

# The Hunter Doctrine and Proposition 209: A Reply to Thomas Wood

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## Introduction

Constitutional law should not be the exclusive province of lawyers for one simple and compelling reason: the Constitution is the “Supreme Law of the Land” because “We the People”—not we the lawyers—understand and continue to retain it. It is thus heartening at some level to see a non-lawyer such as Mr. Wood take the time and effort to read complicated Supreme Court cases, and to respond<sup>1</sup> to our article<sup>2</sup> analyzing them. In the end, however, Mr. Wood fundamentally misreads and misunderstands the Supreme Court precedents most relevant to Proposition 209’s constitutionality. Sometimes, Mr. Wood relies on words and phrases that do not appear in the cases, and fails to account for specific straightforward language that does appear and forecloses his approach.<sup>3</sup> At other times, Mr. Wood fails to interpret words in the context of the entire decision in which they appear, as well as in the context of the larger constitutional picture.<sup>4</sup> For these reasons, we continue to believe that a lower court, faithfully following Supreme Court precedent, should feel constrained to conclude that Proposition 209 runs afoul of equal protection.<sup>5</sup>

The argument against Proposition 209’s constitutionality under existing law is premised on a line of Supreme Court cases which we call the

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1. See Thomas E. Wood, *Does Decisional Law Grant Whites Fewer Political Rights Under the Fourteenth Amendment Than it Grants to Racial Minorities?: A Response to Vikram D. Amar and Evan H. Caminker*, 24 HASTINGS CONST. L. Q. 969 (1997).

2. Vikram D. Amar and Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L. Q. 1019 (1996).

3. See *infra* notes 19-36, and accompanying text.

4. See *infra* notes 37-48, and accompanying text.

5. See generally Amar and Caminker, *supra* note 2. Whether or not the Supreme Court would or should reaffirm the relevant precedents, the question we address concerning how to interpret and apply these precedents remains important even though the Ninth Circuit has rejected their application to Proposition 209. See *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997), *cert. denied* 118 S.Ct. 397 (1997). The Ninth Circuit’s reading of these cases is not binding on any California court that entertains a constitutional challenge to 209, or on other Circuits that might confront similar cases.

*Hunter* doctrine.<sup>6</sup> The two most important of these, for present purposes, are *Hunter v. Erickson*<sup>7</sup> and *Washington v. Seattle School District No. 1*.<sup>8</sup> In *Hunter*, the citizens of Akron amended their city charter to require approval by a majority of Akron voters before any City Council ordinance relating to racial or religious discrimination in real estate transactions could go into effect.<sup>9</sup> The Supreme Court struck down the charter amendment as violative of equal protection.<sup>10</sup> The Court expressly declined to rest its holding on a finding of invidious intent.<sup>11</sup> Instead, the Court concluded that the law, on its face, drew an impermissible racial classification because it treated "racial housing matters differently [and less favorably]" than other matters.<sup>12</sup> Although the charter amendment made no formal distinctions between persons of different races, the Court found that the amendment would uniquely disadvantage beneficiaries of antidiscrimination ordinances (i.e., minorities), by forcing such ordinances to run a legislative gauntlet of popular approval from which other laws—and thus other interest groups—were spared.<sup>13</sup>

The second case, *Seattle*, applied and extended *Hunter*. In response to widespread *de facto* racial segregation in Seattle area schools, a few local school districts adopted a race-conscious busing and pupil assignment plan designed to eliminate racial imbalance.<sup>14</sup> These local programs prompted the people of Washington to enact Initiative 350, which, as understood by the Supreme Court, shifted local authority over racial busing to the state legislature, while leaving intact local authority to engage in busing for any other educationally valid reason.<sup>15</sup> The Supreme Court invalidated Initiative 350 on equal protection grounds, again declining to rest its holding on a finding of invidious intent.<sup>16</sup> Instead, like the Akron charter amendment, Initiative 350 was deemed flawed because it selectively removed a program of particular importance to racial minorities—integrative busing—from a level of decisionmaking that was more politically accessible for minorities

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6. See Amar and Caminker, *supra* note 2, at 1024.

