Redacting Race in the Quest of Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws

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Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to.  

We were created equal, but we live in a constant state of inequality, a disequilibrium based on the inability of some, and unwillingness of others, to disregard race and color. While some denounce the so-called “Colorblind Paradigm” as an inappropriate societal goal, those who believe in it seem to have been led astray by proposed “Racial Privacy” legislation. When Harry Potter covers himself with the invisibility cloak, he still acts, reacts, and causes results, while those around him simply cannot see what he is doing. If racial privacy legislation succeeds in covering racial and ethnic statistics with a similar cloak, people still will act (discriminate), react (retaliate), and cause results (racial harm), but litigants will not be able to prove those actions, nor link their results to the actors, thus subverting the enforcement of civil rights.
Regardless of how or whether we measure it, race counts. This simple message has once again been debated through the voting process of the California electorate. California was the initial testing ground for the voter initiative that decimated affirmative action within state institutions, an initiative that was then exported to other states. Those who were successful in placing Proposition 209 on the California state ballot crafted another proposed amendment to the California Constitution, which was entitled the “Racial Privacy Initiative.” It was presented to the California voters with this more accurate title provided by the Secretary of State: the Classification by Race, Ethnicity, Color, or National Origin Initiative (“CRECNO”). Fortunately, the latest potential expansion to the list of prohibitions in the California State Constitution was temporarily deflected by voters in the October 2003 recall election. Still, its proponents are undaunted and have vowed to bring the issue back to the voting booths in 2006 with a modified version of the initiative. It is likely that racial counting prohibitions will be proposed in other states soon as well.

As its descriptive title suggests, CRECNO sought to prohibit the state from classifying and collecting data on any individual on the basis of race, ethnicity, color, or national origin. This prohibition would have been absolute in the areas of public education, public contracting, and public employment. In all other state operations, the prohibition would apply as a sort of “proactive repeal” to prevent any such classifications, unless and until two-thirds of both houses of the state legislature and the governor vote to approve a particular classification. This Article will examine the text of the initiative and analyze the impact and legality of its various provisions. As one scholar has noted, CRECNO may be “the logical extension of formal colorblindness, for it represents the vain hope that by blinding ourselves to the reality of persistent racial inequality, the problem will simply disappear.”

In Part II, I describe the background of CRECNO and its precursor, Proposition 209, which was a victory for the antiaffirmative action forces in their battle against preferences for people of color. That battle continues currently in Michigan, as those dissatisfied with the United States Supreme Court’s recent decision in the Grutter v. Bollinger have instigated a campaign

4. Id.
5. Id.
6. Id.
to bring a similar antiaffirmative action measure to the Michigan voters this fall. Part III provides a brief analysis of the text of each subsection of CRECNO and is intended as a blueprint for analysis of any future racial privacy legislation. It explains the ambiguity in the definitions and procedures for approving any aspect of racial data collection and discusses the scope and ramifications of the exemptions that would apply to the health care industry, the Department of Fair Employment and Housing, and law enforcement officials. Part IV discusses the constitutionality of CRECNO under the Hunter Doctrine. The Hunter Doctrine provides a test for determining whether a political procedure implicates the Equal Protection Clause when members of a protected racial or ethnic class are burdened more heavily than the majority in their efforts to seek beneficial legislation. If enacted, CRECNO would establish an unequal political process burden on those seeking to enforce their rights under existing civil rights laws. This is not merely a disparate impact situation, which is only actionable under Title VII, but rather is a case of intentional discrimination against the interests of the racial and ethnic minorities in the administration of the political process, which results in further abridgment of the ability to prove actionable discrimination by state actors. Because people of color are more likely to seek the benefit of civil rights law enforcement, the additional burden of proving civil rights violations falls more heavily upon them, resulting in an unequal political process burden that may violate the Hunter Doctrine. The proponents of CRECNO have articulated no clear compelling interest for the legislation, and the ambiguity of its language belies the notion of its being narrowly tailored, and therefore this Article reasons that CRECNO would violate the Fourteenth Amendment’s Equal Protection Clause.

Part V discusses how the provisions governing the recording of racial data in the employment context may be in conflict with, and hence preempted by, Titles VI and VII of the 1964 Federal Civil Rights Act. While discrimination still will be outlawed, state laws will be ineffective in this area, and fewer discriminators will be prosecuted because the pool of available proof will shrink considerably as soon as CRECNO takes effect in a state. Furthermore, by permitting some unlawful employment practices, CRECNO may violate

10. Id.
12. U.S. CONST. amend. XIV.
the preemption doctrine.\footnote{Id. art. VI, cl. 2.}

II. BACKGROUND

CRECNO was a continuation in the struggle against racial and ethnic preferences in the State of California. The preferences debate results in part from the backlash that has been emanating from the nationwide struggle for civil rights and the protection of antidiscrimination laws. A complete history of the civil rights movement is beyond the scope of this Article,\footnote{For a brief legal history of the Civil Rights movement, see, e.g., Theodore Eisenberg, Civil Rights Legislation, Cases and Materials 3–11 (4th ed. 1996).} but some scholars reason that the civil rights struggle was an inevitable result of the Founders’ failure to confront and resolve issues of racial tension at the genesis of our nation, or a failure to protect the constitutional rights of freed slaves after the Civil War.\footnote{See, e.g., Derrick Bell, And We Are Not Saved 26–73 (1987). The only races expressly identified in the U.S. Constitution are whites and Indians/Native Americans, though it obliquely, yet obviously refers to slaves as “all other persons.” U.S. Const. art. I, § 2, cl. 3; id. art. I, § 8, cl. 3.} This refusal to explicitly address race and to explicitly remedy inequality helped lead to an entrenchment of racial inequities, which in turn strengthened the arguments for civil rights reform. As equal protection gave way to preferential treatment, battle lines were redrawn, and the antipreferences movement was born.

The antipreferences struggle in California reached its apex in the fall of 1996, when California voters approved Proposition 209, an initiative that amended the California Constitution to prohibit the state from granting preferential treatment to women and people of color in three enumerated areas: public education, public contracting, and public employment ("the enumerated state operations").\footnote{Cal. Const. art. I, § 31.} These three enumerated areas comprise a significant portion of state actions. The initiative was co-authored by Glenn Custred and Tom Wood, and heartily supported by Ward Connerly, a regent of the University of California system.\footnote{About CADAP and Proposition 209, at http://www.cadap.org/ (last visited Oct. 1, 2004).} Proposition 209’s simple message was that most differential treatment is wrong if based on race or gender, and thus it sought to eradicate any remaining distinctions between benign discrimination (such as affirmative action) on the one hand, and invidious discrimination (like racially restrictive covenants) on the other.\footnote{Proposition 209, California Civil Rights Initiative, Nov. 5, 1996 Cal. State Ballot (codified at Cal. Const. art. I, § 31) [hereinafter Proposition 209].}

After the voters approved Proposition 209, several court challenges were
launched. In one of these challenges, Judge Thelton Henderson of the United States District Court for the Northern District of California issued a preliminary injunction to stay the application of Proposition 209 on the grounds that the challengers had demonstrated a likelihood of success on their claim that Proposition 209 violated the Equal Protection Clause by imposing an unfair political process burden on minority interests and thereby violating the Hunter Doctrine. However, the Ninth Circuit eventually determined that Proposition 209 did not violate the Hunter Doctrine or the federal constitution’s Equal Protection Clause, and dissolved the preliminary injunction. A full discussion of Proposition 209, now Section 31 of the California Constitution, is beyond the scope of this Article, but some references provide useful context for this discussion of CRECNO.

One dominant effect of the implementation of Proposition 209 was the abolition of affirmative action in the enumerated state operations. Thus, in California, state educational institutions can no longer use affirmative action in admissions decisions, state employers cannot practice affirmative action in hiring decisions, and state procurement officers cannot consider minority set-asides or minority participation levels as a factor in awarding public contracts. Section 31 has had no substantial effect on discrimination, because while it also reiterated that the state should not discriminate, existing law already prohibited such discrimination. Soon thereafter, voters in the State of Washington approved a similar measure, as did the governor in Florida and legislators in Texas.


21. Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1448 (9th Cir. 1997).


23. For a comprehensive discussion of Proposition 209 and its implications, see, e.g., Girardeau A. Spann, Proposition 209, 47 DUKE L.J. 187, 195 (1997) (suggesting that Proposition 209 should be subject to heightened scrutiny “as either an affirmative action program for white males or an act of intentional discrimination under Washington v. Davis”).


25. Id. art. I, § 7.

26. See, e.g., Washington’s Initiative 200 (codified at WASH. REV. CODE ANN. § 49.60.400 (West 2002)).


Some of the proponents of Proposition 209 and Washington's Initiative 200 then decided to take their victory one step further, drafting the Racial Privacy Initiative and soliciting signatures to place this initiative on the November 2002 ballot. The Attorney General's Office changed the name of the initiative to the more descriptive CRECNO and set it for placement on the ballot in the next statewide election, which was scheduled for March 2004.

In the summer of 2003, the Grutter decision reinvigorated Connerly and others to begin the task of collecting signatures to bring an initiative modeled after Proposition 209 to the voters of Michigan.

CRECNO appeared on the October ballot as Proposition 54. Voters defeated Proposition 54 with 38% voting to approve the initiative and 62% voting against it. Though Proposition 54 was not successful in large part due to the incompleteness and ambiguity of some of its exemptions, the underlying prohibition is still a matter of fierce debate. Undaunted, supporters of Proposition 54 have indicated their desire to "try again" perhaps with a broader health care exemption. For instance, within days after the election, Ward Connerly told reporters that he planned to put a similar


34. See Official Voter Information Guide, California Statewide Special Election, October 2003, at http://vote2003.ss.ca.gov/propositions/2-3-prop-54.html (last visited Oct. 1, 2004). In the meantime, the financial health of the State of California deteriorated, and concerned citizens began soliciting signatures in support of an election to recall then-Governor Gray Davis. Sufficient signatures were gathered and verified, and the announcement was made that the recall election would be held on October 7, 2003. Joe Mathews, The Keys to Recall Vote? No One Can Say for Sure, L.A. TIMES, July 27, 2003, at A1. With an October election being the next statewide election, a debate began as to whether CRECNO should be included on the October ballot or whether it should remain scheduled for the March 2004 presidential primary election. See, e.g., Erwin Chemerinsky, Law and Logic Should Delay Measure on Race, L.A. TIMES, July 31, 2003, at B17 (noting that there are different definitions in the Elections Code for recall, general, and special elections, and that propositions can be considered only in general and special elections because recall and replacement are the only issues permitted to be included on a recall ballot). As expected, court challenges were launched and defeated.

proposition, reworded to address health care concerns, on the ballot in 2006.\textsuperscript{36} Given the aftermath of Proposition 209, it is also likely that a modified version of this initiative will be proposed in other states as well.

III. CRITICAL ANALYSIS OF THE TEXT OF CRECNO

Given the potential impact of future CRECNO legislation, it is important to understand the scope of CRECNO as it appeared on the California ballot, its strengths, and its weaknesses. Thus, Part III provides a critical analysis of the operating language, definitions, scope, and exemptions to this proposed legislation.

A. The Operating Language of the Initiative

By its broad language, CRECNO would prohibit all race, ethnicity, color, and national origin ("Recno") classifications in all state operations.\textsuperscript{37} It accomplishes this prohibition in two stages. First, CRECNO explicitly bans such Recno classifications in the three enumerated state operations. Subsection (a) explicitly states that "[t]he State shall not classify any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting, or public employment."\textsuperscript{38} Current California law prohibits seeking race information from those applying for employment\textsuperscript{39} but permits maintaining ethnic statistics on those who become actual employees if those statistics are gathered subsequent to any hiring decision and safeguards are in place to prevent misuse of the data.\textsuperscript{40} In addition, current law permits the collection of data on the race and ethnicity of current public school students\textsuperscript{41} and of public contractors who are actually awarded state contracting jobs.\textsuperscript{42}

CRECNO further prohibits such classifications in "any other state operations,"\textsuperscript{43} unless three criteria are met. Subsection (b) states:

The State shall not classify any individual by race, ethnicity, color, or national origin in the operation of any other state operations, unless the Legislature specifically determines that said classification serves

\textsuperscript{36} Id.; see also If Prop. 54 Fails... , SAN FRANCISCO CHRON., Oct. 7, 2003, at A15.
\textsuperscript{37} Proposition 54.
\textsuperscript{38} \textit{Id.} § 32(a).
\textsuperscript{39} See, e.g., \textit{CAL. GOV'T CODE} § 8310 (West 1992).
\textsuperscript{40} See, e.g., \textit{CAL. GOV'T CODE} § 19704 (West 1994).
\textsuperscript{41} \textit{CAL. EDUC. CODE} § 52052 (West 2002).
\textsuperscript{42} \textit{CAL. PUB. CONT. CODE} § 10116(a) (West 2004).
\textsuperscript{43} Proposition 54 § 32(b).
a compelling state interest and approves said classification by a two-thirds majority in both houses of the Legislature, and said classification is subsequently approved by the Governor.\textsuperscript{44}

Those "other state operations" include taxing, welfare, insurance, public buildings, libraries, courts, the Department of Motor Vehicles ("DMV"), records of births, deaths, and marriages, the state lottery, transportation, veterans and national guard affairs, Parks and Recreation departments, and various professional regulations.\textsuperscript{45} In addition, law enforcement\textsuperscript{46} and health programs\textsuperscript{47} would also be subject to the three criteria of subsection (b).

Thus, the state may classify persons by race in other state operations only where: 1) the legislature determines that the classification serves a compelling state interest, 2) both houses approve the classification by a two-thirds majority, and 3) the governor then also approves the classification. Hence, no classification can be made without substantial approval from two of the three branches of state government. This restriction, while not as stringent as an absolute prohibition on future legislation in this area, effectively places a substantial roadblock against those who would seek to classify persons on only a Racial basis, regardless of the reason, remedial or otherwise, for the classification.\textsuperscript{48} It is important to recognize that a simple majority is required to pass most legislation, and that a two-thirds vote is reserved for more serious measures, including to override a governor's veto, to approve legislation requiring financial appropriations, and other specified categories of legislation.\textsuperscript{49} Obtaining a two-thirds vote on a controversial measure is exceedingly difficult, as California's recent budget crisis demonstrates.\textsuperscript{50}

\textsuperscript{44} Id.


\textsuperscript{46} Except for employment, which falls under subsection (a), and profiling, which is excluded under subsection (g).

\textsuperscript{47} Except for employment, which also falls under subsection (a), and research, which is permitted under subsection (f).

\textsuperscript{48} See infra Part IV.G (discussing roadblocks and mere repeals); see also Reitman v. Mulkey, 387 U.S. 369 (1967).


\textsuperscript{50} Reinventing California: Primed for Fiscal Overhaul, L.A. TIMES, Oct. 12, 2003, at M4 (noting the burden of the two-thirds requirement in the budgetary process).
B. The Defined Terms

CRECNO defines its crucial terms; however, the definitions do not provide substantial guidance in interpreting its provisions. Therefore, some statutory interpretation is necessary to better comprehend the scope of CRECNO. There are three steps to statutory interpretation: examining the actual definitions and ordinary meanings of the statutory terms, referring to the legislative history if needed, and finally, applying reason and common sense, recognizing that one should proceed to this step only when the prior step has failed to resolve the ambiguity. With these principles in mind, we first examine the language of CRECNO.

