

Does Decisional Law Grant Whites Fewer Political Rights Under the Fourteenth Amendment Than It Grants to Racial Minorities?: A Response to Vikram D. Amar and Evan H. Caminker

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Introduction

On November 5, 1996, the California electorate adopted Proposition 209, otherwise known as the California Civil Rights Initiative (CCRI), by a margin of 54-46 percent.¹ For the purposes of the present paper, the key provisions of Proposition 209, which now comprises Article I, Section 31 of the state constitution, are as follows:

Prop 209: (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting

. . . .

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school dis-

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1. See Bill Jones, California Secretary of State, *1996 General Election Returns for Ballot Propositions* (visited Jan. 26, 1998) <<http://Vote96.ss.ca.gov/Vote96/html/vote/prop/prop-209.961218083528.html>>.

trict, special district, or any other political subdivision or governmental instrumentality of or within the state.²

Professors Vikram D. Amar and Evan H. Caminker have argued that lower courts, at least, must hold Proposition 209 unconstitutional in light of the Supreme Court precedent set in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).³ This Article responds to the arguments advanced by Amar and Caminker. It shows that under the *Seattle* precedent it is not unconstitutional for a state to use a political decisionmaking process, in this case, a statewide initiative, to constitutionalize a prohibition against race-conscious measures, even if the adoption of such a change in policy makes it more difficult for minorities to obtain legislation at lower levels of government. The *Seattle* ruling invalidates only those enactments that meet both of the following criteria: (1) the enactment addresses a specifically racial matter; and (2) it explicitly alters a political decisionmaking process on that racial matter in a way that places a special burden on minorities.

This Article discusses *Crawford v. Board of Education*, 458 U.S. 527 (1982), and demonstrates ways in which the *Crawford* decision provides important corroborating evidence for this author's analysis of *Seattle*. The Article also criticizes the Amar-Caminker interpretation of *Seattle* on the grounds that it necessarily implies that minorities have political rights under the Fourteenth Amendment that are denied to the majority.⁴

2. Proposition 209, in California Ballot Pamphlet, General Election Nov. 5, 1996 (enacted as CAL. CONST. art. I, § 31).

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

4. Amar and Caminker focus on race in their article, giving as one of their reasons that the *Seattle* decision only addresses race. See Amar & Caminker, *supra* note 3, at 1022 n.10. Since this article is a response to Amar-Caminker, it too focuses on the criterion of race. It should be noted that this writer maintains, as CADAP argued in federal court, that the *Hunter* doctrine cannot be extended to cover the criterion of sex, for two reasons. First, under the Federal Constitution, gender classifications are subject to a lower standard of review than racial classifications. See, e.g., *Mississippi University v. Hogan*, 458 U.S. 718 (1982). Second, race is at the core of the *Hunter* doctrine. Since women are not a minority group, gender falls outside the scope of the *Hunter* doctrine. Women are both a demographic and a political majority in California. See Telephone interview with Jim Fay, Dean of Humanities, California State University at Hayward (Jan. 26, 1998) (citing CALIFORNIA ALMANAC (Jim Fay ed., 5th ed. 1991) (Women and men comprise 50.7 percent and 49.3 percent of the U.S. population, respectively, and 51 percent and 49 percent of the voting population, respectively. See *id.* at 5, 290)). Women also comprised a majority of those who voted on Proposition 209. See Exit polling, VOTER NEWS SERVICE, Nov. 5, 1997 (52 percent of those who voted on Proposition 209 were women; of these, 52 percent voted for the measure, and 48 percent voted against it. Of white women who voted on the measure, 59 percent voted for it; 41 percent voted against it.).

Washington v. Seattle School District No. 1⁵

In 1978, the Seattle School District adopted a desegregation plan that made extensive use of mandatory busing.⁶ Subsequently, a group of citizens in *Seattle* drafted Initiative 350, a statewide ballot measure which, they hoped, would result in the termination of the Seattle busing plan and racial busing in the State of Washington generally.⁷ The key provision of the measure read as follows:

Init. 350: Be it enacted by the People of the State of Washington:

Notwithstanding any other provision of law, after the effective date of this act no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student⁸

The measure also set out a number of broad exceptions to this requirement.⁹ As qualified by the exceptions, the prohibition had the effect of permitting mandatory busing for every purpose other than that of racial balancing or integration of the schools.¹⁰ The measure also proscribed the use of seven enumerated methods of indirect student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of “feeder” schools—which had figured in the Seattle plan.¹¹ The initiative permitted racial busing in only one circumstance; it did not purport to “prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.”¹²

Initiative 350 is distinguished from Proposition 209 in the following ways. First, the people of the State of Washington did not adopt an anti-busing policy when they passed Initiative 350. Indeed, as the *Seattle* Court itself noted, the measure left the state legislature free to order such busing.¹³ Proposition 209, on the other hand, is a substantive policy enacted at

5. 458 U.S. 457 (1982).

6. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461 (1982).

7. See *id.* at 462.

8. 1979 Wash. Laws ch. 4, § 1 (Initiative Measure No. 350) (codified as amended at WASH. REV. CODE § 28A.26.010 (1981) (repealed 1991)).

9. See *Seattle*, 458 U.S. at 457, 462.

10. See *id.* at 457.

11. See *id.* at 462-63.

12. *Id.* at 463.

13. See *id.* at 474 (“Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate.” *Id.*).

the highest level of state government, the constitution. As with virtually all state constitutional amendments, its prohibitions are controlling over all non-federal governmental entities and instrumentalities in the state.

Second, Initiative 350 explicitly altered the state's political decision-making process on a particular issue; specifically, it removed decision-making authority over mandatory racial busing from local school boards. In this respect, too, it differs from Proposition 209, which has no language that explicitly alters California's political decisionmaking process.

In 1982, the Court held, five to four, that Initiative 350 altered the political decisionmaking process in Washington State on a specifically racial question in a way that placed special burdens on minorities in violation of the Fourteenth Amendment of the Federal Constitution.¹⁴ The problem before us is to understand this ruling and its implications, if any, for the adjudication of the constitutionality of California's Proposition 209.

A Divided Court

Does the *Seattle* decision immunize certain kinds of race-conscious enactments by lower levels of government against race-neutral policies enacted by higher levels of government? On this fundamental point, a minority of the *Seattle* Court thought that it might.¹⁵ According to Justice Powell, the Court's invalidation of Initiative 350 had arguably committed the Court to the following positions, which he regarded as not merely untenable, but absurd:

(1) the adoption of a neighborhood school policy by a local school board is permissible under the Federal Constitution, but the adoption of such a policy at the state level violates the Fourteenth Amendment;¹⁶

(2) while it would be constitutionally permissible for the Seattle School District to change its mind and cancel its program of mandatory racial busing of its own volition, neither the state legislature nor the people of the State of Washington could alter what the District had decided;¹⁷

(3) the Supreme Court of the State of Washington is barred from interpreting a provision of its state constitution as prohibiting race-

14. *See id.* at 470 ("In our view, Initiative 350 must fall because it does 'not attempt[] to allocate governmental power on the basis of any general principle.' *Hunter v. Erickson*, 393 U.S. [385,] 395, [(1969)] (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Id.*).

15. *See Seattle*, 458 U.S. at 488 (Powell, J., dissenting).

16. *See id.* at 488-89 (Powell, J., dissenting).

17. *See id.* at 494 (Powell, J., dissenting).

conscious school assignments, despite the fact that such a prohibition would be a facially tenable construction of that provision;¹⁸

(4) The Court was contradicting the dictum in *Regents of the University of California v. Bakke*¹⁹ that “in the absence of a federal constitutional violation *requiring* race-specific remedies, a policy of strict racial neutrality by a State would violate no federal principle.”²⁰ Powell asserted:

Powell, n.14:

The Court’s decision intrudes deeply into normal state decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as whole, the university president, the chancellor of the university system, and the board of regents might be powerless to intervene despite their greater authority under state law. After today’s decision it is unclear whether the State may set policy in any area where a local governmental body arguably has done “more” than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court’s theory one must wonder whether—under the equal protection component of the Fifth

18. *See id.* at 499 n.15 (Powell, J., dissenting). The provision reads: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex.” *Id.* Justice Powell noted in his dissent that the Supreme Court of the State of Washington had not interpreted this provision to prohibit race-conscious school assignments in the absence of a violation of the Fourteenth Amendment. *See id.* But surely, Powell pointed out, the state court could have rendered such a decision without violating the Federal Constitution. *See id.* at 499-500 n.15.

