, and *Korematsu* is now generally classed with *Dred Scott v. Sandford*<sup>18</sup> and *Plessy v. Ferguson*<sup>19</sup> as one of the Court's great mistakes.<sup>20</sup> On that account, the views of the two dissenting Justices in *Korematsu* have particular authority. In his dissenting opinion, Justice Murphy wrote, "under our system of law, *individual guilt is the sole basis for deprivation of rights*."<sup>21</sup> In his separate dissent, Justice Jack-

---

13. Further, since we are in the realm of state rather than federal law, section 5 of the Fourteenth Amendment, giving Congress remedial power to enforce section 1 of that amendment, is irrelevant.

14. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (invalidating the judicial enforcement of restrictive covenants on property ownership based on race).

15. *Korematsu v. United States*, 323 U.S. 214 (1944).

16. See *id.* 216-17.

17. See *id.* at 217-18.

18. *Scott v. Sandford*, 60 U.S. 393 (1857).

19. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

20. See WILLIAM COHEN & DAVID DANIELSKI, *CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS* 968 (4th ed. 1997).

21. *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting) (emphasis added).

son added, "if any fundamental assumption underlies our system, it is that *guilt is personal and not inheritable*."<sup>22</sup> The American political culture has come to reject Justice Black's ruling and embrace the dissenting opinions.<sup>23</sup> Thus, the unequal treatment of individuals by the government based on physical characteristics is barely *permissible* under the Constitution, much less compelled.<sup>24</sup>

Another pivotal case underscoring the central role of the individualist principle in Fourteenth Amendment jurisprudence is *University of California Regents v. Bakke*.<sup>25</sup> That case involved an equal protection challenge to the University of California, Davis Medical School practice of setting aside up to sixteen seats in every entering class of 100 solely for members of certain racial or ethnic minorities. In his controlling opinion, Justice Lewis Powell struck down the quota system yet allowed the use of race or ethnicity as one of many factors in the admissions process on the ground that the promotion of diversity among public university student bodies is a compelling state interest.<sup>26</sup> What is often overlooked by those who embrace the diversity rationale applied in *Bakke* is that Justice Powell was consistent in his liberalism. In *Bakke*, he argued that individual human beings, not groups of human beings, are the fundamental locus of equal protection. Justice Powell wrote:

It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are . . . guaranteed to the individual. The rights established are personal rights . . . . Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.<sup>27</sup>

---

22. *Id.* at 243 (Jackson, J., dissenting) (emphasis added).

23. The fact that Congress appropriated reparations to the internment camp survivors is evidence of this. See Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4.

24. As Judge O'Scannlain wrote for the Ninth Circuit panel that upheld Proposition 209 against equal protection attack, "[t]he Fourteenth Amendment, lest we lose the forest for the trees, does not require what it barely permits." *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431, 1446 (9th Cir. 1997).

25. *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

26. See *id.*

27. *Id.* at 289, 319 n.53.

Beyond his well-known incisive analysis of the logical and political implications of departures from the individualist principle,<sup>28</sup> Powell emphasized that it is a universal principle, rooted in our common citizenship and humanity.<sup>29</sup> The individualist principle is the anchor of equal protection analysis, the starting point from which departures must be justified, and is reflected in the fact that racial classifications by the government are subject to strict scrutiny.<sup>30</sup> Powell expressed that "[w]hen a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest."<sup>31</sup>

While Justice Powell alone recognized the diversity principle in *Bakke*, the *unanimous Court* embraced the principle that the individual is the locus of Fourteenth Amendment protection.<sup>32</sup> While the "Stevens Four" posture on this point is not surprising,<sup>33</sup> Justices Brennan, Marshall, and Blackmun added:

Race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. While such a classification is not per se invalid . . . it is nevertheless true that such divisions are contrary to our deep belief that *legal burdens should bear some relationship to individual responsibility or wrongdoing* . . . . Because this principle is so deeply rooted it might be supposed that it would be considered in the leg-

---

28. See *id.* at 291-99.

29. See *id.* at 292-93; Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); see also PAUL SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 8 (1997). Thus, while some affirmative action proponents defend affirmative action on grounds of inclusion, see, e.g., DEREK BOK & WILLIAM BOWEN, THE SHAPE OF THE RIVER 285 (1998); CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE 124 (1996), it is the individualist principle, not race and gender preferences, that is truly inclusive.

30. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

31. *Bakke*, 438 U.S. at 320.

32. See *id.* at 413-14.

33. Though the individualist principle is at the heart of classical liberalism, it is also embraced by contemporary conservatives. See *id.* (Stevens, Burger, Stewart, and Rehnquist, JJ., dissenting in part). While the "Stevens Four" disposed of the case on statutory grounds, both Title VI and the Equal Protection Clause protect "persons," and even Professor Edley concedes that the standard for Title VI cases is the same as under the Equal Protection Clause. See EDLEY, *supra* note 29, at 69; see also *Bakke*, 438 U.S. at 287.

islative process and weighed against benefits of programs preferring individuals because of their race. But this is not necessarily so: The natural consequence of our governing process may well be that the most discrete and insular of whites will be called upon to bear the immediate, direct costs of benign discrimination . . . . *Thus, even if the concern for individualism is weighed by the political process, that weighing can not waive the personal rights of individuals under the Fourteenth Amendment.*<sup>34</sup>

Since its decision in *Bakke*, the Court has continued to enunciate the individualist principle.<sup>35</sup> For example, Justices O'Connor and Kennedy, on whose views affirmative action proponents stake their case,<sup>36</sup> began their dissent in *Metro Broadcasting v. FCC*<sup>37</sup> by stressing that the individual is the starting point of equal protection analysis.<sup>38</sup> Justice Thomas, who has since joined the Court, would almost certainly agree.<sup>39</sup> Again, the individualist principle does not always prevail in an equal protection challenge; rather, it is the anchor of the analysis from which departures must be justified.

Professor Oppenheimer's initial response to this discussion might be compared to Justice Blackmun's famous assertion that "[i]n order to get beyond racism, we must first take account of race."<sup>40</sup> However, there are at least two responses to this lofty claim. First, it implicitly confuses the importance

---

34. *Bakke*, 438 U.S. at 360–61 (Brennan, White, Marshall, and Blackmun, JJ., dissenting in part) (emphasis added). It can hardly be surprising that the *Bakke* Court unanimously underscored the individualist principle. To be sure, the members of that Court had lived through the Civil Rights Era, and so recalled the days of de jure racial segregation in the American South. Yet they had also lived through World War II and the early Cold War. Thus, they also remembered the Nazi concentration camps, the Soviet gulags, and the internment camps in the American West. They vividly recalled what can happen under collectivist regimes, such as socialism and fascism, when the individual human being is not the locus of civil rights.

35. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 265, 281 n.8 (1986); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

36. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996); Ronald Dworkin, *Is Affirmative Action Doomed?*, N.Y. REVIEW OF BOOKS, Nov. 5, 1998, at 56; Jeffrey Rosen, *The Day the Quotas Died*, NEW REPUBLIC, Apr. 22, 1996, at 21.

37. *Metro Broad. v. FCC*, 497 U.S. 547 (1990).

