Equal Protection, Unequal Political Burdens, and the CCRI

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Table of Contents

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As other contributors to this symposium have observed, recent decisions from the Supreme Court make painfully clear that there are unconstitutional ways to establish race-based affirmative action programs. But, surprisingly enough, an older line of Court cases suggests that there are unconstitutional ways to *dis*establish such programs as well. And the California Civil Rights Initiative ("CCRI"),[1] a proposed amendment to the California Constitution on this November's ballot, may be just such a way.

We explore this possibility, focusing on subdivision (a) of the CCRI: "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."[2] Subdivision (a) comprises both an antidiscrimination component and an antipreference component. The former component, which erects a per se bar to all race discrimination against minorities, is undoubtedly constitutional.[3]

The antipreference component—which prohibits the State from according preferential treatment to individuals based on their race—would outlaw some activity that is currently consistent with the Fourteenth Amendment's Equal Protection Clause.[4] Under current law, state and local governments may employ racial classifications intended to advantage racial minorities if the classifications are narrowly tailored to serve a compelling state interest (the "strict scrutiny" standard).[5] Subdivision (a)'s antipreference component precludes these voluntary affirmative action programs, notwithstanding their permissibility under the Fourteenth Amendment.[6] The question we

1. Bill Jones, Secretary of State, Proposition 209, *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOVEMBER 5, 1996 (forthcoming Sept. 1996) [hereinafter Proposition 209].

2. *Id.*

3. For ease of exposition, we use race as a shorthand for "race, . . . color, ethnicity, or national origin . . . ." *Id.*

4. U.S. CONST. amend XIV.

5. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (*Shaw I*); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

6. *See, e.g.*, Erwin Chemerinsky, *The Impact of the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. ___ (1996) (describing programs foreclosed by the CCRI). Our argument takes swing-vote Justice O'Connor at her word when, in Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995), she observed that strict scrutiny for affirmative action programs need not be fatal. *See id.* at 2114, 2117. She made clear that strict scrutiny will not necessarily invalidate legitimate remedial programs as it would naked race discrimination. *See id.* at 2114 ("According to Justice Stevens [in dissent], our view of consistency 'equates remedial preferences with invidious discrimination, and ignores the difference between . . . a No Trespassing sign and a welcome mat.' It does nothing of the kind. . . . It says nothing about the ultimate validity of any particular law; that determination is the job

address today is whether this preclusion is permissible under the Court's equal protection jurisprudence.

Specifically, this Article focuses on a challenge to the CCRI based on three cases which we sometimes refer to as the "*Hunter* trilogy": *Hunter v. Erickson*;[7] *Washington v. Seattle School District No. 1*;[8] and *Crawford v. Board of Education*.[9] We feel this challenge is quite powerful, and it should move a lower court to invalidate the CCRI on federal constitutional grounds. The CCRI singles out race and treats it differently from any other criterion for public employment, education, and contracting decisions. In doing so, the CCRI 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. This would seem to violate the Equal Protection Clause as interpreted by the Court in the *Hunter* trilogy. To be sure, there are several important and complicated steps along the way in this argument, some of which legitimately require the exercise of political as well as doctrinal judgment. But in the end, although the question is far from easy, we feel a faithful and sophisticated application of the *Hunter* cases cuts against the constitutionality of the CCRI.

Before we begin, let us make clear the limited nature of our claim. In this Article, we mean neither to question, nor to defend, the correctness of the *Hunter* trilogy. Instead, we seek to dissect and understand the Court's language and reasoning in order to see how a state or lower federal court should measure the CCRI against these cases. To do that, we necessarily try to provide the most intelligible and coherent readings of them. We also consider, as would a lower court, how recent Supreme Court cases outside the *Hunter* trilogy might or might not bear on its application. The observations we make could, of course, affect one's views on whether the Supreme Court would, or should, maintain the *Hunter* cases as good law. But because our focus is not on how the Court itself would or should evaluate the

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of the court applying strict scrutiny.") (citations omitted); *see also Croson*, 488 U.S. at 493; Akhil R. Amar & Neal K. Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. (forthcoming 1996). If we are wrong in taking O'Connor at her word, and if in reality there are no race-based preferences consistent with the United States Constitution, the CCRI becomes truly irrelevant.

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

8. 458 U.S. 457 (1982).

9. 458 U.S. 527 (1982).

Hunter cases, but rather on how a lower court should faithfully apply them, a full-fledged normative assessment of these cases must await another day.

We proceed with our analysis as follows. Part I, Section A contains a brief discussion of conventional equal protection cases concerning facial racial discrimination and illicit motive. In Section B, we introduce the special legal doctrine established by the *Hunter* trilogy. This Section examines the cases and reveals a two-pronged doctrinal test: *Hunter* and its progeny render unconstitutional state laws that both (i) are "racial in character" in a special sense and (ii) specially burden a racial minority's exercise of political power. In Part II, we elaborate and apply the first prong of the *Hunter* test to conclude that the CCRI is "racial in character." Part III then explains how the CCRI discriminatorily imposes the sort of political process burden that, under existing caselaw, should trigger strict scrutiny. Part IV then briefly considers whether the CCRI can satisfy the strict scrutiny standard.[10]

I. Equal Protection Analysis and the *Hunter* Doctrine

A. Conventional Equal Protection Analysis

Under conventional equal protection analysis, a statute or state constitutional provision is subject to strict scrutiny if, on its face, it classifies on the basis of race.[11] The CCRI on its face does not embody a race classification in this conventional sense, because it does not single out any particular race for differential treatment, nor does it make a person's race relevant to the receipt of any benefit or imposition of any burden. (To the contrary, it purports to make one's race

10. We focus on the CCRI's impact on race rather than sex for three reasons. First, the *Hunter* trilogy addresses only the former. Second, subdivision (c) makes unclear how much sex-based affirmative action is foreclosed by the CCRI. *See infra notes* 71-73 and accompanying text. Third, because discrimination against women triggers intermediate rather than strict scrutiny, a *Hunter* challenge to the CCRI's provision on sex could succeed only where a challenge to the provision on race would succeed as well. For this latter reason, it is unclear whether an equal protection challenge to the sex provision would add anything, because a successful challenge to the race provision might invalidate the sex provision as well. Subdivision (h) of the CCRI contains a severability clause, which purports to save as much of the initiative as possible in the event that "any part or parts" are invalidated. If the prohibition on racial affirmative action were invalidated under the *Hunter* doctrine, it is unclear whether the provision on preferences for women would remain standing as a severable "part" of the initiative. The answer would depend on general severability principles of California law, as well as an interpretation of subdivision (h). Our initial sense is that the dual aspects of the antipreference provision are sufficiently linked so that they would not be considered severable under state law.

11. *See supra* note 5 and accompanying text.

completely *irrelevant* to the receipt of public education, employment, or contracts.)

Even a facially neutral law is constitutionally flawed if the purpose or motive behind the law's enactment is to disadvantage racial minorities.[12] A successful challenge along these lines requires a demonstration that the relevant lawmakers—in this case the voters enacting the CCRI—"selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" a traditionally disadvantaged group.[13] Such a showing of invidious intent or motive behind subdivision (a) of the CCRI would, we feel, be very hard to make. To begin with, people might support subdivision (a) to endorse the antidiscrimination provision, and thus vote for the CCRI "in spite of" rather than "because of" any antiminority message sent or effect created by the antipreference portion of the measure.

Moreover, there are several noninvidious reasons that could motivate people to support even the antipreference component of the CCRI itself. Two readily apparent justifications are notions of fundamental fairness and concerns about economic efficiency. As to fairness, some people sincerely believe that affirmative action preferences for minorities are morally objectionable in precisely the same way as is conventional discrimination against these groups. For them, using membership in a group defined by immutable criteria to distribute either benefits or burdens is presumptively unjust. And race and gender preference programs are the two most common departures from the so-called individual (as distinguished from group) equality norm. From this perspective, the inclusion of some sex provisions in addition to the race provisions in the CCRI demonstrates the sincerity of the decision to reject programs based on group equality theories.

As to efficiency, some people worry that affirmative action preferences substantially undercut economic growth because the "best persons" are not doing the jobs or filling the classrooms. That preference beneficiaries are in some sense minimally "qualified" does nothing to blunt this comparative argument.

Finally, some might believe that public consideration of race, even when benignly motivated, is inherently stigmatic, divisive, and dangerous public policy. Such "color-blind" advocates might plausibly believe that while affirmative action programs benefit minorities and society in some ways, such programs do more damage than they are worth. In short—and to (mis)paraphrase Justice Blackmun in *Re-*

12. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).
13. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

gents of the University of California v. Bakke[14]—to get beyond race, we must first get beyond race.

For these reasons, we think a court would have a very hard time invalidating the CCRI under conventional equal protection doctrines concerning facial discrimination or illicit motive. Nevertheless, the CCRI is vulnerable to attack under a less familiar and more nuanced branch of equal protection doctrine, to which we now turn.

B. The *Hunter* Framework

The *Hunter* doctrine emerges from a line of cases in which the Court has held unconstitutional certain changes in the structure of a state's or city's political processes—changes that isolate public policy decisions intrinsically important to racial minorities and make more difficult success by these groups in legislative politics. Each of the cases in which the Court has fleshed out the doctrine warrants particular discussion.

