A Progressive Reply to the ACLU on Proposition 209

Martin D. Carcieri
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Men [too often] take it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving these laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection.

I. INTRODUCTION

California voters enacted Proposition 209, also known as the California Civil Rights Initiative (CCRI), in November of 1996. The central focus of the initiative’s controversy is subdivision (a), which invalidates affirmative action in certain forms and contexts by state institutions. It 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.”

The American Civil Liberties Union (ACLU) and other groups challenged the CCRI the day after its enactment un-

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4. Bill Jones, Secretary of State, Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 5, 1996). The ACLU, in Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996) (hereinafter, Wilson I ), only challenged the constitutionality of subdivision (a)’s abolition of preferences, not discrimination. Subdivision (c), which allows “bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting,” will not be the subject of this article. CAL. CONST. art. I, § 31.
ander the Equal Protection Clause of the Fourteenth Amendment. On December 23, 1996, Judge Thelton Henderson issued a preliminary injunction against the measure's enforcement. On April 9, 1997, however, a panel of the Ninth Circuit Court of Appeals, in an opinion by Judge Diarmuid O'Scannlain, vacated that injunction. A petition seeking en banc review of the panel's decision was denied, and the United States Supreme Court twice refused to intervene. The Court first refused to intervene when it declined to issue a stay of Judge O'Scannlain's ruling pending its decision whether to review the case and second when the Court on November 3, 1997 refused to grant certiorari. Therefore, the Ninth Circuit ruling stands and, consequently, we are in the Proposition 209 era.

The Supreme Court's refusal to disturb the lower court's ruling was not surprising given the Court's recent major affirmative action decisions. However, the Court has not yet directly addressed the issue of whether measures like the CCRI, which ban preferences as well as discrimination based on race and gender are constitutional. Only Judge O'Scannlain's ruling in Wilson II addresses that issue.

While Judge O'Scannlain's ruling is supported by a thoughtful analysis, his opinion did not respond to the full range of arguments advanced by CCRI opponents. The Supreme Court's refusal to intervene has given states and localities a

5. See Wilson I, 946 F. Supp. 1480 (N.D. Ca. 1996). While I am not replying to the ACLU alone, I use only its name in the title, both as shorthand and in view of its lead in the constitutional challenge to the CCRI.

6. See Id.

7. See Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997) (hereinafter, Wilson II).


green light to enact similar reforms,\(^\text{12}\) and given the strong opposition to them,\(^\text{13}\) the debate over the constitutionality of CCRI-like reforms will linger for some time. Therefore, it seems quite possible, even likely, that the Supreme Court will hear a challenge to such a reform within the next few years.

This article elaborates on three justifications for the Court's refusal to disturb the Ninth Circuit's ruling. Two justifications\(^\text{14}\)—the majoritarianism difficulty and the group rights difficulty—for the CCRI are grounded in basic constitutional principles, and this article shows that CCRI opponents embrace a constrained theory of the meaning of the Equal Protection Clause in light of the broader constitutional scheme. The third justification will be presented by examining CCRI opponents' arguments under a strand of equal protection jurisprudence known as the Hunter/Seattle\(^\text{15}\) or "political structure doctrine."

This article responds to several arguments articulated by the opponents of the CCRI. These arguments are presented in many sources, but three should be mentioned at the outset. The first source is an article in a recent issue of the ACLU Open Forum, in which Southern California ACLU Executive Director, Ramona Ripston, attempted to justify the organization's challenge to the CCRI.\(^\text{17}\) The second source, which fills out Ms. Ripston's analysis, is Judge Henderson's opinion ruling in the ACLU's favor.\(^\text{18}\) The last source is a symposium on the CCRI hosted by the Hastings Constitutional Law Quarterly three months before it was enacted.\(^\text{19}\)


\(^{13}\) The refusal by Houston voters to invalidate the use of race and gender preferences in the distribution of public contracts is perhaps the best recent example of this opposition. See Jesse Katz, *Houston Thinks Globally in OK of Preferences*, L.A. TIMES, Nov. 6, 1997, at A1.

\(^{14}\) See infra Part II. A-B.


\(^{16}\) See infra Part II.C.


\(^{19}\) Symposium, *The Meanings of Merit: Affirmative Action and Proposition 209*, 23 HASTINGS CONST. L.Q. 921 (Summer 1996). Though I shall take some of the symposium participants' arguments to task, I am grateful to these scholars for helping me find my voice on this issue.
Various contributors to the symposium provided theoretical support to Ms. Ripston's claims and Judge Henderson's opinion.

This article concludes by proposing that employers, public schools and contractors institute aggressive outreach and recruiting programs that focus on the pre-hiring, pre-admission and pre-bidding stages of selection. The article contends that such programs are a presumptively valid middle ground under the CCRI that may serve to protect the interests of the majority, the minority and the individual.

II. THREE JUSTIFICATIONS FOR THE SUPREME COURT'S REFUSAL TO INVALIDATE THE CCRI

A. The Majoritarian Difficulty

As Ms. Ripston writes:

For many people, the fact that a majority of Californians voted for Prop. 209 seems to be enough. "It won, it should be law" goes the logic. Thankfully, that is not how this country works. More than 200 years ago, the Founders of this country created a system to ensure the equal voice of all citizens—not just the majority.... [Without the safeguards against mob rule built into our Constitution]... a simple majority of voters could dictate the way all Americans live their lives and impose their will on the minority at any time, under any circumstances, for any reason. Without these safeguards in place, the American system would allow a majority vote to permit slavery... or require that women not work outside the home.

First, Ms. Ripston is correct that there is more to the kind of democracy established by the U.S. Constitution than

20. See infra text accompanying notes 164-168.

21. Ripston, supra note 17, at 1, 7. As Judge Henderson writes, expressing the same idea, "it is not for this or any other court to lightly upset the expectations of the voters... our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution." Wilson I, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996).

22. Ripston, supra note 17, at 1, 7. While one may doubt whether our political culture is significantly a democratic one, the text of the Constitution plainly provides for representational democracy, i.e., representatives are selected by a majority of voters in each state or district and those representatives in most cases make law by a majority vote in each chamber. See U.S. CONST. art. I, §§. 2, 3, 7.
majority rule. While it is not a sufficient condition, majoritarianism is nonetheless a necessary condition for modern representative democracy. In fact, the presumptive legitimacy of the majority’s will is the irreducible minimum of democracy in any form. Though democratic theory sometimes generates conflicting principles, a regime ruled by a minority is by definition not a democracy. After all, if it is not majority will that presumptively and indirectly makes law, then one must show which minority should rule and why. The Equal Protection Clause analysis under which the ACLU made its challenge must therefore be understood within the context of a basic constitutional commitment to majority rule. Though majority will did not place the CCRI beyond constitutional reach, it cannot simply be dismissed as easily as Ms. Ripston suggests. Therefore, the Supreme Court would have properly employed a rebuttable presumption in the CCRI’s favor.


Judge O'Scannlain thus seems to oversimplify the importance of majority rule in his observation that “a system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.” Wilson II, 110 F.3d 1431, 1437 (9th Cir. 1997). Judge O’Scannlain was urged by the ACLU to override the authority of both the California voters and the California courts. By suggesting that the Judge invalidate a measure, which had gained a majority of the popular vote and which had not been interpreted by the California courts, CCRI opponents twice offended democracy and federalism. The principle of federalism thus bolsters Judge O'Scannlain's point about majority rule and the Supreme Court's recent major rulings in the area of federalism reinforce the propriety of its refusal to invalidate the Ninth Circuit's ruling on the CCRI. See, e.g., New York v. U.S., 505 U.S. 144 (1992), U.S. v. Lopez, 115 S. Ct. 1624 (1995), Boerne v. Flores, 138 L. Ed. 2d 624 (1997), and Printz v. U.S., 138 L. Ed. 2d 914 (1997).

24. Majoritarianism is in an important sense the very embodiment of the political equality at the core of all democracy, including the variant embodied in the U.S. Constitution. See LAWRENCE HERSON, THE POLITICS OF IDEAS 46 (Dorsey 1984).

25. If CCRI opponents' answer is “the judges,” they will need a more powerful theory of judicial review than they have yet produced, for Judge O'Scannlain explicitly rejected such an argument. See Wilson II, 110 F.3d 1431, 1446 (9th Cir. 1997).

26. On the justification of such an approach to constitutional interpretation, see the discussion of “nonclausebound interpretivism” in JOHN ELY, DEMOCRACY AND DISTRUST ch. 2 (Harvard University Press 1980).

27. CCRI opponents might claim that the presumption I have described is
Second, as a general matter, Ms. Ripston is also correct that the majority in our system can deprive the minority of rights, or more precisely, can refuse to allow asserted minority interests to be transformed into enforceable rights. However, this observation does not complete the analysis. Majorities have long prohibited those who might have an interest in committing robbery or murder from having a right to do so. The real question is whether or not in a particular case the majority's refusal to grant the right is just. Ms. Ripston distorts the scope of what is likely or even possible within our system by making unqualified claims about the

Inapplicable where a suspect classification or fundamental interest is involved. In either of these cases, they would argue, strict scrutiny is triggered and the presumption is against the validity of the state action, not in its favor. See, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). As we shall see, this argument has two problems. First, the CCRI involves no suspect classification because it declassifies race and gender as bases for preferences and so arguably presents no equal protection issue at all. Second, the Supreme Court is very unlikely to recognize the interest in securing race and gender preferences as a fundamental interest triggering heightened scrutiny. Therefore, assuming the CCRI even presents an equal protection issue, rational basis scrutiny is applicable and the presumption in favor of its constitutionality is appropriate.

28. As Judge Henderson writes, "the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights." Wilson I, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996). Without a doubt, federal courts have no duty more important than to protect the rights and liberties of all Americans by considering and ruling on such issues, no matter how contentious or controversial they may be. Id. at 1490. While this position is unobjectionable as stated, it amounts to no more than a promise that the judge will convincingly make the case that the CCRI 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.

29. Ripston, supra note 17. Ms. Ripston's claim that the majority could reinstitute slavery, for example, is quite an exaggeration. Id. Thanks to majorities in Congress and state ratifying conventions following the Civil War, the Thirteenth Amendment bans slavery. Reversal of this prohibition would thus require a super-majority to ratify another amendment under Article V, which seems very unlikely any time soon. There is thus no serious comparison between chattel slavery and the passage of the CCRI.

Ms. Ripston also refers to Southern racial segregation in the 1950's and 1960's. See Ripston, supra note 17, at 7. Again, the analogy does not bear scrutiny. Any right one might claim not to have to share a drinking fountain or a seat on a bus with an African-American is simply incomparable to his right not to have his application for a scarce governmental benefit treated differently based simply on his race and gender. A white male in this situation, in fact, is simply asking for what southern blacks during the Civil Rights era sought: not to be denied equal protection based solely on immutable and thus properly irrelevant characteristics. See generally Paul Brest, In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976).
dangers of majority rule and by analogizing long settled questions of the past to questions raised by the CCRI.

Therefore, the first justification for the Supreme Court's refusal to reverse the Ninth Circuit is majority rule's centrality to our constitutional system and its presumptive legitimacy as law. It is, however, only a presumption. As im-

Finally, the claim that majorities could require that women not work outside the home also overstates the case. Under long settled rulings, such a law would unquestionably be held to violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See Craig v. Boren, 429 U.S. 190 (1976); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

I submit that though Ms. Ripston criticizes the majority's vote on the CCRI, she embraces the views of certain majorities, as do most progressives, on many issues. The Civil War Amendments, the Nineteenth Amendment, and the 1964 Civil Rights Act come to mind. Therefore, "simple majorities," as a caption to Ms. Ripston's article cleverly refers to them, are not the problem. Had the CCRI been defeated, in fact, the ACLU would have praised the majority for its wisdom.

