UNEQUAL PROTECTION AND THE RACIAL PRIVACY INITIATIVE

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Advocates of colorblindness doctrine argue that the time has come to look beyond racial categories. In October 2003, Californians voted against an initiative premised on the idea that eliminating the state's power to collect racial data would further the advancement of equality. This Comment proposes that even if the initiative is recast in revised form and wins a majority of California's popular vote, it may not withstand a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment.

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INTRODUCTION

Consider the following three hypothetical scenarios:

1. In Los Angeles, law enforcement officers ramp up traffic stops of individuals of Middle Eastern descent. Over the course of one year, the stops increase such that these individuals are actually stopped at a rate fifteen times greater than that of any other group. A group of plaintiffs seeks to enjoin the Los Angeles Police Department from its practice of racial profiling but cannot gather the necessary data to prove its case because law enforcement agencies and other state actors—including the California Department of Justice, which used to mandate the reporting of such information—are prohibited from collecting or "classifying" individuals "by race, ethnicity, color, or national origin."[1] Unable to produce compelling data based on a large sample size, the plaintiffs rely on anecdotal evidence and lose their case.
2. A professor at the UCLA School of Public Health plans to research the effects and diagnosis rates of sickle cell anemia within different racial groups but finds she cannot because she is prohibited by the state from "classifying" participants in her study "by race, ethnicity, color, or national origin."
3. The African American population at the University of California, Berkeley has been shrinking rapidly over the past eight years. Students complain that, on average, there are only five African American students in large classes of 500 students; only eight years ago, there were, on average, forty African American students in such classes. A legal advocacy organization lobbies the University of California to amend its admissions policies and initiate targeted recruiting efforts in predominantly African American communities. Because the California Constitution prohibits the university from "classifying" its student population "by race, ethnicity, color, or national origin," the university lacks the numbers required to substantiate the allegations of the organization.

1. Proposition 54: Classification by Race, Ethnicity, Color, or National Origin § 32(a) (2003) [hereinafter CRECNO], *in* STATE OF CALIFORNIA, CALIFORNIA SPECIAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 45 (2003) [hereinafter INFORMATION GUIDE], *available at* http://vote2003.ss.ca.gov/voterguide/english.pdf. This proposition proposed amending the California Constitution by adding section 32 to Article I. Throughout this Comment, I will refer to the proposed amendment by this section designation.

> Without knowing the size of the African American student population, the university feels it has no basis for the proposed changes and cannot justify taking any action.

These hypothetical situations present only a few examples of a host of data collection efforts that would have been prohibited by the "Classification by Race, Ethnicity, Color, or National Origin Initiative" (CRECNO),[2] more widely known as the "Racial Privacy Initiative" (RPI).[3] CRECNO appeared as Proposition 54 on the October 7, 2003 California ballot and was defeated with 64 percent of the vote. Had CRECNO passed, it would have amended Article I of the California Constitution to ban the state and its entities from "classify[ing] any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting or public employment"[4] unless the classification fell under one of the initiative's exemptions. The initiative exempted "classification of medical research subjects and patients,"[5] limited classifications by law enforcement, and provided that Department of Fair Employment and Housing (DFEH) "classifications in place as of March 5, 2002" would expire in ten years.[6]

CRECNO supporters maintained that by prohibiting the state from collecting and using race data, the initiative would "end government's preferential treatment based on race."[7] Supporters argued that the initiative would "signal America's first step toward a colorblind society."[8] California would be just the beginning: CRECNO proponents also hoped ultimately to effect change at the federal level.[9] In interviews subsequent to the October 2003 election,

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2. INFORMATION GUIDE, *supra* note 1, at 40–43, 45.

3. Ward Connerly, the drafter of Proposition 54, sought to name the measure the "Racial Privacy Initiative," but California Attorney General Bill Lockyer refused to allow this name to appear on the ballot. Thus, the official name of the initiative is the "Classification by Race, Ethnicity, Color, or National Origin Initiative" (CRECNO). In an interesting twist of fate, Dan Lungren, the Republican State Attorney General, refused opposition efforts in 1996 to prevent Connerly from naming Proposition 209 the "Civil Rights Initiative." *See* Stephen Magagnini, *How Foes Defeated Race Data Initiative*, SACRAMENTO BEE, Oct. 9, 2003, at A3.

4. CRECNO, *supra* note 1, § 32(a).

5. *Id.* § 32(f).

6. *Id.* § 32(e).

7. Racial Privacy Initiative, Prop 54/RPI's Mission Statement, *at* http://www.racialprivacy.org.

8. *Id.*

9. *See Proposition 54: Impacts on Health, Law Enforcement, Education, and Human Rights of Californians: Joint Hearing on Proposition 54 Before the Senate Judiciary Comm. and the Assembly Judiciary Comm.*, 2003–2004 Reg. Sess. 46 (Cal. 2003) [hereinafter *Joint Hearing*] (statement of Kevin Nguyen, former Executive Director, Yes on Proposition 54). Mr. Nguyen stated:

> The proponents of the initiative hope[ ] that one day we would not have to segregate, classify, sort people along racial lines and that we need to initiate a transition towards that color-blind future and so at some point both state and local government as well as the federal government would have to transition to a more precise and constructive way to tally

Ward Connerly, the drafter of Proposition 54, stated that he intends to propose a similar measure for the ballot in 2006 after rewriting the language to address the health concerns that the initiative raised in the 2003 Special Election.[10]

This Comment proposes that CRECNO, even if amended to include a broader medical exemption, would not pass muster under the Equal Protection Clause of the Fourteenth Amendment[11] of the United States Constitution. A thorough analysis of CRECNO and its exemptions, particularly the kinds of data that fall within and outside the exemptions, strongly suggests that passage of the initiative would thwart enforcement of antidiscrimination laws and would place insurmountable burdens on minorities seeking to enact legislation in their interest.

Part I analyzes CRECNO's defeat in a state that passed Proposition 187,[12] Proposition 209,[13] and Proposition 227[14] and discusses how it might be raised in new form. Part II provides an overview of CRECNO and its exemptions. Part III explains why a future revised CRECNO might still contain grave

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> people, to sort and organize people[;] . . . the five basic categories don't serve us well. And so hopefully at some point we'll be able to challenge the thinking at the federal level about how those categories are implemented and how they are a relic of our past.

Id.

10. *See* Katherine Corcoran, *Measure to Ban Collection of Race Data Falters*, SAN JOSE MERCURY NEWS, Oct. 8, 2003, at 12A ("'We have started to get people talking about the whole issue of racial categories and whether they're legitimate,' said Connerly, adding that he may try a second initiative in 2006. 'We're going to come after it again.'"); *see also* Haya El Nasser, *Voters Shoot Down Proposition on Collecting Racial Information*, USA TODAY, Oct. 9, 2003, at 9A ("Connerly said Wednesday that he was not giving up. He plans to push to get a similar measure on the ballot in 2006 . . . . He said the initiative included exemptions for medical research, something that he plans to make clearer the next time around. 'We'll craft language that reassures Western civilization that nobody's life is at risk,' he said."). More recently, Connerly pushed for the inclusion of a "multiracial" check box on the University of California undergraduate student application, arguing that the "system of allowing students to check one or more racial or ethnic identity boxes on the admissions application is 'the ultimate definition of racism' because it does not allow them to describe themselves as multiracial." Connerly's proposal was defeated by the University of California Regents in a 12-to-1 vote. *See* Rebecca Trounson, *UC Panel Rejects 'Multiracial' Box for Undergrad Application Form*, L.A. TIMES, Nov. 18, 2004, at B6.

11. U.S. CONST. amend. XIV, § 1.

12. Proposition 187, the so-called "Save Our State" Initiative, proposed to deny many state services to undocumented immigrants, including all public education, public social services, and all nonemergency health care. It passed on November 8, 1994 with 59 percent of the vote. *See California Judge Limits Reach of Illegal-Immigrant Initiative*, N.Y. TIMES, Feb. 10, 1995, at A20.

13. On November 5, 1996, California voters enacted Proposition 209, the "California Civil Rights Initiative," codified as CAL. CONST. art. I, § 31, which banned racial preferences by state and local government actors, with 54 percent of the vote. *See* Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

14. In November 1998, 61 percent of California voters enacted Proposition 227, the "English for the Children" initiative, codified as CAL. EDUC. CODE § 300–311 (West 2002), which ended bilingual education, with some exceptions, in public schools. *See* Christopher Heredia, *Literacy Programs Help Immigrants Tutor Their Kids*, S.F. CHRON., May 4, 1999, at A17.

constitutional deficiencies based on equal protection grounds. Finally, Part IV discusses how this initiative fits into the larger discourse of colorblindness.

I. THE DEFEAT OF PROPOSITION 54

In the 1990s, the public debate about immigration and affirmative action policy escalated amidst conditions of rising unemployment and economic downturn.[15] In California, these issues were reflected in voter-enacted initiatives, particularly Propositions 187, 209, and 227.[16] Given the recent passage of these initiatives, often viewed as "anti-immigrant" or "anti-minority," it might seem surprising that Proposition 54 was defeated in California with 64 percent of the vote.[17] This result, however, is not surprising when one considers the vigor of the "No on 54" campaign and the current legal climate.

The "No on 54" campaign was unique in that it enabled unions, medical doctors, law enforcement, public university professors, K–12 teachers, students, and many other groups to organize and speak out against Proposition 54 as a united coalition.[18] Campaign advertisements featured an unexpected conservative figure, the former Surgeon General, Dr. C. Everett Koop, who informed Californians that Proposition 54 would be bad for their health.[19] As Jay Ziegler, codirector of the "No on 54" campaign, commented, "Nobody thinks you get better advice from your doctor when [she has] less information on you."[20] The campaign's concentration on the medical exemption enabled campaigners to relay a quick and clear message about the dangers of Proposition 54 without evoking the more controversial themes of colorblindness and racial disparity, which had prevailed in the anti-Proposition 209 campaign. In this vein, Ziegler added:

> We really learned some important lessons from 209 that we applied this time around: You can't make it personal or make it look like it's a negative campaign. . . . We ran a much simpler campaign, but we

15. *See* Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, *in* COLOR LINES 53, 53 (John David Skrentny ed., 2001).

16. *See supra* notes 12–14 and accompanying text.

17. *See* Cal. Sec'y of State, Vote 2003 Map, Proposition 54, *at* http://vote2003.ss.ca.gov/Returns/prop/mapR054.htm (illustrating the vote breakdown of California by county with 100 percent of precincts reporting); *see also The Recall Election Times' Exit Poll Results*, L.A. TIMES, Oct. 9, 2003, at A26.

