A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action

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I. INTRODUCTION

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the employment of such rights.

... There is no caste here. Our Constitution is color-blind, and neither knows, nor tolerates classes among citizens.¹

One hundred years after Justice Harlan drafted his famous Plessy v. Ferguson² dissent, Californians voted to incorporate his ideas into their State Constitution.³ The California Civil Rights Initiative ("CCRI" or "Initiative"), or Proposition 209 as it was referred to on the ballot, passed by a slim majority in the November 1996 election.⁴ The Initiative is the first state-wide ban of all racial, ethnic, and gender-based preferences in state employment, education, and contracting in the history of affirmative action.⁵ As a result of its passage, all state-sponsored affirmative action programs have been eliminated.⁶ Women and minorities may no longer be targeted by employment or educational recruiters, nor may they receive any economic or social benefits solely because of their gender or race.⁷ As a result, California has truly become color and gender blind.

The passage of CCRI has sparked a tremendous amount of controversy both in California and throughout the rest of the United States.⁸ To many, the Initiative is merely an af-

¹. Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting) (holding that laws which discriminate on the basis of race are Constitutional so long as the states proffered separate but equal treatment).
². 163 U.S. 537 (1896).
⁵. Id.
⁶. Id. at 1489
⁷. Id.
⁸. See, e.g., James Kilpatrick, Courts Will Decide Preferences, MONT-
firmation of the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{9} To these supporters of CCRI, the Initiative stands for the proposition that all persons should be treated equally, regardless of color, gender, or national origin.\textsuperscript{10} Others, however, believe that CCRI goes too far by eliminating programs designed to help victims of past and present discrimination.\textsuperscript{11}

The opponents of CCRI gained an early victory in December 1996 when a California district court granted a preliminary injunction against the enforcement and implementation of the Initiative.\textsuperscript{12} However, this victory was short lived. In 1997, the Ninth Circuit Court of Appeals vacated the injunction and declared that the Initiative did not violate the U.S. Constitution.\textsuperscript{13} The Coalition for Economic Equality ("Coalition") filed a petition for a writ of certiorari to the United States Supreme Court on August 29, 1997.\textsuperscript{14} However, on November 3, 1997, the United States Supreme Court denied certiorari to the petitioners.\textsuperscript{15} Thus, the Supreme Court has passed up the opportunity to sort out the legal ambiguities that still exist with respect to the Initiative.\textsuperscript{16}

While the Ninth Circuit opinion upholding the constitutionality of Proposition 209 remains intact, there are still many unanswered questions about how to promote diversity and combat the discrimination that exists in our society, or at least in California state educational and employment sectors. This comment seeks to explore the ramifications of the California Civil Rights Initiative on American minorities in California.\textsuperscript{17} It also attempts to examine the legitimate legal

\textsuperscript{9} GOMERY (AL) ADVERTISER, Jan. 13, 1997, at 6A.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{17} \textit{Silence of the Court on Affirmative Action, S.F. CHRON.,} November 4, 1997, at A20, \textit{available in LEXIS, News Library, Sfchrn File.}
\textsuperscript{17} \textit{See infra} discussion Part IV.A.
challenges raised by Proposition 209 opponents,\textsuperscript{18} and offers alternative means to promote diversity and distributive justice.\textsuperscript{19} The hope is that close scrutiny of the Initiative will persuade readers that, while alterations in affirmative action programs might be necessary, the complete abolishment of such a system will only perpetuate the problems associated with past unfair treatment of women and minorities.

II. BACKGROUND

A. Affirmative Action

1. Executive and Legislative History

The turbulent history of affirmative action is often said to begin with President Roosevelt’s 1941 Executive Order which required the federal government, as an employer, to take “affirmative action” not to discriminate against any worker on the basis of race, creed, color, or national origin.\textsuperscript{20} Although this was technically only a wartime effort to increase minority employment, it paved the way for similar future executive orders.\textsuperscript{21} Both Presidents Truman and Eisenhower, for example, issued similar orders while in office, in response to Congress’ refusal to codify Roosevelt’s policy.\textsuperscript{22}

However, it was President Kennedy who was finally able to convince Congress that progress in civil rights was impossible without legislative action.\textsuperscript{23} In a 1963 formal Congressional address,\textsuperscript{24} Kennedy implored Congress to pass legisla-

\begin{footnotes}
\item[18.] See infra discussion Part IV.B.1.
\item[19.] See infra discussion Part V.A.
\item[20.] MELVIN I. UROFSKY, A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION 16 (1991). In addition to prohibiting the federal government from discriminating on the basis of race, creed, color, or national origin, the Executive Order also applied to holders of defense contracts. \textit{Id.} Similarly, it created the Fair Employment Practices Commission to look into discrimination charges. \textit{Id.}
\item[21.] \textit{Id.}
\item[22.] \textit{Id.}
\item[23.] \textit{Id.} at 17. In addition to persuading Congress to take action, President Kennedy was also responsible for the issuance of Executive Order 10925, which established the Presidential Commission on Equal Employment Opportunity, and mandated that all federal contractors not discriminate against employees on the basis of race. UROFSKY, \textit{supra} note 20, at 17.
\item[24.] Kennedy’s interest in persuading Congress to take action was intensified by events in Birmingham, Alabama and the march in Washington.
\end{footnotes}
tion aimed at the elimination of the economic disparity between Blacks and Whites in America.\textsuperscript{25} He believed that the rights to vote, to have access to public facilities, and to be free of discrimination were meaningless to unemployed Blacks. Thus, he stressed the importance of creating legislation that increased job opportunities for minorities.\textsuperscript{26} As he explained, "[t]here is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job."\textsuperscript{27}

In response, Congress passed Titles VI and VII of the Civil Rights Act of 1964.\textsuperscript{28} Title VI of the Act prohibits federally-funded institutions from discriminating on the basis of race.\textsuperscript{29} To ensure the statute's effectiveness in federal courts, the language of Title VI specifically nullifies the Eleventh Amendment immunity typically afforded states for statutory violations.\textsuperscript{30} Title VI applies largely to racial discrimination in the educational context.\textsuperscript{31}

Similarly, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race.\textsuperscript{32} At the time of its passage, Title VII was seen by many supporters as the most effective means by which to eliminate the great economic disparities between blacks and whites.\textsuperscript{33} As Senator Clark, Democrat of Pennsylvania, explained, "[e]conomics is at the heart of the racial situation. The Negro has been condemned to poverty because of a lack of equal job opportunities. This poverty has kept the Negro out of the
mainstream of American life." As a result, the remedies afforded by Title VII include punitive damages, compensatory damages, attorneys fees, and reinstatement.

In an attempt to promptly execute the Civil Rights Act of 1964, President Johnson issued Executive Order 11,246, which renewed Kennedy's mandate that federal contractors take "affirmative action to recruit, hire, and promote more minorities." In addition, Johnson's Order delegated all enforcement responsibilities to the Civil Service Commission and the Office of Federal Contract Compliance Programs.