Applying the first step of the statutory interpretation process reveals some definitions. Subsection (c) states that classifying "shall be defined as the act of separating, sorting, or organizing by race, ethnicity, color, or national origin, including, but not limited to, inquiring, profiling, or collecting such data on government forms." It is interesting to note that the term "classifying" does not otherwise appear in the proposition, and thus "classify" would have been the appropriate term to define. Nevertheless, we can further analyze this definition by defining its terms. To "separate" means to segregate; to "sort" means to separate according to a classification scheme, and "organizing" takes that task one step further by separating into a useful classification scheme. "Inquiring" means asking or seeking information about a subject. "Classifications" are acts that separate, sort, organize, and organize.


52. Proposition 54 § 32(c).

53. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2069 (2002) (defining "separate" as "to set or keep apart . . . to block off: SEGREGATE").

54. Id. at 2174 (defining "sort" as "to put in a certain place or rank according to kind, class, or nature . . . to arrange according to characteristics").

55. Id. at 1590 (defining "organize" as to put in a certain place or rank according to kind, class, or nature . . . to arrange according to characteristics: CLASSIFY").

56. Id. at 1167 (defining "inquire" as "to ask about . . . to search into . . . to put a question . . . seek for information by questioning").
inquire, profile, or collect data according to Recno. This language may lead to ambiguities because it is unclear; for instance, whether receiving unsolicited racial or ethnic information would be considered “collecting” under subsection (c)\(^{57}\) or whether identifying a person’s race would constitute an impermissible “sorting” or “organizing” remains uncertain. The language of the initiative is not exhaustive, however, and thus does not limit the term “classification” to verbs included on this list. Thus it is possible that the involuntary receipt of information could also violate CRECNO.

Subsection (d) defines the term “individual” in two different ways, depending upon whether an enumerated state operation is at issue.\(^{58}\) When addressing enumerated state operations, “individual” is clearly defined as “current or prospective students, contractors, or employees.”\(^{59}\) CRECNO focuses on the person, prohibiting the state from classifying only those people who are current or prospective students, employees, or contractors.\(^{60}\)

However, when addressing all other state operations, the term “individual” refers to “persons subject to the state operations referred to in subdivision (b).”\(^{61}\) The important distinction in these two definitions is in the use of the phrase “current or prospective.”\(^{62}\) Current students, contractors, and employees are subject to, respectively, the state operations of education, contracting, and employment. Thus the “subject to” definition makes sense for all state operations.

Interpreting the language requires giving meaning to variations in phrasing within the various definitions, and thus the next inquiry is whether being “subject to” in other state operations amounts to anything different from “current or prospective users” of the enumerated state operations. For most of the other state operations, one becomes subject to the state operation when one attempts to do some act within the parameters of that agency or department’s mandate. For instance, one becomes “subject to” the DMV only when one begins to drive or attempts to get a state identification card but remains subject to the DMV thereafter. Therefore, in a post-CRECNO state, the DMV would not be able to classify people with driver’s licenses based on

\(^{57}\) Proposition 54 § 32(c).
\(^{58}\) Id. § 32(d).
\(^{59}\) Id.
\(^{60}\) In contrast, section 31 does not contain a definition of “individual,” and its prohibitions apply more broadly to “any individual or group” in the enumerated state operations. CAL. CONST. art. I, § 31. Thus, the prohibition of section 31 is more process oriented, focusing on preventing preferences in the performance of the enumerated state operations, as opposed to defining the class of persons subject to the state operation.
\(^{61}\) Proposition 54 § 32(d).
\(^{62}\) Id.
Recno. Similarly, one is subject to the state income tax system when one earns a certain level of income but not before. The state then could not classify taxpayers based on Recno in a post-CRECNO state. These two limitations are not very troublesome, but the next one illustrates the potential absurdity of CRECNO. Private litigants seeking to bring discrimination claims before the Fair Employment and Housing Commission could be considered “subject to” that state agency at the time that they bring their claims and therefore could not be “classified” according to Recno, which means that claimants would be unable to demonstrate membership in a protected class. Interestingly, the defendants would also be unable to demonstrate such membership.

This argument can be extended to suggest that each individual within the state is a prospective user of all of the state operations because at some point that individual may do an act which makes her subject to a particular state operation. Under this rationale, the “subject to” phrase would seem to mean the same as “current or possibly prospective,” as long as “prospective” has an exceedingly broad time frame. Thus it appears that any difference in these two definitions depends upon whether there is a time limit implicit in the definition of “prospective.”

The next step in the statutory interpretation analysis is to examine the legislative intent, which, for propositions, includes the voter information or ballot pamphlet. That pamphlet, however, does not provide any information to help us discern the importance of the difference between “subject to” and “prospective.”

In continuing to follow the rules of interpretation, the plain language of the proposition beckons us to consider the ordinary, everyday meaning of the term “prospective.” “Prospective” is defined as “[e]ffective or operative in the future,” Earlier editions of Black's Law Dictionary defined the term as “[l]ooking forward; contemplating the future.” Thus the term “potential” is often associated with the definition of “prospective.” “Intent” to engage in
conduct is also included within the definition of prospective in the analysis of standing issues.\textsuperscript{69}

Based on these definitions, it would seem that California courts will need to develop a test to determine when an individual is a prospective student, employee, or contractor. Such a test may include requiring an intent to enroll, become employed, or bid on a state contracting job, coupled with a reasonable likelihood of realizing that intent, but would fall short of requiring an application or bid proposal. A current applicant or bidder would easily satisfy the test, as would a high school student intending to apply to college in the following year. A junior-high student who once visited the UCLA campus and expressed hopes of someday attending would be a tough case, and it is unlikely that my six-year-old, despite his current expressions of interest, would meet the requirements of this test. The courts also will need to develop a test to determine the parameters of the phrase “subject to.” In the meantime, CRECNO’s definitions of these terms will remain unclear, which could result in uneven application of the prohibitions in a post-CRECNO state.

Subsection (k) provides a definition of the “State”:

For 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, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.\textsuperscript{70}

State agencies would be included within the phrase “governmental instrumentality.”\textsuperscript{71} This definition is modeled after Article I, Section 31(f) of the California Constitution;\textsuperscript{72} the only difference is that CRECNO includes a

\textsuperscript{69} See, e.g., Beztak Land Co. v. City of Detroit, 298 F.3d 559, 568 (6th Cir. 2002) (reasoning that a prospective developer must demonstrate an “intent to develop and operate a casino,” in order to establish standing to challenge the selection process); see also Hubbard Chevrolet Co. v. General Motors Corp., 682 F. Supp. 873, 878 (S.D. Miss. 1987) (stating that a prospective relationship “at the very least,” requires “that at the time of the conduct complained of, there was a reasonable likelihood that the relationship would come into existence”).

\textsuperscript{70} Proposition 54 § 32(k).

\textsuperscript{71} Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) (“It has long been settled that the reference to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.”) (citations omitted).

\textsuperscript{72} CAL. CONST. art. I, § 31(f).
specific reference to the "California State University" system in the "but not limited to" listing. It is not clear why this system was specifically identified here, but it was likely an attempt to further disseminate the effects of Proposition 209 by clearing up any ambiguity over whether that state university system is also subject to its mandate.

C. The Exemptions to the Rule

CRECNO contains several exemptions from the classification ban. These exemptions seem to serve three main purposes. First, some of the exemptions would help to ensure that the initiative is not found to be unconstitutional or fatally in conflict with federal law upon its initial review. This was a successful strategy used in the wording of Proposition 209, and the drafters have learned even more since that time. The second purpose served by some of the exemptions is to garner additional political support by excluding some of the common and more widely accepted uses of statistical information. The third purpose is to obviate the need for the legislature and governor to formally agree, by including what appear to be the drafters' a priori determinations as to what should constitute a sufficiently compelling interest to justify some continuing classifications. Still, it is difficult to discern why state regulation of private employment and housing, medical research, law enforcement, and incarceration issues are all "worthy" of being exemptions to the terms of this initiative, while other aspects of state operations are required to seek legislative and executive approval in advance. Moreover, it would logically seem that all of the exemptions should fulfill this third purpose by serving sufficiently compelling interests for the initiative to be internally consistent and defensible in its entirety. The remainder of this Section will address each of the specific exemptions.

1. Fairness in Employment and Housing

CRECNO provides a specific but limited exemption for the Department of Fair Employment and Housing ("DFEH"). The DFEH monitors discrimination in employment, housing, and public accommodations. The mandate of the DFEH is modeled after Title VII, which extended

73. CAL. CONST. art. I, § 31(f); Proposition 54 § 32(k).
74. Proposition 54 § 32(e)–(h).
75. Id. § 32(i).
76. See, e.g., Proposition 209 § 31(d), (e), (h).
77. See, e.g., Proposition 54 § 32(e)–(h).
78. Id.
79. Proposition 54 § 32(e).
antidiscrimination laws to private employers of a certain size and was enacted by Congress after executive orders first began to address employment by government contractors.\textsuperscript{81} The DFEH "ensures compliance with and investigates violations of state civil rights laws governing employment, housing, public accommodations and hate crimes. . . . In addition, the department's investigations of alleged violations of civil rights law often involve using these types of data to build evidence of a pattern of discrimination."\textsuperscript{82} In actuality, however, there is a separate state instrumentality that prosecutes discrimination cases and makes factual findings on whether discrimination is proven or not in a particular case. This state actor is the Fair Employment and Housing Commission ("FEHC").\textsuperscript{83} FEHC is not included within the exemption, and CRECNO would have further eviscerated the enforcement of antidiscrimination laws, because as merely another state operation, FEHC would be prevented from making factual findings that classify according to Recno without prior legislative and executive approval. Making a prima facie case of wrongful discrimination requires proof of being in a protected class. But because that finding cannot be rendered by the FEHC, there will be no more prima facie cases, and thus defendants always will prevail.

Subsection (e) of Proposition 54 states: "The Department of Fair Employment and Housing (DFEH) shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002."\textsuperscript{84} The significance of the date is not entirely clear, and research has not uncovered an explanation from the drafters. It is possible that the drafters hoped to qualify the initiative for that election date, but more likely that they


\textsuperscript{83} See, e.g., CAL. GOV'T CODE § 12935(f)--(g) (West 1992), which states that the Commission's responsibilities include:

(f) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(g) To create or provide financial or technical assistance to such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and to empower them to study the problems of discrimination in all or specific fields of human relationships or in particular instances of employment discrimination on the bases enumerated in this part. . . .

\textit{Id.}

\textsuperscript{84} Proposition 54 § 32(e).
wished to ensure that no new classifications arose during the political debates prior to a vote on the initiative.

The DFEH exemption seems to fit all three of CRECNO's primary purposes. First, it is designed to avoid a conflict with federal law by maintaining a monitoring and enforcement mechanism for antidiscrimination laws. To the extent that federal law requires maintaining certain classifications, the state will continue to comply under the provisions of subsection (i), and for those classifications which are not required, there will be no actual conflict when the sunset provision becomes operative.

The DFEH exemption also serves the second purpose of being palatable to a large group of potential voters because it suggests a recognition that some racial and ethnic discrimination still occurs in the areas of housing and employment. Nevertheless, it avoids being the exemption that swallows the rule by providing a concession of limited duration: a decade of additional time to try to remedy that unfortunate reality. If a decade is insufficient, then the legislature has the ability to extend the concession period.

Third, this exemption purports to further a compelling interest in remedying past discrimination by permitting the DFEH to continue its monitoring and enforcement of antidiscrimination provisions against private companies. The exemption also seems to address the narrowly tailored prong of the strict scrutiny test, by recognizing that these classifications may no longer serve a compelling interest in ten years, if the need for race-based remedies dissipates in that time period. However, upon closer scrutiny, the existence of the sunset provision suggests an illegitimate motive—to hinder, and perhaps outright block, effective monitoring and enforcement of antidiscrimination laws in ten years, by using the specific limitation in the "sunset" provision.

The sunset provision also appears to create some unnecessary ambiguity. The sunset provision states: "(1) Unless specifically extended by the legislature, this exemption shall expire 10 years after the effective date of this measure." Absent a legislative extension, DFEH classifications based on Recno in any state that approves CRECNO in the year 2006 would become unconstitutional in the year 2016. The phrase "unless specifically extended

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86. See infra Part IV.H.2.
87. Proposition 54 § 32(e)(1).
88. Id.
89. Ironically, the sunset provision for the DFEH is a full fifteen years shorter than the University of Michigan's affirmative action sunset provision, which was announced by the United States Supreme Court in Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved
by the legislature" leads to the erroneous conclusion that such an extension would be a relatively routine matter for the legislature. In voting in favor of the initiative, it is logical to assume that voters would intend that the DFEH exemptions would expire in ten years, unless the legislature, not the voters, decided to extend the length of that exemption. From the plain language of subsection (e), it appears that the legislature must "specifically extend" the exemption. The section says nothing more about how this extension shall be agreed upon, and thus statutory construction rules would suggest that the legislature simply must vote, by a simple majority, to extend the DFEH exemption.

However, the DFEH is not an enumerated state operation because it covers private employment, and thus the DFEH classifications must be analyzed under subsection (b). While it is difficult for scholars to predict what a future state legislature will do, subsection (b) provides a substantial hurdle that may forestall the approval of an extension. If the legislature votes to extend the exemption, then the DFEH's actions after the extension would amount to "classifying," and classifications are not permitted without a two-thirds vote of the legislature and the governor's approval. By voting to extend the exemption, the legislature itself arguably would be classifying and thus would need to satisfy the two-thirds vote requirement in order to extend the DFEH exemption. Thus, while voters might assume that only a simple legislative majority is needed to extend the DFEH classification, a plausible argument could be made that the text of CRECNO requires both a two-thirds legislative majority and governor approval in order to extend the DFEH classification. Accordingly, it may be just as difficult to extend the sunset provision as to constitutionalize a new classification. While this potential ambiguity is not likely to render the initiative unconstitutionally vague, it would be tough to determine the voters' intent should a conflict arise.

The DFEH exemption contains a second limitation which states that "[n]otwithstanding DFEH's exemption from this section, DFEH shall not impute a race, color, ethnicity, or national origin to any individual." Upon first read, this limitation appeals to those supporters who believe that race should be a private matter. In reality, however, this limitation will have at

90. Proposition 54 § 32(e)(1).
91. Id. § 32(b).
92. Id.
95. Proposition 54 § 32(e)(2).
least three significant effects. First, during the ten-year exemption period, the DFEH must inquire, perhaps more diligently than it currently does, to avoid the need for imputation. For those who want to keep their racial information private, a more diligent inquiry will be more intrusive than a silent imputation.

