# Case Notes

## Gender Blindness and the *Hunter* Doctrine

*Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *reh'g en banc denied*, Nos. 97-15030, 97-15031, 1997 WL 528335 (9th Cir. Aug. 21, 1997).

As a factual matter, the recent reinstatement of the California Civil Rights Initiative (CCRI)[1] withdrew many opportunities for racial minorities and women in important public sectors.[2] As a legal matter, the Ninth Circuit decision that justified this result—*Coalition for Economic Equity v. Wilson* (*CEE*)[3]—rests on questionable grounds. The court employed novel reasoning to distinguish the Supreme Court's "political structure" equal protection precedent—the so-called *Hunter* doctrine[4]—which invalidates initiatives that obstruct minorities seeking beneficial local legislation. The *CEE* court held that the *Hunter* doctrine provides "equal protection rights against political obstructions to *equal* treatment," not "equal protection rights against political obstructions to *preferential* treatment."[5] Premising its argument on the heavy constitutional presumption against race-based preferences, the court explained: Since the Equal Protection Clause "barely permits" such preferences, given the

1. CCRI, now codified at CAL CONST art. 1, § 31(a), provides in pertinent part that the government "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 public contracting, employment, or education.

2. *See* Coalition for Econ. Equity v. Wilson (CEE), 946 F. Supp. 1480, 1495-99 (N.D. Cal. 1996) (detailing findings of fact that prove the likelihood of "irreparable injury" suffered by racial minorities and women), *rev'd on other grounds*, 110 F.3d 1431 (9th Cir. 1997), *reh'g en banc denied*, Nos. 97-15030, 97-15031, 1997 WL 528335 (9th Cir. Aug. 21, 1997).

3. 110 F.3d 1431, *reh'g en banc denied*, Nos. 97-15030, 97-15031, 1997 WL 528335 (9th Cir. Aug. 21, 1997).

4. The doctrine's two leading cases are *Hunter v. Erickson*, 393 U.S. 385 (1969), which invalidated an initiative uniquely requiring the city council to secure the electorate's approval for antidiscrimination housing programs; and *Washington v. Seattle School District Number 1*, 458 U.S. 457 (1982), which invalidated a state constitutional amendment that barred local school boards from enacting desegregative busing. Under the doctrine, a state action involves an impermissible classification if it singles out an "issue of particular interest" to racial minorities or women and "impose[s] a novel political burden on all future efforts to enact" such legislation. *CEE*, 946 F. Supp. at 1500.

5. *CEE*, 110 F.3d at 1445 (emphasis added).

rigors of strict scrutiny, the "political structure" cases surely do not require unencumbered political access to them.[6]

In this Case Note, I accept for argument's sake *CEE*'s interpretation of the *Hunter* doctrine. I argue that the court's use of strict scrutiny to do its heavy lifting involved significant slippage with regard to sex-based equal protection. Although *CEE*'s holding applies to race- and sex-based programs, its analysis depends on factors unique to race-based strict scrutiny: the most restrictive means and purpose tests,[7] the underlying fact that courts persistently disfavor race-based preferences, and the rhetoric of colorblindness. None of these factors applies to current sex equality doctrine, however, rendering the application of *CEE*'s final conclusions to sex-based preferences problematic.

## I

The *CEE* court reached its conclusion by relying principally on the Supreme Court's race neutrality cases. Citing *Adarand Constructors, Inc. v. Pena*[8] and *City of Richmond v. J.A. Croson Co.*,[9] Judge O'Scannlain explained that race-based preferences are "prohibit[ed] . . . in all but the most compelling circumstances."[10] The court also cited *United States v. Virginia (VMI)*[11]—the first and last time a sex equality case was mentioned in the court's political structure analysis—for that case's strongest proposition: Sex-based classifications "demand an 'exceedingly persuasive justification.'"[12] Based on these precedents, the court explained that the Constitution "erects obstructions to preferential treatment by its own terms."[13] Yet the profound difference in "terms" that current doctrine mandates for race, as distinct from sex, and the resulting difference in "obstructions" were never discussed.

Instead, the court's subsequent analysis conflated race and sex further. The court reasoned that states can enact (or not enact) all other constitutionally

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6. *See id.*

7. Strict scrutiny employs the most rigid means and purpose tests by demanding that a classification be a "necessary" means for advancing a "compelling" state interest; intermediate scrutiny, which applied to gender classifications, requires only that a classification have a "substantial relationship" to an "important" state interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 219-20 (1995).

8. 515 U.S. 200 (1995) (applying strict scrutiny to a federal minority set-aside program).

9. 488 U.S. 469 (1989) (plurality opinion) (applying strict scrutiny to a city minority set-aside program).