38. See *id.* at 602 (O'Connor, Rehnquist, Scalia, and Kennedy, JJ., dissenting).

39. See *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

40. *University of Cal. Regents v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part).

of the goal with the validity of the means used to achieve it. That a goal is important does not establish the validity of any means to achieve it. As Dr. Martin Luther King once wrote, "the means we use must be as pure as the ends we seek."<sup>41</sup> Not only is such an "ends justify the means" position illiberal and antidemocratic, it also begs the very question of what it means to take race into account. Affirmative action is embodied in a variety of ends, means, and contexts, and there are conflicting legitimate and compelling interests at stake in its constitutional resolution. Justice Blackmun's assertion is thus the beginning, not the end, of the conversation.

Second, and more basically, the California electorate simply disagreed with Justice Blackmun. It apparently believed that "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."<sup>42</sup> In a democracy, the people's judgment must by definition be entitled to a presumption of validity.

#### B. *Professor Oppenheimer's Fallacies*

Professor Oppenheimer's fallacies include the following: (1) mistaken assumptions regarding compelling state interests; (2) fallacy of division; (3) fallacy of distribution; (4) confusion of minority interests with minority rights; (5) equivocation of discrimination with the denial of preferences; and (6) mistaken relevance of laws forbidding discrimination against veterans, the aged, and the disabled.

##### 1. *Mistaken Assumptions Regarding Compelling State Interests*

Professor Oppenheimer appears to concede that the individual is the locus of equal protection. He writes that "individuals have constitutional rights when they are denied equal opportunity based on their group membership."<sup>43</sup> He contin-

---

41. Martin Luther King, *Letter from Birmingham Jail*, in *THE DEMOCRACY READER: CLASSIC AND MODERN SPEECHES, ESSAYS, POEMS, DECLARATIONS, AND DOCUMENTS ON FREEDOM AND HUMAN RIGHTS WORLDWIDE* 197 (Diane Ravitch & Abigail Thernstrom eds., 1992).

42. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979).

43. Oppenheimer, *supra* note 1, at 1154.

ues, "the Supreme Court recognizes that individuals are often mistreated because of their group identity."<sup>44</sup> However, these passages *only refer to those individuals who are members of the race and gender groups that Professor Oppenheimer claims are constitutionally entitled to preferences.*<sup>45</sup> Professor Oppenheimer never refers to the individual *as such* as the locus of equal protection. Doing so would effectively concede that there are *not* two tiers of protection based on race and gender under the equal protection clause. It would be an admission that even individuals like Alan Bakke<sup>46</sup> and Cheryl Hopwood<sup>47</sup> are sometimes mistreated "based on their group membership," and "because of their group identity." Such a concession seriously weakens Professor Oppenheimer's argument.<sup>48</sup>

It might still be objected that while "any person" may bring an equal protection challenge, the challenge is always to a group-based classification. Since the government legitimately and unavoidably classifies based on group characteristics all the time—such as prohibiting the blind from obtaining drivers licenses—the real question is simply whether that classification is constitutional. For example, assuming standing, "any person" may challenge a state law prohibiting the legally blind from obtaining drivers' licenses. The state, however, has a legitimate and in fact compelling interest in classifying individuals in this fashion, namely, protecting public safety against the danger posed by a legally blind driver. At the same time, the State may not deprive an individual of a license because he looks like someone who is blind.

---

44. *Id.* at 1161.

45. *See id.* Professors Lawrence and Matsuda make a similar move in their assertion that "when an individual's rights are denied because her group is subjugated, only remedies creating equality for the group can offer true equality for the individual." CHARLES LAWRENCE & MARY MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 81 (1997).

46. *See University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

47. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

48. In his ambiguity with key terminology, Professor Oppenheimer is at least consistent. In an op-ed article last year, he did the same thing, simply assuming that the American founders' concerns and the meaning of American democracy are exhausted by the "Madisonian dilemma" of majority rule versus majority rights. *See* David Oppenheimer, *King's "Letter from Birmingham Jail" and Affirmative Action*, S.F. EXAMINER, Apr. 10, 1998, at A21. In fact, Madison argued that the biggest threat to individual liberty is faction, whether majority or minority. *See* THE FEDERALIST NO. 10, at 82–84 (James Madison) (Clinton Rossiter ed., 1961).

The *individual person* must pose the threat against which the state may legitimately guard. If, and only if, the state demonstrates that the individual challenging the law is legally blind, thus posing the threat that the state may guard against, there is no equal protection violation. The individual locus of equal protection does not render such a classification unconstitutional.

In contrast to classifications based on ordinary police power concerns, however, race-based classifications are presumptively disfavored from the constitutional viewpoint, as reflected by the requirement to apply strict scrutiny to all such classifications.<sup>49</sup> Not only do "racial characteristics so seldom provide a relevant basis for disparate treatment [and not only are] classifications based on race . . . potentially so harmful to the entire body politic,"<sup>50</sup> but there is no such thing as "benign" discrimination.<sup>51</sup> Therefore, any such classification must be narrowly tailored to advance a compelling state interest.

Consequently, one of the greatest weaknesses in Professor Oppenheimer's position is that he fails to answer the following question: What is the compelling state interest for the race-based classification at the heart of the public affirmative action scheme banned by Proposition 209? Professor Oppenheimer assumes two compelling state interests for affirmative action under equal protection analysis: (1) remedying general societal discrimination, and (2) achieving proportional representation of his favored groups within certain categories of employment. Supporting these assumptions, Professor Oppenheimer cites Bureau of Labor statistics indicating that white males as a group have higher rates of employment than other groups.<sup>52</sup> However, he simply assumes, rather than shows, the constitutional *significance* of these statistics. Even assuming that the disparities suggested by the statistics are solely the result of general societal discrimination, the Supreme Court has ruled for over twenty years that

---

49. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

50. See *Fullilove v. Klutznick*, 448 U.S. 448, 533-34 (1980) (Stevens, J., dissenting).

51. See *Metro Broad. v. FCC*, 497 U.S. 547, 609, 615 (O'Connor, Rehnquist, Kennedy, and Scalia, JJ., dissenting); see also *Adarand*, 515 U.S. at 226; *Bakke*, 438 U.S. at 298.

52. See Oppenheimer, *supra* note 1, at 1170-71.

remedying general societal discrimination is not a compelling state interest.<sup>53</sup> Not only is this “an amorphous concept of injury that may be ageless in its reach into the past,”<sup>54</sup> but it violates the individualist principle. To the unemployed individual, after all, it is no consolation that people who look like him are employed. For important, longstanding reasons, thus, remedying general societal discrimination is an insufficient reason for applying race-based classifications.

Similarly, in citing “the fact that white males are disproportionately represented”<sup>55</sup> in many sectors of public employment, Professor Oppenheimer implicitly assumes that this disproportionate representation is *the* problem to be remedied.<sup>56</sup> However, remedying disproportionate representations is not even considered a compelling governmental interest in public university admissions, where race preferences are relatively defensible. As Justice Powell wrote, the state interest “is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups.”<sup>57</sup>

---

53. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); *Bakke*, 438 U.S. at 309. While Professor Oppenheimer notes my agreement that remedying identified discrimination is a compelling state interest, he neglects to mention that I identify it as a middle ground, a “centrist compromise” between the conflicting interests in remedying discrimination and according equal protection to each individual. See Carcieri, *A Progressive Reply*, *supra* note 2, at 174. By simply assuming that remedying general societal discrimination is a compelling state interest, Professor Oppenheimer excuses himself from responding to whether my characterization of the rule of identified discrimination is valid.

54. *Bakke*, 438 U.S. at 307; see also *Metro Broad.*, 497 U.S. at 614.