19. 438 U.S. 265 (1978).

20. *Seattle Sch. Dist.*, 458 U.S. at 491 (emphasis added) (citing *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)); *cf. Bakke*, 438 U.S. at 379 (Brennan, J., concurring in part, dissenting in part) (“It may be that the Harvard plan is more acceptable to the public than is the Davis ‘quota.’ If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program.” *Id.*). Note that the passage does not merely state that the University of California may abjure granting any racial preferences in its admissions programs; it states that the *State of California* may abjure granting preferences in the University’s admissions programs.

Amendment—even the Federal Government could assert its superior authority to regulate in these areas.²¹

Significantly, the *Seattle* majority denied that its ruling had these implications. It responded in direct reference to the parade of horrors in Powell's footnote 14 in the following way:

Seattle, n.23: Throughout his dissent, Justice Powell insists that the Court has created a "vested constitutional right to local decision-making," that under our holding "the people of the State of Washington apparently are forever barred from developing a different *policy* on mandatory busing where a school district previously had adopted one of its own," . . . and that today's decision somehow raises doubts about the "authority of a State to abolish school boards altogether." . . . These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the process of decisionmaking. It is evident, then, that the horrors paraded by the dissent . . . [²²]—which have nothing to do with the ability of minorities to participate in the process of self-government—are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decision-making power in state officials, or to remove authority from local school boards in a race-neutral manner.²³

There is no way to read this passage except as a statement that the people of a state are not forever barred from developing a different policy on mandatory busing where a school district previously has acted first; that a higher governmental authority may intervene to overturn an affirmative action plan that has been approved by the admissions committee of a law school; that a state may set policy in an area where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. Therefore, whatever the *Seattle* decision may mean, it does not support the proposition that the people of a state are barred from constitutionalizing a prohibition against discrimination and preferences on the basis of race, sex, or ethnicity, as the people of California did when they adopted Proposition 209.

21. *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) (emphasis added).

22. At this point the Court cites footnote 14 of Powell's dissenting opinion in *Seattle*. For the complete text of footnote 14, see *supra* pp. 973.

23. *Seattle*, 358 U.S. at 480 n.23.

The key to interpreting *Seattle* is simply to distinguish between (1) using a political decisionmaking process (such as a statewide ballot procedure) to adopt a race-neutral policy at a higher level of government and (2) explicitly altering a decisionmaking process in a way that places a special burden on minorities on a specifically racial question. The Court's ruling in *Seattle* upholds the constitutionality of measures that fit the first description, even when the policy that has been adopted at a higher level of government makes it more difficult for minorities to obtain legislation that the Court might deem to be in their interest.

There must be a distinction between (1) using a political decisionmaking process to adopt a race-neutral policy at a higher level of government and (2) explicitly altering a decisionmaking process in a way that places a special burden on minorities on a specifically racial question, for if the phrase "explicitly alters the political decisionmaking process" is to have any meaning, it cannot mean that a decisionmaking process is explicitly altered any time a higher level of government adopts a policy that precludes contrary policies at lower levels of government.

The *Hunter* and *Reitman* Precedents

Two earlier cases, *Reitman v. Mulkey*²⁴ and *Hunter v. Erickson*,²⁵ illuminate the Court's hostility to explicit alterations of the political decisionmaking process with respect to racial questions.

In 1964, the city council in Akron, Ohio enacted a prohibition against racial discrimination in real estate transactions, and established a Commission on Equal Opportunity in Housing to enforce its provisions.²⁶ Subsequently, the Akron electorate amended the city charter by a citywide ballot initiative as follows (known as Akron City Charter section 137):

ACC § 137: 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.²⁷

24. 387 U.S. 369 (1967).

25. 393 U.S. 385 (1969).

26. See *Hunter v. Erickson*, 393 U.S. 385, 385-86 (1969).

27. *Id.* at 387 (quoting Akron City Charter § 137).

The amendment essentially did two things. First, it repealed any existing housing ordinance regulating real estate transactions in the city on the basis of race and the other listed factors, including the one that had recently been enacted by the city council which prohibited racial discrimination in real estate transactions.²⁸ Second, it required any future housing ordinance bearing on a racial question to be ratified by a majority of the city's voters in a general election.²⁹

The amendment did not establish a *right* to discriminate on the basis of race and other factors in private real estate transactions in the city of Akron. Furthermore, in the campaign for the city charter amendment and when defending the amendment in court, the measure's proponents and the city of Akron never stated that they favored a policy establishing a right to discriminate in private real estate transactions.³⁰ Rather, they defended the measure on the grounds that any measure on this question was important enough to be submitted to the citywide electorate.³¹

Furthermore, if the citizens of Akron had adopted a policy establishing a right to discriminate, such a policy would have been unconstitutional under *Reitman v. Mulkey*.³² In *Reitman*, the Court struck down Proposition 14, a constitutional amendment which the people of the State of California adopted in 1964.³³ Proposition 14 provided in relevant part:

Prop. 14: Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.³⁴

The question in *Reitman* was not whether states could discriminate on the basis of race in real estate transactions, which they clearly could not under the Fourteenth Amendment. The question was whether the people of a state could constitutionalize a right to discriminate on the basis of race in *private* real estate transactions. The *Reitman* Court held, five to four, that Proposition 14 went beyond a position of neutrality with regard to private discriminations.³⁵ The Court struck down Proposition 14 on the grounds

28. *See id.*

29. *See id.*

30. *See id.* at 392.

31. *See id.* ("We are unimpressed with any of Akron's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of § 137, but does not justify it." *Id.*).

32. 387 U.S. 369 (1967).

33. *See Reitman v. Mulkey*, 387 U.S. 369, 369 (1967).

34. *See id.* at 371 (citing CAL. CONST. art. I § 26 (repealed 1974)).

35. *See Reitman*, 387 U.S. at 376.

that it "encouraged" or "authorized" private discrimination and established a *right* to discriminate.³⁶

Had Akron City Charter section 137 reserved to the residents of Akron the right to discriminate on the basis of race in their private real estate transactions, the amendment would have been invalidated by the Court's ruling in *Reitman*. Akron City Charter section 137 did not establish such a right. Instead, it struck down the city council's prior housing ordinances and required that all future housing ordinances bearing on race and certain other factors be submitted to a citywide referendum.³⁷ Even this measure was struck down by the Court on the grounds that it singled out racial matters for special treatment and altered the political decisionmaking process in a way that placed special burdens on minority interests.³⁸

Seattle in the Light of the *Hunter* and *Reitman* Precedents

The Court's opinion in *Seattle* rests squarely on its prior ruling in *Hunter*. The analysis in the *Seattle* opinion is structured as follows: (1) Initiative 350 is like Akron City Charter section 137 in all constitutionally relevant respects; (2) the *Hunter* Court held Akron City Charter section 137 unconstitutional; therefore, (3) Initiative 350 is unconstitutional.³⁹ To

36. *See id.*

37. *See Hunter*, 393 U.S. at 389-90.

38. *See id.* at 392-93. In *Reitman*, the Court held that while it would be permissible for the people of a state to repeal all existing fair housing laws, the people of a state could not amend their constitution to establish a right to discriminate on the basis of race in private real estate transactions. *See Reitman*, 387 U.S. at 380-81. There is no constitutionally relevant point in common between the measure held unconstitutional in *Reitman* and Proposition 209, which contains a stronger prohibition against racial discrimination and preferences than anything that is presently found in either the Federal Constitution or the Constitution of the State of California. The ban against racial discrimination in Proposition 209 is a *per se* rule. Existing state and federal bans against racial discrimination fall short of this. Consequently, it cannot be argued that in going beyond a "mere repeal" of laws and measures permitting racial preferences, Proposition 209 runs afoul of the Court's ruling in *Reitman*. For Proposition 209 to run afoul of that ruling, it would have to be shown that Proposition 209's *per se* ban against racial discrimination is itself discriminatory.

