Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex

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I. INTRODUCTION

The issue addressed in this Article is whether California's Proposition 209, which prohibits race- and gender-based affirmative action, passes constitutional muster under the Equal Protection Clause

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of The Fourteenth Amendment of the United States Constitution.[1] When voters in California passed Proposition 209 on November 5, 1996, it was enacted into law as part of California's Constitution.[2] This amendment provides that in public employment, education, or contracting, the state will not practice discrimination or give preferential treatment to a person or group because of race, sex, color or national origin.[3]

Governmental laws or policies authorizing race- or gender-based preferences in the public sector are as hotly debated today as they have been for the last twenty-three years. In *DeFunis v. Odegaard*, DeFunis alleged before the United States Supreme Court in its first reverse race discrimination suit that he was not admitted to a state law school because he was white.[4] DeFunis argued that he was a victim of racial discrimination because he was not eligible for the racial preference in admissions awarded to Blacks, Chicanos, American Indians, and Filipinos.[5] By the time the *DeFunis* case was argued before the Supreme Court the issue of reverse race discrimination was moot because DeFunis was about to graduate from law school and a decision by the Supreme Court would not have affected the outcome.[6]

Although the *DeFunis* decision introduced the Supreme Court to the emotionally charged issue of reverse race discrimination against white males, the Supreme Court's constitutional rationale for an affirmative action mechanism in the political process dates back almost six decades to its dictum in *United States v. Carolene Products Co.*[7] The *Carolene Products* case suggested that discrete and insular minorities who suffer prejudicial discrimination, and who have not been historically protected in the political process are entitled to some sort of special protection from the federal judicial branch.[8] Providing special protection or privileges for minorities and women to promote fairness in the political process has become the battle cry for many who support affirmative action policies based on gender or race in the public sector.

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1. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
2. *See* CAL. CONST. art. 1, § 3l(a).
3. *Id.*
4. 416 U.S. 312 (1974).
5. *See id.* at 320 (Douglas, J., dissenting).
6. *See id.* at 317.
7. 304 U.S. 144, 153 n.4 (1938).
8. *See id.*

Professor Rosenfeld, for example, argues that only in an ideal world should racial or gender differences be irrelevant in considering opportunities in public education and employment.[9] Professor Rosenfeld further argues that equality of opportunity cannot be satisfied with race- and gender-neutral policies once a state has practiced official racial segregation or gender discrimination.[10] Thus, he supports raced-based affirmative action on the theory that affirmative action is a preference to compensate for other unjustified preferences aimed at restoring fair competition while advancing equality for minority groups.[11]

Using race-based affirmative action programs to compensate minorities for unjustified societal racial discrimination exemplifies an expansive view of equality. But the Supreme Court has stated that societal discrimination does not, by itself, provide adequate justification for a race-based affirmative action plan.[12] Professor Rosenfeld is correct in his conclusion that rejecting societal-based race discrimination as a permissible remedy under equal protection is to adopt a position of marginal equality.[13] In an affirmative action plan based on gender, the Supreme Court has approved gender preferences for women for the sole purpose of overcoming the effects of societal discrimination.[14]

It is important to understand that under race-based affirmative action programs, the Supreme Court has marginalized equality in favor of expanding the concept of antidiscrimination. The great irony of Proposition 209's attack on affirmative action is that the Proposition forces us to realize that antidiscrimination and pro-affirmative action are headed on a constitutional collision course. California's antiaffirmative action laws present this single question: may race- and gender-based discriminatory preferences be denied to minorities or women without violating antidiscrimination or equal protection laws? Both the Equal Protection Clause and certain civil rights acts grant to all people the equal protection of the law.[15]

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9. *See* MICHAEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 163-165 (1991).

10. *See id.*

11. *See id.*

12. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion).

13. *See* ROSENFELD, *supra* note 9, at 179.

14. *See* Johnson v. Transportation Agency, 480 U.S. 616, 664 (1987) (Rehnquist, C.J., Scalia & White, JJ., dissenting) (decided under Title VII rather than the Equal Protection Clause).

15. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

There are few compelling reasons to support race-based classifications, whether the classification is old-fashioned discrimination based on prejudice or new age discrimination based on preference. Laws prohibiting affirmative action programs based on race are constitutional unless the government shows that it is remedying past discrimination which justifies the race-based preference.[16] Similarly, laws prohibiting gender-based affirmative action programs for women should be considered constitutional where a gender-based preference is not substantially related to an important governmental interest. One such important governmental interest is remedying female under-representation in an area where women have been excluded because of a policy of sexual stereotypes.[17]

This Article will analyze the Equal Protection Clause in relation to the government's ability to classify and will discuss whether race is a prohibited classification. The author will closely critique the case of *Coalition For Economic Equity v. Wilson*,[18] which challenges the constitutionality of Proposition 209 because of its political burdens on interests important to racial minorities and women. The author will argue that Proposition 209's Equal Protection standard should be illicit state action rather than political burdens. Finally, the author will critique the *Wilson* court's understanding of violations of the Equal Protection Clause. This understanding is rejected here because the mere repeal of existing legislation is permissible even if that repeal impacts racial minorities or women.

II. EQUAL PROTECTION CLAUSE ANALYSIS AND THE GOVERNMENT'S ABILITY TO CLASSIFY

The Equal Protection Clause of the Fourteenth Amendment was designed to place on the states an affirmative duty to protect all persons equally in the exercise of their natural and inalienable rights to life, liberty, and property.[19] The Equal Protection Clause, once

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Consider the following examples: (1) It is illegal under Title VI to discriminate on the basis of race in any activity receiving federal money. 42 U.S.C. § 2000d (1994); (2) Title VII prohibits both race and sex discrimination in employment. 42 U.S.C. § 2000e (1994); and (3) It is illegal under Title IX to discriminate on the basis of sex in any activity receiving federal money. Title IX of the Education Amendment of 1972, Pub. L. No. 92-318, 20 U.S.C. §§ 1681-1688 (1990).

16. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

17. *See* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (holding that the state of Mississippi could not exclude a male from a state nursing school for females in the name of affirmative action).

18. 946 F. Supp. 1480 (1996).

19. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

described as the argument of last resort in one's constitutional arsenal,[20] is now a powerful first strike tool used by those who believe they are victims of unlawful discrimination. America made its first official statement in support of equality in 1776 in the Declaration of Independence, declaring it to be a self-evident truth that all people are created equal.[21] The incorporation of the concept of equality into the Fourteenth Amendment was the result of the effort of organized abolitionists.[22]

The Equal Protection Clause demonstrates a general requirement of equality for all persons without exception.[23] However, the demand for equal protection does not mean that laws apply universally to all persons.[24] Instead, the government must be able to classify special groups or classes of persons for benefits or burdens if it is to function at all.[25] The battle for the special benefits of race-based affirmative action demonstrates why the Equal Protection Clause must be properly understood as a general requirement of equality for all persons without exception. Race is simply not an appropriate basis for classification, and neither burdens nor benefits should be based on a person's race. However, this notion of equality conflicts with the government's basic right to classify. The Supreme Court recognized this conflict when it stated, "Indeed, the very idea of classification is that of inequality . . . ."[26]

> Here, then, is a paradox: The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.[27]

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20. *See id.*

21. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). *See also* U.S. CONST. art. IV § 2, cl. 3 ("No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Part to whom such Service or Labour may be due.")

22. *See* Tussman & tenBroek, *supra* note 19, at 341.

23. *See id.* at 343.

24. *See id.*

25. *See id.*

26. Atchison v. Matthews, 174 U.S. 96, 106 (1899).

27. Tussman & tenBroek, *supra* note 19, at 344.

In the affirmative action debate, however, one may ask whether it is ever "reasonable" for the government to classify persons on the basis of race if there is truly only one race—the human race. Given that there is only one human race, the question arises whether an important governmental interest exists to justify race-based classifications that treat persons as not similarly situated for equal protection purposes because of the color of their skin or the size of their noses. Race-based affirmative action laws treat members of the human race as though they were different and not similarly situated. This disparate treatment results in social, political, and legal decisions based on something other than race. The Equal Protection Clause requires that persons similarly situated be treated similarly as a process of promoting equality.[28] Nevertheless, it is fair to ask what the words "similarly situated" mean.[29] Similarly situated is defined not by the nature of the classification but the reasonable nexus of the classification scheme to the purpose of the law.[30] The reasonable classification includes all persons who are similarly situated under the purpose of the law, which may be to avoid some public harm or to promote a public benefit.[31]

Given America's history with race-based classification schemes, it is not reasonable to believe that America can justify a race-based benefit or burden that does not violate the natural equality of all human beings. There was a natural law of equality before the legislature began to place artificial labels on groups of people to further governmental notions of racial superiority and official racial suppression of that class of people deemed to be of an inferior race.