In *Hunter v. Erickson*,[15] the Court first gave "clear[ ] expression" to the principle that equal protection may be violated by "subtl[e] distortions [in] governmental processes [that operate to] place special burdens on the ability of minority groups to achieve beneficial legislation."[16] In *Hunter*, the people of Akron, responding to a fair housing ordinance enacted by the City Council, amended the city charter to prevent the implementation of any fair housing ordinance that had failed to gain the express approval of a majority of Akron voters. The amended charter defined the ordinances that were to be subject to the newly created popular approval requirement as those laws regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry. . . ."[17] The charter amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required approval of the electors before any future [housing discrimination] ordinance could take effect."[18]

By a vote of eight to one, the Court struck down the charter amendment as violative of equal protection. The Court declined to rest its decision on a finding of invidious intent. Instead, the Court subjected the law to strict scrutiny (which it could not survive) be-

14. 438 U.S. 265 (1978).

15. 393 U.S. 385 (1969).

16. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982) (describing origins of *Hunter* doctrine).

17. *Hunter*, 393 U.S. at 387.

18. *Id.* at 389-90.

cause the law effectively drew a "racial classification [which] treat[ed] racial housing matters differently [and less favorably]" than other matters.[19] The Court found it crucial that the law, while neutral on its face in the sense that it drew no distinctions among racial and religious groups, would nonetheless uniquely disadvantage beneficiaries of antidiscrimination laws (i.e., minorities) by forcing such laws to run a legislative gauntlet of popular approval that other laws—and thus other interest groups—were spared.

In *Washington v. Seattle School District No. 1*,[20] the Court applied and extended *Hunter*. In order to cure widespread de facto racial segregation in Seattle area schools, Seattle School District No. 1 adopted a voluntary integration plan that extensively used pupil reassignment and busing to eliminate one-race schools. The Seattle program prompted the people of Washington to enact Initiative 350. On its face, the Initiative provided broadly that "no school board . . . shall directly or indirectly require any student to attend a school other than [the geographically closest school]."[21] The Initiative, however, then set out so many exceptions to this prohibition that the effect on local school boards was to bar them from ordering reassignment or busing for the purpose of racial integration, but to permit them to order reassignment or busing for all other educationally valid reasons. As the Supreme Court put it:

> [T]he initiative was directed solely at desegregative busing in general, and at the Seattle plan in particular. Thus, "except for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students."[22]

On a five to four vote, the Court struck down the plebiscite. As in *Hunter*, the Court declined to rest its holding on a finding of invidious intent. Instead, the Court invalidated Initiative 350 because it specially removed racial busing—a program of particular importance to racial minorities—from the control of local decisionmaking bodies and shifted it to central management at the statewide level, where minorities were less likely to enjoy democratic success. This selective and unfavorable treatment of public programs that were beneficial to minorities denied such minorities the equal protection right to "full participation in the political life of the community."[23]

19. *Id.* at 389.
20. 458 U.S. 457 (1982).
21. WASH. REV. CODE § 28A.26.010 (1981).
22. *Seattle*, 458 U.S. at 463 (quoting district court opinion).
23. *Id.* at 467.

The third case in the *Hunter* trilogy, *Crawford v. Board of Education*,[24] was a companion case to *Seattle*. While the case involved superficially similar facts, the Court voted eight to one to reject the *Hunter*-based challenge to a California initiative. *Crawford* involved the validity of Proposition I, an amendment to the California Constitution enacted by the electorate in response to state court decisions interpreting the California Constitution to require the state to remedy de facto as well as de jure school segregation. To overrule these judicial decisions, Proposition I provided that

> [N]o court of this state may impose upon the State [or any state entity or official] any obligation or responsibility [in the name of the state constitution] with respect to the use of pupil school assignment or pupil transportation [except to remedy a specific action by the State that would violate the federal equal protection clause such that a federal court could impose the obligation as a remedy.][25]

In rejecting the *Hunter*-based challenge to Proposition I, the *Crawford* Court found that the "elements underlying the holding in *Hunter* [were] missing."[26] In particular, Proposition I's classification was not "racial" in the same way that the charter amendment in *Hunter* was. Moreover, the *Crawford* Court reasoned, Proposition I did not disable minorities from enacting racial busing programs legislatively, but rather merely "repealed" the existing state constitutional requirement of these programs that California had no federal obligation to provide. The lack of both a racial character and a political process burden thus served to distinguish and save Proposition I.

Throughout this trilogy, the Court has applied (with varying degrees of clarity) a two-pronged test. First, a challenger must show that the law in question is "racial" or "race-based" in "character," in that it singles out for special treatment issues that are particularly associated with minority interests. Second, the challenger must show that the law imposes an unfair political process burden with regard to these "minority issues" by entrenching their unfavorable resolution. Strict scrutiny is triggered only if the challenger satisfies both parts of the test.[27]

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24. 458 U.S. 527 (1982).

25. *Id.* at 532.

26. *Id.* at 537 n.14.

27. *See id.* (charter amendment's presumptive invalidity in *Hunter* followed from "'the reality . . . that the law's impact falls on the minority' . . . *and* the distortion of the political process worked by the" amendment) (emphasis added) (citation omitted); *Seattle*, 458 U.S. at 470 (constitutional flaw in Initiative 350 is that it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique [political] burdens on racial minorities."); *Hunter*, 393 U.S. at 389-90

A law that imposes special political process burdens on classes not defined by race does not directly implicate the trilogy.[28] Similarly, a law that deals explicitly with "racial" issues but does not impose any entrenching political process burdens is also unproblematic.

The central idea behind this line of cases is relatively straightforward: Just as minorities cannot be singled out for substantively inferior treatment—say, subjected to a unique sales tax—neither can they be singled out and relegated to inferior treatment in the political process—say, subjected to a race-based poll tax. Consider the following (and extreme) hypothetical: A state constitutional provision that requires a 90% legislative supermajority vote for any "law that benefits persons of color." That provision is obviously problematic because its text explicitly defines the provision's scope in terms of minority interests, and because the high supermajority requirement obviously imposes a substantial burden.

The *Hunter* line of cases is controversial in large part because the cases do not concern laws *whose very scope is explicitly defined in terms of minority interests*. The laws in question did not expressly single out minorities at all, but instead singled out issues that the Court *deemed* to be of particular interest to minorities. The equal protection vice found by the Court in these cases is thus more subtle than that plaguing the hypotheticals in the preceding paragraph.

Indeed, one might well wonder whether the Supreme Court would embrace such a context-sensitive doctrine if *Hunter* or *Seattle* arose for the first time today. In a recent series of cases involving government contracting[29] and electoral districting,[30] the Court has held that all racial classifications must satisfy strict scrutiny—"whether or not the reason for the racial classification is benign or the purpose remedial."[31] These cases reflect an equal protection doctrine that em-

("Here, . . . there was a . . . racial classification [that] treat[s] racial housing matters differently [and subjects them to a unique procedural] gauntlet.").

28. *See* James v. Valtierra, 402 U.S. 137 (1971) (suggesting that *Hunter* line of cases is limited to race-sensitive issues). *But see* Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (*Evans I*) (extending *Hunter* line to protect gays and lesbians).

29. *See* Adarand Constr., Inc. v. Pena, 115 S. Ct. 2097 (1995) (overruling Metro Broadcasting, Inc., v. FCC, 497 U.S. 547 (1990)); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

30. *See* Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996) (*Shaw II*); Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 509 U.S. 630 (1993) (*Shaw I*).

31. *Shaw II*, 116 S. Ct. at 1900.

braces formally symmetrical rules governing members of all races,[32] and the cases seemingly downplay the significance of traditional contextual concerns such as the political power or historical oppression of the burdened group. The "feel" of these recent decisions thus diverges from the more nuanced and asymmetrical "feel" of *Hunter* and *Seattle*. On the other hand, as we noted earlier, the *application* of strict scrutiny to facial classifications need not be symmetrical at all.[33] Moreover, the Court's articulated concern for symmetry has thus far been limited to facially discriminatory classifications, leaving open the possibility that the Court would, in a case of first impression arising today, eschew absolute symmetry where necessary to respond to more subtle forms of discrimination.[34] In light of this possibility and the doctrine of stare decisis, it would be quite adventurous to predict that the Court today would *overrule* rather than maintain the *Hunter* framework.

In any event, our focus in this Article is on how a state or lower federal court should apply the *Hunter* framework to the CCRI. Lower courts are generally obligated to interpret and apply existing Supreme Court precedents faithfully, having little discretion to determine that old precedent has lost its binding force.[35] Indeed, the Court has expressly cautioned that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[36] And nothing in the recent Supreme Court cases concerning explicit racial classifications is directly incompatible with the articulated *Hunter* framework. Thus, lower courts remain obligated to administer this framework fully and fairly when assessing the CCRI. We consider a bit later how a lower court might try to incorpo-

32. *See, e.g.*, *Adarand*, 115 S. Ct. at 2111 ("'the standard of review under the Equal Protection Clause is not dependent upon the race of those burdened or benefitted by a particular classification'") (quoting *Croson*, 488 U.S. at 494).

33. *See supra* note 6.

34. *Cf., e.g.*, *Adarand*, 115 S. Ct. at 2105 ("[T]his case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially neutral, result in disproportionate impact and are motivated by a racially discriminatory purpose.").