39. Compare the following passages from *Seattle* which cite *Hunter*: (1) "In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court." *Seattle*, 458 U.S. 457, 484 (1982); and (2) "For present purposes, it is enough that minorities may consider busing for integration to be 'legislation that is in their interest' Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.' . . . We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. . . . As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government." *Seattle*, 458 U.S. at 474 (citation omitted). "Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine." *Id.* at 485.

understand *Seattle*, therefore, it is essential to understand why the Court felt that Initiative 350 presented exactly the same constitutional issue that the Akron city charter amendment presented in *Hunter*.

Without taking a position on racial discrimination in private real estate transactions (Akron City Charter section 137) or the merits of mandatory racial busing (Initiative 350), the electorate in these two ballot measures explicitly altered the established political decisionmaking structure and placed decisionmaking power over a racial issue at a higher level of government. Both measures were deemed by the Court to violate the Fourteenth Amendment. The Court did not say in either case—and in *Seattle* explicitly denied—that states have no power to establish a race-neutral policy on a racial question that makes it more difficult for minorities to obtain legislation the Court might deem to be in their interest. We have also seen that there are *a priori* reasons for not interpreting the phrase “explicitly alters the political decisionmaking structure” so broadly that it covers policies enacted at higher levels of government that preempt contrary policies at subordinate levels of government.

The following principle summarizes the foregoing points regarding the *Hunter* doctrine (hereinafter “HD”),⁴⁰

HD: A measure that addresses a racial question, and which explicitly and directly alters the political decisionmaking structure on that question in a way that places special burdens on racial minorities, offends the Fourteenth Amendment. Measures that offend the Fourteenth Amendment in this way include, but are not limited to, explicit alterations in the political decisionmaking structure that place decisionmaking authority over a specifically racial question at a higher and more remote level of government.

The following principle HD' focuses on what the *Hunter* doctrine does *not* prohibit:

HD': A policy measure that is adopted at a higher level of government through the use of an existing decisionmaking structure does not violate the Fourteenth Amendment, even if such a measure makes it more difficult for minorities to obtain legislation that the Court might deem to be in their

Referring to both *Hunter* and *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1979), the *Seattle* Court stated: “We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does ‘not attempt[] to allocate governmental power on the basis of any general principle.’ . . . Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.” *Id.* at 470.

40. The Hunter Doctrine (“HD”) is the author’s formulation of the doctrine enunciated in the *Hunter* trilogy, namely, *Hunter*, 393 U.S. 385, *Seattle*, 458 U.S. 457, and *Crawford*, 458 U.S. 527.

interest (provided, of course, that the measure itself is constitutionally permissible in all other respects). When a higher level of government adopts such a measure, it is not altering the political decisionmaking structure in a way that violates the *Hunter* doctrine, but is simply exerting the power which it inherently has to establish any policies, including those bearing on specifically racial questions, that are not prohibited by the Federal Constitution.

Much if not most of the controversy between the majority and the dissenting justices in *Seattle* was over the question of whether Initiative 350 violated the *Hunter* doctrine.⁴¹ Justice Blackmun, writing for the Court, said that it violated the *Hunter* doctrine;⁴² Justice Powell, writing for the minority, said that it did not.⁴³ On this particular point, Blackmun was correct, and Powell was incorrect. For example, the Court had no difficulty in showing that decisionmaking authority over school busing had been placed, at least as a matter of practice, in local school boards before the adoption of Initiative 350.⁴⁴ Given this fact, Initiative 350 violated the *Hunter* doctrine as formulated in HD above, for it explicitly denied local school boards decisionmaking authority over a racial question which school boards had previously held.⁴⁵ It was also a *non sequitur* for Justice Powell to suggest that the Court's holding in *Seattle* established that henceforth no state would be allowed to develop "a different policy on mandatory busing where a school district previously had adopted one of its own,"⁴⁶ for the people of the state of Washington did not, by adopting Initiative 350, *establish a policy on racial busing*, nor did the Court's analysis imply that it had.

Nevertheless, there is one crucial difference between Initiative 350 and Akron City Charter Amendment section 137, and Powell was quite right to draw attention to it. What clearly concerned the Court in *Hunter* was the thought that with Akron City Charter section 137 the citizens of Akron had achieved by indirect means what the people of the state of California had tried to achieve directly with Proposition 14. This outcome would be a legitimate concern for the Court, since it had already held Proposition 14 unconstitutional in *Reitman*.⁴⁷ But the situation was quite different in *Seattle*, for the Court had never held (and has not held since)

41. *See Seattle*, 458 U.S. at 497 (Powell, J., dissenting).

42. *See id.* at 470.

43. *See id.* at 498 (Powell, J., dissenting).

44. *See id.* at 478.

45. *See id.* at 480.

46. *Id.* at 498.

47. *See Reitman*, 387 U.S. at 376.

that a prohibition against racial busing for the purposes of remedying *de facto* segregation is per se a violation of the Constitution.

As important as this distinction is, however, it is not one that either requires or recommends amending HD. First, such an amendment would be required only if HD immunized race-conscious measures at lower levels of government against race-neutral measures at higher levels of government. HD does not have this effect, for it does not apply to substantive policy enactments at all.

Second, amending HD would fail to capture the distinction because the distinction is essentially substantive rather than procedural. Consider, for example, the following proposal HD_R, which amends HD to prohibit measures like Akron City Charter section 137, while permitting measures like Initiative 350:

HD_R: A political body may repeal existing legislation on a specifically racial question and alter the political decision-making process on that question, if and only if it would be constitutionally permissible for that body to enact at the same time a permanent prohibition against the legislation that it repeals.

Since Initiative 350 did not repeal any existing antidiscrimination legislation, the amended rule would exempt Initiative 350 while barring Akron City Charter section 137, which repealed a fair housing ordinance. The amended rule is not satisfactory as it stands, however, since it would not cover explicit alterations in the political decisionmaking process that are purely prospective, i.e., that do not repeal any existing antidiscrimination laws, but simply make it more difficult for minorities to enact anticipated legislation of that kind in the future.

There are additional problems. Suppose that the people of a state adopt a ballot measure that removes authority to order racial busing from local school boards and, in addition, imposes a supermajority requirement for the enactment of mandatory racial busing measures, whether by the state legislature or by statewide initiative. Such a measure would satisfy the proposed amended rule—because a policy prohibiting racial busing is not itself unconstitutional—but would surely be struck down by the Court, for placing a supermajority requirement on the enactment of racial legislation, and only such legislation, is precisely the kind of alteration of the political decisionmaking process that the Court regarded as unconstitutional in *Hunter*.⁴⁸ Such measures are suspect as a *class*, including those that,

48. See *Seattle*, 458 U.S. at 486-87 ("Certainly, a state requirement that 'desegregation or antidiscrimination laws,' . . . and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances 'designed to ameliorate race relations or to protect

like Initiative 350, only involve moving decisionmaking authority over such matters to a higher level of government.

The *Seattle* Court applied HD to Initiative 350 and found it wanting, while stating that a measure embodying the policy choice that Initiative 350 left to the discretion of the state legislature (i.e., a neighborhood school policy, or a ban on racial busing to remedy *de facto* segregation) *would* have been constitutional.⁴⁹ At first sight, the ruling may seem perverse, but it is not. It is perfectly reasonable to find in the Federal Constitution a prohibition against explicit alterations of the decisionmaking process on specifically racial issues that have the effect of diminishing the political power of racial minorities on those issues. But, as Powell argued, and the Court agreed, it is absurd to suggest that race-conscious measures enacted by lower levels of government (including those that arguably benefit minorities) have constitutional protection against contrary policies at higher levels of government. *Seattle* turns out to be an unusually nuanced and subtle decision that does justice to both truths.

Amar and Caminker on the Procedure-Substance Distinction

Amar and Caminker acknowledge that drawing a distinction between the use of an existing political decisionmaking process to enact a racial policy change at a higher level of government, on the one hand, and explicitly altering that decisionmaking process on the other, offers an initially plausible, *prima facie* basis for interpreting *Seattle*.⁵⁰ They contend, how-

racial minorities' . . . be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure." *Id.*)

49. See *Seattle*, 458 U.S. at 487.

50. See Amar & Caminker, *supra* note 3, at 1045-46.

Some might try to invoke a procedure-substance distinction in an effort to separate the CCRI from the initiatives found wanting in *Hunter* and *Seattle*. In both of those cases, the Court's language repeatedly characterized the initiatives at issue as having "restructured" the pre-existing political process to impose burdens that are "racial in character." . . . This repeated emphasis at least raises the possibility that such *explicit* restructuring is conceived by the Court to be an integral part of the unconstitutional burden driving the *Hunter* doctrine. In other words, one might argue, the *Hunter* doctrine prohibits states from enacting initiatives that *on their face* directly restructure the pre-existing political process in a manner that is "racial in character," but does not similarly prohibit states from enacting initiatives that on their face merely "work a simple change in policy," even if they *incidentally* entrench the new policy.

