IS IT REALLY RACIST NOT TO BE RACIST?
A REPLY TO PROFESSOR SPANN

LARRY ALEXANDER* AND MAIMON SCHWARZSCHILD†

There are two competing conceptions of the racial equality demanded by the Equal Protection Clause, the 1964 Civil Rights Acts, and other state and federal civil rights laws. According to one conception, racial equality requires that no individual be benefited or burdened because of his race, at least in the absence of a governmental interest of the highest order, such as national security. Some hold this individualist conception of racial equality as a matter of fundamental moral principle. Others hold it because they believe that the use of racial classifications in this culture at this time produces very harmful effects, such as reinforcing racialist myths, divisively balkanizing people, and undermining beneficial standards of excellence and achievement.

The other conception of racial equality is diametrically opposed to the first. On this conception, what matters is equality among racial groups. Obviously, on this group-based conception, the mandate is not to be race blind, but rather to be race conscious. Races are regarded as real entities, individuals are assigned to them, and attention is directed to the races' relative shares of wealth, jobs, college admissions, and so forth.

If the issue is posed to them, most Americans embrace the first conception of racial equality, the individualist one. That conception was beyond cavil the one motivating the 1964 Civil Rights Act.

* Warren Distinguished Professor of Law, University of San Diego.
† Professor of Law, University of San Diego and barrister of Lincoln's Inn, London.
Moreover, most courts – and most importantly, the Supreme Court – hold the individualist conception.

The group-based conception of racial equality is held by a much smaller group of Americans than the individualist conception. Its proponents are primarily found in the academy, the leadership of civil rights organizations, and, to the extent different, the left wing of the Democratic Party.

In 1996, California voters approved by a sizeable vote Proposition 209, which essentially forbids racial and gender discrimination by California governments in awarding public sector jobs, public contracts, and admission to public schools. There is no question but that Proposition 209 embodies the individualist conception of racial equality, just as does the 1964 Civil Rights Act, whose language Proposition 209 tracks. Proposition 209 was spawned by antipathy to a welter of state programs in which individuals were discriminated against and others preferred because of race, all in service to a group-based conception of racial equality.

Those who hold the group-based conception of racial equality do not like Proposition 209. To attack it, however, would appear to require either (1) that one attack the individualist conception of racial equality or (2) that one show that Proposition 209 violates the individualist conception itself.

Girardeau Spann, however, attacks Proposition 209 from neither of these perspectives. Because the individualist conception is the reigning conception in the Supreme Court – and because the individualist conception is much more consistent with our general moral principles, which make the individual, not groups (especially scientifically bogus ones), the locus of moral concern – it would have been difficult for Spann to make a case against Proposition 209 by denying its consistency with the individualist conception or by attacking the individualist conception of racial equality on which it rests.

Instead, Spann attacks Proposition 209 by disingenuously reinterpreting Supreme Court precedents to reflect a group-based conception of equality. Spann's prism, which he erroneously attributes to the Supreme Court, is "What races are being favored and disfavored?," not "Are individuals being preferred or dispreferred on the basis of race?"

From Spann's point of view, laws mandating affirmative action – that is, laws discriminating in favor of blacks and hence against whites – are in effect "laws involving race that redistribute benefits

---

from one race (whites) to another (blacks)."² Laws, like Proposition 209, that forbid such discrimination are, from this perspective, likewise "laws involving race that redistribute benefits from one race (blacks) to another (whites)."³ If the former must meet the Supreme Court's almost always fatal strict scrutiny test of constitutionality, so too must the latter. Hence, as Spann spins doctrine, Proposition 209 is as unconstitutional as the affirmative action plans in *Croson v. Richmond*⁴ and *Adarand Construction Company v. Peña*.⁵

But this is sophistry. Spann's love of paradoxes supposedly illumined by deconstructionist methodology and his attachment to a (racial) group-based conception of equality blind him to the absurdity of his critique.