18. *See* Coalition for an Informed Cal., Opposition to Proposition 54 (the Information Ban), *at* http://www.informedcalifornia.org/endorsers.asp (last visited Aug. 25, 2003) (web site now offline).

19. *See* Carrie Sturrock, *Voters Reject Race Tracking Ban on Prop. 54*, CONTRA COSTA TIMES, Oct. 8, 2003, at 4.

20. Magagnini, *supra* note 3.

> had enough on the impacts on health care, civil rights and law enforcement to make everybody—all the coalition partners—feel they had a stake in this.[21]

The "No on 54" campaign was also able to raise $9.3 million, completely overshadowing the $214,000 that Connerly spent.[22] Moreover, former Governor Gray Davis and four of the five major gubernatorial candidates publicly opposed Proposition 54.[23] Even the coauthor of Proposition 209, Thomas Wood, opposed Proposition 54 because he believed it would interfere with the enforcement of Proposition 209.[24] Finally, community outreach, education, and even advertising in culturally based newspapers galvanized minority communities. Some media focused on this organizing, calling the defeat of Proposition 54 "a win for grass-roots politics."[25]

In contrast, the pro-54 campaign was lacking in many ways. First, donors to the campaign were unnamed. On September 3, 2003, the Fair Political Practices Commission (FPPC) sued Ward Connerly and his American Civil Rights Coalition (ACRC), seeking injunctive relief and damages, and demanding disclosure of funding sources for Proposition 54.[26] The FPPC charged that Connerly intentionally funneled donations for Proposition 54 through the ACRC to avoid complying with California disclosure laws, but the Sacramento Superior Court in which the action was brought denied the FPPC's motion for a temporary restraining order.[27] Although this was a victory for Connerly in court, in the public eye it might have led to decreased accountability and distrust of the initiative. In addition, 91.2 percent (114 out of 125) of Proposition 54's endorsements came from named individuals, while the remaining 8.8 percent (11 out of 125) included minor political organizations, one state assemblyman, one state senator, and a private company.[28] In contrast, the opposition to Proposition 54, the Coalition

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21. *Id.*

22. *Id.*

23. Lieutenant Governor Cruz Bustamante, Arnold Schwarzenegger, Arianna Huffington, and Peter Camejo publicly opposed Proposition 54. Tom McClintock was the only major candidate to support Proposition 54. *See* Cecilia M. Vega, *Field Poll Shows Proposition 54 Losing Support*, PRESS DEMOCRAT (Santa Rosa), Oct. 4, 2003, at A4.

24. *See* Tanya Schevitz, *Prop. 54 Defeated Soundly*, S.F. CHRON., Oct. 8, 2003, at A12.

25. Leslie Wolf Branscomb, *Defeat of Prop. 54 is Called Win for Grass-Roots Politics*, SAN DIEGO UNION-TRIB., Oct. 8, 2003, at A11.

26. *See* Rebecca Trounson, *Disclosure Request Is Denied*, L.A. TIMES, Sept. 20, 2003, at A20.

27. *See id.*; *see also* Appellant's Opening Brief at 1, FPPC v. Am. Civil Rights Coalition, Inc., 18 Cal. Rptr. 3d 157 (Ct. App. 2004) (No. C045570); *see also* Mitchell Landsberg, *State Sues Backers of Prop. 54*, L.A. TIMES, Sept. 4, 2003, at B1.

28. *See* Racial Privacy Initiative, Endorsements, *at* http://www.racialprivacy.org/content/endorsements.php.

for an Informed California, obtained endorsements from over one hundred well-known organizations, over fifty public officials, thirty-nine health professionals, and seventy-five other named individuals.[29] Furthermore, the Proposition 54 campaign was often described as Connerly's personal campaign on behalf of persons of mixed race, like himself, who could not check any one box on government forms. Although Connerly's frustration over checking boxes carries an important sentiment, it did not appear to sway a widespread audience.[30]

While the "No on 54" campaign had a more visible impact on the Proposition 54 election result, the legal climate might also have shaped public reaction to this "colorblind" initiative. First and foremost, the Supreme Court's widely publicized decision in *Grutter v. Bollinger*[31] recognized that race *can* matter. The Court held that educational diversity is a compelling interest under the Fourteenth Amendment and that a university may therefore take race into account in the admissions process as long as it does not rely on quotas. In contrast, the major affirmative action decision that preceded the passage of Proposition 209 was *Hopwood v. Texas*.[32] In *Hopwood*, the Fifth Circuit held that diversity was not a compelling interest and struck down the University of Texas Law School's policy of using race as a factor in admissions.[33] Thus, the Supreme Court's recognition that the Constitution does not demand total colorblindness perhaps contributed to the wider public distaste for Proposition 54. In addition, the political climate within California had changed. For example, in July 1995, the University of California Regents (UC Regents) approved Special Policy 1 (SP-1), which prohibited the use of race in university admissions.[34]

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29. *See* Coalition for an Informed Cal., *supra* note 18, *at* http://www.defeat54.org/endorsers.asp (last visited Aug. 25, 2003) (web site now offline).

30. *See* Katherine Corcoran, *Connerly Will Resubmit Race Initiative Later*, CONTRA COSTA TIMES, Oct. 9, 2003, at 4 ("[T]here is no groundswell so far among mixed-race people to get rid of the boxes. Voters who said they get the question 'what are you?' all the time, sometimes find it annoying—but also necessary from a public policy standpoint.").

31. 539 U.S. 306 (2003) (holding that the University of Michigan's law school admissions program, which treated race as a "plus factor," was narrowly tailored to serve its compelling interest in maintaining a diverse student body). While some cynics may argue that the public is not aware of these academic Supreme Court decisions, *Grutter* was heavily discussed and showcased in the media. *See* Vikram David Amar, *The 2002–03 Supreme Court Term in Review: Landmark Cases Stress the Theme of Equality*, FINDLAW'S LEGAL COMMENTARY, July 11, 2003, *at* http://writ.findlaw.com/amar/20030711.html ("The oral argument was the only domestic news story that shared *New York Times* top headline space with the War in Iraq. It was also only the second oral argument in history as to which, shortly after it concluded, the Court made available an audio version for the public.").

32. 78 F.3d 932 (5th Cir. 1996).

33. *Id.* at 945, 962 ("[W]e hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body . . . .").

34. *See* Kit Lively, *Preferences Abolished*, CHRON. HIGHER EDUC., July 28, 1995, at A26. SP-1 went into effect for graduate and professional schools as of January 1, 1997 and for the undergraduate level as of January 1, 1998. *See id.*

Proposition 209 passed in the November 1996 election. In May 2001, however, the UC Regents rescinded SP-1 by approving RE-28[35] and implemented a policy of "comprehensive review,"[36] possibly portending the defeat of the colorblind CRECNO initiative.

Although Proposition 54 was defeated in the 2003 election, Ward Connerly has publicly declared his intention to amend the medical exemption and propose a modified form of the initiative as early as 2006.[37] Although opponents of a revised CRECNO will likely mount a vigorous defense, one of their attractive objections could disappear if the revised initiative exempts all medical and public health information.[38] But even if the revised initiative wins a majority of voters, it may still contain grave constitutional deficiencies and run afoul of the Fourteenth Amendment.

II. OVERVIEW OF PROPOSITION 54 (CRECNO)

The passage of CRECNO would have prohibited the state[39] from classifying[40] individuals by "race, ethnicity, color, or national origin"[41] in the realms

35. *See* Rebecca Trounson & Jill Leovy, *UC Ends Affirmative Action Ban*, L.A. TIMES, May 17, 2001, at B1; *see also Settlement Reached in Suit Over Discriminatory Admissions Process at UC Berkeley*, NAACP LDF CASES, June 17, 2003, *at* http://www.naacpldf.org/content.aspx?article=54 [hereinafter *Settlement Reached*]. Still, Proposition 209 remains in effect.

36. *Settlement Reached*, *supra* note 35.

37. *See* El Nasser, *supra* note 10 ("Connerly said Wednesday that he was not giving up. He plans to push to get a similar measure on the ballot in 2006."); *see also* Corcoran, *supra* note 30 ("'We're going to sit down with the opposition and see if we can address the concerns about the health issue and try to tighten up the language,' said Connerly, noting that the California Medical Association's chief executive, Dr. Jack Lewin, has agreed to meet with him.").

38. Notable news analysts also attributed Proposition 54's defeat to the medical exemption. *See, e.g.*, *CNN Live Event/Special: Gray Davis Concedes* (CNN television broadcast, Oct. 8, 2003). The broadcast featured Jeff Greenfield, CNN Senior Analyst, who reported:

> [I]n this case a very powerful conservative voice, former Surgeon General C. Everett Koop was widely featured in ads saying, look, if you don't let people gather medical information on diseases in which certain ethnic groups are more subject than others you are going to really hurt medical research. I think that was as big a factor as any and it went down in defeat.

Id.

39. The "State" includes, "but [is] not . . . limited to, the State itself, any city, county, city and county, public university system, . . . school district, special district, or any other political subdivision or governmental instrumentality of or within the State." CRECNO, *supra* note 1, § 32(k).

40. "Classifying" is 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." *Id.* § 32(c). The expansiveness of these definitions and their use of "but not limited to" language leaves "state" and "classification" open to interpretation. Presumably, any entity which receives state funding could fall under the definition of "state."

41. *Id.* § 32(a). For the sake of simplicity, I will hereinafter use "race" to refer collectively to "race, ethnicity, color, or national origin."

of public education, public contracting, and public employment.[42] For state operations other than public education, public contracting, and public employment, the initiative would have permitted the legislature to pass, by a two-thirds majority in each house, and the governor to approve, legislation allowing collection or use of race data only to serve a "compelling state interest."[43] Thus, any state actor that sought to collect or use racial data in the context of public education, public contracting, or public employment could not appeal to the legislative/gubernatorial approval procedure detailed in section 32(b) of CRECNO. Based on a joint hearing of the California Senate and Assembly Judiciary Committees on Proposition 54, ninety-eight California Codes that relied on race data were expected to be affected or prohibited if Proposition 54 had passed.[44]

While CRECNO would have had broad effect, precluding the use of race data in a variety of areas, the initiative did contain several exemptions. For example, CRECNO did not prohibit the use of racial data if (1) a federal law mandated such classification,[45] (2) a program that received federal funding would become ineligible for and lose that funding if it ceased classification,[46] or if (3) a "consent decree or court order which [was] in force as of the effective date of this section"[47] required such classification. Additionally, the initiative contained three categories of exemptions for medical research, law enforcement, and the Department of Fair Employment and Housing. Each exemption is detailed below.