10. *CEE*, 110 F.3d at 1445 (citing *Adarand*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (plurality opinion))).

11. 116 S. Ct. 2264 (1996) (invalidating a state-sponsored military college's exclusion of women).

12. *CEE*, 110 F.3d at 1446 (quoting *VMI*, 116 S. Ct. at 2275). *CEE*'s reliance on the phrase "exceedingly persuasive justification" is questionable; the *VMI* majority's use of the phrase was criticized for being rhetorically misleading. *See VMI*, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring) (arguing that the conventional terms of intermediate scrutiny "have more content and specificity than does the phrase 'exceedingly persuasive justification' . . . [which] is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself" (citing Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

13. *CEE*, 110 F.3d at 1445.

permissible classifications and that it therefore would be "anomalous" if states were required to make readily available "preferences based on the most suspect and presumptively unconstitutional classifications—race and gender."[14] This analysis bootstraps sex into the same position as race.

In the remainder of the court's argument, sex-based analysis dropped out. The court submitted that the Fourteenth Amendment's commitment to colorblindness invites rooting out laws that erroneously claim "race somehow matters."[15] The court also paraphrased *Adarand*'s strongest language,[16] a necessary step before its penultimate statement that the Constitution "barely permits" such programs.[17] With these claims as its predicate, the court ultimately resolved, "'[I]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the state thereby had violated it.'"[18]

The court's rationale has since prompted the plaintiffs to claim that *CEE* imported Justice Scalia's repudiated theory of absolute colorblindness.[19] Their claim is convincing since *CEE*'s holding effectively means racial minorities may seek only neutral programs under the *Hunter* doctrine. Perhaps most significantly, though, *CEE* concerns race *and* sex classifications. That is, Judge O'Scannlain's opinion ratcheted up the legal force of colorblindness while incidentally latching sex "equality" to it.

## II

Under current law, the level of scrutiny given to sex classifications as compared to race classifications involves differences in both degree and kind.[20] Consequently, whenever *CEE* notes special rigors that attach to race-based preferences, the argument strays further from applicability to gender.

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14. *Id.* at 1446.

15. *Id.*

16. *See id.* ("The Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up" (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (1995))).

17. *Id.*

18. *Id.* (quoting Crawford v. Board of Educ., 458 U.S. 527, 535 (1982))

19. *See* Brief for Plaintiffs-Appellees at 18 (contrasting Justice Scalia's theory with controlling precedent), *CEE*, Nos. 97-15030, 97-15031, 1997 WL 528335, *denying reh'g en banc of* 110 F.3d 1431 (9th Cir. 1997); *cf., e.g., Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (joining the opinion "except insofar as . . . [i]n my view, government can never have a 'compelling interest'" in using racial classifications to remedy past discrimination).

20. The Supreme Court may be moving the standards of evaluation for sex classifications closer to the strict scrutiny test. *See* Collin O'Connor Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521 (1996). My argument, however, concerns the *current* case law, in which gender classifications are controlled by the "substantially related means" and "important governmental interest" tests. *See supra* note 7. *cf.* Christina Gleason, Comment, United States v. Virginia*: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 815-18 (1997) (analyzing the continuing divide separating intermediate scrutiny for gender from the rigors of strict scrutiny for race). Indeed, *CEE* accepts these conventional terms. *See CEE*, 110 F.3d at 1440.

Indeed, the standards of intermediate scrutiny would likely favor many sex-based programs that CCRI bans. Numerous justifications for sex-based classifications can satisfy the "important state interest" test.[21] And under the "substantially related" test the Court generally will not second-guess legislative uses of such classifications, even when neutral alternatives are conceivable.[22] Sex-based preferences, in short, are far from "barely permit[ted]."

In practice, the level of scrutiny can decide the fate of preferential programs. As Justice Stevens explained in *Adarand*: Equal protection law now "produce[s] the anomalous result that the Government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African Americans."[23] Indeed, this pivotal difference had not previously escaped Judge O'Scannlain and the Ninth Circuit.[24]

*CEE* discusses "the goal of the Fourteenth Amendment"[25] only in relation to race; "the goal of the Fourteenth Amendment" in relation to gender, however, harmonizes with the pursuit of public sector preferences for women. A principal reason for heightening scrutiny of sex classifications has been to

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21. *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 745-46 (1984) (preserving pensioners' financial expectations); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (raising and supporting armies); Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) (plurality opinion) (preventing teenage pregnancy); Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam) (redressing societal discrimination against women); Kahn v. Shevin, 416 U.S. 351, 352-53 (1974) (reducing economic disparities between the sexes); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 567-68 (1990) (advancing viewpoint diversity), *overruled on other grounds by Adarand*, 515 U.S. at 227; Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992) (Thomas, J.) (explaining that *Metro Broadcasting*'s holding that viewpoint diversity constitutes an important government interest applies to gender).