Despite Johnson's executive efforts, affirmative action did not have a major impact on hiring policies until after President Nixon took office in 1969. In 1971, the U.S. Commission on Civil Rights issued a shocking annual report on the impact of the Civil Rights Act on equality. It reported that "despite these provisions against employment discrimination, the problem of unequal opportunity remains severe... while there has been some overall minority employment gains in the general private labor market, discrimination remains largely unabated [six] years after Congress ordained equal employment opportunity as organic law." In response, President Nixon issued the "Nixon Plan," which supplemented President Johnson's Order by requiring annual affirmative action plans from major contractors, including well-defined numerical hiring goals and

34. 110 CONG. REC. 13,080 (1964) (statement of Sen. Clark).
35. See 42 U.S.C. § 1981(a) (1994); see also § 2000e-5(g) (1994); § 2000e-5(k) (1994). These remedies were also included in the Civil Rights Act of 1991.
36. UROFSKY, supra note 20, at 16.
37. Id. (quoting Exec. Order No. 11,246, 5 C.F.R. 900.404 (1964)). Women were added to the definition of "minorities" two years later, in Executive Order 11,375. Id.
38. GREENE, supra note 24, at 44. The Civil Service Commission is now the Office of Personnel Management. Id.
39. UROFSKY, supra note 20, at 18.
40. GREENE, supra note 24, at 44.
41. Id. The report also identified several problems with the Civil Rights Act which hampered the effectiveness of its implementation. Id. Among them were the government's failure to formally define "affirmative action," to come up with adequate enforcement procedures, to use the available sanctions, and to collect proper racial data. Id. at 45. In addition, the report suggested that implementation of the Civil Rights Act required a larger staff and more resources than the government had previously allotted. Id.
timetables to assist in enforcement. The plan was quickly adopted as a standard for review by federal judges who used it to gage the progress of public employers. It also caught the attention of private employers who slowly began to examine their hiring practices and to change their policies.

In the years that followed the inception of the Nixon Plan, people began to have different ideas about how and when affirmative action programs should be implemented, blurring the definition of affirmative action. While some people argued that affirmative action programs should be used as a remedy for all past discrimination, others claimed that they should only be used in cases of present, intentional discrimination. Still others maintained that race and gender-based preferences have no societal merit whatsoever and should be abolished. As a result, today there are widespread disagreements about the meaning of affirmative action—both in and out of the courts. In the broadest terms, and for the purposes of this comment, “affirmative action” may be said to refer to any program that actively seeks to increase minority representation in the workforce, education, or governmental contracting.

2. The Constitutionality of Affirmative Action

Following the implementation of the Nixon Plan, the courts were flooded with litigation challenging the constitutionality of affirmative action programs. The litigation pri-
marily focused on Fifth and Fourteenth Amendment principles of due process and equal protection. According to the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It was ratified in 1868, with the post-civil war intent that "[w]hatever law protects the white man shall afford equal protection to the black man." Moreover, it was not originally meant to be a "source of rights," but merely a blanket prohibition on state-created rights or immunities that specifically discriminated against its citizens on the basis of race. Through time, however, equal protection jurisprudence has strayed from the narrow intent of the framers, to the point where it has become "the basis for challenging official racial discrimination" and state imposed affirmative action programs.

a. Case Law

The Supreme Court first dealt with the relationship between affirmative action and the Fourteenth Amendment in Regents of University of California v. Bakke. In Bakke the Court examined a preferential admissions program utilized by the University of California at Davis Medical School. The respondent, a white male, argued that by setting aside a certain number of positions in the entering class for minority students, the University had violated both the Fourteenth Amendment of the Constitution and Title VI of the Civil

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53. Id. The Fifth Amendment, not the Fourteenth, applies to cases against the federal government. Id. The Fifth Amendment prohibits deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. V.
54. U.S. CONST. amend. XIV.
56. Id. Despite the original intent behind the Fourteenth Amendment, modern cases have interpreted it to include many "fundamental rights" not specified in the Constitution. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Fourteenth Amendment implies a right to privacy in matters of contraception between married people).
57. LIVELY, supra note 55, at 58 n.50.
58. Id. at 141.
60. Id. at 265.
Rights Act of 1964.61 The Court, in a 5-4 decision, agreed, but held that, although the state may not base admission decisions solely on skin color, it does have a constitutional "interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."62

Two years later, in Fullilove v. Klutznick,63 the Court examined the constitutionality of a congressional statute requiring federally funded public works projects to employ minority subcontractors for ten percent of all subcontractor work.64 The Court, in a plurality opinion, held that the statute was constitutional.65 In support, the Court emphasized the facts that the congressional statute included provisions which permitted waiver of the set-aside requirement in some cases, and that section five of the Fourteenth Amendment is broad enough to encompass set asides such as this.66 In his concurrence, Justice Marshall opined that the proper test for determining the constitutionality of an affirmative action program should be whether it serves an important governmental purpose, and is the appropriate means by which that purpose can be achieved.67

After Fullilove, the Court became less sympathetic toward affirmative action programs. In its 1985 decision, Wygant v. Jackson Board of Education, for example, the Court sustained a challenge to an affirmative action program that gave minority teachers preference in layoff procedures.68 The policy at issue had been adopted by the Board of Education only after extensive collective bargaining, and was a response to a plethora of racial problems plaguing the school system.69 Nonetheless, the Court, in a plurality opinion, held that despite its efforts to alleviate racial tension, the Jackson Board of Education policy was unconstitutional.70 Absent "some

61. Id. at 277-78.
62. Id. at 320.
64. Id. at 456-92.
65. Id.
66. Id. at 476-78, 486-89.
67. Id. at 519 (Marshall, J., concurring).
69. Id.
70. Id. at 276.
showing of prior discrimination by the governmental unit involved," the policy was bound by the Fourteenth Amendment to be racially neutral.\textsuperscript{71} The Court also held that the program placed an undue burden on non-minority teachers, and thus independently violated the Equal Protection Clause.\textsuperscript{72}

Four years later, in \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{73} the Court established a concrete standard for review in affirmative action cases. At issue was a Richmond, Virginia affirmative action program that set aside thirty percent of employment for minority subcontractors.\textsuperscript{74} The program had been based on congressional findings of nationwide racial discrimination in the area of construction,\textsuperscript{75} and on the existence of the congressional policy upheld in \textit{Fullilove}.\textsuperscript{76} Despite the similarities between the two statutes, the Court distinguished \textit{Fullilove} by holding, for the first time, that the proper standard for review in state or local government programs is strict scrutiny.\textsuperscript{77} Thus, unless the state or local government program (1) serves a compelling governmental interest, and (2) is narrowly tailored to meet that interest, it is unconstitutional.\textsuperscript{78} With regard to the facts of \textit{Richmond}, the Court found that "governmental interest" cannot be derived from proof of past nationwide discrimination.\textsuperscript{79} Instead, proof of local discriminatory practices is required. Since the city failed to offer such proof, the ordinance was held invalid.\textsuperscript{80}