Race-based classifications should always raise fundamental questions about the motive behind the legislation and the state's role in legislating race relations. Under the "pressure group" theory of legislation, a race-based classification that either benefits or burdens a particular group is the direct result of political pressure asserted by the group with the largest political clout. Under this theory, the group with the strongest legislative muscle will secure legislation of an unequal character.[32] Yet, the demand for equal protection becomes meaningless under the pressure theory of legislative classifications

28. *See* Tigner v. Texas, 310 U.S. 141, 147 (1940); *see also* U.S. CONST. amend. XIV, § 1.
29. *See* Tussman & tenBroek, *supra* note 19, at 345.
30. *See id.* at 346.
31. *See id.*
32. *See id.* at 350.

because this theory is incompatible with equal protection requirements.[33]

Legislative submission to powerful political pressures has been the source of all race-based classification schemes, whether they are affirmative action programs designed to benefit blacks or Jim Crow laws which burdened blacks with racial discrimination. Such political pressure does not constitute a legitimate purpose to justify race-based classifications. Our common humanity demands that factors such as race and color be treated as irrelevant incidents of birth, not as a basis for a legislative classification.[34]

In their now classic law review article on equal protection analysis, Professors Joseph Tussman and Jacobus tenBroek wrote, "We now suggest the possibility that there are some traits which can never be made the basis of a constitutional classification."[35] Race is one of these traits that should not be the basis of a constitutional classification. Even if an alleged public good is the goal of the legislation, a classification based on race should render it invalid.

Professors Tussman and tenBroek were right when they asserted that the forbidden classification doctrine as applied to race-based classifications "cannot be advanced as an established and matured judicial doctrine, [but] it is nevertheless, worth consideration as an emerging one."[36] Five years before the Supreme Court's decision in *Brown v. Board of Education*, Professors Tussman and tenBroek offered the forbidden classification doctrine as the basis for an all-out assault on segregation laws.[37] Under this doctrine, segregation laws based on race are unconstitutional because race alone is constitutionally irrelevant, and no "separate but equal" argument could save such a law.[38] Similarly, under the forbidden classification doctrine, affirmative action laws based on race should be found unconstitutional, and no rationale such as a set-aside for equality should save such a law because race-based classifications are harmful to the public's sense of fundamental fairness. Even if race is arguably related to a plausible legitimate public purpose, under the forbidden classification doctrine, the use of race would always invalidate such a use.[39] Hence, the forbidden classification doctrine must be developed and applied to

33. *See id.*
34. *See id.* at 353.
35. *Id.* at 354.
36. *Id.* at 355.
37. *See id. See also* Brown v. Board of Educ., 347 U.S. 483 (1954).
38. *See* Tussman & tenBroek, *supra* note 19, at 355.
39. *See id.*

race-based affirmative action laws or policies to defeat any notion of a racial preference for any benign or invidious purpose.

In addition to the forbidden classification doctrine, the suspect classification doctrine has been used by the Supreme Court to decide whether or not a particular law or policy is unconstitutional. Under this doctrine, a presumption of unconstitutionality arises where a law is motivated by race.[40] Applying this doctrine in *Korematsu v. United States*, the Court held that all laws which classify on the basis of race are immediately suspect.[41] The problem with the suspect classification scheme, however, is that it does not prohibit all race-based laws. It gives the government some discretion to play the race card when, for example, political pressure so demands. Any group with significant political clout will usually receive the perceived benefit of this race card game.

Both the forbidden classification and the suspect classification doctrines have a place in analysis of constitutional law. The forbidden classification doctrine, unlike the suspect classification doctrine, would deny the government as a matter of law any ability to classify persons on the basis of race. The rationale behind this prohibition is that race-based classifications violate both the self-evident truth of human equality as articulated in the Declaration of Independence and the racially neutral language of the Equal Protection Clause.

Whereas the forbidden classification doctrine should apply exclusively to race-based classifications, the suspect classification doctrine would apply, for example, to gender classifications. Under the suspect classification doctrine, any law classifying persons based on gender would be presumed unconstitutional. This approach is appropriate because rarely is gender relevant to any government purpose that could not be achieved without the classification.

Although men and women are equal, it can be argued that they are different biologically and that the state, therefore, should be able to claim special circumstances under strict scrutiny to justify classifying persons on the basis of gender. For example, in a situation where a person is placed in imminent danger of losing life or limb, the state may be able to survive strict scrutiny and classify people on the basis of gender. Such a classification, whether based on wise public policy or just plain old common sense, is at work when we place men and women in separate jail cells to accommodate their biological differences. Regardless of certain well-accepted gender classifications like in jail

40. *See* Tussman & tenBroek, *supra* note 19, at 356.

41. *See* 323 U.S. 214, 216 (1944).

cells, as a general rule, gender-based classifications should be suspect and generally rejected as not being relevant to any compelling governmental interest such as overcoming sexual stereotypes.

The Equal Protection Clause has been used by courts to criticize both legislative classifications and legislative purpose which are either discriminatory or arbitrary.[42] If in the process of judicial review, the court concludes that no reason exists for California's ban on race-based affirmative action other than hostility toward African Americans and other racial minorities, then it will find the anti-affirmative action law to be unconstitutional. The Court followed this approach in *Yick Wo v. Hopkins*, a case decided more than one hundred years ago in which the Court struck down a law requiring commercial laundry work to be done in brick buildings.[43] Although this law was racially neutral, it existed for the sole purpose of discriminating against Chinese Americans.[44] Under the *Yick Wo* equal protection analysis, a ban on affirmative action that is racially neutral is likely to be viewed as unconstitutional if the restriction was adopted with prejudice toward a particular racial group. If, however, the Court concludes that as a matter of public necessity a state has a compelling reason to outlaw race-based affirmative action in some areas and not others, it may allow a state to take a piecemeal approach in eliminating racial discrimination.

Understanding the scope and significance of the Equal Protection Clause is difficult because we think of it as a major tool of judicial review.[45] We must remember that all branches of government are obligated to honor their "pledge of the protection of equal laws."[46] The Equal Protection Clause requires that a legislator guard herself against favoritism or inequality of purpose, and that as she imposes special burdens or confers special benefits, she must do so only to promote the public good.[47] The question for analysis then is whether the motive for Proposition 209 is to promote the public good or to express hostility toward women and racial minorities.

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42. *See* Tussman & tenBroek, *supra* note 19, at 345.
43. 118 U.S. 356 (1886).
44. *See id.* at 373.
45. *See* Tussman & tenBroek, *supra* note 19, at 365.
46. *Id.*
47. *See id.*

III. *COALITION FOR ECONOMIC EQUITY V. WILSON*[48]

In *Wilson*, the plaintiffs filed a request for a preliminary injunction to prohibit the state from enforcing Article 1, section 31 of the California Constitution, also known as Proposition 209. This section states in the relevant part, "[t]he 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."[49] In *Wilson*, the federal district court stated that Proposition 209 reaffirms existing antidiscrimination protections provided by the guarantee of equal protection in both the United States and California Constitutions.[50] The equal protection of the laws aspect in *Wilson*, which simply reaffirms existing law, was not at issue in the case because a law that merely affirms constitutional principles of nondiscrimination is of course constitutional.[51]

The federal district court stated that the U.S. Constitution precludes voluntary, government sponsored race and gender preferences without meeting a heightened level of judicial scrutiny. The court pointed out that prior to Proposition 209, governmental entities were generally prohibited from using race based affirmative action classifications unless those classifications could pass the strict scrutiny test. Under Equal Protection strict scrutiny analysis, only those programs narrowly tailored to break down patterns of intentional racial exclusion by the enacting agency are allowed.[52]

Congress and the courts had prohibited discrimination and limited governmental use of race long before Proposition 209 was enacted. However, all the parties concede that the people of California intended to do something more than simply restate the existing law when they adopted Proposition 209.[53]

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48. 946 F. Supp. 1480 (1996).

49. CAL. CONST. art. 1, § 31(a).

50. *See Wilson*, 946 F. Supp. at 1488. *See also* U.S. CONST. amend XIV; CAL CONST. art. 1, § 7(a) (providing for equal protection of the laws).

51. *See id.*

52. *Id.* at 1489 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989)).

53. *See Wilson*, 946 F. Supp. at 1489.

A. *The Right to Full Participation in the Political Life of a Community*

This section of the Article focuses on whether the effort to do "something more" in Proposition 209 violates the Equal Protection Clause. The *Wilson* court decided to issue a preliminary injunction against the enforcement of Proposition 209 based on the rationales articulated by the Supreme Court in three cases known as the *Hunter* trilogy—*Hunter v. Erickson*,[54] *Washington v. Seattle School District No.* 1 [hereinafter *Seattle*],[55] and *Crawford v. Board of Education of Los Angeles*.[56] Using this trilogy, the federal district court issued the preliminary injunction because the plaintiffs demonstrated a probability of success on their claim that Proposition 209 violates the Equal Protection guarantee of full participation in the political life of the community.[57]

The court in *Wilson* framed the Equal Protection issue narrowly. It asked whether the specific method of curtailing race- and gender-based affirmative action chosen by Proposition 209 unlawfully violates the rights of women and minorities to fully participate in the political system.[58] In short, the court in *Wilson* evaluated whether the "something more" intended by Proposition 209 was to deny, in violation of the Equal Protection Clause, minorities and women an equal opportunity to participate in the full life of the political community.[59]

The court's conclusion that Proposition 209 probably violates Equal Protection under the *Hunter* trilogy enjoys some preliminary scholarly support. At least two scholars, Vikram D. Amar and Evan H. Caminker, believe that the *Hunter* trilogy requires a federal district or federal appellate court to invalidate Proposition 209 on Equal Protection grounds.[60] Amar and Caminker argue that Proposition

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54. 393 U.S. 385 (1969).