This, of course, does not establish which majorities are entitled to the presumption: a majority of elected representatives only, or a majority of voters on state ballot initiatives as well. One of the symposium articles addresses this question, arguing that the use of the initiative process in over twenty states is a per se violation of the Republican Guarantee Clause of article IV, sec. 4. See Catherine A. Rogers & David L. Faigman, "And to the Republic for Which it Stands": Guaranteeing a Republican Form of Government, 23 Hastings Const. L.Q. 1057 (1996). A full response would require an entire article, yet the ACLU did not raise the issue in this litigation, so I shall comment only briefly.

First, though they profess not to do so, Rogers and Faigman rely almost exclusively on an originalist approach to constitutional interpretation. Rogers & Faigman, supra note 30. While the original understanding is conceded the starting point for legitimate constitutional interpretation (particularly in the Scalia era, see Jeffrey Rosen, The Tempting of Antonin Scalia, THE NEW REPUBLIC, May 5, 1997, at 26, 27), it is not the endpoint. Employing Professor Ackerman's interpretive device of "constitutional moments," for example, the progressive era which produced reforms like the state initiative process was arguably a minor constitutional moment, which shifted the meaning of the Guarantee Clause to allow for such processes. See BRUCE A. ACKERMAN, WE THE PEOPLE: VOLUME 1: FOUNDATIONS (1991).

Second, even within an originalist framework, Rogers' and Faigman's interpretation of the Guarantee Clause is not clearly valid, for two reasons. First, the Federalist vision which prevailed in the Constitution is only part of the founding vision. The Antifederalists were much more favorably disposed toward popular participation than were the Federalists. On many accounts, moreover, the Antifederalists were more numerous, but Hamilton's success in rushing the ratification process prevented their views from prevailing in the Constitution. See J. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX 208-13 (1969), and M. HECHT, ODD DESTINY: THE LIFE OF ALEXANDER HAMILTON 159-62 (1982). The Federalists, further, were swept from power once and for all by the Jeffersonian Revolution of 1800. See R. KETCHAM, THE ANTIFEDERALIST PAPERS 17-20 (1986). For these reasons, a representative process complemented by an initiative process is arguably the most accurate reflection of the founding vision. Second, the claim that the Guarantee Clause
important as it is that a majority of voters favored the CCRI, this only reinforces the core substantive considerations that would correctly prevail in a challenge to a CCRI-like reform. This article now addresses these considerations.

**B. The Group Rights Difficulty**

A second difficulty CCRI opponents face is suggested by Ms. Ripston's emphasis on the interests of certain "groups historically discriminated against." The basis of this position is that certain groups, based solely on immutable traits, have a constitutional right to preferences in the allocation of scarce public benefits, such that the CCRI violates the Equal Protection Clause by banning these preferences. However, was meant primarily to ensure republicanism against democracy is highly questionable. Given the founders' experience with the British Crown, their fears probably ran primarily in the other direction, against power being too narrowly concentrated in a single despot at the state level rather than too widely distributed through democratic devices like the initiative process.

Finally, the authors' general claim that the legislative process is superior to the initiative process is not convincing. While the need for thoughtful deliberation in the face of complex legal and political issues is well taken, I have three responses. First, the CCRI's passage is a poor occasion on which to make this case since the issue here is arguably not complex: subdivision (c) exceptions aside, should the State as a rule employ race and gender preferences in distributing scarce public benefits? Second, the influence of wealthy and other powerful interests on the legislative process as well as the "horse trading" that routinely occurs there make it doubtful that legislators typically vote based on full and thoughtful deliberation and in the public interest. See D. Hamburg, In the Money: A Congressman's Story, HARPER'S, July, 1997, at 24. These defects in the legislative process, in fact, justify the initiative process as a safety valve for voters to inform their representatives when they are being particularly unresponsive to their wishes. Rogers' and Faigman's thesis will thus have more merit if the influence of money in politics is greatly reduced, either by legislation (or more likely, by initiative) or if Buckley v. Valeo, 424 U.S. 1 (1976) is ever overruled. Finally, since successful ballot initiatives are subject to judicial review under the U.S. Constitution, I conclude that the threat of tyrannical majorities is outweighed by the democratic values served by the initiative process.

31. Ripston, supra note 17, at 1. Ms. Ripston apparently takes this position because a focus on individual rights would embrace the rights of any individual, including a white male, who would also then be entitled to a preference in the allocation of scarce governmental benefits. Apart from the absurdity of everyone being entitled to a preference, this would be inconsistent with the ACLU's goal of vindicating the interests only of certain groups.

32. When one opposes a constitutional provision that bans group preferences based on its immutable traits, one admits that certain groups are constitutionally entitled to such preferences. ACLU attorney Ed Chen has explicitly claimed as much. See Annie Nakao, Bay Area is 209 Battleground, S.F. EXAM'R, Nov. 4, 1997, at A14.
the assertion that groups are entitled to constitutional rights conflicts with a simple, fundamental principle that is consistently emphasized in modern equal protection jurisprudence. This fundamental principle is rooted in the textual evidence of the Fourteenth Amendment’s use of the word “persons”—the Equal Protection Clause protects individuals, not groups. Most recently, in Adarand Constructors, Inc. v. Pena, which tested the use of “set-asides” for minority owned businesses in federal contracting, the Court explicitly referred to “the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.”

Therefore, race and gender preferences as applied to groups violate this basic principle. If group preferences did not violate this basic principle, then the allocation of scarce governmental benefits like public employment could be determined by reference to group membership rather than the abilities and accomplishments of individual applicants for those benefits. Furthermore, the enjoyment of preferences


34. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112 (1995). As Judge O'Scannlain stated the principle, “[t]hat the Fourteenth Amendment affords individuals, not groups, the right to demand equal protection is a fundamental first principle of 'conventional' equal protection jurisprudence.” Wilson II, 110 F.3d 1431, 1441-42 (9th Cir. 1997).

35. Consider the “two pile” method. 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. It is so widely known to be used among public and private institutions that it is openly discussed in the law journals. See Michael Paulsen, Reverse Discrimination and Law School Faculty Hiring: the Undiscovered Opinion, 71 TEX. L. REV. 993, 995 (1993); Richard Delgado, Five Months Later (The Trial Court Opinion), 71 TEX. L. REV. 1011, 1014 (1993).

Even if “separate but equal” were not a thoroughly discredited theory of equal protection, the “two pile” method would not even rise to that level. It 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. Rather, it is used specifically in order to treat them differently based on the applicants’ race and gender, and this is the quintessence of a denial of equal protection to the individuals protected by the Fourteenth Amendment. Analogous to the phenomenon of “mission creep” in military operations, the “two pile” method embodies what may be called “factor creep”: the transformation of race and gender from minor, secondary factors in public hiring into major, primary factors in that process.

Professor Delgado actually suggests that the “two pile” method is em-
by some individuals based solely on race or gender amounts to racial or gender discrimination against those individuals whose immutable traits do not earn them the preference. Former United States Attorney General Richard Thornburgh recently summed it up, "it's a zero-sum game: when one person is favored because of race another is disfavored because of race."\(^{36}\)

Judge Henderson never addressed the principle that equal protection analysis focuses on individuals. He mentioned that defendants Governor Wilson et al. argued that "the affirmative action efforts prohibited by Proposition 209 are, under existing Fourteenth Amendment principles, themselves constitutionally suspect and subject to heightened scrutiny."\(^{37}\) The judge responded only that "the Supreme Court in Seattle expressly declined to reach the question of what level of equal protection scrutiny was applicable to Seattle's busing plan."\(^{38}\) Judge Henderson avoided a direct reply to the defendants' arguments. Moreover, he did not address the argument that under race and gender preferences as actually employed, members of neither the favored nor the disfavored groups are treated by government as individual persons.\(^{39}\)

The individual as the locus of the Equal Protection Clause is consistent with the liberal democratic values displayed throughout the Constitution. If modern democracy consists generally of institutions, processes and devices that serve to disperse power from the few to the many, then enforceable rights against government are, consistent with democratic values, located in the individual.\(^{40}\) Individuals,
after all, generally have less power than groups. Furthermore, it is the individual who experiences and suffers the impact of the exercise of governmental power on his interests. Moreover, history reveals the dangerous tendency that occurs when the group is held to be of primary political importance: the collectivism at the heart of modern fascism. Under such a regime, the unequal treatment of individuals based solely on race is permissible if it is deemed necessary to the achievement of a "greater" collective interest. Such a mentality can ensue if democratic safeguards like individual rights are not in place and, therefore, individuals should be very wary of embracing doctrine that emphasizes group rights. Claims of group rights are claims of inequality, not equality, and cut against the Equal Protection Clause.

As for the Constitution's liberal values, individually held

"collectivist traditions" in American political culture).

It is noteworthy that many constitutional rights outside the Fourteenth Amendment are held by individuals. Since it is the individual that is typically charged with crimes, for example, First, Fourth, Fifth, Sixth and Eighth Amendment rights are necessarily held by the individual so charged. Though groups enjoy a Seventh Amendment right to bring a civil action, this is an individual right as well. The Bill of Rights were made binding on the States through the Incorporation Doctrine. This occurred via the Due Process Clause of the Fourteenth Amendment, which like the Equal Protection Clause, explicitly refers to persons. See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN AND MARK V. TUSHNET, CONSTITUTIONAL LAW 804-09 (3d. ed., 1995). Finally, the right to vote, which is protected by several of the later amendments, is also held by individuals, not groups.

41. As Hans Kohn has written, 20th century European fascism "represented in all its forms a total repudiation of the liberal ideas of the seventeenth- and eighteenth-century revolutions [and] of the rights of the individual ...." Hans Kohn, Nationalism, in 3 DICTIONARY OF THE HISTORY OF IDEAS, at 331 (emphasis added). Martin Riff adds that "fascist regimes ... placed great emphasis on their ability to provide for the interests of special groups in society ...." Martin Riff, Fascism, in DICTIONARY OF MODERN POLITICAL IDEOLOGIES 103 (Martin Riff ed., 1987) (emphasis added). As Dean Brest observes, "[m]ost societies in which power is formally allocated among racial and national groups are strikingly oppressive, unequal, and unstable." BREST, supra note 28, at 50. See also JOHN DEWEY, Means and Ends, in DEWEY: POLITICAL WRITINGS, supra note 40 at 230-33. The link between fascist values and the position of CCRI opponents, then, is the willingness to sacrifice the rights of the individual so long as he belongs to another race or gender group. As Paul Craig Roberts recently noted, race and gender preferences also reestablish the status-based privileges of feudalism, another discredited form of social organization. Paul C. Roberts, Remarks at the American Political Science Annual Convention, Aug. 29, 1997.

42. Majority rule makes sense and can only function properly if each individual member is the locus of civil rights, such as equal protection under the laws and the right to vote as members of the group.
enforceable rights are perhaps the key device under classical liberal theory by which the individual is liberated from the illegitimate control of the group. It is one of many liberal values and institutions provided for by the Constitution, such as the freedom to contract, the freedom to engage in a market economy and religious toleration. One may object that citing the authority of liberal values begs the crucial question whether "liberal legalism" is an appropriate constitutional paradigm in the late twentieth century. After all, critical legal scholars, critical race theorists and feminist legal scholars have had some success in the last several years in exposing some of liberalism's shortcomings. However, as Peter Berkowitz has recently shown, even liberalism's major critics embrace bedrock liberal principles. More to the point, there are serious impediments to an adequate theory of equal protection that abandons the individual as its focus.