7. 393 U.S. 385 (1969).

8. 458 U.S. 457 (1982). A third case upon which Mr. Wood relies is *Crawford v. Board of Education*, 458 U.S. 527 (1982). For an explanation why *Crawford* does not support Mr. Wood's reading of the doctrine, see *infra* notes 49-59, and accompanying text. See also Amar and Caminker, *supra* note 2, at 1049-53.

9. See *Hunter v. Erickson*, 393 U.S. at 386 n.9.

10. See *id.* at 393.

11. See *id.* at 389.

12. *Id.*

13. See *id.* at 390-91.

14. See *Seattle*, 458 U.S. at 461.

15. See *id.* at 483.

16. See *id.* at 487.

(local school districts) to a level that was more remote and less accessible (the state legislature).<sup>17</sup>

As we read the cases, a person challenging a law under the *Hunter* doctrine must satisfy a two-part test. First, she must show that the law in question is "racial" or "racial in character," in that it singles out for special treatment issues that are particularly associated with racial minority interests. Second, she must show that the law imposes an unfair political process burden by entrenching resolution of such "racial matters" in a political process where minorities are less able to succeed. Strict scrutiny is triggered only if the challenger satisfies both parts of the test. A law that imposes special political process burdens on classes not defined by race does not directly implicate the caselaw. Similarly, a law that deals selectively with "racial" issues but does not impose a political disadvantage upon minority interests is unproblematic. For example, the simple repeal of a specific antidiscrimination ordinance or affirmative action program would be entirely permissible.

Under this framework, Proposition 209 seems vulnerable. As we previously wrote:

[Proposition 209] singles out race and treats it differently from any other criterion for public employment, education and contracting decisions. In doing so, [Proposition 209] isolates an issue of special interest to minorities—affirmative action programs designed to remedy past racial wrongs and bring minorities together with nonminorities in educational and vocational settings—and relegates this issue to the highest and most entrenched level of governmental decisionmaking, the California Constitution.<sup>18</sup>

### I. Mr. Wood's Proposed Process-Substance Distinction

Mr. Wood's basic quarrel with our reading of the cases concerns the second prong of the two-part test described above. According to Mr. Wood's reading of the *Hunter* and *Seattle* cases, they cast constitutional doubt only on measures that single out racial matters and *explicitly* alter or restructure the political decisionmaking process as to those racial matters.<sup>19</sup> The fact that a law enacting a substantive policy has the *effect* of moving racial matters, and racial matters alone, to a higher and more remote level of political decisionmaking does not make the law constitutionally vulner-

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17. *See id.* at 485.

18. Amar and Caminker, *supra* note 2, at 1021.

19. *See Wood, supra* note 1, at 970 ("[T]he *Seattle* ruling invalidates only those enactments that meet both of the following criteria: (1) the enactment addresses a racial matter; and (2) it *explicitly* alters a political decisionmaking process on that racial matter in a way that places a special burden on minorities.") (emphasis added).

able, so long as the process-restructuring aspect of the law is not explicit on the law's face.<sup>20</sup>

We previously acknowledged that such a process-substance distinction has surface plausibility as a defense of Proposition 209.<sup>21</sup> Granted, Proposition 209 is less explicit in its restructuring of the political process than the Akron Charter amendment or Initiative 350. Nevertheless, for a variety of reasons, most of which Mr. Wood does not mention let alone address, we do "not believe that a proce[ss]-substance distinction provides a viable and principled limitation on the *Hunter* doctrine."<sup>22</sup>

To begin with, Mr. Wood's repeated references to a requirement of an *explicit* alteration of political processes comes from his own language, not the Court's. Mr. Wood writes as if the Court expressly stated that a process restructuring *must be explicit* in order for a plaintiff to have a constitutional claim. For instance, he says that Proposition 209 must be distinguishable from *Seattle* if "the phrase 'explicitly alters the political decisionmaking process' is to have any meaning."<sup>23</sup> Perhaps this is true, but the phrase "explicitly alters the decisionmaking process" does not appear in *Seattle* or *Hunter* at all; the phrase belongs to Mr. Wood, not to the Court.<sup>24</sup>