A. The Medical Exemption

Section 32(f) provided that "[o]therwise lawful classification of medical research subjects and patients shall be exempt from this section."[48] This particular section was the topic of great controversy during the campaign

42. *Id.*

43. *Id.* The provision 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 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.

Id. § 32(b).

44. *Joint Hearing*, *supra* note 9, at tbl.7, pt. 3 (Table of California Statutes Potentially Affected by Proposition 54). The Codes cover areas ranging from Education to Health and Safety to Welfare and Institutions, to name a few.

45. CRECNO, *supra* note 1, § 32(i).

46. *Id.*

47. *Id.* § 32(j).

48. *Id.* § 32(f).

because the medical community felt that it was too narrow. Because CRECNO failed to define "medical research" within its text, one must turn to a plain-language definition to interpret the exemption. The most widely accepted definition of "medical" research is that "which provides 'diagnosis, preventative treatment or therapy to particular individuals.'"[49] Public health research, "which include[s] the use of surveys and questionnaires administered to hundreds or thousands of individuals in order to learn more about groups, rather than individuals,"[50] and which detects disparities between those groups, is absent from this definition. Thus, with the exception of public health data collection that is federally required, all public health research that involves racial data would have been prohibited by CRECNO. Currently, only five federally funded public health programs are required to collect race data,[51] but "the vast majority (over 300) of federal programs not covered by these regulations would be vulnerable to CRECNO's state-level ban."[52] For instance, the California Department of Health Services (DHS) has detected numerous racial disparities, from infant mortality to substance abuse.[53] Due to such detection, the California legislature has enacted bills to address these disparities, such

49. RICHARD MICHAELSON ET AL., INST. OF GOVERNMENTAL STUDIES, THE CLASSIFICATION OF RACE, ETHNICITY, COLOR, OR NATIONAL ORIGIN (CRECNO) INITIATIVE: A GUIDE TO THE PROJECTED IMPACTS ON CALIFORNIANS 28–29 (2003) (noting that the most widely accepted definition of "research subjects" and "medical" research is found in *The Belmont Report*, which is issued by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research); *see also* U.S DEP'T OF HEALTH, EDUCATION & WELFARE, THE BELMONT REPORT (1979), *at* http://www.hhs.gov/ohrp/humansubjects/guidance/belmont.htm. *The Belmont Report* is the seminal work establishing ethical guidelines for research with human subjects. This report is frequently cited in guidance documents and research guidelines within the Federal Register. *See, e.g.*, Financial Relationships and Interests in Research Involving Human Subjects: Guidance for Human Subject Protection, 69 Fed. Reg. 26,393, 26,394 (May 12, 2004). Another generally accepted definition is found in MedlinePlus, a Merriam-Webster Medical Dictionary, which defines "medical" as "of, relating to, or concerned with physicians or the practice of medicine often as distinguished from surgery." MEDLINEPLUS, *at* http://medlineplus.gov. As this is an even narrower definition than that found in *The Belmont Report*, public health research is again likely absent from this definition.

50. MICHAELSON ET AL., *supra* note 49, at 29.

51. *See id.* at 30. The Department of Health and Human Services mandates the collection of race data for five federally funded programs: (1) "The Maternal and Child Health (MCH) Services Block Grant requires states to provide racial and ethnic group information for women who were provided prenatal, delivery, or postpartum care under MCH or Medicaid"; (2) "The Substance Abuse and Mental Health Services Administration (SAMHSA) conducts surveys that include information on [race] affiliation"; (3) "Grant recipients of SAMHSA monies who provide services to children of substance abusers are required to collect [race] information on those children"; (4) "California must report the demographics of families that receive services under the California Child Health Insurance Programs"; (5) and "California must collect demographic information of individuals served by the HIV/AIDS programs under the Ryan White CARE Act." *Id.*

52. *Id.*

53. *See id.* at 28.

as the Environmental Health Tracking Bill.[54] In addition to prohibiting DHS from collecting vital statistics by race, CRECNO would also prohibit collection of racial data by (1) state-funded public health surveys, such as the California Health Interview Survey[55] and the California Women's Health Survey,[56] (2) city and county health departments, such as the Los Angeles County Department of Health Services,[57] and (3) nongovernmental organizations that rely largely on data collected by state agencies,[58] to name a few.[59] According to one study, CRECNO's public health prohibition on race information would have so greatly impacted California that not only would California have lost significant research, but it would also have had to "spend much more on health care and public health programs in order to maintain its current level of overall health."[60]

B. The Law Enforcement Exemptions

Section 32(g) of CRECNO provided:

> Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways. Neither 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.[61]

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54. *See id.* This bill "established the first-ever comprehensive statewide surveillance system for environmental health." *Id.*

55. *See id.* at 32. The California Health Interview Survey, which is conducted by the UCLA Center for Health Policy Research, is the largest statewide health survey in the country. *Id.*

56. *See id.*

57. *See id.*

58. *See id.* at 33.

59. According to another study that examined four health-related state agencies and the health departments of five counties, of the 109 datasets identified, 103 included race data. Thus, the study concluded that the majority of state and county datasets, used for purposes of disease surveillance, program planning, prioritizing public health interventions, and designing outreach, would have been affected by Proposition 54. KAMRAN NAYERI ET AL., CAL. POLICY RESEARCH CTR., CPAC BRIEFING PAPER: ASSESSING THE IMPACT OF PROPOSITION 54 ON HEALTH CARE POLICY RESEARCH: PRELIMINARY FINDINGS 2 (2003). The authors also interviewed 173 researchers; 93 percent of the researchers felt their current research would be compromised, and 82 percent said that federal research funds would be harder to get were Proposition 54 enacted into law. *Id.* at 4.

60. MICHAELSON ET AL., *supra* note 49, at 35.

61. CRECNO, *supra* note 1, § 32(g).

The second law enforcement exemption, section 32(h), also exempted "lawful assignment of prisoners and undercover law enforcement officers."[62] Race data is currently collected by law enforcement agencies for five main purposes: (1) to search for and identify suspects, arrestees, and victims; (2) to carry out the assignment of prisoners and undercover officers;[63] (3) to "identify[ ] and address[ ] patterns and practices of racially biased police misconduct, such as racial profiling";[64] (4) to detect hate crime trends and trends in criminal behavior based on race;[65] and (5) to "target[ ] education and outreach programs regarding hate crimes."[66] Had CRECNO been enacted, the latter three uses of race data would have been barred. Unfortunately, racial profiling and hate crimes are real problems,[67] and the public needs to be educated about and encouraged to report such problems. Without the use of CRECNO-prohibited race data, it would be very difficult to monitor hate crime trends[68] or to demonstrate a pattern or practice of racial profiling and other civil rights violations by law enforcement. The absence of such data cuts both ways, because innocent law enforcement agencies would have difficulty disproving allegations of racial profiling. At a minimum, enactment of CRECNO would have resulted in decreased accountability by law

62. *Id.* § 32(h).

63. *See* MICHAELSON ET AL., *supra* note 49, at 35.

64. *Id.* at 4.

65. *See* Rick Orlov, *Local Lawmen Against Prop. 54: Effort Impedes Crime Tracking*, DAILY NEWS (Los Angeles), Sept. 19, 2003, at N4. The article states:

> [Bill] Lockyer [said] the measure would prevent his office from tracking crimes based on race.... "[W]e are seeing a trend where there is an increase in the number of African-American women killing African-American men.... We don't know why that is happening... [b]ut if Proposition 54 [were] to pass, we wouldn't know anything about this."

Id.

66. MICHAELSON ET AL., *supra* note 49, at 4.

67. U.S. GEN. ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 2 (2000), *available at* http://www.gao.gov/new.items/gg00041.pdf. The report states:

> [I]n order to account for the disproportion in the reported levels at which minorities and whites are stopped on the roadways, (1) police officers would have to be substantially more likely to record the race of a driver during motorist stops if the driver was a minority than if the driver was white, and (2) the rate and/or severity of traffic violations committed by minorities would have to be substantially greater than those committed by whites. We have no reason to expect that either of these circumstances is the case.

Id. Hate crimes are not fictitious problems either. In fact, after collecting race data of post-9/11-related hate crime victims, the L.A. Commission on Human Relations was able to explain its urgent need to fund additional partners representing South Asian and Middle Eastern communities. *See* MICHAELSON ET AL., *supra* note 49, at 41.

68. Under CAL. PENAL CODE § 13023 (West 2004), law enforcement agencies are mandated by the California Department of Justice to report hate crimes but are not federally mandated to do so.

enforcement agencies, potentially more undetected incidents of discrimination by officers, and staggering obstacles to the detection of hate crime trends.[69]

C. The Department of Fair Employment and Housing Exemption

The Department of Fair Employment and Housing (DFEH)[70] is a state agency primarily responsible for the investigation of employment, housing, and public accommodations discrimination claims.[71] DFEH collects data on employee composition from public employers, private employers, and public contractors.[72] In addition, DFEH frequently examines "aggregate information by race, ethnicity, and national origin for an entire business to see if that business has employment practices that disproportionately affect a particular group."[73] Because CRECNO exempted DFEH's collection of race information for ten years,[74] passage of CRECNO would not have greatly affected DFEH's

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69. *See Joint Hearing*, *supra* note 9, at 32–34 (statement of Rockard Delgadillo, City Attorney of Los Angeles). Delgadillo stated:

> Hate crimes are being reported in greater numbers than ever. In Los Angeles County, reports of race-based hate crimes increased by 22 percent in the year 2000 . . . . [C]harting the racial and ethnic make-up of communities allows the government to act to prevent hate crimes before they occur. Educational programs targeted at eliminating hate crimes and promoting interracial understanding cannot succeed without information. Proposition 54 will cut off the collection and dissemination of valuable educational data. Racial profiling is a hateful practice that must be identified and abolished. Prop. 54 will limit the collection of data on several crucial elements of racial profiling, including whether certain racial or ethnic groups receive disparate treatment by law enforcement agencies and the criminal justice system. If Prop. 54 passes, it will be virtually impossible to uncover evidence that persons of particular racial and ethnic backgrounds were stopped and searched more frequently, mistreated more often or sentenced more harshly. Racial profiling will undoubtedly flourish if the statistics used to detect [it] are unavailable.

Id.