43. As Brest writes, "If a society can be said to have a underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals. . . ." Brest, supra note 29, at 49. The autonomy and protection of the individual is, in fact, a key component of both classical and modern liberalism. See DAVID G. SMITH, Liberalism, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 281 (1981).

44. See U.S. CONST. art. I, § 10.
45. See U.S. CONST. art. I, § 8, cl. 3.
46. See U.S. CONST. amend. I.
47. As Brest observes, "to say that we embrace the liberal tradition is, of course, no response to the claim that we should modify the theory and restructure our institutions accordingly." Brest, supra note 29, at 50.
50. As Brest suggests, "it seems reasonable to place the burden on proponents of a theory of group racial justice to show that it is morally tenable and consistent with other values that we cherish." Brest, supra note 28, at 50. The failure to provide a coherent alternative to the regime that has been attacked has long been a difficulty for critical schools. One example is Marx' inability to provide a specific, credible arrangement to accompany his devastating critique of capitalism. See KARL MARX, Wage Labor and Capital and The Communist Manifesto in THE MARX-ENGELS READER (Robert C. Tucker, ed., 1978). Similarly, Critical Legal Studies (CLS) has been taken to task for its failure to ar-
The emphasis on group rights brings with it the difficulties of choosing which groups are to be favored and who belongs to those groups. Though CCRI opponents no doubt have firm opinions on such questions, these are simply not clear-cut issues, particularly as ethnicity in America is increasingly diluted through interracial marriage. Thus, many would agree that if the Fourteenth Amendment required states to use group preferences in allocating public benefits, African and Native Americans would have the strongest claims. This is because Europeans who colonized America oppressed Africans and indigenous peoples by killing, robbing and enslaving them and, therefore, they have the strongest claim for reparations. While some Hispanics (e.g., Mexicans rather than Chileans) would also seem to have claims based on similar historical atrocities, their claims are less clear than those African and Native Americans. Those of Mexican ancestry may have a claim only if their ancestors were natives of this land or otherwise held land within what is now US territory and were subsequently forced out. If a Mexican American did not have ancestors who suffered at the hands of the American colonists, then that individual has a weaker claim for reparations. Spaniards, including many of the Spanish clergy, committed some of the worst crimes against the Native Americans.

As for preferences for women, these are also not as legitimate as preferences for other groups, particularly those


52. See Eric Pooley, Fairness or Folly?, TIME, June 23, 1997, at 35. As Professor Ford asks, "[however] strongly racial and ethnic differences may be perceived... can they be pinned down with the conceptual coherence and replicability that group-oriented benefit allocation requires?" Christopher A. Ford, Administering Identity: the Determination of "Race" in Race-Conscious Law, 82 CAL. L. REV. 1231, 1239 (1994). I leave aside here the implications of sex-change operations.

53. See L. Katzner, Is the Favoring of Women and Blacks in Employment and Educational Opportunities Justified? J. FEINBERG AND H. GROSS, supra note 51, at 468, and Fiss, supra note 51, at 460-63.

who have come into maturity since the feminist movement of the 1970's.55 Because there are great difficulties involved in justifying which groups are entitled to preferences, it may be argued that these difficulties disappear when the central criteria for distributing scarce public benefits are the accomplishments and abilities of individual applicants.66

Likewise, the proportion of a particular ancestry required to qualify for a racial preference presents a difficult analysis. Any place the line is drawn will be very arbitrary.67 While public policy-making sometimes requires the drawing of arbitrary lines, it does not establish that the lines currently drawn are defensible. Again, when the focus is on the accomplishments and abilities of the individual, rather than on race or gender, the problem dissolves.

This leads to an important logical reason why group

55. As one indication of this, "between 1965 and 1985, the proportion of women students in ABA approved law schools increased from four percent to forty percent." Hermina H. Kay, The Future of Women Law Professors, 77 IOWA L. REV. 5, 11 (1991). See also Katzner, supra note 53.

The difficulty of this issue is illustrated by the attempts of no less able a legal theorist than Professor Owen Fiss. Far from making a convincing case for group preferences under the Equal Protection Clause, he illustrates what a slippery slope it involves. Fiss, supra note 51, at 464. He attempts to delineate criteria by which African Americans can be deemed a "specially disadvantaged group" and thus entitled to protection as a group under the Equal Protection Clause. Id. However, he can say no more with respect to other groups than that. "Jews or women might be entitled to less protection than American Indians, though nonetheless entitled to some protection." Id. (emphasis added). The delineation of an adequate theory of group protection for the latter groups is concededly beyond the scope of his article. Still, his caution and vagueness indicate his recognition of the intractable quagmire into which we are thrust when we try to avoid the fact that the Fourteenth Amendment protects "persons," not groups.

56. In this connection, Professor Michael Sandel recently referred to "the sacred American myth that landing a job, or a seat in a freshman class, is a prize that one deserves thanks solely to one's own efforts." Michael Sandel, Picking Winners, THE NEW REPUBLIC, Dec. 1, 1997, at 13. This misstates the principle dismissed as a myth, however, for it is not one's efforts, but his accomplishments and abilities, that are the proper basis of allocating benefits. One might, after all, expend great efforts toward achieving a goal yet fail to reach it or to exceed mediocre ability.

57. To illustrate, imagine a white male who is one-sixteenth Native American where the minimum requirement is one-eighth. Had his great grandmother rather than his great great grandmother been full blooded Native American, he could now enjoy a race preference in his college, graduate school, employment and research grant applications. Yet it is difficult to see how his life would be significantly different, and therefore how he would be more deserving of a preference. He would almost certainly not look very different and could choose to identify with his Native American ancestry just as easily either way.
rights cannot be read into the Equal Protection Clause. CCRI opponents' argue that one group—white males—has more power in this society than do women and people of color. While this premise may be true, it is fallacious to conclude that every woman or minority is thereby entitled to a preference over every white male. Specifically, this error in logic is called the fallacy of division—because something is true of the whole it is, therefore, true of the part. It is the assertion that the same relationship between groups necessarily exists between their parts. In the context of preferences, the reasoning is that because white males as a group have more power than do any other racial groups, any individual white male has more power than any individual member of the other groups. Thus, race and gender preferences may be used to protect the group.

One symposium contributor, Professor Yxta Maya Murray, commits a variation of this fallacy. She does not deny that merit should be the standard by which public benefits are distributed, but seeks to redefine merit by reference to the "virtues" of "outsiders." In the context of preferences, the reasoning is that because white males as a group have more power than do any other racial groups, any individual white male has more power than any individual member of the other groups. Thus, race and gender preferences may be used to protect the group.

One symposium contributor, Professor Yxta Maya Murray, commits a variation of this fallacy. She does not deny that merit should be the standard by which public benefits are distributed, but seeks to redefine merit by reference to the "virtues" of "outsiders." asserts Professor Murray, "has been constructed without reference to the virtues and values of people of color, women, and sexual minorities—typical 'Outsiders'..." While Murray discusses such "outsider" virtues as empathy, tenacity, praxis and commitment, nowhere does she provide any clear definition of "insiders" and "outsiders." Instead, she insinuates that the terms correlate with whether one is a heterosexual

58. Judge Posner captures the essence of this fallacy in terms of the meaning of prejudice: "to be 'prejudiced' means ... to ascribe to the members of a group defined by a racial or similarly arbitrary characteristic attributes typically or frequently possessed by members of the group without pausing to consider whether the individual member in question has that characteristic—sometimes without being willing even to consider evidence that he does not." Posner, supra note 51, at 10.


60. Murray, supra note 59, at 1075.

61. See id. at 1095-1110.
white male, and nothing she says allows the possibility that such an individual could develop the virtues of an "outsider." For Professor Murray, then, "insider" versus "outsider" is apparently a binary opposition, as clear as black versus white, male versus female and straight versus gay.

To test the merits of this thesis, consider public employment, an example the CCRI explicitly regulates. Suppose that two unemployed men, an African American and a Caucasian, apply for a single opening in a fire department. In what sense is a white man such an "insider" that it is justifiable to employ a preference against him based solely on his skin color? He is, like the African American man, unemployed and needs to pay his bills and put food on the table. These are general human problems and, therefore, the applicants are in precisely the same situation. A race-based preference in favor of either one (and against the other) is not justified. Professor Murray is more interested, however, in "the higher echelons of education and employment." Suppose that two finalists for a public university teaching position are

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62. See id. at 1103, 1105.
63. It will not do to say that the white man can simply obtain work elsewhere, for he will still be an "insider" against whom a preference may be used. As Judge Posner asks, however, "is the position of whites in this country so unassailable that they can not be harmed by racial quotas? Or is the impact of such quotas likely to be concentrated on particular, and perhaps vulnerable subgroups within the white majority?" Posner, supra note 51, at 25. The unemployed seems to be a good example of a vulnerable subgroup. Though Posner speaks of quotas, his comments also apply to preferences, as the effect of either is identical for those who are unemployed as a result of their use. Id.
64. As Professor Richard Wasserstrom has written, "[a]s with the case of race, by almost all important measures, it is more advantageous to be a male rather than a female." RICHARD A. WASSERSTROM, PHILOSOPHY AND SOCIAL ISSUES 17 (Univesity of Notre Dame Press 1980). As Ms. Yvonne Scruggs of the Black Leadership Forum recently expressed the same idea: "[t]here has always been affirmative action for white males." (C-SPAN television broadcast, June 17, 1997). Whatever the precise meaning of such statements, they are hardly true now because practices like the "two pile" method have for many years disfavored the employment of white males. See Delgado, supra note 35. As one labor market observer recently wrote, "1998 will be the worst year ever for white men. As pressures to diversify the workplace increase, hiring and downsizing policies will disproportionately hurt them." M. Nemko, Women and Democrats Could Prosper This Year, S.F. EXAM'R, Jan. 11, 1998, at J2. Therefore, one wonders where all that power is when the application for scarce benefits like employment is disfavored simply and precisely because you are a white male.
65. Murray, supra note 59, at 1075.
a white male and a white female. Imagine the woman’s parents are well-educated and well-connected professionals who have been married for forty years. Suppose further that she has an older sister and a younger brother who are also professionals. By contrast, suppose that the man’s parents never pursued a degree beyond high school, that his only brother died when he was a small child and that his parents divorced five years later, partly because of that death. Given these “concrete experiences,” how is this woman an “outsider” compared to this man? How is it that she alone, based solely on her gender, has had to overcome the obstacles through which one develops empathy, tenacity, praxis and commitment, and is thus entitled to a preference? Professor Murray’s article does not speak to these questions.

This is not to suggest that a preference for this man based on his misfortunes is just. Though he has had to overcome difficulties that many women and minorities may have never known, this man is not entitled to special treatment on that basis alone. For one thing, comparing applicants’ oppressions as part of the hiring process would raise “victimhood” to new heights and attempt to quantify that which is unquantifiable. More importantly, one’s personal trials and tribulations are irrelevant to the decision of who should receive a preference since it tells us little if anything about job performance. The man’s value to the students and taxpayers to whom he would be accountable is a function of his abilities as a teacher and a scholar, and these simply may not correlate with his misfortunes.