35. One of us has argued that, under certain narrow circumstances, inferior courts might properly decide cases before them based on anticipated future superior court rulings. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994). The required circumstances are not satisfied here. *See id.* at 70-72 (courts should not anticipate the overruling of Supreme Court precedents).

36. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

rate the recent Supreme Court cases as the court *applies* each of the two parts of the *Hunter* framework, which we now flesh out in more detail.

II. Is the CCRI's Burden "Racial in Character"?

Understanding the first prong of the *Hunter* test requires a closer look at how the Court has given it meaning in the trilogy. We therefore begin by carefully evaluating the Court's discussion of this prong, and then we apply our conclusions to the CCRI.

A. The "Racial in Character" Test

At the outset we must make a point about nomenclature. In describing and applying the first prong of the *Hunter* test, the Court uses the terms "race-based," "racial in character," and "racial classification" interchangeably, and in a peculiar and distinctive sense. A law that employs a "racial classification" for purposes of the *Hunter* test does not employ a "racial classification" for purposes of the conventional equal protection framework described earlier in this Article.[37] The facial use of a racial classification in that setting, it will be recalled, by itself triggers strict scrutiny. By contrast, a racial classification in the *Hunter* sense does not trigger strict scrutiny unless that classification is the basis for the imposition of a special political process burden on racial minorities. This must be so, or else antidiscrimination laws such as Title VII that (like the Akron charter amendment) employ the concept of "race" would themselves be constitutionally suspect.

In an effort to clarify the discussion in this Article, we hereafter use the phrase "racial in character" to denote a classification that is racial within the meaning of the *Hunter* doctrine. Careful analysis of the trilogy reveals that a law is "racial in character" in this sense if two criteria are satisfied: (i) the law regulates a racial subject matter; (ii) it has a racial impact, meaning it regulates the subject matter to the detriment of the racial minority.

The Court had a relatively easy time in *Hunter* concluding that the Akron charter amendment targeted a racial subject matter, partly on account of the amendment's explicit reference to "race" and "color."[38] The Court had greater difficulty in *Seattle*, partly because of

37. *See supra* text accompanying note 11.

38. *See Seattle*, 458 U.S. at 485 (arguing that *Hunter* was a clear and easy case, because the imposition of the political process burden was accomplished in "explicitly racial terms").

the facial neutrality of Initiative 350. Unlike the charter amendment in *Hunter*, the Washington initiative on its face did not mention race at all. But after parsing all of the Initiative's exceptions, the Court concluded that racial busing was the exclusive focus of the Initiative.[39]

In *Crawford*, the Court concluded that Proposition I was not "racial in character" in the *Hunter* sense because, among other things, the Proposition made no textual reference to race. Rather, Proposition I purported to deny state courts power to order pupil reassignment or busing for *any* reason. And unlike Initiative 350, Proposition I was not riddled with exceptions such that racial busing became its only real application. As the *Crawford* Court observed, although busing for integration purposes "prompted the initiation and probably the adoption of Proposition I," the Proposition "is not limited to busing for the purpose of racial desegregation, [but rather] applies neutrally to 'pupil school assignment or pupil transportation' in general."[40]

So textual references to "race" (*Hunter*) and the fact that a law in operation affects only "racial matters" (*Seattle*) are definitely relevant to the prong-one inquiry. But perhaps more important is the related inquiry into the effect that the challenged law will have on what the Court perceives to be the interests of the minorities themselves. For example, in *Hunter*, the Court made much of the fact that although the charter amendment's popular approval gauntlet formally applied to whites as well as blacks and to gentiles as well as Jews, "the reality is that the law's impact falls on the minority."[41] This is so, the Court reasoned, because majorities ordinarily do not need the protection of antidiscrimination laws, and thus lose very little by an amendment that makes such laws less likely to be enacted.[42]

That these cases are about a real-world assessment identifying the groups hurt by the challenged laws was made clear by the Court's analysis in *Seattle*. After rejecting defendants' argument that *Hunter* was necessarily inapposite because Initiative 350 nowhere mentioned "race" or "integration," the Court addressed the contention that "busing for integration, unlike the fair housing ordinance involved in *Hunter*, is not a peculiarly 'racial' issue at all."[43] The Court began by acknowledging that both whites and blacks stood on each side of the Initiative 350 debate, and that both whites and blacks might benefit

39. *Id.* at 471-72.
40. *Crawford*, 458 U.S. at 538 n.18 (quoting text of Proposition I).
41. *Hunter*, 393 U.S. at 391.
42. *Id.*
43. *Seattle*, 458 U.S. at 471-72.

from school integration. The Court was, however, not moved by the lack of complete racial bloc sentiment on the question of busing, and gave two explanations for this. First, the Court observed that some whites favored and benefitted from Akron's fair housing laws, so that *Hunter* was not easily distinguishable on this score.[44]

More importantly, the Court in *Seattle* phrased the inquiry more generally so as not to require an extremely tight correspondence between race and position on the issue. The critical question, said the Court, was whether "desegregation of public schools, like the Akron open housing ordinance, at bottom inures *primarily* to the benefit of the minority, and is designed for that purpose."[45] Thus, *some* disagreement within the minority community does not necessarily mean an issue cannot be "racial in character" for purposes of the *Hunter* test. With the question pitched at this level of generality, the Court had little trouble concluding that busing to accomplish integration, though more "controvers[ial] than . . . the sort of fair housing ordinance debated in *Hunter*, . . . is legislation that is in [minorities'] interest."[46]

Thus, the real-world impact of a challenged law on what the Court perceives to be the interests of minorities seems to be the most important aspect of the prong-one inquiry. In *Crawford*, the Court's finding that Proposition I was not "racial" for *Hunter*-doctrine purposes rested not only on the facial neutrality of the Proposition,[47] but also on the fact that the Proposition's effect on racial minorities was completely unclear.[48] This real-world assessment seems in tension with the conclusions about the value to minorities of racial busing in the *Seattle* opinion, though the Court's seemingly different empirical conclusions might be explained by its perceptions of different demographics in Seattle and Los Angeles.[49] In any event, the *Crawford* Court did not purport to take issue with the analytic framework

44. It is worth noting that the Court's invocation of *Hunter* here was not fully responsive to the defendants' argument, because the Court did not (and probably could not easily) say that some blacks *disfavored* the Akron fair housing laws, in the same way that some blacks *disfavored* racial busing. *Seattle* thus applied a somewhat looser test in this regard.

45. *Seattle*, 458 U.S. at 472 (emphasis added).

46. *Id.* at 473-74 (citations omitted).

47. *See Crawford*, 458 U.S. at 537.

48. *Id.*

49. *See id.* at 537 n.16. On a related point, it is interesting to note that none of the opinions in *Seattle* or *Crawford* analyzed the demographic breakdown of the people who voted for and against Initiative 350 and Proposition I.

erected by *Hunter* and *Seattle*, but rather applied it and came out differently on both prongs of the test.

The Court's careful focus on the real-world effect of the challenged law may at first glance seem odd, since the Court did not employ this finding in the familiar way, to support a direct finding of invidious motivation under the conventional *Washington v. Davis* equal protection framework. Indeed, even as the Court stressed the adverse real-world impact of Initiative 350 on minorities in *Seattle*, the Court eschewed any inquiry into invidious motive.[50]

The *Seattle* Court's seeming concern with effects for their own sake is, however, at some level consistent with an observation that some scholars have made when looking at political rights cases generally (i.e., cases dealing with voting, officeholding, and jury service). The suggestion is that disparate impact theory plays a more prominent role in political rights cases than it does in other equal protection settings. Actual inclusion of out-groups in political processes may be as or more important to the Court than the subjective motivation behind the challenged exclusionary devices.[51]

But the concern over adverse effects on minority interests reflected in the *Hunter* cases should not be overread. As is explained in much more detail in Section III below, the concern has not moved the Court to question truly race-neutral political process devices, such as the executive veto, that may tend systematically to disadvantage racial minorities in the same way that they disadvantage all numerical minorities. Thus, the "racial in character" prong of the *Hunter* doctrine continues to require some meaningful showing that the challenged law is peculiarly "racial"—not just in the sense that racial minorities may not like it.

B. The CCRI Is "Racial in Character"

Applying the foregoing analysis, we believe that the CCRI is "racial in character" within the meaning of the *Hunter* line of cases. To begin with, like the charter amendment in *Hunter* itself, the CCRI is textually race-conscious. Moreover, as with the Akron charter amendment, the real-world impact of the CCRI falls on minorities: "Preferences" in favor of white males are illegal with or without the CCRI. For these reasons, although some blacks, Latinos, and Asians

50. *Seattle*, 458 U.S. at 485.

51. *See* Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 255-57 (1995); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126-31 (1989).

disfavor affirmative action today, and although affirmative action today is often justified (as was busing in the 1970s) as benefitting *all* of society, we think it still fair to say that affirmative action "inures primarily for the benefit of minorities, and is designed for that purpose."[52] In short, enactment of the CCRI particularly hurts minorities just as did the Akron charter amendment and Initiative 350. The CCRI is also distinguishable from Proposition I in *Crawford*, with respect to both facial neutrality and effects on minorities.[53]

But putting aside the mechanical operation of doctrine, are not affirmative action programs intuitively different from antidiscrimination laws of the kind at stake in *Hunter*? CCRI defenders might claim that the Akron charter amendment seemed more "racial in character" than the CCRI in that the charter amendment was designed to permit people to use race in their business decisions, whereas the CCRI attempts to make race irrelevant to decisionmaking. The preclusion of antidiscrimination laws, defenders would continue, surely seems more clearly linked to incontrovertible minority interests than does the preclusion of racial preferences.