55. 458 U.S. 457 (1982).

56. 458 U.S. 527 (1982).

57. *See Wilson*, 946 F. Supp. at 1491. The court also concluded that the plaintiffs failed to demonstrate a likelihood of success on the argument that Proposition 209 violates the Supremacy Clause because it is preempted by Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972. *See id.* Judge Henderson ruled the plaintiffs demonstrated a likelihood of success on the claim that Proposition 209 is preempted by Title VII of the 1964 Civil Rights Act. *See id.*

58. *See id.* at 1490.

59. *See id.* at 1491.

60. *See* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1020 (1996).

209 treats race differently from any other category for purposes of public employment, education, and contracting.[61] Because Proposition 209 isolates affirmative action based on race, Amar and Caminker argue that it appears to violate the Equal Protection Clause as interpreted by the Supreme Court in the *Hunter* trilogy.[62]

However, Amar and Caminker's limited and relatively guarded prediction that Proposition 209 is unconstitutional should not be given too much weight. In their article, Amar and Caminker attempt to dissect the Supreme Court's reasoning to understand and hopefully predict how a state or lower federal court will measure Proposition 209 against the cases in the *Hunter* trilogy.[63] Amar and Caminker, in concluding that Proposition 209 is unconstitutional, do not focus on how the Supreme Court would or should evaluate the *Hunter* cases, but on how the lower court, faithfully adhering to the *Hunter* cases, should find Proposition 209 unconstitutional.

Unlike Amar and Caminker, this author's goal is to demonstrate that a lower court, faithfully following the *Hunter* trilogy, could determine that Proposition 209 is constitutional under the rationale of the last opinion in the trilogy, *Crawford v. Board of Education*.[64] The Supreme Court, for instance, could and probably will find that Proposition 209's prohibition on race-based affirmative action does not violate the Equal Protection Clause because it contains "neither an illicit motive" nor a discriminatory intent on the part of the state of California.

A state law is subject to strict scrutiny if it has either a race-based classification or an illicit racial motive.[65] Proposition 209 easily avoids strict scrutiny on the race-based classification theory because it is racially neutral on its face. Additionally, it does not have an illicit racial motive. Its obvious motive is to prohibit the use of race-based classifications in making governmental decisions about public education, employment or contracts. Therefore, most courts are certain to conclude that Proposition 209 survives the illicit racial motive test. Indeed, Proposition 209 was enacted in spite of its impact on racial minorities rather than because of its impact on them.[66]

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61. *See id.*

62. *See* id.

63. *See id.*

64. 458 U.S. 527 (1982).

65. *See* Shaw v. Reno, 509 U.S. 630 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Washington v. Davis, 426 U.S. 229 (1976).

66. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Amar and Caminker are correct in stating that it would be very hard to make an illicit or invidious racial

Amar and Caminker are fundamentally wrong to suggest that the *Hunter* doctrine is premised on a rationale other than the traditional theory of illicit motive and race-based classification. The *Hunter* trilogy does not depart from traditional Equal Protection analysis when changes in the political process make it more difficult for racial minorities to achieve legislative success. Instead, according to the *Hunter* doctrine, these changes to the political process will be held valid unless the Court finds they are based on an illicit racial motive.[67]

Despite their article's shortcomings, Amar and Caminker asked the key question of whether, under the *Hunter* doctrine, motive is a more appropriate inquiry than the racial character of the governmental action.[68] Still, while this was the right question, Amar and Caminker came to a highly suspect and vulnerable conclusion because they advised lower courts not to characterize the *Hunter* trilogy as a motive inquiry.[69] *Hunter, Seattle,* and *Crawford* may be understood as either soft intent decisions or as decisions analyzing the spectrum of illicit state action under an equal protection analysis.[70]

When addressing facially race neutral governmental policies that are nonetheless racial in nature, motive or intent has been the correct

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intent behind Proposition 209. Amar & Caminker, *supra* note 60, at 1023. Voters in California may endorse the antidiscrimination provision of Proposition 209 in spite of, rather than because of, any antiminority racial message sent by the antipreference provision in the law. *See id.* According to Amar and Caminker, there are several noninvidious reasons that could motivate people to support the antipreference provision in Proposition 209.

> 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 . . . demonstrates the sincerity of the decision to reject programs based on group equality theories. *Id.*

As to efficiency, some people believe that affirmative action preferences undermine economic growth because the best people are not selected. *See id.*

Other supporters of Proposition 209 might believe that public consideration of race even when benignly motivated is inherently stigmatic, divisive, and dangerous public policy. For some of the reasons listed above Amar and Caminker conclude that a court would find it difficult to find Proposition 209 unconstitutional under conventional equal protection doctrine requiring facial discrimination or illicit motive. *See id.* at 1024.

67. *See Crawford*, 458 U.S. at 538.

68. *See* Amar & Caminker, *supra* note 60, at 1034.

69. *See id.* at 1035.

70. *See id.* Amar and Caminker concede that if *Hunter* and *Seattle* are best understood as soft intent cases, then Proposition 209 may not be vulnerable to constitutional challenge. *See id.*

inquiry under existing Supreme Court precedent ever since *Yick Wo v. Hopkins*.[71] Proposition 209 will ultimately survive constitutional attack because there is no exception for political burden to the discriminatory intent requirement when the law does not classify on its face or otherwise contain illicit state action.

The Equal Protection Clause is designed to keep states from intentionally discriminating against persons on the basis of race.[72] Its ultimate duty is to make race an irrelevant factor in governmental decisions.[73] Not only does Proposition 209 lack the discriminatory intent required for an Equal Protection Clause violation, but it advances the Fourteenth Amendment's goal of abolishing all race-based discrimination imposed by the government.[74] The federal district court in *Wilson* failed to properly analyze its preliminary injunction prohibiting the enforcement of Proposition 209 as an issue of discriminatory intent.[75] Therefore, its decision that Proposition 209 is probably unconstitutional will be reversed unless a subsequent court concludes that Proposition 209 does not rationally relate to a legitimate state interest.[76]

B. The Racial/Gender Impact of Proposition 209 on the California Political Process

Before the passage of Proposition 209, anyone seeking to petition his or her elected representatives to adopt, amend, or retain affirmative action policies based on race or gender faced the same obstacles encountered by any constituent seeking preferential treatment in the field of contracting, employment, or education.[77] These obstacles include petitioning and lobbying the specific policy makers with the authority to adopt such programs. The programs typically can be approved by a simple majority vote or by executive decision. In San

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71. 118 U.S. 356 (1886).

72. *See* Shaw v. Reno, 509 U.S. 630 (1993); Washington v. Davis, 426 U.S. 229, 239 (1976).

73. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

74. *See* Hopwood v. Texas, 78 F.3d 932, 939-40 (1996). For a criticism of *Hopwood*'s rationale and a rejection of the color blind approach to equal protection analysis, see Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1144 (1996). Professor Gotanda believes that since *Hopwood* leaves no place in education for recognition of racial diversity it is not a valid decision. *See id.*

75. *See* Washington v. Davis, 426 U.S. 229 (1976).

76. This author believes the *Wilson* analysis to be fatally flawed because it equates the more burdensome racial impact of Proposition 209 on the political process to be an alternative to the discriminatory intent requirement for establishing a violation of the Equal Protection Clause.

77. *See Wilson*, 946 F. Supp at 1498-99.