The second effect will be to decrease the availability of data during this exemption period, as more and more individuals refuse to respond to the DFEH inquiry, and as agencies that are not exempted from CRECNO stop collecting the underlying data and thus have nothing to report to the DFEH. The DFEH exemption will not save future litigants because the exemption permits only the DFEH to keep its own statistics and does not permit each state agency or operation to maintain its own statistical records.

Because the DFEH cannot impute a race, ethnicity, color, or national origin, "declined to state" may become the largest so-called racial group in the private employment and housing markets. There is no actionable discrimination against "declined to state" because that group is not really a race, an ethnicity, a color, or a national origin. This decrease in accurate information will lead to the third effect: a false sense that the problem of discrimination in housing and employment has been solved simply because we no longer have sufficient racial, ethnic, color, or national origin data with which to measure such discrimination. One editorial has indicated that the DFEH exemption:

is misleading and accomplishes nothing. Because all other public agencies would be prohibited from collecting data under the initiative, no relevant data would exist for the DFEH to analyze and report. If the initiative were passed, DFEH would cease to exist as an effective monitor of race discrimination in employment and housing in California.

The longer term effect of the lack of information will be an appearance that there is no discrimination, and that there is therefore no reason for the DFEH to continue classifying individuals; thus, there will be no need for a legislative extension. Those voters who like the idea of phasing out these classifications as discrimination will have been tricked as if Harry Potter's


“invisibility cloak” covered the missing statistics. The problem will remain, and its effects will linger, but we will not be able to see it, measure it, or record it. The discrimination may still be there, or it may have departed from the state. The problem is simply that we will not know.

2. Medical Patients and Research Subjects

The initiative also provided an exemption for medical patients and research subjects who permit the state to continue to gather Recno information on those who are in organized research studies and those who are receiving medical treatment. Subsection (f) states: “Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.” The terms “medical research subjects” and “patients” are not defined in the initiative, so a court may apply common understandings of these terms or defer to federal definitions, which define “research” as “a systematic investigation, including research development, testing an evaluation, designed to develop or... contribute to generalizable knowledge.” In the California Evidence Code, a patient is defined as “a person who consults a physician... for the purpose of securing a diagnosis... or... treatment.” Any of these definitions should be sufficient.

This exclusion purports to serve the political appeal purpose by ensuring that CRECNO will not interfere with testing and research that focuses on health issues that disproportionately affect particular Recno groups. Performing research categorized by Recno data allows health professionals to identify genetic, environmental, and other factors that contribute to health problems for different Recno groups, and this exemption will allow the health professions to continue this research. However, even the research data will be less complete under this exemption because other state departments currently collect some portions of the underlying data that is used by the medical researchers. The lion’s share of health data is not collected in the

98. ROWLING, supra note 2, at 201-02. Invisibility cloak is a magic cloak that grants the wearer invisibility. Id.
99. Proposition 54 § 32(f).
101. 45 C.F.R. § 46.102(d).
102. CAL. EVID. CODE § 991 (West 1995).
103. Coalition for an Informed California, supra note 96.
104. See National Lawyers Guild Fact Sheet on Connerly’s Initiative (2002), at http://www.aclunc.org/connerly_initiative/nlgfactsheet.html [last visited Oct. 1, 2004] [hereinafter National Lawyers Guild Fact Sheet]. For instance, studies show that race, not income, can be the determining factor for the severity of many environmental hazards.

Many studies show that environmental hazards, ranging from living near toxic dumps or
areas of public education, employment, or contracting. Rather, the departments that collect some of this data involve "other state operations," and thus any classifications involving individuals who were neither patients nor research subjects would be governed by the subsection (b) requirement of a legislative finding of a compelling governmental interest and the approval of the governor. In the time it takes to get such approval, no new data will be added, and the pre-CRECNO data will become outdated. This interruption in data gathering consequentially will increase the potential error rate for the results of any statistical analysis based on that data and make it virtually impossible to do any effective targeting of the communities most at risk.

To the extent that state departments such as the Department of Finance are collecting this data on individuals who can be properly categorized as research subjects or patients, it is likely that this collection will be considered "otherwise lawful" and thus can continue pursuant to this exemption. However, the mere collection of data does not make one a patient or a research subject. Moreover, where the purpose of data collection is to protect from or control disease in a community, that person is not considered to be a research subject. Therefore, CRECNO does not exempt such information gathering from its racial prohibitions.

The larger fallacy in the research protection argument is evident when researchers try to put the results of their work to effective use. One of the most important benefits of medical research is to promote the prevention of disease, and opponents of CRECNO stated that the "one size fits all" approach to health care does not work because the professionals need to target particular racial communities with educational campaigns tailored to them. This was an effective political argument that contributed greatly to

other polluting facilities, breathing unhealthy air, suffering from childhood lead poisoning or pesticide-related illnesses, or eating contaminated fish, are disproportionately concentrated in minority communities, and that race, not income or education or other factors, is the most important reason for this. Some of the most important demographic data on which these studies are based comes from the California Department of Finance, the Department of Health, and County Health Departments, and could no longer be collected if the RPI were enacted into law.
CRECNO's October defeat. The limitation of this exemption to permit classifying only patients and research subjects means that the results of the research cannot be effectively disseminated to the appropriate target audience of potential patients—those most at risk—because membership in that target community depends on environment, conduct, and also Recno. Because the community is not a patient or research subject, CRECNO does not permit the classification of those communities by Recno, the critical missing piece of the analysis. Thus, the "target audience" for the research results—the community most at risk—will not be identifiable without resorting to impermissible Recno classifications.

The state has a legitimate and important interest in maintaining statistical data from health records, but the interest is difficult to define. Discriminatory practices were curtailed as antidiscrimination laws evolved and monitoring mechanisms were introduced. CRECNO opponents recognize that "when you monitor behavior, you modify behavior." The opponents of CRECNO would likely define the interest as a compelling interest in providing meaningful public health data, which requires taking into consideration all relevant factors, including Recno. But monitoring still implicates the need for effective dissemination of the data, which this exemption does not permit. Thus, it is likely that this exemption serves only a partially compelling governmental interest and needs to be expanded to serve that interest more effectively.

3. The Law Enforcement Exemptions

Subsections (g) and (h) provide some additional exemptions in the law enforcement context. Subsection (g) states: "Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways," and that the governor, legislature, or agencies cannot "require [them] to maintain records that track individuals on the basis of said classifications," nor withhold funding from the law enforcement agencies "on the basis of the failure to maintain such records."

This exemption permits the police to give a description of a suspect, but when read in conjunction with subsection (c), prohibits the officers from inquiring about Recno because such an inquiry

108. Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5, 38 (Ct. App. 2001). The Connerly court reasoned that "portions of the statutory scheme that provide for data collection and reporting do not suffer a constitutional defect because a determination of the underutilization of minorities and women in state service can serve legitimate and important purposes." Id.


110. Proposition 54 § 32(g).
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Why prevent the law enforcement officers from inquiring? Perhaps because the prohibition seems more politically palatable and can be billed as an antiprofiling component. However, it seems that most profiling is based on color, or features associated with race, ethnicity, and national origin, and not on knowing the actual race, ethnicity, or national origin. So this cleverly worded (or not so?) phrase actually does nothing to lessen the most common manifestations of such profiling.

Subsection (g) also states that:

[n]either the Governor, the Legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the Governor, the Legislature, or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.

This language leaves open the possibility for the courts to mandate such records and thus serves to avoid any potential conflict with consent decrees and other monitoring requirements. However, it also prevents any new monitoring of police profiling and of accountability for any resulting disparities.

In evaluating its purposes, the law enforcement exemption does not seem to address an issue of avoiding conflict with federal law; however, on its face

111. *Id.* § 32(b).

112. Imagine the end of the slippery slope, and the unlikely, though possible, conversation between a witness and a police officer:

Police Officer: "Describe the person you saw running away."
Witness: "He was tall and big, and running pretty fast."
Police Officer: "Anything else you can think of? Any other feature that might help us narrow this down a bit?"
Witness: "Like what?"
Police Officer: "Well, anything at all, close your eyes and picture him. What did he really look like?"
Witness: "Ooh do you mean like if he was black or white?"
Police Officer: "According to the recent state constitutional amendment, police officers are not permitted to inquire about the race of potential suspects or perpetrators, but if you just tell me what you saw, I can use it."
Witness: "I understand, officer. The guy running away was (race) or (ethnicity), had (color) skin and looked like he was from (national origin)."

And the witness imputes a race or an ethnicity, describes a color and infers a national origin. Is this the type of exchange that the exemption seeks to foster?

113. Proposition 54 § 32(g).
at least, it has some political appeal. In addition, its proponents may argue that this subsection protects a compelling interest involving public safety, crime detection, and arrests. If these are compelling interests, then continuing to classify the individuals would result in more effective law enforcement when the witness is looking through so-called "mug shot" books of people in the system to search for a potential suspect. Yet, under subsection (b), the police may not separate, sort, or classify the books by Recno.114 Neither may the police inquire about Recno from witnesses.115 Yet the officers may continue to use Recno in their own descriptions of the suspects and in their investigations and processing of information, so they can pass along what the witness says or what they themselves observed in their investigations and processing of information. Thus, the exemption incompletely and somewhat ineffectively serves these purported government interests.

Subsection (h) provides a further exemption for prisoners and undercover agents, stating, "Otherwise lawful assignment of prisoners and undercover law enforcement officers shall be exempt from this section."116 The rationale for this exemption seems to be to lessen the possibility of prison riots and to avoid being wholly ineffective in undercover operations. Neither of these rationales seems to have strong political appeal, unless a police officers' union is likely to be a big supporter.117 This exemption also might be deemed to serve a compelling interest in public safety, if broadly defined. However, the interest it really serves is more narrow—safety of prisoners and law enforcement officers. One scholar has noted a troubling dichotomy, stating "[I]t is quite curious how racial classification is permissible in criminal repression of people of color [the prison context] by law enforcement, but impermissible when it legitimately questions law enforcement conduct [the racial profiling context]."118 Nevertheless, it seems like the kind of measure that eventually would garner support of two-thirds of the legislature and the governor, and thus, perhaps this explicit statement of the exemption in the text of the initiative is appropriate.

114. Proposition 54 § 32(b).
115. Id.
116. Id. § 32(h).
117. This support was not evident in California: "Prop 54 is opposed by law enforcement groups, Attorney General Bill Lockyear, Los Angeles County Sheriff Lee Baca, as well as Police Chiefs and Sheriffs throughout California and the California Professional Firefighters and the California State Firefighters Association." Coalition for an Informed California, The Dangers of Prop. 54: An Overview, (2003), at http://www.informedcalifornia.org/healthcare_01.shtml (last visited June 20, 2003) (on file with author).

D. General Provisions of the Initiative

The clear purpose of Subsection (i) is to avoid a conflict with federal law.\textsuperscript{119} It states: "Nothing in this section shall be interpreted as prohibiting action which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."\textsuperscript{120} This provision is cleverly worded because it does not affect actions which may, but are not required to be taken, under federal law, and thus is a slight improvement on the language of Section 31 of the California Constitution, which states, "[n]othing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain any federal program, where ineligibility would result in a loss of federal funds to the state."\textsuperscript{121} The CRECNO drafters likely added the "comply with federal law" language to avoid a facial conflict argument.\textsuperscript{122}

Subsection (j) also is modeled after a provision of section 31. It states that "[n]othing in this section shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section."\textsuperscript{123} The only modification from the section 31 language is the addition of the word "valid" and the switching of the positions of the phrases "consent decree" and "court order."\textsuperscript{124} Thus, police agencies under such orders\textsuperscript{125} will be exempt from CRECNO and still will be required to maintain the statistical records. The purpose is to avoid a conflict with federal or other state laws.

Subsection (m) states that the initiative is self-executing and severable.\textsuperscript{126} If there is a conflict, then the provisions of CRECNO shall be enforced to the maximum that the Constitution and federal law permit. This subsection uses the exact language from Proposition 209.\textsuperscript{127} Again, this language is now standard phrasing and its use mitigates the likelihood of a fatal conflict with federal law destroying the initiative in its entirety.

The foregoing discussion provides an analysis of the text of the initiative, its scope, ambiguities, and exemptions, and is intended as a blueprint for a discussion of Recno legislation in the future political debate when the

\textsuperscript{119} Proposition 54 § 32(i).
\textsuperscript{120} Id.
\textsuperscript{121} CAL. CONST. art. I, § 31(e).
\textsuperscript{122} Proposition 54 § 32(i).
\textsuperscript{123} Id. § 32(j).
\textsuperscript{124} Id.; CAL. CONST. art. I, § 31.
\textsuperscript{125} See, e.g., U.S. v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002).
\textsuperscript{126} Proposition 54 § 32(m).
\textsuperscript{127} See id.; Proposition 209 § 31(h).
modified version of CRECNO next appears.

IV. DO PORTIONS OF CRECNO VIOLATE THE HUNTER DOCTRINE?

If enacted, CRECNO could be determined to violate the Equal Protection Clause of the United States Constitution because the state enacting the legislation would be providing less than equal protection to people of color within its boundaries by erecting additional political barriers, in violation of the Hunter Doctrine.128 The political barrier here would make it illegal to classify, sort, or collect racial data in state operations. Thus, while discrimination still would be outlawed, that state’s laws will be rendered virtually ineffective, at least in the areas of monitoring and enforcing fair housing and fair employment laws. Fewer discriminators will be prosecuted because the pool of available proof will shrink considerably when the state agencies are prohibited from collecting racial data. Because CRECNO expressly prohibits racial classifications, it may appear on the surface that CRECNO cannot be discriminatory on the basis of race. Upon deeper reflection, it becomes evident that this apparently neutral law imposes, and in fact was intended to impose, special burdens on racial and ethnic minorities who seek to vindicate their federally protected rights in both the courts and through the state legislature.129 Of course there is an important constitutional difference between laws that in fact burden minority interests and laws that were intended to burden minority interests. The former are actionable under Title VII of the Civil Rights Act of 1964, but do not violate the Constitution under traditional equal protection analysis.130 However, the United States Supreme Court’s decisions on the political structure component of equal protection, known as the Hunter Doctrine, does not resolve the question of whether intent is required.131

A. The Development of the Hunter Doctrine

The Constitution of the United States provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

129. Thanks to my colleague Bob Pushaw for advice in clarifying this point.
130. Hunter, 393 U.S. 385.
131. Id.
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protection of the laws."

The last phrase, the "Equal Protection Clause," provides the foundation for antidiscrimination laws, and its "central purpose... is the prevention of official conduct discriminating on the basis of race." In the early days of the Equal Protection Clause, the focus was on eradicating facially discriminatory laws, those that explicitly classified according to race and contained separate rules for whites and nonwhites. As the notion of racial equality gained more ground, the next battlefront was to address laws that were facially race-neutral, but still operated to discriminate based on race. Pursuant to the Commerce Clause, federal legislation was enacted, seeking to bridge the gap between conduct prohibited by the Fourteenth Amendment and other methods of discrimination that did not violate the federal constitution. For instance, Title VII of the Civil Rights Act of 1964, enacted under the Commerce Clause, provides that it is an unlawful employment practice for any employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

As one component of the debate over facial neutrality and discriminatory impact, civil rights litigators challenged laws that appeared to be race-neutral but actually resulted in a more substantial burden for minority voters or voters seeking to protect minority interests. These advocates found success in the case of Reitman v. Mulkey. In Reitman, California voters adopted an amendment to the California Constitution that prohibited the state from interfering with the absolute discretion of private landowners to decline to transfer real property to whomever they chose. Because the amendment

134. See, e.g., Civil Rights Act of 1870, 16 Stat. 140 (1870).

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

137. Id. § 2000e-2(a)(2).
139. Id.
changed the situation from restricting against discrimination to prohibiting restrictions on discrimination, the court found that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market." More than merely repealing existing antidiscrimination laws, the amendment encouraged private discrimination and amounted to a "repeal in advance" of fair housing laws.