70. DFEH enforces several civil rights laws, including the Fair Employment and Housing Act (FEHA), "the Unruh Civil Rights Act (California Civil Code section 51), the Ralph Civil Rights Act (California Civil Code section 51.7), and the Bane Civil Rights Act (California Civil Code section 52.1)." MICHAELSON ET AL., *supra* note 49, at 46. Since 1992, FEHA has largely conformed to the Federal Fair Housing Amendments Act and the Federal Fair Housing Act but actually offers more protections than its federal counterparts. *See id.*

71. Dep't of Fair Employment & Hous., Homepage, *at* http://www.dfeh.ca.gov.

72. *See* MICHAELSON ET AL., *supra* note 49, at 4.

73. *Id.* at 49.

74. CRECNO, *supra* note 1, § 32(e). The proposed amendment provided:

> 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.
>
> (1) Unless specifically extended by the Legislature, this exemption shall expire 10 years after the effective date of this measure.
>
> (2) Notwithstanding DFEH's exemption from this section, DFEH shall not impute a race, color, ethnicity, or national origin to any individual.

Id.

operations in the short term.[75] The long-term limitations on DFEH resulting from passage of CRECNO, however, would have been highly suspect. If DFEH were prohibited from collecting race data from employers, disparate impact showings would be nearly impossible to make.[76] For instance, when investigating a race discrimination complaint, the DFEH regularly examines racial composition data of an employer's applicant pool or workforce.[77] Employers generally do not disclose this information voluntarily to the claimant.[78] It is questionable whether the DFEH or a court, both part of the "state" defined in section 32(k), could compel the employer to produce this information—or whether they would be perceived as "classifying" individuals in "other state operations."[79] If CRECNO were to prevent administrative agencies and courts from enforcing discovery requests seeking racial information, plaintiffs would have tremendous difficulty in establishing prima facie cases.[80] Moreover, if the employer were a state or local agency, it would be incapable of providing the kind of racial information needed to prove or disprove a discrimination claim because under CRECNO, it could not "classify" the applicant pool by race in the first place.[81]

Furthermore, because state laws offer more expansive housing and employment discrimination protections than federal laws, certain types of discrimination would have been more difficult to prove as well.[82] Finally, there is no evidence that housing and employment race discrimination will cease in ten years. To the contrary, cases filed with the DFEH claiming

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75. What will be affected in the short term is DFEH's ability to impute a race classification to an individual, a practice known as "hot-decking." Hot-decking was developed in the 1940s and has shown to be an accurate method to replace missing data. *See* MICHAELSON ET AL., *supra* note 49, at 47.

76. *See id.* at 49.

77. *See Joint Hearing*, *supra* note 9, at 71–73 (statement of Catherine Hallinan, Commissioner with the Fair Employment and Housing Commission).

78. *See id.* at 72.

79. CRECNO, *supra* note 1, § 32(b).

80. *See Joint Hearing*, *supra* note 9, at 72 (statement of Catherine Hallinan, Commissioner with the Fair Employment and Housing Commission).

81. *See id.* ("[T]he [Fair Employment and Housing] commission or the court must make . . . specific findings that include classifications based on race. This is a prima facie case under federal law and essential to any Fair Employment and Housing Act case . . . .").

82. *See* MICHAELSON ET AL., *supra* note 49, at 49–50. For example, the FEHA covers a wider range of types of housing than federal laws:

> In particular, the Federal Fair Housing Act does not cover both owner-occupied housing with four or fewer units and any single-family house sold or rented by an owner. These are covered by FEHA. As a result, tenants of either situation who are being discriminated against may not bring their suit or complaint to federal agencies. Instead, they would either file privately or with the DFEH. However, if DFEH may not collect or use [race] data, proving a pattern of discrimination may be more difficult.

Id. (footnote omitted).

employment and housing discrimination on the bases of race and national origin have remained relatively constant over the last four years.[83] Thus, the ten-year limit was arbitrary and unwise. There has been no mention by the backers of CRECNO that this exemption will be amended in future ballots.

III. EQUAL PROTECTION AND THE CRECNO INITIATIVE

A. Protections Under the Fourteenth Amendment

The right to equal protection under the law is enshrined in the Fourteenth Amendment.[84] Under traditional equal protection doctrine, measures containing racial classifications, whether facially racial or facially neutral with an invidious intent, are subject to strict scrutiny. Race-conscious measures pass strict scrutiny "only if they are narrowly tailored measures that further compelling governmental interests."[85]

Under the conventional standard, if a revised CRECNO initiative[86] passes and is challenged as a violation of the Equal Protection Clause, it likely will survive strict scrutiny. A court likely would fail to discern a racial classification altogether because CRECNO purports to prohibit the act of racial classification in the areas of public education, employment, and contracting. Although a facially race-neutral measure is subject to strict scrutiny if enacted

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83. In 2003, the DFEH reported 4516 cases filed claiming employment discrimination based on race/color and 2288 cases filed claiming employment discrimination based on national origin; in 2002, the DFEH reported 4736 cases filed claiming employment discrimination based on race/color and 2675 cases filed based on national origin; in 2001, the DFEH reported 4595 cases filed claiming employment discrimination based on race/color and 2439 cases filed based on national origin; and in 2000, the DFEH reported 4319 cases filed claiming employment discrimination based on race/color and 2233 cases filed based on national origin. Cases charging housing discrimination also were relatively constant over the last four years: In 2003, the DFEH reported 253 cases filed claiming housing discrimination based on race/color and 139 cases filed based on national origin; in 2002, the DFEH reported 270 cases filed claiming housing discrimination based on race/color and 101 cases filed based on national origin; in 2001, the DFEH reported 215 cases filed claiming housing discrimination based on race/color and 141 cases filed based on national origin; and in 2000, the DFEH reported 277 cases filed claiming housing discrimination based on race/color and 128 cases filed based on national origin. *See* Dep't of Fair Employment & Hous., Department Statistics, *at* http://www.dfeh.ca.gov/Reports/Stats.asp (displaying a breakdown of cases, filed by calendar year, based on race/color, national origin, and other bases of discrimination such as age and religion).

84. U.S. CONST. amend. XIV, § 1.

85. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *see also* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 142–43 (2d ed. 1998). For the earliest racial classification that was upheld under strict scrutiny, see *Korematsu v. United States*, 323 U.S. 214 (1944).

86. The revised CRECNO is imagined to have a much broader medical exemption than Proposition 54, so as to exempt public health information.

with an invidious discriminatory purpose,[87] this requires a showing that the measure at issue was enacted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[88] Although discriminatory purpose might be inferred from the types of data that CRECNO does and does not exempt,[89] an alternative and potentially more effective equal protection challenge to the initiative might rely on the theory of equal political access.

The earliest Supreme Court case to recognize the necessity of equal access to the political process, particularly for "discrete and insular minorities," was *United States v. Carolene Products Co.*[90] In the second paragraph of its famous footnote four, the Court suggested that if certain barriers were placed in the political process, the Court perhaps should apply a "more exacting judicial scrutiny" and eliminate those distortions.[91] In the third paragraph, the Court recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes." Decades later, the Court elaborated and reinforced its reasoning in *Hunter v. Erickson*[92] and then in *Washington v. Seattle School District No. 1*.[93]

B. The Right of Equal Access to the Political Process

Hunter v. Erickson and *Washington v. Seattle School District No. 1* stand for the principle that legislation will be subject to strict scrutiny if it deals with a solely racial issue by hindering the enactment of antidiscrimination laws, or if it restructures the political process, thus making it more difficult for minorities to enact legislation in their interest.[94] This line of cases, arising out of *Carolene Products*' footnote four, recognizes that because certain groups do not have an equal voice in the legislature and overall political process, courts should be especially protective of them. Simply put, court access is just as political as legislative access for minorities seeking to enforce protections against discrimination. Therefore, judicial redress for antidiscrimination claims by individual plaintiffs is integral to the notion of political access.

87. Washington v. Davis, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.").

88. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 471 (1982) (citing Per. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

89. *See infra* Part III.D.2.

90. 304 U.S. 144 (1938).

91. *Id.* at 152 n.4.

92. 393 U.S. 385 (1969).

93. 458 U.S. 457.

94. *Hunter*, 393 U.S. at 391–93; *Seattle Sch. Dist. No. 1*, 458 U.S. at 485–87.

In *Hunter v. Erickson*, after the Akron City Council enacted a fair housing ordinance, the people of Akron amended the City Charter to bar existing and future ordinances relating to race or religion unless approved by a majority of voters.[95] The Supreme Court invalidated the amendment because it differentiated between those seeking remedies against racial or religious discrimination within the domain of real estate and "those who sought to regulate real property transactions in the pursuit of other ends"[96] by subjecting the former group to a more complex political system.[97] The Court concluded that although the law was facially race neutral, "treat[ing] [African Americans] and white[s] . . . in an identical manner, the reality [was] that the law's impact [fell] on the minority."[98] Departing from conventional equal protection doctrine, the Court "declined to rest its holding on a finding of invidious intent."[99]

In *Washington v. Seattle School District No. 1*, the Court expanded *Hunter*'s application to an initiative that aimed to prohibit desegregative busing.[100] After the appellee district enacted a mandatory busing plan for desegregation of its schools, the voters of Washington approved a statewide initiative that barred school boards from requiring "any student to attend a school other than the school which is geographically nearest . . . [to] the student's place of residence."[101] The initiative, however, contained exceptions that permitted reassignment through busing for purposes of special education, health and safety, or inadequacy due to "overcrowding, unsafe conditions or lack of physical facilities."[102] The goal was to "preserve to school districts the maximum flexibility in the assignment of students"[103] for virtually all educational purposes except "racial[ ] balancing."[104] The court struck down the initiative as violative of equal protection because it "require[d] those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action" by "plac[ing] effective decisionmaking authority over a racial issue at a different level of government."[105]

95. *Hunter*, 393 U.S. at 387.
96. *Id.* at 390.
97. *Id.* at 392.
98. *Id.* at 391.
99. Vikram David Amar, *Recent Cases: The Equal Protection Challenge to Proposition 209*, 5 ASIAN L.J. 323, 324 (1998).
100. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982).
101. *Id.* at 462.
102. *Id.* (quoting WASH. REV. CODE § 28A.26.010 (1981)).
103. *Id.* at 463 (citing Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1009 (W.D. Wash. 1979)).
104. *Id.*
105. *Id.* at 474.