Francisco, for example, people were able to convince the city to adopt an affirmative action plan to remedy discrimination in that city's contracting practices.[78] In some cases, a local initiative process is required before a city or other government entity can adopt an affirmative action program.[79]

Since the passage of Proposition 209, women and racial minorities petitioning their government for policies based on race or gender face a more difficult burden. Indeed, they must first amend California's Constitution to either repeal Proposition 209 or to allow the specific governmental entity to adopt a race- or gender-based affirmative action program.[80]

In California, there are two methods of amending the state constitution—a constitutional initiative or a legislative constitutional amendment. Both of these methods are burdensome. Under the first process, sponsors must first obtain signatures in support of the constitutional initiative. The number of signatures required is equal to eight percent of the previous gubernatorial vote. In 1996, this process required the collection of 693,230 valid signatures.[81] Often, the cost of getting an initiative qualified is between $500,000 and $1.5 million, and a qualified initiative must also be approved by a majority of the voters.[82] Under the second amendment process, the legislative constitutional amendment, sponsors must get a two-thirds vote of approval by both the California Senate and Assembly. Again, a majority of the voters must approve the amendment in the next statewide election. As one can see, substantial funds are required to organize a campaign for both initiative qualification and for securing legislative approval, the campaign supporting Proposition 209 had spent $3.1 million by October 1996.[83]

Because of the new political process created by Proposition 209, the plaintiffs were effectively precluded from asking local and state policy makers to maintain or expand affirmative action polices based on race or gender. For example, one of the plaintiffs, the Coalition for Economic Equity (Coalition), had proposed fifteen amendments to San Francisco's affirmative action policy. The Coalition had also met with the city while preparing for a vote on the proposed legislation by the entire San Francisco Board of Supervisors. With the adoption of

78. *See id.*
79. *See id.* at 1488.
80. *See id.* at 1488-89.
81. *See Wilson*, 946 F. Supp. at 1498.
82. *See id.* at 1498-99.
83. *See id.* at 1499.

Proposition 209, however, the Coalition can no longer pursue its affirmative action campaigns through the previously available political channels.[84]

C. Wilson's *Equal Protection Claim and the Preliminary Injunction Standard*

The preliminary injunction is designed to preserve the status quo pending a trial on the merits.[85] Consequently, the Ninth Circuit will grant an injunction only after the moving party shows either (1) the probability of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions to be decided and the fact that the balance of hardships sharply favors the plaintiffs.[86] Since the *Wilson* plaintiffs alleged constitutional injury under Proposition 209, the court must evaluate the merits of their constitutional claim before addressing the imminence and irreparable nature of the alleged harm.[87]

In considering the likelihood of success on Plaintiffs' Equal Protection claim, the court in *Wilson* asserted that both racial minorities and women have the right to full participation in the political life of the community.[88] The Equal Protection Clause prevents the exclusion of women and minorities from the political process through overt practices, as well as through subtle distortions of the political process.[89] In *Seattle*, for example, the Court said that under Equal Protection analysis, the state may not disadvantage a particular group by making it more difficult to enact legislation on its behalf any more than the state could dilute a person's right to vote.[90] In *Wilson*, the plaintiffs argued that despite Proposition 209's facial neutrality, the Proposition violates the Equal Protection Clause by restructuring the political process to the disadvantage of people seeking to enact legislation benefiting women and minorities.[91] The *Wilson*

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84. *See id.*

85. *See* Los Angeles Mem'l Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

86. *See* Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1410 (1991).

87. *See Wilson*, 946 F. Supp. at 1492-93 (citing Berry v. City of New York, 906 F. Supp. 163, 166 (S.D.N.Y. 1995) (stating that when a party alleges a constitutional injury, "the two prongs of the threshold showing required for injunctive relief merge into one"), *rev'd on other grounds*, 97 F.3d 689 (2d Cir. 1996)).

88. *See Wilson*, at 1499.

89. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467 (1982).

90. *See id.* at 476.

91. *See Wilson*, 946 F. Supp. at 1499.

plaintiffs argued that unlike individuals seeking race and gender preferences, persons seeking preferences for age, disability or veteran status continue to enjoy access to the political process at all levels of government. They asserted that Proposition 209 violates Equal Protection by removing the authority to redress racial and gender problems to a new and remote level of government, "thereby, singling out the interests of minorities and women for a special political burden."[92]

For Equal Protection analysis purposes, the *Wilson* court simply asked the wrong question. The court asked whether Proposition 209's prohibition of constitutionally-permissible government affirmative action based on race and gender violated plaintiff's right to equal protection. Yet, a more accurate reading of the issue presented in *Wilson* is whether Proposition 209, without an illicit motive or lack of rational basis, may prohibit race- and gender-based affirmative action under a changed political process without violating the Equal Protection Clause. In answering its issue statement, the *Wilson* court relied on what it called the *Seattle-Hunter* doctrine, citing two of the three Supreme Court cases comprising the *Hunter* trilogy. These two cases, *Seattle*[93] and *Hunter v. Erickson*,[94] are relevant to Proposition 209, and although the Supreme Court could fairly use them to hold Proposition 209 unconstitutional, it is more likely that the Court will uphold Proposition 209 under the rationale of *Crawford v. Board of Education of Los Angeles*.[95]

Despite its contrary assertion, the *Wilson* court does not address the defendant's contention that the issues examined by the court are actually controlled by the Supreme Court's decision in *Crawford*.[96] In *Crawford*, as in *Wilson*, California voters amended their constitution by adopting Proposition I.[97] Proposition I required the state courts to mirror the authority of the federal courts with respect to court-ordered busing for the purpose of racial desegregation. On review, the Supreme Court found that Proposition I merely repealed prior state constitutional interpretations giving state courts more power to order busing than federal courts had under the federal Constitution.[98]

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92. *Id.*
93. 458 U.S. 457 (1982).
94. 393 U.S. 385 (1969).
95. 458 U.S. 527 (1982).
96. *See Wilson*, 946 F. Supp. at 1503-04.
97. *See Crawford*, 458 U.S. at 531-32.
98. *See id.* at 535-36.

Like *Crawford*, California voters in adopting Proposition 209 merely repealed state laws passed by state and local entities granting race- or gender-based preferences which exceeded the minimum protection required under federal law. Because there is no illicit governmental motive behind the passage of Proposition 209, and because voters were seemingly motivated by a desire to govern impartially, Proposition 209 passes the rational basis test. It is valid under the Equal Protection Clause despite its adverse racial and gender impact throughout the political process.[99] In *Crawford*, the Court concluded that the repeal of busing as an option for state courts did not distort the political process despite its adverse impact on desegregation. In *Wilson*, the court declared that "the present case is dramatically different from *Crawford*."[100] Yet, Proposition 209, like the law in *Crawford*, can be characterized as simply repealing all existing race- and gender-based affirmative action policies that exceed federally mandated minimum requirements.[101] Proposition 209 does not reorder the political process on all affirmative action programs based on gender and race in California. Instead, it only removes to a new and remote level of government those programs which are not required by either federal statute or the U.S. Constitution. Proposition 209, despite the fact that it singles out an issue of special concern to minorities and women and in doing so alters the political process, does not violate the Constitution unless the governmental action has an illicit purpose or is too arbitrary to be rational.

IV. PROPOSITION 209'S EQUAL PROTECTION STANDARD SHOULD BE ILLICIT STATE ACTION RATHER THAN POLITICAL BURDENS

A close reading of *Crawford* strongly suggests that Proposition 209 will likely survive constitutional scrutiny under the *Hunter* trilogy. Proposition 209 shares a common characteristic with Proposition I: a lack of discriminatory purpose.[102] In *Crawford*, Proposition I amend-

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99. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (holding that a law is unconstitutional if it is motivated by invidious racial discrimination); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that adverse impact on issues important to women is not enough, it is only when one shows an invidious intent to discriminate because of gender that a law or policy violates the Constitution). A showing of invidious motive under Proposition 209 would be difficult to make according to scholars who think Proposition 209 may be invalid under the *Hunter* trilogy. *See* Amar & Caminker, *supra* note 60, at 1023.

100. *Wilson*, 946 F. Supp at 1508.

101. *See id.*

102. *See* Crawford v. Board of Educ. of Los Angeles, 458 U.S. 527 (1982).

ed the California Constitution by forbidding state courts from ordering mandatory student assignment or transportation. The only exception to this ban on mandatory assignment or transportation was if a federal court directed this action as a means to remedy a violation of Equal Protection under the Fourteenth Amendment.[103]

In *Crawford*, minority students attending the Los Angeles Unified School District (District) filed a class action lawsuit in state court. The central purpose of this lawsuit was to desegregate the District's schools. Although filed in 1963, the *Crawford* suit did not go to trial until 1968. In 1970 a California trial court held that the District was sufficiently segregated so as to violate both the California and United States Constitutions. As a result of its conclusion, the trial court required the District to prepare a desegregation plan.[104] The California Supreme Court affirmed the trial court's decision, but on a different legal theory.[105] Unlike the trial court, the California Supreme Court did not find a violation of the Equal Protection Clause because of de jure segregation.[106] Instead, the court affirmed the lower court's decision by finding that only the California Equal Protection Clause had been violated.[107] The court held that under the state constitution, the District was obligated to take reasonable action to remedy de jure and de facto segregation in public schools.[108] Thus, the court remanded the case to the lower court, instructing it to develop a reasonable desegregation plan.[109]

Following the remand from the state supreme court, the District's mostly voluntary desegregation plan was rejected in favor of a second plan that included substantial mandatory "busing" based on race and ethnicity. The desegregation plan went into effect in the fall of 1978 without satisfying any of the litigants. In October 1979, while the unsatisfactory desegregation plan was in effect, the trial court began considering other options to reduce the problems of segregation.[110]

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103. *See id.* at 529.