55. Oppenheimer, *supra* note 1, at 1170.

56. See *id.* at 1169–77.

57. *Bakke*, 438 U.S. at 315. Moreover, Justice O'Connor has expressly rejected proportional representation as a compelling state interest. In rejecting diversity as a compelling state interest, Justice O'Connor has noted that this justification “might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races.” *Metro Broad.*, 497 U.S. at 614 (O'Connor, Rehnquist, Scalia, and Kennedy, JJ., dissenting); see also *Croson*, 488 U.S. at 507–08 (rejecting “outright racial balancing”). Beyond this, even assuming that proportional representation were a compelling state interest, Professor Oppenheimer does not speak to the other side of underrepresentation, namely *overrepresentation*. See Nathan Glazer, *Diversity Dilemma*, NEW REPUBLIC, June 22, 1998, at 11. If even rough proportional representation were the constitutional command, it seems that we must begin limiting the number of Jews and Asians at the University of California, where they matriculate out of proportion to their percentage of the population. Fortunately for those groups, that would be unconstitutional under Justice

Thus, Professor Oppenheimer's first fallacy is that he makes unjustified assumptions regarding the compelling state interests justifying public affirmative action programs. Specifically, simply citing statistics to demonstrate the need to remedy societal discrimination runs directly contrary to Supreme Court precedents holding such interests not compelling.<sup>58</sup>

## 2. *Fallacy of Division*

As this discussion suggests, and as those who have read *A Progressive Reply* will notice, Professor Oppenheimer engages in a fallacy that I identified and elaborated on at some length,<sup>59</sup> but to which he does not attempt to respond. This is the fallacy of division. The fallacy of division is the assumption that what is true of the group is true of any individual member of the group, or more precisely, that the relationship existing between groups necessarily exists between individual members of groups. While Professor Oppenheimer pays lip service to the individualist principle, he only considers those individuals who are members of the groups he deems entitled to preferences under the Constitution. By systematically ignoring that *every* individual is fully protected under the Equal Protection Clause, Professor Oppenheimer easily assumes that, even from a constitutional point of view, only

---

Powell's opinion in *Bakke*. Under proportional representation, further, we need to fire a lot of black teachers in East Los Angeles high schools, for no other reason than their skin color, since they are represented out of proportion to their percentage of the population of East Los Angeles. See Robert Harwood, *Opportunity and the New Diversity*, WASHINGTON POST, July 21, 1997, at A21.

Another problem here is that once proportional representation is implicitly assumed to be a compelling state interest, achieving it becomes unthinkable without the de facto quotas which were declared unconstitutional in *Bakke*. See *Bakke*, 438 U.S. at 316-19. See generally DARIEN MCWHIRTER, *THE END OF AFFIRMATIVE ACTION: WHERE DO WE GO FROM HERE?* 146-47 (1996).

58. Professor Oppenheimer's case against Proposition 209 based on the labor statistics he cites is even weaker than Justice Black's opinion in *Korematsu*. As much violence as Justice Black did to the principle of individualized guilt, at least he rested his decision on a compelling state interest, namely military necessity during time of war. Professor Oppenheimer not only ignores the individualist principle, turning the Equal Protection Clause inside out for short term political gain, but he does not even do so in light of a recognized compelling state interest. As should be clear, I make no claim that anyone is entitled to public benefits. Rather, every person is entitled to a fair chance to obtain those benefits, without his immutable traits being used against him, absent a showing that this is narrowly tailored to advance a compelling state interest.

59. See Carcieri, *A Progressive Reply*, *supra* note 2, at 154-59.

groups and their relations, rather than individuals, are important. Professor Oppenheimer does not seem to acknowledge that the group is not the individual, nor the individual the group.<sup>60</sup> Professor Oppenheimer's premise that more of the gender preferences are constitutionally required, such that state voters cannot eliminate them, rests on the mistaken assumption that only group relationships, and not individual interests, are constitutionally relevant.

### 3. *Fallacy of Redistribution*

Professor Oppenheimer quotes my observation that "[a]n opportunity is a chance. Undergraduate admission to a good university is thus fairly termed an opportunity and . . . there is some merit to the argument for race-based preferences in that context."<sup>61</sup> The broader point in *A Progressive Reply*, however, was that race-based preferences are generally not constitutional in public employment. *A Progressive Reply* continued, "[a] job is not an opportunity; it is not a chance at the prize, it *is* the prize. The vast majority of people who are not independently wealthy need to earn a living. That is largely why they pursue an education."<sup>62</sup>

In failing to discuss the broader point, Professor Oppenheimer, as well as other prominent members of the affirmative action establishment,<sup>63</sup> engages in what may be called the fallacy of redistribution. This is the assumption that since some forms of public resource redistribution are constitutional, even if done in a race-conscious way, the same is true of other such forms of redistribution. This assumption fails to recognize that as shifting contexts change, the degree of offense to the individualist principle, and thus to equal protection, also shifts, given the concentration and degree of burdens worked by the redistribution on disfavored individuals.

---

60. Professor Troy Duster has also recently deployed the fallacy of division. He writes, "the mere fact that one's group has accumulated wealth ten times that of another group is rendered irrelevant by the legerdemain of invoking individual fairness." Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy*, in AFTER BAKKE, IN RACE AND REPRESENTATION: AFFIRMATIVE ACTION 111, 115 (Robert Post & Michael Rogin eds., 1998).

61. Oppenheimer, *supra* note 1, at 1179 n.152.

62. Carcieri, *A Progressive Reply*, *supra* note 2, at 171 n.128.

63. See EDLEY, *supra* note 29, at 249–50; LAWRENCE & MATSUDA, *supra* note 45, at 185, 253–56, 273, 277; Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 863–64 (1995).

To illustrate, there is nothing unconstitutional with the redistribution of wealth through legislative taxing and spending powers. This is so even if it disproportionately benefits minorities, as when public revenues are allocated to support inner city public schools. Not only is the burden of such a plan distributed among all taxpayers, but it is consistent with the liberal value of equality of opportunity in that it helps provide members of targeted groups the chance to develop their abilities to compete for seats at good universities.

The fallacy of redistribution emerges when it is simply assumed that since some redistribution of public resources based on race is defensible in the educational context, it is also legitimate in public employment and contracting. In a contracting or employment situation, another comparable opportunity is not always available.<sup>64</sup> This is particularly true in an era of widespread corporate downsizing, and especially true in public university teaching where, Oppenheimer admits, there is a tight market.<sup>65</sup> Further, the employment and contracting contexts involve an individual's livelihood, not simply the preparation for work. Therefore, the scope of the denied liberty interest is much greater than in the educational context. In these situations, not only are the burdens of race and gender preferences concentrated on a few individuals, but they are more severe than in the educational context. Thus notwithstanding the failure of Professor Oppenheimer and others to make these distinctions, not all contexts of redistribution are created equal.

#### 4. *Confusing Minority Interests with Minority Rights*

One of the major thrusts of *A Progressive Reply* was to show that the *Hunter/Seattle*<sup>66</sup> or "political structure" doctrine does not apply to invalidate Proposition 209.<sup>67</sup> However, Professor Oppenheimer insists that this doctrine has "clear

---

64. As Justice Powell has written, individuals dispreferred for public benefits based on their race "are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others." *University of Cal. Regents v. Bakke*, 438 U.S. 265, 294 n. 34 (1978).

65. See Oppenheimer, *supra* note 1, at 1173.

66. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457 (1982).