It should be equally clear that the woman is entitled to

66. See id. at 1087.
67. Id. at 1106. By her own facts and criteria, in fact, Professor Murray is an “insider” compared to the man in this example. She notes that many of the students with whom she attended law school were “rich people with fancy backgrounds [who] had grown up having dinner table conversations about public policy, legal doctrine, and international relations . . . .” Id. While neither Murray nor our male applicant has had that experience, she notes that her mother, unlike either of his parents, attended college. Id. That, as she suggests, is a great advantage to a child, regardless of race and gender.
68. In this connection, in response to the Clinton Administration’s recently proposed changes to the standards for small businesses to qualify for federal set-asides, The New Republic has dubbed the process of “converting grievances into entitlements” as “the reductio ad absurdum of victimhood politics.” Whitewash, The New Republic, Sept. 22, 1997, at 11.
69. As Murray admits, virtue for Aristotle must benefit its owner and others. See Murray, supra note 59, at 1089 n.73.
no preference over the man based simply on her gender.\textsuperscript{70} First, she has had advantages over him, so that the assumption of an overall disadvantage due to gender is unfounded. Furthermore, gender alone tells us little about what "outsider" virtues she has developed and virtually nothing about her value to those to whom she will be accountable.\textsuperscript{71} In many years as a student and teacher, I have seen women, African Americans and Latinos who are excellent teachers and I have seen women, African Americans and Latinos who are incompetent teachers. I can make both comments about white males as well. Professor Murray does not seem to recognize that "insider" versus "outsider" status is not a binary

\begin{itemize}
\item[M. Sandel, supra note 56, at 16. As Dean Brest adds:]
\item[\textsuperscript{70} As Professor Sandel argues in this connection:]
\item[those who benefit [from affirmative action] are not necessarily those who have suffered, and those who pay the compensation are seldom those responsible for the wrongs being rectified. Many beneficiaries of affirmative action are middle-class minority students who did not suffer the hardships that afflict young African Americans and Hispanics from the inner city. And those who lose out under affirmative-action programs may have suffered obstacles of their own. Those who defend affirmative action on compensatory grounds must be able to explain why otherwise qualified applicants should bear the burden of redressing the historic wrongs that minorities have suffered.]
\item[Brest, supra note 28, at 52 (emphasis added). See also RICHARD RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ ch. 5 (1982).]
\item[71. Professor Delgado commits a variation on the fallacy of division in his attempt to justify the "two pile" method. Delgado, supra note 35. In dismissing the claim that "demographic diversity does not guarantee intellectual diversity," Id. at 1016. He states:]
\item[a moment’s reflection enables us to take notice that most law-and-economics scholars are conservative republicans, that most radical feminists are women, not men; and that most Critical Race Theory exponents are men and women of color. Law schools are not required to ignore what everyone knows, namely that color, gender and life experiences sometimes matter.]
\item[Id. It is not clear how such statements advance the discussion. Even assuming these generalizations to be correct, they tell us nothing about the politics of the individual applicant for a teaching position, even on the dubious assumption that this is nearly as important as are his credentials, teaching and scholarship. Further, Delgado’s recognition of the need to qualify his claims with words like "most" and "sometimes" undercuts much of the force his claim might otherwise have. Finally, while life experiences “sometimes” do matter, our example makes clear that even white males have life experiences.]
\end{itemize}
opposition, but rather a continuum of kind and degree. Human experience is far too varied to pretend that the burden of overcoming obstacles necessarily correlates with race or gender, even if that burden were the most relevant criterion for public employment.\(^{72}\)

Professor Murray's thesis is further undermined by three additional difficulties. First, she focuses at length on the Latina experience,\(^{73}\) yet that experience does not justify preferences for other women or men of color.\(^{74}\) Second, her reliance on Aristotle's moral theory is largely misplaced insofar as she cites some of his weakest, most objectionable doctrines to make her case.\(^{75}\) Third, though narrative has become

\(^{72}\) The division of humans into "insiders" and "outsiders" based simply on race or gender also ignores the social and economic interrelatedness among various groups which feminist scholars have properly underscored. See, e.g., West, supra note 48, at 29; Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 855 (1990). To illustrate, what if the man were married, and his wife's ability to quit work and complete her college education depended on his being employed? What if she were African American or Hispanic, and the couple had three young daughters for whose college education they need to save? These possibilities suggest that the assignment of merit and thus preferences for public benefits based solely on race and gender by no means neatly advances the interests that CCRI opponents are concerned about.

\(^{73}\) Murray, supra note 59, at 1091-1113.

\(^{74}\) The use of such a narrow contextual basis to challenge CCRI generally is typical of CCRI opponents. Another common example is the virtually exclusive reliance on the importance of race-based college admissions in challenging the CCRI in its entirety. See, e.g., Eve Paterson, Proposition 209 and Resegregation, S.F. Exam'r, May 23, 1997, at A23; Jonathan Peterson, Clinton Calls for "National Effort" to End Racism, L.A. TIMES, June 15, 1997, at A1; Rose Elizabeth Bird, A Brutal Education Legacy, S.F. EXAM'R, June 29, 1997, at D7. Concededly, preferences based on immutable traits are relatively defensible in this context. As Jeffrey Rosen has observed, "nonremedial racial preferences may be permissible in very limited circumstances, such as public university admissions ... where the burdens are diffuse and the social benefits are compelling." J. Rosen, Lee's Way, THE NEW REPUBLIC, Dec. 1, 1997, at 53. The CCRI, however, invalidates gender as well as race preferences, and in public employment and contracting as well as university admissions. The arguments that might support preferences in one context do not simply translate into others, and so do little to undermine the CCRI in its entirety.

\(^{75}\) See Murray, supra note 59, at 1083-85. She refers, for example, to Aristotle's theory of natural slavery and his belief in women's intellectual inferiority. Id. She then declares a "strong connection" between such views and the modern "anti-affirmative action" position. Id. This assumes, however, that anyone who voted for the CCRI is "anti-affirmative action," which is an oversimplification. As I shall show, there is no inconsistency in opposing preferences yet approving of weaker forms of affirmative action. Speaking for myself, further, it is largely because women are not intellectually inferior to men that I challenge their right to preferences based solely on gender.
popular in legal scholarship and is valuable in certain contexts, the “stories” of Professor Murray’s mother and grandmother have little clear relevance to the just allocation of constitutional rights among individuals in a world of scarcity.  

In sum, Professor Murray makes a weak case for retaining the race and gender preferences banned by the CCRI. She concedes that merit remains the criterion by which governmental benefits such as public employment are properly distributed.  

I concede, in turn, that the virtues she identifies as signifying merit are, to the degree they can accurately be gauged, relevant to that process. She never shows, however, that white males cannot develop these virtues and that they are sufficient as criteria for the distribution of public benefits. If such qualitative criteria as these virtues are taken into account, then quantitative factors like test scores deserve a place as well. The claim that teaching evaluations

76. Unlike a legal argument in an adversary proceeding, a narrative is not subject to challenge or cross-examination, as is essential when enforceable individual rights are at stake. A narrator can by ignorance or design omit parts of a story that would be relevant or even crucial in a legal setting. See Daniel A. Farber and Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807 (1993); Mark Tushnet, The Degradation of Constitutional Discourse, 81 GEO. L. J. 251, 260 (1992). Even Professors Delgado and Bell concede as much. See Delgado, supra note 35, at 2415 n.22; Derrick Bell, Foreword: The Civil Rights Chronicles, 99 HARV. L. REV. 4, 82 (1985). Though Professor Murray claims that Aristotelian moral theory is open to narrative method, Murray, supra note 59, at 1087, Aristotle lived in an intellectual culture that considered logos, or reasoned discourse, to be the prerequisite for democratic self government and the rule of law. See H.D. RANKIN, SOPHISTS, SOCRATICS, AND CYNICS 13 (1983). As valuable as narrative method can be and as moving as are the stories of Professor Murray’s mother and grandmother, they are insufficient to support the race and gender preferences banned by the CCRI. It goes without saying that the mother of the white male in our example probably has a compelling story also, partly as a result of which her son may well have developed some of the virtues of the “outsider.”

77. Professor John Scrutney has defended affirmative action on the basis that there is little meritocracy in American society. John Scrutney, Remarks at the American Political Science Association Annual Convention (Aug. 29, 1997). While there is some truth to his premise, the conclusion he draws is difficult to justify. The conscious abandonment of individual merit as the primary standard for distributing public benefits yields a blatant race and gender spoils system, like that embodied in the “two pile” method, See Delgado, supra note35, in which there is little incentive for excellence on the part of either the favored or the disfavored group. Even if individual merit cannot precisely be gauged, it can generally be approximated. I submit that the better conclusion to draw from the premise that merit does not always determine reward is that we should redouble our efforts to make it so.
or LSAT scores in the 99th rather than the 70th percentile say nothing important about one's ability is highly questionable and rather convenient. Rather than making an argument to this effect, Professor Murray simply dismisses the numbers.

In this section of the article, I have attempted to show why the individual is properly the focus of equal protection analysis. Given the arguments presented thus far, I submit that California voters had a legitimate interest in abolishing race and gender preferences in the distribution of public benefits. Though CCRI opponents may claim to advance democracy by dispersing power, they ignore both the will of the majority and the plight of the individual, yet both of which support the constitutionality of CCRI-like reforms. Therefore, CCRI opponents' focus on the interests of certain groups yields a constrained interpretation of the Equal Pro-

78. Professor Lani Guinier recently argued that standardized test scores are largely invalid gauges of ability since students from rich families can afford the best test preparation courses. Lani Guinier, Reframing the Affirmative Action Debate, Remarks at Dominican College (Nov. 21, 1997). While there is some validity to this claim, one who relies on this claim to oppose CCRI commits the fallacy of division, for not all and only white males come from rich families. Even given the defects of standardized tests, further, race and gender are hardly better determinants of one's ability. The Kaplan Center, finally, the nation's most extensive test preparation center, grants scholarships for its courses based on financial need.

79. See Murray, supra note 59, at 1112. It is noteworthy in this connection that much of Plato and Aristotle's intellectual project was to expose the flaws in the work of the Sophists, those colorful itinerant teachers of manners and oratory whose educational revolution both advanced and undermined classical Athenian democracy. See, e.g., G. B. Kerferd, The Sophistic Movement ch. 4 (1981); Martin Ostwald, From Popular Sovereignty to The Sovereignty of Law 237-40 (1986). Aristotle's basic response to the Sophists was that they abused logic by failing to make appropriate distinctions of kind and degree with respect to the subject matter under discussion. See, e.g., A.E. Taylor, Aristotle 15 (1955); Rankin, supra note 76, at 22-23; Aristotle, De Sophisticis Elenchus in McKeon, supra note 59, at 209. The division of humanity into "virtuous" and "others" based solely on race and gender is arguably a good example of sophistry.

80. Justice Powell's comment in another equal protection decision is thus apropos: "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535 (1982). In a similar vein, as Judge O'Scannlain sums up his response to the ACLU's claim that people of color and women have a constitutional right to race and gender preferences, "[t]he Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." Wilson II, 110 F.3d 1431, 1446 (9th Cir. 1997).
tection Clause in light of the majority rule, which is at the heart of the constitutional scheme.