Like the *Hunter* Court, the *Seattle* Court declined to base its holding on a finding of improper motivation or intent.[106]

A companion case to *Seattle* that failed to meet the requirements of the "*Hunter* doctrine"[107] was *Crawford v. Board of Education*.[108] The case arose from a California Supreme Court holding that interpreted the California Constitution to bar school segregation, whether it was "de facto or de jure in origin."[109] On remand, the trial court approved a desegregation plan that included mandatory busing.[110] In response to the busing plan, the voters of California enacted Proposition I, which provided in part:

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

Proposition I amended the California Constitution to prohibit any state actor (including state courts) from imposing any remedy that involved student assignment or transportation unless it was to remedy a specific

106. *Id.* at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979))). In fact, the district court had based its holding on three rationales, one of those being that "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." 473 F. Supp. at 1013. Yet the district court conceded "that it was impossible to determine whether the supporters of Initiative 350 'subjectively [had] a racially discriminatory intent or purpose' because '[a]s to that subjective intent the secret ballot raises an impenetrable barrier.'" 458 U.S. at 466 n.9 (quoting 473 F. Supp. at 1014). Rather, the court examined "objective factors, noting . . . that it marked a . . . 'departure from the procedural norm' for 'an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative.'" *Id.* (quoting 473 F. Supp. at 1016). This, together "with the 'racially disproportionate impact of the initiative,' its 'historical background,' and 'the sequence of events leading to its adoption,' were found to demonstrate that a 'racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative.'" *Id.* Rather than affirm based on this line of reasoning, the Supreme Court affirmed on the district court's first rationale, that "the initiative established an impermissible racial classification in violation of *Hunter v. Erickson* . . . 'because it permits busing for non-racial reasons but forbids it for racial reasons.'" *Id.* at 465 (quoting 473 F. Supp. at 1012).

107. *Seattle School Dist. No. 1*, 458 U.S. at 469 (coining the phrase "*Hunter* doctrine").

108. 458 U.S. 527 (1982).

109. *Id.* at 530–31 (quoting Crawford v. Bd. of Educ., 551 P.2d 28, 34 (Cal. 1976)).

110. *Id.* at 531.

111. *Id.* at 532 n.6.

violation of the Fourteenth Amendment of the Constitution.[112] Thus, the proposition could halt the earlier desegregation plan because it was beyond the scope of the Fourteenth Amendment in that it sought to remedy de facto segregation.

The Court upheld the proposition and concluded that the "mere repeal of race-related legislation" does not trigger strict scrutiny.[113] The Court found that, unlike the initiatives in *Hunter* and *Seattle*, Proposition I did not restructure the political process by removing local power nor did it create an explicit racial classification.[114] "Proposition I did not disable minorities from enacting racial busing programs legislatively, but rather merely 'repealed' an existing state constitutional requirement that California had no federal obligation to provide."[115] For example, minorities could still appeal to local school districts to adopt busing plans to cure de facto desegregation.[116]

In order to invoke the *Hunter* doctrine to challenge a law, a party must satisfy two requirements. First, the party "must show that the law in question is 'racial' or 'race-based' in 'character,' in that it singles out for special treatment issues that are particularly associated with minority interests."[117] "[A] law is 'racial in character' in this sense if . . . (i) the law regulates a racial subject matter [and] (ii) it has a racial impact, meaning it regulates the subject matter to the detriment of the racial minority."[118] Next, the party must demonstrate that the law results in the reallocation of decisionmaking power by "remov[ing] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests."[119]

C. Recent Political Access Challenges

The most recent Ninth Circuit holding addressing a *Hunter*-based challenge was *Valeria v. Davis*.[120] *Valeria* involved Proposition 227, an initiative

112. *Id.*

113. *Id.* at 538.

114. The Court also discussed the broader policy implications of its result:

> [If] mere repeal of race-related legislation [were] unconstitutional, . . . [s]tates would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. . . . [C]ertainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.

Id. at 539.

115. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1026 (1996).

116. *See* Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 136 (1999).

117. Amar & Caminker, *supra* note 115, at 1026.

118. *Id.* at 1029.

119. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982).

120. 307 F.3d 1036 (9th Cir. 2002).

passed by voters that replaced bilingual education with a "structured English immersion" program.[121] Proposition 227 also outlined a provision that enabled "limited English proficient" students to waive out of the program in certain situations.[122] Amending the proposition itself was more difficult; the proposition could only be amended "by a statute that [would become] effective upon approval by the electorate or by a statute to further the act's purpose passed by a *two-thirds vote of each house of the Legislature and signed by the Governor.*"[123] The plaintiffs in *Valeria* contended that Proposition 227 was a constitutional violation under the *Hunter* doctrine because it reallocated political power by placing the issue of bilingual education, a uniquely racial issue, at the state level rather than at the local level.[124] While the court acknowledged that Proposition 227 "surely reallocated political authority, placing control over bilingual education at the state (rather than local) level," it did not find that Proposition 227 addressed a solely "*racial problem—and only a racial problem.*"[125] Unlike the programs in *Hunter* and *Seattle*, the purpose of California's bilingual education program was not to address a racial issue but to improve education.[126] Thus, Proposition 227 did not fall under the *Hunter* line of reasoning and was upheld by the court.[127]

In *Coalition for Economic Equity v. Wilson (CEE I)*,[128] the plaintiffs contended that Proposition 209 violated equal protection under the *Hunter* doctrine.[129] Proposition 209 provided that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[130] The district court found that the initiative had a "racial focus" and that it restructured the political process to create a hurdle for minorities by shifting authority over affirmative action from local and legislative bodies to the state

121. *Id.* at 1038.

122. *Id.* Waivers could be granted

> (i) when the student already [knew] English; (ii) when the student [was] 10 years old or older and the school agree[d] that an alternative curriculum would better serve the student's English education; or (iii) when the student ha[d] tried the immersion program for at least 30 days, the school agree[d] "that the child ha[d] special physical, emotional, psychological, or educational needs," and an alternative curriculum would better serve the student's educational development.

Id.

123. *Id.* (emphasis added). Note that this process is identical to that contained in Proposition 54.

124. *Id.* at 1039.

125. *Id.* at 1041 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982)).

126. *Id.*

127. *Id.* at 1042.

128. 946 F. Supp. 1480 (N.D. Cal. 1996).

129. *Id.* at 1489.

130. CAL. CONST. art. I, § 31(a).

constitutional level.[131] For these reasons, the court granted a preliminary injunction in favor of the plaintiffs.[132] On appeal, the Ninth Circuit, in *Coalition for Economic Equity v. Wilson (CEE II)*,[133] upheld the validity of Proposition 209 and vacated the preliminary injunction. The court implied that Proposition 209 was racial in character but did not explicitly so hold.[134] Furthermore, the court likened Proposition 209 to the initiative in *Crawford* and based its holding on the grounds that Proposition 209 was a "mere repeal"[135] of a race-related law that simply brought state law back in line with the Equal Protection Clause of the Fourteenth Amendment.[136] Thus, the court failed to discern a restructuring of the political process.

Finally, in *Romer v. Evans*,[137] the Court did not base its decision on the *Hunter* doctrine but nonetheless reaffirmed its underlying principles.[138] In *Romer*, in response to the passage of local antidiscrimination ordinances that addressed sexual orientation, Colorado voters adopted Amendment 2 by statewide referendum.[139] Amendment 2 precluded "all legislative, executive or judicial action designed to protect . . . homosexual persons or gays and lesbians."[140] The Supreme Court blocked the enforcement of Amendment 2 and restated its equal political access principle:

> [The] government and each of its parts [must] remain open on impartial terms to all who seek its assistance. . . . 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.[141]

131. *CEE I*, 946 F. Supp. at 1505–06.

132. *Id.* at 1520.

133. 122 F.3d 692 (9th Cir. 1997).

134. The court's opinion is ambivalent about whether Proposition 209 was racial in character. The court "accept[ed] without questioning the district court's findings that Proposition 209 burdens members of insular minorities," and also found that Proposition 209 was "a law that addresse[d] in neutral-fashion race-related and gender-related matters." *Id.* at 705, 707. There was not, however, an explicit holding on this prong of the *Hunter* inquiry. Instead the court engaged in a long-winded discussion wherein it lumped all women and minority voters together to make them one super-majority and wondered how such a majority could discriminate against itself. *Id.* at 704.

135. *Id.* at 706 (quoting Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982)).

136. *Id.* at 709 ("As in *Crawford*, '[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.'" (citing *Crawford*, 458 U.S. at 535)).

137. 517 U.S. 620 (1996).

138. The Colorado Supreme Court, however, did rely largely on the discriminatory restructuring principle in *Hunter* and *Seattle* to affirm the trial court's injunction against enforcement of Amendment 2. *Id.* at 625.

139. *Id.* at 623.

140. *Id.* at 624.

141. *Id.* at 633.

D. Application to CRECNO

Because Ward Connerly intends to reintroduce a revised CRECNO with a broader medical exemption on the California ballot as early as 2006, there is a fair possibility that a popular majority will approve the initiative.[142] If this revised CRECNO were to pass, its constitutional deficiencies could be raised in a district court under the *Hunter* doctrine if CRECNO opponents could distinguish it from Proposition I (*Crawford*), Proposition 227 (*Valeria*), and Proposition 209 (*CEE II*).[143] This subpart proposes an equal protection challenge under the *Hunter* doctrine to a revised CRECNO initiative that exempts all medical and public health racial classifications.

First, CRECNO opponents would have to prove that CRECNO deals with a solely racial issue by hindering the enactment of antidiscrimination laws and even permitting discrimination in some cases. Second, opponents would need to demonstrate that CRECNO reallocates political access, including court access, making it more difficult for minorities to enact legislation in their interest and to enforce laws designed to protect them. Although the Supreme Court in *Hunter* and *Seattle* declined to address invidious intent, the Ninth Circuit opinions in *Valeria* and *CEE II* suggest that an intent inquiry about discriminatory purpose is required even under the *Hunter* line of cases.[144] Thus, the challengers of a revised CRECNO might also have to make a showing that the drafters of the initiative had a discriminatory purpose, objectively if not subjectively. This could be achieved by carefully analyzing the language and exemptions of CRECNO, particularly in the areas of law enforcement, employment, and education. Finally, if the challengers are able to prove that CRECNO is vulnerable to the *Hunter* doctrine, the court will have to decide whether CRECNO can survive strict scrutiny.

142. *See supra* notes 8 and 37 and accompanying text.