67. See Carcieri, *A Progressive Reply*, *supra* note 2, at 162-72.

application" to Proposition 209.<sup>68</sup>

Professor Oppenheimer writes that the ACLU plaintiffs "were individual women and minority group members who, because of their group status, would lose governmental benefits [such as affirmative action programs] *to which they were entitled*."<sup>69</sup> The plaintiffs "were threatened with the loss of affirmative action programs that were available to them because they were members of one or more groups which *were entitled to such benefits*."<sup>70</sup> *Descriptively*, these statements are accurate. Before Proposition 209, the government's official practice was to use race and gender preferences in distributing public benefits. However, *prescriptively*, the issue is whether women and minorities ought to be "entitled" to such benefits. Professor Oppenheimer simply assumes that since minorities and women have an *interest* in preferences, they have a *right* to them.<sup>71</sup> Whether women and minorities have a right to preferences was the issue addressed by Proposition 209.<sup>72</sup> The constitutional question faced by the appellate court in *Coalition for Economic Equality v. Wilson*<sup>73</sup> was, therefore, whether the voters' refusal to turn that interest into a right violated equal protection.<sup>74</sup>

As a variation on this assumption, Professor Oppenheimer writes of the initiative in the *Seattle*<sup>75</sup> case that "its *impact* was felt only by the minority residents of Seattle who had sought a busing remedy to improve their children's education."<sup>76</sup> This fact, however, proves nothing. No one denies that Proposition 209 has a differential "impact" on women and minorities, but that is barely the beginning, not the end of the discussion.<sup>77</sup> Many laws have a disproportionate im-

---

68. See Oppenheimer, *supra* note 1, at 1163.

69. *Id.* at 1162 (emphasis added).

70. *Id.* (emphasis added).

71. See Carcieri, *A Progressive Reply*, *supra* note 1, 170–71 n.122–27.

72. See CAL. CONST. art. I § 31.

73. *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996).

74. See *id.* at 1489.

75. *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457 (1982).

76. Oppenheimer, *supra* note 1, at 1167 (emphasis added).

77. On a related topic, Professor Oppenheimer claims that I am "disingenuous" for being puzzled by the ACLU's arguments. See *id.* at 1163. Yet this completely misconstrues my meaning. As I explained:

The ACLU . . . argues that [Proposition 209] imposes "special burdens" on women and people of color who wish to secure preferences. This is puzzling, however, because a denial of equal protection must be a de-

pact on recognizable groups of people. For example, the driver's license law has a differential impact on the blind, but this does not establish a violation of equal protection. Again, for Proposition 209, the issue is whether women and minorities were constitutionally entitled to the preferences in the first place. Professor Oppenheimer does not address this issue, but rather simply assumes that race and gender preferences are properly the status quo, from which departures must be justified. Thus, by claiming that Proposition 209 raised the old issue of "when the white majority uses the law . . . to repress the *rights* of minorities,"<sup>78</sup> Professor Oppenheimer mistakenly assumes that minorities and women have a right to affirmative action.

##### 5. *Equating Discrimination with the Denial of Preferences*

If confronted with the previous fallacy, Professor Oppenheimer might say that he is simply speaking of "the essential right of minority group members to equal protection of the law."<sup>79</sup> Equal protection is a right, of course, but this response simply shifts the question to that of the meaning of equal protection. With respect to *Hunter*,<sup>80</sup> he writes, "the black residents of Akron . . . had lost their legal protection from discrimination."<sup>81</sup> However, Proposition 209 did not affect women and minorities' protection from discrimination. It only ended *preferences* for minorities and women. Yet Professor Oppenheimer simply equivocates the two. With respect to

---

nial of some benefit or imposition of some burden inapplicable to other similarly situated individuals. Under [Proposition 209], however, no individual can secure a race preference in the allocation of public benefits without a constitutional amendment.

Carcieri, *A Progressive Reply*, *supra* note 2, at 164.

78. Oppenheimer, *supra* note 1, at 1160 (emphasis added). He refers elsewhere to those occasions "when majorities deprive minorities of rights." *Id.* at 1154. It is noteworthy that though he fails to acknowledge it, Professor Oppenheimer is no longer arguing for gender preferences with such references, since women constitute a majority of the population. Also, his claim that I "dismiss the possibility of sex discrimination occurring in American life," *id.* at 1169, is quite mistaken. Nowhere do I deny the existence of sex discrimination. Unlike Professor Oppenheimer, I include within such discrimination the use of gender preferences against males. I simply dispute that women are constitutionally entitled to preferences.

79. *Id.* at 1160.

80. *Hunter v. Erickson*, 393 U.S. 385 (1969).

81. Oppenheimer, *supra* note 1, at 1166-67.

*Seattle*, for example, he equates “those favoring the elimination of de facto segregation,”<sup>82</sup> with those favoring the maintenance of race and gender preferences. Such an equation negates the possibility of an evenhanded process by which public benefits might be distributed, making “discrimination” and “no preference” synonymous. If a matter is “racial in character,”<sup>83</sup> it does not matter whether the law imposes preferences or extends protection from discrimination.

This, however, is an untenable position. As stated in *A Progressive Reply*, there is a

crucial distinction between protection from discrimination [or segregation] based on race, as in *Hunter* and *Seattle*, and the denial of preferences based on race, as in [Proposition 209]. While both are “racial in character,” a classification based on race and gender in order to bestow a preference can not simply be equated with declassification of race and gender in order to eliminate the use of such preferences. One is the reverse of the other, and only [Proposition 209] functions to place individuals on an equal footing.<sup>84</sup>

6. *Mistaking the Relevance of Laws Forbidding Discrimination Against Veterans, the Aged, and the Disabled*

Finally, Professor Oppenheimer claims that since veterans, the disabled, and the aged do not lose their “benefits” or “programs” under Proposition 209, the measure denies women and minorities equal protection because they lose preferences based on their immutable traits.<sup>85</sup> Professor Oppenheimer simply assumes that race and gender preferences are for all intents and purposes the same as “benefits” or “programs” for these other groups. Under California law, however, these groups enjoy no general preference in the distribution of public benefits. The aged and disabled, with rare exception, only enjoy protection from discrimination.<sup>86</sup> While veterans enjoy preferences in a few situations, as for positions serving other veterans, two important distinctions exist.

---

82. *Id.* at 1164.

83. Carcieri, *A Progressive Reply*, *supra* note 2, at 167–70.

84. *Id.* at 168–69.

85. See Oppenheimer, *supra* note 1, at 1153, 1162.

86. See CAL. GOV'T CODE §§ 12940(a)(1), 12941(a) (West 1992).

First, veterans are not similarly situated with non-veterans with respect to the reasonable qualifications for such positions, and thus such exceptions pose no equal protection difficulty. Second, these preferences are based on military service, rather than certain immutable traits, and thus are fundamentally distinguishable from race and gender preferences. Veterans' preferences constitute a reasonable means of encouraging people to enlist in the armed forces, and provide a reward for service, which is often life-threatening.

Beyond these considerations, as I wrote in *A Progressive Reply*,

even if California law allowed age or disability preferences in the allocation of public benefits generally, it would still not justify race and gender preferences . . . . Allowing race and gender preferences to exist just because other kinds of preferences exist still allows many people to "fall through the cracks." The individual remains unprotected. The State is thus required to strive for neutrality in the distribution of public benefits; the solution is not to multiply preferences, but to eliminate as many as possible.<sup>87</sup>

### III. RESPONSES TO PARTICULAR POINTS

In addition to engaging in fallacies in his response to *A Progressive Reply*, Professor Oppenheimer specifically attacks certain portions of the arguments in that article. In response, Part III addresses the following points: (1) the significance of the Court's refusal to review the Ninth Circuit's Ruling; (2) the majoritarian difficulty; (3) the use of narrative; (4) the "two-pile" method as fiction; (5) the drop in University of California minority admissions; (6) the pay equity issue; and (7) the outreach and aggressive recruiting programs.