A similar issue was presented in Otey v. Common Council, where the district court determined that a resolution to prevent a government council from enacting fair housing legislation for two years would "give statutory sanction to those who wish to discriminate without interference" and "would significantly involve the City in private discrimination and unquestionably encourage such discrimination, and it therefore constitutes State action proscribed by the Fourteenth Amendment." Then, in Hunter v. Erickson, the city council enacted a fair housing ordinance, and the voters approved a referendum to amend the city charter such that any future ordinance barring racial discrimination in housing would have to be approved by the city council and a majority of the city's voters before it could be enacted. The challengers argued that the referendum violated the Equal Protection Clause because it was an official action that operated to discriminate against those who seek fair housing laws. Because those who seek fair housing laws are more likely to be racial minorities, the referendum made it more difficult for voters of color to obtain redress in the political process. All other housing matters, including those that did not address racial discrimination, remained subject to the former process and thus were more easily enacted. The court found that this change in procedures for enacting antidiscrimination ordinances was not a neutral restructuring of the political process because people of color had a more difficult time obtaining fair legislation in their interest. The United States Supreme Court, relying on Reitman, reasoned that the change in the political process to require both the city council and the voters to approve only those ordinances dealing with prohibiting discrimination in housing provided a new and different process for passing

140. Id. at 381.
142. 281 F. Supp. 264 (E.D. Wis. 1968).
143. Id. at 273.
145. Id. at 387.
146. Id. at 391.
147. Id.
ordinances related to racially fair housing.\textsuperscript{148} The Supreme Court determined that the Fourteenth Amendment was violated because "the reality is that the law's impact falls on the minority," and the law thereby denied voters of color their right to equal protection of the laws in violation of the Fourteenth Amendment.\textsuperscript{149} This rule of law became known as the Hunter Doctrine.

The Supreme Court revisited the Hunter Doctrine in another case of facially neutral legislation with a disproportionate impact on people of color. In \textit{Washington v. Seattle School District No. 1},\textsuperscript{150} the voters adopted a statewide initiative that prohibited school boards from assigning students to schools outside of their neighborhood unless a specific exemption applied. There were numerous specific exemptions, such that the only remaining \textit{impermissible} basis for selecting students' schooling assignments was that of racial desegregation.\textsuperscript{151} The district court found that the initiative was unconstitutional because it violated the Hunter Doctrine.\textsuperscript{152} The Supreme Court recognized that a law can violate the Equal Protection Clause when the political structure appears to treat individuals equally, "yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."\textsuperscript{153} When the state is "explicitly using the \textit{racial} nature of a decision to determine the decision making process,"\textsuperscript{154} then minority groups are especially burdened by the legislation. In \textit{Washington v. Seattle}, the Court found that the initiative violated the Constitution 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."\textsuperscript{155} Prior to the passage of the initiative, all schooling matters had been decided under the authority and discretion of the local school board. Then the initiative separated out the issue of desegregative busing, which became the only issue that was no longer decided by the local school board. The majority of the voters statewide had decided that desegregative busing no longer was an acceptable price to pay to hasten desegregation efforts, and those students still attending largely

\begin{footnotes}
\footnote{148. \textit{Id}.}
\footnote{149. \textit{Id.}; see also Vikram D. Amar & Evan H. Caminker, \textit{Equal Protection, Unequal Political Burdens, and the CCRI}, 23 HASTINGS CONST. L.Q. 1019 (1996). All other housing matters could be decided by the former process. Similarly, subsection (a) of CRECNO permits all non-Recno classifications in enumerated areas to be left alone, and prohibits only Recno classifications. Proposition 54 § 32(a).}
\footnote{150. 458 U.S. 457 (1982).}
\footnote{151. \textit{Id}.}
\footnote{152. \textit{Id.} at 465.}
\footnote{153. \textit{Id.} at 467.}
\footnote{154. \textit{Id.} at 470.}
\footnote{155. \textit{Id}.}
\end{footnotes}
The Washington v. Seattle litigants also argued that the case of Washington v. Davis had discredited the Hunter Doctrine. However, the Seattle Court specifically rejected that contention by distinguishing the explicit use of race in Hunter from the implicit racial factors in Washington v. Davis. Soon thereafter, the United States Supreme Court faced the debate over what was necessary to prove racial discrimination when the challenged program or ordinance was racially neutral on its face. In the Title VII context, the Court determined that a person may make “a claim for discriminatory employment practices based on a showing of disparate treatment based on race, or a showing that those practices have a racially disparate impact on hiring or promotion of employees.” And thus the disparate treatment and disparate impact tests were launched to adjudicate alleged violations of Title VII.

Back in 1976, the Supreme Court had evaluated the applicability of the Title VII jurisprudence to the Equal Protection Clause of the Fourteenth Amendment. In Washington v. Davis, the Court determined that a disparate racial impact is not only probative evidence of discrimination but is sufficient under Title VII to demonstrate a prima facie case of disparate impact discrimination in employment. However, the Court declined to extend the rule to the Equal Protection Clause, stating, “We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.” The Court explained that disparate racial impact “is not the sole touchstone of invidious racial discrimination forbidden by the Constitution,” and will not alone be adequate to establish a prima facie violation of the Equal Protection Clause. Proof of discriminatory purpose is required to satisfy the Fourteenth Amendment test even though some portions of that proof can be established through evidence of disparate impact.

156. Id. at 480–81. The question remains: How does this voter decision meet the intent requirement? For further discussion of this issue, see, e.g., David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 981 (1989).
159. Id. at 485.
162. Id.
163. Id. at 239.
164. Id. at 242.
165. Id.
166. Id. at 244–45 (stating that “to the extent that those cases rested on or expressed the view
Court recognized that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”\textsuperscript{167} One scholar has noted that \textit{Washington v. Davis} has “tamed Brown”\textsuperscript{168} by reducing the Equal Protection doctrine to the “minimum necessary content of Brown: that the Equal Protection Clause prohibits only explicit classifications and the equivalent of racial gerrymanders—facially neutral actions that are in fact based on race.”\textsuperscript{169}

Professor Charles Lawrence notes that:

\begin{quote}
[A] motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions.\textsuperscript{170}
\end{quote}

Thus, the \textit{Washington v. Davis} focus on intent operates to “normalize” white privilege by forcing litigants of color to prove the subjective intent of an alleged discriminator, thus increasing the difficulty of stating a prima facie case.

The Supreme Court’s rationale seems to be that where the racial classification is explicit in the terms of the legislation, the strict scrutiny

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that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement); \textit{but see} Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The Civil Rights Act of 1991 adjusted the requirements to the following:

An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.


167. \textit{Washington v. Davis}, 426 U.S. 229, 242 (1976) (citing jury cases as an example of a severely disproportionate impact that may “demonstrate unconstitutionality” because it is “very difficult” to explain on nonracial grounds).

168. Strauss, \textit{supra} note 156, at 954.

169. \textit{Id}.

analysis is appropriate, as it was in *Hunter*. On the other hand, *Washington v. Davis* involved an implicit classification, based on the ability to pass an employment test, and the disparate racial impact of that test on applicants, and thus the rule announced in that case, the court seems to be saying, applies only to other cases of implicit classifications. When a racial classification is explicit, "regardless of purported motivation, [it] is presumptively invalid and can be upheld only upon an extraordinary justification." When the classification is at most implicit, then the motive inquiry is necessary, as in *Seattle*.72

In a companion case to *Seattle*, the Court rejected a Hunter Doctrine claim. In *Crawford v. Board of Education*,73 the California voters adopted a constitutional amendment to limit desegregative busing to only those instances where such busing would be ordered under federal law; that is, to remedy violations of the Fourteenth Amendment.74 The petitioners argued that this state constitutional amendment violated the federal constitution by truncating the ability to desegregate the public schools.75 The respondents argued that the amendment did not involve a racial classification, given that it applied generally to "pupil school assignment" and "pupil busing."76 The court determined that the state constitutional amendment coincided exactly with the limits of the Fourteenth Amendment because the only limitation was on additional busing, above and beyond what would be required as a remedy for past discrimination under the Fourteenth Amendment.77 Because the State of California was merely stepping back its remedies to no longer provide some measure of additional protection against discrimination, the Court determined that there was no violation of the Federal Constitution.78

172. Id. at 485–86.
173. 458 U.S. 527 (1982). The *Crawford* Court recognized that "the *Hunter* Court noted that although 'the law on its face treats Negro and white, Jew and gentile in an identical manner,' a charter amendment making it more difficult to pass antidiscrimination legislation could only disadvantage racial minorities in the governmental process." Id. at 541 n.26 (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (holding that the state constitutional amendment did not employ a racial classification, where the amendment limited state court ordered busing for desegregation purposes to situations under which a federal court would order such busing)).
174. Id.
175. Id.
176. Id. at 538 n.18.
177. Id. at 542 ("In short, having gone beyond the requirements of the Federal Constitution, the state was free to return in part to the standard prevailing generally throughout the United States.").
178. Id. ("That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.").
Thus, the Court determined that there was no Hunter Doctrine violation because the rights that were taken away through this new political process were those that exceeded the minimum requirements of the Equal Protection Clause. Curtailing that "greater protection" did not operate to burden minorities in the political process in such a way as to violate the Fourteenth Amendment by denying them "equal protection." 179

Professors Amar and Caminker note an additional reason these litigants failed to satisfy the Hunter Doctrine test: The challenged law had a "lack of both a racial character and a political process burden" on minorities, in part because it did not prevent the introduction of new busing legislation. 180 The Crawford Court determined that desegregative busing was racially neutral by defining the issue as "neighborhood schooling," stating that "[t]he benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities." 181 What the Court ignored was the high level of residential segregation in California, which means that many neighborhoods have a high degree of racial homogeneity. When neighborhoods are racially homogeneous, neighborhood schools are racially homogeneous as well, and any plan that sorts students into schools by their residential address effectively sorts those students by race to a large degree. 182

B. Amar and Caminker and Intent in Valeria

Professors Amar and Caminker provide a useful framework for analyzing the Hunter Doctrine as a mechanism for challenging alterations in the political process that "isolate public policy decisions intrinsically important to racial minorities and make more difficult success by these groups in legislative politics." 183 Amar and Caminker break down the Hunter Doctrine into a two-pronged analysis: (1) that the challenged law is "racial in character" and (2) that it imposes an "unfair political process burden" on minorities. 184 A law is racial in character if it "regulates a racial subject matter, [and] it has a racial

179. Id.
180. Amar & Caminker, supra note 149, at 1026.
184. Amar & Caminker, supra note 149, at 1029.
impact, meaning it regulates the subject matter to the detriment of the racial minority.\textsuperscript{185} In evaluating the detrimental impact upon the racial minority, Amar and Caminker emphasize the \textit{Hunter} Court’s reasoning that “‘the reality is that the law’s impact falls on the minority’ . . . because majorities ordinarily do not need the protection of antidiscrimination laws, and thus lose very little by an amendment that makes such laws less likely to be enacted.”\textsuperscript{186} Amar and Caminker go on to state:

With respect to a given issue that is “racial in character,” a state constitution may either remain neutral or prescribe norms favorable to racial minorities (which can later be repealed). But a state constitution can never entrench a substantive norm with respect to an issue that is “racial in character” in a direction that disadvantages a racial minority.\textsuperscript{187}

\textsc{CRECNO} is an attempt to entrench a “substantive norm”—that of “Recno blindness”—that disadvantages racial minorities. The question is whether this norm is “racial in character” or is sufficiently general that the burden does not fall on people of color as such.

In evaluating the prongs of the Hunter Doctrine test, it is not entirely clear whether intent should be a component of the analysis. Amar and Caminker note that in both \textit{Hunter} and \textit{Seattle}, the Court “declined to rest its decision on a finding of invidious intent”\textsuperscript{188} and “eschewed any inquiry into invidious motive” in \textit{Seattle}.\textsuperscript{189} In fact, Amar and Caminker state that the Hunter Doctrine cases do suggest that “disparate impact theory plays a more prominent role in political rights cases than it does in other equal protection settings.”\textsuperscript{190} At least one scholar has suggested a modification to the Hunter

\begin{itemize}
  \item \textsuperscript{185} \textit{Id.}
  \item \textsuperscript{186} \textit{Id.} at 1030 (quoting \textit{Hunter}, 393 U.S. at 391).
  \item \textsuperscript{187} \textit{Id.} at 1052 (emphasis in original). Amar and Caminker further state that this reading of the Hunter Doctrine cases:

  \begin{itemize}
    \item merely means that when the people of a state want to entrench a substantive norm at a centralized level (such as the state constitution) and the norm will be detrimental to the interests of racial minorities, the people must take care to define the norm in a sufficiently general way—to avoid the impression of a gerrymander, if you will—such that the norm is not “racial in character” as defined earlier.
  \end{itemize}

  \textit{Id.} at 1053.
  \item \textsuperscript{188} \textit{Id.} at 1024.
  \item \textsuperscript{189} \textit{Id.} at 1024, 1030, 1034–35 and 1045–46 (stating that the Court’s analysis of the Hunter Doctrine is not an inquiry into illicit intent, but instead concerns minorities’ equal access to the political process, which triggers a focus on effect rather than subjective intent).
  \item \textsuperscript{190} \textit{Id.} at 1032.
\end{itemize}
Doctrine to address the difficulty of proving intent.\textsuperscript{191} Ellis suggests finding a Hunter Doctrine claim in a facially neutral enactment that will contain a suspect or quasi-suspect classification when:

(i) it modifies the existing political process to create a burdensome extra step in the legislative process in order for a [suspect or quasi-suspect class] to enact [constitutional] legislation in its interest; and (ii) the circumstances of the legislation’s enactment create an inference that an improper motive was at work; but (iii) there is insufficient evidence to prove a discriminatory purpose.\textsuperscript{192}

However, the Ninth Circuit, following the \textit{Washington v. Davis} line of cases, recently determined that there is a third prong to the Hunter Doctrine analysis. Purposeful discrimination, which has long been a requirement for traditional equal protection violations, also is a required element to prove a Hunter Doctrine violation.\textsuperscript{193} Amar and Caminker’s analysis, written years before,\textsuperscript{194} recognizes the \textit{Washington v. Davis} line of cases but strongly disagrees with the notion of an intent requirement in Hunter Doctrine jurisprudence.\textsuperscript{195}

While the United States Supreme Court has not yet decided this particular issue, it is important nevertheless to analyze the intent issue as the Ninth Circuit has discussed it. In \textit{Valeria v. Davis}, the litigants challenged the California voters’ approval of Proposition 227 as violating the Hunter Doctrine.\textsuperscript{196} Proposition 227 replaced the bilingual public education system with an English language immersion system and limited the public’s ability to amend the system by requiring either a majority of the electorate or two-thirds of each house of the legislature and the governor’s approval.\textsuperscript{197} The \textit{Valeria} court reasoned that:

\begin{quote}
under this “political structure” analysis, reallocation of political decision making violates equal protection only when there is evidence of purposeful racial discrimination. Be it an overt racial classification or a context of discernible racial animus, constitutional “political structure” analysis resembles “conventional” equal protection analysis
\end{quote}


\textsuperscript{192} Id. at 351.