143. For another treatment of CRECNO's vulnerability under a political access theory, see generally Chris Chambers Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws*, 88 MARQ. L. REV. 299 (2004). While this Comment examines the climate in which CRECNO was defeated, focuses on CRECNO's effects upon individual plaintiffs seeking to enforce antidiscrimination laws, and discusses how CRECNO ties into the larger doctrine of colorblindness, Professor Goodman's insightful article offers an alternative analysis of CRECNO's vulnerability under the *Hunter* doctrine and proposes that the employment provisions of CRECNO are likely preempted by federal law.

144. In *Valeria*, the court noted, "[u]nder [the] 'political structure' analysis, reallocation of political decision making violates equal protection only when there is evidence of purposeful racial discrimination." Valeria v. Davis, 307 F.3d 1036, 1040 (9th Cir. 2002).

1. CRECNO Is Racial in Character

First, CRECNO challengers would have to illustrate that Proposition 54 is racial in character. In order to make such a showing, its challengers would have to prove that Proposition 54 "regulates a racial subject matter" and that it has a "racial impact."[145] Amar and Caminker argue that the Court in *Hunter* had little difficulty in finding that the charter amendment was racial in character because it made "explicit reference to 'race' and 'color.'"[146] In *Seattle*, however, the court had to examine all the exemptions of the initiative before it found that the "law's impact [fell] on the minority"[147] as desegregation was the only targeted issue.[148] CRECNO clearly contains "race" and "color" in its text and specifically targets racial information, thus treating the collection of race data differently from the collection of data about age, sex, disability, religion, and other means of classification. Although CRECNO formally applies to white Americans as well as minorities, as discussed in Part II and in more detail below, "the reality is that the law's impact falls on the minority."[149] Because effective court access for minorities seeking to enforce antidiscrimination laws so often hinges on strong statistical data showing racial disparities, CRECNO's differential treatment of race data suggests that its detrimental impact would fall exclusively on minorities. A further examination of CRECNO's foreseeable effects in the areas of law enforcement, employment, and education is insightful to reinforce the "racial in character" inquiry and also to illustrate the presence of discriminatory purpose.

2. CRECNO Is Discriminatory in Purpose

As discussed in Part II.B, CRECNO's law enforcement exemptions allow for the collection of race data for purposes of searching for and identifying suspects, arrestees, and victims and for the assignment of prisoners and undercover law enforcement officers; however, CRECNO does not provide exemptions for purposes of identifying police misconduct, particularly racial profiling, and hate crime trend detection and outreach. This subpart discusses how CRECNO's law enforcement exemptions allow for the use of

145. Amar & Caminker, *supra* note 115, at 1029.
146. *Id.*
147. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 475 (1982) (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1960)).
148. Amar & Caminker, *supra* note 115, at 1029–30.
149. *Id.*

race information for all valid law enforcement purposes except those that implicate the remediation of racial discrimination.

Section 32(h) allows law enforcement to use race information in the "lawful assignment of prisoners and undercover law enforcement officers."[150] More importantly, section 32(g) provides for law enforcement officers to classify persons "in lawful ways" but "[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."[151] Together, these sections suggest that law enforcement officers could classify by race when assigning inmates or searching for suspects and for other valid law enforcement purposes, but that they could not maintain records to "track individuals" based on race.[152] What does this mean? "Individuals" is a vague and expansive term and conceivably includes officers, arrestees, suspects, and victims. Thus, racial profiling could occur at traffic stops, for instance, and no one would be able to track it.[153] In addition, race-based crimes such as hate crimes could occur at traffic stops, for instance, and no one would be able to

150. CRECNO, *supra* note 1, § 32(h).

151. *Id.* § 32(g).

152. With this exemption, CRECNO would essentially nullify state antidiscrimination laws. For instance, Senate Bill 1102, passed in 2000,

> [p]rohibits law-enforcement officers from engaging in racial profiling and requires every law-enforcement officer in the state to participate in training to avoid racial profiling, the use of race and ethnicity as factors in determining likely crime suspects. The Legislative Analyst's Office is instructed to study and report to the Legislature by January 1, 2002, on the statistics voluntarily being collected by some 70 law-enforcement agencies around the state on the ethnicity and race of the people they detain.

Peace Officers: Racial Profiling Training, ch. 684, 2000 Cal. Legis. Serv. 3547 (West) (amending CAL. PENAL CODE § 13519.4 (West 2000 & Supp. 2005)). CRECNO would preclude the Legislative Analyst's Office from studying existing race data and would bar law enforcement agencies from providing future race data of detainees. Also see Assembly Bill 2484, passed in 2000, which "[p]rohibits any governmental authority from engaging in a pattern or practice of conduct by law-enforcement officers that deprives any person of their civil rights, [and grants] the state attorney general the clear authority to investigate and prosecute police departments if there is a demonstrated pattern and practice of civil rights violations." Civil Rights: Attorney General, ch. 622, 2000 Cal. Legis. Serv. 3263 (West) (codified at CAL. CIV. CODE § 52.3 (West Supp. 2005)). CRECNO, however, forbids the attorney general from accessing race data to determine whether there is a "pattern and practice" of civil rights violations.

Other California Penal Code sections that would probably be affected include: CAL. PENAL CODE § 13012.5 (reporting race data in conjunction with fitness hearings in juvenile court); CAL. PENAL CODE § 13014 (Department of Justice homicide investigation); CAL. PENAL CODE § 5025 (immigration information); CAL. PENAL CODE § 1170.45 (collection of race data on criminal cases annually by Judicial Council); CAL. PENAL CODE § 12025 (Attorney General's collection of race data from the District Attorney and submission of reports to the Legislature); CAL. PENAL CODE § 13519.4 (racial profiling); CAL. PENAL CODE § 13023 (law enforcement reporting to the Department of Justice on crimes motivated by a victim's race). *See Joint Hearing*, *supra* note 9.

153. *See supra* note 152 (SB 1102 and CAL. PENAL CODE § 13519.4).

track them, not even the state Attorney General's Civil Rights Commission on Hate Crimes, a "statewide agency."[154] Not only would the state and local governments be unable to self-monitor, but individual plaintiffs seeking to enjoin law enforcement agencies from racial profiling practices would lack the type of statistical data that would be available, for example, to women if the police were engaging in gender profiling. Without clear statistical evidence, plaintiffs seeking to address racial profiling might only have anecdotal evidence available, which a court probably would not find sufficiently compelling. The same is true with respect to hate crimes. Thus, an examination of the law enforcement exceptions suggests that CRECNO is motivated by a discriminatory purpose because it allows for the use of race information for all valid law enforcement purposes except those that involve remedying racial discrimination.[155]

As discussed in Part II.C, upon the expiration of the DFEH exemption, individual plaintiffs will lack the statistical data necessary to make the requisite

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154. *See supra* note 152 (CAL. PENAL CODE § 13023). Note also that in *Romer v. Evans*, the Court criticized the broad reach of Amendment 2 and noted that "Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced." Romer v. Evans, 517 U.S. 620, 629 (1996). Similarly, challengers of Proposition 54 could cite to Senate Bill 1102 and Assembly Bill 2484. *See supra* note 152 and accompanying text.

155. An analogous argument could be made for the medical exemption. If the revised CRECNO does not exempt public health information, opponents could argue that under the medical exemption, race data could be collected for all medically valid purposes except the targeting of widespread racial disparities, but this is a more complex argument. Section 32(f), which exempts the "lawful classification of medical research subjects and patients" would conceivably allow public hospitals to classify patients and state research institutions to classify research subjects used, for instance, in clinical trials. CRECNO, *supra* note 1, § 32(f). But medical experts have argued that the medical exemption would not exempt epidemiological studies under this language. This would mean that health-related disparities could not be correlated to race and ethnicity. One can argue that this suggests a discriminatory purpose because it would erase the data that shows the widespread disparities between the kinds of illnesses minorities suffer in comparison to the majority. For instance, "[o]ne-fifth to one-third of African American children are anemic, and they account for a disproportionate number of children exposed to lead poisoning." MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 24 (2003). Suppose a civil rights organization sees this data and detects from it that several landlords who own apartment buildings in both predominantly African American neighborhoods and predominantly Caucasian neighborhoods have brought the buildings in the latter neighborhoods in compliance with code while failing to do so with the buildings in the former. The civil rights organization can use the data and findings to lobby for a successful ordinance.

Detection of such a pattern would be much more difficult if an initiative like Proposition 54 passes. Thus, analogously, one could argue that the only purpose for the medical exemption is a discriminatory purpose. What other reasonable purpose could there be for choosing to erase medical information about racial disparities? Nonetheless, this argument seems tenuous because the exemption's impact does not fall exclusively on minorities. Epidemiological data on illnesses that disparately affect Caucasians would also be erased. Thus, the information that would be lost under the medical exemption would be a loss for all.

showing of disparate impact or discriminatory intent in employment discrimination cases. The DFEH regularly examines racial composition data of an employer's applicant pool or workforce when investigating a race discrimination complaint.[156] If CRECNO were to prevent administrative agencies and courts from enforcing discovery requests seeking racial information, individual plaintiffs would have tremendous difficulties establishing prima facie cases of racial discrimination in the workplace.[157]

Finally, a court may be more likely to find a racially discriminatory purpose in CRECNO if opponents highlight the framework of the proposition in the context of public education. Because public schools must comply with federal reporting requirements, CRECNO would allow them to collect certain race data. For example, the No Child Left Behind Act mandates that states report testing and dropout information compiled by race and ethnicity.[158] Thus, certain types of achievement gaps between different racial groups could likely be tracked after the passage of a revised CRECNO. However, the California Basic Education Data System, which collects information on student and staff characteristics and enrollment and hiring practices, would be greatly affected by the passage of a CRECNO initiative.[159] Information that would likely no longer be collected includes: (1) "High school graduation and drop-out rates by CRECNO for schools not receiving special federal grants under [The No Child Left Behind Act]"; (2) "Student enrollment in AP, honors and special education courses tracked" according to race; and (3) "Testing scores disaggregated by CRECNO for tests not required to assess achievement under [the No Child Left Behind Act], such as SAT, ACT, and AP exams."[160] Finally, "schools and school districts will not be able to use state-collected CRECNO data in school and classroom integration efforts."[161] Because CRECNO would prevent school districts from collecting these datasets, segregation in schools and achievement gaps between different racial groups would be more difficult to track.[162] Even if the need for desegregation

156. *See Joint Hearing*, *supra* note 9, at 72 (statement of Catherine Hallinan, Commissioner with the Fair Employment and Housing Commission).

157. *See id.* For a discussion of how the employment provisions of CRECNO may be preempted by Title VI and Title VII, see Goodman, *supra* note 143, at 354–64.