Moreover, the proffered distinction seems unrelated to the central conceptual inquiry underlying *Hunter* and *Seattle*. Had the cases been concerned with invidious intent, then the explicitly procedural wording of an initiative might be relevant insofar as it betrays an illicit motive. But the cases expressly eschew emphasis on intent in the traditional sense.<sup>25</sup> Instead, *Hunter* and *Seattle* focus primarily and repeatedly on effective access

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20. Most if not all of Mr. Wood's criticisms of our argument come back to this explicit procedural alteration/substantive policy distinction. See, e.g., *id.* at 970; *id.* at 971-72 (*Seattle* is distinguishable from 209 because "the people of the State of Washington did not adopt a [substantive] anti-busing *policy* when they passed Initiative 350" and because "initiative 350 *explicitly* altered the state's political decisionmaking process on a particular issue.") (emphasis added).

21. See Amar and Caminker, *supra* note 2, at 1046.

22. *Id.*

23. Wood, *supra* note 1, at 975; see also *id.* at 978 ("[T]here are *a priori* reasons for not interpreting the phrase 'explicitly alters the political decisionmaking structure' too broadly." *Id.*)

24. The Court does say its concerns are triggered when a State allocates governmental power non-neutrally, by "explicitly using the *racial* nature of a decision to determine the decisionmaking process." See *Seattle*, 458 U.S. at 470 (emphasis in original); see also *Crawford*, 458 U.S. at 551 (Marshall J., dissenting) (quoting same from *Seattle*). But in this sentence, the word "explicitly" modifies the phrase, "use[s] the racial nature," not the phrase, "determine[s] the decisionmaking process." In fact, in each and every instance where the Court in *Hunter*, *Seattle*, or *Crawford* uses either the word "explicit" or "explicitly," the term is used to modify the adjective "racial," and never to modify a verb such as "alter," "restructure," or "determine" the decisionmaking process. See *Hunter*, 393 U.S. at 389 ("Here, unlike *Reitman*, there is an explicitly racial classification"); *Seattle*, 458 U.S. at 485 (the *Hunter* charter amendment dealt with legislation in "explicitly racial terms"); *id.* at 485 n. 28 (strict scrutiny is applied to "explicit racial classifications"); *Crawford*, 458 U.S. at 536 (plaintiffs contend that Proposition I is an "explicit racial classification").

25. See, e.g., *Seattle*, 458 U.S. at 485; see also Amar and Caminker, *supra* note 2, at 1046.

to political power by the minority groups in question.<sup>26</sup> This effects/intent difference becomes clear when one compares the *Hunter* doctrine with the *Washington v. Davis*<sup>27</sup> line of equal protection cases. *Washington* addresses a distinct equal protection doctrine that Mr. Wood does not discuss, but which is part of the larger equal protection landscape that necessarily shapes the inquiry. And the process-substance distinction is beside the point if effects, rather than intent, drive the *Hunter* doctrine.

Putting such nuance aside, the most obvious reason we rejected the process-substance distinction is that the Court in *Seattle* rejected it.<sup>28</sup> As we explained, footnote 17 of Justice Blackmun's majority opinion demonstrates that the *Seattle* Court regarded the process-substance distinction as constitutionally unimportant. Mr. Wood, however, finds "it difficult to understand why"<sup>29</sup> we rely on this footnote. We therefore return to the heart of it. In footnote 17, the Court stated:

*Hunter* would have been virtually identical to [the law struck down in *Seattle*] had the Akron charter amendment simply barred the City Council from passing any fair housing ordinance. . . . Surely, however, *Hunter* would not have come out the other way had the charter amendment made no provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.<sup>30</sup>

In other words, if the Akron charter amendment provided only that "the City Council shall not enact any fair housing ordinance," it would have run afoul of equal protection just as much as the charter amendment actually struck down, which provided in essence that "the City Council shall not enact any fair housing ordinance, unless the ordinance goes through the procedure of popular approval." The hypothetical charter amendment which makes no mention of a popular approval procedure is nothing more than a substantive enactment of a policy against fair housing laws—it would not explicitly restructure any procedures—and yet the Court stated that it would strike such an amendment down.<sup>31</sup>

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26. See, e.g., Amar and Caminker, *supra* note 2, at notes 41-52, 76-82 and accompanying text; *Hunter*, 393 U.S. at 391; *Seattle*, 458 U.S. at 472, 476, 486; *Crawford*, 458 U.S. at 537.