The \textit{Croson} holding was limited in \textit{Metro Broadcasting, Inc. v. FCC},\textsuperscript{81} when the Court refused to extend the strict

\begin{footnotes}
\item[71] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). According to Justice Powell, affirmative action programs must be prefaced by an actual showing of "sufficient evidence to justify the conclusion that there has been prior discrimination." \textit{Id.} Such evidence was said to ensure that new racial distinctions are not created. \textit{Id.} at 277-78.
\item[72] \textit{Id.} at 276.
\item[74] \textit{Id.} at 712-14.
\item[75] \textit{Id.} at 714.
\item[76] \textit{Id.} at 712-14. See discussion \textit{supra} Part II.A.3.a.
\item[77] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Since the statute at issue in \textit{Fullilove} was congressionally mandated, it was not affected by this holding. See \textit{Fullilove v. Klutznick}, 448 U.S. 448 (1980).
\item[78] \textit{Croson}, 488 U.S. at 493-506.
\item[79] \textit{Id.} at 500-04.
\item[80] \textit{Id.} At 506.
\end{footnotes}
scrutiny test to federal affirmative action programs. In *Metro Broadcasting*, the Court upheld two federally prompted affirmative action policies designed to favor minority broadcast firms. The first awarded special preferences to minority owners applying for new broadcasting licenses. The second gave preference to minority owners seeking broadcast licenses in distress situations. The Court felt that since Congress had not only approved these measures, but had, in fact, mandated them, a lower standard of review in federal affirmative action program cases was justified. As such, it adopted the test proffered by Justice Marshall in his *Fullilove* concurrence: so long as an affirmative action program (1) serves “important governmental objectives,” and (2) the means chosen are closely related to that purpose, the program is constitutional. In addition, the Court held that “important governmental objectives” include benefits of broadcast diversity, and, thus, are not limited to proof of past discrimination.

Five years later, the Court changed its mind. In *Adarand Constructors, Inc. v. Pena*, it held that despite the *Metro Broadcasting* holding, a constitutional standard of strict scrutiny is appropriate for review of affirmative action programs at both the federal and state level. At issue in *Adarand* was a Small Business Association program which gave contractors on federally funded projects significant financial incentives to employ socially and economically disadvantaged subcontractors. In particular, the program required contractors to “presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities...” Writing for the majority, Justice O’Connor expressed the belief that prior cases had es-

82. Id. at 577-99.
83. Id.
84. Id. at 577-78.
85. Id.
86. Id. at 577-99.
88. Id.
90. Id. at 224.
91. Id. at 205-06.
92. Id. at 205 (quoting 15 U.S.C. §§ 637(d)(2)).
established that these racial classifications elicited skepticism, consistency, and congruence. Thus, to the extent that Metro Broadcasting permitted a less strict test for federally mandated programs, it was overruled.

While the Adarand test makes it exceedingly difficult to draft a constitutional affirmative action program, the Court was careful to point out that such programs are not impossible. So long as the government demonstrates (1) a compelling interest that can be served only by affirmative action, and (2) that the affirmative action program selected is the most appropriate means to the fulfillment of that interest, the program will be found constitutional.

B. The California Civil Rights Initiative

1. Passage and Implementation

California’s response to the controversy surrounding the issue of affirmative action was the November 1996 passage of Proposition 209, the California Civil Rights Initiative (“CCRI”). CCRI amends Article I of the California State Constitution by adding section 31, which states: “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 term “state” is broadly defined by section 31(f) to include “the state itself, any city, county, city and county, public university system, including University of California, community

93. Id. at 223.
95. Id. 237
96. Id. at 235.
97. Karen Brandon, Affirmative Action Ban Sparks Suit: ACLU says California Measure is Unconstitutional, CHI. TRIB., Nov. 7, 1996, at A24. The California Civil Rights Initiative was passed by a slim 54% to 46% margin in the November 5, 1996 election. Id. It was drafted by supporters of California Assemblyman, Bernie Richter (R-Chico), who introduced similar bills to the state legislature in 1994 and 1995. A.G. Block, Ballot of Propositions, CALIF. JOURNAL BALLOT BOOK, Sept. 1996. It follows the recent abolishment of affirmative action in the University of California system, and is supported by California Governor Pete Wilson and California Attorney General Dan Lungren. Id.
college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.99

The language of CCRI suggests that it was intended not to protect any particular racial, gender, or ethnic group, but to eliminate some of the protection already afforded minorities and women under previous affirmative action laws.100 Opponents of the measure101 argue that in addition to eliminating obvious gender and race based preferences in both the professional and educational arenas, CCRI will also profoundly effect recruiting, scholarship, and educational programs which target minorities and women.102 For example, it is expected that CCRI will put an end to such programs as the University of California Mathematics, Engineering and Science Achievement ("MESA") mentoring program, which specifically targets women and minority students for future careers in the math and science fields.103

Similarly, opponents argue that voluntary school desegregation programs, such as bussing and remediation efforts, will most likely be eliminated, as will dozens of government and privately endowed scholarship funds that take race and gender into account.104 At the University of California at Berkeley alone, it is estimated that $28 million in financial aid programs will have to be cut—$7 million of which stems from private funds targeted at such groups as Portuguese men and women.105

Opponents of Proposition 209 also claim that multicultural programs and classes at public schools will also greatly suffer, as they “give preferential treatment” to minority cultures and interests by allocating government funds to them.106 According to these opponents, the initiative could,

102. Id.
103. Id.
104. Id.
105. Id.
106. A.G. Block, Ballot of Propositions, CALIF. JOURNAL BALLOT BOOK, Sept.
therefore, be found to prohibit the teaching of African American culture, or Women’s Studies; and, it may force public educators and government officials to disregard the observance of such holidays as St. Patrick’s Day.\textsuperscript{107}

While supporters of CCRI\textsuperscript{108} acknowledge the breadth of the effects it will have on Californians, they claim that it is not inconsistent with the Civil Rights movement of the 1960’s, and that its passage is necessary to reaffirm Justice Harlan’s vision of a color-blind Constitution.\textsuperscript{109} The belief is that the Civil Rights Act of 1964 was intended to end all racial discrimination—to make it unlawful to judge someone or place inherent value on the color of his or her skin or gender.\textsuperscript{110} Instead of fulfilling this goal, however, CCRI proponents argue that the Act has been corrupted to the point where government imposed preferences, quotas, and set-asides have become no more than forms of legalized reverse discrimination.\textsuperscript{111} Proponents of CCRI claim that it is time to acknowledge the failure of affirmative action, and the injustice it has created for Caucasians throughout America.\textsuperscript{112} As one supporter put it,

Our national and state governments must never again permit discrimination by race, ethnicity or gender; they must protect the right of equal opportunity for all. Our governments of late have failed us in this fundamental responsibility by permitting special privileges to be granted to some groups at the expense of others. The legacy of this is found in the intensifying balkanization of our country in the name of “diversity” and expansion of the social pathology called multiculturalism. . . . The California Civil Rights Initiative will go a long way toward reestablishing a colorblind society and a more level playing field, with goal posts available to all.\textsuperscript{113}

\textsuperscript{106} \textsuperscript{107} \textsuperscript{108} \textsuperscript{109} \textsuperscript{110} \textsuperscript{111} \textsuperscript{112} \textsuperscript{113}

1996.

\textsuperscript{107} Id.

\textsuperscript{108} Supporters of CCRI include California Governor Pete Wilson, State Attorney General Dan Lungren, Stanford University professor Glynn Custred, and State Senator Quentin Kopp (I-San Francisco). A.G. Block, \textit{Ballot of Propositions}, CALIF. JOURNAL BALLOT BOOK, Sept. 1996; see also supra note 97.


