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## Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases

Victor Suthammanont  
*New York Law School*

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JUDICIAL NOTICE: HOW JUDICIAL BIAS IMPACTS THE  
UNEQUAL APPLICATION OF EQUAL PROTECTION  
PRINCIPLES IN AFFIRMATIVE ACTION CASES

VICTOR SUTHAMMANONT\*

*[F]or love of grace,  
Lay not that flattering unction to your soul,  
That not your trespass but my madness speaks.  
It will but skin and film the ulcerous place,  
Whiles rank corruption, mining all within,  
Infects unseen.<sup>1</sup>*

I. INTRODUCTION

A black teen and a white teen walk into a store. While the white teen wanders the store browsing, the black youth is stalked by the suspicious shopkeeper.<sup>2</sup> Later, while the same two youths are driving down the New Jersey Turnpike, the black teen is more likely to be stopped, and his car searched.<sup>3</sup> Socially, there may be paren-

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\* J.D. Candidate New York Law School, May 2005. There are too many people for me to thank by name in this space. While all the professors here have been extremely generous, I would like to thank Prof. David Chang for teaching me the concepts and skills I used to write this Note, Prof. Nadine Strossen for her advice and support of my efforts, and Prof. Denise Morgan for her thoughtful and constructive feedback. Additionally, I thank the staff of the *New York Law School Law Review* for their many contributions. All errors are my own.

1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 3, sc. 4, ln. 146-51 (Harold Jenkins ed., Methuen & Co. LTD 1982).

2. See Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003).

3. See, e.g., ST. POLICE REV. TEAM, OFF. ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf), cited in Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUMAN RIGHTS L. REV. 41, 50 n.24 (2001); Warren Cornwall & Cheryl Phillips, *The Racial-Profiling Question: How is the State Patrol doing?*, SEATTLE TIMES, Jan. 5, 2003, at A1 (reporting that although stopped in equal rates, minorities were searched twice as much as whites); David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1 (reporting New Jersey's contentions that the United States government encouraged racial profiling).

tal pressures not to date or socialize with others of a different race.<sup>4</sup> Applying to college, the black teen may be admitted into an institution ahead of the white teen who has higher indicator scores.<sup>5</sup> This is life as it is lived everyday by millions of Americans. Yet, when issues of race are brought before courts, they remain ignorant of the realities facing people of color and are ill equipped to render the equal justice due to all.<sup>6</sup> Affirmative action is one area where this inequity is apparent, but not in the ways usually alleged.<sup>7</sup> The burdens faced by minorities and others friendly to their interests in implementing and maintaining affirmative action programs remain far greater than the burdens faced by those seeking to preserve the unequal distributions of opportunity resulting from over a hundred years of political and societal oppression.

Unequal treatment has been a fact of life in the United States since the nation was born.<sup>8</sup> Political and social equality did not exist. Even the Fourteenth Amendment, designed to grant legal equality, did not remedy political and social oppression.<sup>9</sup> Despite a few victories,<sup>10</sup> for nearly the first hundred years of Equal Protection jurisprudence the courts allowed pernicious legislation and ra-

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4. See Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 889 (1994); Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7, 33 (1998); Ronald Smothers, *Principle Causes Furor on Mixed Race Couples*, N.Y. TIMES, March 16, 1994, at A10, cited in Mark Strasser, *Unconstitutional? Don't Ask, if it is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375 (1995). See also SAVE THE LAST DANCE (Paramount 2001) (examining the issues facing a mixed race couple); O (Lions Gate 2001) (same, update of Shakespeare's *Othello*); JUNGLE FEVER (Universal 1991) (same). But see Anne Marie O'Connor, *Learning to Look Past Race*, L.A. TIMES, Aug. 25, 1999, at A1.

5. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan's affirmative action program).

6. See U.S. CONST. amend. XIV § 1.

7. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (challenge to the University of Michigan Law School's affirmative action program as unfair to whites); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995) (challenge to affirmative action program as unfair to white contractor).

8. See generally U.S. CONST. art. I, § 2 (discussing how blacks would be accounted for in the census); U.S. CONST. art. I, § 9 (prohibiting Congress's power to proscribe the importation of slaves prior to 1808); U.S. CONST. art. IV, § 2 (discussing fugitive slaves).

9. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988).

10. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

cially discriminatory enforcement to stand.<sup>11</sup> During a brief period of racial justice,<sup>12</sup> the Civil Rights Act of 1964 was passed.<sup>13</sup> Unfortunately, minorities still face political and social challenges. Some of these challenges can be addressed by the law; some are beyond the law's reach. Racial animosity has been driven underground. There it lurks, awaiting its chance to rise, as it does from time to time in matters of social policy<sup>14</sup> and matters of life and death.<sup>15</sup>

One of the remaining areas where unequal protection still exists in the law is the difference between the judicial treatment of those laws enacting and those ending an affirmative action program. There are a variety of ways of "ending" affirmative action: a repeal of a specific program, a general ban, a regulatory change, a court decision.<sup>16</sup> This Note specifically addresses only challenges<sup>17</sup> to those state actions (whether a repeal, a prospective ban, etc.)<sup>18</sup> that have the effect of ending or repealing an already existing pro-

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11. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

12. For example, *Loving v. Virginia*, 388 U.S. 1 (1967), struck down anti-miscegenation laws, and *Brown v. Board of Education*, 347 U.S. 483 (1954), ended the doctrine of "separate but equal" in public schools. The changing social values are reflected in the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2004)).

13. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2004)).

14. See generally Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000) (discussing how race affected the formulation of drug laws); Charisse Jones, *Crack and Punishment: Is Race the Issue*, N.Y. TIMES, October 28, 1995, at sec. 1, 1 (same).

15. See, e.g., Carol Marie Cropper, *Black Man Fatally Dragged In a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16 (reporting the murder of James Byrd Jr. in Texas).

16. Regulatory change is meant to encompass state actions taken at the administrative or agency level, such as changes in program criteria or requirements, or changes in school admissions policies, etc., that have the effect of curtailing or ending benefits. Sunset provisions, another manner of ending an affirmative action program, are not considered here because they are outside the scope of analysis pursued in this Note.

17. Although a challenge to the repeal or ban of a law is uncommon, it is not prohibited by issues of standing or immunity, nor is it without precedent. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491-92 (N.D. Cal. 1996). See also discussion *infra* note 326.

18. Because this Note only addresses actions that have the effect of repealing an existing program, regardless of the form of the action, it will use the word "ending" interchangeably with words such as repeal, ban, forbid, etc.

gram, although the analysis pursued may relate to other situations.<sup>19</sup>

As a law with a racial classification, a law implementing an affirmative action program is subject to the “most rigid scrutiny” by the judiciary due to the requirements of the Equal Protection Clause.<sup>20</sup> Although originally construed to protect minorities from legislation or state action undertaken with an “evil eye and unequal hand[,]”<sup>21</sup> the Equal Protection Clause in recent jurisprudence has been interpreted to protect “innocent whites” from inequities imposed by affirmative action programs.<sup>22</sup> The obstacles of strict scrutiny are incredibly difficult to overcome. As a facially neutral action, a state ending an affirmative action program is merely required to show a rational basis for the law.<sup>23</sup> This is an easy burden for a state to meet. Therefore, while those seeking to advance minority interests with constitutionally proper purposes must survive strict scrutiny, those acting to harm minority interests by ending affirmative action, even if possessing an impermissible purpose, must withstand the least of scrutiny to do so.<sup>24</sup> Given the hostility of courts to minority concerns,<sup>25</sup> courts are ill equipped to guard against impermissible purposes underlying some facially neutral laws, and a new test for purposes rooted in racial animosity or stere-

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19. For example, a state or locality without any existing affirmative action program might enact a prospective ban on future programs. Or a state might exempt existing programs from such a ban. These situations are discussed in further detail, *infra* note 326.

20. *Korematsu*, 323 U.S. at 215; *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265.

21. *Yick Wo*, 118 U.S. at 373-74.

22. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Bakke*, 438 U.S. 265; David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790 (1991). *See also* Seth D. Harris, *Innocence and The Sopranos*, 49 N.Y.L. SCH. L. REV. 577 (2005), for an interesting discussion of the rhetoric of “innocence.”

23. *See* *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997).

24. *See id.*

25. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217 (1970) (upholding city’s closure of city pools rather than desegregate); *Johnson v. California*, 321 F.3d 791 (9th Cir. 2004) (upholding segregation of prisoners by race in California for first 60 days of confinement), *rev’d*, 125 S. Ct. 1141 (2005); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (striking down University of Texas law school affirmative action program); *Econ. Equity*, 122 F.3d 692 (upholding voter initiative ending affirmative action in California).

otype must be implemented in reviews of measures ending affirmative action programs.

This Note argues that because the Equal Protection Clause is being enforced unequally by courts in affirmative action cases, strict scrutiny should be applied to actions implementing and ending affirmative action programs, and a new test to detect impermissible purposes should be adopted. Part II briefly examines the history of racial discrimination during the life of the Equal Protection Clause and the history and underlying policies of affirmative action. Part III explains the “anti-racism principle” and its application by courts in affirmative action cases, particularly focusing on *Coalition for Economic Equity v. Wilson*.<sup>26</sup> The arguments for strict scrutiny and a new test are analyzed in Part IV. Equal opportunity for all can only be protected by an equal application of the principles underlying the Fourteenth Amendment.

## II. RACE AND AMERICAN LIFE

### A. *An Extremely Brief History of Racism and Discrimination in the United States*

To understand the challenge presented by affirmative action cases to courts today, it is necessary to understand how race has affected the history and politics of American life during the years since the adoption of the Fourteenth Amendment. Despite the efforts of many, race continues to affect all aspects of life in the United States.<sup>27</sup> During the period from the end of the Civil War to the achievements of the civil rights movement, race was openly a factor in the social and political unequal treatment of citizens. After the Civil Rights Act of 1964 was passed, racism still played a large

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26. 122 F.3d 692.

27. This is not to suggest “color-blindness” or homogenization should be values that we aspire to achieve as a nation. There are significant social, cultural, and identity issues involved with how race should be perceived, acknowledged, and treated by society and government, particularly where diversity is found to be a value worth pursuing. This is notwithstanding how dubious race is as a concept. See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (discussing race as a social construct); Carrie Lynn H. Okizaki, Comment, “What Are You?": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463 (2000) (discussing Critical Race Theory and the inadequacy of racial definitions).

part in the unequal treatment of minorities, although racists have learned to hide behind “coded” language and politics. An area where the development of the law has been corrupted by this unequal treatment is in the disparate treatment of the laws instituting affirmative action programs and the measures repealing them.

