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Constitutional Law: The Redefinition of "Minority" and Its Impact on Political Structure Equal Protection Analysis (Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997))

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CONSTITUTIONAL LAW: THE REDEFINITION OF "MINORITY" AND ITS IMPACT ON POLITICAL STRUCTURE EQUAL PROTECTION ANALYSIS

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

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Appellees are organizations who lobby for affirmative action programs and persons who benefit from them.[1] In the State of California, voters passed a referendum known as Proposition 209[2] which, in pertinent part, abrogated affirmative action.[3] Appellees sought injunctive relief,[4] contending that Proposition 209 contravened the U.S. Constitution and demanding that the State be enjoined from fully implementating Proposition 209.[5] The U.S. District Court for the Northern District of California found that Appellees would likely succeed on the merits of their suit and issued a preliminary injunction blocking the enforcement of Proposition 209.[6] The Governor of California appealed to the Court of Appeals for the Ninth Circuit to stay the preliminary injunction during the pendency of appeals.[7] The Ninth Circuit deferred submission of Appellants' motion and elected, instead, to rule on the substantive merits underlying the preliminary injunction.[8] The court of appeals determined that the district court misapprehended the law in reaching its decision.[9] Thus, the Ninth Circuit vacated the preliminary injunction, denied the stay as moot, and HELD, that Proposition 209 did not violate the U.S. Constitution because the referendum was consistent with the

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* *Editor's Note:* This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Summer 1997.

** In memory of my mother, Arlene Doris Goldstein Moore.

1. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 697 (9th Cir.), *cert. denied*, ___ S. Ct. ___, No. 97-369, 1997 WL 589411 (Nov. 3, 1997).

2. CAL. CONST. art. I, § 31(a) (amended 1996) (providing, in pertinent part, 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").

3. *Coalition for Econ. Equity*, 122 F.3d at 696.

4. *Id.* at 697.

5. *Id.*

6. *Id.* at 698.

7. *Id.*

8. *Id.* at 699.

9. *Id.* at 710.

Equal Protection Clause,[10] and no opposing federal legislation gave rise to a Supremacy Clause[11] challenge.[12]

Because Californians are entitled to amend their own constitution,[13] the Ninth Circuit approached Proposition 209 with deference.[14] But plebiscites are not beyond judicial review, and in *Hunter v. Erickson*,[15] the U.S. Supreme Court struck down a popular referendum without apology.[16] In *Hunter*, voters in Akron, Ohio, elected to change their city charter to mandate referenda in certain political situations.[17] Specifically, the amended city charter provided that proposed antidiscrimination ordinances regarding real property transactions be approved by the general electorate.[18] The *Hunter* Court found that this requirement would have a disparate, adverse impact on "minorities."[19] The Court reasoned that popular referenda favor "majorities," groups that have traditionally wielded political power.[20] Before Akron's charter was amended, persons or groups seeking antidiscrimination protection in the course of real property transactions could petition their local government.[21] Akron residents alleging racial discrimination in the course of purchasing a home, for example, could address a complaint before a local commission.[22] The *Hunter* Court concluded that Akron's new policy

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10. U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

11. *Id.* art. VI, cl. 2 (providing, in pertinent part, that "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land").

12. *Coalition for Econ. Equity*, 122 F.3d at 710-11.

13. CAL. CONST. art. II, § 8.

14. *Coalition for Econ. Equity*, 122 F.3d at 699 ("A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.").

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

16. *Id.* at 392 ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.").

17. *Id.* at 387.

18. *Id.* The amended City of Akron charter stated as follows:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Id. (quoting AKRON, OHIO, CHARTER § 137 (1964)).

19. *Hunter*, 393 U.S. at 390-91.

20. *Id.* at 391.

21. *Id.* at 386.

22. *Id.* at 386-87. The Court referred, specifically, to "[a] Commission on Equal Opportunity in Housing." *Id.* at 386. Appellant, Nellie Hunter, attempted to "invoke this machinery," that is, utilize the Commission, when she was told that she could not buy a

contravened the Equal Protection Clause by "plac[ing] special burdens on racial minorities within the governmental process."[23]

The *Hunter* decision was significant because it extended the Court's distinction between "minority" and "majority" groups and their respective political power. The *Hunter* Court asserted that "majority" groups can manipulate the political system to their own advantage.[24] Thus, it would be "bothersome," but "no more than that" for the "majority" to introduce and enact a referendum.[25] By contrast, the Court found marginalized groups, or "minorities," ill-equipped to produce substantive political change by means of the general electorate.[26]