104. *See id.* at 529-30.

105. *See* Crawford v. Board of Educ. of Los Angeles, 551 P.2d 28 (Cal. 1976).

106. *See id.* at 30.

107. *See id.*

108. *See id.* at 33.

109. *See id.* at 48. The California Supreme Court made the following comments to the trial court while remanding the case: "While critics have sometimes attempted to obscure the issue, court decisions time and again emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's obligation in this field . . . . [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its costs, both in financial and educational terms will render its use inadvisable." *Crawford*, 458 U.S. at 531 n.3 (citing *Crawford*, 551 P.2d at 47).

110. *See Crawford*, 458 U.S. at 531.

In November 1979, California voters approved Proposition I, thereby amending the Due Process and Equal Protection Clauses of the state constitution. That amendment limited the scope of remedies available under the state's constitution to those exercised by federal courts under appropriate federal standards. In relevant part, Proposition I provided as follows:

> [N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause.[111]

After California voters passed Proposition I, the District asked the state trial court to stop all mandatory reassignment and busing of students. The state trial court denied this request. The basis for the trial court's denial was the court's conclusion that Proposition I did not apply to the *Crawford* case because of the court's prior finding of unconstitutional de jure segregation by the District. As a result, the

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111. *See id.* at 531 n.6. Proposition I added a lengthy proviso to Art. 1, § 7(a) of the California Constitution. Following the adoption of Proposition I, section 7 now provides, in relevant part:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution . . . and (2) unless a federal court be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
>
> Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended. In amending this subdivision, the Legislature and people of the state of California find and declare that this amendment is necessary to save public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquillity in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

Id. at 531 n.6.

trial court ordered a revised desegregation plan be implemented that substantially relied on mandatory student reassignment and busing.[112]

The California Court of Appeals reversed the trial court.[113] The appellate court concluded that the trial court's 1970 findings of fact did not support the conclusion that the District violated the United States Constitution through practicing intentional segregation.[114] The California Court of Appeals held that Proposition I applied to the trial court's desegregation plan, and the court therefore prohibited the portion of the plan requiring mandatory reassignment and busing of students for desegregation purposes. The court also held that Proposition I did not violate the United States Constitution.[115] Furthermore, the court concluded that California did not have a duty under state law to maintain a greater remedy for promoting desegregation than that required under the Fourteenth Amendment's Equal Protection Clause.[116]

The California Court of Appeals held that Proposition I was constitutional under both state and federal standards and therefore vacated the orders entered by the state trial court. The California Supreme Court refused to hear the case on appeal.[117] The United States Supreme Court in *Crawford* agreed with the California Court of Appeals, rejecting the holding that once a state chooses to do "more" than is required by the Fourteenth Amendment, it can never recede.[118] The Supreme Court also rejected the trial court's narrow interpretation of the Fourteenth Amendment calling it "destructive of a State's democratic processes and of its ability to experiment."[119] The court found that such an interpretation had no support in the decisions of the United States Supreme Court.[120]

By concluding in *Wilson* that Proposition 209 is probably unconstitutional, the court improperly equated political burdens and raced-based classifications with an illicit discriminatory purpose.[121] Race-based classifications are permitted under current equal protection

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112. *See id.* at 533.

113. Crawford v. Board of Educ. of Los Angeles, 170 Cal. Rptr. 495 (Cal. Ct. App. 1981).

114. *See id.* at 503-04.

115. *See id.* at 509.

116. *See id.* at 509-10. The California Court of Appeals did not accept the argument that Proposition I denied minorities a right to desegregated education under due process. *See id.* at 510.

117. *See Crawford*, 458 U.S. at 534.

118. *See id.* at 535.

119. *Id.*

120. *See id.*

121. *See Wilson*, 946 F. Supp. at 1502.

analysis if they are necessary to further a compelling state interest.[122] Indeed, the Supreme Court has stated that, "a racial classification, regardless of purported motivation, can be upheld only upon an extraordinary justification."[123] Proposition 209 does not contain a racial classification, and therefore the court's analysis is misplaced. The trial court in *Wilson* should have analyzed the unfair political burden imposed by Proposition 209 on minorities and women under the illicit motive or intent test or under the rational basis test. Instead, the court mistakenly concluded that these political burdens violate the Equal Protection Clause.

The *Wilson* court points out that Proposition 209 is similar to the measures struck down in *Hunter* and *Seattle* in that none of the initiatives classify persons based on race or gender.[124] Instead, these three initiatives were designed to turn back gains that were intended as remedies for long-term discrimination suffered by minority groups. Under all three measures, those seeking to reenact and preserve those remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.[125] The measures in *Seattle* and *Hunter* dealt exclusively with the matter of race, while Proposition 209 addresses the twin issues of race and gender.[126]

A threshold matter to questions involving the Equal Protection Clause is that the court must determine whether the legislation in question contains a prohibited classification.[127] A reasonable inference can be made from *Adarand* that when a race- or gender-based classification is not present, then intent analysis is not necessary.[128] If a court determines that there is no prohibited classification, it should not then create what could be construed as the equivalent of a prohibited classification in the absence of an illicit motive or the lack of rational basis. In *Wilson*, the defendants properly asserted that Proposition 209, unlike the initiatives in *Hunter* and *Seattle*, expressly prohibits classifications based on race and gender, and it should not be

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122. *See Crawford*, 458 U.S. at 536.

123. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); *see also* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

124. *See Wilson*, 946 F. Supp. at 1501.

125. *See id.*

126. *See id.* ("The differing levels of judicial scrutiny accorded race and gender classifications, however, do not render the reasoning of *Seattle* and *Hunter* inappropriate in context of gender. On the contrary, the doctrinal approach of those cases is wholly constant with the heightened scrutiny applicable to gender classifications.") *Id.*

127. *See* Adarand Contractors, Inc. v. Pena, 115 S. Ct. 2097, 2105 (1995).

128. *See id.*

read to create such classifications.[129] However, the apparent facial neutrality of the challenged measures in *Hunter* and *Seattle* did not prevent the Supreme Court from going beyond the plain language of the measures and asking whether, "'in reality, the burden imposed by [the] arrangement necessarily falls on the minority.'"[130]

In *Wilson*, the district court should have gone beyond the plain language used in *Hunter* and *Seattle* and asked whether, in reality, the burden imposed by Proposition 209 violates the Equal Protection Clause. The burden created by Proposition 209 arises because the Proposition expresses illicit hostility to a recognized group based on that group's race or gender. When a neutral law without a race- or gender-based classification has a disproportionately adverse impact on a minority, the Fourteenth Amendment is violated only if the law has a discriminatory purpose.[131] It is only when facially neutral classifications are passed because of an illicit motive to burden racial minorities or women that the court must look beyond the law's plain language. This illicit motive test can be used to indicate either a discriminatory purpose or such a lack of rational basis for a legislative policy that an arbitrary motive is necessarily inferred.

The *Wilson* court states that "defendants cannot use Proposition 209's facial neutrality as a shield against the *Hunter* analysis."[132] The court in *Wilson* apparently misunderstood the defendants' argument. The defendants were not attempting to use the facial neutrality of Proposition 209 as a shield to avoid scrutiny because the legislation makes distinctions based on race or gender.[133] Instead, they were merely asking the court to recognize "that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."[134] The defendants simply argued that Proposition 209 does not contain an illicit motive or burden by the fact that it addresses—on a race- and gender-neutral basis—affirmative action issues which may have a disproportionate adverse impact on women and minorities.

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129. *See Wilson*, 946 F. Supp. at 1502.

130. *Id.* (quoting *Seattle School Dist. No. 1*, 458 U.S. at 468).

131. *See Crawford*, 458 U.S. at 537-38 (citing Washington v. Davis, 426 U.S. at 238-48; Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); James v. Valtierra, 402 U.S. 137, 141 (1971)).

132. *See Wilson*, 946 F. Supp. at 1502.

133. *See id.*

134. *Crawford*, 458 U.S. at 538.

A. *Proposition 209 Is not an Illicit Political Burden on Race- and Gender-Based Affirmative Action Governmental Programs*

The most serious flaw in *Wilson*'s analysis is the failure to treat Proposition 209 as an affirmative action remedy based on race and gender, but instead treating it as a case about access to the political process.[135] The defendants in *Wilson* asked the court to read *Seattle* and *Hunter* "as cases about limits on state-sponsored remedies for past discrimination."[136] It is not helpful for the *Wilson* court to conclude that *Seattle* and *Hunter* are political access cases without addressing the issue of illicit state action because of arbitrariness or discriminatory motive. Burdens to the political process must contain either a discriminatory purpose or illicit state action to violate the Equal Protection Clause. Proposition 209 is constitutional because it prevents racial and gender discrimination by denying preferences not otherwise allowed under the Equal Protection Clause.[137] "[W]henever the government treats any person unequally because of his or her race that person has suffered an injury . . . ."[138] Proposition 209 is valid legislation because, as the defendants in *Wilson* asserted, it bars legislation harmful to the rights of nonminorities.[139]

In *Wilson*, the defendants contended that Proposition 209 is distinguishable from the illicit mandatory busing program barred in *Seattle* and the legislation barred in *Hunter* because Proposition 209 is designed to protect the rights of nonminorities against racial discrimination in the form of affirmative action. Unlike *Hunter* and *Seattle*, Proposition 209 is not designed to deny political access, but to protect nonminorities from exposure to the burdens of race- and gender-based affirmative action programs. The defendants argued that Proposition 209 is constitutional because the only interference involved "zero-sum

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135. *See Wilson*, 946 F. Supp. at 1503.