C. The Political Structure Doctrine Difficulty

A third difficulty that undermines the ACLU's challenge to the CCRI is Ms. Ripston's assertion that the measure violates equal protection by "creat[ing] a different political process for women and people of color."\(^81\) Symposium participants, Professors Vikram Amar and Evan Caminker, attempted the heavy lifting required to fill out this theory.\(^82\) Judge O'Scannlain refers to it as the "political structure" doctrine,\(^83\) and Judge Henderson in his opinion relies on Amar and Caminker's arguments at length.\(^84\)

The political structure doctrine is rooted in two cases, *Hunter v. Erickson*\(^85\) and *Washington v. Seattle School District No. 1*.\(^86\) In *Hunter*, the Supreme Court struck down an amendment to the Akron City Charter requiring the approval of a majority of city voters for any fair housing ordinance that

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83. See *Wilson II*, 110 F. 3d at 1439. Political structure analysis is a subtle, nuanced strain of equal protection analysis. Amar and Caminker as well as Judge O'Scannlain distinguish it from conventional equal protection analysis. Amar and Caminker actually concede the CCRI would survive conventional equal protection analysis insofar as it involves no purposeful discrimination. See Amar & Caminker, *supra* note 82, at 1022-24; *Wilson II*, 110 F.3d at 1439. I suggest, however, that the political structure doctrine is attractive to CCRI opponents precisely because it appears to implicate both triggers for heightened scrutiny under the conventional approach where state action either: 1) employs a suspect classification, like race or 2) impinges on a fundamental interest, like voting. Indeed, Judge Henderson quotes plaintiffs' first ground for challenging the CCRI as the claim that equal protection guarantees "the right to full participation in the political life of the community." *Wilson I*, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996); See also Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994). The claim of such a right seems clearly an attempt to establish a derivative of the fundamental interest in voting.
84. See *Wilson I*, 946 F. Supp. at 1499-1509. Though the ACLU advanced the political structure doctrine as well as a conventional equal protection argument before the Ninth Circuit, the appellate court was not convinced. It held that the CCRI constitutes nothing more than a "mere repeal" of existing law back to the federal constitutional minimum, and that CCRI does nothing more than "address, in neutral fashion, race-related matters." *Wilson II*, 110 F.3d. 1431, 1443 (9th Cir. 1997). It thus ruled that *Crawford v. Board of Education*, 458 U.S. 527 (1982) controls rather than *Hunter* and *Seattle*. See *Wilson II*, 110 F.3d 1440-46.
86. 458 U.S. 457 (1982).
would regulate real estate transactions "on the basis of race, color, religion, national origin, or ancestry." Since the Court found that the amendment effectively drew a racial classification that treated racial housing matters differently and less favorably than other matters, the Court applied strict scrutiny. By an eight-to-one vote the Court held that the statute violated the Equal Protection Clause.

In Seattle, the Supreme Court struck down Initiative 350, a Washington ballot measure that nullified a busing plan by the Seattle School Board designed to remedy de facto racial segregation in the Seattle public schools. Though the initiative was facially race neutral, the Court held by a five-to-four vote that in light of its history, the initiative effectively reallocated power in a way that in Hunter was found to violate equal protection. In other words, though the state may restructure its decision-making process, for example, by removing authority for certain decisions from the local to the state level, it may not do so in a way that effectively employs an impermissible racial classification.

Amar and Caminker distill a two-pronged test—the political structure doctrine—from Hunter and Seattle:

First, a challenger must show that the law in question is "racial" or "race-based" in "character," in that it singles out for special treatment issues that are particularly associated with minority interests. Second, the challenger must show that the law imposes an unfair political process burden with regard to these "minority issues" by entrenching their unfavorable resolution.

Amar and Caminker argue that the CCRI satisfies both of these prongs and, therefore, violates the political structure doctrine. Although their argument would be defeated by showing that one of the prongs is not satisfied, this article

87. Hunter, 393 U.S. at 387.
88. Id.
89. See Seattle, 458 U.S. at 462.
90. Id. at 467-87. The busing plan intended to bring white children to the predominately black area and black children into the white area. Id.
91. See id.
92. Amar & Caminker, supra note 82, at 1026. Since this rule focuses only on race, Amar and Caminker explicitly disavow any attempt to justify preferences based on gender. See id. at 1022 n.10. Thus even if their argument with respect to race were persuasive (and I shall show that it is not), it would provide no support for retaining gender preferences.
93. Amar & Caminker, supra note 82, at 1029-55.
contends that neither prong is satisfied, beginning with the second prong.

1. Prong Two: Does the CCRI Impose an Unfair Political Process?

For groups seeking race and gender preferences, noted Judge Henderson, the CCRI removes the political process from the legislative and administrative level to the more remote level of constitutional amendment. On this basis, he concluded that the second Hunter/Seattle prong is satisfied. As Judge O'Scannlain observed in response, however, "a law [that] resolves an issue at a higher level of state government says nothing in and of itself." Justice Harlan clarified this in his Hunter concurrence and Justice Blackmun conceded the point in Seattle. Therefore, the ACLU will probably not be able to undermine this position before the current Supreme Court.

The ACLU's also argues that the CCRI 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 denial of some benefit or imposition of some burden inapplicable to other similarly situated individuals. Under the CCRI, however, no individual can secure a race or gender preference in the allocation of public benefits without a constitutional amendment. The "special burden" the CCRI imposes on women and people of color is

95. See id.
96. Wilson II, 110 F.3d. 1431, 1443 (9th Cir. 1997).
97. See Seattle, 458 U.S. at 486 n.29. Again, this underscores the fact that satisfaction of the second prong is only a necessary, not a sufficient, condition for the doctrine's application. The significance that Judge Henderson attaches to the restructuring of the political process would thus only exist if it were done with respect to a racial issue. Since we shall see that this first prong is not met, any restructuring of the process by which race and gender preferences for public benefits may be secured is rendered insignificant. As Justice Harlan noted, using a related but not identical example, even a rule making a state constitution relatively difficult to amend is not subject to equal protection attack so long as it is made on the basis of neutral principles. See Hunter, 393 U.S. 385, 394-95 (1969) (Harlan, J. concurring).
98. Amar & Caminker, supra note 82, at 1043 (quoting Hunter, 393 U.S. at 391; Seattle, 458 U.S. at 470).
99. See supra note 4.
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thus not obvious.

Finally, the ACLU also contends that the measure creates a special burden for women and racial minorities compared to groups like veterans, the aged and the disabled. It claims that the CCRI does not prohibit these groups from seeking preferences based on their group membership, and yet it prohibits women and people of color from doing so. This argument was raised before the Ninth Circuit, and Judge O'Scannlain responded that "those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status who continue to enjoy access to the political process at all levels of government include, we must remember, everyone—members of all races and both genders."

Concededly, this response appears to avoid the ACLU's point. That is, Judge O'Scannlain does not seem to address the argument that under the CCRI, racial minorities and women are, by seeking protective legislation in their capacities as members of those groups, treated differently than the aged, disabled or veterans are treated in seeking such legislation in their capacities as members of those groups. However, even considering the various preferences allowed under current California law to some groups, the position of CCRI opponents is still unpersuasive. For example, some veterans' preferences are currently allowable under California law. However, they are distinguishable from race and gender preferences insofar as they constitute a reasonable means of encouraging people to enlist in the armed forces. They also provide a reward for service, which is often life-threatening,

100. Again, dismissal of this point based on the power of white males as a group commits the fallacy of division. Justice Powell's dissent in Seattle, which has effectively become the law, speaks to this issue of special burdens. As he wrote, "racial minorities, if indeed they are burdened by Initiative 350, are not comparatively burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the state level." Seattle, 458 U.S. 457, 498 n.13 (1982) (Powell, J., dissenting). The same is true of the CCRI: even if it is said that it burdens women and people of color, it does not comparatively burden them.

101. See Wilson I, 946 F. Supp. 1480, 1499 (N.D. Cal. 1996); Wilson II, 110 F.3d 1431, 1445 (9th Cir. 1997).

102. Judge Henderson found this fact significant. See Wilson I, 946 F. Supp. at 1499, 1506.

103. Wilson II, 110 F. 3d at 1445 n. 17.

104. See, e.g., CAL. GOV'T. CODE § 12940(a)(4) (West 1992); CAL. GOV'T. CODE § 18979(a) (West 1995).
rather than simply giving a reward for having been born with certain immutable traits.

While veterans' preferences are allowable under California law, the aged and disabled with minor exception only enjoy protection from discrimination. However, there is a crucial distinction between a group's ability to secure anti-discrimination legislation and its ability to secure preferences. Thus, after the CCRI, the aged and disabled can certainly ask for preferences in the allocation of scarce public benefits. If the preferences were granted and then challenged on equal protection grounds, however, these groups would have no greater right based on their group membership than would women or people of color. The CCRI thus denies the latter groups no tangible right retained by the aged and disabled.

Furthermore, 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. CCRI opponents have recently disputed such a claim, asking why athletic and legacy preferences in college admissions are not. Their

106. See infra text accompanying notes 116-127.
107. This assertion is subject to considerations that fairly and reasonably render members of the group "not similarly situated" to other potential recipients of public benefits. For reasons of physical safety, for example, California law directs local agencies "to consider criteria which give priority to rehabilitation of senior citizen housing." CAL. HEALTH & SAFETY CODE § 37915 (West 1997). Preferences in favor of disabled veterans, further, are allowed "in making appointments to positions performing the duties of... representatives in the disabled veterans outreach program..." CAL. GOVT. CODE § 18979(a) (West 1995). In some situations, race or gender might function in the same way, for example, in hiring the director of a Black Studies program at a University of California (UC) or California State (Cal) campus or in hiring guards for a women's prison. As this article contends, "general societal discrimination" is properly insufficient in constitutional law to establish that women and minorities are not similarly situated to white males when applying for public employment generally.

108. See, e.g., William M. Banks, Black and Brown Athletes Boycott UC, L.A. TIMES, Nov. 4, 1997, at B7; Editorial, A Court in Fantasyland, L.A. TIMES, Nov. 4, 1997, at B6; Frank Del Olmo, The Affirmative Action Case isn't Closed, L.A. TIMES, Nov. 9, 1997, at M5; Gregory Lewis, Proposition 209 Hurts UC, says Education Leader, S.F. EXAM'R, Jan. 9, 1998, at A5. Professor Banks makes a compelling case that athletic preferences are illegitimate, but one wonders what a boycott of the UC by top minority athletes would really accomplish, even assuming it would ever happen. One form of preference would end, of course, since its potential recipients would uniformly reject it. In order to make up the
point seems valid at first glance, and their call for a serious national discussion of preferences is well taken. However, they fail to justify race and gender preferences, for the constitutional problem remains that there are many people who benefit from none of the preferences mentioned thus far. Equal protection is a right held by all individuals, not only by those who benefit from one or another kind of preference. 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.\(^\text{109}\)

As for athletic and legacy preferences, there is concededly merit to the argument for their elimination. Given the revenues typically generated through such preferences, however, such preferences may be necessary for public universities to survive so long as tax and tuition rates remain in their current general range.\(^\text{110}\) If other ways of generating sufficient revenues for public universities can be found, then the termination of athletic and legacy preferences may be feasible. As for veterans’ preferences, perhaps we need to devise other ways to encourage enlistment and to reward veterans for their service. However, even if such preferences are here to stay, the constitutional problem with race and gender preferences is still not justifiable.

2. Prong One: Is the CCRI “Racial in Character?”

The first prong of the political structure doctrine is the requirement that the state action be “racial in character.”\(^\text{111}\)


\(^{111}\) See supra note 92 and accompanying text.
The weaknesses of CCRI opponents' arguments are most apparent here. Before the CCRI's enactment, California used race and gender classifications for the purpose of granting preferences. The CCRI abolished those preferences by prohibiting the State from classifying on the basis of race and gender in the distribution of public benefits. Consequently, women and people of color are unable to secure race or gender preferences without a constitutional amendment. Nonetheless, Amar and Caminker argue that because the CCRI, like the measures invalidated in *Hunter* and *Seattle*, is "racial in character" it should have been struck down on the authority of those cases.

