

ARTICLES

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A CRITIQUE OF THE CALIFORNIA CIVIL RIGHTS INITIATIVE

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete. . . ' and still justly believe that you have been completely fair.¹ "This is a historic moment," exulted Governor Pete Wilson. "This is the beginning of the end of racial preferences."²

Within the space of 30 years, we have witnessed both the embrace of affirmative action at the highest levels of government and the recent campaign to "wipe away the scars of centuries"³ by declaring race-based affirmative action unnecessary and unfair. President Johnson understood that anti-discrimination laws alone would not break down long-standing patterns of discrimination and exclusion. As a white southerner, Johnson well understood that race prejudice can take subtle, yet effective forms with the result that institutions remained all-white or all-male long after court decisions and laws formerly ended discrimination. Today, efforts to expand opportunity for women and racial minority groups that have been subject to discrimination by using membership in those groups as a consideration⁴ are characterized as "a great injustice" and "the most significant departure from the principle of fairness" in our public policy.⁵ In an effort to end affirmative action, Tom Wood and Glynn Custred have authored an initiative⁶ which would amend the California State Constitution to outlaw racial

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1. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 894 (3rd ed.) (quoting II Public Papers of the Presidents. Lyndon B. Johnson 635-640 (Washington, 1965)).

2. *Taking It All Back: At Pete Wilson's Urging, the University of California Says No to Racial Preferences*, *TIME*, July 31, 1995, at 34 (remarking upon vote by the UC Board of Regents to terminate race-based affirmative action programs).

3. *See supra* note 1.

4. President Clinton's Affirmative Action Review Report adopts this definition of affirmative action and I will do the same in this essay. *See* George Stephanopoulos and Christopher Edley, Jr., *AFFIRMATIVE ACTION REVIEW, REPORT TO THE PRESIDENT*, July 19, 1995, at 1 n.1.

5. Nicholas Lemann, *Taking Affirmative Action Apart*, *N.Y. TIME MAGAZINE*, June 11, 1995, at 36.

6. Proposition 209, The California Civil Rights Initiative (hereinafter CCRI) (currently ENJOINED by the Federal District Court for the Northern District of California, *see* *Coalition for Economic Equality v. Wilson*, 1996 WL 734682 (N.D. Cal.)).

and gender "preferential treatment" or, *sans* political spin, affirmative action.⁷

At first glance, Johnson's intuition about the need for affirmative action in this white male dominated country continues to ring true as African-Americans as a group remain burdened with the effects of racial discrimination. California has a strong, if not compelling, interest in ensuring that all racial groups share in the benefits of education, employment and economic opportunity. Yet, even in this day of formal affirmative action, racial minorities do not have equal access to the mainstream economy. For example, Los Angeles County, with a nearly two-thirds African-American and Latino population, awarded only five cents of every public works dollar invested to minority firms.⁸ African-American employees working for state and local governments in California earned a median salary of \$33,774, compared to a white median salary of \$40,313.⁹ Most telling is the disparity between net worth of our African-American and white California citizens: the average net worth of African-Americans is \$9,359 compared with \$44,980 for whites. Clearly, the "scars of centuries" are still evident.

Against this backdrop of disadvantage in employment and economic opportunity, this essay will offer a case against the California Civil Rights Initiative or CCRI. Section I will review some recurrent themes in the civil rights movement which racial minorities can never forget and CCRI proponents seem all too eager to forget. Section II will suggest that key changes in society since 1965 have prepared the way for the Orwellian characterization of affirmative action as "racial preference". Section III will argue that CCRI is unsound as a matter of public policy. Section IV will argue that CCRI is suspect under the constitutional guarantee of equal protection under the law for two reasons. First, CCRI infringes upon a fundamental

7. The major and relevant portions of CCRI include the following:

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, state shall include but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law.

8. David Parrish, *Minority Firms Get Only Fraction of Tax Dollars*, L.A. DAILY NEWS, Jan. 21, 1994, at N23.

9. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *JOB PATTERNS FOR MINORITIES AND WOMEN IN STATE AND LOCAL GOVERNMENT* (1993) (reflecting salary data for California public employees in 1993).

right to participate in the political process.¹⁰ Moreover, CCRI runs afoul of conventional equal protection clause analysis to the extent that provisions in the initiative lack a rational relationship to legitimate governmental interests.¹¹ Section V concludes the argument.

SECTION I. RECURRENT THEMES FROM THE CIVIL RIGHTS MOVEMENT.¹²

Before the Civil War, African-Americans were property in the eyes of the law. A fortunate few (approximately ten percent of the black population¹³) had secured their freedom, gaining the privilege of living at the margins of society and on the edge of poverty. For the unfortunate many, however, life would offer 240 years¹⁴ of generational bondage.

The Reconstruction Era followed the Civil War and the Emancipation of black slaves. Several African-Americans achieved a modest level of success during this era of formal equality under the Thirteenth, Fourteenth, and Fifteenth Amendments.¹⁵ For instance, many African-Americans began to acquire property and invest their savings in the Freedmen's Bank. As the old antebellum restrictions against educating black people fell, a burst of enthusiasm for learning swept across southern communities. The American Dream of home ownership and education had never meant more.¹⁶

Several African-Americans, including my great-great-grandfather-in-law,¹⁷ served in Congress while others started business enterprises and de-

10. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

11. *Cf. Romer v. Evans*, 116 S. Ct. 1620 (1996).

12. In this essay, I will focus upon the African-American experience for several reasons. First, I am most familiar with the African-American experience. Second, readers of the National Black Law Journal probably share my interest in the impact of CCRI upon our community. Third, a discussion about CCRI's prohibition of affirmative action based upon sex would require an extended treatment of special and unique constitutional issues. *See Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *U.S. v. Virginia*, 116 S. Ct. 2264 (1996).

The reader should well note, however, that discrimination has been and remains a problem for other racial groups and women as well. *See generally* Theodore Hsien Wang and Frank Wu, *Beyond the Model Minority Myth: Why Asian Americans Support Affirmative Action*, 53 GUILD PRACTITIONER 35-47 (1996) Stephanopoulos and Edley, *supra* note 4, at 23-25.

13. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1273 (1994); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 20 n.85 (1990); A. Leon Higginbotham, Jr. and Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967, 1973 n.21 (1989).

14. The racial enslavement of black people in the United States lasted from 1619 to 1865.

15. Known as the Reconstruction era amendments, these constitutional provisions opened the door for black participation in the larger society. The Thirteenth Amendment declared slavery unconstitutional. The Fourteenth Amendment prohibited states from denying equal protection under the laws due to race, color and national origin. The Fifteenth Amendment prohibited states from denying citizens the right to vote based upon race, color, or national origin.

16. *See* RICHARD KLUGER, *SIMPLE JUSTICE* 51 (1977); DOROTHY STERLING, *THE TROUBLE THEY SEEN: THE STORY OF RECONSTRUCTION IN THE WORDS OF AFRICAN AMERICANS* 248-74 (1994). *See generally* WILLIE L. ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT* (1976).

17. U.S. Representative Joseph H. Rainey (R-SC) became the first African-American to serve in the U.S. House of Representatives on December 12, 1870. Congressman Rainey held

veloped grade schools. Beneath the equality promised by the Reconstruction-Era Amendments, however, stood the physical presence of government soldiers. The U.S. government had deployed federal troops in the South to protect the lives and freedom of freedmen. As these troops were removed, the black community's achievements under a decade of formal equality proved no match for white supremacy and retribution.

By 1877, federal troops had been removed from the South, "the last Radical Reconstruction governments were overthrown,"¹⁸ and a reign of white terror rained down upon "uppity"¹⁹ blacks. During this Jim Crow period of legal segregation, blacks lost all hope in the fairness of the marketplace.²⁰ Talented political leaders learned that merit in black skin did not matter. Former South Carolina Speaker of the House Robert B. Elliott, acclaimed as "one of the most brilliant political organizers in South Carolina during Reconstruction",²¹ could not earn a living as a lawyer "owing to the severe ostracism and mean prejudice"²² and would die impoverished in New Orleans. Former South Carolina lieutenant governor Alonzo Ransier found employment after Reconstruction as a night watchman at the Charleston custom house and as a day laborer for the city.²³ Whites denied African-American women the right to teach in public schools because white women teachers might lose their jobs,²⁴ and delivered countless other indignities at the hands of government.²⁵ The gains of the 1870s

office until March 3, 1879 (42nd through 45th Congresses), thus setting a record for tenure in Congress among black Reconstruction-era congressmen. Rainey also became the first black to preside over the U.S. House of Representatives as Speaker pro tempore in 1874.