### 1. From the Civil War to Civil Rights

The Civil War and its aftermath marked the end of institutionalized slavery.<sup>28</sup> It was, however, merely the beginning of a long struggle to achieve not only the Fourteenth Amendment’s guarantee of equal protection,<sup>29</sup> but social, political, and economic equality as well.<sup>30</sup> Although some framers of the Fourteenth Amendment sought to give freedmen social as well as legal equality, most thought of African-Americans as socially inferior, preferring to continue segregation, anti-miscegenation laws, and other practices aimed at ensuring the superiority of the white race.<sup>31</sup> Indeed, although the Fourteenth Amendment was passed to counteract the passage of “Black Codes,” which were laws designed to maintain the social order that existed under slavery,<sup>32</sup> later “Jim Crow” laws ensured the subjugation of African-Americans into the twentieth century.<sup>33</sup> Most interpretations of the Fourteenth Amendment

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28. Slaves in rebellious areas of the United States were freed by President Lincoln’s Emancipation Proclamation as of January 1, 1863. See ABRAHAM LINCOLN, GREAT SPEECHES 98 (Stanley Appelbaum ed., Dover Publ’ns 1991). Slaves in all of the United States were freed via the Thirteenth Amendment in 1865. U.S. CONST. amend. XIII.

29. U.S. CONST. amend XIV. See also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

30. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION (1988).

31. See Bickel, *supra* note 29. See also Plessy v. Ferguson, 163 U.S. 537, 544 (1896):

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

32. Paul Finkelman, *John Bingham and the Meaning of the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681-85 (2003). See also Bickel, *supra* note 29 (discussing Fourteenth Amendment as a means to counteract “Black Codes”); FONER, *supra* note 30 (describing the history of Reconstruction).

33. See, e.g., JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 224-38 (6th ed., McGraw-Hill 1988); MICHAEL L. LEVINE, AFRICAN AMERICANS & CIVIL RIGHTS: FROM 1919 TO PRESENT (Oryx Press 1996); Ronald L. F. Davis, *Creating Jim Crow: In-Depth Essay*, at <http://www.jimcrowhistory.org/history/creating2.htm> (last

following Reconstruction cemented this pattern of oppression,<sup>34</sup> all the while hiding behind the rhetoric of “separate but equal.”<sup>35</sup>

Other races were subjected to oppression as well. Chinese immigrants were excluded from becoming citizens until 1943.<sup>36</sup> Most other Asian immigrants were not given the right to become citizens until 1952.<sup>37</sup> In addition to the prohibition on citizenship, Asians were discriminated against in getting permits for businesses,<sup>38</sup> sent to segregated schools,<sup>39</sup> not allowed to marry persons of a different race,<sup>40</sup> and interned by the hundreds of thousands during World War II.<sup>41</sup> Native Americans were nearly exterminated in the aftermath of the Civil War.<sup>42</sup> Latinos were the target of discrimination

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viewed on February 28, 2004) (describing the general history of Jim Crow in the United States).

34. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390-92 (1978) (Marshall, J., dissenting). Marshall points to specific examples of the Court “strangl[ing] Congress’ efforts . . . to promote racial equality,” *id.* at 391, such as *The Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy*, 163 U.S. 537.

35. See *Plessy*, 163 U.S. 537.

36. The Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58 (1882) (repealed 1943). By 1940, this prohibition was expanded to all non-white aliens not from Africa or the Western Hemisphere — in other words, all Asians with the exception of certain Philipinos. The Nationality Act of 1940, ch. 876; 54 Stat. 1137 (1940) (amended 1943). Chinese immigrants were allowed citizenship in 1943, The Chinese Repealer Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (1943), largely as a result of the embarrassment of the United States in discriminating against citizens of an important ally against the Japanese in World War II. Although the ban on immigration was lifted, the annual quota on Chinese naturalization was limited to 105 Chinese immigrants until all quotas were ended in 1965. Miriam Kim, Notes and Comments, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 123 n.32 (2002).

37. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 143-45 (1996).

38. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

39. See, e.g., Chin et al., *supra* note 37, n.75 (citing *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

40. *Id.*, n.74 (“For instance, California’s anti-miscegenation law was not repealed until 1948. See HYUNG-CHAN KIM, *DICTIONARY OF ASIAN AMERICAN HISTORY* 137 (1986).”) See also *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s anti-miscegenation law).

41. Chin et al., *supra* note 37, at 147-48. See also *Korematsu v. United States*, 323 U.S. 214 (1944).

42. See, e.g., JOHN SELBY, *THE CONQUEST OF THE WEST* 199-240 (Rowman & Littlefield 1976); DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (Henry Holt 2001); William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 24-25 (2002).



as well, such as “mass deportations” in the 1930s.<sup>43</sup> The condition and struggle of minorities in the United States between the Civil War and the Civil Rights movement has been documented in popular books,<sup>44</sup> film,<sup>45</sup> and music.<sup>46</sup>

During this period, the language and rhetoric of racism was clear, as was the intent behind it.<sup>47</sup> Words like “nigger,” “darkie,” “coloreds,” “coolie,” “Chinaman,” “nip,” “Jap,” “wetback,” “kike,” “Hebe,” “wop,” were all said openly, and without much in the way of social consequence.<sup>48</sup> Language maintained the existing social order by its dehumanization of minorities.<sup>49</sup> The law for the most part reinforced the existing social order through the endorsement of segregation.<sup>50</sup> Occasionally, however, in cases involving unequal

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43. Nancy Cervantes, et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 2 (1995).

44. See, e.g., WALTER MOSLEY, *DEVIL IN A BLUE DRESS* (Pocket Books 1990); HARPER LEE, *TO KILL A MOCKINGBIRD* (Warner Books 1982) (1960); MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (Penguin 2003) (1884); LANGSTON HUGHES, *SELECTED POEMS OF LANGSTON HUGHES* (Vintage Classics 1990).

45. See, e.g., *ROSEWOOD* (Warner Bros. 1997); *DANCES WITH WOLVES* (MGM 1990); *COME SEE THE PARADISE* (20th Century Fox 1990); *SHOW BOAT* (Universal 1936).

46. See, e.g., TALIB KWELI, *Four Women*, on *TRAIN OF THOUGHT* (Priority 2000); *2PAC, Panther Power*, on *THE LOST TAPES* (Lightyear 2000); *CAST RECORDING, Ol' Man River*, on *SHOW BOAT* (Quality Records 1994).

47. See, e.g., RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (Pantheon Books 2002); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (Perennial 1988); Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 *ASIAN L.J.* 1, 6 n.24 (2000) (describing the origin of the term “Yellow Peril”); *BUGS BUNNY NIPS THE NIPS* (Warner Bros. 1940); *ROSEWOOD* (Warner Bros. 1997).

48. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* (Westview Press 2004); KENNEDY, *supra* note 47; MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (Penguin 2003) (1884); *SCHOOL TIES* (Paramount 1992).

49. See, e.g., KENNEDY, *supra* note 47; DELGADO & STEFANCIC, *supra* note 48.

50. *Plessy*, 163 U.S. 537. Even Justice Harlan's dissent in *Plessy* recognized that the basis of segregation laws was “[t]he white race deem[ing] itself to be the dominant race in this country,” *id.* at 559, and seeking to maintain that position. *Id.* Even as he goes on to write that the Constitution is “color-blind,” and knows no classes, Justice Harlan has faith that the white race will continue to dominate so long as it “remains true to its great heritage and holds fast to the principles of constitutional liberty.” *Id.* His words may be truer than he realized, for the use of his dissenting words in *Plessy* has led to the invalidation of much legislation aimed at undoing the effects of the discrimination Harlan was opposed to. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Stevens, J., concurring in part and concurring in judgment) (quoting *Plessy*, 163 U.S. 537).

political privilege<sup>51</sup> and obvious discriminatory enforcement,<sup>52</sup> the Court enforced the Equal Protection Clause so as to protect minority groups against discrimination. The root of the “anti-racism” doctrine lies in these cases.<sup>53</sup>

“Separate but equal” was still good law in 1948 when President Truman desegregated the U.S. military.<sup>54</sup> President Truman’s adoption of the civil rights cause alienated southern Democrats, causing a walkout during the 1948 Democratic National Convention.<sup>55</sup> Even with the desegregation of the military, achieving civil rights was slow to come; segregation was still the law, even in the nation’s capital.<sup>56</sup> In 1954, as the result of litigation by the National Association for the Advancement of Colored People (“NAACP”), the Supreme Court in *Brown v. Board of Education*<sup>57</sup> held that segre-

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51. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879). The privilege in this case was the right to be included in a jury pool. The majority uses interesting language in describing the intent of the framers of the Fourteenth Amendment:

It was well known that in some States laws making such discriminations then existed, and others might well be expected. *The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.* They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted.

*Id.* at 306 (emphasis added).

52. See, e.g., *Yick Wo*, 118 U.S. 356.

53. See *infra* discussion Part III-A. Interview with David Chang, Professor of Law, New York Law School, in New York, NY (Feb. 3, 2004).

54. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

55. Adam Clymer, *Divisive Words: News Analysis: G.O.P.'s 40 Years of Juggling on Race*, N.Y. TIMES, Dec. 13, 2002, at A1. Then Governor of South Carolina, Strom Thurmond, split from the Democratic Party to run for President to protect “states’ rights” to segregate on the basis of race. *Id.*; *The Rise and Fall of Jim Crow*, at [http://www.pbs.org/wnet/jimcrow/stories\\_events\\_truman.html](http://www.pbs.org/wnet/jimcrow/stories_events_truman.html) (last visited on Feb. 14, 2005).