Concededly, the CCRI may be termed "racial in character" insofar as subdivision (a) explicitly prohibits preferences based on race. However, this characterization overlooks the crucial distinction between protection from discrimination based on race, as in *Hunter* and *Seattle*, and the denial of preferences based on race, as is the CCRI. While both are "racial in character," a classification based on race and gender in order to bestow a preference cannot simply be equated

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113. *See id.*
114. *See Amar & Caminker, supra* note 82, at 1032-41.
116. Judge Henderson commits the same fallacy when he refers to the CCRI as having "racial purposes" and a "racial [and gender] focus," and refers to affirmative action as being a "racial and gender problem." *See Wilson I*, 946 F. Supp. 1480, 1504-05 (N.D. Cal. 1996). Such phrases as "racial focus," "racial issue," and "racial classification," etc., of course, were used in *Seattle*. Blue Shield of Virginia v. McCready, 457 U.S. 465, 474 (1982). Since *Seattle* concerned racial desegregation, however, there is no basis to claim that these terms were intended to or can properly be used to control the question of the CCRI's constitutionality under the political structure doctrine. Nothing in *Seattle* lays a foundation for such terms to be extended to the declassification of race and gender as bases for preferences for scarce public benefits. Similarly, Judge Henderson's attempt to smuggle in the *Hunter/Seattle* rule of heightened scrutiny of racial (and by extension, gender) classifications without acknowledging the difference between classification and the CCRI's declassification is also mistaken. *See Wilson I*, 946 F. Supp. at 1508-09. Judge O'Scannlain encapsulates the distinction between busing programs like that in *Seattle* and the racial preferences invalidated by the CCRI as the difference between "stacked deck" programs and "shuffled deck" programs, arguing that "unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." *Wilson II*, 110 F.3d 1431, 1445 n.16 (9th Cir. 1997).
with declassification of race and gender in order to eliminate the use of such preferences. One is the reverse of the other and only the CCRI functions to place individuals on an equal footing.

This fallacy can be seen in the following way. Race and gender preferences repealed by the CCRI involved governmental bestowal of an advantage, an inequality, on some individuals over others based solely on an immutable characteristic. By contrast, when Hunter and Seattle invalidated governmental discrimination and segregation based on race, they functioned to make things equal for members of both races (specifically, access to good housing and schools). The CCRI, therefore, does exactly what the Court in Hunter and Seattle tried to do—it makes things equal where formerly there had been an advantage based solely on race (and here,}

117. As Judge O'Scannlain writes, "a law that prohibits the state from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." Wilson II, 110 F.3d at 1440. Viewed in this light, the CCRI really presents no equal protection issue at all. I suspect that astute CCRI opponents recognized this difficulty, and so pressed their political structure claim, as indicated above, as a "denial of the right to full participation in the political life of the community." Wilson I, 946 F. Supp. at 1489. As I argue below, however, the Supreme Court should not be persuaded.

Amar and Caminker's reliance on Reitman v. Mulkey, 387 U.S. 369 (1967), which concerned the validity of restrictive covenants based on race in contracts for the sale of property, is thus misplaced. See Amar & Caminker, supra note 82, at 1049. Like the charter amendment in Hunter, such covenants involve discrimination rather than preferences based on race. Similarly, Romer v. Evans, 517 U.S. 620 (1996), cited by Judge Henderson, although handed down after the symposium appeared, would have been no help to the ACLU. In Romer, gays in Colorado successfully challenged Amendment 2, a state ballot initiative which disabled them from securing local legislation protecting them from discrimination, not preferences, in housing and employment based on their sexual orientation. Just as he tries to employ Seattle out of context, Judge Henderson attempts to do so with Romer when he quotes that opinion in referring to groups seeking "aid from the government." Wilson I, 946 F. Supp. 1480, 1510 (N.D. Cal. 1996). Both protection from discrimination and preferences are "aid," but that does not mean they share the same status under the Equal Protection Clause.

118. See CAL. CONST. art. I, §31. Insofar as the state action involved in the CCRI is not a preferential policy, but rather the elimination of a preferential policy, Professor Fiss' attempted justification for race preferences and Professor Tribe's argument that legislatures ought to be free to design and implement affirmative action programs are inapplicable. See Fiss, supra note 51, at 465; Laurence Tribe, In What View of the Constitution Must the Law be Colorblind?, 20 J. MAR. L. REV. 201,205 (1986).


gender). The CCRI attempts to restore neutrality to the process of applying for public benefits, a goal which Amar and Caminker approve of.\footnote{121}{See Amar & Caminker, supra note 82, at 1042-45.} Though it has been termed "racial in character," the CCRI cannot be invalidated under the authority of Hunter and Seattle because the first prong of the doctrine is not satisfied.

There is another way to see how CCRI opponents equate protection from discrimination with the receipt of a preference. After conceding defendants' argument that the CCRI contains no classification on its face, Judge Henderson stated that Seattle dealt with such a problem by looking beyond the facial neutrality of Initiative 350 to inquire whether in reality "the burden imposed by the arrangement necessarily falls on the minority."\footnote{122}{Wilson I, 946 F. Supp. at 1502.} Like Amar and Caminker, he spoke at many points of state action that are "of concern to minorities," "in the interest of minorities" or "of special interest to minorities."\footnote{123}{See, e.g., id. at 1500, 1505, 1510; Amar & Caminker, supra note 82, at 1026, 1034 (emphasis added).}

Loosely speaking, protection from racial discrimination or segregation on the one hand and the securing of preferences based on race on the other, are both "in the interest of minorities." From the viewpoint of minorities, there is a strong interest both in protection from racial discrimination and in receiving a preference based on race. This loose way of speaking implies, however, that minorities are entitled as a matter of constitutional right to whatever "inures primarily to their benefit."\footnote{124}{Wilson I, 946 F. Supp. 1480, 1505 (N.D. Cal. 1996) (quoting Seattle, 457 U.S. at 472). See generally Wilson I, 946 F. Supp. at 1504-05.} That, however, is simply untenable. Because minorities (and women) have an interest in group preferences does not establish that they have a constitutional right to them.\footnote{125}{This is especially problematic for women since, as Judge O'Scannlain points out, they are a majority, not a minority, and "the majority needs no protection from discrimination." Wilson II, 110 F.3d 1431, 1441 (9th Cir. 1997) (quoting Hunter, 393 U.S. at 391). Much less, it would seem, is the majority entitled to preferences.} This is the central question to be decided and Judge Henderson begs it throughout his opinion.\footnote{126}{See id. at 1500-10.} Though every right rests on one or more underlying interests, not every interest translates automatically into an enforce-
able right. This is particularly true when there are competing legitimate and compelling interests at stake, like that of California voters in ensuring equal consideration for each applicant for public benefits regardless of race or gender. The interests advanced by CCRI opponents are thus not the only interests relevant to the constitutional resolution of affirmative action.\textsuperscript{127}

For these reasons, it is reasonable to conclude that the Supreme Court properly declined to use the political structure doctrine to reverse the Ninth Circuit.\textsuperscript{128} Moreover, three

\begin{footnotesize}
\begin{enumerate}
\item Again, therefore, when Justice Blackmun spoke of “burdens on minority interests” in the desegregation context of \textit{Seattle}, 457 U.S. at 484, his words and ruling cannot be taken to apply to a denial of preferences.
\item There is another key word that merits brief discussion here because its careless use by CCRI opponents causes great mischief. It is the word “opportunity,” which appears several times in Judge Henderson’s opinion, both in his own words and in quotes from the California Ballot Pamphlet’s arguments by CCRI Opponents. See \textit{Wilson I}, 946 F. Supp. 1480, 1493, 1496, 1497 (N.D. Cal. 1996). CCRI opponents often claim that they seek nothing more than an “opportunity” for members of certain groups through various affirmative action programs, yet they are often seeking more than that.

An opportunity is a chance. Undergraduate admission to a good public university is thus fairly termed an opportunity and, again, there is some merit to the argument for race based preferences in that context. They are less defensible, however, in graduate and professional school admissions. While it is certainly plausible to say that admission to a major public law or medical school is an opportunity, it is just as plausible to say that individuals at that level have had their opportunity, four years worth as undergraduates, to show what they can do. What is overlooked is that non-minority individuals who would be admitted to these graduate programs but for race and gender preferences also have a keen interest in that “opportunity.” See, \textit{e.g.}, Annie Nakao, \textit{Big Minority Dip at Boalt Raffles S.F. Law Firms}, S.F. EXAM’R, July 6, 1997 at A1; H. Sample, \textit{Clinton Cites Boalt Hall’s Lack of Blacks}, S.F. EXAM’R, July 18, 1997, at A2. If it be said that white males can just as well attend their second choice school, the same can be said of the minority and female applicants who claim entitlement to preferences. As for the assertion that minority doctors and lawyers are needed to serve under served populations, I observe that one need not graduate from Boalt Hall or UCSF Medical Center in order to do so. See \textit{Posner}, supra note 51, at 12.

When we move to the public employment context, then, the word “opportunity” is properly inapplicable. A job is not an opportunity; it is not a chance at the prize, it is \textit{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. When race and gender preferences are allowed in the public employment hiring process, it is often the third time, after undergraduate and graduate admissions, that white male applicants have such preferences used against them. If the accomplishments and abilities of a woman or person of color are not sufficient by this time to exceed those of a white male applicant, it is not clear why she is entitled to the job. Finally, in contrast to undergraduate and graduate admissions, in which one can always attend another program if
additional considerations support this conclusion. First, though the Supreme Court affirmed the Colorado court's ruling in *Romer*, not only did it not use the political structure doctrine to do so; it never mentioned it or even used the same level of scrutiny as did the Colorado court.\(^2\) Second, even beyond the desegregation/preferences distinction, *Seattle* is distinguishable from the CCRI because of the special solicitation for children long operative in constitutional law.\(^3\) In contrast to the use of busing to enhance the education of primary and secondary school children in *Seattle*, the CCRI directly affects only young adults in college admissions and older adults in public employment and contracting.\(^4\) Finally, even if Judge Henderson used *Seattle* in a legitimate manner, it is a sixteen-year-old, five-to-four decision by a much more liberal Court than the Court sitting today.\(^5\) In 1982, Justices Blackmun, Brennan and Marshall were on the Court and Justices Scalia, Kennedy and Thomas were not. As Jeffrey Rosen has written of *Seattle*, "like dinner guests that have overstayed their welcome, unconvincing Supreme Court opinions tend to linger long after their shortcomings have been exposed."\(^6\)

3. Did the CCRI Eliminate "Remedies for Established Wrongs?"

Amar and Caminker appear to have two general responses to the distinction underscored between protection from discrimination and the denial of preferences. One is suggested by their claim that "the affirmative action preferences eliminated by the CCRI are those grounded in remedies not admitted to his first choice, there is by no means always another public job opening in one's field if he is denied a position, for which he was most qualified, based simply on his race and gender. This takes on particular significance in an era of widespread corporate downsizing.

These considerations suggest another reason why Professor Delgado's dismissal of the claim of the white male applicant for the teaching position is so unpersuasive. He asserts that there was, after all, no injury because the white male had secured another position. *See Delgado*, *supra* note 35, at 1016. In public university and law teaching, this is the exception, not the rule.