27. 426 U.S. 229 (1976).

28. See *Seattle*, 458 U.S. at 474-75 n.17.

29. Wood, *supra* note 1, at 982.

30. *Seattle*, 458 U.S. at 474-75 n.17.

31. The Court's rejection of a process-substance distinction here makes eminent sense. To appreciate this easily, imagine that the Akron charter amendment had subjected all fair housing laws not to a popular approval requirement, but rather to a City Council supermajority requirement (60%). Mr. Wood would surely agree that this would violate the *Hunter* doctrine. Imagine further an even higher supermajority requirement (90%). Same result. Now imagine a Council unanimity requirement (100%). Clearly the same result. Next imagine a higher bar still—an absolute ban on fair housing ordinances even if the Council is unanimous. It is not hard to see why permitting this highest (absolute) bar, while invalidating lower bars would make little sense in

This reasoning extends to Proposition 209. Just as the Court's hypothetical Akron charter amendment prohibiting fair housing ordinances outright violates the *Hunter* doctrine because it effectively withdraws policy-making power to the most remote level—the People of Akron<sup>32</sup>—so also does 209 violate *Hunter* by effectively withdrawing policy-making power to the most remote level—the People of California.<sup>33</sup>

Mr. Wood might respond to this equation by labeling the Court's hypothetical charter amendment "procedural" because it targets an entity—the City Council—and its power to make certain racial policies. But Proposition 209 is "procedural" in precisely this same way—it targets "the State" (which is defined as including all cities, counties, and other public entities) and its powers to make certain racial policies. For this reason, Mr. Wood cannot distinguish the Court's own hypothetical, which the Court said was unconstitutional, from Proposition 209.

Similarly, Mr. Wood's attempt to distinguish between Initiative 350 and Proposition 209 along a process-substance dimension further reveals the fragile nature of the proffered distinction. Mr. Wood argues as follows:

[T]he people of the State of Washington did not adopt an anti-busing policy when they passed Initiative 350. Indeed, as the *Seattle* Court itself noted, the measure left the state legislature free to order such busing. Proposition 209, on the other hand, is a substantive policy enacted at the highest level of state government, the constitution. As with virtually all state constitutional amendments, its prohibitions are controlling over all non-federal entities and instrumentalities in the state.<sup>34</sup>

It is difficult to see analytically why 350 qualifies as procedural rather than substantive merely because the state legislature could, if it wanted, engage in racial busing itself. Initiative 350, like 209, expressed antipathy for particular race-conscious policies and, at the time of the Initiative's enactment, left Washington devoid of such policies. It is true (1) that the controversial race-conscious programs at issue in Washington had been adopted by local governments, so that these local entities were naturally the target of busing's opponents;<sup>35</sup> (2) that the situation is different in California, where the controversial race-conscious programs at issue have been maintained by both local and state governmental units; and (3) that Proposition 209 naturally targets both. But none of this means that 350 should be considered less "substantive" and more "procedural." A policy is no less

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terms of the values underlying the *Hunter* doctrine. And yet this anomalous result, already foreclosed by the Court, is exactly what Mr. Wood urges.

32. They are the only ones who can still use their sovereign power to make fair housing laws.

33. They are the only ones who can still use their sovereign power to make affirmative action laws.

34. Wood, *supra* note 1, at 971-72.

35. *See id.*

“substantive” merely because it can be changed by the legislature in the future. Proposition 209’s policy can also be changed in the future—by the voters of California. And this (clear but unstated) possibility of amendment surely does not, in Mr. Wood’s eyes, render Proposition 209 any less substantive. The simple fact is that in both Washington and California, certain state entities (the state legislature and the state electorate in Washington, and the state electorate in California) could still, even after the respective initiatives, implement controversial race-conscious policies in the future (though subordinate governmental units could not). Accordingly, just as 209 cannot be distinguished on process-substance grounds from the hypothetical (and unconstitutional) Akron charter amendment posited by the Court, neither can it be meaningfully distinguished on process-substance grounds from the invalidated Initiative 350.