136. *Id.*

> [D]efendants' focus on the particular legislation barred by . . . Proposition 209, rather than on the initiative . . . [itself], suffers from a more fundamental flaw. Accepting defendants' arguments would essentially require that this Court read *Seattle* and *Hunter* as cases about the limits on state-sponsored remedies for past discrimination. This is the inevitable conclusion that emerges from a primary focus on the legislation blocked, rather than on the blocking initiative. As this Court has pointed out, however, the instant case, as well as *Seattle* and *Hunter*, are more appropriately understood as cases about access to the political process.

Id.

137. *See Adarand*, 116 S. Ct. at 2114.

138. *Id.*

139. *See Wilson*, 946 F. Supp. at 1502.

antidiscrimination," which they defined as governmental policies that help minorities at the expense of nonminorities.[140] Proposition 209 is constitutional because its purpose is to move this nation away from zero-sum antidiscrimination policies to a zero-tolerance antidiscrimination plan.

The *Wilson* court's *Seattle-Hunter* attack on Proposition 209 is unlikely to survive judicial review on the merits of the case. The *Wilson* court's examination is likely to fail because Proposition 209's only effect is to prohibit suspect governmental classifications that "trigger heightened equal protection scrutiny."[141] Because race-based affirmative action programs are presumed to be unconstitutional under *Adarand's* equal protection analysis, a state should be able to regulate and prohibit those programs.[142] Unlike racial classifications, gender classifications are not inherently suspect.[143] Instead, intermediate scrutiny applies to gender classifications, requiring governmental policies based on a gender classification to be subject to "an exceedingly persuasive justification."[144] Applying intermediate scrutiny to Proposition 209, California has the burden of showing that any gender classification "serves important governmental objectives 'and that the means used are' substantially related to the achievement of those objectives."[145] Proposition 209 restricts governmental affirmative action plans to those that are either race- and gender-neutral or that are required by federal law because of an important governmental interest for gender-based classifications or because of a compelling governmental interest for race-based classifications. The United States Supreme Court's holding in *Crawford* supports the restrictive nature of California's affirmative action remedies.[146] Proposition 209 does not inhibit enforcement of any federal law or constitutional requirement for race or gender-based affirmative action.[147] To the contrary, the real

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140. *See id.*

141. *Id.*

142. *See Adarand*, 515 U.S. at 220. In *Wilson*, one of the defendants' arguments focused on the level of judicial review that attaches to the conduct prohibited by the challenged initiatives. "According to defendants, the affirmative action efforts prohibited by Proposition 209 are, under existing 14th Amendment principles, themselves constitutionally suspect and subject to heightened scrutiny." Wilson 946 F. Supp. at 1502. The defendants argued that the "fair housing ordinance and the busing programs that were overturned by the initiatives in *Seattle* and *Hunter* did not themselves trigger heightened equal protection scrutiny." *Id.* at 1502-03 (citing *Adarand*, 515 U.S. at 220).

143. *See Adarand*, 515 U.S. at 220.

144. United States v. Virginia, 116 S. Ct. 2264, 2275 (1996).

145. *Id.*

146. *See* Crawford v. Board of Educ. of Los Angeles, 458 U.S. 527 (1982).

147. *See id.* at 535.

focus of Proposition 209 is to embrace the requirements of the Equal Protection Clause with respect to gender- and race-based governmental affirmative action policies. As the Court held in *Crawford*, "It would be paradoxical to conclude that adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the state actually violated it."[148]

In the *Hunter* trilogy, some believe the Supreme Court used a two-pronged test.[149] Under the first prong, one must demonstrate that the law under attack is raced-based because it "uses the racial nature of an issue to define the governmental decision making structure while imposing substantial and unique burdens on racial minorities."[150] Under the second prong, one must prove that the law imposes an unfair political process burden on minority issues. According to Amar and Caminker, strict scrutiny is triggered only if the legislation satisfies both of these prongs.[151] A law imposing special political process burdens on classes not defined by race does not directly implicate the trilogy. Similarly, a law that deals explicitly with "racial" issues, but does not impose any entrenching political process is unproblematic under the analysis presented by Amar and Caminker.[152]

Notwithstanding the views propounded by Professors Amar and Caminker, strict scrutiny review is required under either of the prongs identified in the *Hunter* trilogy. When the state makes a race-based decision, strict scrutiny is implicated, and the governmental policy is unconstitutional unless necessary to further a compelling governmental interest.[153] Under the first prong, if the state "singles out for special treatment issues that are associated with minority interests,"[154] then, under traditional equal protection analysis, the Fourteenth Amendment is violated because a subtle discriminatory purpose has been shown to adversely impact minority interests.[155]

The very act of singling out issues based on their importance to a racial group is suspect, and that conduct alone is sufficiently suspicious to be presumed unconstitutional and subject to strict scrutiny. "[T]he standard of review under the Equal Protection Clause

148. *Id.*
149. *See* Amar & Caminker, *supra* note 60, at 1026.
150. *Id.* (citing *Seattle School Dist. No. 1*, 458 U.S. at 470).
151. *See id.*
152. *See id.*
153. *See Crawford*, 458 U.S. at 536.
154. Amar & Caminker, *supra* note 60, at 1026.
155. *See* Washington v. Davis, 426 U.S. 229, 239-48 (1976).

is not dependent on the race of those burdened or benefited by a particular classification."[156] Therefore, the real message from the *Hunter* trilogy is that the Equal Protection Clause will be violated when there is illicit governmental action. Moreover, this violation exists whether the illicit government action is called a discriminatory classification by implication for facially neutral legislative acts, or called a subtle inference of discrimination when the legislation is merely an attempt to disadvantage minority interests because of race or gender.

Under *Hunter*'s second prong, any law imposing an unfair political process burden on any group, regardless of race, should be subject to strict scrutiny because equal access to the political process should be treated like a fundamental interest, similar to the right to vote, for equal protection purposes.[157] In *Reynolds*, for example, the Court treated the right to vote as a fundamental interest because that right is the essence of a democratic government.[158] By analogy, equal access to a fair political process is a fundamental interest because it is the life blood of democracy, and therefore, it too should be subject to strict scrutiny. If a facially neutral law creates a judicial presumption that it was designed to create an unfair political arena for insular and discrete minority interests, then that law should be subject to strict scrutiny.[159] Footnote four of *Carolene Products* indicates that whenever ordinary political processes cannot be relied upon to protect minority interests, a more searching judicial inquiry is needed.[160] In *Romer v. Evans*, the Court stated that central to the idea of the Constitution's guarantee of equal protection is the principle that the government be open on impartial terms to all who seek its assistance.[161] "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[162] In *Romer*, the Court acknowledged, without disapproval, the Colorado Supreme Court's holding that the Colorado Constitution infringed on the fundamental right of gays and lesbians to participate in the political process.[163] Although not directly cited

156. *Adarand*, 515 U.S. at 213 (quoting *Croson*, 488 U.S. at 493-94).
157. *See* Reynolds v. Sims, 377 U.S. 533 (1964).
158. *See id.* at 554-55.
159. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).
160. *See id.* at 153 n.4.
161. 116 S. Ct. 1620, 1628 (1996).
162. *Id.*
163. *See id.* at 1624 (citing *Hunter*, 393 U.S. at 389; *Seattle School Dist. No. 1*, 458 U.S. at 457).

in its reasoning in *Romer*, it is clear that the *Hunter* trilogy's message of fair and impartial access to the political process is directly implicated. Under the rationale of *Romer*, when laws deny access to the political process, they may be held unconstitutional even if they do not involve a suspect class.[164] Given the Court's rationale, *Romer* can properly be understood as a radical and expansive view of the *Hunter* trilogy's concerns about unfair political burdens on a class of people. In *Romer*, the Court expanded the rationale of the *Hunter* trilogy while revolutionizing its traditional equal protection analysis.