For information on Rainey's struggles before, during, and after his congressional term, see CYRIL O. PACKWOOD, *DETOUR—BERMUDA, DESTINATION—U.S. HOUSE OF REPRESENTATIVES: THE LIFE OF JOSEPH HAYNE RAINEY* (1977).

18. ERIC FONER, *FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION XI* (1993).

19. As I use the term, "uppity" describes African-Americans whose ambitions and occupational pursuits run counter to white supremacist attitudes about the proper place for black achievement. The label facilitated white denigration of black achievement with the inference that choice career roles were off-limits. See Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512, 1564 (1991) ("The attitudes of the white people in the Reconstruction era sounded very similar to the attitudes I heard routinely growing up in West Tennessee—talk of 'uppity' blacks not knowing their place, how inherently inferior they were, basically lazy and 'shiftless,' untrustworthy and undependable."); Clark Freshman, *Note: Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 265 (1990) ("One also could have looked at how the firm treated others besides women who seemed to defy stereotypical expectations, such as blacks labeled 'uppity' or Jews labeled 'pushy' for being assertive."); and PATRICIA MORTON, *DISFIGURED IMAGES: THE HISTORICAL ASSAULT ON AFRO-AMERICAN WOMEN* 19 (1991) ("As white supremacy became institutionalized by racial segregation, the uppity Negro who failed to know his place was scapegoated as the great menace to order").

20. Cf. FONER, *supra* note 18, at xxvii ("Look at the progress of our people—their wonderful civilization," declared freeborn North Carolina registrar George W. Brodie. "What have we to fear in competition with the whites, if they give us a fair race?").

21. *Id.* at 69.

22. *Id.*

23. *Id.*

24. J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER* 220 (1993).

25. Richard Delgado, *Review Essay: Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 938 (1988) ("Even after slavery was formally declared illegal, Jim Crow laws were passed to maintain its substance, if not its form. Segregation was enforced with respect to railroad cars, streetcars, hospitals, schools, parks, waiting rooms, theaters, libraries, elevators, staircases, drinking fountains, windows, and even cemeteries").

were lost, and by 1896, the U.S. Supreme Court had blessed racial segregation as a constitutional virtue.²⁶

From the end of Reconstruction until the 1964 Civil Rights Act, African-Americans faced legal²⁷ and social exclusion from the job market. African-Americans were segregated into low wage, usually agricultural,²⁸ jobs. Consider the example of William Henry Hastie.²⁹ He would have been the first African-American actuary around the turn of this century. Hastie's qualifications could not surmount the race bar, however, and the trained actuary had to support his family in Washington, D.C. as a low-level federal government clerk.³⁰ The experience of former Transportation Secretary William T. Coleman, Jr. provides another telling example of the exclusion of African-Americans from the marketplace. He graduated *summa cum laude* from the University of Pennsylvania. Coleman later graduated first in his class at Harvard Law School and served as an editor of the Harvard Law Review. Upon graduation, he was excluded from every law firm in his home town of Philadelphia because of his race. His professors took an interest in his plight and prevailed upon Supreme Court Justice Felix Frankfurter to hire young Coleman as a Supreme Court clerk. Even after his clerkship with one of the leading Justices in this century, no Philadelphia law firm would hire Coleman.³¹

26. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

27. See generally KLUGER, *supra* note 16, at 90 ("The newly named Collector of the Internal Revenue for Georgia, for example, fired blacks of unquestioned competence from their civil-service posts and replaced them with whites of dubious credentials. 'There are no government positions for Negroes in the South,' he was quoted as declaring. 'A Negro's place is in the cornfield.'"); SMITH, *supra* note 24, at 295 ("In 1884 Samuel A. Beadle applied for admission to the bar in Brandon, Mississippi. He was sponsored by Anselm J. McLaurin, who later became a United States senator. When McLaurin made the motion that Beadle be admitted to the bar by examination, the 'chancellor said that he did not examine niggers in [his] court.'"); DONALD G. NIEMAN, PROMISES TO KEEP AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 109 (1991) ("A number of states forbade whites and blacks to be taught together, even in private schools, and barred teachers and nurses from serving students or patients of another race.").

28. See Stephanopoulos and Edley, *supra* note 4, at 7.

29. Hastie should not be confused with his son, William Henry Hastie, Jr., who would become the first black federal judge, dean of Howard Law School, and a judge on the Third Circuit Court of Appeals. Indeed, Hastie might have been elevated to the U.S. Supreme Court in 1961 but President Kennedy decided "the time was not ripe to select a Negro for the high court. . . ." KLUGER, *supra* note 16, at 760.

30. See GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 3 (1984). ("William Henry Hastie had studied mathematics at Ohio Wesleyan Academy but had been unable to find work as an actuary.").

Asa Spaulding broke the race barrier as an actuary in 1933 because of opportunity unavailable to Hastie:

As [Charles Clinton] Spaulding (owner of North Carolina Mutual Life Insurance Co., the largest black company in its field) hired increasing numbers of bright college graduates, a black intellectual community flourished in Durham. When Asa Spaulding, a young second cousin back home in Columbus County, showed unusual ability with numbers, Spaulding had the Mutual send him north to college to become the nation's first black actuary in time to make North Carolina Mutual solid enough to survive the Depression.

Donald D. Holt, *The Hall of Fame for Business Leadership*, FORTUNE, Apr. 21, 1980, at 101.

31. A leading Philadelphia firm ultimately succumbed to political pressure from the Mayor of the city and hired Coleman. Arthur S. Hayes & A. Leon Higginbotham; *Headed for the High Court?*, THE AM. LAW. NOV. 1987, at 85. ("Richard Dilworth of Dilworth, Paxson, Kalish & Kauffman, who had just been elected district attorney, hired William Coleman, Jr. Coleman, who now

In addition to this historical and recurrent exclusion of African-Americans from positions for which they are qualified, there also has been a pattern of occupational displacement and exclusion. For example, most people are unaware that most of the jockeys around the turn of the century were African-American.³² These professionals set records that still remain unbroken.³³ Over time, the rules were changed so that entry into the business required educational credentials and sponsors.³⁴ As a result, black jockeys were eased out of the profession over time. Today, it is rare to see an African-American jockey. Occupational displacement is also evident in the barbering trade. Before the Civil War, free blacks with the most economic security were barbers by and large. In fact, society regarded barbering as a "black business".³⁵ Well into the 19th century, most barbers in the South were black men whose clientele was predominantly white. Shortly after the turn of the century, white competitors gradually pressured black barbers into the segregated black community.³⁶

serves as a senior partner in O'Melveny and Myers, had commuted to Paul, Weiss, Rifkind, Wharton & Garrison in New York for four years because he could not get a job in his hometown.").

32. Edward Hotaling, *When Racing Colors Included Black*, *The N.Y. Times*, June 2, 1996, at sections 8-9. ("After New York State banned gambling on races in 1802, the sport's center of gravity shifted to the South, where African-American riders dominated many meetings"); Bruce Lowitt, *A Proud Derby Past, A Meager Present*, *St. Petersburg Times*, May 3, 1995, at 1C. ("At the turn of the century, African-Americans constituted a small majority or a large minority of jockeys at many tracks"); Martha Woodham, *They're Rare Today, but Black Jockeys Once Dominated U.S. Horse Racing*, *The Atlanta J. and Const.*, Apr. 30, 1995, at 1N. ("The irony is that African-American jockeys dominated the early days of horse racing in America.").

33. Jeff Johnson, *Arlington Keeps Murphy's Name Alive*, *Chi. Sun-Times*, Aug. 2, 1996, at 94. ("A fitness rider who rarely used his whip, (Isaac) Murphy won, by his count, 628 races in 1,412 mounts, or 45 percent winners, during his 20-year career. Even the incomplete records of the day, which credit him with winning 34 percent of 1,538 mounts, would place him No. 1 in all-time winning percentage. . . Murphy died of pneumonia at 35 on Feb. 12, 1896, his body weakened by the constant dieting required of riders.").