We acknowledge that such a purported procedure-substance distinction might at first blush provide a plausible defense of the CCRI. After all, on its face the CCRI looks more like a mere change of policy rather than a direct attempt to reallocate political power within the state. Unlike the Akron charter amendment and Initiative 350, the CCRI does not directly declare that it is withdrawing political authority from one government level and vesting it solely in a higher one (i.e., the constitutional amendment process).

See Amar & Caminker, *supra* note 3, at 1045-46 (citations omitted).

ever, that there is evidence within the *Seattle* opinion that the Court regarded the substance-procedure distinction as vague and unimportant.⁵¹ But the passage from *Seattle* that they cite in support of this assertion, which is given below, is not on point:

Justice Powell finds *Hunter* completely irrelevant, dismissing it with the conclusory statement that "the political system has not been redrawn or altered." . . . The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While Justice Powell and the United States find it crucial that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It is surely an excessive formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron city charter amendment simply barred the City Council from passing any fair housing ordinance, as Initiative 350 forbids the use of all mandatory desegregation strategies. Surely, however, *Hunter* would not have come out the other way had the charter amendment made no provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.⁵²

It is difficult to understand why Amar and Caminker regard this passage as evidence that the *Seattle* Court regarded the procedure-substance distinction as constitutionally unimportant. The point of the passage is to show that, contra Justice Powell, Initiative 350 was exactly like Akron City Charter section 137 in all constitutionally relevant respects—and as we have seen, Initiative 350 and the Akron City Charter Amendment were

51. See *id.* at 1047.

52. *Seattle*, 458 U.S. at 474-75 n.17, cited in Amar and Caminker, *supra* note 3, at 1047-48 (adducing the passage as evidence that the Seattle Court "explicitly rejected a bright-line distinction between procedural and substantive changes." Amar & Caminker, *supra* note 3, at 1048.). Although Amar and Caminker opine that this rejection is "consistent with the Court's general concern for real-world effects and its rejection of formalism," they fail to mention footnote 23 of the *Seattle* decision in this connection. There is no plausible way of interpreting that footnote except as an acknowledgment by the Court that this distinction is a constitutionally important one. See *supra* pp. 972-75; *infra* pp. 985-90.

procedural changes in the political decisionmaking process, rather than substantive policy enactments.

The passage responds directly to Powell's assertion (1) that "nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority," (2) that "in this case, unlike in *Hunter*, the political system has *not* been redrawn or altered," and (3) that "*Hunter*, therefore, is simply irrelevant."⁵³ Blackmun had no difficulty showing that these assertions are mistaken. He began by pointing out that Initiative 350 worked its changes precisely by altering the existing political decisionmaking structure.⁵⁴ Before the adoption of Initiative 350, decisions about racial busing were made by local school boards in the State of Washington.⁵⁵ After the adoption of Initiative 350, local school boards no longer had this power.⁵⁶ Likewise, in *Hunter*, Blackmun said, "the procedures for enacting racial legislation were modified in such a way as to place effective control in the

53. See *Seattle*, 458 U.S. at 497-98 (Powell, J., dissenting). Powell also asserts in this connection that:

[T]he State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State.

Id. at 497-98. Taken in context, this implies that Initiative 350 was such a policy. This is an error, however, and a serious one that infects Powell's critique generally. The Court itself never made this mistake. As previously mentioned, the Court noted that Initiative 350 left the state legislature free to order racial busing. See *id.* at 474. A referendum adopted by the people of a state that leaves its state legislature free to order racial busing, and that would remain entirely unmodified by any future referendum that ordered such busing, most emphatically does not constitute the adoption of an anti-busing policy by the people of that state.

The above passage was a response to Powell's claim that Initiative 350 did not redraw or alter the political system in Washington State, rather than a response to Powell's implied assertion that Initiative 350 represented a policy on racial busing. See *id.* at 491-93. There is, therefore, absolutely no reason to interpret the last sentence of the quoted paragraph as Amar and Caminker do. They say: "We can restate this final sentence to focus on a state constitution rather than a city charter as follows: A substantive state constitutional amendment prohibiting all racial preferences would be treated the same under the Equal Protection Clause as would a procedural state constitutional amendment submitting all statutes granting racial preferences to ratification by referendum (which would clearly be unconstitutional under *Hunter*)." Amar & Caminker, *supra* note 3, at 1048. Nothing in the cited passage even remotely suggests this reading. Furthermore, the suggested reading is irreconcilable with what the *Seattle* Court stated regarding the impact of its ruling on policy enactments. See *Seattle*, 458 U.S. at 480 n.23.

54. See *Seattle*, 458 U.S. at 474.

55. See *id.* at 477-79.

56. See *id.* at 480.

hands of the citywide electorate."⁵⁷ The effect in each case, he added, is to "redraw decisionmaking authority over racial matters."⁵⁸

It was also easy for Blackmun to dispense with Powell's claim that Initiative 350 differed constitutionally from Akron City Charter section 137 on the grounds that proponents of mandatory racial busing in Washington State could use the initiative process to overturn Initiative 350 and obtain race-conscious legislation they deemed to be in their interest.⁵⁹ Blackmun pointed out that this failed to distinguish Initiative 350 from the Akron city charter amendment, because the same was true of minority citizens seeking fair housing legislation after the adoption of Akron City Charter section 137.⁶⁰

Indeed, if one ignores the fact (as Blackmun did in the above passage) that Initiative 350 left the *state legislature* free to order mandatory racial busing and focuses solely on Initiative 350's effect on local school boards, Initiative 350 made it even more difficult for minorities to obtain legislation that was arguably in their interest than was the case with Akron City Charter section 137. Akron City Charter section 137 established a two-step decisionmaking structure with respect to housing ordinances involving racial issues.⁶¹ It left the city council with the power to draft and propose housing ordinances involving racial questions but left decisionmaking authority over such measures with the citywide electorate, which either adopted them or rejected them by majority vote.⁶² For a precise analogy between the Akron city charter provision and Initiative 350, one would have to suppose that section 137 had removed even the drafting and proposing powers from the city council, just as Initiative 350 had completely removed *all* power over racial busing from the local school boards. As Blackmun pointed out, this removal of powers would have made section 137 even more vulnerable to attack under the *Hunter* doctrine, as it would have left the city council with no authority over such matters.⁶³

Since neither Initiative 350 nor Akron City Charter section 137 involved a substantive policy enactment on a racial question, the passage cited by Amar and Caminker cannot be taken as in any way undermining the procedure-substance distinction. The passage is limited to the argument that no matter how it is viewed, Initiative 350 is exactly like Akron

57. *Seattle*, 468 U.S. at 474 n.14.

58. *Id.*

59. *See id.*

60. *See id.*

61. *See Hunter*, 393 U.S. at 387.

62. *See id.* Alternatively, citizens could place such measures on the citywide ballot directly by gathering petition signatures from 10 percent of the citywide electorate.

63. *See Seattle*, 458 U.S. at 474 n.14.

City Charter section 137 in all relevant respects under the *Hunter* doctrine, which is concerned solely with explicit alterations in the political decisionmaking process on racial questions.