\textsuperscript{194} Amar & Caminker, \textit{supra} note 149.

\textsuperscript{195} Id. at 1023.

\textsuperscript{196} \textit{Valeria}, 307 F.3d 1036.

\textsuperscript{197} Id. at 1038; see also \textsc{Cal. Educ. Code} § 30 (West 2002).
in that demonstrable evidence of purposeful racial discrimination is required.\textsuperscript{198}

In analyzing the genesis of the Hunter Doctrine, the \textit{Valeria} court states:

\textit{Hunter} and \textit{Seattle} stand for the simple proposition that strict scrutiny applies if an initiative creates an outright racial classification, or if a facially neutral initiative was driven by the racial nature of its subject matter. . . . Given Proposition 227's facial neutrality, and the lack of evidence that it was motivated by racial considerations, we hold that Proposition 227's reallocation of political authority over bilingual education does not offend the Equal Protection Clause.\textsuperscript{199}

Thus, the Ninth Circuit has determined that purposeful discrimination is an element of a Hunter Doctrine claim where the challenged legislation is facially neutral. This rule of law is inconsistent with the \textit{Seattle} Court's reasoning on the distinction between \textit{Hunter} and \textit{Washington v. Davis}.

In making this interpretation of the Hunter Doctrine, the Ninth Circuit analyzed the barriers to equal treatment that were erected by the challenged legislation. The majority determined that the "[r]eallocation of political power offends equal protection only when the racial implications of the underlying issue determine the newlyformed [sic] decision-making process."\textsuperscript{200} The court noted that the amendment in \textit{Hunter} "operated to prevent the city council from enacting ordinances to address racial discrimination in housing,"\textsuperscript{201} and the initiative in \textit{Seattle} "placed special burdens on the ability of minority groups to combat racially segregated school districts."\textsuperscript{202} The court went on to state that "[u]nlike ordinances enacted to address pervasive racial discrimination in housing, or efforts taken by local school boards to desegregate racially stratified school districts, California's system of bilingual education did not operate to remedy identified patterns of racial discrimination."\textsuperscript{203} Thus, based on the reasoning in the Hunter Doctrine cases, the converse also should be true, such that where the challenged legislation seeks to eradicate a policy or program that did operate to remedy identified patterns of racial discrimination, the legislation operates as a barrier to minorities receiving equal treatment, on a theory that might be termed

\begin{itemize}
\item \textsuperscript{198} \textit{Valeria}, 307 F.3d at 1040.
\item \textsuperscript{199} \textit{Id.} at 1042 (citations omitted).
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{Id.} at 1040.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 1041.
\end{itemize}
The court identified the purpose of the bilingual education program as to "improve education, and not to remedy racial discrimination," and thus Proposition 227 did not rest upon an invidious intent to curtail a remedy for discrimination based on race or ethnicity. According to the court, the demolition of the bilingual education system was not a racial issue but rather an educational issue. This broad reframing of the issue was critical in allowing the court to find race neutrality where a more narrow reading would show the true racial or ethnic nature of Proposition 227. Still, the court tries to have it both ways. Recognizing the "undeniable racial dimension" to the issue of bilingual education, the court stated: "While bilingual education has obvious racial implications, the record establishes neither that racial discrimination was the impetus of bilingual education, nor that racial animus motivated the passage of Proposition 227." Thus, the court concluded that the "racial makeup" of the public student population "did not shape Proposition 227's reallocation of political authority over bilingual education." The court seems to be implicitly reasoning that even though the subject matter is racial, and the impact might be to the detriment of minority students, there was no proof of intent to discriminate, nor any invidious racial purpose motivating the legislation, and thus the Hunter Doctrine claim must fail. It is interesting to note that the court did not address the unfair political process prong of the test. The fact that the legislation could be changed only by a voter majority or a supermajority of the legislature along with the governor's affirmative approval imposes a more substantial burden on those seeking to reinstitute bilingual education similar to the burdens imposed in *Otey v. Common Council*. In contrast to the *Valeria* court's reasoning on bilingual education programs specifically, existing classification laws in the various states, while once operating to discriminate against disfavored minorities, have been operating to combat racial and ethnic discrimination by providing effective mechanisms for identifying when and where discrimination does occur and monitoring those mechanisms afterwards. Like the legislation struck down in *Hunter* and *Seattle*, CRECNO would operate to prevent city councils, local governments, and state agencies from enacting ordinances or implementing
policies designed to address and redress discrimination in our midst in two ways: First, because the state will no longer have the data to support such a need, and second, because as state institutions, they cannot "classify" without the approval of two-thirds of the legislature and the Governor.

The analysis proceeds as follows: If CRECNO itself constitutes a racial classification, then strict scrutiny applies, which in turn means that a compelling interest must be shown and narrow tailoring will be required for CRECNO to survive a constitutional challenge. If CRECNO does not constitute a racial classification and is considered facially race-neutral, then in the Ninth Circuit, strict scrutiny will apply only if racial motivations for the legislation can be established by proof that the law was adopted because of, and not merely in spite of, the racial nature of the subject matter. In the rest of the nation, or at least in most other circuits, the question remains open as to whether Romer v. Evans obviates the perceived need to prove intent in Hunter Doctrine litigation.

C. Romer v. Evans and the Political Burden on Identifiable Minority Groups

While it is well settled that the voters may decide to increase the burden on everyone seeking to obtain a particular governmental benefit, when the increased burden falls disproportionately upon members of an identifiable minority group, strict scrutiny may be justified. The United States Supreme Court addressed the notion of equal rights to obtain legislation in Romer v. Evans. In Romer, Colorado voters approved Amendment Two to the state constitution, which provided that no state departments, agencies, or political subdivisions:

shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

The trial court struck down the amendment as infringing upon the fundamental right to vote, as well as on Hunter Doctrine grounds. The trial court determined that the initiative operated to repeal those laws and policies

211. Id.
212. Id. at 624 (quoting COLO. CONST. art. II, § 30b).
213. Id. at 625–26.
that prohibited sexual orientation discrimination, stating that the ""ultimate effect of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." 214 The trial court's main concern was with the future of antidiscrimination laws because of the raised standard for reinstating those laws.

The United States Supreme Court focused on both the current and the future harm in identifying the crucial problem with Amendment 2 as that it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination and ... forbids reinstatement of these laws and policies." 215 The first point is of paramount importance in the analysis of Recno classification data. In Romer, the withdrawal of legal protection for the injuries caused by discrimination was based on a repeal of antidiscrimination laws for gays and lesbians. If such discrimination is no longer illegal, then legal protection against discriminatory acts is withdrawn from gays and lesbians. While CRECNO does not repeal antidiscrimination laws for racial and ethnic minorities, CRECNO seeks to similarly withdraw protection for the injuries caused by racial and ethnic discrimination by removing the best available and most widely used methods for establishing the existence of the injury, and of linking up the causal connection between the illegal discrimination and that injury.

On its second point, the Court seems to be slightly overreaching, because while the amendment prohibited and rendered invalid all such policies, reinstatement of the antidiscrimination policies was not forever foreclosed, but rather could be accomplished through an additional amendment to the state constitution. As a practical matter, however, the court did recognize the near futility of seeking reinstatement, stating that gays and lesbians "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." 216 Similarly, CRECNO mandates that the state citizens would have to change their minds and agree once again to amend the state constitution, convince two-thirds of the legislature and the governor to permit some classifications, or to enact legislation that permits proof of racial discrimination without the use of racial data, although such a notion is (bordering on the) absurd.

214. Id. at 627 (quoting Evans v. Romer, 854 P.2d 1270, 1284–85 (Colo. 1993)).
215. Id.
The Court went on to state that:

[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. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.""\textsuperscript{217}

This protection means that a discrete and identifiable minority cannot be prevented from obtaining legislation or governmental redress for discrimination. In \textit{Romer}, that minority was gays and lesbians, who as a class are subject to mere rational review; with CRECNO, that minority is people of color, who as a class, meet the requirements that trigger strict scrutiny. The Court reasoned that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."\textsuperscript{218} Thus, the Court determined that the amendment did not even meet the rational basis/legitimate purpose test because for gays and lesbians, Amendment Two "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."\textsuperscript{219} Similarly the breath of CRECNO's prohibitions is inconsistent with the reasons offered and thus might fail even rational review.\textsuperscript{220}

D. Proving Purposeful Discrimination Through Unequal Treatment in Antidiscrimination Remedies

Based on \textit{Valeria v. Davis}\textsuperscript{221} and \textit{Coalition for Economic Equity v. Wilson},\textsuperscript{222} a court, particularly one within the Ninth Circuit, may decide that CRECNO does not constitute an explicit classification and is race neutral on its face. Where the challenged legislation is race neutral, asserting an equal protection claim requires a demonstration of purposeful discrimination. Purposeful discrimination can be proven by intentional conduct, such as where a law is adopted because of, and not merely in spite of, its effects on

\textsuperscript{218} \textit{Id.} at 632. Nevertheless, it is likely that a similar analysis would apply if a court determined that rational review was more appropriate, and CRECNO could fail even under that lower standard of review.
\textsuperscript{219} \textit{Id.} at 635.
\textsuperscript{220} \textit{See also} Spann, \textit{supra} note 23, at 324.
\textsuperscript{221} 307 F.3d 1036, 1042 (9th Cir. 2002).
\textsuperscript{222} 122 F.3d 692 (9th Cir. 1997).
racial minorities.\textsuperscript{223}

If CRECNO eventually is passed by the voters of a state, it likely will be because of, not merely in spite of, its effect upon racial and ethnic minorities in the state. The causal relationship between CRECNO's classification prohibition and the detrimental effect on people of color is not an intricate one. The purpose of CRECNO is to prevent the state from recording information about the races and ethnicities of its citizens.\textsuperscript{224} While the prohibition applies to white and nonwhite citizens alike, only people of color will be affected and actually harmed by this rule because, as the \textit{Hunter} Court noted, minorities need the benefit of antidiscrimination laws and majorities generally do not.\textsuperscript{225} This observation has taken on significantly greater importance in the decades since the \textit{Hunter} decision. As a brief review of the recent racial discrimination cases demonstrates, people of color need the numbers to prove their discrimination cases. These days, for people of color at least, discrimination is less often displayed in an overt or intentional manner sufficient to fulfill the purposeful discrimination prong. Antidiscrimination cases generally rely upon statistical data\textsuperscript{226} and arise in the educational environment\textsuperscript{227} and in the public contracting arena.\textsuperscript{228} We no longer have many of the more obvious manifestations of intentional, purposeful discrimination against racial minorities that can be proven in court without statistical evidence.\textsuperscript{229} Therefore, the classifications and recordkeeping schemes are necessary to identify the patterns of racial discrimination and to provide proof sufficient to mandate that a remedy be imposed.

A critical problem is that CRECNO does not protect because the roadblock to obtaining protection is too high. As Professor Charles L. Black has noted, "[i]naction, rather obviously, is the classic and often most efficient way of 'denying protection.'"\textsuperscript{230} In analyzing \textit{Reitman}, Karst and Horowitz

\begin{footnotesize}
\begin{enumerate}
    \item 223. \textit{Valeria}, 307 F.3d at 1040; \textit{Coalition for Econ. Equity}, 122 F.3d at 704.
    \item 230. Charles L. Black, Jr., \textit{Foreword: "State Action," Equal Protection, and California's
\end{enumerate}
\end{footnotesize}
noted that the "state can be said to authorize all conduct that it does not prohibit, and in this sense the state is 'involved' in all private conduct that it does not condemn." Like the Reitman prohibition of any limitation on housing transfers, CRECNO categorically prohibits any classification without first circumventing one of the many roadblocks. As in Reitman, the only options for redress were to obtain a two-thirds legislative majority (and the governor's signature for CRECNO), or sufficient voter signatures to get another constitutional amendment on the ballot, effectively assuring "special immunity" to the discriminator. CRECNO similarly erects a uniquely high barrier to the interests of people of color by making it more difficult to combat discrimination and redress violations of antidiscrimination laws.

A court could determine that CRECNO constitutes intentional discrimination by reallocating societal resources based on the race of the potential litigant. While whites could also rely upon statistical evidence to prove a "reverse discrimination" or "antipreference" claim, as a practical matter, most reverse discrimination cases do not rely upon statistical evidence because the purposeful discrimination prong is met in form by using an explicit racial classification and in substance by actually providing a preference to a person of color. The main argument for antipreference cases is the overt policy, the intentional purposeful granting of preferences that can be proven without reference to statistical data. In addition, when statistical data is used in these cases, it is often used to show an impermissible quota and usually is not used to prove the underlying policy. Intentional conduct is sufficient to satisfy the purposeful discrimination prong, and thus no intent need be inferred from the circumstantial evidence of statistical records based on racial and ethnic classifications. Accordingly, the loss of statistical records will not change much in the way that reverse discrimination and antipreference claims are litigated, but will have a dramatic impact on the litigation of antidiscrimination cases.

Because antipreference and reverse discrimination claims

Proposition 14, 81 HARV. L. REV. 69, 73 (1967).


232. Black, Jr., supra note 230, at 76, 79.

233. For a discussion of this argument in the context of Proposition 209, see Spann, supra note 23, at 293, 299.


236. Id. at 55-56.

disproportionately involve white plaintiffs, and antidiscrimination claims disproportionately involve plaintiffs of color, the antidiscrimination plaintiffs—the plaintiffs of color—will suffer the greatest detriment in a state that adopts CRECNO. As Professor Spann has noted in the Proposition 209 context, prohibiting preferences that favor people of color while failing to prohibit preferences that favor white males (such as legacies in the educational setting) could constitute illegal discrimination against people of color. Thus, by imposing a substantial roadblock in the path of antidiscrimination litigants, CRECNO results in differential treatment for antipreference laws benefiting whites, vis a vis antidiscrimination laws benefiting people of color. The loss of statistics would regulate the subject matter of racial classification to the detriment of racial minorities much more heavily than to the detriment of the racial majority.

E. If CRECNO Is Determined to Be facially Race-Neutral, Does It Nonetheless Violate the Hunter Doctrine Because the Racial Implications Determine the Decisionmaking Process?