The fatal flaw in a process-substance distinction can be illuminated by one final hypothetical. Suppose that Proposition 209 said “No unit of state government shall enact any race-consciousness law, *unless the race-conscious law is approved by a majority of the state electorate through a constitutional initiative.*” Even Mr. Wood would have to concede that this version of Proposition 209 is, by his own definition, procedural because it explicitly changes the level of state government at which race-conscious laws can be made. Why should this version be any more unconstitutional than the version of 209 actually enacted, which in effect does precisely the same thing?<sup>36</sup>

## II. Thomas Wood on Harry Blackmun on Lewis Powell

Mr. Wood next argues that we must read *Seattle* to recognize a process-substance distinction because that is the *only* way to make sense of another footnote, footnote 23 of Justice Blackmun’s *Seattle* majority opinion. Mr. Wood reads footnote 23 as specifically declaring statewide efforts to eliminate local governments’ race-conscious programs to be permissible,

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36. It is noteworthy that the Ninth Circuit, in rejecting a *Seattle*-based challenge to Proposition 209, did not seize on the process-substance distinction embraced by Mr. Wood. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) *cert. denied*, 118 S.Ct. 397 (1997). Instead, the Ninth Circuit for the most part resisted *Seattle*’s logic itself—labeling as “paradoxical” the notion that a law eliminating race consciousness could ever be considered a racial classification. See *Coalition for Econ. Equity*, 122 F.3d at 709. The Ninth Circuit did try to distinguish *Seattle* from 209 on the ground that racial busing is a *sui generis* kind of race-conscious affirmative action. See *id.* at 708 n.16. Although this is obviously not the place to fully critique the Ninth Circuit opinion, for the record we think that lower courts should not ignore Supreme Court reasoning they find “paradoxical,” and that the distinction between racial busing and other race-conscious programs does not survive close scrutiny.

interpreting laws like Proposition 209 to be constitutional.<sup>37</sup> Mr. Wood, however, misreads footnote 23; it does not constitutionally bless laws like 209 and has nothing to do with any process-substance distinction.

Because footnote 23 is a response to Justice Powell's dissent, his argument should first be considered. Justice Powell did raise some concerns about the scope of the majority opinion:

Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene. . . . After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene.<sup>38</sup>

Mr. Wood is correct that in footnote 23 the majority denied Justice Powell's assertion that under the *Seattle* rationale a state could never intervene in local policies.<sup>39</sup> But Mr. Wood's suggestion that the Court meant that a state may *always* thereafter intervene in local decisionmaking, including through a measure like Proposition 209, flies in the face of the Court's own explanation.

In simple terms, Justice Powell said: "the Court's opinion would mean a state can never intervene in local decisionmaking," to which the Court responded, "That's not true." Mr. Wood reads this response to mean: "That's not true—a state may *always* intervene." But the Court's response could just as well be read: "That's not true; a state may *sometimes* intervene, depending on the manner." Powell's fear that intervention will always be foreclosed is unwarranted because, according to the Court, a state may intervene in some circumstances, i.e., so long as it does so "in a *race-neutral* manner."<sup>40</sup>

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37. See Wood, *supra* note 1, at 974, 985.

38. 458 U.S. at 498 n.14 (Powell, J., dissenting).

39. See Wood, *supra* note 1, at 985.

40. 458 U.S. at 480 n.23 (majority opinion) (emphasis added), responding to 458 U.S. at 498 n.14 (Powell, J., dissenting). Mr. Wood's claim that our reading must be rejected as a "purely linguistic matter," Wood, *supra* note 1, at 986, rests on a distortion of the dialogue. Mr. Wood argues as follows:

If X is asked whether Y has the authority to adopt a policy on a particular subject-matter that preempts contrary policies by lower levels of government, and X replies that Y does have such authority, it would be unusual to interpret that affirmative answer to mean that Y may do so but only if Y also reserves decisionmaking authority on all other matters.