34. Susan Reed, *Arthur Ashe Remembers the Forgotten Men of Sport-America's Early Athletes*, *People*, Mar. 8, 1989, at 243. ("In 1894 the Jockey Club was founded. One of its duties was to license and relicense jockeys. Because black jockeys were so successful, there was a lot of resentment from white people. As black licenses came up for renewal the jockey club turned them all down. Black jockeys rode in the Kentucky Derby until 1911. Within 36 years racism eradicated them from a sport they had practically dominated"). Interview with Arthur Ashe, in *McNeil-Lehrer Newshour*, (August 6, 1989) ("The Jockey Club had been formed to come up with minimum standards for all jockeys on all tracks and black jockeys were turned down for license renewals"). Tommy C. Carter, *Fine Tuning*, *New Orleans Times-Picayune*, Feb. 18, 1996, at T-51. ("African-American jockeys won 11 of 20 Kentucky Derbys before white people drove them out of the sport").

See generally ARTHUR R. ASHE, JR., *A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE* (1988).

35. David Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 *SAN DIEGO L. REV.* 89, 102 (1994). ("In the late 19th century, southern blacks had a near monopoly on the barber profession. Many northern blacks worked as barbers as well. Overall, in 1890 20.5% of the barbers and hairdressers in the United States were black."); HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 15 (1977); EDWARD A. GASTON, *A HISTORY OF THE NEGRO WAGE EARNER IN GEORGIA* 270 (1957) (unpublished).

36. Bernstein, *supra* note 35, at 102 ("If union members discovered an unlicensed black barber who continued to serve white customers, the union would complain to the authorities. Legal authorities, therefore, did not harass unlicensed black barbers as long as they restricted their trade to black neighborhoods"); Steven Beschloss and Robert McNatt, *Many Black Professionals Are Turning Their Backs on Corporate New York and Changing the Rules of Gain*, *CRAIN'S N.Y. BUS.*, Oct. 30, 1989, at 31 ("In the first decades of this century, blacks were displaced from busi-

Despite the labor shortages of World War II, racial segregation continued and African Americans were, for the most part, still segregated into low wage jobs into the 1960s.³⁷ Police departments and fire departments remained all white and male.³⁸ In stores, clerks were white and janitors were black.³⁹ Generations of African-Americans were steered into low-paying, low-prestige positions without complaint from white males. The *Affirmative Action Report to the President* makes the point well:

African-Americans, even if they were college-educated, worked as bell-boys, porters and domestics, unless they could manage to get a scarce teaching position in the all-black school—which was usually the only alternative to preaching, or perhaps working in the post office. In higher education most African-Americans attended predominantly black colleges, many established by states as segregated institutions. . . . A few went to predominantly white institutions, in which by 1954, about one percent of entering freshmen were black.⁴⁰

Together these themes suggest that civil rights advances have been followed by periods of retrenchment and backlash. Moreover, African-American history reflects a painful realization that race has mattered more than qualifications for much of this century. Even demonstrated achievement has been thwarted in the face of pressure from white competitors. These fundamental acts of unfairness set the stage for affirmative action in 1965.

SECTION II. AFFIRMATIVE ACTION AS RACIAL PREFERENCE.

What circumstances have changed in society so that affirmative action can now be characterized as racial preference? In this section, I will suggest that several elements are at work, including standardized tests, a young generation unacquainted with de jure apartheid, subtle and elusive race discrimination, a poor state economy, and pressures prompted by immigration. Together, these changes have created a climate wherein expanding opportunity in a race-conscious manner is perceived as unfair.

One change influencing public perception of race-conscious public policy is the advent of standardized testing as an admissions requirement for undergraduate and professional schools. Before 1950, most law schools maintained an open admissions policy. There were no rigid standards required for admission to law school, and at the same time, there was nominal competition from women and racial minorities.

Testing has been used as a tool of exclusion in other fields throughout U.S. history. For instance, licensing exams for barbers excluded blacks with little formal education around the turn of the century because the

nesses they had dominated by entrepreneurial-minded waves of Eastern and Southern Europeans. Black barbers, for example, were pushed out by Italians around the turn of the century, notes Roger Waldinger, a professor of sociology at City College of New York"); RICHARD WRIGHT, *THE NEGRO IN PENNSYLVANIA: A STUDY IN ECONOMIC HISTORY* 75-76 (1911) (Black barbers lost most of their white customers, but retained their black customers.").

37. Stephanopoulos and Edley, *supra* note 4, at 7.

38. *Id.*

39. *Id.*

40. *Id.* at 8.

typical exam consisted of written sections.⁴¹ Much of the pressure for these written exams came from white competitors of black barbers.

Testing has also been used as a tool of exclusion in the plumbing trade. As early as 1902, historical accounts indicate that blacks weathered difficulties in passing plumber license tests.⁴² Indeed, license tests were conceived and implemented as part of a general plan for removing blacks from the industry.⁴³ The testing process held out no pretense of fairness for African-American candidates. "Examining boards would require a union apprenticeship before a potential licensee could even qualify to take the licensing examination. Because blacks were banned from union apprenticeship programs, they could not even qualify to take the test (citation omitted)."⁴⁴

Aside from the African-American experience, testing has been used as a tool of exclusion against women as well. For instance, no U.S. jurisdiction hired female fire fighters before 1974. Now that formal barriers against women have been removed, however, fire fighting still remains a 98 percent male profession. Hiring tests that include dragging bulky hoses and lifting heavy ladders have "the effect of virtually denying employment to the entire class of women."⁴⁵ Consider how well these tests can exclude women from fire fighting by noting the track records of New York City and San Diego. "In New York City, applicants are ranked primarily according to how fast they complete events such as climbing stairs while wearing heavy gear. Men beat women in most events, so they are hired first. The department hired its first woman in 12 years (2 summers ago)."⁴⁶ On the other hand, the San Diego Fire Department revised its physical test in 1977 by "abolish[ing] height and weight requirements, and eliminat[ing] such events as having to lift a ladder overhead five times consecutively."⁴⁷ Today, the department may have the highest percentage of females (over 8.5 percent) among fire departments in the country.

By placing standardized testing within this historical context, the idea that merit can be quantified is open to question. First, test scores better reflect educational training and resources than merit. As with the argument that black barbers denied formal education could not quantify their true merit as practicing barbers based upon written licensing tests, so an African-American student, denied an advanced placement history course at his school for whatever reason, cannot have his merit quantified based upon an advanced placement test. The test score becomes, rather, quantification

41. Bernstein, *supra* note 35, at 89 ("Moreover, because of discrimination, blacks usually had little formal education, making the typical licensing exam comprised of written sections an insurmountable hurdle to many blacks.").

42. LORENZO GREENE & CARTER G. WOODSON, *THE NEGRO WAGE EARNER* 192 (1969).

43. STERLING SPERO & ABRAM HARRIS, *THE BLACK WORKER* 59 (1931) ("It is generally understood that Negroes are not admitted to the Plumbers' and Steamfitters' Union. One of the plans for disqualifying them is the license law. It requires that every person wishing to practice the plumbing trade pass an examination given under municipal authority.").

44. Bernstein, *supra* note 35, at 95.

45. Joyce Hogan and Ann Quigley, *Issues in Using Physical Ability Tests for Employment Decisions, Employment Testing*, *LAW & POLICY REPORTER*, at 194 (Nov. 1994).

46. Tracey Kaplan, *Still A Flicker: Women Entered Fire Fighting Years Ago, But Few Have Joined Them*, *L.A. TIMES*, at B1, Aug. 2, 1994.

47. *Id.*

of his lack of exposure to advanced history. So, test scores must be kept within perspective.