22. *See Michael M.*, 450 U.S. at 473 (plurality opinion); *id.* at 481 (Stewart, J., concurring) ("'[T]he issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen . . . are within constitutional limitations.'" (citing *Kahn*, 416 U.S. at 356 n.10)); *see also Rostker*, 453 U.S. at 70 (noting that the Court must decide whether the classification denies equal protection, not what alternative it would choose). *But cf.* Caban v. Mohammed, 441 U.S. 380, 392 n.13 (1979) (comparing alternatives to sex classification in evaluating the state's asserted interest).

23. *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

24. Two leading Ninth Circuit cases invalidated race-based preferences in city contracting while upholding sex-based preferences under the same legislative scheme. *See* Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991); Associated Gen. Contractors of Cal., Inc. v. San Francisco, 813 F.2d 922 (9th Cir. 1987). Notably, *Associated General Contractors* is the case Justice Stevens cited for his argument in *Adarand*. *See* 515 U.S. at 247 (Stevens, J., dissenting). In *Coral Construction*, Judge O'Scannlain himself expressly recognized that intermediate scrutiny uniquely permits local government "broad power" to adopt preferences for women:

> Unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy. . . . [W]e [have] observed that the "government has the broad power to assure that physical differences between men and women are not translated into permanent handicaps, and that they do not serve as a subterfuge for those who would exclude women from participating fully in our economic system."

*Coral Constr. Co.*, 941 F.2d at 932 (citation omitted). Notably, the structure of the argument Judge O'Scannlain adopted in *Coral Construction* is remarkably different from the analytic organization of *CEE*. The former opinion separately analyzed the discrete questions raised by strict and intermediate scrutiny, rather than virtually collapsing them under one framework as *CEE* does.

25. *CEE*, 110 F.3d at 1446.

remove barriers generated by past and persistent economic discrimination.[26] Moreover, the Supreme Court's equal protection analysis takes account of societal discrimination against women[27] and endorses preferences to *equalize* those conditions.[28] As such, *CEE*'s distinction between "political obstructions to *equal* treatment" and "political obstructions to *preferential* treatment"[29] is patently incoherent in the context of sex.

*CEE*'s use of colorblindness—to explain why minorities may seek only neutral interests in the political process—betrays a clear indication that the court's framework does not work for sex. Supreme Court doctrine has no colorblindness analogue for sex.[30] In fact, the long line of "similarly situated" sex equality cases[31] maintains a large divide between gender jurisprudence and conservative theories of constitutional colorblindness. That is, current doctrine recognizes that men and women are often *not* similarly situated—due

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26. *See* Califano v. Goldfarb, 430 U.S 199, 242 (1977) (Rehnquist, J., dissenting) (stating that "economic discrimination . . . has been the basis for heightened scrutiny of gender-based classifications"), *cf. id.* at 221 (Stevens, J., concurring) (finding legislation invalid because it was "not the product of a conscious purpose to redress the 'legacy of economic discrimination' against females" (citation omitted))

27. *See Kahn*, 416 U.S. at 353; *cf. id.* at 358-59 (Brennan, J., dissenting) ("[I]n providing special benefits for a needy segment of society long the victims of discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups")

28. *See* Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam), *see also* Michael M v Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion) ("[A] legislature may 'provide for the special problems of women.'" (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975))), *Goldfarb*, 430 U S at 209 n.8 (distinguishing *Kahn*, 416 U.S. 351 (1974); Schlesinger v Ballard, 419 U S 498 (1975))

In fact, several Supreme Court decisions striking down preferences for women have been analyzed according to the Equal Protection Clause's protection of women from discrimination In a series of cases—what we may call the "double-edged discrimination" decisions, *see* Wengler v Druggists Mut Ins Co., 446 U.S. 142, 152 (1980)—the Court based its holdings substantially on its determination that programs favoring one group of women actually injured other women's interests *See, e g , id* (invalidating workers' compensation preferences for widows because the program discriminated against female wage earners whose widowers did not receive the same benefits); *id* at 147-49 (describing cases that accord with this framework, such as *Goldfarb*, 430 U.S. at 242, *Weinberger*, 420 U S at 636, and *Frontiero v Richardson*, 411 U.S. 677 (1973)). In another set of decisions, the Court invalidated legislation purportedly benefitting women based on conclusions that so-called favoritism actually involved archaic generalizations or regressive role-typing. *See, e.g.*, Mississippi Univ for Women v Hogan, 458 U S 718, 725 (1982), *Goldfarb*, 430 U.S. at 207; Stanton v. Stanton, 421 U S 7, 15 (1975) Considered together, these decisions suggest (1) that equal protection analysis for sex tries primarily to ensure *proper* preferential purposes, and (2) that a commitment to improving women's status guides such determinations