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.
2. Constitutional Issues

The debate over Proposition 209 does not end with the public policy concerns outlined above. Proponents and opponents of CCRI have, in fact, extended the debate to the legal arena. On November 6, 1996, only a day after CCRI was passed, a group of civil rights advocates filed suit in federal court alleging that Proposition 209 violates both the Fourteenth Amendment and the Supremacy Clause of the United States Constitution. Plaintiffs include the Coalition for Economic Equity, the California National Association for the Advancement of Colored People ("NAACP"), several groups representing the interests of women and minority-owned businesses, and several persons adversely affected by the initiative. Among the named defendants are California Governor Pete Wilson, Attorney General Dan Lungren, several California counties and cities, and many state officials.

On November 27, 1996, in Coalition for Economic Equity v. Wilson, Chief U.S. District Court Judge Thelton Henderson granted the plaintiffs' motion for a temporary restraining order. He also certified as a class of plaintiffs "all persons or entities who on account of race, sex, color, ethnicity, or national origin, are or will be adversely affected by Proposition 209." The restraining order prohibited the defendants from implementing CCRI pending a hearing on a preliminary injunction.

On December 23, 1996, Judge Henderson issued a preliminary injunction. As a result, defendants were enjoined from "implementing and enforcing proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education, or public contracting,"

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114. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996). Plaintiffs argued that Proposition 209 violates the Fourteenth Amendment by making it much more difficult for women and minorities to achieve legislation in their favor than it would be for any other group to do the same. Id.
115. Id. Plaintiffs alleged that CCRI violates the Supremacy Clause of the U.S. Constitution by interfering with "[c]ongressional goals embodie[d] in Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972." Id.
116. Id.
117. Id.
pending final judgment in the action.¹¹⁸

In his sixty-seven page ruling, Judge Henderson agreed with plaintiffs' contention that Proposition 209 violates the Fourteenth Amendment by making it much harder for women and minorities to implement race- and gender-based programs aimed at remedying present discrimination than it is for all other groups to achieve favorable legislation.¹¹⁹ As Judge Henderson pointed out, prior to the passage of Proposition 209, women and minorities who desired to implement race- or gender-based affirmative action programs “were able to petition their state and local officials directly”¹²⁰ in much the same way as anyone else seeking preferential treatment would.¹²¹ As a result of CCRI, however, proponents of affirmative action programs are no longer able to seek political assistance in this way.¹²² Instead, they must first face the difficult task of amending the California Constitution so as to permit an appropriate affirmative action program.¹²³ As a result, Judge Henderson argued that minorities and women are effectively precluded from “petitioning local and state policymakers and representatives to adopt, maintain, or expand race- or gender-conscious affirmative action programs.”¹²⁴

In contrast, all other gender- and race-neutral groups that wish to achieve similar preferential legislation in the areas of government contracting, employment, or education are not affected by the passage of Proposition 209.¹²⁵ A group of disabled contractors, for example, can still effectively secure

¹¹⁹. Id. at 1491.
¹²⁰. Id. at 1499.
¹²¹. Id. at 1498. “Such programs can generally be approved by simple majority vote, or by executive decision.” Id.
¹²². Id. at 1499.
¹²³. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498 (N.D. Cal. 1996). Amending the California State Constitution necessitates either an initiative amendment, which requires sponsors to collect the signatures of at least eight percent of the number of people voting in the last gubernatorial election and then gain majority approval by voters, or a legislative amendment, which requires a two-thirds vote by both California’s Senate and Assembly. Id. In addition to being a very time-consuming process, amending the state constitution is also a very expensive task. Id. In the 1990 election, for example, over $109 million was spent on statewide initiatives alone. Id.
¹²⁴. Id. at 1499.
¹²⁵. Id. at 1505.
legislation which would set aside a certain number of government contracts for use by similar disabled contractors, without interference by CCRI.\textsuperscript{126} Unlike women and minorities, they do not have to amend the state Constitution prior to petitioning the appropriate state or local government officials.\textsuperscript{127} As Judge Henderson articulated, such a discrepancy demonstrates that despite Proposition 209’s facially-neutral language,\textsuperscript{128} the effect of its implementation is the imposition of a heavy burden on only a select portion of the state population—women and minorities.\textsuperscript{129}

In coming to these conclusions of law, Judge Henderson relied heavily on the Supreme Court’s decisions in \textit{Washington v. Seattle School District No. 1},\textsuperscript{130} and \textit{Hunter v. Erickson}.\textsuperscript{131} In \textit{Washington v. Seattle School District No. 1}, the Court interpreted the Equal Protection Clause as a guarantee of “the right to full participation in the political life of the community.”\textsuperscript{132} In so doing, the Court invalidated a Washington state initiative (“Initiative 350”) that prohibited school boards “from requiring any student to attend a school other than the one geographically nearest or next nearest to the student’s place of residence . . . and which offers the course of study pursued by each student . . . .”\textsuperscript{133} The law included several exceptions to this general rule, which had the ultimate effect of permitting bussing for almost any other reason be-

\begin{footnotesize}
\begin{enumerate}
\item[126.] Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1505 (N.D. Cal. 1996).
\item[127.] Id.
\item[128.] Id. at 1503-04. In both \textit{Hunter} and \textit{Washington}, the Court looked beyond the facially neutral language of the statutes in question to see if, “in reality, the burden imposed by the arrangement necessarily falls on a minority.” \textit{Washington v. Seattle Sch. Dist. No. 1}, 458 U.S. 457, 468 (1982).
\item[129.] Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1499 (N.D. Cal. 1996).
\item[130.] \textit{Washington v. Seattle Sch. Dist. No. 1}, 458 U.S. 457 (1982) (holding that a statewide initiative intended to prohibit bussing of students to achieve racial integration in schools is a violation of the Equal Protection Clause of the Fourteenth Amendment).
\item[132.] \textit{Washington v. Seattle Sch. Dist. No. 1}, 458 U.S. 457, 467 (1982); see also \textit{Romer v. Evans}, 116 S. Ct. 1620, 1628 (1996) (“Central . . . to our own Constitution’s guarantee of equal protection is the principle that government in each of its parts remain open on impartial terms to all who seek its assistance.”).
\item[133.] \textit{Washington}, 458 U.S. at 462.
\end{enumerate}
\end{footnotesize}
sides racial diversity in the schools.\textsuperscript{134} The Court interpreted these exceptions as evidence that the "initiative was directed solely at desegregative bussing in general."\textsuperscript{135} As a result, Initiative 350 denied minorities the opportunity to achieve beneficial legislation, and, therefore, discriminated against them in violation of the Fourteenth Amendment.\textsuperscript{136}

This rationale was largely drawn from the Court's prior holding in \textit{Hunter v. Erickson.}\textsuperscript{137} In this decision, the Court held that discrimination includes facially neutral legislation which "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."\textsuperscript{138} However, the mere fact that a law may "make it more difficult for minorities to achieve favorable legislation," is not alone sufficient to deem it legally discriminatory.\textsuperscript{139} State actions which go further, however, "by explicitly using the racial nature of a decision to determine the decisionmaking process," are unconstitutionally discriminatory.\textsuperscript{140} They make "it more difficult for certain racial and religious minorities to achieve legislation that is in their interest" in much the same way as blatantly denying minorities the vote did.\textsuperscript{141}