Scholars have stated:

> [I]n *Romer v. Evans*, . . . the Supreme Court struck down an amendment to the Colorado State Constitution as an unprecedented per se violation of the Equal Protection Clause . . . . The Court held that Amendment 2, which singled out a class of persons—homosexuals, lesbians, and bisexuals—and denied them the right to seek protection from the government against public or private discrimination based on that class membership, was 'a denial of equal protection of the of the laws in the most literal sense'. . . . Because it also analyzed the Amendment under the rational basis test, however, the Court's opinion is fraught with interpretive difficulties. Although it leaves several unanswered . . . questions in the gay rights context, the case revolutionizes the Court's equal protection analysis, raising new questions about the methodology and substance of equal protection jurisprudence.[165]

After *Romer*'s unacknowledged expansion of the *Hunter* trilogy's rationale—namely, the protection of class interests against hostility—Proposition 209's constitutionality may be analyzed under either *Romer* or the *Hunter* trilogy by either the lower courts or by the United States Supreme Court.

This Article's primary focus is on the pre-*Romer* and post-*Hunter* trilogy Equal Protection implications of Proposition 209 under both strict scrutiny and rational basis review. If Proposition 209 is about promoting race-based affirmative action for minorities, then it must survive strict scrutiny, and is therfore likely to be held unconstitutional under traditional equal protection analysis.[166] If, on the other hand,

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164. *See id.*

165. Leading Cases, 110 HAR. L. REV. 135, 155-156 (1996).

166. Some scholars think of the strict scrutiny standard as strict in theory and fatal in fact. *See* Gerald Gunther, *The Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). However in a recent raced-based affirmative action case the following statement was made about the strict in theory and fatal in fact school of thought. "We wish to dispel the notion that strict scrutiny

Proposition 209 merely limits the remedies available to racial minorities suffering societal discrimination to those remedies available under the United States Constitution, without any illicit motive, then the Proposition is entitled to a heavy presumption of constitutionality under the Court's traditional rational basis review.[167] The message of *Crawford* is that merely limiting the remedies available to achieve racial diversity or desegregation does not violate the Equal Protection Clause.[168] However, in *Wilson*, the court characterized Proposition 209 as a facially neutral constitutional amendment singling out minorities for unique political burdens. Under this characterization, Proposition 209 involves a suspect classification under equal protection analysis.[169]

B. Proposition 209's Political Burdens are not Illicit in Character Because Governmental Decisions Are Made in Spite of Race and Gender

The federal district court in *Wilson* should have rejected the plaintiffs' argument. They argued that despite facial neutrality, Proposition 209 violates the Equal Protection Clause because it restructures the political process to disadvantage only those seeking to enact legislation benefiting minorities and women.[170] The plaintiffs stated that prior to the passage of Proposition 209, those favoring affirmative action policies based on race or gender were able to petition state and local officials directly for support. Since Proposition 209 has become law, supporters of race- and gender-based affirmative action face the more daunting task of engaging in a statewide campaign to amend the California Constitution. Supporters of preferences based on a status other than race or gender (for example, age, disability, or veteran status) continue to enjoy access to the political process at all levels of government.

The plaintiffs contended that Proposition 209 denied them Equal Protection by "removing the authority to redress only racial and gender problems."[171] They maintained that because race and gender problems can now only be redressed at a new and remote level of state

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is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 220 (quoting Fullilove v. Klutznik, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

167. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1442-43 (2d ed. 1988).

168. *See Crawford*, 458 U.S. 527.

169. *See Wilson*, 946 F. Supp. at 1503-04.

170. *See id.* at 1499.

171. *Id.*

government, Proposition 209 singles out the interests of minorities and women for a special burden.[172] Under traditional equal protection analysis, preferences for age, disability, or veteran status are only subject to a rational basis standard of judicial review. The age, disability, or veteran preferences are not similarly situated in the political process to race and gender because only race and gender, among the identified preferences, are subject to a heightened level of judicial scrutiny—strict scrutiny for race and intermediate scrutiny for gender.[173] Any political burdens faced by minorities and women because of Proposition 209 do not violate the Equal Protection Clause because those burdens are not special despite their perceived disproportionate impact on the interests of minorities and women. Thus, in California, women and minorities face the same political obstacles as nonminority males seeking preferences under the law. For example, Proposition 209 would prohibit a county or city government from passing an affirmative action program giving race-based preferences to white males married to minority females in the name of promoting racial diversity without first amending the state Constitution. Although white males would be the direct beneficiaries of such a policy, Proposition 209 would require amending the state constitution to implement it because it is race-based. Such a policy is race-based despite its special interests to white males and minority women who might believe interracial marriages promote racial diversity and affirmative action.

In *Seattle*, the Court stated that a "political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action."[174] However, the Court went on to say that, "the State [may not] allocate governmental power non-neutrally by explicitly using the racial nature of a decision to determine the decision making process."[175]

The *Wilson* court relied on two Supreme Court decisions, *Hunter* and *Seattle*, in concluding that Proposition 209 probably violates the Equal Protection Clause.[176] In *Hunter*, the Supreme Court was asked to decide whether citizens of Akron, Ohio, could repeal legislation

172. *See id.*

173. Strict scrutiny is required for race-based voluntary governmental preferences. *See Croson*, 488 U.S. at 493-94. Gender-based governmental policies are subjected to a heightened intermediate level of scrutiny. *See* United States v. Virginia, 116 S. Ct. 2264, 2275 (1996).

174. *Seattle School Dist. No. 1*, 458 U.S. at 470.

175. *Id.*

176. *See Wilson*, 946 F. Supp. at 1499-1500.

enacted to prohibit racial discrimination in housing.[177] After the Akron City Council passed a fair housing law, local citizens passed a referendum to amend the city charter to require that fair housing regulations be put to a citywide vote before such regulations could take effect. As a result of the referendum, Section 137 of the city charter applied not only to future fair housing policies, but it also suspended the prior antidiscrimination housing law.[178] The Court believed that Section 137 singled out city legislation of interest to racial minorities for an unfair political burden. People seeking to enact housing regulations in Akron on any basis other than race simply had to persuade the city council to adopt the regulations. By contrast, those seeking race-based regulations were required by Section 137 to confront a city referendum. Indeed, for those citizens of Akron seeking protection from racial bias in housing, "the approval of the city council was not enough."[179] The Supreme Court correctly held that Akron's restructuring of the political process violated the Equal Protection Clause of the Fourteenth Amendment.[180]

V. A CRITIQUE OF THE *WILSON* COURT'S EQUAL PROTECTION VIOLATION THEORY

According to *Wilson*, the Supreme Court's analysis of Section 137 in *Hunter* was based on two particular features of the legislation.[181] First, Section 137 raised an Equal Protection issue because it singled out an issue of particular interest to racial minorities: race-based housing discrimination.[182] In order to avoid violating the Equal Protection Clause, Section 137 would have to impose a new political burden on all legislation.[183] The second reason Section 137 deserved heightened scrutiny was the fact that it imposed a novel political burden on all future efforts to enact fair housing legislation. The citizens of Akron could use the referendum process simply to repeal the fair housing ordinance previously passed by the city council without violating the Equal Protection Clause.[184]

"Although neither of these two features of [Section] 137, standing alone, would have offended the 14th Amendment, the Supreme Court

177. *See* Hunter v. Erickson, 393 U.S. 385 (1969).
178. *See id.* at 387.
179. *Id.* at 390.
180. *See id.* at 393.
181. *See Wilson*, 946 F. Supp. at 1500.
182. *See id.*
183. *See id.* (citing *Hunter*, 393 U.S. at 393-95 (Harlan, J., concurring)).
184. *See id.*; *Hunter*, 393 U.S. at 390 n.5. *See also Crawford*, 458 U.S. at 539.

held that the confluence of the two factors—the targeting of a racial issue and the reordering of the political process—constituted a racial classification that required the most exacting judicial scrutiny."[185]

The *Wilson* court's treatment of *Hunter* is superficial considering the much larger scope of the Equal Protection doctrine. The *Hunter* decision itself is conducive to superficial analysis by lower courts because it was result-oriented. In an effort to reach its desired result, the United States Supreme Court unnecessarily equated race-neutral legislation with race-based legislation. However, under this approach, the *Hunter* Court reached the right result with the wrong rationale. In *Hunter*, Section 137 violated the Equal Protection Clause because restructuring the city's political process could only be rationally explained as directing hostility toward a racial minority and not as a mere repeal of existing legislation.[186] Classifications that are facially neutral, but that serve as an obvious pretext for racial discrimination, are presumed unconstitutional and violate the Equal Protection Clause unless they are justified by a compelling state interest.[187] A proper reading of *Hunter* suggests that Section 137 violated the Equal Protection Clause because restructuring the political process to require a referendum for a fair housing law was an obvious pretext for racial discrimination.

Unlike Section 137, Proposition 209 is neither an obvious nor subtle pretext for gender or racial discrimination. Proposition 209 has the opposite effect of Section 137 because it prohibits rather than encourages discrimination on the basis of race and gender. Unlike Section 137, Proposition 209 can easily be explained on a basis other than as race-based discrimination. One of the rational and laudable goals of Proposition 209 is to encourage state government to designate race as a forbidden classification and gender as a suspect one. Because of these differences between Proposition 209 and Section 137, Proposition 209 is likely not unconstitutional under the *Wilson* court's reading of *Hunter*.