Amar and Caminker on *Washington v. Seattle School District No. 1*

As we have seen, Initiative 350 was not a substantive policy enactment that extended the right of the people of the State of Washington to be free of racial classifications.⁶⁴ Rather, it was an explicit alteration of the political decisionmaking process on a specifically racial question, and only that. Despite this fact, Amar and Caminker contend that *Seattle* also stands for the proposition that a measure like Proposition 209, which is a substantive, race-neutral policy enactment, is unconstitutional as well.⁶⁵

Unaccountably, however, Amar and Caminker never once mention that the *Seattle* Court, in footnote 23, specifically *denied* that its ruling precluded a state from adopting a different policy on mandatory busing where a school district previously had adopted one of its own.⁶⁶ In fact, the following passage is the only explicit reference that Amar and Caminker make to footnote 23: “[T]he State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner. . . . [W]hat we find objectionable about Initiative 350 is the *comparative* burden it imposes on minority participation in the political process”⁶⁷

Amar and Caminker failed to address the Court’s explicit denial of Powell’s horrors in footnote 23, including its denial of Powell’s allegation that “the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a

64. See *supra* notes 50-63 and accompanying text.

65. See Amar & Caminker, *supra* note 3, at 1021. Amar and Caminker state that:

The CCRI singles out race and treats it differently from any other criterion for public employment, education, and contracting decisions. In doing so, the CCRI isolates an issue of special interest to minorities—affirmative action programs . . . —and relegates this issue to the highest and most entrenched level of governmental decisionmaking. This would seem to violate the Equal Protection Clause as interpreted by the Court in the *Hunter* trilogy. See *Hunter v. Erickson* 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982).” *Id.*

66. See *Seattle*, 458 U.S. at 480 n.23.

67. Amar & Caminker, *supra* note 3, at 1045 n.85 (Emphasis added). This citation reverses the order of the two sentences in the cited passage, and also omits the phrase “that is, the racial nature of the way in which it structures the *process* of decisionmaking” from the sentence that begins “[W]hat we find objectionable about Initiative 350” See *Seattle*, 458 U.S. at 480 n.23. For the complete text of footnote 23, see *supra* p. 974.

school district previously has adopted one of its own."⁶⁸ Consequently, Amar and Caminker never directly address the problem that this explicit denial presents to their interpretation of *Seattle*.⁶⁹ In their view, the fact that the people of a state can adopt a different policy on mandatory busing where a school district previously has acted means that they may do so, but only if they develop a policy on every other matter involving school transportation and school assignments, whether racial or non-racial. They state, for example:

In both [*Hunter* and *Seattle*], the Court reaffirmed that a state or city may freely remove political authority *generally* from lower to higher levels within the intrastate governmental hierarchy. But a state may not so remove political authority in a manner that is 'racial in character'—even (as in *Hunter*) where that removal is back to the people themselves—because such a move might entrench the antiminority policy and thus preclude equal participation in political decisionmaking

. . . .

. . . [W]hen the people of a state want to entrench a substantive norm at a centralized level (such as the state constitution) and the norm will be detrimental to the interests of racial minorities, the people must take care to define the norm in a sufficiently general way—to avoid the impression of a gerrymander, if you will—such that the norm is not "racial in character" . . . [T]he CCRI is problematic because it singles out *race* for unique treatment—no other education, employment, or contracting criterion is removed from consideration by lower levels of government—just as Initiative 350 treated race unlike any other criterion in busing decisions.⁷⁰

Amar and Caminker's interpretation of footnote 23 of the Court's opinion must be rejected for several reasons. First, it must be rejected as a purely linguistic matter. If X is asked whether Y has the authority to adopt a policy on a particular subject-matter that preempts contrary policies by lower levels of government, and X replies that Y does have such authority, it would be unnatural to interpret that affirmative answer to mean that Y may do so if, but only if Y also reserves decisionmaking authority on all other matters. According to Amar and Caminker, however, a state may preempt race-conscious policies of a certain kind by lower levels of government only by adopting policies that sweep so broadly that they are not

68. *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting).

69. There can be no doubt that the reference in footnote 23 to "mandatory busing" was to mandatory racial busing in particular. Footnote 23 is a response to Powell's parade of horrors, and Powell announces at the outset of his dissent that he uses the term "mandatory busing" to refer to busing or mandatory student assignments for the purpose of achieving racial integration. See *Seattle*, 458 U.S. at 488 n.1.

70. Amar & Caminker, *supra* note 3, at 1044, 1053.

racial in character at all. This is not a plausible reading of the statement in question.

Second, Amar and Caminker's interpretation of the crucial statements in footnote 23 can be taken seriously only if the condition that it lays down could be met in the real world—and it obviously could not be met. While it might be possible for the people of a state to adopt a statewide measure that deals with the full range of policy choices which might arise in a very restricted domain, they clearly could not do so for a more broad range of government action. This problem applies to Proposition 209, which sweeps very widely, prohibiting discrimination and preferences against any individual or group in three broad areas of governmental action.

It is not clear from the Amar-Caminker analysis of *Seattle* how Initiative 350 could be amended to pass constitutional muster. Initiative 350 purported to be a prohibition against school busing, but included so many exceptions that its sole practical effect was to prohibit racial busing. How many of Initiative 350's exceptions would have to be removed in order for it to be exempt from the charge of being specifically "racial in character?" Furthermore, if the drafters had wanted to drop some but not all of the exceptions, what criterion could have been used to make the selection? Any truncated list would almost certainly be arbitrary; as a practical matter, the drafters would have been forced to drop all the exceptions. The drafters would have been forced to present the voters with a measure that prohibited busing for any reason—including busing which is required when a student requires special education, or when there are health or safety hazards between the student's residence and the nearest or next nearest school, or when the nearby schools are overcrowded, unsafe, or lacking in physical facilities.⁷¹ This poison pill would render any proposal to prohibit racial busing so unattractive that it could never be taken seriously.

Similar questions arise when applying the Amar-Caminker analysis of footnote 23 to Proposition 209. Discrimination and preferential treatment under a given criterion X occurs whenever two or more individuals or groups are treated differently on the basis of X. To conform with the Amar-Caminker analysis of footnote 23 of the *Seattle* opinion, therefore, Proposition 209 would either have to prohibit all preferences and discriminatory treatment in the three areas of governmental action that it covers, or it would have to state clearly, for each and every way in which individuals or groups could be treated differently in these areas of governmental action, whether that kind of discriminatory and preferential treatment is or is not permissible.

71. See *Seattle*, 458 U.S. at 489 (Powell, J., dissenting), where Justice Powell mentions that these exceptions were permitted by Initiative 350.

The first suggestion could not be taken seriously, for by its very nature, governmental action classifies and draws distinctions among individuals and groups; consequently, an unqualified prohibition of discrimination and preferences in the three areas of governmental action covered by Proposition 209 would effectively bar the State of California from legislating in these three areas altogether. The other option would be equally unacceptable. As a purely practical matter, the people of a state could not, for example, decide in their constitution all questions about overtime, compensation, pension plans, occupational safety standards, and all other matters involving public employment. Similar problems would arise in the other two areas of state action. In the case of university admissions, for example, a universal prohibition against discrimination and preferences under any criterion would necessarily impose on a state an unqualified open admissions policy. But the only alternative to such a policy under the Amar-Caminker interpretation of *Seattle* would be to have the state constitution provide decision rules for university admission so comprehensive and so detailed that they would leave no discretion to university officials. Such micromanagement by government would clearly not be feasible and would be highly undesirable even if it were feasible.⁷²

Nor could Amar and Caminker evade the force of the foregoing objections by arguing that their analysis requires only that a measure like 209 sweep broadly enough to prohibit all forms of discrimination and prefer-

72. The difference between the interpretation of footnote 23 that is advocated in this paper and the one provided (at least elliptically and implicitly) by Amar and Caminker can be summarized as follows. On the interpretation that is advocated here, the assertion in footnote 23 that the people of a state are permitted to adopt a policy prohibiting race-conscious action even when a local school board has acted first means exactly what it says. According to Amar and Caminker, however, it means that the people of a state may do so, but only if they also accept responsibility for setting policy on every other conceivable matter. But the assertion that the people of a state may establish a race-neutral policy even when a subordinate jurisdiction has enacted a race-conscious policy first is in conflict with the claim that the people of a state may do so only if they reserve all policy-making responsibilities to themselves, for this condition could never be met in the real world.