Judge Henderson's opinion in \textit{Coalition for Economic Equity v. Wilson} noted that "Proposition 209 shares several characteristics with the measures struck down in \textit{Hunter} and \textit{Seattle.}" As he explained,

\begin{quote}
[a]ll three initiatives are facially neutral. All three grew from controversial efforts aimed at rolling back legislative gains that were intended as remedies for historical discrimination suffered by particular groups. Perhaps most
\end{quote}

\begin{footnotes}
\textsuperscript{134} \textit{Id.} at 457. For example, under Initiative 350, school boards could require bussing for health or safety concerns, special needs of students, inadequate facilities, and overcrowded or unsafe conditions. \textit{Id.}

\textsuperscript{135} \textit{Id.} at 463. In its analysis, the Court noted that the language of Initiative 350 was facially neutral, but, nonetheless, reaffirmed that "there is little doubt that the initiative was effectively drawn for racial purposes." \textit{Id.} at 471.


\textsuperscript{137} \textit{Hunter} v. \textit{Erikson}, 393 U.S. 385 (1969) (holding that an Akron, Ohio city charter amendment requiring that all fair housing ordinances be put to a citywide vote before they could take effect is a violation of the Fourteenth Amendment).

\textsuperscript{138} \textit{Washington}, 458 U.S. at 470.

\textsuperscript{139} \textit{Hunter}, 393 U.S. at 395.

\textsuperscript{140} \textit{Washington}, 458 U.S. at 470.

\textsuperscript{141} \textit{Hunter}, 393 U.S. at 386-91.
\end{footnotes}
importantly, in the wake of all three measures, those seeing to reenact such remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.  

Given these similarities, Judge Henderson applied the precedent to *Coalition for Economic Equity v. Wilson*, and found that Proposition 209 creates a race and gender classification. The court then applied an intermediate scrutiny test to the classification, and concluded that the alleged state interests in ending discrimination and in avoiding liability under the 14th Amendment for affirmative action programs that have not yet been tested in court," are not sufficient justifications for "the nonneutral reordering of the political process that is at issue in this case."

The district court also agreed that plaintiffs' "demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is preempted by, Title VII of the 1964 Civil Rights Act." The court relied on the Equal Employment Opportunity Commission’s (“EEOC”) Guidelines on Title VII and supporting case law for the principle that “Congress intended to protect employers’ discretion [to use] race- gender-conscious affirmative action as a method of complying with their obligations under Title VII.” Similarly, the plain language and legislative history of Title VII led Henderson to conclude that “Congress intended the persons or entities potentially liable under Title VII to be entrusted with the power to avail themselves of the safe passage provided by voluntary


143. *Coalition*, 946 F. Supp. at 1510. The court concluded “that the initiative 'plainly rests on distinctions based on race.'” *Id.* at 1508 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982)).

144. *Id.* at 1509. The intermediate scrutiny test, used in gender classification case analyses, requires “that the challenged classification 'serves important governmental objectives' and that the means employed are 'substantially related to the achievement of those objectives.'” *Coalition*, 946 F. Supp. at 1509 (quoting United States v. Virginia, 116 S. Ct. 2264, 2275 (1996)).


146. *Id.* at 1517. The court, however, rejected the claim that CCRI was also preempted by Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972. *Id.* at 1517-19.

147. *Id.* at 1517.
The court found that Proposition 209 "contravenes" Congress' intent in both respects, and was, therefore, unconstitutional.  

On January 3, 1997, the district court's ruling in Coalition for Economic Equity v. Wilson was appealed to the Ninth Circuit. A three-judge panel unanimously overturned Judge Henderson's opinion, holding "that, as a matter of law, Proposition 209 does not violate the United States Constitution." As such, the Ninth Circuit vacated "the preliminary injunction, [denied] the motion to stay the injunction as moot, and [remanded] to district court for further proceedings consistent with this opinion."

According to the Ninth Circuit, the district court was mistaken to rely on the precedents set forth in Washington v. Seattle School District No. 1 and in Hunter v. Erickson. For the Seattle-Hunter doctrine to apply, "the state somehow must reallocate political authority in a discriminatory manner." Whereas both Seattle and Hunter involved such reallocation of political power, the Ninth Circuit was unable to say the same for Proposition 209. As the court explained, CCRI differs from the Seattle ordinance in that it:

addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area

148. Id.
150. Coalition for Econ. Equity v. Wilson, Nos. 97-15030, 97-15031, 1997 U.S. App. LEXIS 22955 (Aug. 21, 1997). The defendant class also moved to stay the district court's injunction pending appeal at that time. Id. A three judge panel heard oral argument on the motion to stay on February 10, 1997. Id. "On February 10, 1997, [the panel] heard oral argument on the application for a stay. The parties' arguments for and against a stay pending appeal focused primarily on the merits underlying the preliminary injunction itself. [The panel] thus deferred submission of the stay application and expedited submission on the merits." Id. at *12.
151. Id. at *52-*53.
156. See id. at *36-*47.
differently from race and gender discrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.\textsuperscript{157}

The court, therefore, held that Seattle and Hunter are completely irrelevant to the case at bar.\textsuperscript{158}

The Ninth Circuit also argued that even if the court were to concede that CCRI does restructure the political process, the initiative would still be constitutional.\textsuperscript{159} According to the court, "[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment."\textsuperscript{160} Although plaintiffs argued that CCRI imposes a tremendous burden on those who would seek race and gender preferences, the Ninth Circuit held that such a burden is already imposed by the Constitution itself.\textsuperscript{161} Furthermore, the Ninth Circuit panel stated "[t]hat the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification."\textsuperscript{162}

The appellate court concluded its analysis of the equal protection issue by analogizing Coalition for Economic Equality v. Wilson to Crawford v. Board of Education of the City of Los Angeles.\textsuperscript{163} "As in Crawford, 'it 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.'"\textsuperscript{164} Thus, the court held that the district court's analysis of the equal protection claim "relied on an erroneous legal premise."\textsuperscript{165}

The Ninth Circuit also held that the district court was wrong to conclude that Proposition 209 violates the Supremacy Clause of the Constitution.\textsuperscript{166} According to the appellate

\begin{flushleft}
\textsuperscript{157} Id. at *41.
\textsuperscript{158} Id. at *36.
\textsuperscript{159} Id. at *41-*47.
\textsuperscript{160} Id. at *41.
\textsuperscript{162} Id. at *45.
\textsuperscript{163} Id. at *46.
\textsuperscript{164} Id. at *47, n.18 (quoting Crawford v. Bd. of Educ. of the City of Los Angeles, 458 U.S. 527, 535 (1982)).
\textsuperscript{165} Id. at *47.
\textsuperscript{166} Id. at *48-*49.
\end{flushleft}
court, the plain language of Title VII "does not preempt Proposition 209." Section 708 of Title VII provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

According to the court, CCRI does not necessitate any act which would qualify as an "unlawful employment practice" under Title VII. Thus, "the district court relied on an erroneous legal premise in concluding that plaintiffs are likely to succeed on the merits of their preemption claims."