#### A. *The Significance of the Court's Refusal to Review the Ninth Circuit's Ruling*

Professor Oppenheimer begins his critique of *A Progressive Reply* by noting that the Supreme Court's refusal to disturb the Ninth Circuit's ruling signifies nothing about the Court's view of the merits of the case.<sup>88</sup> Since it was a facial challenge, he explains, the Court may be simply waiting for a

---

87. Carcieri, *A Progressive Reply*, *supra* note 2, at 166–67.

88. See Oppenheimer, *supra* note 1, at 1158–59.

more fully developed factual context to evaluate the equal protection challenge of a Proposition 209-like reform.<sup>89</sup> Though the Court has certainly accepted review of facial challenges to state laws before,<sup>90</sup> Professor Oppenheimer is correct—strictly speaking, the Court's refusal to intervene is not a statement of its views of the merits of the case. However, two observations are important on this point.

First, *A Progressive Reply* did not claim that the Court's refusal to grant certiorari was an expression of its view of the merits. Rather, that article indicated simply that it was not surprising that the Court did not view the proposition as such an obvious constitutional violation that it had to intervene.<sup>91</sup> Second, there is little serious doubt about the Court's decision had it granted certiorari. One of the Court's legacies under Chief Justice Rehnquist is a reassertion of the fundamental principle of American constitutional democracy: federalism. Apart from the Court's likely ruling on a claim of a right to group preferences in the allocation of public benefits under the Fourteenth Amendment in light of *Adarand*,<sup>92</sup> *Croson*,<sup>93</sup> *Wygant*,<sup>94</sup> and *Bakke*,<sup>95</sup> the Rehnquist Court strongly favors state sovereignty.<sup>96</sup> Thus, those challenging Proposition 209 would properly have a heavy burden of persuasion based both on this principle and another bedrock principle of modern democracy to which we now turn.

### B. *The Majoritarian Difficulty*

Professor Oppenheimer fails to respond to my argument concerning the significance of the majority rule in a democ-

---

89. See *id.* at 1156–59.

90. See *Gooding v. Wilson*, 405 U.S. 518 (1972); *Strauder v. West Virginia*, 110 U.S. 303 (1879).

91. See Carcieri, *A Progressive Reply*, *supra* note 2, at 142.

92. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

93. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

94. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

95. *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

96. I submit, in fact, that the ACLU is fortunate the Court did not grant review of its challenge to Proposition 209, as suggested by the decision of civil rights groups to urge a settlement of *Piscataway Township Bd. of Educ. v. Taxman*, 522 U.S. 1010 (1997), in order to avoid the Court's resolution of the conflict. See Steven Holmes, *Civil Rights Leaders Execute Retreat on Affirmative Action*, S.F. EXAMINER, Nov. 23, 1997, at A18. See generally *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

racy.<sup>97</sup> Certainly the majority will is not beyond judicial review,<sup>98</sup> “the presumptive legitimacy of the majority’s will is the irreducible minimum of democracy in any form.”<sup>99</sup> This is indisputable since otherwise society would have to establish which minority is presumptively entitled to rule and why. Rather than attempting to respond to the substance of this point, however, Professor Oppenheimer simply quotes some isolated statements I made and summarily concludes that Judge Henderson, *in a passage I quoted*, effectively spoke to me.<sup>100</sup> As I responded to Judge Henderson, however, his statement “amounts to no more than a promise that the judge will convincingly make the case that [Proposition 209] violates equal protection. Since, as I shall show, he does not do so, he fails to overcome the presumption in favor of the majority’s will.”<sup>101</sup>

Had the Supreme Court accepted review of the ACLU’s challenge, it would have engaged a presumption in favor of the people’s vote. While Professor Oppenheimer and the ACLU claim that women and minorities have a constitutional right to preferences, they refuse to acknowledge that one of the most fundamental rights in a democracy is the right of the people to self-government.<sup>102</sup> Apart from the merits of the claim of group rights to preferences under the Fourteenth Amendment, the majoritarian principle, in combination with the Court’s emphasis on federalism, would have likely resulted in the Court upholding Proposition 209.

### C. *The Use of Narrative*

Professor Oppenheimer notes that after questioning the use of a narrative by another scholar,<sup>103</sup> *A Progressive Reply* mentions that my many years as a college teacher involved mentoring and writing references for students of many races and both genders.<sup>104</sup> On this account, Oppenheimer seems to think my article contradicts itself, but a fair reading of *A Pro-*

---

97. See Carcieri, *A Progressive Reply*, *supra* note 2, at 144–48.

98. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

99. Carcieri, *A Progressive Reply*, *supra* note 2, at 145.

100. See Oppenheimer, *supra* note 1, at 1160–61.

101. Carcieri, *A Progressive Reply*, *supra* note 2, at 146 n.28.

102. See ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 175 (1989).

103. See Oppenheimer, *supra* note 1, at 1169 (citing Carcieri, *A Progressive Reply*, *supra* note 2, at 159–60).

104. See *id.* (citing Carcieri, *A Progressive Reply*, *supra* note 2, at 179–80).

*gressive Reply* shows that he is mistaken.

While *A Progressive Reply* claimed that narratives cannot simply be substituted for legal argumentation,<sup>105</sup> it states they are "valuable in certain contexts."<sup>106</sup> The point of stories regarding treating students based on their merits regardless of race or gender is important. While affirmative action proponents expect professors to proceed by the rules of civil society and ignore race or gender, they excuse themselves from adhering to the same rules. In reserving the right to apply preferences against individuals not in their favored groups, these proponents assume that they can operate at the level of the Hobbesian state of nature, where there is only war, even though everyone else must operate according to principles of liberal democracy. Use of a narrative in *A Progressive Reply*, thus, is not an exercise in a contradiction, but rather serves to identify the contradiction in proponents of affirmative action.

#### D. *The "Two-Pile" Method as Fiction*

Professor Oppenheimer saves his harshest criticism for my reference to the "two-pile" method.<sup>107</sup> "Under this practice, applications for university teaching positions are sorted at the outset of the selection process into a 'favored pile' for women and people of color, and a 'disfavored pile', to be denied serious consideration, for white males."<sup>108</sup> Professor Oppenheimer claims that the two-pile method is a fiction because the article discussing the two-pile method relied on in *A Progressive Reply* disclaims responsibility for its contents, insisting that the article simply showed up in Professor Paulsen's mailbox.<sup>109</sup>

First, *A Progressive Reply* made no claim that the two-pile method is universally used in public university faculty hiring. The article merely stated that "it is so widely known to be used among public and private institutions that it is openly discussed in the law journals."<sup>110</sup> Second, it strains

---

105. See Carcieri, *A Progressive Reply*, *supra* note 2, at 160 n.76.

106. *Id.* at 160.