This narrower reading of the Court's rejection of Powell's concern is the better reading for two reasons. First, it makes the most sense of the text of the Court's footnote itself. The Court's response to Powell is worth quoting in full:

Throughout his dissent, Justice POWELL insists that the Court has created a "vested constitutional right to local decisionmaking," that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own," and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, *the racial nature of the way in which it structures the process of decisionmaking*. It is evident, then, that the horrors paraded by the dissent—which have nothing to do with the ability of minorities to participate in the process of self-government—are entirely unrelated to this case. *It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.*<sup>41</sup>

As the highlighted language makes clear, Justice Powell's contention that under the majority's approach a state may not override local policy choices is sometimes false. A state may develop a different statewide policy, provided that the policy results in a neutral (i.e., not race-specific) reallocation of decisionmaking power. For example, the state may "intervene" to terminate local race-conscious programs in public contracting by declaring a state policy to award contracts to the "lowest responsible bidder."<sup>42</sup> Such a contracting policy is race-neutral in that it dictates criteria for selection, rather than singling out race as a uniquely impermissible grounds for preference. Similarly, the state may "intervene" to terminate racial preferences in employment or law school admissions by affirmatively

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*Id.* Perhaps Mr. Wood is correct that a blanket "yes" generally does not mean "yes, but." The actual dialogue between Blackmun and Powell, however, does not track the structure of Mr. Wood's hypothetical question and answer session. Powell never "asked" the Court a question to which the Court responded with a blanket "yes." Instead, Powell stated that Y (a State or its People) lacked authority to adopt a particular policy, and Blackmun (X) replied "no, that statement is false." Given the structure of this dialogue, X's "no" can mean *either* "no, Y can always, rather than never adopt the policy" (Wood's reading) *or* "no, Y can sometimes, rather than never, adopt the policy" (our reading). No *linguistic* rule or convention privileges the former reading over the latter.

41. *Seattle*, 458 U.S. at 480 n.23 (emphasis added) (citations omitted).

42. *See, e.g., Associated Gen. Contractors v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381 (9th Cir. 1980).

defining some meritocratic criteria, rather than by uniquely prohibiting preferences based on race.<sup>43</sup> Such race-neutral intervention “where a local governmental body arguably has done ‘more’ than the Fourteenth Amendment requires,”<sup>44</sup> is perfectly consistent with the rule of *Hunter* and *Seattle*. But the state may not intervene in a manner that imposes a “comparative burden . . . on minority participation in the political process” by using “the racial nature” of a problem to “restructure[] the process of decisionmaking.”<sup>45</sup>

Second, our reading of footnote 23 is the only one that is consistent with the rest of the Court’s opinion. As the Court explains over and over, the *Hunter* doctrine’s “simple but central principle”<sup>46</sup> is that a state is free to “allocat[e] political power according to ‘neutral principles’ [even though this] may ‘make it more difficult for minorities to achieve favorable legislation,’”<sup>47</sup> but the state cannot “differentiate[] between the treatment of problems involving racial matters and that afforded other problems in the same area.”<sup>48</sup> By contrast, Mr. Wood’s reading would require us to believe that the Supreme Court, in a single footnote, meant to take back virtually everything else it repeatedly said in the text—and in a way that leaves the result in *Seattle* completely unexplained and perhaps inexplicable. Conventional rules of interpretation preclude such a reading.

### III. The Limited Relevance of *Crawford*

Moving from *Seattle* footnotes to other opinions, Mr. Wood also seeks support from *Crawford v. Board of Education*.<sup>49</sup> In that case, the Court upheld California’s Proposition I, which removed state law obligations on public entities to use busing to integrate California schools beyond the requirements imposed by the Fourteenth Amendment.<sup>50</sup> In our earlier article,

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43. We do not mean to suggest that under our approach, the *only* way for a state to intervene would be to specify a full set of permissible criteria. A state could permissibly eliminate race preferences along with a host of other preferences, instead of prescribing affirmative criteria to be used. While tough line drawing questions about how many other kinds of preferences must be included along with race to make a law permissible certainly arise, this “how general is general enough?” question is not unique to the *Hunter* doctrine, and instead runs through much of equal protection jurisprudence. Suffice it to say that the Akron charter amendment, Initiative 350, and Proposition 209 all present easy cases in this regard, in that they are so race-specific and thus—to use the Court’s term—“non-neutral.”