The phrase, "established wrongs," is rather vague, but presumably the authors are referring to discrimination, past or present, against women and people of color based solely on race or gender. Sometimes referred to as "general societal discrimination," the claim is that women and people of color are disadvantaged in their applications for public benefits. In the absence of race and gender preferences, white males would receive most of the benefits, and so the preferences simply level a tilted playing field.

In a line of cases extending back twenty years, the Court has spoken to this argument through the development of the Wygant/Croson rule. It has held that government may employ race based preferences in the allocation of public benefits only where narrowly tailored to remedy specific, "identified discrimination" by the governmental unit seeking to employ them. Otherwise, it is not clear what the preferences are remedying and there is no logical stopping point for their use. An assertion of "general societal discrimination," even within a particular industry, is thus an insufficient basis for a legislative body to determine the scope of the problem that it is trying to redress. Without proof of discrimination by the governmental unit in question, the Court has

134. Amar & Caminker, supra note 82, at 1034.
139. Justice Powell wrote in Wygant, "This Court has never held that societal discrimination alone is sufficient to justify a racial classification. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive." Wygant, 476 U.S. 267, 274, 276 (1986).
140. In the Hopwood decision, which the Supreme Court let stand, the term "governmental unit" was, for remedial purposes, construed as "the specific agency involved" rather than, for example, a state's entire educational system. Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996). As the Fifth Circuit
ruled that it is unjust to bar non-minority applicants from an equal opportunity to obtain scarce public benefits. Such a rule recognizes that those applicants may have worked longer and harder than anyone else to build their skills, resumes or businesses. The fact that people who look like them have discriminated against minorities and women is an insufficient basis for denying them equal protection. The Court has recognized a basic principle which CCRI opponents have not refuted, namely that it is presumptively unjust to punish individuals for what society has done.

The Wygant/Croson rule allows that individuals may sometimes be denied equal consideration for public benefits based on discriminatory acts by others. As Justice Powell wrote, "[w]e have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of that remedy." Though it has been dismissed as the ranting of a reactionary Court, the Wygant/Croson rule is in fact a centrist compromise among conflicting legitimate and even compelling interests. The rule mediates the state's interest in remedying the effects of past and present discrimination and its inter-

wrote, "[t]he Supreme Court . . . has limited the remedial interest to the harm wrought by a specific governmental unit." Id. at 951 n.43.

142. See supra notes 137-140.
143. See supra notes 137-140.
146. Remedying the effects of discrimination is only one of the interests claimed to justify race and gender preferences. See STONE, ET AL., supra note 40, at 691-92. The needs for diversity and for role models are also often advanced. Id. A full treatment of these justifications is beyond our present scope, since we are focused on the CCRI, but a few brief comments are in order.

As for diversity, Professor Sandel recently argued that in the college admissions context "the moral force of the diversity argument is that it detaches admissions from individual claims and connects them to considerations of the public good." Sandel, supra note 56, at 16. Even granting that diversity within a student body advances the public good, it is not clear that race and gender preferences promote that diversity any more than, say, preferences based on economic class. Professors Sandel's and Delgado's insinuations notwithstanding, diversity of race and gender is no simple proxy for diversity of thought. See Delgado, supra note 35, at 1016. Further, as we have considered, detaching the distribution of public benefits from individual claims is a moral weakness within the liberal constitutional framework to which we are commit-
est in according equal protection to each “person,” regardless of race or gender. 147

ted, not a moral strength. See supra Part II.B. It is for this reason that the Hopwood decision put diversity to rest as a basis for governmental discrimination. Hopwood v. State of Texas, 78 F.2d 932 (5th Cir. 1996). As the Fifth Circuit wrote, “diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals.” Id. at 945.

As for role model theory, the Court properly rejected this as a justification for race based discrimination by government. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 267-68 (1986). The assertion that we may only aspire to be like those who look like us, after all, is profoundly questionable. The claim that Anita Hill, Madeleine Albright or Thurgood Marshall cannot be role models for white males, or that Lech Walesa, Ralph Nader or Mikhail Gorbachev can only be role models for white males, is neither accurate nor likely to advance race and gender relations. I submit that any human life that exemplifies justice or perseverance in the face of great obstacles can be a model for anyone else, regardless of race or gender. Conversely, if it were true that only those who look like us can be our role models, then white males who set examples of toleration, compassion, and nonviolence are needed in prominent positions since only they can be role models for younger white males. Furthermore, I shall elaborate below the related assumption that a white male is incapable of mentoring anyone who is not a white male is also indefensible.

Finally, as for remedying discrimination, it would take an entire article to fully address CCRI opponents’ routine assumption that discrimination against women and people of color is remedied rather than worsened by discrimination against white males who have usually never been in a position to deny anyone a benefit based on race or gender. For now, two references will suffice.

First, as Professor Delgado admits, under affirmative action, “those of us who need it least are moved ahead.” Richard Delgado, Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model? 89 MICH. L. REV. 1222, 1224 (1991). If, as Professor Derrick Bell claims, racial discrimination is a cancer, then Delgado’s admission exposes race preferences as analogous to treating cancer with band-aids or worse, with more cancer. See Derrick Bell, It’s at Odds With the Real World, TIME, Sept. 8, 1997, at 62. Not only does the “remedy” not improve the condition, it makes it worse. Not only do we erroneously think that we are addressing the underlying problem when we are not, but those who have not been shown to have discriminated become resentful and as under the “two pile” method. Professor Van Alstyne argues 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. Indeed, that is the great lesson for government itself to teach . . . .” William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. CHI. L. REV. 775, 809-10 (1979).

147. Concededly, Croson has a compelling set of facts, as Professor Williams has noted. See Williams, supra note 145, at 2128. Her dismissal of the ruling as “interpretive artifice,” however, paralleled only by the use of the parol evidence rule, is not a response on the merits to the Court’s arguments. See id. at 2130. For one thing, as with many legal rules, there are good reasons for the parol evidence rule, even if its application sometimes leads to apparently unjust results. See, e.g., 2 B. Witkin, CALIFORNIA EVIDENCE, § 963. Professor Wil-
Amar and Caminker's reference to "established wrongs" thus fails to engage the real issue. The Court has shown that it is fair to ask, "established wrongs by whom?" It is convenient to assume that all Caucasians are sufficiently complicit in racism and all males sufficiently complicit in sexism that any white male may fairly be denied equal consideration in applying for public benefits no matter what he has done in his life. However, this formulation at least partially implicates women and minorities, to which CCRI opponents have not adequately spoken. More importantly, the formulation begs the constitutional question of whether or not the state's use of classifications based on immutable traits in the distribution of public benefits is narrowly tailored to advance a compelling state interest. The formulation is inaccurate.

liams seems simply to be objecting to one of the side effects of the attempt at a system governed by the rule of law.

148. Such broad assumptions seem to lead Professor Delgado to scoff at what he calls the "myth of white innocence," as though it were beyond dispute that guilt flows simply from being born into the wrong race and that constitutional rights may be allocated accordingly. See Delgado, supra note 59, at 2413 n.11. Perhaps he would have a point if we knew, for example, that all whites or males tell and laugh at racist or sexist jokes and secretly wish for the failure and suffering of other groups. As suggested above, however, this is an illusion: virtue and corruption come in all colors and both genders. Those who declare all whites to be guilty seem to have no room, then, for a white male who volunteers to teach math and reading skills to inner city children, or one who as a graduate teaching assistant provides encouragement, mentoring and favorable reference letters for undergraduate women and people of color. As Judge Posner has thus stated the rule emanating from the Equal Protection Clause in the affirmative action context,

though it is frequently efficient to sort people by race or ethnic origin...efficiency is rejected as a basis for governmental action in this context. The government is required to incur the additional costs of determining the individual applicant's fitness to hold a particular job...or be admitted to one of its educational institutions.

Posner, supra note 51, at 22 (emphasis added).

149. Since all (and only) men, including African American and Hispanic men, are by definition guilty of sexism and since all (and only) Caucasians, including women, are by definition guilty of racism, women and minorities are implicated.

150. The assumption inherent in the "old boys network" formulation is that every white male in a position of power will always, given the chance, hire a white male over anyone else. This, however, is exactly the kind of stereotyping that women and people of color resent when directed at them. In this case, it conveniently ignores those fair-minded white males without whom many of the gains of women and people of color would never have been realized. It also overlooks those white males who, having obtained academic tenure or some other security of employment, can be dissuaded from voting to hire a white male, even if he is the most qualified applicant, simply to avoid rocking the boat or to appear progressive on race and gender issues. The idea that white males always stick together, and that the playing field is thus always tilted in their
unjust and more likely to wound than to heal race and gender relations.\textsuperscript{161}


Amar and Caminker's second response to the distinction between discrimination and the denial of preferences is suggested by a rhetorical question. They ask how "a lower court [could] really draw a principled line—in terms of what is in the interest of minorities—between protection from discrimination and protection from its lingering effects?"\textsuperscript{152} Presumably, by "protection from [the] lingering effects" of discrimination, the authors mean to include the use of race and gender preferences in the allocation of public benefits.

Though it may not seem so at first blush, this assertion has profound implications. It implies that any time a minority or woman is denied a preference in applying for a scarce public benefit, which then goes to a white male, the minority or woman has been the subject of discrimination. She has been left unprotected from the "lingering effects" of discrimination because there is no possibility of an objective process in which each applicant receives substantially equal consideration. There is, in other words, no possible middle ground between "discrimination" and "no preference."

This radical position is a variation on critical legal studies conclusions that the rule of law and an objective process favor, is a sham.

\textsuperscript{151} Professor Kathleen Sullivan has suggested an alternative justification for race and gender preferences that seems to avoid the \textit{Wygant/Croson} difficulty. See Kathleen Sullivan, \textit{Sins of Discrimination: Last Term's Affirmative Action Cases}, 100 HARV. L. REV. 78, 80-81 (1986). She notes that "public and private employers often adopt affirmative action less to purge their past than to build their future . . . promoting a variety of goals dependent on racial balance, from securing workplace peace to eliminating workplace caste . . . ." \textit{Id.} Beyond the fact that this approach still abandons the individual applicant for employment who happens to be the wrong color or gender, it is not clear what limits there are to such a principle. Again, how long must individuals who have not been shown to have discriminated pay for what has been done by those who look like them? Further, Professor Sullivan simply lumps private and public employers together. While the current trend in the private sector is to disfavor the hiring of white males in order to project the appearance of diversity, \textit{see} Thernstrom, \textit{supra} note 136, at 452-53, I submit that the public sector, which is subject to the Fourteenth Amendment, is obligated to take the lead in refusing to discriminate based on race or gender in employment decisions, as it did in the wake of the Civil Rights Movement.

\textsuperscript{152} Amar & Caminker, \textit{supra} note 82, at 1034.
are illusions,\textsuperscript{153} and that "law is politics, all the way down."\textsuperscript{154} In the CCRI context, the position is that there is ultimately only politics and war between the races and genders and it is all truly a zero sum game. At the level of radical critique, it may be that any semblance of a process in which objective criteria are employed to distribute public benefits substantially independently of political considerations is difficult to achieve at best. However, consider the three following observations.

First, the radical position proves too much—more than CCRI opponents would want it to prove. If there is no possibility of a process in which the judgment of those who distribute public benefits is constrained by standards of merit, independent of race and gender politics,\textsuperscript{155} then there is no basis to claim that less qualified Caucasians or males have ever been hired or promoted over more qualified minorities or women. However, all would agree that this has occurred. That agreement, in turn, presupposes an objective standard by which such judgments can be made. Second, CCRI opponents sacrifice their credibility when they effectively embrace the radical position while purporting to oppose the CCRI because of liberal values such as "neutral principles" and a "fair political process."\textsuperscript{156} They cannot have it both ways. The un-

\textsuperscript{153} As Professor Kelman cleverly sums it up, "rules are the opiate of the masses." MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 63 (Harvard University Press 1987). See also Paul Brest, \textit{The Substance of Process}, 42 OHIO ST. L.J. 131 (1981); ROBERT L HEYMAN, JR. & NANCY LEVIT, JURISPRUDENCE 213 (West Publishing 1995).