Finally, on November 3, 1997, the United States Supreme Court, without comment, denied the petition for the writ of certiorari submitted by the Coalition for Economic Equality. Thus, the Ninth Circuit opinion in Coalition stands as the law in California.

III. STATEMENT OF THE PROBLEM

The passage of CCRI has sparked a great deal of controversy throughout California and across the nation. The initiative has raised a plethora of social issues which can only be fully understood and appreciated in light of the turbulent history of affirmative action. Similarly, as the contrast between Judge Henderson's district court opinion in Coalition for Economic Equality v. Wilson and the subsequent Ninth Circuit opinion demonstrates, the debate over the constitutionality of affirmative action is far from over, despite the U.S. Supreme Court's refusal to hear the case. This comment seeks to delve into the public policy and constitutional concerns at the heart of the Proposition 209 debate, and to ad-

168. Id. (quoting 42 U.S.C. § 2000e-7 (1994)).
169. Id.
170. Id. at *52.
dress the issue of whether an initiative banning race- and gender-based programs in public hiring, contracting, and education is an appropriate moral and constitutional response to the problems of racism and segregation in America.

IV. ANALYSIS

A. Public Policy Concerns

Close scrutiny of the California Civil Rights Initiative demonstrates that it is flawed. Neither precedent nor the history of affirmative action support CCRI. While it is true that discrimination based solely on skin color is contrary to the purpose of the civil rights laws, CCRI does not reestablish this goal by creating "a more level playing field," as proponents contend. Instead, it sets women and minorities back several decades by ignoring the inherent benefits of affirmative action programs.

Affirmative action programs were originally created to assist in the achievement of social and economic equality among all Americans. Over thirty years later, the benefits of such programs have survived, and are even continuing to make a difference in the quality of life for many minorities and women in the United States. For example, affirmative action programs are still a means of economic compensation for the past discrimination against women and minorities have endured, as well as compensation for the discrimination such individuals continue to endure on a day to day basis. Similarly, affirmative action programs can be seen as compensation for a merit system that is primarily based on the values of white males. Additionally, such programs promote diversity, which benefits everyone, regardless of skin color or gender.

Unfortunately, the Ninth Circuit's decision to uphold CCRI and the Supreme Court's denial of certiorari ignore the positive effects affirmative action programs can have on women and minorities. As a result, California has become not only "color-blind," but "race and color ignorant."

174. See supra note 41 and accompanying text.
175. See supra note 1.
a. Distributive Justice

The Ninth Circuit and the United States Supreme Court, by its silence, have failed to address the negative effects that the Initiative will have on distributive justice in California. Through time, racism and discrimination have created a system of economic inequality. Women and minorities have been “relegated to the lower end of the socioeconomic ladder because of their race or sex,” and the only way to alleviate this injustice is to give these groups an unqualified chance to succeed. Affirmative action programs create “a new social reality—one which more nearly resembles the one captured by the good society . . . in which the places of significance will be held to a substantially greater degree than they are at present by persons who are nonwhite and female.”

It is an unfortunate fact that women and minorities are more likely to be unemployed and in the lower economic brackets than are white males. While there are multiple reasons for this phenomenon, the role of employment discrimination, education, and work experience must not be underestimated. Those with fewer resources often have less of an opportunity to receive quality primary and secondary education. The result is that instead of attending college, which could propel them out of poverty, many lower income high-school graduates must immediately enter into the work force where they are relegated to jobs in which they receive little compensation. Affirmative action programs target those women and minorities that are stuck in the poverty cycle, and often provide them with an opportunity to succeed.

b. Present Discrimination

Affirmative action programs also benefit society by giving job and educational opportunities to capable individuals who would otherwise be susceptible to race- and gender-
based discrimination. Past discrimination against minorities and women has created a society so deeply rooted in racism and sexism that these trends have carried through to modern practice. Despite the belief that "[m]ost Americans are not racists," hate crimes and other acts stemming from racism still occur at an alarming rate.

The truth is that prejudice still emanates from every pore of modern-day America. How else can we explain the senseless death of Chinese-American Vincent Chen, the continued burning of crosses on lawns of African-Americans and Jews, and the destruction of African-American churches in the South? Americans are not all color-blind; many are still largely racist. Affirmative action programs seek to provide those persons most susceptible to racially motivated discrimination with some sort of compensation. By ignoring both past and present sexual and racial discrimination, CCRI denies the opportunity to women and minorities, in effect, serving to make them more susceptible to racism and sexism in America.

"Racism" is not, however, limited to overt acts of racism such as those mentioned above. It also includes subconscious racist comments and actions which cause stigma or humiliation to a person because of the color of his or her skin. Examples include a Caucasian national broadcaster who calls an African-American professional football player a "little monkey" during a televised game, a Caucasian man who

187. Lawrence, supra note 184, at 235.
188. See Habari Njeri, The Turning Point, L.A. TIMES, Jan. 1, 1989, at F1 (recalling the brutal killing of Vincent Chen, the "Chinese-American who was mistaken for a Japanese by white auto workers in Michigan.").
189. Heilprin, supra note 186.
190. Id.
191. Id.
192. Lawrence, supra note 184, at 235.
194. Id.
195. Lawrence, supra note 184, at 240 (quoting a remark made by Howard
comments to an Asian-American woman that he does not think of her as being "Asian," or a Caucasian man who purposely crosses the street so as to avoid walking by a group of African-Americans. Such instances of subconscious racism, coupled with occasional intentional acts of discrimination, have a profoundly negative effect on the way minority men, women, and children view the world around them. Thus, to help counter the ignorance belying overt and subtle instances of racial and sexual discrimination, it is important to ensure that women and minorities are adequately represented in the workforce and educational system.

Admittedly, Title VI and Title VII of the Civil Rights Act do offer relief to those who actually suffer present-day discrimination on the basis of race or gender. The extent of this relief, however, is dependent on the effectiveness and costs of the remedies Titles VI and VII provide. Unfortunately, proving discrimination under these statutes is not always easy. It typically requires a strong showing of intent to discriminate—an element that is not always readily ascertainable. As a result, it is exceedingly difficult for many victims of discrimination to seek redress in the court system. Yet, so long as the courts make it exceedingly difficult for a victim of racial or sexual discrimination to prove injustice, there should be a place for affirmative action programs in our society.

c. Merit System

The Ninth Circuit's decision to uphold Proposition 209 and the Supreme Court's refusal to hear the case ignore the fact that affirmative action is a means by which society can compensate for the imposition of a system of merit that fails

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196. Id. at 240, 241. Lawrence believes that statements like this demonstrate self-conscious ethnocentrism. Id.
197. Id.
198. Id. at 236.
199. GREENE, supra note 24, at 4-8.
201. McAllister, supra note 31, at 24-25.
202. Id.
203. Id. at 21-24.
204. Id.
205. Id.
to recognize that different genders and races have different values and social practices. The modern concept of merit is based on white male values—especially those pertaining to academic and scholastic achievement. An example of this is found in the American and European legal educational systems, where the importance of test scores and grades is heavily stressed. Like most existing societal institutions, the educational system was created by Caucasian men at a time when it was acceptable to exclude African-American, Asian-American, or other minority cultures from schools. As a result, it is void of other culture and gender-based values. Often, the only option minorities have if they are to "succeed" in such a society is to abandon a part of their culture and, themselves, jump on the white band-wagon. Affirmative action programs give back that piece of culture to women and minorities that the education system had heretofore ignored.