56. See Letter from Stewart A. Street, U.S. Army Reservist, to Harry S Truman, President of the United States (January 2, 1951) (on file at the Truman Presidential Museum and Library), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/1951/daf50-2.htm](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/1951/daf50-2.htm) (last visited Feb. 14, 2005). Mr. Street wrote to the President about having had his college education cut short. *Id.* Although the Army may have been integrated, upon returning home from his fight for democracy, he would again live in a segregated society. *Id.* Mr. Street surmised that the President probably did not think about racial conflict. *Id.* Then Street wrote, “But it does enter my mind, not only in brief moments, but for twenty-four hours a day. You see Mr. Truman, I am a Negro.” *Id.*

57. 347 U.S. 483 (1954).

gated “educational facilities were inherently unequal.”<sup>58</sup> Over the following decade, the struggle for civil rights played out across the United States, in private life,<sup>59</sup> in public lives,<sup>60</sup> in the courts,<sup>61</sup> and in Congress,<sup>62</sup> culminating in some respects with the Civil Rights Act of 1964.<sup>63</sup> With the Civil Rights Act outlawing discrimination in public accommodations,<sup>64</sup> federal programs,<sup>65</sup> and in private employment,<sup>66</sup> all that remained was for minorities to achieve actual equality.

## 2. From Civil Rights to the Millennium

Following the enactment of the Civil Rights Act, President Johnson issued Executive Order 11,246 which began federal affirmative action in contracting,<sup>67</sup> as a way of effectuating Title VII of the Civil Rights Act.<sup>68</sup> President Johnson said about affirmative action:

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58. *Id.* at 496. Interestingly, Justice Warren focuses on the psychological harm done to the plaintiffs. *Id.* He never actually overrules *Plessy*'s separate but equal doctrine, merely anything in *Plessy* that contradicts the finding that segregation “denot[es] the inferiority of the negro group,” *id.* at 494-95 (cite omitted). If some manner of segregation were to be found equal, theoretically under *Brown*, it might be allowed to stand, although it may still run afoul of the anti-racism principle in cases like *Strauder*, 100 U.S. 303, *Yick Wo*, 118 U.S. 356, and *Korematsu v. United States*, 323 U.S. 214 (1944). For a recent example of segregation being upheld, see *Johnson v. California*, 321 F.3d 791 (9th Cir. 2003) (permitting the segregation of prisoners by race during first 60 days of confinement), *rev'd*, 125 S. Ct. 1141 (2005).

59. *See, e.g.*, JUAN WILLIAMS, *EYES ON THE PRIZE* (Penguin 1988).

60. *See, e.g.*, MALCOM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOM X* (Grove Press 1965); MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* (Warner 1998); WILLIAMS, *supra* note 59.

61. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958).

62. *See, e.g.*, 110 CONG. REC. 1606-07 (1964) (statement of Rep. Curtis regarding Republican reaction to the proposed civil rights act); 110 CONG. REC. 12640-43 (1964) (debate regarding counterfilibuster and amendment to the civil rights act).

63. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2004)).

64. 42 U.S.C. § 2000a.

65. 42 U.S.C. § 2000d.

66. 42 U.S.C. § 2000e-2.

67. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-65), *reprinted as amended in* 42 U.S.C. § 2000e (2004).

68. *See* Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. J. PUB. INT. L. 1, 14 n.55 (2001) (citing Carl E. Brody Jr., *A Historical View of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 300 (1996)).

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.<sup>69</sup>

Over the next thirty years, affirmative action would be both widely implemented and challenged.<sup>70</sup> Meanwhile, as minority groups tried to take advantage of new opportunities, they still faced the continuing effects of past racial discrimination.<sup>71</sup>

Some of those continuing effects were, and still are, reflected in the place that minorities occupy in society. Blacks and Hispanics have poverty rates twice that of whites.<sup>72</sup> Minorities, especially blacks, are disproportionately unemployed.<sup>73</sup> Inner city, predominately minority schools lag behind their whiter, suburban counter-

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69. Commencement Address at Howard University, 1965 Pub. Papers 635-40 (1966), *reprinted in* Lyndon Baines Johnson, *To Fulfill These Rights: Commencement Address at Howard University*, in *AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?* 57 (Francis J. Beckwith & Todd E. Jones eds., 1997).

70. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (challenge to University of Michigan Law School's affirmative action program); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (challenge to University of Michigan's undergraduate affirmative action program); *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (challenge to federal law requiring affirmative action in subcontracting); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (challenge to minority preference in license applications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (challenge to 30% set-aside in city contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (challenge to affirmative action in a lay-off provision in an employment contract); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (challenge to 10% federal set-aside for public works); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (challenge to University of California's affirmative action program); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (challenge to University of Texas School of Law's affirmative action program); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (challenge to voter initiative ending affirmative action in California).

71. *See, e.g.*, *Bakke*, 438 U.S. at 390-92 (Marshall, J., dissenting); *Croson*, 488 U.S. at 552 (acknowledging that past racial discrimination may have present effects, citing *Fullilove*, 448 U.S. at 518).

72. U.S. CENSUS BUREAU, *POVERTY IN THE UNITED STATES: 2002 2* (2003), available at <http://www.census.gov/prod/2003pub/p60-222.pdf>.

73. *See, e.g.*, Janny Scott, *Nearly Half Of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1.

parts.<sup>74</sup> They are typically underrepresented in post-secondary education.<sup>75</sup> Minorities are incarcerated at higher rates than whites, while being underrepresented politically.<sup>76</sup> They tend to live in segregated neighborhoods.<sup>77</sup> People of color are the victims of discriminatory policing<sup>78</sup> and official indifference.<sup>79</sup> They are

74. See, e.g., JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (Crown Pub. 1991).

75. See JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002 4 (2003) (blacks achieve bachelor degrees at half the rates of whites); Cecilia A. Conrad, *Affirmative Action and Admission to the University of California*, in IMPACTS OF AFFIRMATIVE ACTION: POLICIES AND CONSEQUENCES IN CALIFORNIA 171 (Paul Ong, ed. 1999). In California, although 7.4% of high school graduates are African American and 23.3% are Latino, those groups only comprise 6.6% and 12.9% respectively of the postsecondary enrollment. *Id.* Fewer minority students take the steps to apply to post secondary education and, when they do, have lower scores than whites on average. *Id.*

76. See, e.g., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 9(1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>. In 2003, 44.08% of federal and state prison inmates were non-Hispanic black, while 18.73% were Hispanic, compared with 35.01% being non-Hispanic white. Compare this with population rates of 12.95% for blacks, 13.71% for Hispanics, and 81.74% for whites in 2003. U.S. Census Bureau, *Annual Estimates of the Population by Sex, Race and Hispanic or Latino Origin for the United States: April 1, 2000 to July 1, 2003* (2003), at <http://www.census.gov/popest/national/asrh/NC-EST2003/NC-EST2003-03.pdf>. These statistics are illustrated in the following chart:

	White	Black	Hispanic
Prison Population Rate	35.01%	44.08%	18.73%
US Population Rate	81.74%	12.95%	13.71%

In other words, blacks comprised a percentage of the prison population at four times their representation in the general population. If blacks in 2004 were represented at that rate in the Senate, there would have been forty-four black Senators instead of zero. In 2005, Barak Obama of Illinois was seated as just the third black senator since Reconstruction, and fifth ever. Cheryl Gay Stolberg, *In Congress, Raising Hands Before Rolling Up Sleeves*, N.Y. TIMES, Jan. 5, 2005, at A20 (reporting the swearing in ceremony for the new Congress); Robin Toner & Katherine Q. Seelye, *Republicans Add Seats in South: Obama Wins*, N.Y. TIMES, Nov. 3, 2004, at A1 (reporting Mr. Obama's victory over Alan Keyes); Naftali Bendavid, *Primary Colors: 40 Years After the Voting Rights Act, Most Americans Still See Politics in Black and White*, CHI. TRIB., Oct. 24, 2004, at Magazine C17 (noting that two African Americans were appointed during Reconstruction, and two others, Edward Brooke and Carol Moseley Braun, were elected).

77. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993), cited by Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty, and Public Education*, 1998 ANN. SURV. AM. L. 267, 279 n.34 (1998).

78. See, e.g., Ira Glasser, *Speech: American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703 (2000).

unlikely to be federal judges.<sup>80</sup> Life expectancy among blacks still lags behind whites.<sup>81</sup> The continuing effects of race as a factor in American life have been examined in television and movies,<sup>82</sup> plays,<sup>83</sup> music,<sup>84</sup> and literature.<sup>85</sup>

Along with the continuing effects of past racial discrimination, new challenges confronted minorities as the millennium approached and passed. The crack epidemic in inner-cities tore a hole in black communities;<sup>86</sup> in Washington, D.C., children were

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79. See, e.g., James Dao, *Ohio Town's Water at Last Runs Past a Color Line*, N.Y. TIMES, Feb. 17, 2004 at A1:

"The denial of water service 'wasn't in your face racism,'" said Vincent Curry, executive director of Fair Housing Advocates Association, a group based in Akron that helped the residents file their complaint. "This was more, 'We won't respond to you because we don't care about you.'"

80. Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CALIF. L. REV. 1109, 1111-12 (2003), cited in *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004). Judge Chen cites the following statistics:

Of the nearly 1,600 active federal judges (including Article III judges, part- and full-time magistrate judges, bankruptcy judges, and court of claims judges) as of September 30, 2001, 7.2% were African American, 4.0% were Latina/o, 0.8% were Asian American, and 0.1% were Native American. None were Pacific Islanders. Among minority judges, women of color were substantially underrepresented. In contrast, according to the 2000 census, African Americans were 12.3% of the U.S. population, Latinas/os were 12.5%, Asian Pacific Americans were 3.7%, and Native Americans were 0.9%.

*Id.* at 1111-12 (citations omitted).

81. See, e.g., Linda Villarosa, *The Racial Divide: As Black Men Move into Middle Age, Dangers Rise*, N.Y. TIMES, September 23, 2002, at F1.

82. See, e.g., BAMBOOZLED (New Line 2000); SAVE THE LAST DANCE (Paramount Pictures 2001); BOYZ N THE HOOD (Columbia Pictures 1991); *The West Wing: Mr. Willis of Ohio* (NBC television broadcast) (dramatizing White House and American politics, often involving questions of race); *Law & Order: Bounty* (NBC television broadcast) (episode in which defendant uses stigmatization of affirmative action as a mitigation defense to murder); THE TEST (Flickering Duck Productions 1999) (two minorities struggle in affluent white school).

83. See, e.g., JOHN LEGUIZAMO, FREAK: A SEMI-DEMI-QUASI-PSEUDO AUTOBIOGRAPHY (Riverhead 1997); LEROI JONES, DUTCHMAN AND THE SLAVE: TWO PLAYS (William Morrow 1971) (1964).