\textsuperscript{155} On this formulation as a bulwark against the radical claim that the rule of law reduces simply to politics, see Owen Fiss, \textit{Objectivity and Interpretation}, 34 STAN. L. REV. 739, 744-45 (1982).

\textsuperscript{156} See Amar & Caminker, \textit{supra} note 82, at 1043; Ripston, \textit{supra} note 17, at 1. As for the phenomenon of a "fair process," some CCRI opponents have argued that this consists in the public employment context of distilling from all submitted applications a "short list" of applicants who are "minimally qualified," Amar and Caminker, \textit{supra} note 82, at 1023, or "otherwise qualified," \textit{Wilson I}, 946 F. Supp. at 1496, and then selecting from that list based on the need for women and people of color. The room for abuse here should escape no one. A short list can always be expanded from three to four, from four to five or from five to six in order to include a member of the desired group who then magically gets the job. Expanding the list thus effectively determines who is given the position. As Professor Paulsen suggests, it sometimes happens that when no "minimally qualified" member of a desired group can be located, the official practice is to decline to fill the position rather than to hire a white male,
derlying warfare mentality\textsuperscript{157} undermines any claim of interest in a fair process by which public benefits are allocated on the merits regardless of politics. Third, there are fair and objective processes to the degree that people are willing to employ them. That is what a democratic polity is all about. To illustrate this point and its implications, consider the following narrative,\textsuperscript{158} with which I would like to complete this section of the article.\textsuperscript{159}

During several years of college teaching, I have written nearly 70 letters of reference, almost all for students applying to law school. This is an important process, for the graduate and professional schools depend on professors and teachers to provide the fairest, most objective appraisal of which they are capable. They count on teachers, for example, not to rank a student in the academic top five percent when he or she is barely in the top third, and vice versa. Fortunately, there are measurable criteria by which teachers can make this evaluation.\textsuperscript{160}

I take this responsibility seriously and write a reference only if I can honestly write a good one,\textsuperscript{161} as it is a component

\footnotesize{and to advertise for it again the following year so that a "minimally qualified" woman or minority might be located then. \textit{See} Paulsen, \textit{supra} note 35, at 997. Such practices render Justice O'Connor's suspicion of preferences as a de facto quota system to be well founded. \textit{See} Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988).

\textsuperscript{157} Once again, as Martin Riff reminds us, for modern fascism, "[t]he liberal ideal of a society of rational and co-operating individuals was an illusion and unceasing struggle was the law of all animal life ... ." \textit{Riff, supra} note 41, at 91.

\textsuperscript{158} Professor Delgado's own words will be especially useful to keep in mind during this narrative:

\textit{[s]tories and counter-stories can show us that what we believe is ridiculous, self serving or cruel. And they can show us the way out of the trap of unjustified exclusion .... They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain.}

\textit{Delgado, supra} note 59, at 2415.

\textsuperscript{159} See \textit{supra} note 76 for discussion of the value and weakness of narrative.

\textsuperscript{160} Some students, for example, have strong speaking skills but weak writing skills, and vice versa. Some are well organized but do not penetrate the material very deeply, and vice versa. Some students have several of these abilities but do not apply themselves nearly as conscientiously as do others.

\textsuperscript{161} I can almost always do so, however, for any student who thinks he or she has done well enough to ask me for one. Moreover, I have occasionally offered to write such references for students in whom I have seen promise yet who have, for whatever reasons, been too shy to ask. In nearly all cases, these students have been women.
of justice in the most basic personal sense of giving each his
due. 162 Most of the references I have written have been for
women and many have been for African Americans, Latinos,
Asian Americans, Jews and Native Americans. According to
those who see only a race and gender war, it seems that
white males would want to end this as soon as possible. By
writing references for young women and people of color, I am
almost certainly hurting people on my side of this so-called
“war,” since these law school seats could be going to white
males. It would be wrong for me to do this, of course. It
would be the essence of distributive injustice for me to deny a
reference to one student based solely on race or gender when
I would write a recommendation for another individual who
had done just as well.

While they would rightly expect me to evaluate students
based on merit regardless of race or gender, many CCRI op-
ponents would apparently deny my right to be treated by the
same principle. If I were applying for a public university
teaching position, they would have no difficulty putting my
application into the “disfavored pile,” 163 to be denied serious
consideration, based solely on race and gender. This is not
only unjust, it is inefficient, given CCRI opponents’ purported
goal of equal opportunity. 164 This behavior not only provides
white males a rationale to fall into a race and gender warfare
mentality, it encourages them to do so.

The radical position of some CCRI opponents thus seems
aimed at ensuring that race and gender relations never prog-
ress past the warfare stage. It is for this reason that I have
titled this article a “progressive” response. Their radical po-

tition leads backwards, not forward; it is reactionary, not
progressive. It deliberately ignores our common humanity,
which is at least as real and profound as the race and gender
differences that distinguish us. Those who believe that peo-
ple who look a certain way should be given preferential
treatment do a great disservice to the efforts and sacrifices of

argued that justice in this sense is a component of the moral virtue on which
civil society depends. See ARISTOTLE, Nichomachean Ethics, Bk V., ch 3, 1131a,
in McKeon, supra note 59.
163. See supra note 35.
164. M. Berry, Affirmative Action: Why We Need it, Why it is Under Attack,
in GEORGE E. CURRY, THE AFFIRMATIVE ACTION DEBATE at 299-313 (Addison-
Wesley 1996).
those in the civil rights and feminist movements. They have fought so that race and gender will not continue to be the criteria by which human beings are treated by government or any other locus of influence.  

III. CONCLUSION

This article has argued that the Supreme Court properly declined to disturb the Ninth Circuit’s ruling upholding the CCRI. The basic justification is that CCRI opponents are committed to a constrained theory of the Equal Protection Clause, particularly in light of the majoritarianism evident in the constitutional scheme as a whole. This is not to deny, however, that public policy may constitutionally reflect concern for the apparent interests of groups whose members have often been subject to discrimination. A more balanced constitutional vision would accord concern to all three levels, the majority, the minority and the individual. Some CCRI opponents seem unwilling to acknowledge that there is a way that this can be done under the CCRI, one that will accommodate the interests and principles that have been identified: remedying discrimination, promoting equal opportunity, giving proper deference to majority will and protecting the individual.

165. Since I have retained a copy of each reference I have written, I can document my claims. I know from experience, however, that some will simply dismiss the possibility of a white male helping any deserving student regardless of race or gender as a lie because it is inconsistent with the warfare ideology. I also know from experience, however, that there are fair minded CCRI opponents who will acknowledge my point and recognize that race and gender warfare is neither necessary nor productive. As one who has contributed to the ACLU because I agree with its basic position on most issues, I hope that progressives can resolve and move beyond issues like affirmative action, which divide and distract us from addressing problems that would render it largely moot, like the gross and growing wealth disparities in our society and genuine access to quality education for all children.

In this light, I applaud as a good beginning President Clinton’s recent proposal for $350 million in federal funds to be allocated for training, scholarships and loan forgiveness for teachers to work in undeserved areas. See Clinton Cites Boalt Hall’s Lack of Blacks, S.F. EXAM’R, July 18, 1997, at A2. As I hope I have shown, however, part of the solution to the problems of public education is to hire the most able and qualified public university teachers regardless of race or gender so that undergraduates receive the best education available. Those students (and the taxpayers) are the demos in public education, and so democratic principles demand that we take their interests seriously rather than leaving them to the vagaries of race and gender politics.

166. See supra Part II.A.
I am referring to the use of outreach and aggressive recruiting programs. These constitute a defensible middle ground, for they are used only in the pre-selection stages of the public college admissions, employment and contracting processes: pre-admission, pre-hiring and pre-bidding. While there is room for abuse even with some of these programs, they merit the presumption of being fair and reasonable ways of accommodating the conflicting interests and principles relevant to the constitutional distribution of public benefits. On the one hand, they function to improve the qualifications of and ensure the receipt of applications from members of groups whose members have historically been subject to discrimination. At the same time, they do not undermine the


168. An illustration may emerge from a challenge to a San Jose ordinance requiring firms bidding for city contracts to document outreach to female and minority owned businesses for their subcontracting work. Contractor Steve Zinnel submitted the lowest bid by $3000 for a contract to install a large electrical switch, which he claims does not require a subcontractor. Nonetheless, the contract was awarded to the next lowest bidder, which hired a female owned firm simply to buy the switch. Mr. Zinnel has thus challenged the ordinance as a violation of the CCRI for requiring race and gender preferences regardless of the degree to which a non-minority firm may be struggling. See Robert Salładay, San Jose Suit Tests How 209 Affects Cities, S.F. EXAM'R, Sept. 10, 1997, at A12, Annie Nakao, Bay Area is 209 Battleground, S.F. EXAM'R, Nov. 4, 1997, at A14, and C. Morello, Opponents Chip Away at Prop. 209, USA TODAY, Nov. 17, 1997, at 2A.

169. Even UC Regent Ward Connerly, who led the charge both for the elimination of race preferences in UC admissions and for the passage of the CCRI, favors some forms of outreach. See S. Gwynne, Back to the Future, TIME, June 2, 1997 at 48; Eric Pooley, Fairness or Folly?, TIME, June 23, 1997 at 36. Though I basically share Mr. Connerly's position on the CCRI, I take exception to his disapproval of UC President Richard Atkinson's recently announced plan to guarantee UC seats to the top 4% of every high school graduating class in the state. See Katherine Seligman, Novel UC Plan to Boost Diversity, S.F. EXAM'R, Feb. 12, 1998, at A1, A20. While there is some merit to Mr. Connerly's point that such a plan could lower the quality of UC students, I tentatively support the plan (upon a showing, for example, that high school students throughout the state would have to complete a similarly challenging course of study in order to graduate). Consistent with the position I have tried to articulate throughout this article, I find President Atkinson's plan appealing in that it combines an emphasis on merit with democratic principle. Further, to the degree that "diversity" is one of many legitimate interests to be advanced in public education, and to the limited degree that race enhances diversity, the new plan would probably promote diversity among the student body at UC. See supra note 128.

170. As an example, UC has already announced plans to increase funds for outreach to low achieving high schools both through teacher training and men-
right of individual applicants for public benefits to be assessed on their own abilities and accomplishments. Therefore, the California courts could quite justifiably exclude most outreach and aggressive recruiting programs from the reach of the word "preferences" in subdivision (a) of the CCRI.

Some will say that I am too optimistic that the California courts will rule in this fashion. Only time will tell, of course, for there is no way to predict exactly how the courts will construe the word "preferences" in the various cases they will hear. Even this risk, however, does not establish that the CCRI was improperly allowed to stand. As millions of voters recognized, the legislative and administrative process failed to address a system in which some individuals, based solely on immutable traits, were denied public benefits for which they may have been best qualified. As we have seen, such treatment is inefficient, unjust and unconstitutional. A majority of those whose voices should presumptively matter—those who voted—felt that something had to change. It will be up to the courts to adjust the law of affirmative action in California in a way that reasonably accommodates the majority will, group interests and individual rights.

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