Race can be—and often is—as much of an indicator of who a person is and what he or she is capable of as grades and test scores are. Race is not just about skin color; it is also about cultural values that stem from racial differences. These values are deeply embedded within our souls—they shape the way minorities and women see the world, and their place in it.

Admittedly, the Supreme Court has recognized that employers cannot attach certain characteristics to a culture or

206. See GARY PELLER, Race-Consciousness, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 143 (Kimberlee Crenshaw et al. eds., 1995).
207. Id. According to Peller, any social practice which was created by white males, for white males, is inherently biased towards majoritarian values and beliefs. Id. Such systems "can no longer provide a neutral ground from which to defend existing definitions either of qualifications or of merit," and, therefore, must be eradicated. Id.
208. Id. In the educational system—especially higher education—admissions, hiring, and tenure debates are premised on a merit system that stresses and rewards excellent grades and test scores. Id.
209. PELLER, supra note 206, at 143.
210. Id.
211. Id.
212. Id.
214. Id. at 271.
gender and assume that an individual possesses certain valued traits simply because of his or her skin color.\footnote{215} However, CCRI takes this too far by prohibiting government employers from recognizing that a specific person may actually embody certain cultural, racial, or gender characteristics which might prove invaluable in the office or classroom.\footnote{216} By embracing a state constitution that is not only color-blind—but also culturally-blind, CCRI forces state employers and educational institutions to ignore the value of diversity by subscribing to a primarily white merit system.\footnote{217} As a result, cultural differences are ignored, and minority cultures are forced to adopt a value system that they did not help create.

d. Diversity

Proposition 209 overlooks the positive effects affirmative action programs have on society by promoting diversity.\footnote{218} There is an undeniable value in having a racially and gender diverse workforce or university community.\footnote{219} Persons of different cultures and genders see the world from different perspectives. Thus, it is socially desirable to have an environment where several views are represented.\footnote{220} In a diverse environment, people will be able to learn about one another's gender and cultural differences on a personal level, which will hopefully create an atmosphere of acceptance and understanding.\footnote{221} As one corporate manager explained, "[b]y learning about others we learn about ourselves. In the process, individuals become empowered to view differences as assets and to put these assets to work creatively."\footnote{222}

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\begin{itemize}
  \item \footnote{215}{Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1985).}
  \item \footnote{216}{PELLER, supra note 206, at 132.}
  \item \footnote{217}{See supra part II.A.2.}
  \item \footnote{218}{PELLER, supra note 206, at 132.}
  \item \footnote{219}{Id.}
  \item \footnote{220}{Id. at 132. This is not to say that we should generalize race and gender such that, for example, all African-Americans are seen as possessing certain cultural characteristics. Instead, we should merely recognize the potential significance of one's culture and gender, and determine on a personal level if an individual does, in fact, embody certain racial, cultural, or sexual characteristics. \textit{Id.}}
  \item \footnote{221}{Donald Altschiller, \textit{The Legal Dimensions of Affirmative Action}, in \textit{AFFIRMATIVE ACTION} 10, 10 (Donald Altschiller ed., 1991).}
  \item \footnote{222}{Id. (quoting Alan Zimmerle, Corporate Manager of Equal Opportunity, valuing differences and affirmative action at Digital Equipment Corp. in Maynard, Mass.).}
\end{itemize}
As the California Civil Rights Initiative stands, minority cultures and women will be forced to comply with the value judgments of white males. In place of the individuality that is central to their identity will be a more acceptable "whiteness." What the appellate court fails to recognize is that skin color and race are not interchangeable. Culture and gender do more than shape what we look like on the outside; they also make us who we are on the inside. Thus, an environment that is culturally and sexually diverse will typically be composed of individuals who, because of race or gender, see the world through different perspectives. Such differences facilitate problem solving, and can create "a more humane and stimulating work environment for all." In addition, the tendency of people to be attracted to those who most resemble them must not be overlooked. If a university or corporation has racial and gender diversity, more people will tend to find it a comfortable environment. Similarly, if there are minorities and women in higher positions, those in lower positions will feel comfortable going to them for assistance or advice. Such a system of camaraderie could certainly improve employee productivity and motivation.

B. Procedural and Constitutional Concerns

In addition to being flawed with respect to the aforementioned public policy concerns, the Ninth Circuit's holding in Coalition for Economic Equity v. Wilson also suffers from several procedural and constitutional infirmities. First, the three-judge panel which was reviewing Judge Henderson's District Court decision overstepped the boundaries of their judicial power by deciding much more than the issue that was before them. It is well-settled that an order granting a

225. Id. at xiv.
226. See Tounya Lovell Banks, Two Life Stories: Reflections of one Black Woman Law Professor, in Critical Race Theory: The Key Writings that Formed the Movement 329. (Kimberlee Crenshaw et al. eds., 1995).
227. Id.
228. Id.
229. Id.
preliminary injunction prior to final judgment is appealable. However, the "scope of an appellate court's inquiry is only to determine whether or not the trial court has abused its discretion." As the court explained in Miller & Lux v. Madera Canal Co., "[t]he granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy." Thus, the appellate court may not determine the merits of the claim before trial.

The Ninth Circuit was apparently unaware of the limited scope of its reviewing powers when it decided Coalition for Economic Equity v. Wilson. The sole issue before the three-judge panel was whether the District Court abused its discretion by issuing the preliminary injunction on the implementation of Proposition 209. The appellate court went a step further, however, by addressing the constitutionality of the Initiative itself, and holding "that, as a matter of law, Proposition 209 does not violate the United States Constitution." At most, the court should have vacated the preliminary injunction and remanded the case to the lower court for determination on the merits. Instead, it may have precluded any chance for trial that the Initiative had.

Even assuming for the sake of argument that the Ninth Circuit did not abuse its discretion by ruling on the merits of the Initiative, the court's analysis of the constitutional issues before it suggests a total lack of understanding of the United States Constitution. The language of the Fourteenth Amendment suggests that all state laws must apply to citizens equally. They may not single out certain characteristics for preferential treatment, or deny general benefits to a specific group. The Ninth Circuit's claim that the Seattle-Hunter doctrine is inapplicable to a constitutional analysis of Proposition 209 completely ignores the central meaning behind the theory of "equal protection." It is obvious that the

235. U.S. CONST. amend. XIV.
Ninth Circuit was willing to stop at nothing—not even the parameters of the United States Constitution—to uphold the California Civil Rights Initiative.