107. See *id.* at 149 n.35.

108. *Id.*

109. See *id.* (citing Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 995 (1993)).

110. *Id.*

credulity that Professor Paulsen "found" rather than wrote the piece. However, it is clear why Professor Paulsen would make such a claim: as a young faculty member at a prominent public law school, he could seriously risk his chance of securing tenure if he recognized that such a blatantly unconstitutional process takes place. Most likely, Paulsen was highlighting something that people know happens, but takes place behind closed doors.<sup>111</sup> Therefore, the two-pile method is not subject to reliable measurement. In the same journal issue, in fact, Professor Delgado's response to Paulsen is literally an admission that the two-pile method is widely used since it is effectively a statement against interest.<sup>112</sup> Rather than disputing the practice's existence, Delgado attempts to justify it with broad generalizations about the link between political views and race and gender.<sup>113</sup> Professor Oppenheimer claims that Delgado simply assumed the truth of Paulsen's claims in order to critique its legal analysis,<sup>114</sup> but Professor Oppenheimer's claims are unconvincing. If Professor Delgado felt that he could credibly challenge the existence of the two-pile method, he would unquestionably have done so. Rather, Delgado most likely knows of the system, and simply put forth a non-persuasive attempt to justify it.

As suggested, a precise assessment of the two-pile method's prevalence in public university faculty hiring is difficult because such a practice will, for obvious reasons, generally be kept secret. While Professor Oppenheimer did not prove that the two-pile method is a fiction, no one can show the scope of its use. However, an inside description of a faculty search cannot simply be dismissed as fiction. As Professor Kindrow wrote regarding faculty selection methods at his university, "[l]ooking day after day at applications from hopeful Ph.D.'s, I began to develop moral qualms. Basically, I was

---

111. Several commentators have noted that the simultaneous enforcement and denial of race and gender preferences demanded by the current system entails lying and hypocrisy on the part of public institutions. See Symposium, *Is Affirmative Action on the Way Out? Should it be?*, COMMENTARY MAG., Mar. 1998, at 20, 23, 46, 52. As one symposium contributor remarked, "demanding assent to the lie . . . has been a feature of totalitarian rather than democratic societies." *Id.* at 42.

112. See Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011 (1993).

113. See *id.* at 1016.

114. See Oppenheimer, *supra* note 1, at 1168.

screening them for indications of race, not scholarship. It was as simple as the *two piles* of applications on my desk: one for minority candidates, another for nonminorities."<sup>115</sup> Before Proposition 209's passage, further, I interviewed faculty in both the California State University and University of California systems. Both confirmed that in their experiences, *the first thing that happens* when it is time to start narrowing down the pool of applicants is the division of the applications into two piles, one for white males, and one for everyone else, just like Professor Paulsen describes.<sup>116</sup> Moreover, as the New York Times recently reported, "University of New Hampshire President Joan Leitzel recently promised to double the number of black faculty and quadruple the number of black students by 2006."<sup>117</sup> How President Leitzel plans to quadruple the number of black faculty without the two-pile method, which Professor Oppenheimer insists is a fiction, is a mystery.

Although the prevalence of the two-pile method in public university faculty hiring is unknown, it certainly is not a fiction. *Bakke*, *Hopwood*,<sup>118</sup> the recently dismissed University of Georgia case,<sup>119</sup> the pending University of Michigan cases,<sup>120</sup> and other recent lawsuits<sup>121</sup> illustrate a clear pattern: color-coded, separate admissions processes exist.<sup>122</sup> In short, the

---

115. G. Kindrow, *The Candidate: Inside One Affirmative Action Search*, in DEBATING AFFIRMATIVE ACTION 144 (1994) (emphasis added).

116. Telephone Interview with Michael Graham, Professor, California State University (Mar. 8, 1997); Telephone Interview with Edward Erler, Professor, California State University (Mar. 28, 1998); Telephone Interview with Tom Schrock, Professor, University of California (May 12, 1997); Telephone Interview with Joel Clark, Professor, University of California (May 12, 1997). See Paulsen, *supra* note 109, at 997. As I wrote in *A Progressive Reply*, the two-pile method "cannot possibly be used so that all applications for a position will be given equal consideration, for then there would be no reason, and no one would have thought, to separate them based on race and gender." Carcieri, *A Progressive Reply*, *supra* note 2, at 149 n.35.

117. *Two New Hampshire Campuses Address Rise in Racial Tensions*, N.Y. TIMES, Nov. 30, 1998, at A18.

118. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

119. See *Wooden v. Board of Regents of Univ. Sys. of Ga.*, 32 F. Supp. 2d 1370 (S.D. Ga. 1999).

120. See *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999); *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998).

121. See Michael S. Greve, *The Demise of Race-Based Admissions Policies*, CHRON. OF HIGHER EDUC., Mar. 19, 1999, at B6.

122. Indeed, an expert witness for the university in the *Hopwood* case attempted to justify the University of Texas Law School's practice by claiming

two-pile method is not universal, rather only common, and Professor Oppenheimer does not show otherwise. But here is the final irony. Professor Oppenheimer admits that "the data suggest that in academic hiring, race and gender preferences have largely been eliminated."<sup>123</sup> If this is so, and the playing field is as level for everyone as he suggests, how can he still insist that women and minorities are constitutionally entitled to preferences in the competition for such positions?

E. *The Drop in University of California Minority Admissions*

Professor Oppenheimer cites the drop in minority admissions to the undergraduate, law, and medical schools at the University of California system the year after Proposition 209 took effect, and claims that minority students have "suffered dramatically" as a result.<sup>124</sup> This drop, however, was far more dramatic at the University of California, Berkeley and UCLA than at the other University of California campuses.<sup>125</sup> Even more significantly, minority admissions have significantly rebounded at all University of California campuses for the 1999–2000 academic year.<sup>126</sup> Further, it is improper to suggest that minority students not accepted to the University of California, Berkeley or UCLA because of the ending of race preferences are "suffering dramatically" by having to attend the University of California, Irvine or Riverside.

F. *The Pay Equity*

While listing the employment statistics from the Bureau of Labor mentioned above,<sup>127</sup> Professor Oppenheimer cites comparative salary figures suggesting pay inequity between

---

that "everyone is doing it." *Hopwood v. Texas*, 861 F. Supp. 551, 576 n.72 (W.D. Tex. 1994).

123. Oppenheimer, *supra* note 1, at 1172.

124. *Id.* at 1180.

125. See James Traub, *The Class of Proposition 209*, N.Y. TIMES MAG., May 2, 1999, at 44; *University of California Points to Rebound in Admissions of Minority Undergraduates*, N.Y. TIMES, Apr. 4, 1999, at 18; Kenneth R. Weiss, *UC Sees Halt to Steep Drop in Minorities*, L.A. TIMES, Mar. 17, 1999, at A3.

126. See Traub, *supra* note 125, at 46; see also A. Cohen, *When the Field is Level*, TIME, July 5, 1999, at 32. A similar dynamic has taken place at the University of Texas in the wake of *Hopwood*. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); see also Dan Carnevale, *Enrollment of Minority Freshmen Near Pre-Hopwood Levels at U. of Texas at Austin*, CHRON. OF HIGHER EDUC., Sept. 3, 1999, at A71.

127. See *supra* Part II.B.1.

race and gender groups.<sup>128</sup> There are constitutional difficulties with using preferences against individuals based on what is true of their race and gender groups. In this case, accordingly, the salary figures do not reflect what a given individual within any of these groups earns. Even assuming that the numbers cited are accurate,<sup>129</sup> it does not follow that race and gender preferences in public employment are a legitimate remedy for pay inequity. If there is pay inequity between members of different groups performing the same job, the remedy is pay equity, not the use of race and gender preferences against unemployed individuals.