84. See, e.g., THE ROOTS, THINGS FALL APART (MCA Records 1999); COMMON, ONE DAY IT'LL ALL MAKE SENSE (Relativity Records 1997); WU TANG CLAN, ENTER THE WU TANG (36 CHAMBERS) (RCA 1993).

85. See, e.g., WALTER MOSLEY, ALWAYS OUTNUMBERED, ALWAYS OUTGUNNED (Pocket Books 1998); AMY TAN, THE JOY LUCK CLUB (Prentice Hall 1990); CHANG-RAE LEE, NATIVE SPEAKER (Riverhead Books 1996).

86. See, e.g., Clifford Krauss, *Murder Rate Plunges in New York City*, N.Y. TIMES, July 8, 1995, at sec. 1, pg 1 (discussing the end of the crack epidemic as a reason for the fall in

planning their own funerals.<sup>87</sup> In California, voter initiatives attempted to end bilingual education,<sup>88</sup> public services to illegal immigrants, and affirmative action.<sup>89</sup> Following the passage of Proposition 209 in California, legislatures in other states unsuccessfully attempted to end affirmative action programs.<sup>90</sup> Five other states attempted ballot initiatives, with only Washington voters passing their initiative.<sup>91</sup> A failed California ballot initiative in 2003 tried to end the tracking of racial statistics.<sup>92</sup> The effect of the California proposition would have been to make the compilation of statistics by racial categories difficult, if not impossible, rendering any policy debates about race in California blind, as well as making it impossible to measure compliance with a number of anti-discrimination laws.<sup>93</sup>

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the murder rate from a high of 2,245 in 1990); Rich Connell, *The Hidden Devastation of Crack: The Epidemic is Eating Away Everyone's Quality of Life*, L.A. TIMES, Dec. 18, 1994, at A1 (one in a series outlining the effects of the crack epidemic in Los Angeles).

87. DeNeen L. Brown, *Getting Ready to Die Young: Children in Violent D.C. Neighborhoods Plan Their Own Funerals*, WASH. POST, Nov. 1, 1993, at A1, quoted in Speech of William Jefferson Clinton, President of the United States, in Memphis, Tennessee (Nov. 13, 1993), in *IN OUR OWN WORDS* 405 (Robert Torricelli & Andrew Carroll eds., 1999) (speaking extemporaneously before an audience of black ministers on what Martin Luther King, Jr. would say if he were alive to address the audience).

88. See William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV 487, 499-501 (2002) (explaining the history of Proposition 227 in California).

89. See LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* (Univ. of Cal. Press 1998). Proposition 187 was passed in 1994, ending public schooling and hospital care for illegal immigrants, *id.*, although a federal district court held that federal law preempted most of the provisions of 187. *League of United Latin American Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418 (1998) (holding that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1601, preempts the state initiative). In 1996, Proposition 209 was passed in California, ending state affirmative action programs. The amendment to the California constitution was upheld in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied* 522 U.S. 963 (1997).

90. Jodi Miller, *Affirmative Action: "Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 9 (1999).

91. *Id.*

92. See, e.g., John M. Broder, *The California Recall: The Overview, Davis is Out, Schwarzenegger is in by Big Margins in California Recall*, N.Y. TIMES, Oct. 8, 2003, at A1.

93. *Id.*

Since Strom Thurmond's walkout during the 1948 Democratic Convention,<sup>94</sup> race and racial issues have been convenient political tools — “wedge issues” — for splitting blocks of voters.<sup>95</sup> Efforts to increase minority political power have met with resistance.<sup>96</sup> In the 1988 Presidential election, there was the notorious “Willie Horton” advertisement.<sup>97</sup> In 1996, both Governor Pete Wilson of California, running for the Republican nomination for President, and the eventual nominee, Bob Dole, pushed Proposition 209 as a means of splitting Democrats in California.<sup>98</sup> In the 2000 primaries, then Governor Bush's campaign visited Bob Jones University, which at the time banned interracial dating,<sup>99</sup> and allegedly spread a story in South Carolina that opponent Senator John McCain had a black daughter.<sup>100</sup> In Florida during the 2000 election, minorities faced greater difficulty in exercising their franchise, including allegations

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94. Adam Clymer, *Divisive Words: News Analysis: G.O.P.'s 40 Years of Juggling on Race*, N.Y. TIMES, Dec. 13, 2002, at A1.

95. See CHÁVEZ, *supra* note 89; Clymer, *supra* note 94. The “wedge” works by taking voters who agree on issue A, and splitting them along another issue, B, so that the unified block in favor of A dissolves along new lines around B, the effect of which is usually to give the opponents of issue A victory in that issue.

96. Sheryl G. Snyder, *The Future of Affirmative Action: Gratz and Grutter in Context*, 92 Ky. L.J. 241, 246-248 (2003/2004) (discussing the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003)). In *Georgia v. Ashcroft*, the Court examined whether the unpacking of blacks from “super majority/minority” voting districts to “influence” districts violated the Voting Rights Act. *Id.* Ms. Snyder argues that the maintenance of all white districts is important to the Republican party in maintaining its majority in the House. *Id.* Republican administrations' Justice Departments refuse to preclear redistricting that would be “sympathetic to minority interests” and, therefore, also presumably Democratic. *Id.*

97. See, e.g., Elena R. Laskin, Note, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1200-01 (2000). In the 1988 presidential election, then Vice-President Bush was aided by an ad criticizing Massachusetts Governor Michael Dukakis for allowing the furlough of Willie Horton. *Id.* Horton, who was black and a convicted murderer, raped a white woman while on furlough. *Id.* The ad's effectiveness was based on the stereotype that race is connected to crime, coupled with the image of a black man raping a white woman. *Id.*; see also Clymer, *supra* note 94.

98. CHÁVEZ, *supra* note 86.

99. See, e.g., Jonathan Tilove, *Racial Policies at Stake in November*, TIMES-PICAYUNE (New Orleans), Oct. 8, 2000, at Nat'l 9.

100. See, e.g., Maureen Dowd, *Robert Redford, Now More than Ever: A 1972 Film About Empty Politics, “The Candidate” is Ripe for a Sequel*, PITTSBURGH POST-GAZETTE, Jan. 20, 2003, at A-11 (editorial); Greg McDonald, *McCain's Reform Message Has Rivals Going to Extremes*, HOUSTON CHRONICLE, Feb. 29, 2000, at A5. Senator McCain's adopted daughter is Bangladeshi.



of police intimidation.<sup>101</sup> In the 2004 election, there were numerous stories regarding the alleged efforts of Republicans to suppress the minority vote;<sup>102</sup> while scattered reports persisted,<sup>103</sup> these efforts did not seem to materialize as feared.<sup>104</sup>

While racial issues have played an important part in politics, bias has also played a role in the judicial process. A recent challenge to the process for selecting grand jury forepersons in California revealed a complete exclusion of Chinese-Americans, Filipino-Americans, and Latinos for over thirty years.<sup>105</sup> Importantly, the district court examining the challenge acknowledged “the pervasiveness of unconscious racial and ethnic stereotyping and group bias.”<sup>106</sup> Judge Breyer cited to the extensive work of scholars and others on unconscious stereotyping.<sup>107</sup> Unconscious stereotyping is not limited to the judicial process, but also affects the working conditions of minorities,<sup>108</sup> as well as other more personal aspects of their lives.<sup>109</sup>

Not only has some racism retreated to the unconscious, but the blatant racist rhetoric employed prior to the Civil Rights Act has

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101. See, e.g., Mireya Navarro & Somini Sengupta, *Contesting the Vote: Black Voters: Arriving at Florida Voting Places, Some Blacks Found Frustration*, N.Y. TIMES, Nov. 30, 2000, at A1.

102. See, e.g., Ruth Morris et al., *Poll Watcher Find Few Problems, Firestorm Worries Don't Materialize*, SUN-SENTINEL (Ft. Lauderdale), Nov. 3, 2004, at Local 2B (describing fears that Republican monitors would challenge minority voter eligibility); James Dao & Adam Liptak, *G.O.P. in Ohio Can Challenge Voters at Polls*, N.Y. TIMES, Nov. 2, 2004, at A1 (describing challenge to Republican poll monitors in Ohio). The corresponding Republican fear was that minorities were committing voter fraud. *Id.*

103. See Robert D. McFadden, *Voters Find Long Lines and Short Tempers, but Little Chaos at Polls*, N.Y. TIMES, Nov. 3, 2004, at P1 (reporting on scattered irregularities in voting across the country).

104. See, e.g., *id.*; Morris et al., *supra* note 102 (reporting that few challenges to voter eligibility were made).

105. *Chin v. Runnels*, 343 F. Supp. 2d 891, 905 (N.D. Cal. 2004) (turning down petitioner's *habeas* appeal, but acknowledging need for greater scrutiny).

106. *Id.* at 906.

107. *Id.* at 906-07.

108. See FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 57-142 (1995) available at <http://www.dol.gov/asp/programs/history/reich/reports/ceiling.pdf> (outlining difficulties of minorities in business, partly due to stereotypes), cited by *Chin*, 343 F. Supp. 2d at 907.

109. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317-19 (1987), cited by *Chin*, 343 F. Supp. 2d at 906.

been submerged and replaced by a new rhetoric composed of code words and symbols. Perhaps the first use of racial coding was the use of the term “states’ rights” as a means of expressing support for segregation.<sup>110</sup> The term would have a continuing power to appeal to white voters, particularly in the south.<sup>111</sup> This ciphering of racist rhetoric was displayed in the Congressional reaction to the crack epidemic,<sup>112</sup> the debate over illegal immigration,<sup>113</sup> and in the battles over welfare reform.<sup>114</sup> Coded racist stereotypes are apparent

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110. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 143-44 (2001); Inaugural Speech of George Wallace, Governor of Alabama (Jan. 14, 1963), in *IN OUR OWN WORDS* 228 (Robert Torricelli & Andrew Carroll eds., 1999) (promising “Segregation now! Segregation tomorrow! Segregation forever!”). Wallace’s speech is an excoriation of the federal government’s moves toward civil rights. He calls for greater respect of the powers of each state to regulate as they please, presumably to restrict the rights of minorities. See also, 100 CONG. REC. 7,251-57 (1954) (remarks of Sen. Eastland) (speaking out against the Court’s decision in *Brown* as usurping the states’ discretion to enforce the social inequality between the races). Senator Eastland notes: “There is no racial hatred in the South. The Negro Race is not an oppressed race.” *Id.* at 7,255. He earlier asks, “What about the white children? Do they not, also, have rights? Will not the commingling of the races in public schools have a detrimental effect upon white children?” *Id.* at 7,252.