We have a number of responses. For starters, *Seattle* involved *more* than mere antidiscrimination laws. It involved affirmative steps taken to redress de facto segregation—steps that, like admissions, employment, and contracting preferences, make race relevant. In a very meaningful sense, then, the busing at issue there *was* affirmative action—and yet the Court applied *Hunter* to invalidate Initiative 350.

Indeed, the busing whose centralization was invalidated in *Seattle* was arguably *less* basic to remedial objectives than are the affirmative action programs foreclosed by the CCRI. This is so because after *Croson* and other recent affirmative action cases, the majority of race and sex "preference" schemes that are now permitted under federal

52. *Seattle*, 458 U.S. at 472.

53. Supporters might defend the CCRI by arguing that its antidiscrimination component *helps* minorities, in that it flatly prohibits discrimination against them, instead of merely subjecting such discrimination to the strict scrutiny test found in federal law. Such help is more illusory than real, as there are probably no actual instances of discrimination against racial minorities that pass strict scrutiny and therefore are uniquely prohibited by the CCRI's antidiscrimination provision. We note also that in *Hunter*, charter amendment supporters could have argued that the amendment helped minorities by making enactment of Jim Crow housing segregation ordinances (including those that might satisfy strict scrutiny) more difficult. (Recall that the amendment covered all legislation dealing with discrimination "on the basis of race," etc.) Similarly, Initiative 350 as a formal matter made it more difficult for a locality to use busing to *resegregate* Seattle schools. These hypothetical benefits to minorities did not prevent the Court from finding harm to minorities in *Hunter* and *Seattle*, and they should not do so with respect to the CCRI either.

equal protection doctrine (and thus the programs affected by CCRI) are programs that are carefully designed to remedy past de jure discrimination against women and persons of color.[54] If minorities had an important and "peculiarly racial" interest in remedying de facto segregation in *Seattle*, it seems they should have an even stronger interest in programs designed to redress de jure wrongs. Thus, the CCRI is in some sense more appropriately deemed "racial in character" under the *Hunter* doctrine than was Initiative 350.

In fact, this last point suggests further that the CCRI may not really be so different from the Akron city charter amendment for purposes of the first prong of the *Hunter* test. When we consider that the affirmative action preferences eliminated by the CCRI are those grounded in remedies for established wrongs (at least outside of the education field), the gap between affirmative action and antidiscrimination narrows. Could a lower court really draw a principled line—in terms of what is in the "interest of minorities"[55]—between protection from discrimination and protection from its lingering effects?

In response to this analysis, CCRI supporters might offer three reasons why the CCRI does not impose a cognizable burden that is "racial in character" under the *Hunter* test: (1) focus on the burden is misplaced; (2) given the Court's current attitude about affirmative action, the burden imposed is constitutionally insignificant; and (3) the burden imposed is too general to be deemed "racial." We consider each of these contentions in turn.

1. Is a Motive Inquiry More Appropriate?

The preceding analysis assumes that the Court's articulated doctrinal framework and reasoning should be taken at face value. Some might question this assumption, suggesting that the Court in *Hunter* and *Seattle* applied strict scrutiny only because the Court saw in the initiatives some indicia of invidious intent. These indicia were not enough to justify invalidation under the "unconstitutional motive" test

54. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one . . . interest [that is compelling for purposes of strict scrutiny in this realm]: remedying the effects of racial discrimination.").

Some have argued that diversity, as distinguished from remedying past discrimination, may remain a proper basis for some race-conscious programs in the educational context. *See* Amar & Katyal, *supra* note 6. *But see* Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (concluding that diversity is not a compelling interest in higher education), *cert. denied sub nom.* Thurgood Marshall Legal Soc. v. Hopwood, 116 S. Ct. 2580 (1996).

55. *Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

of *Washington v. Davis*,[56] but still enough to warrant invalidating the initiatives by stretching somewhat prior equal protection doctrine to encompass laws that are "racial in character." If *Hunter* and *Seattle* are best understood as "soft intent" cases, perhaps the CCRI is not so clearly vulnerable.[57]

But we think it adventurous to read *Hunter* and *Seattle* as driven primarily by a "soft intent" inquiry. It is always somewhat risky to impute to the Supreme Court an unarticulated rationale in the face of a carefully developed doctrinal framework; it is even more hazardous when the Court has explicitly disavowed the proposed rationale.[58] And the Court's articulated *Hunter* framework—with its concern for effect rather than intent—does to some extent resonate with other cases involving burdens on racial minorities in the exercise of political rights such as voting and jury service.[59] For these reasons, lower courts cannot recharacterize the *Hunter* doctrine rationale in motive inquiry terms.

2. *In Light of Recent Cases, Does the Elimination of Affirmative Action Programs Still Qualify as a Cognizable Racial Burden?*

Even accepting the *Hunter* framework as articulated, supporters might defend the CCRI by arguing that the elimination of affirmative action programs does not as clearly disadvantage racial minorities as did the *Hunter* and *Seattle* initiatives. The effects of affirmative action programs are ambivalent, CCRI supporters would claim, because such programs generally hurt racial minorities in some ways even if they help minorities in others. This challenges the notion that the programs terminated by the CCRI "inure[ ] primarily to the *benefit* of the minority."[60]

This defense would build on recent Supreme Court cases, which assertedly support such an ambivalent characterization of affirmative action programs. Over the past seven years, *City of Richmond v. J.A.*

56. 426 U.S. 229 (1976); *see supra* notes 12-13 and accompanying text.

57. *See supra* notes 13-14 and accompanying text (identifying noninvidious motivations behind CCRI).

58. *See, e.g., Seattle*, 458 U.S. at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.") (citation omitted).

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

60. *Seattle*, 458 U.S. at 472 (emphasis added).

Croson Co.[61] and its progeny[62] have justified strict scrutiny for purportedly "benign" race-conscious programs in part through renewed emphasis on certain costs that affirmative action programs threaten to impose on minorities (whether uniquely or along with others). According to the Court, such programs threaten to embrace and "foster harmful and divisive stereotypes,"[63] which might "balkanize us into competing racial factions."[64] The CCRI, supporters would thus contend, does not frustrate valued minority interests. Rather, the Initiative simply moves California law in line with the Supreme Court's disparaging attitude toward affirmative action programs.

This argument is superficially appealing, and it likely provides the most plausible basis for rejecting the *Hunter*-based challenge to the CCRI. Nevertheless, upon careful reflection, we believe that a faithful reading of *Hunter* and *Seattle* still compels a lower court to characterize the CCRI as imposing a cognizable "racial in character" burden—*Croson* notwithstanding.

First, this defense of the CCRI reads too much into the Supreme Court's recent affirmative action cases. Yes, the Court invoked strict scrutiny because of the potential costs of race-conscious measures. And, not surprisingly, the Court sounded unenthusiastic about such programs—after all, in each of these cases the Court invalidated the program under review for being too loosely tailored and thus contributing to racial stereotyping and social divisiveness.

But the proper question is not whether the class of all *conceivable* or even historical affirmative action programs inures primarily to the benefit of minorities; the question is whether the class of all *constitutional* programs—the only ones foreclosed by the CCRI—inures to their benefit. Programs that *satisfy* strict scrutiny do so precisely because the costs of stereotyping and polarization are avoided, or at least are outweighed by the programs' benefits. The Court continues to remind us that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."[65] When the Court agrees that

61. 488 U.S. 469 (1989).

62. *See* cases cited *supra* notes 29-30.

63. Bush v. Vera, 116 S. Ct. 1941, 1963 (1996) (plurality opinion authored by Justice O'Connor); *see also* Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (classifications based on stereotypes can be "offensive and demeaning" to minorities).

64. Shaw v. Reno, 509 U.S. 630, 657 (1993) (*Shaw I*).

65. Adarand Constr., Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); *see also Shaw I*, 509 U.S. at 656 (noting the "significant state interest in eradicating the effects of past racial discrimination").

a particular program achieves a "compelling" interest, it essentially recognizes that the program *does* significantly assist the intended beneficiaries. In short, nothing in *Croson* and its progeny casts aspersions on the value and significance of *constitutional* affirmative action programs. For that reason, eradication of these programs—effected in one fell swoop by the CCRI—must still be viewed as appreciably and specially disadvantaging racial minorities. Thus, the CCRI does more than bring California law in line with the Court's expressed attitude of late; the CCRI takes California far beyond.

Second, the suggestion that contemporary affirmative action programs do not primarily benefit racial minorities cannot be squared with the holding of *Seattle*. As explained earlier, Initiative 350 eradicated racial busing designed to remedy de facto school segregation—a race-conscious program that, in its day, was extremely controversial.[66] Racial busing imposed both practical and emotional costs on black schoolchildren, and it generated interracial divisiveness and even hostility. For a lower court to uphold the CCRI without calling *Seattle* into question (which the court could not legitimately do), the court would have to find that the constitutional affirmative action programs foreclosed by the CCRI impose greater costs than did integrative busing in 1982. Given the heated debate over busing's effects, and given the complexity and variety of affirmative action programs today, any such judicial finding would be quite ambitious, to say the least.