Second, proponents of CCRI fail to offer constructive solutions for solving the quantification problem. Before 1950, law schools produced members of the bar without standardized test scores, and there has been no suggestion that pre-1950 law graduates were therefore unqualified or stigmatized. In other words, the mind set that merit could be quantified had not taken root. Today, we can see that quantifying merit based upon standardized test scores has the effect of virtually denying professional and graduate education to the entire group of African-Americans. Nonetheless, neither Governor Wilson nor other CCRI proponents have proposed changing standardized tests to better account for racial differences in educational resources, training, and exposure.⁴⁸

Because merit is now quantified, all can see the tragedy of African-American disadvantage and discrimination revealed in standardized test scores. The experience of the San Diego Fire Department reminds us that quantification of merit can be used to include or exclude African-Americans, depending upon our purpose. One wonders whether CCRI would be as well received if standardized testing were not widespread. With "objective" test scores, it is easy (and quite mistaken, because of racial differences in educational resources and exposure) to argue that higher SAT scores signify higher qualifications.

A second trend behind the labeling of affirmative action as "racial preference" is the emergence of "Generation X,"⁴⁹ a group which has no personal memory of American apartheid. Most of my law students have never seen a whites-only sign. They have no political memories of Presidents Kennedy and Johnson signing executive orders against racial discrimination. Rather, their memories are of Presidents Reagan and Bush championing claims of reverse discrimination against white males at every turn.

Third, race discrimination is now subtle and elusive.⁵⁰ During slavery and at the turn of the century, racial hatred visibly and palpably manifested

48. Cf. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 682-84 (hypothetical involving professional aptitude test geared towards black community experience).

49. The term "Generation X" has been used loosely to describe young people in their 20s. See Jackie Spinner, *Reality Snarls: Stereotyped Portrait Doesn't Ring True for Many Members of Generation X*, *The S.D. UNION-TRIB.*, at D-1, July 24, 1994 ("Novelist Douglas Coupland made the first attempt three years ago to declare something cohesive about the 56 million Americans born between 1964 and 1979. With visions of college graduates in minimum wage "McJobs" and no Vietnam War or Woodstock to shape them, Coupland settled on the label, 'Generation X.'"); Jon Fine, *Pushing 30: When Bad Ads Happen to Good People*, *NEWSDAY*, at B02, June 18, 1996 ("So: According to Richard Thau, who runs a nonpartisan youth advocacy group called Third Millennium, there are two definitions for Generation X. The first one, where you're X'ed if you were born between 1965 and 1978, is the smaller generation, significantly smaller than the baby boomers. The second, put forth by authors Neil Howe and William Strauss, in a 1991 book called 'Generations,' is much larger, encompassing about 78 million people born between the years of 1961 and 1981."); Shannon Maughan and Jonathan Bing, *Tuning in to Twenty Something: Generation X Book Market*, *PUBLISHERS WEEKLY*, at 48, Aug. 29, 1994 (young people ages 18 to 30).

I use the term because it encompasses a generation that came of age after the 1964 Civil Rights Act, legislation prohibiting racial segregation in public facilities and accommodations.

50. As a rebuttal to the claim that affirmative action is now not necessary because society is "just," the subtlety and elusiveness of racial discrimination can be illustrated in several ways. Peggy McIntosh has written that white privilege allows one "to be in the company of people of

itself in the treatment of African-Americans as property, in lynchings, and "For Whites Only" signs. Today, social choices reinforce racial patterns of exclusion on a daily basis. As young white professional couples leave cities because the quality of inner-city public schools is so poor, the racial and social isolation of students left behind deepens. The seemingly private choices of white law firm partners to mentor mostly white male associates⁵¹ deepen the racial and social isolation of minority associates left behind.⁵² However, this discrimination is beyond the reach of the equal protection clause.⁵³

Fourth, the poor performance of the economy⁵⁴ creates a need for scapegoats. In California, the military industrial complex no longer fuels the economy. Whites no longer occupy all of the positions which their grandparents and parents took for granted, i.e. police officer, plumber,

my [white] race most of the time," to "be reasonably sure that my neighbors in . . . a [new] location will be neutral or pleasant to me," to "go shopping alone most of the time, fairly well assured that I will not be followed or harassed by store detectives," to "turn on the television or open to the front page of the paper and see people of my race widely and positively represented," and to "go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out of place, outnumbered, unheard, held at a distance, or feared." LESLIE BENDER AND DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 25-26 (1995) (quoting Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, Working Paper No. 189, Wellesley College Center for Research on Women (1988)). See also Donna Greene, *The Persistence of Passive Bigotry*, *THE N.Y. TIMES*, at 3, Mar. 10, 1996 ("What was interesting most of all is I found that at the [all-white country] club, just as I find in corporate America, there is a great degree of passive bias. The kind of bigotry that exists in these places is not the open, malicious type. . . My feeling is, no one is so schizophrenic that they can be a bigot on the weekend and discriminate against all these different groups of people but yet get to the office Monday morning and suddenly evaluate employees or coworkers on a colorblind, gender-blind, ethnic-blind basis"); William C. Smith, *African-American Attorneys Are Slowly Finding Acceptance: Lack of Diversity Is Still A Concern In The Suburbs*, *THE LEGAL INTELLIGENCER*, at 1, Sept. 4, 1996 ("African American attorneys are often 'relegated' to a criminal practice, Page observed, 'because normally they won't be invited in as an associate or partner in a majority firm. They go out and get jobs. . . as public defenders and district attorneys, and they work themselves up. Most practitioners are in small firms or [work as] sole practitioners'").

51. Less than 3% of partners at major law firms are minority. See, e.g., *Rx for Law Firms: Shatter the Glass Ceiling*, *NEW YORK LAW JOURNAL*, at 2, Oct. 6, 1994 ("People are often uncomfortable with differences. The thinking goes: 'You can't ask lawyers to be partners with people with whom they don't feel comfortable.'").

52. But see REGINALD F. LEWIS & BLAIR S. WALKER, "WHY SHOULD WHITE GUYS HAVE ALL THE FUN?": HOW REGINALD LEWIS CREATED A BILLION-DOLLAR BUSINESS EMPIRE 72-96 (1995) (suggesting that greater opportunity for African-American associates lies in creation of independent law practices).

53. A violation of the equal protection clause under the 14th Amendment requires discriminatory action by a state or local governmental body. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

But see Emily Baker, *Invisible Man*, *THE AM. LAW.*, at 65, May 1996 (former African-American associate, Lawrence Mungin, sued Katten Muchin & Zavis for race discrimination under Title VII of the 1964 Civil Rights Act, winning \$1 million in compensatory damages and \$1.5 million in punitive damages).

54. James K. Galbraith, *Why the Recovery Isn't Working For Everyone: Greenspan's High Interest Rates Keep the Economy in Low Gear*, *THE WASH. POST*, at C03, May 26, 1996 ("[t]he current expansion, which began in the first quarter of 1991, is among the weakest of the post-War era"); Ruy A. Teixeira, *The Economics of the 1994 Election and U.S. Politics Today*, *CHALLENGE*, at 26, Jan. 1996 ("For example, between 1992 and 1994, the median full-time, male worker experienced an earnings decline of 3.3 percent, while the earnings of the corresponding female worker declined 1.7 percent. In addition, median household income went down 0.3 percent over the same period, leaving median income still 6.6 percent below its 1989 prerecession peak.").

public contractor, major law firm partner. It is all too easy to blame one's economic woes on newcomers in the work place.

Finally, this fear and prejudice against newcomers has been fueled by the recent campaign for Proposition 187. Approved by the voters as an initiative in 1994, "Proposition 187 requires educators, public health providers, and others to deny public services to those persons they suspect are not legal residents."⁵⁵ This draconian initiative fed rising anti-immigrant and anti-minority sentiment in California. As Governor Wilson led the charge, "the [Proposition 187] campaign focused on the theme of 'these new immigrants are stealing your jobs.' They're using governmental services and benefits intended for you."⁵⁶ Even though enforcement of Proposition 187 has been enjoined pending constitutional review, the mere passage of the initiative reflected a culture receptive to scapegoating of racial minorities.

From an African-American perspective, these trends highlight a movement away from the racial understanding of the 1960s. If these trends continue, then the Kerner Commission's fear about the creation of two nations—one black and white⁵⁷—will be realized in a short time.

SECTION III. CCRI AS PUBLIC POLICY.