44. *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting).

45. *Id.* at 480 n.23.

46. *Id.* at 469.

47. *Id.* at 470 (citation omitted).

48. *Id.* at 480 (citation omitted).

49. 458 U.S. 527 (1982).

50. See *Crawford*, 458 U.S. at 527.

we (like the *Crawford* court itself) distinguished *Crawford* from *Seattle* by pointing out that even after Proposition I, state and local governments in California were not disempowered from adopting busing programs beyond those required by the federal Constitution.<sup>51</sup> Proposition I simply removed state constitutional *obligations* on state and local government to use busing beyond federal requirements.

Mr. Wood acknowledges that the *Crawford* Court distinguished *Seattle* in this way, but simply asserts that even had Proposition I disempowered state and local government from engaging in racial busing, Proposition I would have been upheld.<sup>52</sup> He concludes by analogy that Proposition 209 should be upheld as well.

Mr. Wood appears to argue as follows: In the course of its opinion, the *Crawford* Court observed that even after Proposition I, California's Constitution went *beyond* what the federal Constitution requires by giving local school boards the power to engage in busing beyond that required by the federal Constitution.<sup>53</sup> If giving local government power to engage in such racial busing goes beyond federal constitutional requirements, then, as a logical matter, preservation of that local power certainly cannot be *required* by anything in the federal Constitution. In Mr. Wood's words, when California, through Proposition 209, eliminates state and local race-conscious programs, it "recede[s] from something that the Federal Constitution does not require, and no more."<sup>54</sup> Mr. Wood's argument rests on faulty reading and reasoning, and is thus both descriptively and normatively incorrect.

As a descriptive matter, Mr. Wood fundamentally mischaracterizes the *Crawford* Court's statements concerning the relationship of state and federal law after Proposition I. The *Crawford* Court did observe that even after Proposition I, the California Constitution went beyond federal requirements, but not because the California Constitution *authorized* state and local government to act affirmatively. Instead, California law went beyond federal constitutional requirements in that it *obligated* local government to take certain steps that were not federally required. The passage Mr. Wood himself quotes makes this clear:

Even after Proposition I, the California Constitution still imposes a greater *duty* of desegregation than does the Federal Constitution. The state courts of California continue to have an *obligation under state law* to order segregated school districts to [remedy de facto, as opposed to de

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51. See Amar and Caminker, *supra* note 2, at 1052; *Crawford*, 458 U.S. at 536 n.12.

52. See Wood, *supra* note 1, at 993.

53. This is Wood's key point. He asserts, "the Court regarded the power that school boards retained under Proposition I as a feature of the measure that went beyond anything required by the Federal Constitution." Wood, *supra* note 1, at 993-94 (emphasis added).

54. Wood, *supra* note 1, at 994.

jure segregation.] The school districts themselves retain a state-law *obligation* to take reasonably feasible [non-busing] steps to desegregate, and they remain free to adopt busing plans [if they choose.]<sup>55</sup>

There is an obvious difference between duty to act and power to act, and when the Court speaks of California law going beyond federal law, it does so in terms of the “*duty of desegregation*” imposed by the California Constitution and the “*obligations*” imposed by state law on local government. It is true that the last clause of the last sentence of the quoted passage refers to power—as opposed to duty—on the part of state and local government. But read in context, this language is simply part of the more general point that the Court is making in this passage: that Proposition I did not eschew a federally required duty—which by definition would violate the federal Constitution—because Proposition I still imposed a greater “*duty of desegregation than does the federal Constitution.*”<sup>56</sup>

As a normative matter, Mr. Wood is wrong in suggesting that a state may prohibit a particular local power with impunity because, in so doing, it merely “recede[s] from something that the Federal Constitution does not require, and no more.”<sup>57</sup> Whether a state may prohibit a particular local power consistent with the federal Constitution depends on *how* the state does it. For example, a state has no duty to offer its residents welfare benefits, and thus a state law precluding local government welfare programs would merely “recede[] from something that the Federal Constitution does not require.” But a state law precluding local governments from providing welfare to racial minorities would “do more”—it would draw an unlawful racial classification. Here also, Proposition 209 “do[es] more” than recede from preference programs that the federal Constitution does not require; it recedes from them *selectively* in a manner violative of equal protection.