Finally, there is a more careful way to read the Supreme Court's recent uncomplimentary descriptions of affirmative action programs, one that is actually coherent with rather than in conflict with the holding in *Seattle*. The Court's disparaging language has been directed at programs whose weak justification or poor design creates a propensity to "balkanize" people of different races, dividing rather than integrating them.[67] Significantly, the state laws invalidated in *Hunter* and *Seattle also* tended to frustrate, rather than promote, integration.[68] The Court's invalidation of these laws thus dovetails with the central theme of *Croson* and its progeny: The use of race by government is

66. See *supra* note 21 and accompanying text.

67. *See, e.g., Shaw I*, 509 U.S. at 646-47 ("In some exceptional cases, a reapportionment plan may be so irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race.") (citation omitted); *id.* at 647 (race-based districting with dramatically irregular shapes "bears an uncomfortable resemblance to political apartheid").

68. The Akron city charter amendment placed structural barriers in the way of housing antidiscrimination ordinances, which are obviously intended to encourage residential integration of different races. Initiative 350 placed structural barriers in the way of racial busing programs intended to integrate public schools.

particularly disfavored when it contributes to (*Croson*), or makes systematically more difficult the remediation of (*Hunter*; *Seattle*), racial divisions and balkanization.

We believe that under this "integration reading" of the cases, the CCRI remains vulnerable to lower court invalidation. Defenders would quickly point out that the CCRI does more than forbid race-based integrative affirmative action; it also forbids *segregative* discrimination against racial minorities, so that the overall effect on integration is mixed. But, as we noted earlier, the CCRI's antidiscrimination component does precious little if anything beyond what the United States Constitution already does. Not so with the antipreference component, which forecloses a myriad of affirmative action programs.[69] While it is true that the CCRI does not (as did Initiative 350) target a defined subset of racial preferences that tend to integrate, in reality the programs the CCRI forecloses would tend to bring people of different races together, just like desegregative busing. Indeed, desegregative busing—the very policy protected in *Seattle*—itself would be forbidden by the CCRI.

So too would all race-based affirmative action in higher education, a setting where the Court has already recognized that affirmative action programs operate to bring people of all races together rather than to segregate them.[70] The CCRI also forecloses race-based affirmative action in government employment. As is true with education, race-based programs in this area, whether grounded on remedy or diversity rationales, have a profound tendency to bring people together, not to segregate them. Even affirmative action in government contracts, if well conceived, can be designed to promote interaction rather than balkanization. Yet, these programs are foreclosed. And if a particular affirmative action program did tend to balkanize, it might under recent cases be unconstitutional for that reason, and thus would not be part of the class of programs the CCRI effectively forbids. In other words, under a strong "integration reading" of *Hunter*, *Seattle*, and more recent equal protection cases, only those affirmative action schemes that avoided balkanization could survive strict scrutiny, and thus only those programs would be meaningfully affected by the CCRI. Indeed, under this reading the real difference between CCRI

69. *See supra* note 6 and accompanying text.

70. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978) (appendix to opinion of Powell, J.); *id.* at 374 (opinion of Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). *See generally* Amar & Katyal, *supra* note 6.

and Initiative 350 cuts *against* the CCRI. Whereas Initiative 350 zeroed in on *some* race-based integration programs for special inferior treatment, the CCRI is more ambitious, seeking to entrench a rejection of *all* race-based integration programs.

The foregoing suggests that the impulse to incorporate the lessons of the Court's recent affirmative action decisions when applying the *Hunter* doctrine to the CCRI must be carefully tempered. It is inappropriate for a lower court to read between the lines of *Croson* and its progeny and adduce a principle that would, fairly applied, conflict with the holding of *Seattle*. Reading the recent decisions to reflect an undifferentiated antagonism to all affirmative action programs fails this test. In contrast, a more nuanced reading that distinguishes among programs based on their integrative effects harmonizes the recent cases with *Seattle*—and also confirms the constitutional vulnerability of the CCRI.

3. *Is the CCRI Sufficiently General to Avoid Being Deemed "Racial in Character"?*

Because the CCRI affects affirmative action for women as well as for racial minorities, the class of citizens burdened extends beyond race. This fact gives rise to two possible defenses of the CCRI.

First, CCRI supporters might argue that the inclusion of sex makes the CCRI's regulatory scope more general, so that it cannot be characterized as "racial in character" like the law in *Seattle* (which explicitly isolated *racial* busing). But the entrenchment in *Hunter* involved not just racial housing discrimination, but religious discrimination as well. Thus, there is no requirement that race be treated completely uniquely from other criteria for *Hunter* to be implicated. Surely the result in *Hunter* would not have changed had the special voter approval requirement applied to all fair housing (or fair employment) laws regulating sex as well as race discrimination; if the coupling of race and religion did not save the Akron charter amendment, neither would the coupling of race and sex.

In any event, subdivision (c)[71] makes clear that although sex is covered by the CCRI, it is treated somewhat differently. While subdivision (a) dictates that race-based preferences are absolutely prohibited, subdivision (c) suggests that sex-based preferences are not.[72]

71. *See* Proposition 209, *supra* note 1.

72. This is so because subdivision (c) provides that subdivision (a)'s seemingly absolute prohibition of preferences (as well as discrimination) should not be interpreted to prohibit "bona fide qualifications based on sex which are reasonably necessary to the nor-

Thus, the CCRI's treatment of race *is* unique, just as was the treatment of race in *Seattle*.

Second, CCRI supporters might contend that minorities and women together have sufficient political power to block the Initiative's passage, and therefore racial minorities have no legitimate claim to special judicial protection through strict scrutiny if the Initiative passes anyway. This argument is sufficiently novel that we are unaware of any cases that are directly responsive. But we find it unpersuasive. To begin with, because subdivision (c) may mean the CCRI does not absolutely prohibit sex-based preferences,[73] women may not necessarily have the same interests at stake as do racial minorities. In any event, as a general matter the bundling of historically disadvantaged groups into a numerical majority should not save a law from rigorous scrutiny. The fact that a burdened class lacks political power due to small numbers is but one of several traditional justifications for treating a legislative classification as "suspect" under equal protection doctrine.[74] Consider, for example, facially discriminatory statutes that explicitly disadvantage both racial minorities and women by imposing direct burdens (such as a special sales tax or exclusion from jury service). We believe, and are confident the Court would agree, that the traditional rationales for strictly scrutinizing the explicitly racial components of any such laws are not vitiated by the breadth of the victim class.

The same should be true here, unless the rationales underlying strict scrutiny in *Hunter*-type cases are weaker or more ephemeral. To be sure, the Court did not explain in *Hunter* or *Seattle* whether the rationales for strict scrutiny in cases involving explicit racial classifications and in *Hunter*-type cases are identical. But the Court gave no hint that *Hunter* doctrine violations are any less deserving of judicial remedy.[75]

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mal operation of" the specified public programs. *Id.* This means, for example, that while the CCRI forbids all-black high school sports teams, it does not necessarily forbid all-girl teams. Moreover, subdivision (c) might permit some traditional affirmative action programs for women; for example, sex might be considered a bona fide qualification for the "normal" operation of educational institutions based on the value of diversity.

73. *See supra* note 72.

74. The Supreme Court has recited numerous factors bearing on whether a discrete class of persons deserves heightened judicial protection. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-23, at 1544-45 (2d ed. 1988).

75. Indeed, the Court has suggested that *Hunter* cases and more traditional cases involving explicit racial lines raise the same concerns. *See* the Court's language in *Seattle* quoted *supra* note 58.

In the end, a lower court cannot fairly avoid the conclusion that the CCRI is "racial in character" within the meaning of the *Hunter* framework. This framework therefore dictates that the CCRI be subjected to strict scrutiny if it also uniquely entrenches a political process burden on racial minorities. We now take up that inquiry.

III. Does the CCRI Impermissibly Entrench an Unequal Political Burden?

The Court accepted in *Hunter* and *Seattle*, and rejected in *Crawford*, equal protection challenges to plebiscites that allegedly imposed special "political process burdens" on the ability of racial minorities to achieve beneficial legislation. We believe that the most analytically coherent doctrinal interpretation of the trilogy suggests that the CCRI—because it will (if enacted) be entrenched in California's Constitution—suffers the same infirmity as the initiatives invalidated in *Hunter* and *Seattle*, and that *Crawford* is distinguishable in a principled way. We recognize, however, that our assimilation of the CCRI to the *Hunter-Seattle* side of the line, like our conclusion that the CCRI is "racial in character," requires the exercise of some political judgment built into the doctrinal framework.

Our four-part analysis proceeds as follows. Section A further elaborates the political and doctrinal vision that underlies the burden analysis in *Hunter* and *Seattle*. It then explains why, at least as a prima facie matter, the rationale of *Hunter-Seattle* applies to the CCRI as well. Section B discusses and rejects a procedure-substance distinction that some may advance to distinguish the CCRI from the laws struck down in *Hunter* and *Seattle*. Section C evaluates *Crawford*, explains and justifies the Court's distinction between that case and *Hunter-Seattle*, and explains why *Crawford* does not support the constitutionality of the CCRI. Finally, Section D considers a defense of the CCRI rooted in a theory of constitutionalism, a defense that we believe undergirds a widespread intuition that the CCRI *must* be permissible. We conclude that this argument is not easy to defend doctrinally.