### G. *The Outreach and Aggressive Recruiting Programs*

Professor Oppenheimer claims that weaker forms of affirmative action, such as outreach and aggressive recruiting programs, as well as the power of public agencies to engage in voluntary affirmative action, "are the very heart of what the ACLU is attempting to save."<sup>130</sup> This is hard to believe. The California Ballot Pamphlet,<sup>131</sup> Ms. Ripston's article,<sup>132</sup> and the attacks on Proposition 209 in the Hastings Constitutional Law Quarterly symposium<sup>133</sup> fail to indicate that these programs, and not preferences in the distribution of public benefits generally, were being defended. Rather, the ACLU was fighting to keep race and gender preferences in place, the electorate knew this, and chose against these preferences. Professor Oppenheimer makes it sound like poor marketing by the ACLU, rather than the substance of its position, led to Proposition 209's enactment, but this is unconvincing. Nowhere in the California Ballot pamphlet, Ms. Ripston's article, or the Hastings Constitutional Law Quarterly symposium

---

128. See Oppenheimer, *supra* note 1, at 1171, 1175-76.

129. Mona Charen claims that after appropriate adjustments are made, women earn 98% of what men earn. See Mona Charen, *Pay Inequity is Figment of Liberals' Imagination*, FL. TIMES-UNION, Mar. 23, 1999, at B7.

130. Oppenheimer, *supra* note 1, at 1180. It is interesting that elsewhere in his article Professor Oppenheimer downgrades the importance of such programs to having been "in large part" what the ACLU was trying to protect, so it seems that the ACLU itself was confused about what it was trying to salvage. See *id.* at 1183.

131. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1494 (N.D. Cal. 1996).

132. See Ripston, *supra* note 7, at 1.

133. See Symposium, *The Meanings of Merit: Affirmative Action and Proposition 209*, 23 HASTINGS CONST. L.Q. 921 (1996).

did affirmative action proponents indicate that it was only the weaker forms of affirmative action that they were trying to save.

#### IV. AREAS OF PARTIAL OR SUBSTANTIAL AGREEMENT

While the thrust of this essay is that Professor Oppenheimer failed to rebut the arguments made in *A Progressive Reply*, there are specific issues with at least partial agreement.<sup>134</sup> To clarify the issues and establish a foundation for constructive dialogue and consensus, this essay concludes with an assessment of these areas of partial or substantial agreement.

##### A. *Outreach and Aggressive Recruiting*

To begin, there is no dispute that the less coercive forms of affirmative action generally pose no constitutional problems.<sup>135</sup> No thoughtful individual doubts the legitimacy, in fact the vital importance, of vigorous enforcement of anti-discrimination laws. Beyond this, outreach to, and aggressive recruiting of, targeted groups likewise generally poses no constitutional problems.<sup>136</sup> Properly administered, such programs expand the applicant pool for public benefits such as education, employment, and contracts. Accordingly, there is no Fourteenth Amendment violation in the allocation of public funds for the University of California to send its undergraduates to counsel and tutor minority high school students.<sup>137</sup> Although a race-conscious use of public resources, such programs promote equal opportunity for admission to a good university without dictating such an outcome.<sup>138</sup> Like-

---

134. See Oppenheimer, *supra* note 1, at 1179-83.

135. See *id.* at 1183-84.

136. See Carcieri, *A Progressive Reply*, *supra* note 2 at 181-83; Martin Carcieri, *Operational Need, Political Reality and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 461-62 (1999) [hereinafter Carcieri, *Operational Need*]. Even affirmative action opponents like Robert Alt, Director of Public Relations and Education for the Center for Individual Rights, agree. See Robert Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 181 (1997). Though such outreach and aggressive recruiting programs have their potential for abuse, I agree with Professor Edley that vigorous enforcement of anti-discrimination law is not enough. However, I tend to reject the conclusions he thinks can be drawn from that premise. See EDLEY, *supra* note 29, ch. 4.

137. See Traub, *supra* note 125, at 46.

138. If Florida follows California and Washington's lead next year, such prac-

wise, a policy of advertising public job openings or invitations to bid on public contracts in publications targeted to minority groups, as well as in mainstream publications, poses no constitutional difficulty. Again, such race-conscious advertising functions to expand the applicant pool, yet does not involve awarding the public benefit based on an applicant's skin color. These practices are consistent with the liberal values of a fair process for each applicant and an optimally competitive market for scarce public resources. In these practices, any race or gender consciousness occurs before the benefits are allocated—in the pre-admission, pre-hiring, and pre-bidding stages. Outreach and aggressive recruiting, thus, do not generally involve the use of race or gender preferences in the actual process of distributing public benefits.<sup>139</sup>

#### B. *Law Enforcement and Corrections Employment Practices*

Among stronger forms of affirmative action, quotas have been found unconstitutional since Justice Powell rejected them in *Bakke*.<sup>140</sup> At the same time, Powell upheld the use of preferences, i.e., the bestowal of a "plus factor" for membership in certain races, in public university admissions.<sup>141</sup> Since preferences are explicitly banned by Proposition 209, however, they are at the center of the current debate. Absent a showing of discrimination by a particular governmental agency, race or gender preferences in public employment generally violate equal protection.<sup>142</sup> Some federal judges, including Judge Posner, indicate that under the "operational need" doctrine,<sup>143</sup> temporary race preferences are relatively defensible within a narrow sector of public employment, namely law enforcement and corrections hiring and promotion practices.<sup>144</sup> Where the government demonstrates, by

---

tices may embody the future of the resolution of public affirmative action at the state level. *See id.* at 45–46; Cohen, *supra* note 126, at 30.

139. Polls show that the majority of Americans oppose measures involving the use of race or gender preferences. *See* Sam Howe Verhovek, *Poll Finds Ambivalence Over Racial Preference*, S.F. EXAMINER, Dec. 14, 1997, at A12.

140. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 316–18 (1978).

141. *See id.*

142. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–75 (1986).

143. The "political need" doctrine is "a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, able to communicate with the public, and is respected by the community it serves." *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988).

144. *See* Carcieri, *Operational Need*, *supra* note 136, at 466–76; *cf.* Wittmer

clear and convincing evidence, that such preferences are necessary for the effective policing of specific neighborhoods or the effective administration of specific correctional facilities, courts could uphold such preferences against equal protection attack on a principled basis. While not specifically addressed in his response to *A Progressive Reply*, I assume Professor Oppenheimer would have no objection to this use of the "operational need" doctrine.

C. *Modest Race Preferences in Public University Admissions Under the Diversity Rationale*

The "operational need" rationale is similar to a justification advanced for preferences in other contexts:<sup>145</sup> the "political reality" doctrine.<sup>146</sup> Professor Russell Weintraub of the University of Texas Law School observed, in response to *Hopwood*,<sup>147</sup>

If the majority of people in this state are going to be Mexican-American and African-American, and they are going to assume many of the leadership roles in the state, then it's going to be big trouble if the law school doesn't admit many minority students—it's going to be a bomb ready to explode.<sup>148</sup>

This statement implies that the risk of serious violence, which justifies race preferences in the law enforcement and corrections contexts, also justifies them in the law school admissions context. However, threats of violence cannot be a routine basis for constitutional interpretation in a democracy,

---

v. Peters, 87 F.3d 916 (7th Cir. 1996); *Barhold*, 863 F.2d at 233; *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979).