Because race prejudice today excludes African-Americans in subtle, yet effective, ways, Californians should question whether CCRI will be more effective than affirmative action in eliminating long-standing patterns of discrimination and exclusion. One can compare college and professional school admissions, where affirmative action efforts have become somewhat institutionalized, with employment areas sheltered from pressure to include qualified African-Americans. In fields ranging from U.S. Supreme Court clerkships and administrative assistant positions for white members of Congress to public contracting awards and professional baseball management, African-Americans do not fare well in a marketplace free of affirmative action. Where "companies aren't feeling the pressure"⁵⁸ to recruit, hire, retain and promote qualified African-Americans, the edge of white prejudice remains undisturbed and African-Americans suffer.

By contrast, at the college and professional school admissions level, all-white institutions have become integrated. The University of Virginia, for example, would not have accepted my father for admission because of his race in 1951. Due to the Civil Rights Act of 1964, subsequent desegre-

55. Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U.L. REV. 1027, 1036 n.43 (1996). For the statutory language, see Cal. Educ. Code § 48215, (West 1995); Cal. Gov't Code § 53069.65 (West 1995); Cal. Health & Safety Code § 130 (West 1995); Cal. Penal Code § 113 (West 1995); Cal. Welf. & Inst. Code § 10001.5 (West 1995).

56. *Conference: Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U.L. REV. 567, 603 (1996). See also Dale Maharidge, *The Coming White Minority*, *Kirkus Reviews*, Aug. 15, 1996 (book review).

57. *Report of the National Advisory Commission on Civil Disorders* 1 (1968) ("Our nation is moving toward two societies, one black, one white, separate and unequal").

58. GERALD DAVID JAYNES & ROBIN M. WILLIAMS, JR., *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 139 (1989) ("The *Wall Street Journal* reported . . . that there was 'some evidence of a relaxation of efforts to recruit minority group members and women. We get the sense that companies aren't feeling the pressure anymore.'").

gation litigation, and affirmative action, Virginia broke the cycle of race exclusion maintained by white males and now admits entering classes that are over ten percent black.⁵⁹ One can only wonder about my father's mixed emotions as I graduated from Virginia with high honors in 1983, an opportunity denied all black men of my father's generation.⁶⁰

Virginia is not alone in its recruitment and admission of African-American students.⁶¹ Other institutions that were once less than one percent African-American have prioritized a fairer inclusion of black students.⁶² The class of 2000 at Stanford is eight percent African-American.⁶³ Nine percent of Harvard's 1995 freshman class is African-American.⁶⁴ By the 1970s, entering classes at Yale and Princeton ranged from seven percent to ten percent African-American.⁶⁵

The African-American presence has also increased at our nation's professional and graduate schools. For example, about 7,500 of the 127,000 students enrolled in law schools in 1991 were African-American.⁶⁶ African-Americans constituted 6.2 percent of all medical school graduates in the same year.⁶⁷ Perhaps the clearest evidence that affirmative action works in bolstering the inclusion of African-Americans would be graduate MBA programs. In the mid-1960s, a survey showed less than 50 MBA students were black out of 12,000 students enrolled in MBA programs.⁶⁸ As a direct result of recruitment efforts and the Consortium for Graduate Study in Management, 2,500 blacks earned MBAs out of a total of 78,000 MBAs awarded in 1991.⁶⁹

African-Americans have fared less well in fields where affirmative action has not been a priority. Despite growing racial diversity within law schools and law reviews, white Justices of the U.S. Supreme Court have not included African-Americans within their ranks of law clerks. Consider that the majority of Justices—Justices Rehnquist, O'Connor, Scalia, Kennedy, and Souter—have never hired an African-American law clerk.⁷⁰ Indeed,

59. 3 Profiles in Excellence: The Newsletter of the Walter N. Ridley Scholarship Fund 5 (Fall 1996) ("According to *U.S. News & World Report*, 11.5 percent of UVA's entering class in the fall of 1994 was black—the highest percentage of any of the country's top universities"). For a more mixed assessment of UVA's admission policy for black students, see ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 134-35 (1992) [hereinafter *Hacker*].

60. For a personal account about externalities imposed by affirmative action upon the black father-son relationship, see ANDRE C. WILLIS, *FAITH OF OUR FATHERS: AFRICAN-AMERICAN MEN REFLECT ON FATHERHOOD 193-205* (1996).

61. HACKER, *supra* note 59, at 135.

62. John H. Bunzel, *Race and College Admissions*, *PUBLIC INTEREST*, Winter 1996, at 49.

63. Mark Simon, *Well Water A Boon in San Mateo: College District Hopes to Sell Site for \$1.5 million*, *S.F. CHRON.*, June 12, 1996, at A13.

64. Bruce Weber, *Inside the Meritocracy Machine*, *N.Y. TIMES*, Apr. 28, 1996, at 44.

65. Bunzel, *supra* note 62, at 49.

66. Anna Quindlen, *Affirmative Action and the Great White Myth*, *THE CHIC. TRIB.*, Jan. 21, 1992, at 15.

67. William Raspberry, *Group Identity Still Matters*, *THE DENVER POST*, June 2, 1996, at F-03.

68. Milton Moskowitz, *The Best Business Schools for Blacks: Special Report: African-Americans in Corporate America*, *BUSINESS AND SOCIETY REVIEW*, Jan. 1994, at 43.

69. *Id.*

70. Randall Kennedy, *Justice Brennan: Why No Black Law Clerks?*, 1 *RECONSTRUCTION* 63 (1991).

even a liberal Justice like William Brennan never employed an African-American law clerk.⁷¹ It is hard to explain this all-white hiring unless one remembers "the familiar tendency of people to identify most with those who are most like them".⁷² Certainly, the all-white hiring of these white Justices conflicts with the record of Justice Thurgood Marshall. "Justice Marshall hired seven (African-Americans) which equals the number hired by all of the other (white) Justices in the entire history of the Court."⁷³

The absence of African-Americans from positions of responsibility is not unique to the Supreme Court. Members of Congress also have "virtually unchallenged freedom in hiring and promoting their staffs."⁷⁴ Indeed, as recently as 15 years ago, "some senators and representatives seeking staff told the Congressional Placement Office that they wanted 'no blacks.'"⁷⁵ Without affirmative action incentives to ensure that African-Americans are recruited, hired, and promoted, some black staffers have labeled Capitol Hill "the last plantation" and with good reason.⁷⁶ More African-Americans have been hired by the 40 African-American Congressmen and women than all of the 500 white Senators and Representatives on Capitol Hill. These statistics suggest an inability by white employers to include African-Americans in policy-making positions without the incentive of affirmative action.

Where racial inclusion has been devalued in public contracting, we see the same devastating consequences for African-Americans. Richmond, Virginia, a majority-black city, once required that 30 percent of city contracts be set aside for minority business enterprises.⁷⁷ After the Supreme Court subjected these affirmative action programs to strict scrutiny in *City of Richmond v. J.A. Croson Company*,⁷⁸ many states suspended affirmative action business programs. Minority participation in Richmond construction business dropped from 40 percent of all contracts to less than three percent.⁷⁹ Philadelphia experienced a 97 percent decline and Tampa weathered a 99 percent decline in public contracts to African-American businesses.⁸⁰

71. *Id.*

72. *Id.*

73. *Id.*

74. *Congress Itself Has Few Minority Staff*, NPR, All Things Considered, May 25, 1992.

75. Miles Benson, *Washington's Top Positions Seldom Go To Minorities*, HOUS. CHRON., Dec. 13, 1991, at 1. (Although "antidiscrimination laws have applied at least in part to Senate employees since 1976 and to House staffers since 1988", aggrieved staff with discrimination complaints can now take their actions to court under new legislation effective January 22, 1996.) Alice A. Love, *There's a New Workplace World Starting Tomorrow: Here's Our Guide to Coping with Accountability Act*, ROLL CALL, Jan. 22, 1996. It remains an open question whether this measure will lead to the increased hiring and retention of blacks in white congressional offices.

76. See generally Louis Jacobson, *Too Hard A Hill To Climb?*, NAT'L J., June 4, 1994, at 1321 (documenting bleak status of employment in Capitol Hill staff positions where no institutionalized affirmative action strategy is in place); Benson, *supra* note 75, at 1.

77. Gordon Hickey, *City Gains On Minority Business Goal*, RICHMOND TIMES DISPATCH, Aug. 19, 1996, at A1.

78. 488 U.S. 469 (1989).