A. The CCRI's Entrenchment of Political Process Burdens

Hunter and *Seattle* reflect what might be called a "political process" concern embedded within equal protection jurisprudence. Much equal protection law is concerned with policing the process of political

representation and decisionmaking.[76] As noted by Justice Stone in his famous *Carolene Products* footnote four,[77] conventional political processes may become dysfunctional when interests of racial minorities are at stake. Thus courts must take special care to ensure that racial minorities at the very least enjoy access to political power on equal terms with the rest of the population. As the Court observed in *Seattle*:

> [W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice [arguably including affirmative action], the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities" [citing *Carolene Products*]. In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups. . . .[78]

Within this tradition of special political process-based scrutiny, *Seattle* and *Hunter* thus represent efforts by the Court to protect against the allocation of political rights in a manner that peculiarly disadvantages racial minorities by entrenching into law norms harmful to minorities' interests.

In both *Hunter* and *Seattle*, the Court identified circumstances in which the structuring of democratic processes unconstitutionally burdens the political power or access of racial minorities. More specifically, the Court distinguished between "neutral" and "nonneutral," or "racial," burdens on political power. As the Court explained in *Seattle*:

> [Our] cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to

76. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Reynolds v. Sims, 377 U.S. 533 (1964). *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

77. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.") (citations omitted).

78. *Seattle*, 458 U.S. at 486 (citation omitted). *See also id.* ("[M]inorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'") (citation omitted).

> achieve favorable legislation." Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.[79]

Not only may a state employ political structures that generally disadvantage numerical minorities (and hence racial minorities) on *all* subjects, but the state may also employ different structures for different subjects—again, so long as there is a neutral principle justifying the distinctions drawn.[80] Similarly, a state may allocate policy decisions on different subject matters to different interior levels of state government, dictating, for example, that decisions on one subject be made by local governments and decisions on another subject be made by the state legislature.[81]

But, as the Court in *Seattle* continued:

> A different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said [in *Hunter*], "places special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest." Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others."[82]

At its core, then, the *Hunter* doctrine is designed to protect racial minorities against political burdens imposed specially on them, which frustrate their equal access to the reins of political power.

This principle does not, of course, protect minorities from losing any or even all political battles, so long as the political process is fair. The Court has repeatedly insisted that the "mere repeal" of a law ad-

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79. *Id.* at 469-70 (citations omitted).

80. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971) (rejecting challenge to California constitutional amendment requiring referendum approval for all low-rent public housing projects). In *James*, the Court noted that "[b]ut of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group." *Id.* at 142.

81. *See Seattle*, 458 U.S. at 476 ("States traditionally have been accorded the widest latitude in ordering their internal governmental processes . . . .").

82. *Id.* at 470 (citations omitted).

vantaging racial minorities (such as an affirmative action program) by the same entity that originally enacted it does not trigger heightened scrutiny.[83] This doctrinal rule serves compelling policy justifications; were the rule otherwise, "[s]tates would be committed irrevocably to legislation that has proved unsuccessful or even harmful [to both minorities and majorities] in practice."[84]

More significantly for present purposes, the rule that "mere repeal" by the enacting governmental entity does not trigger strict scrutiny is consistent with, and reflects the central message of, *Hunter-Seattle*. Repeal of a law by the enacting governmental entity reflects the normal operation of the political process in which there are winners and losers. Repeal of legislation favorable to the interests of a racial minority simply indicates that a prior winner has now lost. The repeal thus substantively disadvantages the racial minority. But the repeal itself does not alter or distort the existing political process in any way. Nor does it suggest that the existing process is racially biased; by hypothesis, the racial minority previously succeeded in achieving favorable legislation, revealing its ability at least sometimes to exercise power effectively at this particular level of government. Thus, the antiminority decision is in no meaningful way entrenched, the central concern of the Court in these cases.

In *Hunter* and *Seattle*, the initiatives under review worked more than a mere repeal of legislation favorable to a racial minority. They also operated (albeit in different ways) to frustrate the effective political power of a racial minority by restructuring the political system. Specifically, the rejection of favorable legislation was entrenched because roadblocks were placed in the path of future laws. In both cases, the Court reaffirmed that a state or city may freely remove political authority *generally* from lower to higher levels within the intrastate governmental hierarchy. But a state may not so remove political authority in a manner that is "racial in character"—even (as in *Hunter*) where that removal is back to the people themselves—because such a move might entrench the antiminority policy and thus preclude equal participation in political decisionmaking. As the Court explained in *Hunter*:

83. *See, e.g.*, Crawford v. Board of Educ., 458 U.S. 527, 539 (1982) ("[T]he simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."); *see also Seattle*, 458 U.S. at 483; Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 531 n.5 (1979).

84. *Crawford*, 458 U.S. at 539. The Court did caution that "[o]f course, if the *purpose* of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason." *Id.* at 539 n.21 (emphasis added).

> Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage [a minority] group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.[85]

Applying all these principles to the CCRI, we conclude that it embodies the kind of political process burden on the exercise of minority political power that the *Hunter* doctrine forbids. In the past, racial minorities have achieved favorable affirmative action legislation in California through normal channels at both local and state governmental levels. The CCRI would withdraw from these institutions the political authority to enact preference programs. And the rejection of these programs would now be entrenched in the most remote level of government, the California Constitution. Adoption of preference programs in the future would require a *new* constitutional amendment. In the words of the *Seattle* Court as applied to the CCRI: "[The CCRI], however, works something more than the 'mere repeal' of a [preference] law by the political entity that created it. It burdens all future attempts to [enact preference programs] throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government."[86]

B. Procedure Versus Substance?

Some might try to invoke a procedure-substance distinction in an effort to separate the CCRI from the initiatives found wanting in *Hunter* and *Seattle*. In both of those cases, the Court's language repeatedly characterized the initiatives at issue as having "restructured" the pre-existing political process to impose burdens that are "racial in character."[87] This repeated emphasis at least raises the possibility that such *explicit* restructuring is conceived by the Court to be an integral part of the unconstitutional burden driving the *Hunter* doctrine. In

85. *Hunter*, 393 U.S. at 392-93; *see also Seattle*, 458 U.S. at 480 n.23 ("[T]he State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.... [W]hat we find objectionable about Initiative 350 is the *comparative* burden it imposes on minority participation in the political process ....") (emphasis added).

86. *Seattle*, 458 U.S. at 483.

87. *See, e.g., id.* at 474 ("As in *Hunter*, then, the community's *political mechanisms are modified* to place effective decisionmaking authority over a racial issue at a different level of government.") (emphasis added); *id.* at 486 n.29 ("It is the State's race-conscious *restructuring of its decisionmaking process* that is impermissible, not the simple repeal of the Seattle Plan.") (emphasis added).

other words, one might argue, the *Hunter* doctrine prohibits states from enacting initiatives that *on their face* directly restructure the pre-existing political process in a manner that is "racial in character," but does not similarly prohibit states from enacting initiatives that on their face merely "work a simple change in policy," even if they *incidentally* entrench the new policy.

We acknowledge that such a purported procedure-substance distinction might at first blush provide a plausible defense of the CCRI. After all, on its face the CCRI looks more like a mere change of policy rather than a direct attempt to reallocate political power within the state. Unlike the Akron charter amendment and Initiative 350, the CCRI does not directly declare that it is withdrawing political authority from one government level and vesting it solely in a higher one (i.e., the constitutional amendment process). Nevertheless, for the several reasons that follow, we do not believe that a procedure-substance distinction provides a viable and principled limitation on the *Hunter* doctrine.

To begin with, a procedure-substance distinction seems unrelated to the central conceptual inquiry underlying the *Hunter* cases. If the *Hunter* doctrine were solely concerned about ferreting out laws that were motivated by an intent to discriminate, then perhaps the procedurally oriented wording of an initiative might provide some probative evidence of an illicit intent. The more clearly the language spells out a dual procedure which tends to work to the disadvantage of minorities, the more suspicious a court might be that the electorate cared about this disadvantage more than the underlying substantive policy issues. However, as explained earlier, the Court has denied that the *Hunter* doctrine concerns illicit motive in the traditional sense.[88] Rather, the doctrine is more concerned with minorities' equal access to effective political power,[89] which should trigger a greater focus on an initiative's effect than on its subjective intent. And with respect to effect, the CCRI's withdrawal of political authority from lower levels of government is unrelated to any procedure-substance characterization.

Moreover, even if illicit motive remains part of the focus, the "substance-packaging" of a constitutional amendment ought not to significantly allay any concern about motive, because the amendment's substantive effect is *inherently intertwined* with an alteration of conventional decisionmaking processes. It is understandable that

88. *See supra* note 50 and accompanying text.

89. *See supra* notes 41-51, 76-82 and accompanying text.