In *Seattle*, the Court applied the *Hunter* rationale to a statewide initiative that prohibited the mandatory busing of students to achieve racial integration in the schools.[188] After a Seattle school district made plans to implement a mandatory busing plan, voters in Washington adopted Initiative 350. Initiative 350 stated, in relevant part, that

185. *See Wilson* 946 F. Supp. at 1500.
186. *See Hunter*, 393 U.S. at 392-93.
187. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
188. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

"no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest to the student's place of residence."[189] The Court was not impressed with the facially neutral language of Initiative 350 and held that the measure was enacted because of, and not merely in spite of, its adverse impact upon busing for integration.[190] The *Wilson* court correctly observed that both *Hunter* and *Seattle* violated the Fourteenth Amendment's Equal Protection Clause because those measures were enacted with the purpose of adversely impacting an issue important to racial minorities.[191] It is mere speculation to conclude that Proposition 209 was enacted for this same purpose because it is equally plausible to conclude that Proposition 209 was passed in spite of its impact on race and gender issues. When the *Wilson* court conceded that the measures in *Hunter* and *Seattle* violated the Equal Protection Clause because they were enacted for the purpose of adversely affecting racial minorities, it may have inadvertently distinguished those cases from Proposition 209. Proposition 209, unlike the Washington and Akron initiatives, cannot be read to create hostile or adverse racial and gender classifications because it was enacted in spite of its impact on race and gender.[192] Proposition 209 is like the facially neutral measure that impacted busing for school integration in *Crawford* that did not use a racial classification.[193]

The defendants in *Wilson* were correct to ask the court to focus on the nature of the legislation barred by Washington's Initiative 350, Akron's Section 137, and California's Proposition 209. This request simply asked the court to read *Crawford* as a case about the limits on state-sponsored remedies for past societal discrimination in the absence of a federal remedy. In *Crawford*, the Court made clear that the

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189. *Id.* at 462.

190. *See id.* at 471.

191. *See Wilson*, 946 F. Supp. at 1500-01.

Despite its facially neutral language, the Court found that Initiative 350 in reality barred only busing plans aimed at achieving racial integration while permitting busing for other purposes. In striking down the initiative, the Court found that it, like the enactment in *Hunter* singled out an issue of concern to minorities—racial busing—and imposed special political burdens on those who supported the issue. These features of Initiative 350 led the Court to find that the facially-neutral measure was, in reality, a racial classification, subject to the most searching judicial scrutiny. In the words of the Court, It is beyond dispute . . . that the initiative was enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration. As in *Hunter*, the Court concluded that, viewed in this light, Initiative 350 violated the 14th Amendment.

Id.

192. *See id.* at 1502.

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

simple repeal of an antidiscrimination law raises no Equal Protection concern.[194] Like the measure in *Crawford*, Proposition 209 is an antidiscrimination law requiring other state governmental agencies not to practice race and sex discrimination, except where required by relevant federal law.

Proposition 209 does not have a race or gender focus. It was enacted in spite of its potentially disproportionate adverse impact on racial minorities and women. The racial focus inquiry does not depend on the wisdom or efficacy of a specific affirmative action program.[195] When there are no constitutional violations, race- and gender-based affirmative action policies "are matters to be resolved through the political process."[196] "This Court has no trouble concluding that affirmative action is appropriately understood as a 'racial problem' and, similarly, a 'gender problem' . . . ."[197] Contrary to the court's decision in *Wilson*, Proposition 209 and, more broadly, affirmative action, are best understood as problems of economic disparity. The decisions in *Hunter* and *Seattle* can best be explained by the Supreme Court's apparent conclusion that the measures could only rationally be explained as the products of impermissible motivation or other illicit state action.[198]

Proposition 209 does not restructure the political process so as to violate the Equal Protection Clause merely because it may now become more burdensome for supporters of affirmative action based on race or gender to petition their state government for redress under a measure lacking an impermissible motivation or other illicit state action. The fact that supporters of race- and gender-based governmental affirmative action policies must amend the state constitution to receive a preference is not a constitutionally impermissible political hurdle. This type of obstacle is not unconstitutional because it was created despite its impact on affirmative action, rather than because of its adverse effects on interests important to women and minorities. Unlike minorities and

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194. *See id.*

195. *See Wilson*, 946 F. Supp. at 1505.

196. *Seattle School Dist. No. 1*, 458 U.S. at 474.

197. *Wilson*, 946 F. Supp. at 1505.

198. *See id.* at 1506.

> In so finding, the Court does not pass on whether any discriminatory intent lay behind the adoption of Proposition 209. The Supreme Court in *Seattle* made it plain that such an inquiry is not required under the *Seattle-Hunter* analysis. [citations omitted] The Court nevertheless notes that the Supreme Court in *Seattle* also suggested that any measure that ran afoul of the *Seattle-Hunter* analysis 'inevitably raises dangers of impermissible motivation. . . .

Id. at 1506 n.27.

women, "those seeking preferential treatment on all other grounds need not surmount any new political hurdles."[199] When minorities and women must jump new political hurdles as an incident of state citizenship, the Constitution is simply not violated. The *Wilson* defendants correctly argued that Proposition 209 in no way reorders the political process for racial and gender preferences because the prohibition on such preferences is viewed as a general attack on race and sex discrimination.[200] The court in *Wilson* likely committed reversible error by concluding that the issue in Proposition 209 is about preferences rather than about discrimination. The realistic message of Proposition 209 is that all race- and sex-based discrimination is presumed to be invidious and therefore a violation of a person's individual constitutional right to equal protection in California.[201]

Political correctness aside, gender- and race-based preferences are considered discrimination and thus entitled to a presumption that such preferences are unconstitutional. In *Crawford*, local school boards that had been free to adopt certain busing programs to promote racial integration, remained free after the passage of Proposition I to adopt such programs.[202] The *Wilson* court believed that Proposition I in *Crawford* survived constitutional attack because of the ability to adopt school busing in the future to achieve desegregation. Proposition 209, like the measure in *Crawford*, allows local governments to support racial and gender diversity in education, employment and contracting by implementing economic or class-based affirmative action. Because women and racial minorities tend to be disproportionately economically disadvantaged owing to societal discrimination, they will benefit more

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199. *Wilson*, 946 F. Supp. at 1506.

200. *See id.* at 1507.

201. *See id.*

In response to plaintiffs showing regarding political burden, defendants insist that Proposition 209 in no way reorders the political process with respect to race and gender preferences. In their view, the proper forum for addressing fundamental issues regarding individual rights has always been the state constitution, and Proposition 209 merely modifies the existing constitutional guarantee of equal treatment at the governmental level. This argument has substantial merit with respect to Proposition 209's broad antidiscrimination provision the general ban on invidious race and gender discrimination is certainly a matter of constitutional decisionmaking. As the Court has pointed out, however, it is Proposition 209's ban on preferences, not its general ban on discrimination, that is the focus of the instant lawsuit. In this narrower context, defendants' argument falls short. Prior to the passage of Proposition 209, the discretion to adopt constitutionally-permissibly race-and-gender-conscious affirmative action programs, was as defendants counsel conceded at oral argument, lodged with state and local government entities, not reserved at the constitutional level.

Id. at 1507.

202. *See Crawford*, 458 U.S. at 535-36.

than others from affirmative actions policies designed to promote economic diversity.

Wilson is not significantly different from *Crawford*. First, Proposition 209 can be fairly characterized as a mere repeal of existing state and local affirmative action programs based on gender or race. However, the government remains free to adopt all other diversity affirmative action goals. Issues of economic disparity that impact racial minorities and women can still be addressed at the local level through economic based affirmative action as a reasonable and preferred alternative to race- or gender-based affirmative action. The court in *Wilson* improperly applied heightened scrutiny to Proposition 209, a measure that was gender- and race-neutral and void of illicit state action. It is only when governmental action is based on illicit gender or race classification that the court must use "a most searching examination."[203] The mere reordering of the political process to prohibit affirmative action on the basis of race or gender should not invoke heightened judicial review. A state remains free to restructure the political process, in the absence of an illicit state action through a neutral method, even where such change incidentally burdens the political participation of women and minorities.[204]

VI. CONCLUSION

Proposition 209 will likely be held constitutional because those supporting race- and gender-based governmental affirmative action policies were given an opportunity in California to compete within the fair rules of the political process. Yet, those supporters lost in the democratic struggle to establish nontraditional battle lines against racial and gender discrimination.[205]

The legal battle over whether Proposition 209 is valid under the Constitution has not yet been resolved. However, a three-judge panel of the Ninth Circuit has overturned the preliminary injunction issued by the *Wilson* court.[206]

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203. *Adarand*, 515 U.S. at 214 (quoting *Wygant*, 476 U.S. at 273 (opinion of Powell, J.)).
204. *See Wilson*, 946 F. Supp. at 1509.
205. *See Hunter*, 393 U.S. at 394 (Harlan, J., concurring).
206. *See* Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (1997).