CRECNO also meets the second prong of the Hunter/Valeria test by reallocating political decisionmaking based on racial implications. Under subsection (a), which prohibits any Recno classification in the enumerated state operations, those who seek racial classifications in education, employment, or contracting can do so only if they can convince a majority of the state’s voters to reverse themselves. The Seattle Court recognized the potential constitutional problem with a similar requirement stating that:

[c]ertainly, a state requirement that ‘desegregation or antidiscrimination laws,’... and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances ‘designed to ameliorate race relations or to protect racial minorities’ be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in Hunter—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle. 3t

Amendment Two in Romer provides another illustration of legislation

238. Spann, supra note 23, at 297 (noting that “when Proposition 209 invalidates a constitutionally valid affirmative action program it precludes the possibility of any meaningful remedy for past discrimination”).

going too far by decimating the protection of minority rights. While the burden in CRECNO does not go quite as far as the examples cited in dicta by the Seattle Court, neither did the legislation that was struck down in Seattle and Hunter. Romer is much closer factually to this "parade of horribles," and CRECNO falls in between the enactments from these precedent cases. CRECNO mandates that existing laws, regulations, and ordinances that are designed to protect racial minorities by monitoring their participation levels and progress in the enumerated state operations be suspended or deemed to be unconstitutional unless or until the state constitution is amended.  

State constitutional amendments are difficult to pass, and in California, are permitted only where the voters pass a proposition by majority vote or where two-thirds of the legislature agree and then the voters adopt the amendment by a majority vote. These requirements are not quite as stringent as requiring a unanimous legislature but still impose an additional burden on those seeking the protection of racial and ethnic antidiscrimination laws over those who seek the protection of other types of nonracial or ethnic antidiscrimination laws in areas such as gender, religion, or sexual orientation. Without CRECNO, the state can classify persons based on Recno in the enumerated state operations, as long as the classification itself does not amount to a discrimination or preference based on Recno, and the compelling interest test is met in any subsequent challenge. If CRECNO becomes law, the state cannot classify in the three enumerated areas at all as long as CRECNO is the law.

In addition, CRECNO alters the authority for addressing racial problems in the nonenumerated state operations under subsection (b) by requiring the governor's approval in addition to a two-thirds vote of the legislature in order

240. Proposition 54 § 32(a)–(c).
241. CAL. CONST. art II, §§ 8, 10.
242. Id. art. XVIII, § 1.

The legislature by roll call vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.

Id.
243. Id. art. XVIII, § 4.

A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

Id.
to affect any classification. CRECNO potentially restructures the political process in a second way by granting the governor a pocket veto power for legislation classifying people based on Recno in the nonenumerated state operations. Subsection (b) states that classifications in any other areas can be permitted only when two-thirds of the legislature finds that the classification serves a compelling interest, and the governor agrees. Declining to veto any such legislation will not be sufficient to save it, unlike other legislation that the governor declines to approve or veto, which generally becomes law in ten days, notwithstanding his inaction. Thus, the ultimate power over the reinstitution of Recno classifications in the nonenumerated areas of state operations is transferred to the state’s governor. Recall that Proposition 227 contained a similar provision, which the Valeria court interestingly did not address. Those seeking to reinstate Recno classifications must convince a supermajority of the legislature, as well as the governor, to support the legislation, which is a substantial political process burden.

The legislative supermajority issue is reminiscent of the changes in authority that the Supreme Court nullified in the Seattle and Hunter cases. The Seattle Court reasoned that the only authority to be curtailed was that involving the racial problems with public school busing and determined that the initiative affected a racial classification by removing the “authority to address a racial problem—and only a racial problem—from the existing decision making body, in such a way as to burden minority interests.”

The Ninth Circuit later acknowledged this point, stating, “the state obstructed equal education by removing only racially desegregative prerogatives from the lawmaking procedure for all other educational matters.” By imposing the two-thirds plus governor approval requirement on all Recno classifications in other state operations, CRECNO would remove these classifications from the existing decisionmaking structure—one that allows agencies, departments, and other government instrumentalities to make classifications in their discretion and pursuant to existing regulations, ordinances, and rules.

We must recognize, however, that the mere change in decisionmaking

245. Proposition 54 § 32(b).
246. Id.
247. Id. The only exception is where the legislative session adjourns during that ten-day period. In those cases, the governor’s inaction would operate as a pocket veto. CAL. CONST. art. IV, §10; LARRY N. GERSTON & TERRY CHRISTENSEN, CALIFORNIA POLITICS AND GOVERNMENT: A PRACTICAL APPROACH 43 (1991); BERNARD L. HYINK ET AL., POLITICS AND GOVERNMENT IN CALIFORNIA 121 (3d ed. 1959).
249. Id.
250. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 706 (9th Cir. 2001).
structure alone is not fatal. But when that change results in an unusual burden on proper minority interests, the reallocation of political decisionmaking violates the Equal Protection Clause. As Professor Charles Black has proposed:

where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.251

Consider also then-Solicitor General Marshall, whose brief in Reitman stated that "by sheltering the right to discriminate in its constitution, the State has accorded it a unique insulation from the normal political processes."

The brief further stated that this "enshrining . . . not only clothes it with the traditional immutability that inures to constitutional texts, but places a very serious burden on even the most dedicated advocates of repeal." Like the legislation limitation in Reitman, CRECNO would announce a constitutional right to "not be counted" and would encourage discrimination by making it virtually impossible to prove because every person will have the right to avoid being classified by state actors. Recno counting can be reinstituted only if a two-thirds legislative majority and the governor, or a majority of the state's voters, adopt another amendment. Obtaining the support of the current governor, along with a supermajority of legislators, would be a formidable task indeed.

The Seattle Court stated:

But when the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"

And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to

251. Black, Jr., supra note 230, at 82.
252. Karst & Horowitz, supra note 231, at 50 n.51 (quoting Brief for U.S. as Amicus Curiae at 26).
253. Id. (quoting Brief for U.S. as Amicus Curiae at 30).
overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect the minority."\textsuperscript{254}

In *Romer*, the Court recognized the explicit denial of specific legal protections against discrimination for the identifiable minority group comprised of gays and lesbians.\textsuperscript{255} Similarly, CRECNO denies the protections gained from monitoring and enforcing antidiscrimination laws for people of color.

In addition, like the burden found in the *Seattle* case, CRECNO places "unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice."\textsuperscript{256} This third unusual burden is the voter or two-thirds legislative hurdle. The legislation to overcome prejudice consists of a variety of antidiscrimination and participation monitoring laws and ordinances. If the state cannot have racial categories, then groups cannot convince the legislature that there is a problem for any particular racial group or that there is any need for additional legislation to protect that group. All of these protections are to be abrogated unless or until two-thirds of the legislature is convinced to identify a compelling interest in maintaining those laws, and the governor is persuaded to agree. Another even more unlikely option is available: to convince the voters to repeal CRECNO, which is the same hurdle that the *Romer* Court recognized as tantamount to "forbid[ding] reinstatement"\textsuperscript{257} of those protections. Each of these options makes it more difficult for people of color to obtain redress for violations of antidiscrimination laws.

**F. Does CRECNO Constitute a Racial Classification or Is It Sufficiently Racial in Character to Implicate the Hunter Doctrine?**

The basic, and perhaps all-too-quickly dismissed, question is whether CRECNO makes an explicit racial classification. The subject matter of CRECNO is to prohibit classifications and recordkeeping according to race, ethnicity, color, and national origin, and thus its subject matter has an explicit racial character. Under subsection (a), only Recno classifications are outlawed, whereas gender, religion, and veterans' status are unaffected.\textsuperscript{258}

There is a legitimate argument that CRECNO is a race-neutral regulation

\textsuperscript{256} Seattle, 458 U.S. at 486.
\textsuperscript{257} Romer, 517 U.S. at 627.
\textsuperscript{258} Proposition 54 § 32(a). If the argument is that these areas were also the subject of the voters' action in approving Proposition 209, then gender, which was included in Proposition 209, should also be included here.
of racial matters. It applies uniformly to people of all races and ethnicities, and no particular races or ethnicities are singled out in its language. Moreover, CRECNO is not itself a classification because it does not classify. In fact, it expressly prohibits classifications of anyone's race regardless of whether the person is white or nonwhite. In *Coalition for Economic Equity v. Wilson* ("CEE"), the Ninth Circuit addressed this issue, stating that Proposition 209 did not violate the Fourteenth Amendment because:

[r]ather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.260

With this language as Ninth Circuit precedent, there is a strong argument that CRECNO does not classify by race because it prohibits such classifying.

If one accepts this Ninth Circuit statement as binding authority, the argument that CRECNO does not classify because it prevents classifying misses the point of the Hunter Doctrine: that where the burden of the challenged legislation falls more heavily on minority access to the political process, the resulting unequal treatment violates the Equal Protection Clause. The "no classification" language will not necessarily save CRECNO from this constitutional violation. A closer analysis of the reasoning of the *CEE* court reveals the constitutional flaw in the Ninth Circuit's statement that a law prohibiting classifications "*a fortiori* does not classify."261 The court states that when:

a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all

259. 122 F.3d 692 (9th Cir. 2001).
260. *Id.* at 702.
261. *Id.*
race and gender preferences by state entities.\textsuperscript{262}

This language demonstrates the permissible scope of race-related legislation: In order to pass constitutional muster, the legislation must not isolate those laws in the political process, and it must not treat racial antidiscrimination laws in one area differently from racial antidiscrimination laws in another area in a way that burdens minority interests.

The \textit{Valeria} court describes the issue as whether the racial implications of the underlying issue determine the decisionmaking process.\textsuperscript{263} Does the issue of classification have racial implications? Yes. The racial classification either is not permitted, or under subsection (b) would not be permitted unless or until there is a two-thirds legislative vote and the governor’s approval. For classifications that are not based on race, such as gender classifications, the classification is permitted unless or until it is challenged in the courts. Thus a racial classification must be approved by the legislature and the executive branch and then will be subject to a challenge in the courts. On the other hand, a gender classification is permitted without any legislative or executive approval and is simply subject to a court challenge. While we want racial classifications to be exceedingly difficult to uphold so that all improper and illegitimate uses of race can be “smoked out,” this additional step for Recno classifications does not seem to further the purpose of curtailing illegitimate racial classifications. Instead, this dichotomy illustrates the unequal political burden for Recno classifications, especially in a state like California, whose state constitutional jurisprudence mandates strict scrutiny for gender\textsuperscript{264} as well as racial classifications.

In \textit{Hunter}, the Supreme Court recognized that singling out fair housing measures that addressed race amounted to an explicit racial classification, stating there was an “explicitly racial classification treating racial housing matters differently from other racial and housing matters.”\textsuperscript{265} CRECNO
effectively singles out all racial classification and data collection matters from all nonracial classification and data collection matters. It disadvantages those who benefit from the monitoring of antidiscrimination laws by curtailing any effective monitoring. CRECNO would remove the means of redress for a racial problem and only a racial problem. Discrimination against women, for instance, would still be subject to redress because the state still is permitted to gather statistics on women, and women will have access to these statistics to prove their disparate impact claims or to provide circumstantial evidence to support their intentional discrimination claims. The effect for people of color is that the state is providing less protection to people of color than to white men and white women, thus isolating people along racial lines in the political process.

One can argue, however, that the crucial feature of Hunter was that the referendum applied only to the ordinance banning racial discrimination in housing, and might have been acceptable if it had simply addressed ordinances concerning racial discrimination in housing, whether such ordinances are banning or permitting racial discrimination. It was one-sided to the obvious disadvantage of racial minorities. But the essence of the political restructuring claim is an unfair burden on the political minority and thus an even broader ordinance—one affecting fair housing in general—would not satisfy Hunter because the increased scope does not change the analysis. As discussed above, the minorities are the ones who need the benefit of fair housing laws in general. Thus, making it more difficult to enact fair housing laws generally, in contrast to antidiscrimination laws in housing specifically, still operates to disproportionately disenfranchise minorities. The court implicitly recognized that the majority is not burdened by removing fairness legislation. The law disadvantaged those who would benefit from "laws barring racial, religious, or ancestral discriminations as against those who would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority."

Id. at 474-75.

266. Amar & Caminker, supra note 149, at 1026.
267. Id. at 1030 n.42.
estate market in their favor," 268 and "[t]he state obstructed equal housing by removing only racially fair housing prerogatives from the lawmaking procedure for all other housing matters." 269 Thus, if one applies the reasoning of the Hunter Court, CRECNO would constitute an explicit racial classification by treating racial and ethnic classification and data collection matters differently from all other classification and data collection matters.

G. Challenges to the Use of the Hunter Doctrine

The Hunter Doctrine has succeeded in striking down legislation in the Hunter and Seattle cases but was found inapplicable in two important and more recent cases, CEE 270 and Valeria, 271 as well as in Crawford 272 and James v. Valtierra. 273 CRECNO is distinguishable from the legislative enactments in each of those cases, and thus a Hunter Doctrine argument is more likely to prevail in this context. For instance, Crawford stands for the proposition that a "mere repeal" of stronger antidiscrimination laws is not actionable as long as the minimum level of protection required by the Fourteenth Amendment is maintained. 274 The Crawford court stated that "[t]he simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." 275 The legislation at issue in Crawford was determined to be a mere repeal of existing beneficial laws, which exceeded the requirements of the federal constitution such that their repeal did not bring California to violate the federal constitutional standards. 276 The Court has recognized that where the purpose of the repeal "is to disadvantage a racial minority, the repeal is unconstitutional for this reason." 277 Here, the repeal of beneficial legislation that was not required by the Federal Constitution would be Proposition 209, the constitutionality of which has been upheld by the Ninth

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268. Hunter, 393 U.S. at 391.
269. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 706 (9th Cir. 2001); see also Hunter, 393 U.S. at 390.
270. Coalition for Econ. Equity, 122 F.2d 692.
271. Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002).
274. See, e.g., Crawford, 458 U.S. at 556 (challenging a constitutional amendment that prohibited state courts from mandating bus and pupil assignment except as a remedy for a specific violation, which found that "'the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification').
275. Id. at 527.
276. Id. at 528.
277. Id. at 539 n.21 (citing Reitman v. Mulkey, 387 U.S. 369 (1967)).
Circuit. While antidiscrimination laws provide a remedy for identified patterns of racial discrimination, classification and reporting schemes are somewhat different because they constitute a necessary component of effective monitoring and enforcement of the level of protection guaranteed by the Fourteenth Amendment. Preventing the classifying, sorting, and even counting of minority representation figures in enumerated state operations erects a new barrier to equal treatment and thus is greater than a mere repeal. In addition, CRECNO imposes a burden on future beneficial legislation similar to the burden that was addressed in the Hunter, Seattle, and Romer cases. CRECNO, then, seeks further to chip away at mechanisms for redress that still exist in a state like post-Proposition 209 California, and additionally seeks to erode, by requiring a two-thirds legislature and the governor’s approval, any preferences that were not outlawed by Proposition 209 by preventing any classifying that could form the basis for a preference.