The distinction between majoritarian and marginalized groups, and their respective political power, also surfaced in *Richmond v. J.A. Croson Co.*[27] In *Croson*, the Court reviewed a Richmond, Virginia ordinance that provided opportunities for "minority" contractors.[28] The ordinance required nonminority prime contractors hired by the city to subcontract to "minority" businesses a certain percent of the dollar amount of the city's contract.[29] The *Croson* Court objected to the plan, in part, on the ground that traditional "minorities," like African Americans, were not disadvantaged in Richmond's construction industry.[30] The Court also pointed out that African Americans comprised a majority of the Richmond city council and made up half of the city's population.[31] In her plurality opinion, Justice O'Connor implied that reverse "majoritarian" politics may have been a factor in Richmond's affirmative action planning.[32]

The question of majoritarian politics was again at issue in *Romer v.*

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particular home because she was African American. *Id.* at 387.

23. *Id.* at 391.

24. *See id.*

25. *Id.*

26. *Id.*

27. 488 U.S. 469 (1989) (plurality opinion).

28. *Croson*, 488 U.S. at 477-78 (citing RICHMOND, VA., CITY CODE § 12-156(a) (1985)).

29. *Id.* The ordinance referred to minority subcontractors as Minority Business Enterprises (MBE). *Id.* at 477. Nonminority general contractors "to whom the city awarded construction contracts" were required to set aside 30% of the dollar amount of the city contract for subcontracts to MBE's. *Id.* at 477-78. An MBE was defined as "'[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.'" *Id.* at 478 (quoting RICHMOND, VA., CITY CODE § 12-23, p. 941) (alteration in original). The expression "minority group members" was defined broadly to refer to "'[c]itizens of the United States who [we]re Blacks, Spanish-speaking [sic], Orientals, Indians, Eskimos, or Aleuts.'" *Id.* (quoting RICHMOND, VA., CITY CODE § 12-23, p. 941).

30. *Id.* at 505 ("In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry.").

31. *Id.* at 495.

32. *Id.* at 495-96 ("The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.").

Evans.[33] In *Romer*, the Court granted certiorari to the Supreme Court of Colorado to determine whether Amendment 2,[34] a referendum, violated the Equal Protection Clause.[35] Amendment 2 prohibited governmental entities in Colorado from advancing the rights of homosexuals.[36] Furthermore, it revoked existing homosexual rights measures.[37] The *Romer* Court was persuaded that the Colorado Constitution would have to be " '[re-]amended to permit such measures' " before municipalities could adopt ordinances and policies that would directly benefit the unique interests of homosexuals.[38] The *Romer* Court held that Amendment 2 denied homosexuals equal protection of the law precisely because it imposed this political obstacle.[39] Specifically, Amendment 2 required homosexuals, but not other groups seeking "protection against discrimination," to "enlist[] the citizenry of Colorado to amend the state constitution."[40]

Another case that was factored into the Ninth Circuit's analysis was *United States v. Virginia*.[41] The *Virginia* Court granted certiori to the Fourth Circuit to determine whether the State of Virginia could prevent women from enrolling at the Virginia Military Institute (VMI), a public college.[42] The Court held that Virginia could not maintain VMI as a single-sex, public institution in view of the Equal Protection Clause.[43] Justice Ginsburg, writing for the majority, invoked the United States' " 'long and unfortunate history of sex discrimination' " as a vital factor in its decision.[44] The *Virginia* Court held that gender, although not a "proscribed classification,"[45] still requires an "'exceedingly persuasive justification.'"[46] The decision in *Virginia* was significant, in part, because it focused attention on

33. 116 S. Ct. 1620 (1996).

34. COLO. CONST. art. II, § 30b (amended 1996) (providing that no governmental entity in the State of Colorado shall "entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination" on the basis of "homosexual, lesbian or bisexual" distinctions).

35. *Romer*, 116 S. Ct. at 1623.

36. *Id.*

37. *Id.* at 1626 (stating that Amendment 2 "operate[d] to repeal . . . all laws or policies providing specific protection for gays and lesbians from discrimination").

38. *Id.* at 1625 (quoting Evans v. Romer, 854 P.2d 1270, 1284 n.26 (Colo. 1993)).

39. *Id.* at 1627. According to the Court, "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." *Id.* at 1628.

40. *Id.* at 1627.

41. 116 S. Ct. 2264 (1996) (7-1 decision).

42. *Id.* at 2269.

43. *Id.* at 2276.

44. *Id.* at 2274-75 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

45. *Id.* at 2276.