The problem is not with the rule laid down in *Seattle* that an explicit alteration of the political decisionmaking structure on a specifically racial question that disadvantages racial minorities is unconstitutional. According to that principle, explicit changes in a state's political decisionmaking structure cannot be specifically directed to a racial question, but must apply generally. Such a constitutional principle is workable and does not lead to the result that race-conscious measures by subordinate entities preempt race-neutral policies by higher governmental entities, unless higher governmental entities are also prohibited from adopting preemptive race-neutral policies. It is the combination of *Seattle's* constitutional doctrine prohibiting procedural changes of a certain kind and the Amar-Caminker assertion that a pure policy enactment like Proposition 209 is also unconstitutional that effectively deprives the state of any viable means of preempting race-conscious measures enacted at lower levels of government. According to the Court's explicit statement in footnote 23, however, such policies can be preempted.

ential treatment that do not involve merit. This proposal does not work because there is no workable definition or understanding of merit. Indeed, civil rights measures like the United States Civil Rights Act or California's Proposition 209 do not attempt to define what merit is. They simply assert that however merit may be defined and whatever it may include, it cannot and should not include race.⁷³

The Amar-Caminker interpretation of footnote 23 must be rejected for a third reason. The Court has subjected explicit changes in the political decisionmaking process bearing on specifically racial questions to strict scrutiny.⁷⁴ This is because, in the case of substantive policy enactments on racial questions, everything is "on the table." But it is otherwise in the case of explicit alterations in the political decisionmaking process. In the latter, the concern is not so much with what such alterations do directly, as with how they can affect the political outcome of future measures that are placed before the electorate, including those designed to protect minorities against discrimination. The purpose of the *Hunter* doctrine is to protect minorities against alterations of the political process which, although they elude conventional constitutional analysis, nevertheless prejudice the interests of minorities.⁷⁵

73. See Bill Jones, Secretary of State, Proposition 209, in California Ballot Pamphlet, General Election November 5, 1996. One of the most common objections to 209, both before and after election day, has been that it singles out race and sex for special treatment. This objection is confused, for it is precisely this feature that distinguishes civil rights legislation from other kinds of legislation. Future civil rights legislation and case law may include prohibitions against discrimination and special treatment under criteria that are not presently regarded by the law or public opinion as civil rights issues, but it is silly to argue that 209 is invalid because it includes only the criteria of race, sex, color, ethnicity, and national origin.

Significantly, those who have criticized CCRI on this score have never provided a comprehensive, closed list of additional criteria that either could or should have been used instead. This is hardly surprising, given the inherent difficulties in providing such a list. Should the government extend civil rights protections to beet farmers, thereby making it impossible for the government to grant subsidies to artichoke farmers but not to them? Should civil rights laws be extended to protect poor or rich people, veterans or non-veterans, urban or rural residents (to name only a few possible categories) against unfavorable or less favorable treatment by government? The point is that critics cannot condemn measures like 209 for its "specifically racial character" without providing a larger, closed, comprehensive list of criteria that is not specifically racial but which nevertheless provides a rational basis for governmental action. It is virtually certain that no consensus could emerge about such a list.

74. See *supra* pp. 972-75.

75. See, e.g., Crawford v. Board of Educ., 458 U.S. 527, 546 (1982) (Blackmun, J., concurring) ("The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a 'just framework,' . . . it is unlikely that they will be drawn on just principles." *Id.* at 546.).

This protection was the underlying concern of the Court in *Seattle*. It is true that racial busing to cure de facto segregation is not constitutionally required. But Initiative 350 did significantly alter the political decision-making process on a specifically racial question (indeed, that is *all* it did), and the Court found this alteration sufficiently suspect under the *Hunter* doctrine to strike down the measure, rather than distinguish it. The Court's decision was defensible, because alterations of the political structure on specifically racial questions are *generally* suspect.

It is this concern regarding the protection of minorities against alterations of the political process which prejudice their interests that explains the Court's emphasis in footnote 23 of the *Seattle* opinion on the way that Initiative 350 structured the *process* of decisionmaking on a specifically racial question. The only plausible way of interpreting the Court's emphasis on this point is to assume that the Court was drawing attention to the very procedure-substance distinction that Amar and Caminker ask us to dismiss. That is, footnote 23 must be read as dismissing Powell's parade of horrors on the grounds that, while its ruling *did* prohibit measures (like Initiative 350) that explicitly alter the political decisionmaking process, its ruling did not prohibit *policies* that would preempt race-conscious measures by local school boards.

Powell's fundamental objection was that the Court's ruling in *Seattle* threatened to immunize race-conscious enactments by lower levels of government against race-neutral enactments by higher levels of government.⁷⁶ Powell regarded this supposed implication as patently absurd, which it is. Footnote 23 can be read only as an answer to the whole parade of horrors in Powell's dissenting opinion and this implication in particular. On the Amar-Caminker reading, however, footnote 23 cannot be read as an answer to what Powell clearly regarded as the most serious and obvious horrible of all. Indeed, on Amar and Caminker's reading, footnote 23 actually *endorses* it.

Initiative 350 did not establish a neighborhood school or anti-busing policy for the State of Washington, nor did it alter in any way the regime of rights under the State's Constitution.⁷⁷ However, on the same day that the Court handed down its decision in *Seattle*, it also handed down its decision in *Crawford*, which concerned a ballot measure adopted by the people of California which *did* directly alter California's constitutional scheme with respect to pupil school assignment and pupil transportation, including school assignments based on race and mandatory racial busing.⁷⁸ *Craw-*

76. See *Seattle*, 458 U.S. at 489 (Powell, J., dissenting).

77. See *Seattle*, 458 U.S. at 457.

78. See *Crawford*, 458 U.S. at 546.

ford, therefore, is a particularly important precedent for the constitutional analysis of Proposition 209. What the Court did in *Crawford* provides strong evidence for the constitutionality of 209, and important additional evidence against the Amar-Caminker interpretation of *Seattle*.

Crawford v. Board of Education⁷⁹

Prior to Proposition I, a statewide constitutional amendment by referendum that was adopted by the California electorate in 1970, California courts could order racial busing even when they would have had no authority to do so under the Federal Constitution.⁸⁰ These court orders had been based on the state constitution's equal protection clause, which the courts had interpreted as requiring the state to remedy *de facto* as well as *de jure* segregation in the public schools.⁸¹

Proposition I added a lengthy proviso to Article I, Section 7(a) of the California Constitution to prohibit such court-ordered busing. This section of the state constitution now provides in relevant part:

Prop. I: (a)[1] A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; [2] provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. [3] In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

....

79. 458 U.S. 527 (1982).

80. *See id.* at 530.

81. *See id.*

[4] Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.⁸²

In *Crawford*, the Court upheld the constitutionality of Proposition I, eight to one. If one looked only at Proposition I(a)[3] above, this might seem surprising because phrase [3] has much the same form as Initiative 350, which the Court struck down on the same day. Prop. I (a)[3] says “[N]o court of this state may impose . . .,” just as Initiative 350 said, in effect, “No local school board etc. shall order” But phrase [3] cannot be considered in isolation, for it is in fact a mere corollary of phrase [2].

Before the adoption of Proposition I, state courts had interpreted the equal protection clause of the state constitution as requiring the State of California to take race-conscious measures that went beyond anything required by the Federal Constitution. Proposition I repealed that interpretation of the State Constitution and brought the California Constitution into conformity with the Federal Constitution on this particular question in every respect. Consequently, state courts could not enforce non-federally-required racial busing after the adoption of Proposition I, because the corresponding right on which such court-ordered busing had been based had been repealed. Justice Blackmun, joined by Justice Brennan, offered the following analysis in his concurring opinion in *Crawford*:

State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the state’s political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the state’s decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy⁸³

The implication for Proposition 209 is clear. Since the Federal Constitution does not require racial busing as a cure for *de facto* segregation, the people of a state may repeal any provision in their state constitution that requires such busing. By the same reasoning, the people of a state may amend their state constitution to abolish all discrimination and preferential treatment based on race, since the Federal Constitution does not require—indeed, barely tolerates—racial preferences. Neither Proposition I

82. CAL. CONST. art. I, § 7(a). In citing this section of the California state Constitution, the square brackets “[1]”, “[2]”, “[3]”, and “[4]” have been inserted to facilitate references to particular phrases in the following exposition. Before the adoption of Proposition I, Article I, Section 7(a) included only (a)[1]; (a)[2]-(a)[4] were added to it by Proposition I.

83. *Crawford*, 458 U.S. at 546 (Blackmun, J., concurring).

nor Proposition 209 suffers from the constitutional infirmity of Initiative 350, for they are both substantive policy enactments rather than explicit alterations in the state's decisionmaking process. Since Proposition I was held to be constitutional by the Court, Proposition 209 is constitutional as well.