29. *CEE*, 110 F.3d at 1445 (emphasis added); *see supra* text accompanying note 5

30. In fact, some of the Justices who most ardently advocate the immediate adoption of a legal system "in which race no longer matters," *CEE*, 110 F3d at 1446 (citation omitted), are those most receptive to sex classifications. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-27, at 1569 & n 32 (2d ed. 1988) (contrasting Justice Rehnquist's theory of race neutrality with his theory of difference for sex); *see also* United States v. Virginia (VMI), 116 S Ct 2264, 2295-96 (1996) (Scalia, J., dissenting) (claiming that sounder arguments exist for lowering sex equality review to rational basis than for elevating it to strict scrutiny); J.E.B. v. Alabama *ex rel.* T.B., 511 U S 127, 154 (1994) (Rehnquist, C J., dissenting) (arguing that "sufficient differences between race and gender discrimination" mean that the Constitution's prohibition of race-based peremptory challenges should not extend to sex), *id* at 157-58 (Scalia, J., dissenting) (suggesting the principle of *vive la difference* for constitutional questions of sex)

31. *E.g., Michael M.*, 450 U.S. at 469 (plurality opinion) ("[The] Court has consistently upheld statutes [that] realistically reflect[] the fact that the sexes are not similarly situated" (citing Parham v Hughes, 441 U.S. 347 (1979); *Webster*, 430 U.S. 313 (1977) (per curiam), *Schlesinger*, 419 U S 498 (1975), *Kahn*, 416 U.S. 351 (1974))).

to sociological,[32] physiological,[33] or preexisting legal[34] conditions—an acknowledgment that is conceptually incongruent with the proposition that individuals of different races are, in general, similarly situated.[35] Also, in a "not similarly situated" case, the means and purpose tests may be suspended,[36] and the constitutional presumption may shift to favor the legislation.[37] In short, *CEE*'s strong use of colorblindness to interpret the *Hunter* doctrine reveals the inappropriateness of applying its reasoning to sex.

## III

The argument pursued here leads to several conclusions, a full elaboration of which is beyond the scope of this discussion. At a minimum, though, this Case Note exposes an error in *CEE*'s reasoning, suggesting the need for review. The Ninth Circuit's confusion of sex-based equal protection and strict scrutiny—especially in a case justifying the permanent withdrawal of state preferences for women—runs afoul of doctrinal principles and precedent.

The Case Note's argument also puts into doubt the viability of the preference-focused framework itself. *CEE* recast the *Hunter* doctrine by shifting the focus of constitutional inquiry from the initiatives in question to the programs that the initiatives prohibit. Yet this framework—if faithfully executed—produces an anomalous result: broader legal protections for women than for racial minorities. Can the application of the *Hunter* doctrine—which has primarily focused on invalidating "[s]tate action [that] 'places special burdens on racial minorities in the political process'"[38]—yield broader political rights for a group that occupies a lower rung of the equal protection ladder? Perhaps to avoid this anomalous result, hornbook law on the *Hunter* doctrine makes no distinction between "preferential treatment" and "equal treatment."[39] *CEE*'s ability to avoid this same anomalous result, on the other hand, arguably *depends* on its misanalysis of sex equality doctrine.

*—Ryan Goodman*

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32. *See, e.g., Michael M.*, 450 U.S. at 471 (plurality opinion).

33. *See, e.g., id.* (plurality opinion); *id.* at 481 (Stewart, J., concurring).

34. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 76, 78 (1981); *Parham*, 441 U.S. at 355; *Schlesinger*, 419 U.S. at 508.

35. *See Michael M.*, 450 U.S. at 478 (Stewart, J., concurring).

36. *See Rostker*, 453 U.S. at 94 (Marshall, J., dissenting) (discussing differences in "similarly situated" analysis as illustrated by comparison of the majority opinion and Justice Stewart's concurring opinion in *Kirchberg v. Feenstra*, 450 U.S. 455, 463 (1981) (Stewart, J., concurring)).

37. *See Michael M.*, 450 U.S. at 497-98 n.4 (Stevens, J., dissenting) ("In cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant . . . [making it] appropriate to presume that the classification is lawful."); Caban v. Mohammed, 441 U.S. 380, 409-10 (1979) (Stevens, J., dissenting); *cf. Parham*, 441 U.S. at 351-52 (1979) (noting a presumption of statutory validity absent invidious discrimination).

38. Washington v. Seattle Sch. Dist. No. 1., 458 U.S. 457, 470 (1982) (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

39. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 659-61 (5th ed. 1995).