46. *Id.* at 2271 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

women as a class of persons, in the context of equal protection analysis.[47] By rejecting VMI's single-sex admission policy, the *Virginia* Court participated in the U.S. jurisprudential tradition of "extend[ing] . . . constitutional rights and protections to people once ignored or excluded."[48] *Croson*, *Romer*, and *Virginia* thus emerge, in the wake of *Hunter*, as useful for their equal protection analyses. These decisions, in some form, turn on the relative political strength of a constituency or a group.

In the instant case, the Court of Appeals for the Ninth Circuit addressed the political strength of a constituency. In determining whether a preliminary injunction was properly granted, the instant court was presented with the issue of whether Proposition 209 contravened the U.S. Constitution.[49] The instant court noted that prior to the enactment of Proposition 209, local governments and state agencies in California could implement racial and sex-conscious affirmative action programs at their own discretion.[50] Californians,[51] in turn, could petition for such programs directly.[52] The specific issue before the court was therefore whether individuals would be denied equal protection of the laws should they lose this opportunity.[53]

To resolve this question, the instant court applied two modes of equal protection analysis.[54] First, the instant court used a " 'conventional' equal protection analysis, which looks to the substance of the law at issue."[55] The court examined the plain language of the Equal Protection Clause and concluded that "as a matter of law[,] . . . Proposition 209 does not violate the Equal Protection Clause in any conventional sense."[56] Next, the instant court engaged in a "'political structure' equal protection analysis, which looks to the level of government at which the law was enacted."[57] The

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47. *Id.* at 2274 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex *responds* to volumes of history.") (emphasis added).

48. *Id.* at 2287 n.21 (quoting RICHARD MORRIS, THE FORGING OF THE UNION, 1781-1789, at 193 (1987)).

49. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 699-700 (9th Cir. 1997) (citing Armstrong v. Mazurek, 94 F.3d 566, 567 (9th Cir. 1996) (indicating the correct standard for determining whether a preliminary injunction should be granted)).

50. *Id.* at 703.

51. *Id.* The instant court used the expression "women and minorities." *Id.*

52. *Id.*

53. *Id.* at 697. Appellees also argued that Proposition 209 clashed with Title VII of the Civil Rights Act of 1964 and thus, was void under the Supremacy Clause. *Id.* Confident that the plain language of Title VII did not require the implementation of either racial or sex-based affirmative action measures, the instant court rejected this argument outright. *Id.* at 710.

54. *Id.* at 700-02.

55. *Id.* at 701-02.

56. *Id.* at 702. Based on its understanding that the Fourteenth Amendment always forbids unequal treatment, the instant court proceeded to argue that "the central tenet of the Equal Protection Clause [would] teeter[] on the brink of incoherence" if Appellees' argument were to be accepted. *Id.*

57. *Id.* at 702-03.

court invoked the equal protection doctrine established in *Hunter*[58] in acknowledging that a political process cannot be reorganized to impede "'minority interests.'"[59] However, the instant court did not find that affirmative action[60] was a "minority interest," within the purview of *Hunter*.[61] The instant court thus vacated the preliminary injunction because Appellees could not prevail on the merits.[62]

In the instant case, the Ninth Circuit redefined "minority."[63] This enabled the instant court to distort the *Hunter* doctrine,[64] which states that "minorities" are uniquely vulnerable in the political process.[65] In *Hunter*, the Court held that voters cannot restructure a municipal government to "disadvantage any particular group by making it more difficult to enact legislation in its behalf."[66] Although Appellant was African American,[67] and voters had specifically burdened African American interests,[68] the

58. *Id.* at 703; Hunter v. Erickson, 393 U.S. 385, 393 (1969) ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote . . . ."); *accord* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982) (adopting the same rationale and coining the phrase *"Hunter* doctrine").

59. *Coalition for Econ. Equity*, 122 F.3d at 707 (quoting *Seattle*, 458 U.S. at 477).

60. *Id.* at 700. By "affirmative action," the instant court meant only "state programs that use race or gender classifications." *Id.* The instant court was careful in this regard because of the "'amorphous'" nature of the expression. *Id.* (quoting Lungren v. Superior Court, 55 Cal. Rptr. 2d 690, 694 (3d Dist. Ct. App. 1996)).

61. *Id.* at 707 (stating that "[a] denial of equal protection entails, at a minimum, a classification that treats individuals unequally"). The instant court also aligned Proposition 209 with Proposition 1, per *Crawford v. Board of Educ.*, 458 U.S. 527 (1982). *Coalition for Econ. Equity*, 122 F.3d at 705. In *Crawford*, the U.S. Supreme Court upheld a referendum that prohibited state courts from mandating public school busing assignments. *Id.* The instant court found the holding in *Crawford* more relevant to the case at bar than the holding in either *Hunter* or *Seattle*. *Id.* at 706. The instant court's rationale was that Proposition 209, like Proposition 1, was facially neutral and nondiscriminatory. *Id.* The instant court noted the "explicit distinction 'between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.' " *Id.* at 705 (quoting *Crawford*, 458 U.S. at 538). According to the instant court, Proposition 209 is an example of the latter. *Id.* at 709.