111. See, e.g., Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 84 n.135 (1991) (discussing Ronald Regan’s use of the term “states’ rights” in Philadelphia, Mississippi (the scene of the slaying of three civil rights workers in the 1960s), where the term was associated with white supremacy); Clymer, *supra* note 94.

112. Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000). Dvorak discusses how coded phrases were used during the sentencing debates, how crack was not a problem when it was being fought in the “burned out, abandoned buildings of our large metropolitan areas” (where minorities are), but the war was a problem when it moved to “country roads . . . in the tree-lined streets of small towns and villages” (where white people live). *Id.* at 654-655. See also Charisse Jones, *Crack and Punishment: Is Race the Issue*, N.Y. TIMES, Oct. 28, 1995, at sec. 1, 1 (discussing racial controversy behind sentencing guidelines for crack possession in contrast to powdered cocaine possession). The article notes that although federal statistics indicated that half of crack users were white, 90% of those convicted of federal crack offenses were black, compared with a 3.5% white conviction rate. *Id.*

113. See, e.g., Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395 (1997); Kristen M. Schuler, Note, *Equal Protection and the Undocumented Immigrant, California’s Proposition 187*, 16 B.C. THIRD WORLD L.J. 275 (1996) (discussing ties between anti-immigrant movement and racism).

114. See, e.g., MARTIN GILES, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (Univ. of Chicago Press 1999); Linda Kelly, *Reproductive Liberty Under the Threat of Care: Deputizing Private Agents and Deconstructing State Action*,

in media depictions of minorities and in everyday conversation.<sup>115</sup> One of the issues where this is most apparent is in the current debate over affirmative action.

*B. An Extremely Brief History of Affirmative Action*

Responding to the reality that merely ending state oppression of minorities would not be enough to reverse the effects of nearly 180 years of racist policies, President Johnson issued Executive Order 11,246, instituting federal affirmative action.<sup>116</sup> President Nixon expanded federal affirmative action plans, and states and localities began to build their own.<sup>117</sup> Most of these initial plans saw affirmative action as a remedial measure to counter the effects of past discrimination.<sup>118</sup> In addition to remedial purposes, educators sought to overcome historic under-representation in certain professions, indirectly provide professional services to minority communities, and benefit from a diverse student body.<sup>119</sup> While other policy reasons for affirmative action programs exist,<sup>120</sup> these four justifica-

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5 MICH. J. GENDER & L. 81, 102 (1998) (discussing “welfare reform” as a code word for race because of the perception that it is predominately minorities who are on welfare).

115. Richard Delgado & Jean Stephanic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (“Racism’s victims become sensitized to its subtle nuances and code-words — the body language, averted gazes, exasperated looks, terms such as ‘you people,’ ‘innocent whites,’ ‘highly qualified black,’ ‘articulate’ and so on[.]”), cited in Dvorak, *supra* note 112. See also CHRIS ROCK: BRING THE PAIN (HBO 1996) (talking about racism reflected in white reactions to Colin Powell).

116. Exec. Order No. 11246, 3 C.F.R. § 339 (1964-65), reprinted as amended in 42 U.S.C. § 2000e (2004).

117. Ward Thomas & Mark Garrett, *U.S. and California Affirmative Action Policies, Laws, and Programs*, in IMPACTS OF AFFIRMATIVE ACTION: POLICIES AND CONSEQUENCES IN CALIFORNIA 34 (Paul Ong, ed. 1999).

118. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305-07 (1978) (discussing the university’s asserted reasons for its affirmative action program), Commencement Address at Howard University, 1965 Pub. Papers 635-40 (1966), reprinted in Lyndon Baines Johnson, To Fulfill These Rights: Commencement Address at Howard University, in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? 57 (Francis J. Beckwith & Todd E. Jones eds., 1997), cited in Jodi Miller, *Affirmative Action: “Democracy in Free Fall”: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 13 (1999).

119. See *Bakke*, 438 U.S. at 306 (discussing University’s justifications for its program).

120. For example, affirmative action in the private sector may more closely connect a business with the community it serves, or allow a business to benefit from the perception that it is minority friendly. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (cit-

tions are significant due to their consideration by the Supreme Court.<sup>121</sup>

In 1978, the Supreme Court heard a challenge to the University of California's medical school affirmative action program in *Regents of the University of California v. Bakke*.<sup>122</sup> While striking down the use of quotas, the Court upheld the use of race as a plus factor in admissions decisions.<sup>123</sup> Likewise, in *Fullilove v. Klutznick*, the Court upheld the remedial use of affirmative action in a federal contracting scheme.<sup>124</sup> Thereafter, the two seemingly permissible uses of affirmative action were either to advance educational diversity or to specifically redress past discrimination by the state.<sup>125</sup>

The effects of implementing and ending affirmative action programs have been studied. In Los Angeles, an affirmative action program implemented before the *Croson* decision produced an almost fivefold increase from previous minority participation in local contracts.<sup>126</sup> The same types of effects were observed in affirmative

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ing amici briefs of corporations). Likewise, in the military, the appearance of discrimination by the under-representation of minorities in command positions led to tensions, while a diverse command structure was beneficial to morale. Brief for Amici Curiae Julius W. Becton, Jr., et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516).

121. See *Bakke*, 438 U.S. 265.

122. 438 U.S. 265.

123. *Bakke*, 438 U.S. at 314-18 (favorably discussing Harvard's diversity plan).

124. 448 U.S. 448 (1980).

125. *Grutter*, 539 U.S. 306 (upholding University of Michigan Law School's affirmative action program); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan's undergraduate affirmative action program); *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (requiring strict scrutiny under Fifth Amendment equal protection claims); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding minority preference in license applications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a 30% set-aside in city contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down a lay-off provision in an employment contract).

126. Tom Larson, *Affirmative Action Programs for Minority- and Women-Owned Businesses*, in *IMPACTS OF AFFIRMATIVE ACTION: POLICIES AND CONSEQUENCES IN CALIFORNIA* 144 (Paul Ong, ed. 1999) [hereinafter *IMPACTS*] (showing an increase in total dollar amounts awarded to minority owned firms from 2.2% to 11.8%). Although gains were made previous to the *Croson* decision, following *Croson*, 488 U.S. 469, minority participation declined moderately as the affirmative action policy was modified to comply with the Court's requirements. *Id.* at 145. Despite these increases, minority businesses are still underutilized. *Id.*

action programs in Florida and Connecticut.<sup>127</sup> Moreover, a survey of disparity studies shows that while overall there is a gap between the amount minority businesses would be expected to receive based on their representation, that gap is larger in cities without affirmative action programs than in cities with such programs.<sup>128</sup> In education, ending affirmative action has produced dramatic effects on minority admission and enrollment.<sup>129</sup> For example, following the end of affirmative action at the University of California, Latino admissions to Boalt Hall dropped by 50% and African Americans by 80%.<sup>130</sup> None of the blacks admitted to Boalt Hall enrolled;<sup>131</sup> the only black student to enter Boalt Hall in 1997 had deferred entry from the previous year.<sup>132</sup>

Despite the beneficial effects of affirmative action programs to minority groups and the harmful results of ending those programs, affirmative action continues to come under attack. California's effort to end affirmative action through the California Civil Rights Initiative ("CCRI")<sup>133</sup> is an informative example. Following the ef-

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127. *Id.* In Tallahassee, Florida, an affirmative action program increased minority participation from zero contracts to 24% of all city construction contracts. *Id.* In New Haven, Connecticut, minority participation increased from 1% to 25% of the city contracts. *Id.*

128. *Id.*, citing MARIA E. ENCHAUTEGUI ET AL., DO MINORITY-OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT CONTRACTS? (The Urban Institute 1997). In cities without an affirmative action program, only 45% of the expected dollar amount goes to minority businesses, as opposed to 57% in cities with programs. *Id.*

129. See, e.g., Paul Ong, *Proposition 209 and Its Implications*, in *IMPACTS*, *supra* note 126, at 205-06 (stating that following the ending of affirmative action at the University of California, new registration by minorities fell by 30% at UCLA and 52% at Berkeley, the most competitive campuses, and systemwide by 10%); Jennifer L. Shea, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 *IND. L.J.* 587 (2003) (outlining the effects replacing affirmative action programs in Florida, Texas, and California with so-called "percentage plans" which guarantee admission to some top percentage of a state's graduating high school class).

130. See, e.g., LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 254 (Univ. of Cal. Press 1998); Danny Feingold, *Test Tube for a Changing Political Climate*, L.A. TIMES, Oct. 6, 1997, at E1.

131. Jessica Marie Delgado, *Commentary: The Courage I Know*, 13 *BERKELEY WOMEN'S L.J.* 7, 8 (1998).

132. *Id.*

133. The California Civil Rights Initiative, eventually on the ballot as Proposition 209, amended the California Constitution to state: "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." CAL. CONST. art. I, § 31.

fect that endorsing the anti-immigrant Proposition 187 had on Governor Pete Wilson's re-election campaign and presidential aspirations, supporters of the CCRI saw an opportunity to split the Democratic vote in California and end affirmative action.<sup>134</sup> Whites, men in particular, were feeling dissatisfied at what they saw as opportunities lost to minorities because of affirmative action.<sup>135</sup> The political advantages of supporting an end to affirmative action were confirmed when Governor Wilson's approval rating increased after helping to engineer the end of the affirmative action programs at the University of California.<sup>136</sup> Soon other Republican politicians jumped on the CCRI bandwagon, ultimately gathering the signatures to put the CCRI on the ballot as Proposition 209.<sup>137</sup>

Opposing affirmative action by way of supporting Proposition 209 was seen as an effective way to get the white vote.<sup>138</sup> Moreover, minorities were confused by the language of Proposition 209 and what its effects would be;<sup>139</sup> most voters did not know it would end affirmative action.<sup>140</sup> As the debate became more polarized, the real issues became clouded.<sup>141</sup> Supporters of the measure could

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134. CHÁVEZ, *supra* note 130, at 37-47.

135. *Id.* at 39-47.