79. Prepared Statement of Deval Patrick, Assistant Attorney General, Civil Rights Division Before the Senate Labor and Human Resources Committee Concerning S. 1085, The "Equal Opportunity Act of 1996", FED. NEWS SERV., Apr. 30, 1996 (citing U.S. Commission on Minority Business Development, Final Report at 99 (1992)).

80. *Id.*

Finally, African-Americans are also absent from professional baseball management. Without the protection of affirmative action, the prejudices of white employers and decision makers have excluded African-Americans from supervisory positions. Former Los Angeles Dodgers' Vice-President Al Campanis alleged in an infamous Nightline interview that "there were few blacks in the front offices of professional sports teams (because blacks) 'may not have some of the necessities' to run a franchise."⁸¹ As a consequence of this racist way of thinking, Campanis may have prevented countless African-Americans from succeeding in numerous facets of professional baseball management.⁸² It is a sad irony that "the Dodgers, who integrated baseball with (Jackie) Robinson, have never had a black manager, general manager, farm director or scouting director."⁸³ Today, there is only one black general manager in professional baseball—Bob Watson of the New York Yankees.⁸⁴

These facts suggest that Californians should be wary of claims about the distant nature of race discrimination. In occupational fields ranging from Supreme Court clerkships and Congressional staff positions to public contracting and professional baseball management, African-Americans have been essentially barred from employment and economic opportunities. Only where decision makers have made African-American participation a priority have African-Americans been included in public contracting, or Supreme Court clerkships. Without affirmative action, Supreme Court clerkships, Congressional staff positions and professional baseball management opportunities have remained essentially white endeavors. Before Californians decide whether to close the door on affirmative action, a proven strategy for African-American inclusion, proponents of CCRI should demonstrate that their proposal more effectively includes black people in positions of responsibility and authority as a matter of public policy. As Arnold Reyes, an Austin, Texas lawyer, has framed the policy dilemma: "It's a function of people preferring to deal with people they feel comfortable with . . . It's just human nature that you won't go out of your way to work with someone who is not like you without some incentive."⁸⁵ For a generation, affirmative action has provided this incentive.

81. Sam Fulwood III, *Generation Gap Tears at NAACP: Many Young Blacks Turn Away From the Group that Waged Key Civil Rights Battles*, L.A. TIMES, Sept. 14, 1991, at A1. It should be noted that the Dodgers organization fired Campanis for his public statement about black incompetence.

82. Dolph Hatfield, *The Jack Nicklaus Syndrome: Racism in Sports*, HUMANIST, July 1996, at 38 ("This attitude prevents African-Americans from succeeding in numerous facets of society and particularly in upper corporate positions.").

83. Bob Nightengale, *Minority Hiring Practices Questioned*, L.A. TIMES, May 25, 1996, at C6. This pattern of occupational exclusion is consistent with Jimmy "the Greek" Snyder's attitude "that blacks were superior athletes because of 'breeding from the time of slavery' and that the only area in sports left for whites was coaching". Courtland Milloy, *The Blinding Racism of His Comment*, WASH. POST, Mar. 6, 1996, at C01. CBS Sports fired Snyder for his on-the-air comment.

84. Nightengale, *supra* note 83, at C6. See also Terry Blount, *Winning Without Bagwell Has Proved To Be Challenge*, HOUS. CHRON., Aug. 4, 1995, at 3 ("I hope I've paved the way," Watson said. "But the scary thing is there's no one in the pipeline of assistant GMs (General Managers) and farm directors. There are no blacks in line.").

85. Richard C. Reuben & Debra C. Moss, *Affirmative Inaction: Some Minority Law Firms Report A Decline In Business*, A.B.A. J., Sept. 1996, at 19.

SECTION IV. CCRI AS UNCONSTITUTIONAL LAW.

The Constitution contemplates that political debates about policy matters like affirmative action will be contested in the political process, according to several scholars.⁸⁶ Dissatisfied with the give and take of the normal legislative process affecting affirmative action laws and policies, however, Wood and Custred proposed CCRI as a ballot initiative amending the state constitution.⁸⁷ Popular initiatives are generally symptomatic of a healthy political process but in appropriate circumstances "the Supreme Court has recognized the existence of, and acted to remedy, prejudiced laws that masquerade as instances of democratic redistributions of authority."⁸⁸ CCRI is such a masquerading law.

This Section will argue that CCRI violates the Equal Protection Clause in two ways. First, CCRI, by excluding affirmative action from the political discourse, infringes upon the fundamental right derived from "precedents involving discriminatory restructuring of governmental decision making"⁸⁹ to participate in the political process. Under CCRI, traditional victims of racial prejudice and discrimination cannot petition their state and local officials for remedial and inclusionary measures based upon race. These barriers in the political process are particularly suspect because the burdens fall upon racial minorities.⁹⁰

Second, CCRI violates the spirit and letter of *Romer v. Evans* to the extent that CCRI prohibits inclusive affirmative action measures across the board in a manner far removed from anecdotal accounts of "reverse discrimination" in college admissions. Under the equal protection clause of the Fourteenth Amendment, the Court now requires a close match between broad, popular initiatives that deny a class of persons protection from discrimination and the reasons offered for the sheer breadth of such

86. See James E. Jones, Jr., "Reverse Discrimination" in *Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 How. L.J. 217, 221 (1982)(reasoning that modern-day affirmative action and special efforts to include African-Americans raise issues of political judgment rather than constitutional permissibility). See also Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1, 4 (1995)("My position is that the issue of how societal resources should be allocated between the majority and racial minorities is an issue that is quintessentially political"); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 81 (1994)("Even if the Supreme Court embraced all affirmative action plans, the societal debate would continue because the vision of equality that is hostile to affirmative action would survive in the context of the political process as well. . . Like abortion and Miranda warnings, affirmative action touches off a deep public disagreement that no line of Supreme Court cases can resolve.")

As I use the term, "political process" means the activity of lobbying and petitioning one's local and state elected officials for color-conscious affirmative action measures.

87. As Lemann writes of Custred's motivation and intent, ". . . there seemed to be no venue for complaints about such things [affirmative action efforts]." Lemann, *supra* note 5, at 39. Custred's point is that he perceived no platform or forum in the local or state legislative process where he and other aggrieved white males might successfully close down affirmative action efforts.

88. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1484 (2d ed. 1988).

89. See generally *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); TRIBE, *supra* note 88, at 1460.

90. *Romer v. Evans*, 116 S. Ct. 1620, 1627-28 (1996). See generally *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

an initiative.⁹¹ Because CCRI denies racial minorities the possibility of affirmative action protection across the board in a manner unconnected to the discrete objective of remedying "reverse discrimination" in college admissions, CCRI violates the fundamental principle that the reasons offered for a state constitutional amendment must bear a reasonable connection to the amendment's breadth.⁹²

Subsection A will present the constitutional framework for determining whether a popular initiative has infringed upon the fundamental right to participate in the political process. Subsection B will apply the framework to CCRI. Subsection C will explore the disconnection between the wide breadth of CCRI and the primary reasons proponents offer for CCRI.

SUBSECTION A. THE FUNDAMENTAL RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS.

The fundamental right to participate in the political process is a key protection under the Equal Protection Clause of the Fourteenth Amendment. This right of participation includes the right to vote,⁹³ to have one's vote count⁹⁴ and to have equal participation in policy making.⁹⁵ State action which infringes upon this fundamental right is subject to a heightened level of scrutiny by the Courts. States, in these instances, must show that the law has been narrowly tailored to promote a compelling governmental interest. If they cannot so show, the Court will conclude that a central right has been infringed.⁹⁶

Hunter v. Erickson illustrates the doctrinal analysis.⁹⁷ In *Hunter*, the City of Akron, Ohio had enacted a fair housing ordinance⁹⁸ and created a Commission on Equal Opportunity to enforce the fair housing provision. Shortly thereafter, residents opposed to fair housing placed on the ballot an amendment to the city charter. Passed by the city voters in a general election, the amendment provided:

91. *Romer*, 116 S. Ct. at 1627-29.

92. *Id.*

93. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968).

94. *Gomillion*, 364 U.S. at 346.

95. *TRIBE*, *supra* note 88, at 1460.