Only this reasoning explains how the Court in *Crawford* could distinguish the opposite result it reached in *Seattle*. In *Crawford*, the Court properly interpreted Proposition I as a “mere repeal” of an unusually broad interpretation of the State Constitution’s equal protection clause. This repeal was made by the entity that had enacted the clause (the People of California). The *Crawford* Court explained that “the simple repeal or modification of desegregation or antidiscrimination laws, *without more*, never has been viewed as embodying a presumptively invalid racial classification.”<sup>58</sup> By contrast, the Court said that Initiative 350, at issue in *Seattle*, was *more* than a mere repeal by the enacting entity—and was thus constitutionally problematic—in that it placed a special burden on minorities by disempow-

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55. *Crawford*, 458 U.S. at 541 (emphasis added); see Wood, *supra* note 1, at 994.

56. *Crawford*, 458 U.S. at 541.

57. Wood, *supra* note 1, at 994.

58. *Crawford*, 458 U.S. at 539 (emphasis added).

ering local government from enacting desegregation programs.<sup>59</sup> Proposition 209, like Initiative 350 and unlike Proposition I, disempowers state and local government in a non-neutral way and is thus constitutionally problematic.

#### IV. Equal Protection Symmetry

At the end of the day, Mr. Wood is reduced to suggesting that our reading of the cases gives non-whites more equal protection rights than those enjoyed by whites.<sup>60</sup> This charge is somewhat confusing, since it is equally applicable to *Hunter* and *Seattle* as he interprets them, and yet he claims to believe these cases were rightly decided.<sup>61</sup> In any event, the charge is also misleading. The *Hunter* doctrine does not protect non-whites more than whites because of their race per se, but rather because of their numerical minority status, their history of oppression and their lack of political power. The same is true of the Supreme Court's affirmative action doctrine announced recently in *Croson*<sup>62</sup> and *Adarand*.<sup>63</sup> Under these recent cases, all facial racial classifications are subject to strict scrutiny, regardless of what race is burdened. But the Court has made clear that the facially symmetrical strict scrutiny test plays out asymmetrically across racial groups because laws that explicitly disadvantage minority races are much less likely to survive strict scrutiny than laws that explicitly aid minority races.<sup>64</sup> It just so happens that in California today, as in the rest of the country, eliminating race consciousness means eliminating only programs that help persons of color, because racial preferences for white persons cannot currently satisfy strict scrutiny. Thus the asymmetry of which Mr. Wood complains is not inherent in the formal doctrine, but it is inherent in the history and nature of racial oppression that the Court, quite properly, continues to find relevant to the meaning of the Fourteenth Amend-

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59. See *supra* note 51, and accompanying text.

60. He does this in the title of his piece itself (a part of the title being, *Does Decisional Law Grant Whites Fewer Political Rights Under the Fourteenth Amendment Than It Grants to Racial Minorities?*)

61. Indeed, in his own description of *Seattle*'s two-part test, Mr. Wood explains that a law is not vulnerable unless it explicitly alters the process "in a way that places a special burden on minorities." Wood, *supra* note 1, at 970 (emphasis added). Thus, a state constitutional amendment that explicitly altered the political process as to racial issues in a way that favored minority interests (for example, by insulating local racial busing from any state intervention—even race-neutral intervention) would not give Mr. Wood pause. Given his concession that *Seattle* is about protecting minorities, much of Mr. Wood's argument is hard to understand.

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

63. *Adarand Construction v. Peña*, 115 S.Ct. 2097 (1995).

64. See, e.g., *Adarand*, 115 S.Ct. at 2114.

ment. This asymmetry fulfills, rather than frustrates, the core values of the Equal Protection Clause.