1. Fourth Amendment

By holding that Proposition 209 does not violate the Equal Protection Clause, the panel of Ninth Circuit justices completely overlooked relevant Supreme Court precedent. As Judge Henderson explained in his district court decision, both *Washington v. Seattle School District Number 1*237 and *Hunter v. Erickson*238 stand for the proposition that the government may not pass legislation that makes it exceedingly more difficult for a particular group of individuals to use the political process to gain laws in their favor.239 Such legislation “reallocate[s] political authority in a discriminatory manner,”240 and is, therefore, not tolerated by the Fourteenth Amendment.241

The District Court relied heavily on the similarities between these cases and the Proposition 209 case when it decided to issue a preliminary injunction banning implementation of the Initiative.242 Like the ordinances at issue in both *Seattle* and *Hunter*, CCRI is not blatantly discriminatory. Nonetheless, it still places an immense burden on women and minorities by making it impossible to pass legislation in their favor, or to implement programs that recognize racial and gender differences.243

The Ninth Circuit saw this effect “not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment.”244 As the appellate court explained:

Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have

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243. *Id.* at 1489.
equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms. \(^{245}\)

Such reasoning completely ignores the legal significance of *Seattle* and *Hunter*. Proposition 209 is not about ending discrimination, as the panel would have us believe. The Initiative does not, after all, prohibit all forms of discrimination and preferential treatment—just that based on race and gender. \(^{246}\) State educational systems and employers are still permitted to give preferential treatment to athletes, California residents, students with disabilities, children of alumnus, and single-parent children. \(^{247}\) Despite the passage of Proposition 209, a college can choose to admit an all-star football player with a high school grade point average of 2.0 (on a 4.0 scale), over an oboe player with a high school grade point average of 3.5. Such preferential treatment is more than just suggestive of discrimination.

Apparently, the drafters of Proposition 209 and the Ninth Circuit believe such “characteristics” say something “about the content of a person’s character,” which race does not. \(^{248}\) Such logic, however, is greatly flawed. Just as not all minorities share the same character traits in the same way, not all athletes, single-parent children, or legacies are exactly alike. \(^{249}\) Nonetheless, the government still permits state educational systems and employers to group such people together and to discriminate against those individuals who are not athletically inclined, do not have divorced parents, or whose parents never went to college. \(^{250}\)

This analysis suggests that affirmative action programs are, in fact, an issue of special interest to minorities in much

\(^{245}\) *Id.*


\(^{247}\) *Id.*


\(^{249}\) *Id.*

the same way that racial bussing was found to be in Seattle.\textsuperscript{251} This is further substantiated by the fact that those persons most affected by Proposition 209 are the ones outraged by its passage.\textsuperscript{252} The consensus seems to be that those most affected by CCRI believe affirmative action is necessary to their receipt of equal protection of the laws.\textsuperscript{253} Perhaps we should listen to the victims instead of insisting that only white majoritarian views be voiced.

The Seattle analysis suggests that the California Civil Rights Initiative is indeed unconstitutional on equal protection grounds.\textsuperscript{254} Since its holding in 1982, however, the composition of the Court has dramatically changed.\textsuperscript{255} As the Adarand Constructors Inc. v. Pena\textsuperscript{256} and City of Richmond v. J.A. Croson Co.\textsuperscript{257} holdings suggest, the Supreme Court is much less sympathetic today to the plight of minorities and women than it was when it decided Seattle.\textsuperscript{258} The majority opinions in Adarand and Richmond were, however, quite narrow, which might have suggested that the Court would now be ready to reevaluate affirmative action and its place in society.\textsuperscript{259} But since the Court has refused to grant certiorari to Coalition v. Wilson,\textsuperscript{260} the valid concerns regarding the constitutionality of Proposition 209 may not be addressed for years.

For instance, San Francisco has openly vowed to defy the law with respect to Proposition 209.\textsuperscript{261} But even those California public entities who want to make a good faith effort to

\textsuperscript{252} See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996); see also Both Sides With Jesse Jackson (CNN Television Broadcast, Nov. 10, 1996), available in LEXIS, Nexis Library, News File.
\textsuperscript{253} Both Sides With Jesse Jackson (CNN Television Broadcast, Nov. 10, 1996), available in LEXIS, Nexis Library, News File.
\textsuperscript{254} See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1509 (N.D. Cal. 1996) (holding that “plaintiffs have demonstrated a probability of success on the merits of their equal protection claim.”).
\textsuperscript{255} Linda Chavez, Winds of Change, RECORDER, Nov. 13, 1996, at 5.
\textsuperscript{256} Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995).
\textsuperscript{258} Chavez, supra note 255.
\textsuperscript{259} Chavez, supra note 255.
\textsuperscript{260} 946 F. Supp. 1480 (N.D. Cal. 1996).
\textsuperscript{261} Louis Freedberg, Agencies Say They'll Ignore Prop. 209 Ban on Preferences Starts on Day of Protest March, S.F. CHRON., August 28, 1997, at A1, available in LEXIS, News Library, Sfchrn File; see also Silence of the Court on Affirmative Action, supra note 16.
comply with the law "will want to know what tools that they have to fight discrimination and promote diversity." So even though CCRI stands as the law of the state, many legal issues remain regarding its implications.

V. PROPOSAL

Since the California Civil Rights Initiative has been declared constitutional, Californians are now faced with the problem of how to alleviate some of the stress it will undoubtedly place on women and minorities. Programs which have targeted lower income individuals for recruitment in the educational and employment sectors have certainly received the economic benefits of affirmative action. Unfortunately, such assistance can no longer be provided. So in order to reach the past beneficiaries of affirmative action programs, new strategies for promoting distributive justice must be created.

For instance, at public colleges and universities in California, admissions officers could follow the example of many private schools, including Santa Clara University, Stanford University, University of Notre Dame, Cornell University, and Harvard University. Admissions committees could include questions in their applications which ask applicants to identify how their past experiences have shaped who they are. Such questions are open-ended enough to permit students to write about the ways their culture personally influenced them, or how they were discriminated against on the basis of race or gender, and the impact such discrimination had on them.

The same method of questioning could also be imposed by employers in interviews. CCRI does not make it unlawful to ask potential employees what life experiences have most shaped who they are. Nor does it make it unlawful to hire someone because their life experiences would add an unique perspective to the organization.

VI. CONCLUSION

The California Civil Rights Initiative may have resulted from an honest effort on the part of Californians to place all

state residents on an equal playing ground.\textsuperscript{263} Unfortunately, such a goal is not socially or constitutionally feasible.\textsuperscript{264} In a world where color and gender are still the basis of much hate, violence, and discrimination, it is necessary to have appropriate remedies at our disposal.\textsuperscript{265} CCRI strips Californians of such remedies, and ignores the importance of race and diversity in state educational systems and employment.\textsuperscript{266}

Since its inception, affirmative action has always been a controversial issue.\textsuperscript{267} It is not easy to ascertain when and how affirmative action should be implemented, or to gage the effectiveness of current programs.\textsuperscript{268} Nonetheless, affirmative action programs do provide a plethora of benefits to modern society—benefits which are obliterated by the passage of Proposition 209.\textsuperscript{269} Instead of a world of equality and diversity, we are left with a colorless world.

\textit{Rebecca Smith}

\textsuperscript{263} BLOCK, supra note 97.  
\textsuperscript{264} See supra discussion Part IV.  
\textsuperscript{265} See supra discussion Part IV.  
\textsuperscript{266} See supra discussion Part IV.  
\textsuperscript{267} BLOCK, supra note 97.  
\textsuperscript{268} McAllister, supra note 31, at 24.  
\textsuperscript{269} Id.