It is not surprising that Amar and Caminker see *Crawford* as a threat to their interpretation of the *Hunter* doctrine and to their claim that CCRI is unconstitutional under Supreme Court precedent. They attempt to meet this threat by arguing that the *Crawford* Court implicitly held that, whereas a state may create a right on the part of its citizens to be free of court-ordered racial busing that is predicated on their state constitution, a state is barred from creating a right on the part of its citizens to be free of racial busing when it is ordered by a local school board.⁸⁴ Since Proposition I did not limit the discretion of lower levels of government in California to order racial busing, they argue, it was a "mere repeal."⁸⁵ Had it *not* been a mere repeal, we are asked to believe, the *Crawford* Court would have struck it down:

Superficially, *Crawford* seems to establish some limiting principle to the reach of the *Hunter* doctrine, one that might appear to save the CCRI because it, like Proposition I, is a constitutional amendment that is (arguably) packaged as a substantive policy change rather than an alteration of political process. On closer examination, however, *Crawford* represents an unexceptional application of the 'mere repeal' rule. Proposition I simply worked a repeal, *by the enacting entity* of a substantive constitutional norm favorable to racial minorities. It did not, by word or effect, withdraw pre-existing or future political authority from lower levels of government.⁸⁶

It is true that the *Crawford* Court mentions the power which Proposition I left with local school boards as a feature of the measure that distinguished it from Initiative 350.⁸⁷ But it is an error to maintain, as Amar and Caminker do,⁸⁸ that the *Crawford* Court somehow implied that if Proposition I had not been distinguishable from Initiative 350 on this score, it would have been deemed unconstitutional. A close reading of the text shows that the opposite is the case. It is perfectly clear from the *Crawford* opinion that the Court would have upheld the constitutionality of Proposition I even if the measure had withdrawn the power to order racial busing and racial school assignments from local school boards.

84. Amar & Caminker, *supra* note 3, at 1052.

85. *Id.* at 1049-50.

86. *Id.*

87. *Cf. Seattle*, 458 U.S. at 535-36 n.12.

88. *See* Amar & Caminker, *supra* note 3, at 1049-52.

The principal reason is that the Court regarded the power that school boards retained under Proposition I as a feature of the measure that went beyond anything *required* by the Federal Constitution.⁸⁹ It follows that this power was not a feature that would have rendered the measure unconstitutional by its absence. Take, for example, the following passage:

Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. It 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. *Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution.* The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.⁹⁰

After declaring that the California electorate could have amended the state constitution to impose no greater duty of desegregation than does the Federal Constitution, this passage proceeds to list three ways in which the California Constitution, even as amended by Proposition I, imposed a *greater* duty of desegregation than does the Federal Constitution:

- (1) as amended by Proposition I, the California Constitution imposes on state courts the obligation to order segregated school districts to use voluntary desegregation techniques (i.e., techniques that require the consent of parents) to cure even *de facto* segregation;
- (2) as amended by Proposition I, the California Constitution continues to impose on school districts an obligation to take reasonably feasible steps to desegregate, even when the segregation is *de facto*;
- (3) as amended by Proposition I, the California constitution leaves school districts free to adopt reassignment and busing plans to effect desegregation.⁹¹

The passage clearly indicates that the foregoing features of Proposition I both singly and collectively go beyond anything that is required by the Federal Constitution. If Proposition I had prohibited local school boards

89. See *Crawford*, 458 U.S. at 535.

90. *Id.* at 535-36 (emphasis added).

91. See *id.* at 536 n.12 (Likewise, as amended by Proposition I, the California constitution "would not bar state-court enforcement of state *statutes* requiring busing for desegregation or any other purpose." *Id.*).

from ordering racial busing, therefore, it would have receded from something that the Federal Constitution does not require, and no more.⁹²

Further evidence against the Amar-Caminker interpretation of *Crawford* exists in a passage in *Crawford* that explicitly compares Proposition I with the city charter amendment that was at issue in *Hunter*.⁹³ According to this passage, Proposition I, unlike the Akron city charter, did *not* explicitly alter the political decisionmaking structure.⁹⁴ Furthermore, by implication, Proposition I would not have explicitly altered the political decisionmaking process in California on specifically racial issues even if it *had* removed the power of local school boards to order racial busing. This, of course, is exactly what one would expect on the view that it is only *explicit* alterations in the political process, rather than substantive policy enactments like Proposition I, that were deemed by the *Seattle-Crawford* Court as violative of the Fourteenth Amendment.⁹⁵

As we have seen, there were two prongs to Akron City Charter section 137.⁹⁶ The first prong involved a repeal of all then-existing housing ordinances.⁹⁷ This prong alone did not make the measure unconstitutional.⁹⁸ The second prong, which did render the charter amendment unconstitutional, involved an explicit alteration of the political decisionmaking process on a specifically racial question which disadvantaged racial minorities, i.e., the requirement that housing ordinances bearing on racial matters, and only such ordinances, be submitted to a referendum of the general electorate.⁹⁹

The *Crawford* Court compared Proposition I with Akron City Charter Amendment section 137 on these very points.¹⁰⁰ If the Court had regarded the power that Proposition I left with local school boards as essential to the measure's constitutionality, it would have distinguished Proposition I from

92. It is true, of course, that the Federal Constitution does not require local school boards to act to cure de facto segregation. But the passage doesn't assert this truism. The passage clearly means that a *state constitution* that either implicitly or explicitly grants permission to local school boards to order racial busing goes beyond any requirement of the Federal Constitution in granting that permission.

93. See *Crawford*, 458 U.S. at 541-42.

94. See *id.*

95. See *supra* notes 39-46, 50-63 and accompanying text.

96. See *supra* notes 27-29 and accompanying text.

97. See *Crawford*, 458 U.S. at 540.

98. Cf. *Hunter*, 393 U.S. at 389-90 n.5 ("By adding § 137 to its Charter the City of Akron . . . not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect. . . . Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment").

99. *Crawford*, 458 U.S. at 541.

100. See *id.* at 541-42.

the Akron City Charter on the grounds that the city charter amendment altered the decisionmaking process by moving authority on a racial issue from the city council to the citywide electorate, whereas Proposition I left school boards with the authority to order racial busing. On this analysis, the contrast would have been between Proposition I's grant of continued power to local school boards and the *second* prong of the Akron city charter. Instead, the Court compared the power that Proposition I left with local school boards to the *first* prong of the Akron City Charter, describing it as *less* than a repeal of those aspects of the California Constitution that went beyond anything that is required by the Federal Constitution.

Thus, even if the power to order racial busing had been removed from local school boards, the Court would not have held that the measure had impermissibly altered the political decisionmaking process to the disadvantage of minorities. It would simply have concluded that the measure had *fully* repealed those aspects of the California Constitution that went beyond anything required by the Federal Constitution. As it was, the Court said, Proposition I was actually *less* than a full repeal in this sense:

Hunter involved *more* than a 'mere repeal' of the fair housing ordinance; persons seeking anti-discrimination housing laws—presumptively racial minorities—were 'singled out for mandatory referendums while no other group . . . face[d] that obstacle . . .'.¹⁰¹ By contrast, even on the assumption that racial minorities benefited from the busing required by state law, Proposition I is less than a 'repeal' of the California Equal Protection Clause. . . .¹⁰² [A]fter Proposition I, the State Constitution still places upon school boards a *greater duty to desegregate than does the Fourteenth Amendment*.¹⁰³

This reading finds further confirmation in the paragraph immediately following the one above. The paragraph begins: "Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental judicial power on the basis of a discriminatory principle."¹⁰⁴ Significantly, the rest of the paragraph makes no reference to the authority that school boards retained under Proposition I to order racial busing.

101. This sentence refers to the second prong of the Akron City Charter amendment.

102. This sentence compares the power that Proposition I left with local school boards to the first prong of the Akron City Charter amendment.

103. *Crawford*, 458 U.S. at 541 (emphasis added).