The Hunter Doctrine argument also was unsuccessful for the challengers of Proposition 209, for reasons distinguishable from the CRECNO situation. In CEE, the political structure argument failed because the court determined that the challenged legislation erected a barrier to preferences, and preferences constitute “extra,” not “equal,” protection. Analyzing the district court’s reasoning for striking down portions of Proposition 209, the Ninth Circuit recognized a burden on people of color because while before Proposition 209, white women and people of color could petition their local governments for preferential treatment in these areas, people of color and white women now must garner enough votes for another statewide initiative in order to resume receiving preferences. The court stated, “[w]e accept without questioning the district court’s findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities.” However, this argument was not sufficient to support a Hunter Doctrine claim because the court noted that:

[p]laintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are “equal” and “protection.” Impediments to preferential

278. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 2001).
279. See supra Part IV.A.
280. Proposition 54.
281. Coalition for Econ. Equity, 122 F.3d at 708.
282. Id. at 705.
treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.\textsuperscript{283}

The court determined that because the Constitution already imposes a burden against preferences, and the United States Supreme Court requires a compelling interest and narrow tailoring to justify such preferences, Proposition 209's obstruction of preferential treatment did not amount to a constitutional violation.\textsuperscript{284}

Based upon the CEE court's own reasoning, CRECNO classifies because it isolates and provides for differential treatment. Racial antidiscrimination laws in enumerated state operations are isolated from all other racial antidiscrimination laws because only a constitutional amendment can permit classifications in those areas. Racial antidiscrimination laws in the nonenumerated state operations are isolated from other racial antidiscrimination laws because classifications will be permitted only where two-thirds of the legislature finds a compelling interest, and the governor also specifically approves the classification.\textsuperscript{285}

CRECNO also violates the differential treatment prong of the CEE test in two ways. Because of the relationship of classifications to proof of actionable racial discrimination, CRECNO in effect provides different treatment for racial antidiscrimination laws addressing preference issues than it does for racial antidiscrimination laws addressing discrimination issues. In addition, the plain language of the text of CRECNO explicitly treats the racial antidiscrimination laws differently in enumerated and nonenumerated areas.\textsuperscript{286}

Furthermore, CRECNO imposes a political obstruction to equal treatment because it burdens members of insular minority groups within the majority who will enact the legislation, particularly those who would otherwise seek enforcement of the antidiscrimination, as opposed to antipreference, laws. The Seattle Court relied on the famous \textit{U.S. v. Carolene Products}\textsuperscript{287} footnote four, which states, "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically

\textsuperscript{283} Id. at 708.
\textsuperscript{284} Id. at 708–09.
\textsuperscript{285} Proposition 54.
\textsuperscript{286} See id. § 32(a)–(b).
\textsuperscript{287} 304 U.S. 144 (1938).
designed to overcome the ‘special condition’ of prejudice, the governmental action seriously ‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.’ Protection refers to the right to equal protection of the laws, which includes an equal right to participate in the democratic process of developing and changing those laws.

In Valeria, the court determined that the Hunter Doctrine did not apply because the equal right to participate was not curtailed for racial reasons, but rather for reasons of education policy, and thus there was no evidence of purposeful discrimination. Similarly, in James v. Valtierra, the Court determined that the classification was not racial, but rather economic, affecting low-income housing residents. As one commentator has noted, “[c]rucial to the Court’s analysis was its conclusion that public housing is not a peculiarly racial concern.” CRECNO would accomplish more than Valtierra’s change in low-income housing policies, more than Valeria’s change in educational policies, and more than CEE’s denial of extra protection to vigorously pursue antidiscrimination policies. CRECNO would operate as more than a mere failure to protect; it would distort the government process by requiring a supermajority of the legislature and executive approval, or a majority of the popular vote, in order to affect future classification legislation. In the meantime, CRECNO would prevent the monitoring of compliance with equal treatment laws and circumscribe the ability of potential litigants to provide proof of their claims. It is likely that CRECNO would deny some measure of equal protection to people of color in whatever state enacts it. Therefore, strict scrutiny should apply and the next step is to determine whether CRECNO is narrowly tailored to serve a compelling state interest.


289. Note that at least one district court has determined that that right is not violated by a state’s failure to “enforce its race-oriented policies as vigorously as its non-race-oriented policies.” U.S. v. City of Yonkers, 880 F. Supp. 212, 237 (S.D.N.Y. 1995). The Yonkers court noted that the State of New York “addressed racial issues in education in ways that were less than optimally beneficial to racial minorities. But it cannot be said that the State defendants distorted the governmental process by adopting measures making it more difficult to pursue a political path supportive of school desegregation.” Id. at 238.

290. 307 F.3d 1036 (9th Cir. 2002).

291. Id. at 1042; see also supra notes 196–208 and accompanying text.


293. Id. at 140–41.


295. See infra Part IV.H.2.
H. Will a Court Find That CRECNO Violates the Hunter Doctrine?

1. Will a Court Even Address the Issue?

From all of these authorities, we see that the key to successfully maintaining a Hunter Doctrine claim is that the state law must burden the individual’s right to equal treatment.

In *Hunter*, the lawmaking procedure made it more difficult for Nellie Hunter to obtain protection against unequal treatment in the housing market. In *Seattle*, the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education. In *Romer*, Colorado’s Amendment 2 denied homosexuals [sic] the ability to obtain protection against discrimination, thus classifying homosexuals not to further a proper legislative end but to make them unequal to everyone else.296

Similarly, CRECNO makes it more difficult for minorities to obtain protection through the enforcement of antidiscrimination laws. Changing whether statistics can be gathered by a particular state has a dramatic impact on the enforcement of antidiscrimination laws because, for potential victims of discrimination, the state’s inability to gather statistics will make it harder to obtain protection against unequal treatment. Those who seek such classifying in other state operations need either to get the voters to reverse themselves, or to get a two-thirds vote in the legislature and the governor’s approval. Both are higher hurdles for those seeking the benefits of antidiscrimination laws. Nevertheless, a court is likely to defer to the voters’ wishes in enacting CRECNO and leave the battle for another day.

2. If a Court Chooses to Address This Issue, Strict Scrutiny Should Apply

If CRECNO is determined to be racial in character in a way that disadvantages people of color in the political process and thus meets the requirements for establishing a Hunter Doctrine claim, then strict scrutiny will apply.297 Strict scrutiny involves a two-pronged test. The first prong is to demonstrate that the challenged legislation serves a compelling state interest, and the second prong is to establish that the means used to further that interest are narrowly tailored.298 So let us examine some of the potential compelling

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296. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 707–08 (9th Cir. 1997) (internal quotations omitted).
state interests that a state seeking to follow CRECNO may assert, which include remedying past discrimination, fostering diversity, and perhaps promoting color blindness.

Remedying past discrimination has been widely used to justify race-based classifications because the United States Supreme Court has made it clear that remedying past discrimination constitutes a compelling state interest. It is likely that CRECNO proponents would argue that CRECNO seeks to remedy past discrimination by preventing the continuation of preferential treatment policies that exclude individuals based on their race. More specifically, of course, the “preferential policies” included affirmative action, itself a remedy for past discrimination, where the “racial discrimination” was against members of the majority race.

The proponents of CRECNO may also assert that it seeks to remedy past discrimination by preventing future discrimination, including future preferences, and a court may determine that preventing future discrimination is a separate compelling state interest. In either case, CRECNO accomplishes this goal, on paper at least, by lessening the ability for state actors, again on paper at least, to discriminate based on any Recno characteristic. If the state actors do not know the race, ethnicity, or national origin of an applicant, then the state actor cannot discriminate on that basis. The same argument applies to preferences, which can be considered to be discrimination against the class of people who do not receive the benefit of the preference. Thus, in a post-CRECNO state, Recno preferences would be more difficult to implement, and this difficulty would help a state like California to comply with the mandates of its existing antipreference legislation.

The next question is whether the means chosen, preventing the classification of any individuals in almost every state operation, are narrowly tailored to serve any of these potentially compelling interests. CRECNO’s broad denial of the ability to classify in the three enumerated areas, as well as the higher hurdle erected for classifying in other state operations, is not narrowly tailored to serve any of these interests. First of all, the classification is but one step in the preference process, and while a preference cannot be granted without some sort of classification, classifying alone does not necessarily lead to impermissible preferences. Thus, the classification ban is over-inclusive because it prohibits more than is necessary in furthering the asserted compelling interest.

Second, CRECNO does not prevent the discrimination based on color that

300. See Proposition 54, § 32(a)–(c).
301. See id. § 32(b)–(c).
can occur when state actors meet applicants face to face. No data need be recorded, and the mental classification will be sufficient to permit discrimination to continue. Thus, the prohibition on classifying also is under-inclusive in preventing future discrimination based on color.

CRECNO supporters will suggest that its exception provides some narrow tailoring to address the apparent over- and under-inclusiveness in the legislation. Nevertheless, a court would likely find the exceptions to be insufficiently narrowly tailored. For instance, the Department of Fair Employment and Housing ("DFEH") exception seeks to provide a ten-year window for the DFEH to continue to collect and use Recono data. Unfortunately, the DFEH is not responsible for prosecuting discrimination cases and does not actually collect most of the data it uses. Thus, exempting the DFEH from CRECNO will have little practical effect on CRECNO's effectiveness in remedying past discrimination. In addition, to the extent that the ten-year time limit, the "sunset provision," is considered narrowly tailored, there is no way to tell when sunset is appropriate without any numbers on who is doing what, where, and in what numbers. Ten years is an arbitrary time frame, unsupported by any data, and thus will not suffice to constitute narrow tailoring.

Another potentially compelling interest that may be asserted is diversity, which the United States Supreme Court recently determined to be a sufficiently compelling state interest to justify race-based affirmative action programs. While it is not clear from the *Grutter v. Bollinger* decision whether this interest is compelling outside of the educational context, if it is, then the next question is the extent to which the prohibition is narrowly tailored to serve the interest in diversity. It seems that a prohibition on classifying is at cross-purposes with a goal of diversity because the progress towards that goal cannot be measured without the classification and recording of data. CRECNO supporters may argue that the prohibition against classifying fosters a more natural, rather than engineered, diversity—a more "true diversity"—but it is difficult to see how a refusal to acknowledge racial and ethnic differences actually can promote racial and ethnic diversity. The means do not seem to serve the interest in any concrete, let alone narrowly tailored, way.

CRECNO supporters may decide to take a different route altogether, and

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302. *Id.* § 32(e)–(e)(1).
303. *See supra* note 83 and accompanying text.
304. *See supra* note 88 and accompanying text.
306. *Id.*
seek to have the courts find "color blindness" to be a compelling state interest that satisfies the first prong of the strict scrutiny test. The color blindness route would be a bold step, and one that was rendered less likely, at least in the educational context, by the *Grutter* decision. Nevertheless, in the public employment and contracting areas, color blindness may be an appealing state interest, and one that a court could find to be sufficiently compelling. If so, the classification prohibitions are still not narrowly tailored to serve that interest for the simple reason that color is evident with or without anything but a mental classification. Race and ethnicity blindness often will be served by the prohibitions, as will national-origin blindness when language and accent are not at issue because most people cannot be certain that they "know" a person's race, ethnicity, or national origin based simply on one look. However, most people will be able to assign a color, with a high degree of accuracy, based on that same look. The interest in color blindness itself can never be served as long as people interact face to face with state actors, and thus CRECNO cannot be sufficiently narrowly tailored to serve the goal of color blindness.

V. NOTWITHSTANDING THE POTENTIAL FOURTEENTH AMENDMENT CONFLICT, ARE THE EMPLOYMENT PROVISIONS OF CRECNO PREEMPTED BY FEDERAL LAW?

The preemption doctrine arises from the United States Constitution, which states that the Constitution, "and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Thus, when Congress makes a law, "the federal law may supersede state laws and preempt state authority, because of the operation of the supremacy clause of Art. VI."
The primary obligation is that the states follow federal law if it applies to preempt state law. There are three types of preemption: express, field, and obstacle or conflict. The general rule is that "[f]ederal law may pre-empt [sic] state authority, and supersede state law to the extent that the federal law expressly repeals the state law, the state law contradicts a valid rule of federal

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307. *Id.* at 343 ("In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

308. U.S. CONST. art. VI, cl. 2; see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).


310. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000) (questioning the usefulness of these categories and criticizing the general notion of obstacle preemption when it is addressed without reference to a particular federal statute).
law, whether it be an express rule or an implied rule,” 311 or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”312 Field preemption does not apply in the employment areas addressed by CRECNO, and thus this portion of the Article will discuss express and obstacle preemption.

A. Express Preemption: Requiring or Permitting Unlawful Employment Practices

Recently, the preemption argument was raised in the context of another California state proposition. In 2001, the Ninth Circuit addressed the issue of whether Proposition 209 was preempted by federal civil rights laws, specifically the 1964 Civil Rights Act.313 Title VII of that Act contains a specific provision on preemption, which provides that preemption will occur only for “any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”314

In the CEE case, opponents of Proposition 209 argued that affirmative action was not only permitted, but also encouraged by Title VII, and thus that the Proposition conflicted with federal law.315 The Ninth Circuit determined that Proposition 209 did not actually conflict with Title VII on the employment issue, and therefore was not preempted by federal law, because although Title VII permitted affirmative action, Title VII did not require affirmative action, and Title VII did not require the granting of any preferential treatment based on race.316 Moreover, the court found that Proposition 209 did not “remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII. Quite the contrary, ‘[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”317 The plain language of Proposition 209 purported to prohibit, among other things, the very discrimination that Congress sought to prevent when enacting Title VII.

At first blush, it seems that a similar analysis would apply to CRECNO, and that CRECNO would not be preempted by this explicit Title VII preemption provision because on its face, CRECNO does not require the

311. Id. at 251.
312. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
314. Coalition for Econ. Equity, 122 F.3d at 708.
315. Id. at 710.
316. Id.
performance of any act that would be an unlawful employment practice under Title VII. However, the more difficult question is whether CRECNO should succumb to preemption on the grounds that it permits unlawful employment practices to occur.

The CEE court did not specifically address whether Proposition 209 permitted unlawful employment practices, and there are two likely reasons for this. First, the issue of permitting unlawful practices probably was not addressed simply because the explicit terms of the proposition prohibited discrimination in public employment. Thus, its terms could not be interpreted to permit discriminatory employment practices. Second, the issue in that litigation was framed narrowly enough to make this argument largely irrelevant. The court stated, "Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment, but as an impediment to receiving preferential treatment." Because Title VII itself was deemed to be an impediment to preferential treatment for the racial majority, Proposition 209's broader ban on preferential treatment based on race did not implicate the issue of permitting unlawful employment practices. If the issue had been framed as an impediment to protection against unequal treatment, then the argument would become one about equal protection, and what Proposition 209 permits may have been relevant to the court's analysis.