136. *Id.* at 66-67. Wilson's orchestration of the University of California meetings and his refusal to compromise or consent to further study despite widespread support among University of California regents, students, faculty, and alumni were all based on political strategy. *Id.* at 62-66. Wilson gained a five point jump in his national approval ratings in his bid for the 1994 Republican Presidential nomination. *Id.* at 67. Many of the predicted drops in minority enrollment at University of California campuses came to pass. Editorial, *Prop. 209 Lands on U.C.*, L.A. TIMES, Apr. 1, 1998, at B6.

137. CHÁVEZ, *supra* note 130, at 73-76.

138. *Id.* at 111-12. Jesse Helms had used the issue in 1990. *Id.* Pat Buchanan had exploited the race issue to win the New Hampshire primary. *Id.* at 113. Even Bob Dole, who had long been a supporter of affirmative action programs, backed the CCRI. *Id.* at 116-17.

139. *Id.* at 195.

140. *Id.* at 153.

141. *Id.* at 198-203 (discussing the effects of racist David Duke's campaigning for the CCRI and the opponents' subsequent response). Duke, campaigning on behalf of Proposition 209 stated: "The founding elements of this country . . . the basis of this nation was created primarily by white Europeans. And we should not be second class citizens in our own country. We should not face discrimination in the fabric of which we created." *Id.* at 202.

This reasoning is often heard in various forms from white opponents of affirmative action. What this ignores is that racist policies enabled the slave economy in the south, the acquisition of territory by the conquest of the Native Americans, and that the

easily talk about “fairness” and “preferences” as violating equality principles, leaving supporters of affirmative action explaining concepts like the continuing effects of past discrimination, current discrimination, and educational diversity to a skeptical majority.<sup>142</sup> The supporters of Proposition 209 produced advertisements that oversimplified issues, ignored racial discrimination against minorities, and played to racial fears.<sup>143</sup> Opponents of Proposition 209 resorted to advertisements about David Duke,<sup>144</sup> various celebrity radio spots, and an ad showing a female doctor being stripped by

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continuing effects of these and other racist policies benefits whites disproportionately. Instead, it focuses on whites’ claims on American history (ignoring the contributions of people of color), so that while whites do not want to remain responsible for the racism of the past, they wish to exclusively retain the benefits of that racism.

142. See *id.*, at 207 (“More than changing anyone’s mind, the debates offered a glimpse of how difficult it is to talk about complex issues in a political campaign. Rather than exploring issues of race and discrimination, each side tried to make points with the voter.”).

143. CHÁVEZ, *supra* note 130, at 216-17 (these advertisements mainly related to “reverse discrimination” against whites due to affirmative action):

*Male Announcer*: The following actually happened January 19th, 1994.

*Camarena* [white woman]: The teacher said to me, “You have to leave.”

*Male Announcer*: Because you’re white.

*Camarena*: Yes. Then I left. (*door slams shut — sound under-current*)

*Male Announcer*: As she went out the door, students laughed. (*laughter fades*) But for this young, widowed mother trying to enroll in a class at a public college, racial quotas were no laughing matter.

*Camarena*: I thought discrimination was illegal.

*Male Announcer*: But the law allows preferential treatment

...

These programs are based *not* on merit, or even on need, but on race. Janice Camarena Ingraham is white. Her deceased husband was Mexican American.

*Camarena*: Recently our public school asked the race of my children. I said the human race.

*Id.* at 217 (emphasis in original). The community college where Camarena attended disputed the facts of the story. *Id.* at 216. It is notable how the ad attributes Camarena’s being asked to leave to a “racial quota,” although none in fact existed. The ad mentions the word “quota” three times, although quotas had been illegal since *Bakke*, 438 U.S. 265, in 1978.

144. David Duke was Grand Wizard of the Knights of the Ku Klux Klan in the 1970s, elected to political office in the Louisiana legislature in 1989, and ran unsuccessfully for national office numerous times. Anti-Defamation League, *David Duke: In His Own Words*, at [http://www.adl.org/special\\_reports/duke\\_own\\_words/duke\\_intro.asp](http://www.adl.org/special_reports/duke_own_words/duke_intro.asp) (last visited February 27, 2005). He is regarded as a white supremacist. *Id.* According to Duke, he “has dedicated his life to the freedom and heritage of European American peoples.” David Duke’s European American Home Page, *About David Duke*, at <http://www.davidduke.com/index.php?p=90> (last visited February 27, 2005).

men, representing what women had to lose if affirmative action ended.<sup>145</sup> In the end, California voters passed Proposition 209, 54.6% in favor to 45.4% opposed.<sup>146</sup>

Exit polls showed how racially polarized the vote was. Men and whites favored the measure, whites overwhelmingly so.<sup>147</sup> Women were narrowly opposed.<sup>148</sup> Blacks, Asian Americans, and Latinos, although only a small segment of voters, all strongly opposed Proposition 209.<sup>149</sup> Interestingly, as the income levels of voters rose, so did the level of support for the measure.<sup>150</sup> Republicans and independents, a combined 52% of the voters, strongly favored Proposition 209, while 69% of Democrats, representing 21% of voters, opposed the measure.<sup>151</sup>

Following the passage of Proposition 209, numerous states attempted to end affirmative action through initiatives and legislation, with only Washington succeeding.<sup>152</sup> Proposition 209 and voter initiatives are not the only challenges to affirmative action. In Florida, Governor Jeb Bush issued an executive order ending affirmative action.<sup>153</sup> Recently, lawsuits regarding affirmative action in education were heard in several circuits and the Supreme Court,<sup>154</sup> and a court struck down San Francisco's affirmative ac-

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145. CHÁVEZ, *supra* note 130, at 227-33.

146. *Id.*, at 235. 9,657,195 Californians voted. *Id.*

147. *Election '96: State Propositions: A Snapshot of Voters*, L.A. TIMES, Nov. 7, 1996, at A29 [hereinafter *Snapshot of Voters*]. Males, representing 47% of all voters were 61% in favor of the measure. Whites, representing 74% of the voters, were 63% in favor of Proposition 209. Sixty-six percent of white men and 58% of white women voted for Proposition 209. CHÁVEZ, *supra* note 130, at 239.

148. *Snapshot of Voters*, *supra* note 147. Fifty-two percent of women were opposed to the measure, and women were 53% of the voters.

149. *Id.* Blacks were 7% of the voters and were 74% opposed to the measure. Asian Americans were 5% of the voters, and were 61% opposed. Latinos represented 10% of the voters, and were 76% opposed.

150. *Id.* This could be a function of minorities making up larger proportions of the lower income brackets, or people with larger incomes being opposed to the redistribution of opportunities, or both.

151. *Id.* Republicans represented 38% of the voters, Independents 14%. Republicans were 80% in favor, Independents 59%.

152. Jodi Miller, *Affirmative Action: "Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle Stat-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 9 (1999).

153. Fla. Exec. Order 99-281 (Nov. 9, 1999), *cited in* Shea, *supra* note 129, at 611 n.234.

154. *See Grutter*, 539 U.S. 306 (upholding University of Michigan Law School's affirmative action program); *Gratz*, 539 U.S. 244; *Johnson v. Bd. of Regents of the Univ. of*



tion program as violating Proposition 209.<sup>155</sup> Although the Supreme Court rulings in *Grutter* and *Gratz* have institutions and states reconsidering how to implement their affirmative action policies in admissions,<sup>156</sup> opponents of affirmative action are considering challenges in new areas.<sup>157</sup> For example, Ward Connerly, one of the leaders in ending affirmative action in California, is seeking to institute voter initiatives in other states, such as Michigan.<sup>158</sup> In the coming years, there will likely be many legislative and judicial challenges to affirmative action programs.

### III. HOW COURTS HAVE FAILED TO ENFORCE THE EQUAL PROTECTION PRINCIPLES

As this brief history indicates, given the extent that race has permeated social and political life in America, it is somewhat surprising how ineffectively courts deal with issues of race. The changing nature of racism and the sophistication of those with a racist purpose have rendered courts unable to effectively enforce the anti-racism principles underlying the Fourteenth Amendment. The successful adoption of "equal rights" rhetoric by conservatives has not only obfuscated the public debates over racial policies, but also con-

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Ga., 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law School*, 233 F.3d 1199 (9th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

155. *Judge Overturns San Francisco Program*, N.Y. TIMES, July 29, 2004, at A14.

156. *See V. Dion Haynes, Bans on use of race get new scrutiny; Admissions rules in 4 states face fresh challenge*, CHICAGO TRIBUNE, June 25, 2003, at C11.

157. *See, e.g., Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001) (arguing that "percentage plans," although facially neutral, should be struck down under strict scrutiny); Christopher M. Singer, *Ruling Helps Michigan Anti-Affirmative Action Forces*, DETROIT NEWS, June 13, 2004, at 1A; Elissa Gootman, *Scholarship, 'Whites Only,' Roils a Campus*, N.Y. TIMES, Feb. 17, 2004 at A17 (reporting on a "whites only" scholarship meant to parody minority scholarships); Stuart Silverstein, *Pepperdine Defends Its Minority Scholarships*, L.A. TIMES, Jan. 22, 2004, at B1 (discussing challenges to race-based scholarships and scholars programs). Mr. Fitzpatrick's article is interesting for two reasons. The first is that his main normative concern with the Texas Ten Percent plan is with the disadvantage to whites, as opposed to the fact that for the plan to function, it relies on the continuing de facto segregation of Texas high schools. The second reason is his willingness to consider the motivations of a legislature in passing a facially neutral law that disadvantages whites, something conservatives seem loath to do in laws that disadvantaged minorities. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

158. Dean E. Murphy, *Top Foe of Affirmative Action Leaves California Regents*, N.Y. TIMES, Jan. 21, 2005, at A18.

fused the formation of legal doctrines. The current tests that the Supreme Court uses to examine laws ending affirmative action programs do not effectively enforce the principles announced in *Strauder v. West Virginia*<sup>159</sup> and *Yick Wo v. Hopkins*.<sup>160</sup> Courts are out of touch with the realities facing people of color and need to refine their understanding of the principles involved in these debates and reformulate the legal analysis designed to protect citizens against legislation with an impermissible purpose under the Fourteenth Amendment.