First, although a law forbidding racial classification and discrimination is a law involving race, it is not a law that involves racial classification and discrimination. Strict scrutiny applies to the latter, not the former. Otherwise, the 1964 Civil Rights Act would be subject to strict scrutiny. (After all, it "involves" race, and at the time it was passed it "redistributed" jobs from whites to blacks.)

Moreover, Spann's position implies that there is no area between those laws pertaining to race that are constitutionally forbidden and those that are constitutionally required. In other words, there are no laws pertaining to race that are constitutionally permissible but not mandated. To see this implication, consider a state that is deciding whether to enact a program that it knows will "redistribute" some benefit from one race to another – for example, a law mandating that

² Spann characterizes affirmative action programs, not as cases of racial and gender discrimination, but as racial group redistributive measures and unconstitutional for that reason. Spann, p. 296. He thus takes what for some is a justification for affirmative action to be its salient characteristic in the eyes of the Supreme Court.

³ Spann's actual characterization of Proposition 209 is as a "race- and gender-conscious redistribution measure "." (Spann, p. 296; see also Spann, p. 298) or a "discriminatory allocation of resources . . . benefit[ing] white males" (Spann, p. 299). He also labels it a measure that "expressly singles out race and gender for special treatment" (Spann, p. 300), attempting thereby to place it on a par with laws, such as affirmative action, that racially or sexually classify and discriminate against individuals. Indeed, he calls Proposition 209 "an affirmative action program for white males." Id.

⁴ "Throughout the history of the Nation, white males have controlled the bulk of the social, economic and political power exercised in the United States, typically by using formal legal rules to secure and retain their control over that power." Spann, p. 305.

⁵ "Proposition 209 is part of the general anti-affirmative action backlash that emerged when white males began to resent their loss of jobs and educational opportunities to women and minorities in times of economic decline." Spann, p. 307.
state universities only consider grades and test scores in admissions decisions. If such a program is neither constitutionally required nor constitutionally forbidden, then it would seem that the state would be permitted to enact the program. If it did so, however, then it would have enacted a law that according to Spann involves race and that redistributes benefits from some races to others. In the absence of a compelling interest behind it, the program would fail Spann's test.

On the other hand, if the state already has such a program and then repeals it, the state would have also engaged in racial redistribution, which, in the absence of compelling interest, should invalidate the repeal. Thus, neither the affirmative action program nor its absence would be constitutional in Spann's world, which contradicts the opening assumption. Spann's position is incoherent.

Of course, from our perspective, where Spann goes wrong is in adopting the group conception of racial equality and attributing that conception to the Supreme Court. There is no argument for why the treatment of "groups," much less the scientifically arbitrary constructs of "racial" groups, should be the center of moral or legal concern. Western morality focuses on individuals because it is individuals who live lives, have projects, ideals, and relationships, feel pleasure, pain, hope, and fear, and so on. Groups do not, apart from the individuals who constitute them. How "Asians" are doing relative to "whites" or "blacks" is of no moral import in itself, no more than whether the group "Dodger fans" has higher per capita earnings than the group "Yankee fans." Race can be and has been a quite arbitrary and distinctive way of treating individuals, which is why racial discrimination is widely condemned. But except insofar as information about racial groups provides evidence that racial discrimination against individuals is occurring, it is difficult to see its moral relevance.

Near the end of his article, Spann also attempts to ride the individualist conception horse. Thus, he suggests – or things he says could be construed as suggesting – that Proposition 209 was passed, not because racial discrimination was deemed morally wrong or bad policy, but because white voters wanted to take benefits away from blacks as individuals because they were blacks and redistribute them to white individuals because they were white. If Proposition 209 were so motivated, then it would count as racial discrimination on the individualist conception.