One can argue that the mere absence of enforcement mechanisms through the compilation of statistical data does not actually permit unlawful employment practices to occur in the State of California, just as the abolition of affirmative action under Proposition 209 does not necessarily permit unlawful discrimination. However, there is a strong rebuttal to this argument—that CRECNO would permit acts that constitute unlawful employment practices because CRECNO's prohibition on recordkeeping would make it substantially more difficult for plaintiffs to successfully challenge unlawful employment practices, even though CRECNO does not go so far as to authorize such unlawful practices. The legislative history of Title VII recognizes the importance of recordkeeping, stating:

Requirements for the keeping of records are a customary and necessary part of a regulatory statute. They are particularly essential in Title VII because whether or not a certain action is discriminatory will turn on the motives of the respondent, which will usually be best

318. Id.
319. Proposition 209, § 31(a).
320. Coalition for Econ. Equity, 122 F.3d at 708.
321. Id.
evidenced by this pattern of conduct on similar occasions. The provisions of section 709 (c) have been carefully drawn to prevent the imposition of unreasonable burdens on business and there are more than the customary safeguards against arbitrary action by the Commission.322

Establishing a prima facie case of disparate impact employment discrimination requires that the plaintiff “prove circumstances raising an inference of discriminatory impact, plus the discriminatory impact at issue.”323 The plaintiff can make this showing “usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are ‘in operation . . . functionally equivalent to intentional discrimination.”324 Thus, without the statistical evidence, the plaintiffs will be forced to prove intentional discrimination, and disparate impact will no longer be a route available to them. Because proof of a disparate impact necessarily requires an assessment of the numbers of people within various racial or ethnic categories, CRECNO prevents proof of disparate impact claims.

One way in which CRECNO would permit unlawful practices will arise when the DFEH sunset provision takes effect. The DFEH exemption in subsection (e) allows a state agency like California’s DFEH to continue classifying and recording Recno information until the exemption expires.325 If there is no legislative extension, in ten years DFEH will be subject to CRECNO. Subjecting DFEH to CRECNO would permit unlawful employment practices to occur because without any racial classification, inquiry, or collection of data, no disparate impact employment discrimination charges will be filed against private employers within the state by the DFEH. Moreover, private litigants will no longer be able to use data collected by DFEH, and thus will effectively be foreclosed from stating a prima facie case of employment discrimination. After the sunset provision takes effect, any allegation that the employment practices of any private employer within the State of California are in violation of Title VII would lack the necessary

322. LEGISLATIVE HISTORY OF TITLES VII & XI OF CIVIL RIGHTS ACT OF 1964, at 3045 (1968) [hereinafter LEGISLATIVE HISTORY] (noted in the floor manager’s statement of Senators Clark and Case).
325. Proposition 54 § 32(e)(1).
statistical record to establish the requisite reasonable cause to justify filing a charge against that employer for an unlawful employment practice. Without any monitoring or enforcement of the antidiscrimination laws, acts that constitute unlawful employment discrimination by private employers will be permitted to resume and continue, and thus will violate the specific preemption provision of Title VII.

CRECNO can be distinguished from Proposition 209 on one other ground: It does not reaffirm existing civil rights and antidiscrimination laws along with its prohibition of classifications in state employment, and in effect discourages the use of a crucial mechanism for monitoring and enforcing those antidiscrimination laws. While it did not disavow antidiscrimination laws, Proposition 209 abolished a mechanism of redress for discrimination, specifically affirmative action and other preferential policies. CRECNO, in contrast, abolishes a mechanism for monitoring behavior. In effect, CRECNO provides that a state cannot check to see if it might be violating federal antidiscrimination laws.

B. Obstacle Preemption: Conflicts With the Policies and Underlying Purposes of the Federal Law

There is another general preemption provision that applies to the entire 1964 Civil Rights Act, which states:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

CRECNO appears to conflict with the purposes and policies underlying Title VII. The Declaration of Policy of the 1964 Civil Rights Act provides that “it is the national policy to protect the right of the individual to be free from such discrimination,” and that the purposes of these fair employment laws are “to ensure the complete and full enjoyment by all persons of the rights, privileges and immunities secured and protected by the Constitution of the United States.” These rights include the right to equal protection of the

326. See generally supra notes 96-98 and accompanying text.
laws, which is meaningless without equal enforcement of the laws in the antidiscrimination context. Title VII recognizes the need for enforcement information and specifically provides for the gathering of employment records by requiring that, unless exempted, every employer:

subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.  

This provision expressly precludes any claim of field preemption (the second of the three, and the one we will not address here), and explains the obstacle preemption in terms of inconsistency with purposes or provisions of the Civil Rights Act.  

The first inquiry is whether there is an actual conflict with a purpose or provision of Title VII. If there is a conflict, or no information, then courts would look to Equal Employment Opportunity Commission (“EEOC”) guidelines to help interpret whether a conflict exists. The CEE court determined that Proposition 209 was not “inconsistent with any purpose or provision” of the 1964 Civil Rights Act, reasoning that the only statement in Title VII as to preferences states that such preferences are not required, and thus the two provisions are “entirely consistent.” Accordingly, the court found that under the general preemption provision of the Civil Rights Act, Title VII did not preempt Proposition 209. Nevertheless, the Ninth Circuit determined that there was no need to address the guidelines because there was no actual conflict, and thus no need for any further consideration.

330. Id.
331. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 710 (9th Cir. 1997).
332. Id.
333. Id. The district court decision gave a more detailed analysis of this issue, which is worth exploring here. The district court explained that in order to establish a conflict with the purpose of the Civil Rights Act, one need not establish that affirmative action was mandated by the Act, but rather “either that (1) the discretion to utilize voluntary affirmative action is necessary to achieve the objectives of Congress or (2) such affirmative action is a method Congress intended to preserve under Title VII is sufficient to establish that the prohibition of affirmative action would interfere with Congressional intent.” Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1513 (N.D. Cal. 1996).
334. Coalition for Econ. Equity, 946 F. Supp. at 1513 (discussing more comprehensively the contrary argument). The district court noted that Title VII does not address whether Congress
Here there is an actual conflict on the issue of the classifying and gathering of data, and thus there is no need to look to the guidelines. Section 709(c) of the 1964 Civil Rights Act specifically mandates the gathering of data, and thus a purpose to gather data is clear from the plain language of the Civil Rights Act. CRECNO would eliminate this data gathering.

Employers are exempt from this recordkeeping requirement in states that have fair employment laws, but the EEOC has discretion to require employers to supplement whatever records are kept pursuant to the state law. The EEOC has the discretion to order compliance with such reporting requirements in the form of requiring additional notations. The ability to exercise this discretion to require additional notations relies upon an implicit recognition that the existence of such fair employment practice laws means that some sort of recordkeeping either expressly is required under those laws or implicitly is required to comply later with reporting requirements. For instance, if data must be reported once every ten years, or even upon request, the state agency is implicitly required to keep records so the information will be there if and when it is requested. That recordkeeping requirement may be explicitly stated in the statute, as in California’s Fair Employment and Housing Act, or may be implicit, where employers are simply required to produce certain information when requested, and thus most employers gather the information as a matter of course so that the data is intended to preserve voluntary affirmative action programs. Because the plain language of the statute was silent on the issue, the district court turned to the EEOC’s interpretation of the statute and noted that the guidelines “reveal that Congress intended to safeguard the discretion to employ voluntary race- and gender-conscious affirmative action as a means to allow ‘flexibility in modifying employment systems to comport with the purposes of Title VII.’” Id. at 1514 (quoting 29 C.F.R. § 1608.1(c) (1964)).

336. This section provides:

with respect to matters occurring in any state or political subdivision thereof which has a fair employment practice law during any such period in which such employer, employment agency, labor organization, or joint labor-management committee is subject to such law, except that the Commission may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the state or local laws and the provisions of this title.

Id. § 709(d).
337. Id.
338. One Senator explained this provision as follows: “The substitute language provides that where records on employment practices are required by State laws or Federal Executive orders, any additional information required by this law may be added to what is already being kept.” LEGISLATIVE HISTORY, supra note 324, at 3031 (statement by House Manager on Senate Substitute).
available if and when it is requested.

The purpose behind the recordkeeping exemption was to avoid interfering with state sovereignty when the states were adequately promoting and enforcing antidiscrimination laws and to avoid the undue hardship and the burden of duplicate data collection. In a post-CRECNO state, while discrimination still will be outlawed, state laws will be ineffective in this area, and fewer discriminators will be prosecuted because the pool of available proof will shrink considerably as soon as CRECNO takes effect for a state agency like California's DFEH.

In a post-CRECNO state, state employers will be prevented from gathering this statistical evidence by constitutional mandate, despite the continued existence of fair employment laws in the state. The state instrumentality employers also are subject to the mandates of Title VII, and thus the degree of "additional notations" that the EEOC is likely to require will be significant and would result in a virtual suspension of CRECNO for state employers if they are going to comply with the policies and purposes of Title VII. In addition, when the DFEH exemption expires, that agency will be prohibited from gathering Recno information from private employers within the state. Those private employers still will be subject to Title VII, and thus will have to provide statistical information in the form of "additional notations" when required by the EEOC. This new reactionary system of recordkeeping is likely to lead to a decrease in the accuracy of Recno data. Thus, to the extent that a court determines that CRECNO is not inconsistent

340. Senator Clark remarked:

It is important to note that title VII is so drafted that the states and the Federal Government can work together. When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with title VII. The Federal Commission can agree under title VII not to bring any suits in cases in a particular State or locality where the State or locality has adequate power under its own laws or ordinances to carry out the purposes of the act and it is effectively exercising that power.

LEGISLATIVE HISTORY, supra note 324, at 3345 (Senator Clark's remarks). Senator Clark's remarks continued with:

So, I take it that title VII meshes nicely, logically, and coherently with the State and city legislation already in existence in a number of the States and a number of our cities, small as well as large. The Federal Government and the State governments could cooperate effectively and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted.

Id.

341. LEGISLATIVE HISTORY, supra note 324, at 1018, 3056.

with any express provisions of Title VII, CRECNO should still be found to be inconsistent with the purposes and underlying policies of the Title VII data-collection provisions.

Of course, it also is likely that a court will decline to decide the preemption issue as "unripe" until the EEOC fails to order recordkeeping. A court is likely to try to avoid a decision on preemption by giving effect to CRECNO and to Title VII. Unless the EEOC orders data and a state agency refuses to comply, or the EEOC fails to order additional notations and a state citizen files suit, this controversy may not be ripe for adjudication. When a judicial decision becomes appropriate or necessary, however, the court should find preemption. In the meantime, uncertainty will reign because this inconsistency suggests that the portion of CRECNO that applies to state instrumentality employment and agencies—like the DFEH's monitoring of private employment within the state—is preempted by Title VII.

C. Does CRECNO Conflict With Title VI's Funding Provisions?

We must also consider whether CRECNO conflicts with Title VI of the Civil Rights Act of 1964, which governs requirements for federal funding.\(^\text{343}\)\(^\text{344}\) No such conflict was found with Proposition 209.\(^\text{344}\) In fact, even the district court in \textit{CEE} determined that there was no actual conflict between Title VI and Proposition 209.\(^\text{345}\) Unlike the federal law conflict exemption that saved portions of Proposition 209 from conflicting with, and being preempted by, Title VI, the almost identical provision will not save CRECNO from preemption. On the issue of Proposition 209, the district court reasoned that even though Title VI sometimes does require affirmative action, a failure to practice affirmative action when required by Title VI would result in a loss of federal funds.\(^\text{346}\) Any such failure triggers subsection (e) of Proposition 209, which mandates that that compliance be excused where compliance results in a loss of federal funding.\(^\text{347}\) Thus, the district court determined that plaintiffs failed to meet their burden on the Title VI preemption claim.\(^\text{348}\) Similarly, subsection (i) of CRECNO is triggered to prevent the prohibition of action that must be taken to avoid a loss of federal funding.\(^\text{349}\)

\(^{344}\) Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 n.19 (9th Cir. 1997).
\(^{346}\) Id. at 1518.
\(^{347}\) CAL. CONST. art. 1, § 31(e).
\(^{348}\) \textit{Coalition for Econ. Equity}, 946 F. Supp. at 1519, \textit{pet. reh'g denied}, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997) (Plaintiffs did not allege a conflict with Title VI on appeal).
\(^{349}\) Proposition 54 § 32(i).
However, CRECNO also contains an additional clause, a limitation to avoid prohibiting action that must be taken in order to comply with federal law.\textsuperscript{350} Federal law does not require the gathering of these statistics in states with fair housing laws, and thus, as long as California has fair housing laws, the state is not required to gather the information but merely to provide supplemental information as needed.\textsuperscript{351} A straightforward interpretation of the plain language of CRECNO suggests that the subsection (i) limitation will NOT apply to anything but the need to supplement as requested by the EEOC.\textsuperscript{352} This means that state agencies will not classify and gather the data until the EEOC demands or requests the information. Only a failure to respond to the EEOC request can trigger a loss of federal funding, which in turn activates the subsection (i) exemptions. At that point, the historical record of data will be interrupted, and some information will not be recoverable after the fact. The interruption of data postpones effective enforcement of antidiscrimination laws, particularly for disparate impact claims, and therefore is likely to violate the underlying policies, though not the express provisions, of Title VI.

Willful blindness to statistical measures of the actual enjoyment of the rights guaranteed by the Constitution denies the full measure of equal protection to those who most need the benefit of the antidiscrimination laws such as Title VI and Title VII. CRECNO is inconsistent with the policy of protecting individuals from discrimination and the asserted purpose of ensuring the complete and full enjoyment of the privileges and immunities of the Constitution. Thus, it is likely that should the controversy become ripe, a court would find that the employment provisions of CRECNO are preempted by Title VI and Title VII of the 1964 Civil Rights Act.

\textbf{VI. CONCLUSION}

As currently drafted, CRECNO is neither strong legislation nor appropriate political policy. Some of the definitions are ambiguous, and the description of the procedures for approving classifications is misleading. The exceptions are incomplete, and in some instances illogical or wholly ineffectual. Moreover, the employment provisions likely are preempted by Titles VI and VII of the 1964 Civil Rights Act.

The most troubling aspect of CRECNO is the substance of the measure, which requires the state to ignore the continuing significance of race in the most important of state operations. CRECNO violates the Hunter Doctrine by

\textsuperscript{350} \textit{Id.}
\textsuperscript{351} See \textit{supra} Part V.A.
\textsuperscript{352} Proposition 54 § 32(i).
imposing an unfair political process burden on people of color who seek to enforce their civil rights through either the legislative or judicial process. While CRECNO does not repeal existing antidiscrimination laws, it does render the protection of those laws ineffective by removing the primary mechanism of proof in racial and ethnic discrimination cases—the data on the races and ethnicities of the alleged victims—as well as on the available pools of candidates, applicants, and employees. As the database of racial and ethnic identities diminishes, so would the enforceability of civil rights protections under existing jurisprudence. Any decrease in the enforcement of racial fairness legislation has a disproportionate impact on those most likely to be treated unfairly because of their race. Therefore, regardless of whether CRECNO is determined to be a race-based measure, due to the racial character of its subject matter, or a race-neutral measure that uses the subject of race to determine which political decisionmaking process will apply, it is unlikely that CRECNO can serve a compelling governmental interest in a way sufficiently narrowly tailored to survive strict scrutiny.

In an antidiscrimination case, counting race is all the plaintiff has to prove her claim. Covering race with a cloak does not make it go away, it simply means that we cannot see it and thus cannot count it. If the state cannot count race, then true victims of civil rights violations cannot obtain justice, and the colorblind paradigm will not be achieved.