145. See Carcieri, *Operational Need*, *supra* note 136, at 484–87.

146. See *id.* at 484–500.

147. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

148. James Traub, *Testing Texas*, NEW REPUBLIC, Apr. 6, 1998, at 20. As the authors of the *Piscataway* brief have written,

if affirmative action is ended, inevitable political, economic, and legal forces will pressure the great public universities to lower admissions standards as far as necessary to avoid re-segregation. Barring a miraculous improvement in elementary and secondary education for minority students, color blind admissions will soon produce either public universities without competitive admissions, without adequate funds, or both.

Brief of Charles Alan Wright et al. as Amici Curiae, *Piscataway Township Board of Educ. v. Taxman*, 522 U.S. 1010 (1997).

a cornerstone of which is an independent judiciary. Public universities should not operate on principles applicable to prisons. In the university context, as opposed to law enforcement and corrections,

we are no longer in the criminal realm, at the threshold of the Hobbesian state of nature, where we must take our bearings primarily from human fear, ignorance, and greed. Rather . . . we may rely on the human capacities for reason, compromise, and adherence to the rule of law—democratic citizenship. Those who do not prevail in court but who prefer allegiance to democracy may be expected to limit themselves to civil forms of resistance.<sup>149</sup>

Thus, the use of race preferences in the public university admissions context under the “political reality” rationale is not constitutional.<sup>150</sup>

At the same time, modest<sup>151</sup> race preferences in public university admissions might pass constitutional muster under the diversity rationale recognized by Justice Powell in *Bakke*.<sup>152</sup> In spite of the recent views of some federal courts,<sup>153</sup> Justice Powell basically got it right: diversity is a fundamental principle of liberal education, embraced in various ways by

149. Carcieri, *Operational Need*, *supra* note 136, at 490–91.

150. *See id.* at 487–500.

151. The meaning of “modest” can obviously not be pinned down with precision, though the amici curiae brief in *Piscataway* defines it as one standard deviation. *See* Brief of Wright et al., *supra* note 148, at 17. Another definition is “limited in extent or aim.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1452 (3d ed. 1993).

152. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 311–15 (1978). In effect, Justice Powell ruled that public university admissions must accommodate the twin liberal principles of (1) diversity, and (2) the individual locus of equal protection. As a guideline for making this accommodation, he indicated that race could be “one factor among many” which public university admissions officers may take into account. *Id.* The problem, of course, as has been exposed in the *Hopwood* litigation and recent inquiries under state Freedom of Information Acts, is that race has been not simply one factor among many, but rather a primary factor in admissions to selective public universities. This has been reflected in the separate track, color-coded admissions processes, and SAT score gaps of 200 points, in fact nearly 300 points, between successful black and white applicants at some public universities. *See* Alt, *supra* note 136, at 187–88; Michael Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139, 148 (1997); Stephan & Abigail Thernstrom, *Racial Preferences: What We Now Know*, COMMENTARY MAG., Feb. 1999, at 45–46. Even Bok and Bowen’s figures reflect this. *See* BOK & BOWEN, *supra* note 29, at 21–23.

153. *See, e.g.,* Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996); Wessmann v. Gittens, 160 F.3d 790, 796–800 (1st Cir. 1998).

Madison,<sup>154</sup> Mill,<sup>155</sup> and Dewey.<sup>156</sup> Diversity is closely related to the social and political toleration at the heart of classical liberalism.<sup>157</sup> Though there may be problems of narrow tailoring where race preferences are employed as a means to advance diversity, I agree that promotion of diversity among a public university student body is a compelling state interest.<sup>158</sup> If the Supreme Court grants review of one of the pending challenges to the use of race preferences in the context of public education, as in the University of Michigan liti-

---

154. "An acquaintance with . . . the globe we inhabit, the nations among which it is divided, and the characters and customs which distinguish them . . . never fails in uncorrupted minds to weaken local prejudices and enlarge the sphere of benevolent feelings." Letter from James Madison to Samuel S. Lewis (February 16, 1829), in *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 280 (Rives & Fendall eds., 1884). At the same time, I must admit that I have not seen it proven that it is necessary, for a student to successfully study a foreign culture, that members of that culture matriculate at his university.

155. For Mill, liberal education is "directed . . . to a broad development of understanding over the widest possible area of knowledge; . . . it is an education concerned not so much with factual acquisition as with the quality of experience, with truth, not dogma, with discovery in intellectual exploration and the release of individual potential." F. GARFORTH, *JOHN STUART MILL ON EDUCATION* 18 (1971).

156. See, e.g., JOHN DEWEY, *THE POLITICAL WRITINGS*, ch. IV (Debra Morris & Ian Shapiro eds., 1993).

157. See David Smith, *Liberalism*, in 9 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 276 (1968).

158. Since I agree that diversity could satisfy the ends prong of strict scrutiny, I find plausible the recent arguments by leading liberal scholars that the Court would, on the right facts, uphold modest race preferences under the authority of Powell's *Bakke* opinion. See Amar & Katyal, *supra* note 36, at 1745; Dworkin, *supra* note 36, at 56; Rosen, *supra* note 36, at 24. Still, there are at least two problems.

First, Justices O'Connor and Kennedy disapproved of the diversity rationale in the broadcasting context. See *Metro Broad. v. FCC*, 497 U.S. 547, 612 (1989). More recently, lower federal courts have been skeptical of this rationale. See *Eisenberg v. Montgomery*, 197 F.3d 123, 130 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 797-800 (1st Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). Though Amar and Katyal ably distinguish the educational context from the broadcasting and contracting contexts, this will still be an uphill battle. See Amar & Katyal, *supra* note 36.

Second, states attempting to defend their race preferences in admissions under the diversity rationale will have difficulty with the means prong of strict scrutiny: even if we stipulate that diversity is a compelling state interest, it is highly questionable whether race preferences, especially as currently employed, are narrowly tailored to advance that interest. In my estimation, they are unquestionably underinclusive and, depending on how *Bakke* diversity is characterized, arguably overinclusive as well. See generally Martin Carcieri, *The Wages of Taking Bakke Seriously* (unpublished manuscript, on file with the author).

gation,<sup>159</sup> it may resolve this conflict permanently.

## V. CONCLUSION

Professor Oppenheimer suggests that by titling my article a "progressive reply," I hijack a noble word.<sup>160</sup> The assumption seems to be that being progressive and disagreeing with the ACLU is impossible. This raises the question of whether it is the continuation or the extinction of race-based differential treatment by the government that constitutes progress. The civil rights movement initially characterized progress in the latter way, holding that no individual should be held back based on immutable, accidental traits of race. That idea gave the movement its great moral authority and the Civil Rights Act of 1964 its moral foundation.<sup>161</sup>

So I could be clever and say that Professor Oppenheimer really is a conservative since he seeks to conserve governmental preferences based on immutable traits, attempting in principle to extend the regime of Jim Crow. But he is no more a conservative than I am, and even if we do not agree on means, at least we substantially agree on ends. It may unfortunately just be that there is an impasse on some of the major issues in this debate, that the two sides simply cannot hear each other. Still, we have a duty to keep having a constructive dialogue, as this is at the heart of democratic citizenship.

---

159. See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998).

160. See Oppenheimer, *supra* note 1, at 1186.

161. See PAUL CRAIG ROBERTS & LAWRENCE STRATTON, *THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY* ch. 1 (1995); Morris Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312-13 (1986); Gregory Rodriguez, *Has the Civil Rights Movement Become Too Inclusive?*, L.A. TIMES, Mar. 1, 1998, at M2.

\*\*\*