158. *See* MICHAELSON ET AL., *supra* note 49, at 16.

159. *See id.* at 17.

160. *Id.*

161. *Id.* at 18.

162. In *CEE II*, the court upheld the validity of school desegregation programs but invalidated racial preference programs. *CEE II*, 122 F.3d 692, 707 n.16 (9th Cir. 1997) ("We have recognized, however, that 'stacked deck programs . . . trench on Fourteenth Amendment values in ways that reshuffle programs [such as school desegregation] do not.' . . . Unlike racial preference programs,

became apparent, the district could not produce the hard data to prove the need for integration efforts. Although desegregation programs seem to be a thing of the past, a federal court desegregation decree for the largest school district in Kentucky was only dissolved in 2000, when the school finally was declared to be integrated.[163] Thus, CRECNO pushes the constitutional limits further than Proposition 209 did because it interferes with a school district's ability to monitor desegregation efforts.[164]

3. CRECNO Imposes a Governmental Process Burden on Minorities

To fulfill the second requirement of the *Hunter* inquiry, challengers of CRECNO would have to prove that the initiative itself reallocates political power, making it more difficult for minorities to enact legislation in their interest. According to CRECNO,

> The State shall not classify any individual by race, ethnicity, color, or national origin . . . unless the Legislature specifically determines that said classification serves a compelling 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.[165]

In order for a state actor to obtain an exemption on a particular use of race data under section 32(b), an Assemblyman or Senator would probably have to introduce a bill in the state legislature requesting collection of the data and convince a two-thirds majority in both the state Senate and the state Assembly that collection of race data for that particular use, such as targeting hate crime trends, serves a compelling interest.[166] Even if the bill succeeds in procuring a two-thirds majority in both houses, the governor can choose to deny the use. Although CRECNO backers touted this provision as evidence of

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school desegregation programs are not inherently invidious . . . and do not deprive citizens of rights." (quoting Associated Gen. Contractors of Cal. v. SFUSD, 616 F.2d 1381 (9th Cir. 1980))).

163. On October 21, 2002, a white parent filed a lawsuit against the district claiming that the integrative student assignment policies violated the constitutional rights of his children. *See LDF Granted Role in First Challenge to a Public School's Race-Conscious Student Assignment Policies Since Supreme Court's Michigan Rulings*, NAACP LDF CASES, Dec. 4, 2003, *at* http://www.naacpldf.org/content.aspx?article=31.

164. The argument can be extended to employment and contracting as well because the court in *CEE II* recognized that when "a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race.'" *CEE II*, 122 F.3d at 700 n.7. CRECNO, however, would make it difficult, if not impossible, to target such identified discrimination and even more difficult to enact legislation to remedy such discrimination.

165. CRECNO, *supra* note 1, § 32(b).

166. Shouldn't the state encourage such uses? By imposing these procedural obstacles, the state actually discourages minorities from seeking to use data that will enable them to identify and remedy racial disparities by persuasively lobbying for legislation that is in their interest.

the initiative's flexibility, this is a very inefficient and time-consuming process for anyone challenging a particular use of race data. Without this data, it also becomes more difficult for minority interest groups to identify areas of racial disparity and to use that hard data to lobby the legislature to enact remedial legislation. The state should not discourage the enactment of antidiscrimination legislation, but that would be precisely the result if CRECNO were in place. Thus, like Initiative 350 in *Seattle*, CRECNO "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities."[167]

A comparison of *Valeria v. Davis* is integral to this prong of the *Hunter* inquiry. In *Valeria*, the text of Proposition 227 provided that "[t]he provisions of this act may be amended by a statute that becomes effective upon approval by the electorate or by a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor."[168] In analyzing the text of the initiative, the court found that "Proposition 227 surely reallocated political authority [by] placing control over bilingual education at the state (rather than local) level."[169] Although the court ultimately upheld Proposition 227 because it was not racial in character, the court found a political process burden in language that mirrors that of Proposition 54. In fact, Proposition 54 would have imposed a higher political process burden than Proposition 227 because the latter's waiver provision left some authority to the local school and to the parents of the child. Proposition 54's waiver provision, however, usurps local authority completely and places the grant of a waiver in the hands of three separate state governmental bodies. Since Proposition 54 functions as an amendment to the state constitution, altering the initiative itself would require a new constitutional amendment. Thus, Proposition 54 reallocates the ultimate power to use racial data to seek a race-conscious remedy from local and state legislative bodies to the state constitutional level.

4. CRECNO Is More Vulnerable to the *Hunter* Doctrine Than Propositions 227, 209, and I

In addition to considering the arguments for why a CRECNO initiative should fail under the *Hunter* inquiry, a court may question whether CRECNO

167. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982).
168. Valeria v. Davis, 307 F.3d 1036, 1038 (9th Cir. 2002).
169. *Id.* at 1041.

is really that different from the initiatives that came before it, all of which passed scrutiny under the *Hunter* doctrine, namely Propositions 227, 209, and I.

In *Valeria*, the court accepted that Proposition 227 resulted in the real-location of political power but held that the initiative "operated solely to address an educational issue, *not* a racial one."[170] In reaching its conclusion, the court looked to the purpose of the initiative and the program it sought to eliminate. In the eyes of its proponents, the initiative sought to "improve . . . a pedagogically flawed educational system" by eliminating bilingual education.[171] Thus, the issue was not solely "a racial one."[172] Furthermore, unlike the initiatives in *Hunter* and *Seattle*, "California's system of bilingual education did not operate to remedy identified patterns of racial discrimination."[173] If a court applies the same pattern of reasoning to CRECNO, it would first examine its purpose and then the programs it is trying to eliminate. As discussed earlier, the proposition's language and its exemptions suggest that most of the race information that the state would be barred from collecting is the kind that would be used to remedy discrimination. Thus, the purpose is a solely "racial one;" it is to hide the racial disparities that the majority does not wish to see. Furthermore, the programs that CRECNO would burden are those that would seek to target racial profiling, hate crimes, segregation in schools, and any other programs that involve tracking race data to remedy identified discrimination.

In *CEE II*, the court suggested that Proposition 209 was a "race-related" measure but did not explicitly so hold. In this first prong of the *Hunter* inquiry, CRECNO stands a better chance in fulfilling the racial-in-character test because it imposes a burden not just on the enactment of racial preference programs but also on antidiscrimination measures. As discussed earlier, its exemptions also suggest discriminatory intent. In addition, and perhaps more importantly, opponents could easily distinguish CRECNO from Proposition 209 in the second prong of the *Hunter* inquiry because CRECNO explicitly imposes a political process burden in its text. The major justification behind the *CEE II* court's decision was its failure to discern a political process burden in Proposition 209. Rather, the court likened Proposition 209 to the initiative in *Crawford*, calling it a "mere repeal." Proposition 54, however, goes beyond Proposition 209 by requiring three governmental bodies (two-thirds majority in both houses and the governor) to find a compelling state interest before permitting a state actor to classify an individual by race.[174]

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*.
174. CRECNO, *supra* note 1, § 32(b).

Finally, unlike Proposition I in *Crawford*, Proposition 54 does not act as a "mere repeal" or merely bring California law in line with the Fourteenth Amendment. Instead, it pushes state law away from the Constitution by posing obstacles to the enforcement of equal protection and antidiscrimination measures such as SB 1102 and AB 2484.[175] This is not the mere repeal of an antidiscrimination program; rather, CRECNO could prohibit outright the effective implementation of the majority of state codes that rely on the collection of race data to detect disparities.[176] In *CEE II*, the court noted,

> *Crawford*... dictates that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required... in the first place"... *Hunter* and *Seattle*, on the other hand, prohibited states from placing decisionmaking authority over certain racial issues at higher levels of government.[177]

This is precisely what CRECNO would do; it would place decisionmaking authority about additional exemptions for race information in the hands of three separate governmental bodies, all of which would have to find a compelling interest for any challenged classification.

5. CRECNO and Strict Scrutiny

Because CRECNO reallocates governmental power in a way that burdens minorities seeking to enact legislation in their interest, it violates the Equal Protection Clause of the Fourteenth Amendment unless it can withstand strict scrutiny. Thus, a court must examine whether CRECNO serves a compelling interest and is narrowly tailored. In their mission statement, the proponents of Proposition 54 asserted that passage of their initiative would "save [the] state budget over $10 million," "throw out the entire system of checking little boxes [regarding race on state forms]" and lead to "a color-blind society."[178] Although financial savings might serve a compelling interest, CRECNO is certainly not narrowly tailored to serve that interest. In fact, according to a report by the Legislative Analyst's Office, CRECNO would not even serve that interest, for the study concluded that "the measure would not result in a significant fiscal impact on state and local governments."[179] Furthermore, it is doubtful that a court would hold that not having to check boxes on state

175. *See supra* note 168 and accompanying text.
176. *See generally Joint Hearing*, *supra* note 9.
177. *CEE II*, 122 F.3d 692, 706 (9th Cir. 1997) (citing Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982)).
178. Racial Privacy Initiative, *supra* note 7.
179. INFORMATION GUIDE, *supra* note 1, at 40.

forms is a compelling interest, because checking them is a voluntary process. Finally, although a court may hold that achieving a colorblind society is a compelling interest, CRECNO is certainly not narrowly tailored to serve that interest. As discussed above, it actually disserves the interest by preventing state actors from tracking hate crimes, racial profiling, employment discrimination, and other odious forms of discrimination. Upon close examination, a court may well find that a revised CRECNO, like the initiatives invalidated in *Hunter* and *Seattle*, cannot pass constitutional muster.[180]

180. A revised CRECNO might also be challenged on First Amendment grounds. The speech implications of CRECNO are complex and do not fit neatly into any one doctrinal category within First Amendment law. Although subjecting a revised CRECNO to First Amendment scrutiny is beyond the scope of this Comment, I will offer a few suggestions and resources.

First, in the CRECNO context, the government is not acting as speaker so much as recordkeeper. CRECNO does not restrict content-based speech per se but rather the use and collection of a type of data. This data is used by the state and its citizens to further informed speech. The Supreme Court has recognized that its "precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'" Bd. of Educ. v. Pico, 457 U.S. 853 (1982). Thus, if the state removes race data from the arsenal of information that it previously collected to further informed decisionmaking, it may do so only if it has good reason, not simply because it does not like the content of that data or fears how it will be used.