62. *Coalition for Econ. Equity*, 122 F.3d at 710.

63. *Id.* at 704 (stating that "women and minorities . . . constitute a majority of the California electorate"). *But see* 29 C.F.R. § 1608.1(b) (1979) (defining "minorities" as groups who have suffered a "pattern of restriction, exclusion, discrimination, segregation, and inferior treatment").

64. Hunter v. Erickson, 393 U.S. 385, 392-93 (1969).

65. *Id.* at 391 ("The majority needs no protection against discrimination . . . .").

66. *Id.* at 393.

67. *Id.* at 386. Appellant, Nellie Hunter, was described by the Court as a "Negro citizen." *Id.*

68. *Id.* By enacting section 137 of the City Charter, voters removed the city's authority to effect antidiscrimination housing ordinances. *Id.* at 387 (citing AKRON, OHIO, CHARTER § 137 (1964)).

Hunter Court's holding remained broadly applicable.[69] The Court never stated that its rationale would only apply to African Americans or "minorities."[70] In dicta, however, the Court undermined the potential breadth of its holding by arguing that "the majority needs no protection from discrimination."[71]

The combined subject of "minority" rights and "minority" representation is central to U.S. constitutional jurisprudence.[72] In *Croson*, the U.S. Supreme Court addressed its longstanding role in "protect[ing] 'discrete and insular minorities' from majoritarian prejudice or indifference."[73] The *Croson* Court expressed that sometimes this role is characterized as a duty, mandated by the Equal Protection Clause itself.[74] As the *Croson* Court pointed out, this sense of duty may permit "dominant racial groups to disadvantage themselves," that is, by effecting " 'benign' racial classifications."[75]

In the instant case, the Ninth Circuit advanced this position by suggesting that it was impossible for the majority of an electorate to "stack the political deck against itself."[76] Thus, the Court reasoned that Appellees[77] had not been denied equal protection because they had enacted Proposition 209 themselves.[78] According to the instant court, "women and minorities together . . . form[] the majority of the California electorate."[79] Utilizing dicta from *Hunter*, the instant court stated that "women and minorities" did not deny themselves equal protection as a matter of law because they had enacted Proposition 209 in the capacity of a political majority.[80]

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69. *Id.* 393 U.S. at 393.

70. *Id.*

71. *Id.* at 391.

72. *See generally, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 135-179 (1980) (providing historical commentary on, and theoretical analysis of, the Supreme Court's role in the representation of marginalized people in the United States).

73. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (quoting United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938)).

74. *Id.* For a discussion of the *Croson* Court's reference to footnote 4 of *Carolene Products*, *see* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 80 (1996).

75. *Croson*, 488 U.S. at 495 (citing ELY, *supra* note 72, at 170); *see also, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

76. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997). The instant court expanded its argument as follows: "When the electorate votes up or down on a referendum alleged to burden a majority of the voters, it is hard to conceive how members of the majority have been denied the vote." *Id.*

77. *Id.* at 697. Appellees were described as "several individuals and groups . . . [who] claim[ed] to represent the interests of racial minorities and women." *Id.*

78. *Id.* at 703-04.

79. *Id.* at 704.

80. *Id.* at 705 n.13. "Had the parties presented evidence, and had the district court found, that women constitute a majority of the California electorate, we would likely conclude

The instant court's analysis is problematic for several reasons. First, the analysis implies that women and "minorities" voted cohesively in support of Proposition 209, when the opposite was in fact true.[81] Second, by questioning whether it is possible for the majority of an electorate to deny itself equal protection, the instant court undermines *Hunter*, which broadly held that a popular referendum is never "immunized" from equal protection review.[82] The *Hunter* Court, instead, demanded an impact-based analysis of popular legislation.[83] This approach, by definition, must look past facially neutral laws. The instant court's analysis is therefore based, in part, on a fallacious factual predicate.[84] Further, by addressing "women and minorities" as a single entity, the instant court ignores the complexity of contemporary equal protection analysis.[85]

The term "minority," by itself, is empty of meaning. As the instant case demonstrates, the outcome of political structure equal protection analysis can turn on whether minority is used as a statistical reference or a term of art.[86] As *Croson* illustrates, statistical inequality does not automatically translate into political discrimination.[87] Furthermore, as Justice Marshall argued in his dissenting opinion in *Croson*, a group's statistical dominance in one community does not protect it from global discrimination or eliminate the effects of residual prejudice.[88]

In his dissenting opinion in *Romer*, Justice Scalia reasoned that

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as a matter of law, *for that reason alone*, that Proposition 209's ban on gender-based preferences does not deny women equal protection." *Id.* (emphasis added).

81. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 n.12 (N.D. Cal. 1996). The district court noted that 52% of the female electorate had voted "no" on Proposition 209, and that 74% of the African American electorate and 76% of the Hispanic electorate also had voted "no" on Proposition 209. *Id.*

82. Hunter v. Erickson, 393 U.S. 385, 392 (1969) (citation omitted). The Court further stated that "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Id.*

83. *Id.* at 391 (examining the comparatively disparate impact of section 137 of the Akron City Charter despite its neutral "face").

84. *See Coalition for Econ. Equity*, 122 F.3d at 703-04.

85. *See id.* at 708-09. The instant court acknowledged the discrete review standards per *Adarand* and *Virginia*, but said nothing of their intersection or the problems that arise therefrom. *Id.* In *Virginia*, the Court indicated that strict scrutiny should only be applied, as a review standard, to official classifications on the basis of race, not gender. United States v. Virginia, 116 S. Ct. 2264, 2275 n.6 (citing Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995)). Classifications along gender lines must be found "'exceedingly persuasive.'" *Id.* at 2275.

86. *Coalition for Econ. Equity*, 122 F.3d at 703-04. The instant court was persuaded that "a majority of the electorate" had enacted Proposition 209. *Id.* at 704. This observation supported its holding. *Id.*

87. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) ("There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.").

88. *Id.* at 530 (Marshall, J., dissenting).

Amendment 2 was enacted fairly because homosexuals, despite being a statistical minority, wielded "enormous influence."[89] In *Virginia*, Justice Scalia again critiqued the traditional notion of " 'discrete and insular minorities' " as it pertained to women.[90] This time, Justice Scalia deferred to a purely statistical construct, arguing that "[i]t is hard to consider women a discrete and insular minorit[y] . . . when they constitute the majority of the electorate."[91] The instant court clearly found this rationale persuasive.[92]

The instant case illustrates the temptation to either criticize or defend a referendum on the basis of who voted for it.[93] Even the district court was persuaded along these lines, taking judicial notice of the fact that voters in San Francisco opposed Proposition 209 by an overwhelming majority.[94] This tendency to examine who voted for what surfaces in other cases addressing referenda and equal protection.[95]

These observations undermine the potentially broad scope of the *Hunter* doctrine.[96] Federal courts should address only whether a voter initiative will deny certain citizens equal protection.[97] Although this approach will not automatically favor all affirmative action supporters,[98] supporters will enjoy a stronger legal position if courts ignore the premise that "the majority needs no protection from discrimination."[99]

The instant case could be prescient. It demonstrates that *Hunter* can be used to weaken the jurisprudential viability of affirmative action. By introducing the idea that "women and minorities" together form "the majority," and proposing that "the majority" can never discriminate against itself, the instant court lends a valuable strategy to affirmative action

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89. Romer v. Evans, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting) (stating that homosexuals "possess political power much greater than their numbers").

90. *Virginia*, 116 S. Ct. at 2296 (Scalia, J., dissenting) (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

91. *Id.* Justice Scalia also added that "the suggestion that . . . [women] are incapable of exerting . . . political power smacks of the same paternalism that the Court so roundly condemns." *Id.*

92. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 705 n.13 (9th Cir. 1997) ("[Appellants'] argument that *Hunter* and *Seattle* do not extend to gender-based laws because women themselves constitute a majority of the electorate is . . . compelling.").

93. *Id.*

94. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1507 n.31 (N.D. Cal. 1996).

95. *See* Crawford v. Board of Educ., 458 U.S. 527, 545 n.33 (1982) ("Proposition I received support from 73.9% of the voters in Los Angeles County which has a 'minority' population . . . of over 50%.").

96. Hunter v. Erickson, 393 U.S. 385, 393 (1969).

97. *Coalition for Econ. Equity*, 946 F. Supp. at 1490 (stating that "federal courts have no duty more important than to protect the rights and liberties of all Americans . . . . This duty is certainly undiminished where the law under consideration comes from the ballot box").

98. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny").

99. The *Hunter* doctrine has been eviscerated. *See supra* text accompanying notes 63-65.

opponents. In the future, affirmative action opponents may employ this rhetorical strategy to their advantage. At the same time, the instant case should serve as a warning to affirmative action supporters, not to embrace *Hunter* as they have in the past.