104. *Id.*

Equal Protection, Unequal Political Burdens, and the Amar-Caminker Interpretation of *Hunter*, *Crawford*, and *Seattle*

The view that a state is barred by the Federal Constitution from preempting all race-conscious measures within its borders is strange enough in itself. It would be even stranger if this view had been expressed, either explicitly or implicitly, by Justice Powell, the author of both the *Crawford* opinion and the dissenting opinion in *Seattle*. However, the view that a state may create a right on the part of its citizens to be free of court-ordered racial busing but may not create a right on the part of its citizens to be free of racial busing when it is ordered by a local school board, is more than just exceedingly odd. There is actually a fatal constitutional objection to it.

According to Amar and Caminker, a state is barred from creating a right on the part of its citizens to be free of racial busing when it is ordered by a local school board because racial busing is arguably in the interest of minorities, and because a prohibition at the state level that preempts busing at the local level places impermissible burdens on the political rights of minorities.¹⁰⁵ The problem with this view is the prohibition obviously runs in only one direction: there is no similar prohibition against political structures that burden the interests of whites. It follows that the Fourteenth Amendment grants political rights to minorities that it denies to the majority. Astonishingly, Amar and Caminker do not shrink from this implication:

A state constitution may be amended so as to repeal or modify pre-existing constitutional provisions, even those that have been interpreted in a manner favoring a racial minority. But a state constitution may not be amended in a direction that disadvantages the racial minority if the effect of such amendment would be to withdraw pre-existing *local or state legislative authority* [emphasis added] in a manner that is 'racial in character.' We acknowledge that, so understood, the *Hunter* doctrine has *what some might perceive as a far-reaching consequence*.¹⁰⁶ With respect to a given issue that is 'racial in character,' a state constitution may either remain neutral or prescribe norms favorable to racial minorities (which can later be repealed). But a state constitution can *never* entrench a substantive norm with respect to an issue that is 'racial in character' in a direction that disadvantages a racial minority. For example, a constitution can mandate affirmative action, but it can never selectively prohibit it and thus foreclose the possibility of minority success in more accessible political arenas.¹⁰⁷

105. *Id.*

106. This is an understatement: the consequence is not just far-reaching, it is preposterous.

107. Amar & Caminker, *supra* note 3, at 1052 (emphasis added).

On this view, whites, in order to defend themselves against racial discrimination by governmental entities, must be prepared to combat affirmative action preferences now and forever (or at least until the Fourteenth Amendment is repealed) at each and every level of state and local government. Whites cannot save themselves from this unpleasant task—which we know from experience will subject them to cries of “racism”—by working to amend their state constitution. Minorities, on the other hand, labor under no such restriction of their political rights.

The asserted constitutional doctrine has particularly counterintuitive consequences at the federal level, which is arguably even more remote from local racial politics than a state constitution. As Justice Stevens pointed out in his concurring opinion in *Johnson v. Transportation*,¹⁰⁸ “[p]rior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority.”¹⁰⁹ No one could possibly have supposed that, under this construction, the Civil Rights Act violated the Fourteenth Amendment or that a state constitutional provision which fully conformed with the Civil Rights Act, as it was then interpreted, was unconstitutional. According to the Amar-Caminker interpretation of the *Hunter* doctrine, however, the Civil Rights Act, in its original meaning and as it was interpreted by the Court prior to 1978, was arguably unconstitutional under the Fourteenth Amendment, and all state constitutional provisions at that time having the same effect were also unconstitutional.¹¹⁰

Typically, legal opponents of Proposition 209 deny that they are committed to the view that minorities have a constitutional right to preferential treatment. However, the view that a state constitution is permitted to altogether prohibit racial discrimination against minorities, but is precluded from altogether prohibiting racial preferences in their favor clearly entails preferential treatment for minorities *in some form or other*. Under the Amar-Caminker interpretation of *Seattle* and *Crawford*, it turns out that this preferential treatment lies in the domain of political rights.

It is true that the *Hunter* Court stated: “[t]he majority needs no protection against discrimination and if it did, a referendum might be bother-

108. 480 U.S. 616 (1987).

109. *Id.* at 642-43 (Stevens, J., concurring).

110. *Cf. Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) (“Indeed, under the Court’s theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.”). As I have already argued, the Court majority denied that its ruling and opinion in the case had this consequence. Nor did it accept any of Powell’s other criticisms. It distinguished its position from Powell’s on very different grounds.

some but no more than that.”¹¹¹ But this statement cannot be read as an endorsement of a doctrine of special political rights for racial minorities. Rather, the Court was simply laying out the conditions under which an explicit alteration of the political decision making process, like that of Akron City Charter section 137, violates the Fourteenth Amendment. The Court made the common sense point that such a measure cannot escape constitutional scrutiny on the grounds that it subjects “[n]egroes and whites, Jews and Catholics . . . to the same requirements if there is housing discrimination against them which they wish to end.”¹¹² One is certainly not committed to a constitutional doctrine of unequal political rights in favor of minorities simply because the relative numerical strength of various racial groups might be constitutionally relevant in scrutinizing explicit alterations in the political decision making process on racial questions. It is clear, furthermore, that any other reading of *Crawford* and *Seattle* would conflict with fundamental constitutional principles. The Fourteenth Amendment does not provide protection under the law just for minorities; it provides equal protection under the law for all citizens. Similarly, the Civil Rights Act does not prohibit discrimination only against women and minorities; it prohibits discrimination against anyone on the basis of race or sex generally.

It is as grotesque to read a doctrine of unequal distribution of political rights into the Fourteenth Amendment as it is to read into it a doctrine of preferential treatment on the basis of race in any other respect. Nor is there any reason to think that the present Court, which has taken an increasingly hostile view toward racial gerrymandering to promote equality of results in the political process for minorities, would find any merit in the Amar-Caminker constitutional argument that decisional law presently grants political rights to minorities under the Fourteenth Amendment which it does not grant to whites.¹¹³

Conclusion

According to the *Seattle* Court, a state may adopt race-neutral policies that preclude race-conscious measures at lower levels of government. What it may not do is explicitly alter the decisionmaking process on a specifically racial question in a way that makes it more difficult for racial minorities to obtain legislation that the Court might deem to be in their inter-

111. *Hunter*, 393 U.S. at 391.

112. *Id.* at 390.

113. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that a particularly egregious instance of racial gerrymandering constituted a racial classification and was therefore unconstitutional unless it could be justified as furthering a compelling state interest).

est. Since Proposition 209 is a pure policy enactment and does not explicitly alter the political decision making process on a racial question, it does not offend the *Hunter* doctrine.

It would have been astonishing if the *Seattle* Court had come to any other conclusion. To reach the conclusion that the Federal Constitution prohibits such pure policy enactments and civil rights measures, the *Seattle* Court would first have had to stretch the expression "explicit alteration of a political decision making structure" to the point where it loses any clear, recognizable meaning. Secondly, it would have had to commit itself to the preposterous constitutional doctrine (which Amar and Caminker actually find meritorious) that a state can have a constitutional provision prohibiting discrimination against minorities at all levels of government, but cannot have a constitutional provision prohibiting discrimination against whites at all levels of government. Such a doctrine would have committed the Court to the view that minorities have political rights under the Fourteenth Amendment that the majority does not have.

Amar and Caminker assure us that although Proposition 209 is likely unconstitutional under Supreme Court precedent, there are "constitutional ways to disestablish affirmative action programs throughout California."¹¹⁴ But they do not say what these methods are, and as the foregoing discussion has shown, it is virtually certain that there are no alternative methods. The statement of Amar and Caminker cannot merely mean that each and every program of racial preferences can be repealed, one by one, by the governmental entity that enacted it, since the majority might have to wait forever for that to happen. Even if it did happen, the end result would fall short of a statewide *policy* prohibiting racial preferences. In addition, the crucial statements of the *Seattle* Court in footnote 23 can sensibly be read only as acknowledging that statewide policy measures preempting race-conscious measures taken by lower levels of government are not per se unconstitutional. Such a reading totally undermines Amar and Caminker's case against the constitutionality of Proposition 209.

Unless the legal opponents of Proposition 209 can find another, plausible way of interpreting its plain, straightforward statements, the decision in *Seattle* cannot be regarded as a precedent that stands in the way of a judicial determination that Proposition 209 is constitutional. Legal opponents of the measure will have to look elsewhere for a pretext with which to strike it down.

114. Amar & Caminker, *supra* note 3, at 1056.