Spann's difficulty here is that he provides no evidence that this hypothesized motivation was the actual motivation of the California voters who voted for Proposition 209. Having been in California at
Proposition 209's passage – and more importantly, having worked for its passage – we can state that we saw virtually no evidence of racist motivation in the pro-209 camp. It is true that the majority of whites voted in favor of Proposition 209 while the majority of Asians, Hispanics, and blacks voted against it. But this is surely not evidence that the motivation was racist rather than principled. One can just as easily claim that the majority of Asian, Hispanics, and blacks who voted against it did so because they let the prospect of benefits dominate their principles. Indeed, what really needs explanation, given Spann's claim that Proposition 209 represented anti-minority racism, is why such large minorities of Asians, Hispanics, and blacks voted for it.

Spann's arguments regarding the motivations of California voters who backed Proposition 209 range from the paranoid to the cynical to the silly. In some passages he hints at a white cabal – perhaps a clubhouse meeting of white males at which, after secret handshakes and signs, white males plotted to retake gains from blacks and women.6 Perhaps read more charitably, Spann suggests widespread resentment by white males generally at the losses of jobs and other benefits to minorities and females because these were benefits white males qua white males should have.7 Read slightly more charitably, Spann is suggesting that those particular white males who lost jobs and other benefits to minorities and women under affirmative action programs resented the losses because the jobs and benefits were going to minorities and women (i.e., they would not have resented non-meritocratic rules under which they would lose the jobs and benefits to less qualified white males).

All three of these racist readings of the Proposition 209 vote are ridiculous. One wonders how the federal civil rights laws and the welter of state and local anti-discrimination laws ever got passed in the first place if white males so resent giving up benefits to minorities and females. Spann adduces only three pieces of evidence for such white male racism.

First, Spann points to the fact that the same California electorate that passed Proposition 209 also passed Proposition 187 and 227, all within a few years period. Proposition 187 withdrew certain public benefits from illegal aliens. Proposition 227 eliminated bilingual

---

6 Spann asks, cynically, "Would the equality principle to which white male supporters of Proposition 209 purport to adhere . . . cause those white males to favor Proposition 209 . . . [in situations where race and gender blindness would favor minorities and females]?" If support for such measures as the 1964 Civil Rights Act is any barometer, the answer appears to be "yes," contrary to Spann's jaundiced intimation.

7 Spann, pp. 307-308.
education programs and mandated English immersion programs for non-English speaking schoolchildren. Spann argues that the three propositions together demonstrate the racism of white Californians. (Perhaps this answers the question in the previous paragraph: White males have generally not been racists and sexists in the last thirty years, but in California they now are.)

But the result of this reading of the three propositions is unconvincing. With respect to Proposition 187, one has to assume that those who resent illegal immigrants receiving public benefits do so because the recipients are immigrants, not because they entered the country illegally. And then one has to make the further assumption that those who resent immigrants' receiving public benefits do so because of the immigrants' races. Each of the assumptions is extremely strained, and together they cannot support a feather, especially given much more straightforward reasons for supporting Proposition 187. We do not necessarily believe Proposition 187 should have been approved, but it is a far cry from disagreeing with it to attributing racism to its backers. (And why did so many Hispanics vote for it? False consciousness? Self-hatred? Or agreement that illegal entrants should not thin benefits available to those who are legally here?)

Proposition 227 is even a further stretch. Bilingual education was viewed by many of all races as a complete failure in terms of getting students sufficiently fluent in English to be competitive in school and beyond. Moreover, and worse still, in some school districts the bilingual establishment had become a political force against assimilation into the English-speaking culture, in the eyes of most a position antithetical to the welfare of the non-English speaking children. Although reasonable people can disagree about whether bilingual education is or is not superior to English immersion as a method for teaching English to the non-English speaking, and whether bilingual education should have been eliminated state-wide, reasonable disagreement is a far cry from a charge of racism. (Again, many minorities, including a high percentage of Hispanics, voted for Proposition 227.)

The racism label just cannot be hung on either Proposition 187 or Proposition 227. Nor can it be hung on the two together. And they constitute no evidence that Proposition 209 was a racist measure.