CCRI supporters would want to enact a substantive ban on race and sex preferences that would govern throughout the State. But one can still ask: Why did CCRI supporters decide to implement their policy position through a state constitutional amendment as opposed to working through plebiscitary legislation or more conventional legislative channels? The answer seems clear: The supporters wanted to remove political power from the state legislature or local government to amend or repeal the preference ban. In this sense, an intent to reallocate political power is necessarily implied by a decision to enact a substantive policy at a higher level of decisionmaking than had been utilized previously.

This point is nicely illustrated by Justice Scalia's dissent in *Romer v. Evans*.[90] He candidly observed that Colorado's Constitutional Amendment 2 (which relocated political issues concerning homosexuals from the local to statewide constitutional level) was specifically intended to dilute this group's erstwhile political clout:

> [H]omosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.
>
> *That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides.*[91]

Thus, the purported distinction between substantive policy changes and procedural restructuring is ephemeral; where the former goes beyond "mere repeal," the latter is necessarily implicated.

Perhaps most importantly for present purposes, the Court in *Seattle* explicitly rejected a bright-line distinction between procedural and substantive changes, which is consistent with the Court's general concern for real-world effects and its rejection of formalism.[92] Justice Powell argued in his *Seattle* dissent that Initiative 350 operated more

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90. 116 S. Ct. 1620 (1996).

91. *Id.* at 1634 (Scalia, J., dissenting) (emphasis added). It should be noted that Amendment 2, unlike the CCRI, explicitly targeted a discrete minority, persons of homosexual orientation. This difference does not bear, however, on the irrelevance of the procedure-substance distinction presently under consideration.

92. *See Seattle*, 458 U.S. at 474 ("[T]he *practical effect* of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.") (emphasis added); *cf. id.* at 467 ("[T]he Fourteenth Amendment . . . reaches 'a political structure that treats all individuals as equals,' yet more *subtly distorts* governmental processes in such a way as to place

like a substantive policy change than a restructuring of the political process:

> In this case, unlike in *Hunter*, the political process has *not* been redrawn or altered. . . . [T]he State's political system is not altered when [the State] adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State.[93]

This language exactly tracks the defense of the CCRI described above.

But the majority's response to Justice Powell's argument is quite revealing:

> It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron charter amendment simply barred the City Council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. 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 [at all], instead of subjecting such legislation to ratification by referendum.[94]

We can restate this final sentence to focus on a state constitution rather than a city charter as follows: A substantive state constitutional amendment prohibiting all racial preferences would be treated the same under the Equal Protection Clause as would a procedural state constitutional amendment submitting all statutes granting racial preferences to ratification by referendum (which would clearly be unconstitutional under *Hunter*). The Court's response to Justice Powell thus makes clear that the precise mechanism through which ordinary political channels are choked off, whether through indirect effect of substantive legal change or through direct reallocation of political authority, is not salient for purposes of the *Hunter* doctrine.

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special burdens on the ability of minority groups to achieve beneficial legislation.") (emphasis added) (citation omitted).

93. *Id.* at 497-98 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting).

94. *Id.* at 474-75 n.17.

Our conclusion here is also buttressed by *Reitman v. Mulkey*.[95] In *Reitman*, the Supreme Court invalidated an initiative-based amendment to the California Constitution, according to which the people retained the right to refuse to sell or lease property for any reason, including racial reasons. The Court explained that the initiative would "significantly encourage and involve the State in private discriminations" in violation of the Equal Protection Clause.[96] The Court's rationale would seem not to survive more recent decisions clarifying unconstitutional purpose analysis, *e.g.*, *Washington v. Davis*,[97] though the Court occasionally still refers to *Reitman* as if it were based on such an analysis.[98] *Reitman* is more coherently understood as a precursor to *Hunter*, because the initiative in *Reitman* clearly suffered from the same structural defect.[99] If this reading of *Reitman* is the best one (and defending the result in *Reitman* any other way is difficult), then a procedure-substance distinction is difficult to maintain insofar as the initiative in *Reitman* could not have been more substantive.

For the aforementioned reasons, we believe that the CCRI cannot meaningfully be distinguished from the initiatives invalidated in *Hunter* and *Seattle* along some procedure-substance line. At its core, the *Hunter* doctrine reflects concern about indirect as well as direct ways in which majorities might visit special political process burdens on racial minorities, thus precluding their equal access to the "channels of political change" (to quote John Ely).[100] This rationale applies to the CCRI as well.

C. Reconciling *Crawford* with *Hunter* and *Seattle*

Superficially, *Crawford* seems to establish some limiting principle to the reach of the *Hunter* doctrine, one that might appear to save the CCRI because it, like Proposition I, is a constitutional amendment that is (arguably) packaged as a substantive policy change rather than an alteration of political process. On closer examination, however, *Crawford* represents an unexceptional application of the "mere re-

95. 387 U.S. 369 (1967).

96. *Id.* at 381.

97. 426 U.S. 229 (1976).

98. *See* Crawford v. Board of Educ., 458 U.S. 527, 539 n.21 (1982).

99. *See Reitman*, 387 U.S. at 376-77 (noting that the initiative worked more than "the mere repeal" of state antidiscrimination statutes because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government").

100. *See* ELY, *supra* note 76.

peal" rule. Proposition I simply worked a repeal, *by the enacting entity*, of a substantive constitutional norm favorable to racial minorities. It did not, by word or effect, withdraw pre-existing or future political authority from lower levels of government.

Proposition I proclaimed that "nothing contained herein or elsewhere in this Constitution imposes upon [any state actor] any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation."[101] This language serves to clarify the meaning of the California Constitution's pre-existing guarantees of equal protection, in essence overruling (the functional equivalent of "repealing") prior state court rulings to the contrary.

Proposition I's next provision reworded this same mandate in a manner focused directly on state court authority: "In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon [any state actor] any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation [unless a federal court could do so under federal decisional law to remedy a violation of the federal Equal Protection Clause]."[102] The petitioners in *Crawford* seized upon this second provision and argued that the Proposition, like Initiative 350 in *Seattle*, operated to withdraw effective political authority from a "lower level" of government (the state courts), reserving it to a more remote level (the state constitution).

But Justice Powell's majority opinion rejected "petitioners' characterization of Proposition I as something more than a mere repeal."[103] In fact, the majority characterized Proposition I as "less than a 'repeal' of the California Equal Protection Clause," noting that "the State Constitution still places upon school boards a greater duty to desegregate [through avenues other than busing] than does the Fourteenth Amendment."[104] The Court then continued as follows:

> Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of discriminatory principle. . . . Remedies appropriate in one area of legislation may not be desirable in another. . . . Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply

101. *See Crawford*, 458 U.S. at 532 n.6.
102. *See id.*
103. *Id.* at 540.
104. *Id.* at 541.

> because civil rights remedies are different from those available in other areas. . . .
>
> In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States.[105]

The key conceptual point, albeit only implicit in the just-quoted passage, is that the government entity previously extending state constitutional law beyond the requirements of the United States Constitution was the people of California through the state constitution, such that Proposition I represented a *repeal by the same entity* (the people) that enacted the law favorable to racial minorities in the first place.

This key point was made more directly in Justice Blackmun's concurring opinion, joined by Justice Brennan. The concurrence distinguishes Proposition I from the initiatives invalidated in *Hunter* and *Seattle* as follows:

> In my view, something significantly different is involved in this case. *State courts do not create the rights they enforce; those rights originate elsewhere*—in the state legislature, in the State's political subdivisions, *or in the state constitution itself.* When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy.[106]

To be sure, the premise that state courts do not themselves exercise lawmaking power but rather merely "interpret" constitutional provisions is highly formalistic. But it is precisely this formally correct premise that justifies the Court's characterization of Proposition I as a mere repeal.[107]

In sum, both the majority and concurrence agreed that Proposition I did not actually *withdraw* pre-existing decisionmaking authority from a more accessible unit of government and entrench it at a less accessible level, either directly or indirectly. Because the pre-existing authority for court-ordered busing came not from local or state legislation, but rather from judicial interpretations of the state constitu-

105. *Id.* at 541-42 (citations omitted).

106. *Id.* at 546 (Blackmun, J., concurring) (first and second emphases added).

107. *See id.* at 547 (Blackmun, J., concurring) ("In short, the people of California—*the same 'entity' that put in place the State Constitution, and created the enforceable obligation to desegregate*—have made the desegregation obligation judicially unenforceable.") (emphasis added).

tion's Equal Protection Clause itself, Proposition I merely replaced a constitutional norm favorable to racial minorities with one that was neutral. Importantly, and unlike the CCRI, Proposition I did not entrench its rule by precluding the state legislature or local school boards from adopting busing programs beyond those required by the federal or state constitutions[108]—racial busing remained *permissible*, just not constitutionally *mandated*. Thus, *Crawford* becomes an exceedingly easy case—which is consistent with the fact that its result was supported by eight Justices, including four joining the majority in *Seattle*. *Crawford* establishes no new limitation on the reach of the *Hunter* doctrine; rather, it merely applies the "mere repeal" principle already inherent from the beginning.[109]

Reading *Crawford* in conjunction with *Hunter* and *Seattle*, then, we are left with the following consistent principles. A state constitution may be amended so as to repeal or modify pre-existing constitutional provisions, even those that have been interpreted in a manner favoring a racial minority. But a state constitution may not be amended in a direction that disadvantages the racial minority if the effect of such amendment would be to withdraw pre-existing local or state legislative authority in a manner that is "racial in character." The CCRI falls squarely on the *Hunter-Seattle* side of this distinction.