A. *The Anti-Racism Principle of the Equal Protection Clause*

Early in the jurisprudence of the Fourteenth Amendment, the Supreme Court recognized that one of the fundamental purposes of the Equal Protection Clause was to protect against “unfriendly legislation” passed because of race,<sup>161</sup> and discriminatory enforcement of a facially neutral law.<sup>162</sup> Thereafter, in *Korematsu v. United States*,<sup>163</sup> the Court set three Constitutional principles — two substantive and one adjudicative. *Korematsu* involved a challenge to an order excluding Japanese Americans from “West Coast military areas.”<sup>164</sup> In upholding the law, Justice Black, writing for the majority, stated that while “pressing public necessity may sometimes justify the existence of [racial classifications], racial antagonism

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159. 100 U.S. 303 (1879).

160. 118 U.S. 356 (1886).

161. *Strauder*, 100 U.S. at 307. It is worth noting the following statement of Justice Strong:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — *the right to exemption from unfriendly legislation* against them distinctively as colored, — exemption from legal discriminations, *implying inferiority in civil society*, lessening the security of their enjoyment of the rights which others enjoy, and *discriminations which are steps towards reducing them to the condition of a subject race.*

*Id.* at 307-08 (emphasis added). The Court later abandoned this statement, reasoning in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that it was not the government’s place to secure social equality so long as the equality principle was not being violated, even though segregation laws may have been rooted in racial animus.

162. *Yick Wo*, 118 U.S. at 373-74 (protecting against enforcement with “an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances[.]”).

163. 323 U.S. 214 (1944).

164. *Id.* at 217. The effect of the order was the forced relocation of Japanese-Americans to concentration camps.

never can.”<sup>165</sup> In dissent, Justice Murphy wrote that “assumption of racial guilt,” or racial stereotype, is likewise impermissible.<sup>166</sup> The two substantive interpretations of the Equal Protection Clause in *Korematsu*, stating action with a racist motive or stereotype is impermissible, combine to form the substantive “anti-racism principle.”<sup>167</sup>

To ensure the enforcement of the anti-racism principle, Black writes that laws which “curtail the rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”<sup>168</sup> Although the Court in *Korematsu* ultimately failed to apply the adjudicative standard it set, the substantive principle and adjudicative standard would be further developed (and muddled) by the Court in the following decades of Equal Protection jurisprudence.<sup>169</sup> These principles seem at odds with segregation, but it was not until *Brown v. Board of Education* that segregation was found inherently unequal.<sup>170</sup>

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165. *Id.* at 215.

166. *Id.* at 235-36 (Murphy, J., dissenting).

167. See David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790, 802 (1991).

168. *Korematsu*, 323 U.S. at 216.

169. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that affirmative action in education is permissible); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995) (holding that the federal government is not entitled to greater deference under the Fifth Amendment’s equal protection analysis); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (introducing new substantive concerns into the equal protection analysis, such as the innocent white victim); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (holding that disproportionate impact can be evidence of a discriminatory purpose); *Washington v. Davis*, 426 U.S. 229 (1976) (stating that disproportionate impact does not itself trigger strict scrutiny); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down prohibitions on interracial marriage).

170. 347 U.S. 483 (1954). In *Brown*, Chief Justice Warren, in examining the constitutionality of segregation in public schools, explored the history of the Fourteenth Amendment and found it inconclusive. *Id.* at 489. Abandoning an examination of original intent as unilluminating and distinguishing *Plessy*, Warren stated:

we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

*Id.* at 492-93. Warren goes on to state that the psychological harm caused by segregation to minority children makes segregated schools unequal, and therefore unconstitutional. *Id.* at 493-94. Chief Justice Warren notably relies on “modern authorities” in his determination, *id.* at 494 n.11, but never speaks as to whether segregation laws were passed with an impermissible purpose.

The Court's jurisprudence in disproportionate impact cases has further diluted the protections of the Fourteenth Amendment, particularly with regard to facially neutral laws. In *Washington v. Davis*, the Court examined a challenge, based on a black failure rate four times greater than that of whites, to the District of Columbia's Police Department personnel test.<sup>171</sup> Writing for the majority, Justice White stated that: "Standing alone, [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to . . . strict scrutiny[.]"<sup>172</sup> In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, however, the Court clarified its examination of disproportionate impact cases.<sup>173</sup> Although a "discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," a discriminatory purpose need not be the only factor motivating a state action.<sup>174</sup> Even among many factors, if discrimination was a "motivating factor," then a court should apply strict scrutiny.<sup>175</sup> While disproportionate impact is an important starting point in an examination of a legislature's purpose, the judicial scrutiny requires a "sensitive inquiry into *such circumstantial and direct evidence of intent* as may be available."<sup>176</sup> In both *Davis* and *Arlington Heights*, the Court concluded there was not enough evidence of racist purposes to impose strict judicial scrutiny of the facially neutral laws at issue.

In examining a racial classification in *Regents of the University of California v. Bakke*, the Court had an opportunity to examine an affirmative action program alleged to be discriminatory against whites.<sup>177</sup> Of the four purposes that the university used to defend its program, Justice Powell, writing the opinion of the Court, found two — redressing past discrimination and educational diversity — permissible.<sup>178</sup> Powell chose to apply strict scrutiny over Brennan's dissent, not to enforce the anti-racism principle, but because of

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171. 426 U.S. 229 (1976).

172. *Davis*, 426 U.S. at 242 (internal citations omitted).

173. 429 U.S. 252.

174. *Id.* at 265.

175. *Id.* at 265-66.

176. *Id.* at 266 (emphasis added).

177. 438 U.S. 265.

178. *Id.* at 305-15. The other two, reducing historical under-representation and increasing the number of doctors who serve underprivileged communities, were impermissible or unsupported by evidence. *Id.*

concerns that affirmative action programs may reinforce stereotypes and racism and because of the burden to the “innocent persons” who bear no responsibility for past discrimination.<sup>179</sup> Powell’s concerns, which are irrelevant to an examination of whether a legislature acted with a racist purpose,<sup>180</sup> would be incorporated into the Court’s Equal Protection analysis in later cases.<sup>181</sup>

The effect of these decisions has been to dilute the anti-racism protections of the Equal Protection Clause. It is extremely difficult to prove an impermissible purpose in the absence of a racial classification triggering strict scrutiny because the burden is on the challenger to prove that some racist purpose was a factor.<sup>182</sup> Proving that a racist purpose was a factor is difficult without an obvious pattern of explicit racism.<sup>183</sup> When an affirmative action program is implemented, strict scrutiny applies, and not many laws survive such scrutiny.<sup>184</sup> It is incredibly ironic that a facially neutral law may be passed or enforced without regard for its impact upon minorities because of a court’s deference to legislative discretion, yet where the legislative discretion is to correct past racial discrimination, the impact upon the majority is of constitutional significance.<sup>185</sup> This method of enforcement has turned the anti-racism principle on its head. It enables conservatives to attack affirmative action on Equal Protection grounds with the presumptive unconstitutionality of any racial classification. But this logic also allows the

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179. *Id.* at 298-99. *But see id.* at 324 (Brennan, J., dissenting in part and concurring in part) (arguing for a lower standard of review in light of remedial nature of affirmative action).

180. *See* Chang, *supra* note 167.

181. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

182. *Arlington Heights*, 429 U.S. at 266.

183. *See id.* at 266; *Davis*, 426 U.S. 229. While the disparate impact in these cases are not enough, the “stark impact” in cases such as *Yick Wo*, 118 U.S. 356, and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), were enough to trigger strict scrutiny. A question remains as to what is precisely the level of impact to implicate “stark impact.” Contrasting the factual scenarios in *Arlington Heights* and *Davis* with *Yick Wo* and *Gomillion*, however, the level of impact must be considerable, probably approaching a level of complete disparity in enforcement.

184. For example, at the Supreme Court level, affirmative action laws were struck down in *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469; *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *Bakke*, 438 U.S. 265.

185. *See* Chang, *supra* note 167. For an example of an article focused on the disadvantage to whites, see Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 *BAYLOR L. REV.* 289 (2001).

passage or enforcement (with an impermissible intent) of facially neutral laws with disproportionate impacts, where courts are loath to inquire as to whether there was a racist motivation.<sup>186</sup> This irony is most evident in measures to end affirmative action.

*B. Ending Affirmative Action in California: Coalition for Economic Equity v. Wilson*<sup>187</sup>

After the passage of Proposition 209, the American Civil Liberties Union (“ACLU”) and others filed suit to enjoin enforcement of the new law.<sup>188</sup> The district court noted that the challenge to the law was not a facial challenge to the entire proposition, rather it was a challenge to the portion of the initiative which would prohibit voluntary affirmative action programs.<sup>189</sup> This was because some of the discrimination banned by Proposition 209 was already forbidden under the Constitution.<sup>190</sup> The district court held that Proposition 209 was clearly intended to “close the narrow but significant window” that allows affirmative action programs that pass the measure of strict scrutiny.<sup>191</sup> The ACLU alleged that this violated the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause.<sup>192</sup> After finding that the plaintiffs had standing,<sup>193</sup> Judge Henderson made extensive findings of fact, including that Proposition 209 was intended to end affirmative action programs,<sup>194</sup> and that it would negatively affect minority gains in public

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186. See Chang, *supra* note 167. But in Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997), Prof. Spann notes that this unequal treatment may be the result of courts violating the Equal Protection Clause. How a disadvantaged party might challenge this manner of violation is unclear, although the idea is interesting.

187. 122 F.3d 692 (9th Cir. 1997).

188. *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996).

189. *Id.* at 1489.

190. *Id.* at 1488-89.

191. *Id.* at 1489.

192. *Id.* at 1489-90. This Note will only address the analysis of the Equal Protection issue in both the district court and the Ninth Circuit.

193. *Id.* at 1491-92. The District Court found that the plaintiffs met the three elements of standing in a federal case. *Id.* The plaintiffs showed a real and immediate injury in the loss of benefits from affirmative action. *Id.* The injury was caused by the challenged conduct, because the Governor would have to enforce Proposition 209. *Id.* at 1492. Finally, a declaration of unconstitutionality of Proposition 209 would redress the plaintiff's injury. *Id.*

194. *Econ. Equity*, 946 F. Supp. at 1493-95.

contracting,<sup>195</sup> employment,<sup>196</sup> education,<sup>197</sup> and the political process.<sup>198</sup>

After declaring the findings of fact, the district court analyzed the plaintiffs' likelihood of success on their Equal Protection claims before granting a preliminary injunction.<sup>199</sup> Judge Henderson examined the case in light of *Hunter v. Erickson*<sup>200</sup> and *Washington v. Seattle School District No. 1*.<sup>201</sup> These cases, stating Equal Protection "political structure" principles, prohibit the reallocation of political power in a discriminatory manner in violation of the Fourteenth Amendment.<sup>202</sup> After finding the "*Seattle-Hunter*" doctrine applicable,<sup>203</sup> the district court found that Proposition 209 had a racial focus,<sup>204</sup> and that it restructured the political process to the detriment of minorities because Proposition 209 required minorities to go through a state constitutional referendum to institute a remedial affirmative action program, where other groups would be able to institute such a program locally.<sup>205</sup> Because the state could assert no important governmental interest in the law, it likely violated the

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195. *Id.* at 1495-96 (quoting minority business owners discussing the lack of opportunity before affirmative action because of discrimination). The district court noted that in Los Angeles, affirmative action increased the percentage of city contracts awarded to women (from 0.3% to 8%) and minorities (from 2% to 11.8%). *Id.* at 1496.