Spann's next piece of evidence for Proposition 209's racism is that almost all of the social program that it targeted were unconstitutional under Supreme Court precedents. Only those programs that satisfied the Court's strict scrutiny test and hence served compelling interests would be affected by Proposition 209.
Therefore, reasons Spann, Proposition 209 was aimed at only those cases of racial preferences that were necessary to combat racial discrimination. And that shows racism.

This argument goes wrong at the point of assuming Proposition 209 was aimed at only the most compelling use of racial preferences. Proposition 209, however, was aimed at the welter of racial preference programs that despite being unconstitutional remained on the books and active. Many California officials chose to ignore Supreme Court preferences. Proceeding to challenge them one by one in federal court would be time-consuming and costly. A state-wide constitutional requirement would not only provide a state cause of action in addition to a federal one, but would give the Governor an administrative weapon against recalcitrant state and local officials.

There are many, many instances of state laws tracking federal ones. There are advantages to such duplication. Proposition 209's targets were not a few terribly compelling and carefully crafted instances of racial classification and discrimination. They were a multitude of rather crude programs of racial preference, which were undoubtedly unconstitutional under the federal Constitution. Now they are unconstitutional under the California constitution as well. Such "overkill" surely does not show racism.

Spann's final piece of "evidence" for racism is just the demography of Proposition 209's support – in other words, the fact that it was supported by a majority of white males and opposed by a majority of minorities and women. But this is as weak a reed as the other "evidence" of racism.

Why would white males support Proposition 209 other than for racist reasons? Presumably some individuals were motivated by naked self-interest: if racial and gender preferences were eliminated, they would get the job or the contract, or their kid would get into Berkeley. Naked self-interest isn't particularly pretty, but it's surely not racism. Much legislation is supported because it will directly benefit supporters rather than out of public spiritedness. We suspect that some support for civil rights laws of the type Spann favors has also been nakedly self-interested. So what's new?

In any event, we doubt that most who supported Proposition 209 did so because they would benefit and for no other reason. Even among those who would directly benefit, we suspect that many and probably most supported Proposition 209 because they believed it only just that they benefit. In other words, they believed that racial preferences were wrong, and that if they were denied benefits because of racial preferences, they were denied benefits unjustly.
Surely this morally constrained form of self-interest is a proper ground for supporting laws. (Didn't people who were denied jobs because of racial discrimination back the 1964 Civil Rights Act because they wished to rectify and prevent wrongful denials of jobs to them?) So even if some white males would benefit from Proposition 209, their support for it might not have rested just on the prospect of benefit, but might have rested in addition on the belief that the denial of benefits on account of their race or sex was wrongful. And that motive, a mixture of self-interest (standing up for one's own rights) and morality, is surely a plausible one to attribute to many white male voters.

We doubt that most of the white males who voted for Proposition 209 did so because they expected any benefit for themselves or their families. We expect, rather, that they, like the many women and minorities who also supported Proposition 209, did so because of a sincere belief that racial and gender classification and discrimination by government is wrong no matter whose ox is gored.

We think that the average pro-209 voter thought, as we did, that racial discrimination is unfair and/or destructive no matter how various races come out under it. It was predicted, for example, that Asians would be the primary beneficiaries of Proposition 209 in higher education, a prediction subsequently borne out. We are sure that the whites who voted for Proposition 209 are happy with that result, not because they are pro-Asian, but because the Asians have succeeded through a race-blind process. People really do care about the principle of race-blind government action rather than which "races" win or lose.

In the end, then, Spann's cute deconstructionist trick – that race-blindness and race-consciousness are both about "race" and therefore on a moral and legal par – should fool no one. If one holds the individualist conception of equality, then one should be concerned whenever the government determines individuals' prospects by assigning individuals to "races." If one holds the racial group-based conception of equality, however, then one ought to explain why. We doubt that professor Spann (or anyone else) can do so persuasively.