We acknowledge that, so understood, the *Hunter* doctrine has what some might perceive as a far-reaching consequence. With respect to a given issue that is "racial in character," a state constitution may either remain neutral or prescribe norms favorable to racial minorities (which can later be repealed). But a state constitution can *never* entrench a substantive norm with respect to an issue that is "racial in character" in a direction that disadvantages a racial minority. For example, a constitution can mandate affirmative action, but it can never selectively prohibit it and thus foreclose the possibility of minority success in more accessible political arenas.

While perhaps this conclusion sounds far-reaching when stated this way, it is the conclusion dictated, we think, by the most coherent

108. Proposition I merely prohibited courts from imposing busing programs on the basis of the California Constitution.

109. Another way of putting our point here is as follows: The power of the people to amend their state constitution so as to correct or revise what is perceived to be an erroneous or outdated judicial interpretation is an essential feature of popular sovereignty; otherwise, judicial interpretations would be subject to revision only by later-appointed judges, and only if the inertial influence of stare decisis could be overcome. Like the executive veto, the power to amend is neutral with respect to race. So long as the power to amend is not *exercised* in a manner that *specially imposes a new burden on racial minorities*, it does not contravene federal equal protection principles.

reading of the cases. Moreover, the *constraints this reading places on the structure or substance of state constitutions may not be so great.* It merely means that when the people of a state want to entrench a substantive norm at a centralized level (such as the state constitution) and the norm will be detrimental to the interests of racial minorities, the people must take care to define the norm in a sufficiently general way—to avoid the impression of a gerrymander, if you will—such that the norm is not "racial in character" as defined earlier. It is not enough for defenders to say that the CCRI is but one part of a bigger state constitution that regulates a number of things, just as in *Seattle* it was not enough to say (as did the losing Justices) that Initiative 350 was sufficiently general because racial busing was but one of many issues withheld from local governments and reserved to the state level. Instead, the CCRI is problematic because it singles out *race* for unique treatment—no other education, employment, or contracting criterion is removed from consideration by lower levels of government—just as Initiative 350 treated race unlike any other criterion in busing decisions. *Hunter-Seattle's* central premise bears repeating here:

> [T]he political majority may generally restructure the political process to place obstacles in the path of *everyone* seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power *nonneutrally*, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.[110]

D. The Propriety of Resolving Racial Controversy by Constitutional Amendment

We have heard colleagues and other constitutional scholars defend the CCRI based on a judgment that the social-political conflict concerning the proper role of race and gender in governmental action constitutes a matter fundamental to the self-definition of the State. Even conceding (for purposes of argument) that the CCRI would uniquely burden racial minorities' exercise of political power in contravention of the *Hunter* doctrine, they suggest that the CCRI nevertheless seems to be an appropriate response in an appropriate forum to a longstanding social conflict. At least in this context, then, a boundary must be placed on the *Hunter* doctrine's reach so as to protect state constitutional amendment from challenge.

110. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982) (first and second emphases added).

This judgment appears to be based on an impressionistic theory of constitutionalism, which holds that certain subject matters are fundamental to the self-definition of a political community, and it is inherently proper for a state's foundational charter to address these matters. The role of race in our political tradition has long been considered a central and defining feature of American constitutionalism. Indeed, both the federal and state constitutions have long included equal protection and other provisions aspiring to define the relationship between majority rule and racial minority participation.

Moreover, because a constitutional amendment is at stake, debate over the CCRI might well reflect a transcendence of conventional politics and instead reflect the grappling with a divisive issue of a people who fully recognize the fundamental moral and social significance of this "constitutional moment."[111] Therefore, this impressionistic argument concludes, it seems entirely appropriate to allow constitutional resolution of this central controversy of the day through the CCRI, *Hunter* and *Seattle* notwithstanding.

Although we recognize that this argument has some rhetorical force, as a doctrinal matter the position seems unsupported. First, federal constitutional caselaw does not suggest that state constitutional amendments (by plebiscite or otherwise) deserve less rigorous scrutiny than other state laws. There is no hint in *Crawford* that Proposition I deserved more deferential review than did Initiative 350 because only the former was a constitutional amendment. Likewise, *Reitman* offered no hint that Amendment 2 deserved special deference because of its constitutional status.[112]

This impressionistic defense of the CCRI also fails to appreciate fully the fact that states' sovereignty is limited in our system by the supremacy of federal law. Were states the ultimate sovereigns, then a theory of state constitutionalism could comprehensively dictate when a state charter is an appropriate forum for resolving a particular social-political controversy. But within our federal structure, all state laws—including constitutional ones—are subordinate to federal principles. And the federal principles underlying the *Hunter* doctrine suggest that a state's decision to constitutionalize a norm that is "racial in

111. *See* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (distinguishing between moments of "normal politics" and "constitutional moments"—the latter being periods of time in which the people rise above parochial concerns and conscientiously resolve foundational constitutional issues based on "high legal principle").

112. Nor did the Court in *Romer* ever suggest in invalidating Colorado's Amendment 2 that it deserved any special deference because of its constitutional status.

character" against a racial minority's interests poses the greatest possible threat to equal protection values because it removes governance of the issue to the most remote level at which racial minorities are least likely to be capable of electoral success.

But perhaps most importantly, any claim that the CCRI deserves unique deference as a long-awaited resolution of deep-seated moral and social controversy cannot easily be squared with *Seattle*, which invalidated the people of Washington's attempt to resolve the equally contentious issue of busing for desegregative purposes.[113] Given the centrality of *Brown v. Board of Education*[114] to both constitutional vision and political life through the 1960s and 1970s, surely busing was considered the foundational issue connecting race and democracy in 1982 when *Seattle* was decided. While perhaps the passage of time makes it difficult to conjure up vivid memories and sensations of that era, we are not persuaded that today's affirmative action controversy can fairly be characterized as any more "foundational," nor more likely to engender conscientious and high-minded debate as opposed to partisan politics or even prejudice, than was yesterday's busing controversy.

IV. The CCRI and Strict Scrutiny

Because the CCRI entrenches a political process burden that is "racial in character," the CCRI violates the Equal Protection Clause unless it can survive strict scrutiny. For this to happen, a court would have to find the CCRI narrowly tailored to serve a compelling state interest. It is difficult to assess the CCRI under this standard, because we do not yet know the full panoply of supposedly compelling interests that the Initiative's supporters will claim on its behalf. Unlike the proposition upheld in *Crawford*, the CCRI contains no statement of purposes or justifications.[115] Presumably, the primary interests that supporters will claim are those we mention in Part I of this Article.[116]

Based on the justifications we can anticipate today, we do not believe that a court could, consistent with Supreme Court precedent,

113. While *Seattle* did not involve a state constitutional amendment per se, Initiative 350 passed by the people of Washington was superior to ordinary law in that it could not be repealed by the state legislature within two years of its enactment, and could be amended during that time only with the concurrence of two-thirds of each legislative house. *Seattle*, 458 U.S. at 462 n.4.

114. 347 U.S. 483 (1954).

115. *Compare* CAL. CONST. art. I, § 7, cl. 5 (listing several "compelling public interests" served by Proposition I).

116. *See supra* text accompanying notes 13-14.

find the CCRI to survive strict scrutiny. The Supreme Court has been reluctant to identify interests sufficiently compelling to support racial preferences. We think the Court would be even less generous in identifying interests sufficiently compelling to support measures that discriminate against traditional suspect classes. Indeed, the Court's recent observations that strict scrutiny need not be fatal have not been made in any case involving discrimination *against* a minority.

Nevertheless, here again we recognize the potential influence of political judgment. We have never been sure exactly how a court knows whether an asserted interest is "compelling," and a court might interpret the Supreme Court's reluctance to embrace affirmative action as a signal that the Court finds color blindness to be, if not quite required absolutely by the Fourteenth Amendment, at least an overriding social norm. We thus recognize that a court might be tempted to conclude that the CCRI is a narrow means of promoting the compelling interest of establishing a "just" political regime. To do so, however, a lower court would have to read recent cases as having effectively overruled *Seattle*, which the court could not do.

V. Conclusion

While *Hunter* was probably perceived in its time to be a relatively easy case, *Seattle* was decided by a single vote.[117] Subsequent decisions in the race-relations area reflect a more formal and less context-sensitive approach to equality doctrine than that underlying the *Hunter* framework. Although we believe there are some strong, consistent themes that connect *Hunter* and *Seattle* to recent decisions,[118] the volatility of modern doctrine makes difficult any prediction of the ultimate fate of the *Hunter* cases.

Our focus in this Article, however, is on state and lower federal courts that might be called upon in the near future to determine the constitutionality of the CCRI. Upon close examination, the various proffered distinctions between the CCRI and the initiatives invalidated in *Hunter* and especially *Seattle* prove difficult to defend in a principled fashion. There are, of course, constitutional ways to disestablish affirmative action programs throughout California. But under the present law of the land, the CCRI does not appear to be one of them.

117. Of the Justices sitting today, Justice Stevens was in the majority, and Justices Rehnquist and O'Connor were in dissent.

118. *See supra* notes 67-68 and accompanying text.