A comparison to *Board of Education v. Pico* is illustrative. In *Pico*, a school board ordered the removal of certain books that it found to be immoral from its school libraries. *Id.* at 858. In a plurality opinion authored by Justice Brennan, the Court articulated that although school boards have significant discretion to determine the content of their libraries, the Constitution does not call for the "official suppression of ideas." *Id.* at 871. "Thus whether [the Board's] removal of books from [its] school libraries denied [students] their First Amendment rights depend[ed] upon the motivation behind [the Board's] actions." *Id.* If the Board removed the books based solely on the "educational suitability" of the books, "then their removal would be 'perfectly permissible' . . . [because the Board's motivation] would not carry the danger of an official suppression of ideas." *Id.* However, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 872. The Court emphasized that its holding applied narrowly to the act of removal.

Passage of a revised CRECNO initiative would accomplish a similar removal of previously permitted information. If opponents challenged the initiative on First Amendment grounds, a court applying *Pico* would examine the motivation behind the removal action. Like a school board, the state has wide discretion. If for example, the state's reasoning in adopting a revised CRECNO initiative and therefore removing race data was that government forms were becoming too long and complicated, that would likely be permissible because it "would not carry the danger of official suppression of ideas" (just as educational unsuitability would have been a permissible motivation in *Pico*). If, however, the motivation were content-based, and the government removes the use and collection of race data from its databases because it does not like the information, a court would find a constitutional violation under *Pico*. The proponents of CRECNO disfavor the government's collection and use of race data because they believe the data is used improperly and divisively. They argue that classifying Americans by race "continue[s] to imbed race as a social construct," causing people to view themselves in racial categories and to act accordingly. *See* Racial Privacy Initiative, Comments, *at* http://www.racialprivacy.org/content/comments.php. Under *Pico*, "removal" of race information under a revised CRECNO probably would be impermissible because it falls within the "official suppression of ideas." Although the context of removal in *Pico* is quite different from that in the CRECNO context, both actions tie into the doctrine of antipaternalism. For a discussion of the

IV. CRECNO WILL NOT ACHIEVE A "COLORBLIND" SOCIETY

According to their Mission Statement, the proponents of Proposition 54 sought to achieve "America's first step towards a color-blind society."[181] By eliminating the collection and use of race data by the government (with certain exceptions), the backers of Proposition 54 hoped to erase public recognition of race and thereby achieve a colorblind state. Measures such as Proposition 54 rely on the premise that race, a private trait, has been improperly "obsessed" over by the state, when it simply should be part of an individual's personal identity.[182] Thus advocates of a colorblind model seek to do away with government intervention in the context of race.[183]

Colorblindness discourse is premised on the idea that each individual has the right to choose and pursue her own ends, regardless of race.[184] Advocates of colorblindness contend that racism is a thing of the past and that the time has come to move past color lines and color-conscious legislation.[185] According to advocates of a colorblind model, the racial disparities that

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antipaternalism doctrine as applied to CRECNO, see Vikram David Amar & Alan E. Brownstein, *The Broader First Amendment Questions Raised by Proposition 54, the So-Called "Racial Privacy Initiative,"* FINDLAW'S LEGAL COMMENTARY, Oct. 3, 2003, *at* http://writ.news.findlaw.com/amar/20031003.html (discussing the Court's antipaternalistic jurisprudence throughout the commercial speech cases).

Finally, for a discussion of how a revised CRECNO may run afoul of the First Amendment based on grounds of academic freedom, see Erwin Chemerinsky, *Why California's Proposed Racial Privacy Initiative is Not Only Unwise, but Also Unconstitutional and Potentially Fiscally Damaging for the State*, FINDLAW'S LEGAL COMMENTARY, Aug. 21, 2003, *at* http://writ.news.findlaw.com/commentary/20030821_chemerinsky.html. *But cf.* Vikram David Amar, *California's "Racial Privacy Initiative": Will It Be Struck Down on the Ground That It Violates Academic Freedom Protected by the First Amendment?*, FINDLAW'S LEGAL COMMENTARY, Sept. 5, 2003, *at* http://writ.news.findlaw.com/amar/20030905.html (discussing the complexities of the academic freedom argument and concluding that a court may be reluctant to invalidate CRECNO on academic freedom grounds).

181. Racial Privacy Initiative, *supra* note 7. The idea of a colorblind society has old roots in American law, surfacing as a model as early as 1896. *See* Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a "Color-Conscious" Theory*, 13 HARV. BLACKLETTER L.J. 183, 191 (1997) ("Beginning with Justice Harlan's famous dissent in *Plessy v. Ferguson*, and punctuated by the resounding statement in *Brown v. Board of Education* that 'separate educational facilities are inherently unequal,' the United States Supreme Court has steered toward a 'color-blind' approach in its civil rights jurisprudence.").

182. Racial Privacy Initiative, FAQs: Why Does California Need the Racial Privacy Initiative?, *at* http://www.racialprivacy.org/content/faq/need.php ("By helping California government stop obsessing about race, RPI will unite us to create a colorblind state for our children and grandchildren, one that is more respectful of the inherently private and complex nature of racial identity."); *see also* Shavar D. Jeffries, *What's Wrong With California's Racial Privacy Initiative*, FINDLAW'S LEGAL COMMENTARY, Sept. 3, 2002 *at* http://writ.findlaw.com/commentary/20020903_jeffries.html.

183. *See* BROWN ET AL., *supra* note 155, at 8.

184. *See* Cummings, *supra* note 181, at 184.

185. *See* BROWN ET AL., *supra* note 155, at 2.

exist today are due to the personal traits of minority individuals themselves, not to racial discrimination.[186]

In the United States, however, race is not merely a component of an individual's private identity: Critical race theorists, cognitive scientists, and psychologists alike agree that race is a value-laden social construct to which American society has ascribed meaning for nearly four hundred years.[187] Although the de jure segregation that pervaded American society some decades ago largely has been eliminated, examples of veiled racism are exposed everyday.[188] Even if CRECNO were enacted, race would continue to shape stereotypes and attitudes whether "one is applying for a job, driving a

186. *See id.* at 5–6 (discussing the works of Tamar Jacoby, Dinesh D'Souza, Shelby Steele, and Stephen & Abigail Thernstrom).

187. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, *in* "RACE," WRITING, AND DIFFERENCE 21 (Henry Louis Gates, Jr. ed., 1986); Lani Guinier, *(E)Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994); James M. Jones, *Psychological Models of Race: What Have They Been and What Should They Be?*, *in* PSYCHOLOGICAL PERSPECTIVES ON HUMAN DIVERSITY IN AMERICA 37 (Jacqueline D. Goodchilds ed., 1991) (explaining race as a "social" concept); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

188. In August 2003, Texas Governor Rick Perry pardoned thirty-five people, thirty-one of them African American, who had been arrested on drug charges in 1999 without evidence, solely on the word of a white undercover police officer, Tom Coleman. Coleman was charged with perjury. *See* Adam Liptak, *Texas Governor Pardons 35 Arrested in Tainted Sting*, N.Y. TIMES, Aug. 23, 2003, at A7. Although this an extreme and isolated incident by one racist individual, numerous studies and surveys show that many white Americans still perceive race in a negative way, often without realizing it. For some telling surveys, see BROWN ET AL., *supra* note 155, at 40. For example:

> In 1992, the Detroit Area Survey found that 16 percent of whites said they would feel uncomfortable in a neighborhood where 8 percent of the residents were black, and nearly the same percentage said they were unwilling to move to such an area. If the black percentage rose to 20 percent, 40 percent of all whites indicated they would not move there, 30 percent said they would be uncomfortable, and 15 percent would try to leave the area. Were a neighborhood to be 53 percent black, 71 percent of whites would not wish to move there, 53 percent would try to leave, and 65 percent would be uncomfortable. A more recent study of four cities (Atlanta, Boston, Detroit, and Los Angeles) yielded similar results. Camille Zubrinsky Charles found that more than half of whites in these four cities expressed a preference for same race neighborhoods, while blacks expressed a strong preference for integrated neighborhoods.

Id. For a remarkable study in the employment context, see *Racial Discrimination Continues to Play a Part in Hiring Decisions*, ECON. SNAPSHOTS (Econ. Policy Inst.), Sept. 17, 2003, *at* http://www.epinet.org/content.cfm/webfeatures_snapshots_archive_09172003. In the study, a sociologist examined employers' treatment of job applicants in Milwaukee, Wisconsin. He used four test groups, all of whom were given comparable resumes and were trained to behave similarly: white applicants without a criminal record, white applicants with a criminal record, black applicants without a criminal record, and black applicants with a criminal record. The study looked to the rate of callbacks for interviews. Whites without a criminal record were called back at a rate of 34 percent, and blacks with a criminal record were called back at a rate of 5 percent. White applicants with a criminal record, however, were more likely than blacks without a criminal record to be called back, 17 percent versus 14 percent.

car, walking into a boardroom, or simply standing on a porch with a wallet in hand."[189] Some prominent scholars contend that this is not the result of intended racism, but rather of "unconscious racism," which is reflected in the underlying associational and cognitive brain functions that link racial appearances with negative associations.[190] Because racial data tracks disparities, and such disparities often provide overwhelming evidence of "unconscious racism" when discriminatory intent cannot be proven beyond a reasonable doubt, passage of a CRECNO-like initiative would exacerbate the problem of racism by eliminating an effective tool for minorities to enact legislation in their interest. Thus, CRECNO ignores the real problem of discrimination and is not only ineffective, but also destructive to attempts to enforce equal protection.

CONCLUSION

Although Proposition 54 was successfully defeated in the October 2003 special election, its author has suggested that he will propose a revised initiative. The revised initiative will likely exempt most, if not all, medical and public health information. Because the dangers of the medical exemption were a central focus of the Proposition 54 campaign, there is a possibility that the initiative may win a majority of California's voters. If so, an equal protection challenge based on the *Hunter* doctrine can be mounted in a federal court by proving that the revised CRECNO is racial in character, imposes a political process burden, and is objectively motivated by a discriminatory purpose. If its opponents are successful, the revised CRECNO initiative will likely fail a strict scrutiny test. Not only is CRECNO not narrowly tailored, but there is no compelling interest for a CRECNO initiative. Like many approaches that are based on colorblindness, the initiative misunderstands the nature of the problem it seeks to remedy. Rather than eliminating racial discrimination, the passage of CRECNO would merely bury the evidence of discrimination, making it even more difficult to combat.

189. Jeffries, *supra* note 182. "The problem is not that the government knows the skin color of those with whom it comes into contact—though that is the RPI's misplaced preoccupation. It is that government employees, and private companies under government regulation, often decide to draw substantive conclusions on the basis of skin color." *Id.*

190. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 328–44 (1987); *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).