96. The analysis does not change in light of recent Court rulings in the area of race for several reasons. First, the fundamental right to participate in the political process stands apart from the conventional strict scrutiny applied to racial classifications. *See generally* *Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Second, the fundamental right to participate in the political process should resonate with O'Connor, Kennedy and Souter, conservative justices who have been receptive to fundamental rights arguments in other contexts. *See generally* DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 467-471 (1992); *Romer v. Evans*, 116 S. Ct. 1620 (1996). Third, the most recent Court pronouncement in this field rejected Colorado's attempt to roll back protections for a class of persons. *See Romer v. Evans*, 116 S.Ct. 1620 (1996).

97. 393 U.S. 385 (1969).

98. The fair housing ordinance codified the city's policy of "assur[ing] equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." Akron, Ohio, Ordinance No. 873-1964 § 1.

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.⁹⁹

Although, on its face, the Amendment to the City Charter treated the races in an identical manner, the Court understood that the amendment would burden African-Americans, hampering their ability to petition City Council for civil rights protections. The Court dismissed the argument that the popular initiative process immunized the charter amendment from constitutional challenge, stating that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size [citations omitted]."¹⁰⁰ Simply put, removing issues of a racial character from the political process via initiative created a discrimination that the City could not justify.

This case is similar to CCRI in several ways. First, on their face, both CCRI and the Akron City Charter Amendment treat the races in an identical manner. Second, CCRI would burden African-Americans in their ability to petition their local city officials for inclusive affirmative action measures. The impact would be particularly evident where at least 20 local governmental bodies have or are considering race-conscious contracting programs.¹⁰¹ Under CCRI, African-Americans would have to run the gauntlet of amending the state constitution in order to gain the benefit of inclusive affirmative action measures at the city and county level. Third, even though Californians could resolve the issue of affirmative action by majority vote at city and county legislative meetings, CCRI instead pursues the more complex system of amending the state constitution. As with the Akron City Charter amendment, the State may not disadvantage any particular group by restructuring the governmental decision making process. CCRI places African-Americans at a great disadvantage in protecting inclusive affirmative action legislation because the statewide population is only 7.5 black. African-Americans are best positioned to defend affirmative action at the city and county level where black political strength may constitute a majority or near-majority of the electorate.

99. 393 U.S. at 387.

100. *Id.* at 393.

101. The local agencies include: Alameda County; Contra Costa County; County and City of San Francisco; City of San Jose; Santa Clara County; San Francisco Redevelopment Agency; San Francisco Unified School District; Sacramento County; City of Sacramento; City of Hayward; City of Richmond; City of Oakland; Oakland Unified School District; Bay Area Rapid Transit District (BART); Alameda/Contra Costa Transit District (AC Transit); Central Contra Costa Transit Authority; Golden Gate Bridge, Highway and Transportation District; San Francisco Municipal Railway; San Mateo County Transit District, and Santa Clara County Transportation Agency.

SUBSECTION B. FUNDAMENTAL RIGHTS, THE POLITICAL PROCESS
AND CCRI.

Understood in this light, efforts to bypass the normal legislative process with a statewide popular initiative signal the latest chapter in majoritarian reactions to civil rights advances. In the late 1950s and early 1960s, several California laws were enacted to address private race discrimination in residential housing.¹⁰² California voters responded by enacting Proposition 14, a measure providing that:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.¹⁰³ Although the initiative appeared neutral on its face, Proposition 14 sought by design and intent "to overturn state laws that bore on the right of private sellers and lessors to discriminate. . . and to forestall future state action that might circumscribe this right."¹⁰⁴

The U.S. Supreme Court held against the constitutionality of Proposition 14 because the initiative sanctioned race discrimination in the housing market. Rather than "just repeal an existing law forbidding private racial discriminations,"¹⁰⁵ the Court reasoned that the initiative "create[d] a constitutional right to discriminate on racial grounds in the sale and leasing of real property."¹⁰⁶ The sweep of Proposition 14 proved so expansive that "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government."¹⁰⁷ Because the breadth of the language implicated the state in private racial discrimination, the Court considered the initiative to be a violation of the equal protection clause under the Fourteenth Amendment.

In *Washington v. Seattle School District*,¹⁰⁸ the Court faced a similar effort to bypass the political process. In 1982, the Seattle District No. 1 School Board adopted a desegregation plan in order to eliminate racial isolation in its public schools. The desegregation program proved highly effective in addressing racial imbalance. However, a number of Seattle residents continued to oppose the desegregation plan which mandated student reassignments and busing. Having failed in their appeals before the School Board and in their litigation efforts to enjoin the plan, these citizens "drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration."¹⁰⁹ Two months after the Seattle

102. See The Unruh Act of 1959, CAL. CIV. CODE §§ 51, 52; The Hawkins Act, formerly Health & Safety Codes §§ 35700-35741; and the 1963 Rumford Fair Housing Act, Health & Safety Code §§ 35700-35744, superseding the Hawkins Act.

103. *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967).

104. *Id.* at 374.

105. *Id.* at 380-81.

106. *Id.* at 376.

107. *Id.* at 377.

108. 458 U.S. 457 (1982).

109. *Id.* at 462.

Plan went into effect, the initiative¹¹⁰ passed with 66 percent of the vote statewide.

The Court struck down Initiative 350 because "it use[d] the racial nature of an issue to define the governmental decision making structure, and thus impose[d] substantial and unique burdens on racial minorities."¹¹¹ Rejecting the argument that Initiative 350 had no racial overtones because it applied to all races, the Court concluded that the measure had an undeniable racial focus sufficient to trigger the Hunter doctrine. The facial neutrality of the proposal's language could not mask the removal of authority to address a racial problem from the existing local decision making body to a statewide electorate. This reallocation of power burdened minority interests in a manner "condemned in Hunter."¹¹²

Finally, during recent decades, several cities in Colorado had enacted antidiscrimination laws for the protection of homosexuals.¹¹³ Nothing prevented localities or voters from repealing any of these anti-discrimination laws and policies in the normal cycle of local and state policy making. Dissatisfied with the ebb and flow of the political process affecting homosexual interests, however, Colorado for Family Values proposed Amendment 2¹¹⁴ as a ballot initiative amending the Colorado state constitution. The Amendment prohibited "any. . .claim of discrimination" made pursuant to "any statute, regulation, ordinance or policy" whenever the discrimination for which the claimant seeks relief is based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."¹¹⁵ The voters passed the initiative into law, thus enshrining into the very structure of Colorado state government a measure designed to "close the lid on the entire issue [of civil rights for gay people] here in Colorado."¹¹⁶

The Court held Amendment 2 unconstitutional, although for reasons other than the Hunter doctrine. The important point here is that the Court viewed Amendment 2 in a manner consistent with, if not sympathetic to, its "precedents involving discriminatory restructuring of governmental decision making [citations omitted]."¹¹⁷ The Court lectured Colorado at length about burdens imposed upon homosexuals in the political process—that homosexuals "can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability."¹¹⁸ These are fundamental principles echoed in the Court's earlier rulings against Akron's City Charter Section 137, California's Proposition 14, and Washington's Initiative 350.

110. The proposal, titled Initiative 350, mandated that "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 the student's place of residence. . .and which offers the course of study pursued by such student. . . ." WASH. REV. CODE § 28A.26.010 (1981).

111. *Washington v. Seattle Sch. Dist.* 458 U.S. 457, 470 (1982).

112. *Id.* at 474.

113. Denver Rev. Municipal Code, Art. IV §§ 28-91 to 28-116 (1991); Aspen Municipal Code § 13-98 (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-11 (1987).

114. COLO. CONST. art. II, § 30b.

115. *Id.*

116. Brief For Respondents, *Romer v. Evans*, 116 S. Ct 1620 (1996) (No. 94-1039).

117. *Romer v. Evans*, 116 S.Ct. 1620, 1629 (1996).

118. *Id.* at 1627.

Should the California Civil Rights Initiative be enacted into law, then the State of California would have to justify the infringement upon the fundamental right of racial minorities within the state to petition their elected officials for remedial and non-remedial measures in their interests.¹¹⁹ There are several parallels between the initiatives and laws previously discussed and CCRI that support this position. First, CCRI declares in a statewide constitutional amendment that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹²⁰ It is important to note that CCRI takes a broad view of "state" so that every level of government from the state itself to "any city, county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state"¹²¹ would be prohibited from adopting affirmative action policies. Similar to Proposition 14, Initiative 350 and Amendment 2, CCRI removes power to address minority issues from a local level to the statewide electorate level. The African-American community in San Francisco, for example, would be stripped of the political right to petition Mayor Willie Brown and other local elected officials for appropriate affirmative action measures. Instead, the community would have to gain support from throughout the statewide electorate for a state constitutional amendment permitting affirmative action at the local level. This reallocation of power has been condemned by the Court in other initiative cases.

Second, CCRI has an undeniable racial cast similar to Akron's City Charter 137 and Washington State's Initiative 350. A sweeping prohibition against affirmative action will produce an immediate impact on racial minorities, whether the impact be measured by a sharp decrease in African-American students at the University of California at Berkeley or a precipitous drop in African-American public contracting business.¹²² To argue that CCRI on its face treats all races the same denies the reality of subtle prejudice and discrimination against African-Americans.

Third, CCRI, Akron's City Charter 137, California's Proposition 14, and Colorado's Amendment No. 2 are all comparable measures to the extent that the law's burdens do not fall upon the majority. For example, there is no evidence to suggest that whites as a majority group in California will see a decline in colleges admissions, public contracting, or public employment under CCRI. Indeed, it is more likely that whites might gain somewhat in these instances. Under Akron's City Charter 137, whites would not suffer from widespread discrimination in housing. Thus, whites

119. *But see Crawford v. Board of Education of Los Angeles*, 458 U.S. 527 (1982) (holding that Proposition 1, a constitutional provision relieving state courts of the power to order school busing for school desegregation purposes, did not alter the political structure in violation of Hunter doctrine). *See generally* TRIBE, *supra* note 88, at 1488 (criticizing Crawford as aberrant.)

120. *See supra* note 7.

121. *Id.*, at subsection (f). Indeed, CCRI may cover additional, undefined governmental entities because subsection (f) provides that the term "state shall include, but not necessarily be limited to" the above offices.

122. *See supra* notes 77-80 and accompanying text.

would not be burdened by the need to pursue a referendum before city implementation of fair housing measures. Similarly, Proposition 14's authorization of racial discrimination in housing would not produce or facilitate widespread discrimination against white Californians. Racial discrimination under Proposition 14 would be borne by racial minority groups, particularly African-Americans. Finally, Colorado's Amendment No. 2 did not threaten the heterosexual majority. All citizens understood quite well that prohibiting localities from passing antidiscrimination laws on the basis of sexual orientation would burden gays and lesbians.

The Court has struck down majoritarian attempts at constitutional change that impose unique, special and identifiable burdens on African-Americans. Indeed, the Court has been so sensitive to the dangers of majoritarian abuse with the initiative process that these risks have been recognized under Colorado's Amendment No. 2 even though the Amendment burdened homosexuals rather than a racial group. Extending the concern about majoritarian abuse of the initiative process to homosexuals is particularly noteworthy because, unlike African-Americans, homosexuals are not a suspect classification under the Equal Protection Clause. Thus, concern about majoritarian abuse of the initiative process to the detriment of the African-American community, a suspect class under the Equal Protection Clause, should heavily influence the Court's perception of CCRI.

SUBSECTION C. EVANS V. ROMER AND THE SHEER BREADTH OF CCRI.

In striking down Colorado's Amendment No. 2, the Court breathed new life into the rational relationship standard of review¹²³ within the factual context of a statewide popular initiative. The Court struck down Amendment No. 2 because the initiative "impos[ed] a broad and undifferentiated disability on a single named group"¹²⁴ and the sheer breadth of Amendment No. 2 lacked continuity "with the reasons offered for it".¹²⁵ These principles about the need for a rational connection to a legitimate governmental interest can be raised against the broad scope of CCRI.

For example, CCRI imposes a broad and undifferentiated disability against racial groups securing equal opportunity through the means of affirmative action programs. This disability would be enshrined in the state constitution regardless of a program's effectiveness. Moreover, the disability against affirmative action programs would apply irrespective of manifest imbalance between a city's population and city employment. To illustrate the point, consider a hypothetical 40 percent black city with a five percent black police force. Under CCRI, the city's black community would be prohibited from lobbying city officials to recruit and employ more black police officers. Because the initiative allows no rational consideration of race as

123. The Court reviews state law under the Equal Protection Clause in one or two ways. Where a state measure burdens a fundamental right or targets a suspect class like race or gender, then the Court will apply a heightened level of scrutiny. Absent an implicated fundamental right or suspect class, the Court will uphold a state measure "so long as it bears a rational relation to some legitimate end." *Evans v. Romer*, 116 S. Ct. 1620, 1627 (1996).

124. *Id.* at 1627.

125. *Id.*

an affirmative factor whatsoever,¹²⁶ CCRI shares a flaw analogous to Colorado's Amendment No. 2.

Secondly, the Court will not hesitate to uphold a classification "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous".¹²⁷ However, these laws have shared a narrow scope and "grounding in a sufficient factual context"¹²⁸ sufficient for the Court to judge the relation between the classification and the purpose served. CCRI can be distinguished from these laws on two counts. First, the scope of CCRI would prohibit affirmative action at all levels of state and local government and in all public education, employment, and contracting. Second, CCRI has been designed to eliminate "preferential treatment" but there are no studies available to show either widespread quotas or reverse discrimination. Indeed, reverse discrimination complaints by white males are very rare.¹²⁹ The sheer breadth of CCRI coupled with the limited factual record of quotas and reverse discrimination based upon race should expose the irrational link between a sweeping statewide prohibition and anecdotal accounts of racial preference.

Third, CCRI will inflict "immediate, continuing, and real" injuries upon African-Americans from the standpoint of less inclusion. For example, African-Americans will diminish among the student bodies throughout the University of California system. Fewer African-Americans will receive the benefits of a public medical school education. African-Americans will be largely invisible among the ranks of public contractors and subcontractors. Colorado's Amendment No. 2 also worked analogous burdens upon the inclusion of homosexuals in "ordinary civic life".¹³⁰ Amendment No. 2 imposed a number of restrictions upon the Colorado homosexual community, including the ability to lobby for "any minority status, quota preferences, protected status."¹³¹

The State of California must offer legitimate justifications for these far-reaching impacts on African-Americans. If *Evans v. Romer* can serve as an instructive guide, the Court will match the breadth of CCRI against the particular justifications offered for the initiative. For example, the need to eliminate racial preference in the UC Berkeley admissions system is far removed from the initiative's language that covers every level and all aspects of education. Consider race-conscious programs in local high schools designed to address under achievement among African-American males. These local efforts are far afield from the controversy over college admissions. However, CCRI prohibits race-consciousness across the board without exception. So, even measures that must take race into account to get

126. Even Justice Sandra Day O'Connor recognized the continuing need for tailored affirmative action programs in *Adarand Constr., Inc. v. Peña*, 115 S.Ct. 2097, 2117 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy.").

127. *Evans*, 116 S.Ct. at 1627.

128. *Id.*

129. See, e.g., Stephanopoulos & Edley, *supra* note 4, at 31.

130. *Evans*, 116 S.Ct. at 1627.

131. *Id.* at 1620.

beyond race-based disadvantage would be prohibited under CCRI. It is questionable whether the Court would uphold the breadth of CCRI unless the State of California can offer particular justifications that match up with the initiative's sweeping impact. For these reasons, CCRI should be considered suspect under the Equal Protection Clause of the Fourteenth Amendment.

SECTION V. CONCLUSION.

Governor Wilson is wrong about the recent vote to end affirmative action.¹³² This historic "moment" in time marks no more than the latest wrinkle in our national debate about racial justice. As suggested in this essay, the California Civil Rights Initiative is a reaction to the mythology of privileged racial minorities. The facts, however, do not support the myth of widespread "racial preference" for African-Americans or other minorities. Perhaps "racial preference" might make sense if people of color constituted a majority of the privileged interests in California, but we are far, far short of this point in time.

As a constitutional change to the California State Constitution, the California Civil Rights Initiative is unsound and it will fail ultimately. The more interesting question becomes whether and when race will cease to color our destiny.

132. *See supra* note 2.