196. *Id.* at 1496-97.

197. *Id.* at 1497-98 (finding that the admissions of some minority students could be reduced by up to 50%).

198. *Id.* at 1498-99. The district court found that Proposition 209 would prohibit minorities from seeking a remedial program at the local level. *Id.* at 1498. Instead, they would have to amend the California constitution to permit affirmative action, then seek a local program. *Id.*

199. *Id.* at 1499. In the district court's words: "[T]o obtain a preliminary injunction, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant." *Id.* at 1492 (citations omitted) (describing the preliminary injunction standard).

200. 393 U.S. 385 (1969) (challenge to an ordinance requiring fair housing ordinances to pass not only the City Council, but citywide voting).

201. 458 U.S. 457 (1982) (challenge to initiative prohibiting busing of students to achieve integration).

202. *See Econ. Equity*, 946 F. Supp. at 1500-01.

203. *Id.* at 1499-1504. The district court noted that the differing levels of scrutiny due to racial and gender classifications did not affect whether the political structure doctrine was applicable to gender classifications. *Id.* at 1501.

204. *Id.* at 1504-06.

205. *Id.* at 1506-08.

Equal Protection Clause.<sup>206</sup> In conclusion, the district court noted that Proposition 209 “is tantamount to vote dilution in the most literal sense: the relevant voting pool is effectively expanded until the prior victory [in implementing the program] is undone.”<sup>207</sup>

The Ninth Circuit Court of Appeals, however, held differently on appeal.<sup>208</sup> The Ninth Circuit drew a distinction between “conventional” Equal Protection analysis and “political structure” Equal Protection analysis, the former being concerned with the substance of the law and the latter being concerned with the level at which the law is enacted.<sup>209</sup> The main contention of Judge O’Scannlain in the Ninth Circuit opinion was that Proposition 209 does not violate the Equal Protection Clause in either a “conventional” analysis<sup>210</sup> or a “political structure” analysis.<sup>211</sup>

In his opinion, Judge O’Scannlain applied “conventional” Equal Protection analysis based on the premise that the purpose of the Fourteenth Amendment is to prevent “official conduct discriminating on the basis of race.”<sup>212</sup> The court of appeals noted the differences between laws with a racial classification and facially neutral laws, and upon noting that Proposition 209 was facially neutral, held that “as a matter of law and logic, [Proposition 209] does not violate the Equal Protection Clause in any conventional sense.”<sup>213</sup>

The Ninth Circuit then considered Proposition 209 under the “political structure” analysis of *Hunter* and *Seattle School*.<sup>214</sup> After summarizing the district court’s opinion regarding *Hunter* and *Seattle School*,<sup>215</sup> Judge O’Scannlain examined whether a majority of the electorate could restructure the political process against itself, ultimately deferring any decision on that issue because of the lack of

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206. *Id.* at 1508-09.

207. *Id.* at 1510.

208. *Econ. Equity*, 122 F.3d at 701-10. The Ninth Circuit heard arguments in the case on application for a stay of the district court’s decision. *Id.* at 698-99. The Ninth Circuit, instead of issuing or denying the stay and sending the case back to district court for trial, expedited its decision on the merits. *Id.* at 699.

209. *Id.* at 701.

210. *Id.* at 701-02.

211. *Id.* at 702-10.

212. *Id.* at 701, quoting *Washington v. Davis*, 426 U.S. 229 (1976).

213. *Id.* at 702.

214. *Econ. Equity*, 122 F.3d at 702-709.

215. *Id.* at 703-04.



specific findings in the district court opinion.<sup>216</sup> Next, the Ninth Circuit examined whether “a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws.”<sup>217</sup> Judge O’Scannlain’s examination began with an attempt to distinguish Proposition 209 from the statutes challenged in *Hunter* and *Seattle School* because the proposition prohibited all racial and gender preferences by the state; it did not merely withhold discretion in certain areas.<sup>218</sup> Secondly, the Ninth Circuit analyzed the question of whether “an individual’s right to equal treatment” was implicated by the law.<sup>219</sup> On that question, the Ninth Circuit found that because the right to seek preferential treatment was different from the right to seek equal treatment, and there was no protection of the right to seek preferential treatment, the district court was wrong in finding that the plaintiffs displayed a likelihood of success in their claim that the Equal Protection Clause was violated by Proposition 209.<sup>220</sup>

While both the district court and the Ninth Circuit noted that Proposition 209 was facially neutral, only the district court correctly analyzed the problem under a “conventional” Equal Protection analysis.<sup>221</sup> Judge Henderson was correct in stating that the effect of Proposition 209, like those laws in *Hunter* and *Seattle School*, supplied the “classification” necessary to subject the law to greater scrutiny, and his subsequent analysis in finding a lack of a compelling purpose for Proposition 209 is solid.<sup>222</sup> But the Ninth Circuit’s analysis is inadequately supported. Judge O’Scannlain, while correctly identifying the adjudicative rules involved with racial classifications and facially neutral laws,<sup>223</sup> completely misstates the values underlying the Fourteenth Amendment. The Ninth Circuit cites

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216. *Id.* at 704-05. Judge O’Scannlain commented in a footnote that if there had been evidence in the district court that women were a majority of the electorate, he would have likely concluded that Proposition 209’s prohibitions on gender preferences would be valid. *Id.* at 705 n.13.

217. *Id.* at 705.

218. *Id.* at 705-707.

219. *Id.* at 707.

220. *Econ. Equity*, 122 F.3d at 707-09. The Ninth Circuit also reversed the district court’s findings with respect to the Supremacy Clause claims. *Id.* at 709-11.

221. *See Econ. Equity*, 946 F. Supp. at 1499-1504.

222. *See id.* at 1503-1504.

223. *Econ. Equity*, 122 F.3d at 702.

*Palmore v. Sidoti*<sup>224</sup> for the premise that the “ultimate goal of the Equal Protection Clause is ‘to do away with all governmentally imposed discrimination based on race.’”<sup>225</sup> This statement of the Fourteenth Amendment’s purpose is incorrect for two reasons. First, *Palmore* cites *Strauder v. West Virginia* for its understanding of the purpose of the Fourteenth Amendment,<sup>226</sup> and *Palmore*’s characterization of *Strauder* is inaccurate because *Strauder* was concerned with purpose.<sup>227</sup> Secondly, this ignores that the Equal Protection Clause has always allowed governmental discriminations, as evidenced in cases like *Plessy v. Ferguson*<sup>228</sup> and segregation laws which were constitutionally permissible until cases like *Brown v. Board of Education*<sup>229</sup> and *Loving v. Virginia*.<sup>230</sup> This also ignores how the clause’s purpose was enforced in *Arlington Heights*,<sup>231</sup> and cases like *Regents of the University of California v. Bakke*,<sup>232</sup> and later in *Grutter v. Bollinger*.<sup>233</sup> In those cases, it was the possibility of an impermissible purpose rooted in animus or stereotype that the Court was guarding against. If some discrimination can be constitutional,<sup>234</sup> then the ultimate goal of the Equal Protection Clause cannot be to end all discrimination. Rather, the goal of a “conventional” Equal Protection analysis must be to find and end discrimination based on impermissible purposes.<sup>235</sup>

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224. 466 U.S. 429 (1984).

225. *Econ. Equity*, 122 F.3d at 701 (citation omitted).

226. *Palmore*, 466 U.S. at 432 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

227. See discussion *supra* note 51. *Strauder* mentions “unfriendly” discriminations, *Strauder*, 100 U.S. at 306, and could not have meant all discrimination because segregation and anti-miscegenation laws were still legal. See also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (noting that examinations of the purposes of the framers of the Fourteenth Amendment are ultimately inconclusive).

228. 163 U.S. 537 (1896).

229. 347 U.S. 483.

230. 388 U.S. 1 (1967).

231. 429 U.S. 252 (1977).

232. 438 U.S. 265 (1978).

233. 539 U.S. 306 (2003).

234. See *Johnson v. California*, 321 F.3d 791 (9th Cir. 2004) (O’Scannlain, J.) (upholding segregation of prisoners by race in California prisons), *rev’d*, 125 S. Ct. 1141 (2005).

235. See *Romer v. Evans*, 517 U.S. 620 (1996) (holding that animus is not even rationally related to a legitimate state interest); *Arlington Heights*, 429 U.S. 252 (Equal Protection Clause protects against legislation passed with animus); *Korematsu v. United*

If the facial neutrality of the law is not dispositive in determining whether an Equal Protection violation has occurred, but rather whether the state's purpose in enacting the law was permissible, then Judge O'Scannlain's reliance on Proposition 209's ostensible neutrality to find that there was no Equal Protection violation is misguided. This is particularly true considering the district court's findings that Proposition 209 had a racial focus because it was purposefully targeted at ending programs that were beneficial to minorities and women.<sup>236</sup> This focus may have triggered suspicion under *Arlington Heights*.<sup>237</sup> Despite the district court's finding of racial focus, Judge O'Scannlain assumed, without questioning, the permissibility of the voters' purposes in enacting the law. Properly applied judicial scrutiny, however, would have found that the values underlying the Fourteenth Amendment necessitated, at the very least, a closer consideration of the issues in this case.<sup>238</sup> The Ninth Circuit's consideration of the "political structure" doctrine is similarly faulty.

The Ninth Circuit's application of the "political structure" doctrine is hampered by its incomplete analysis of the *Hunter*<sup>239</sup> and *Seattle School*<sup>240</sup> cases. The Supreme Court in *Hunter* examined a law prohibiting the city council from remedying racial discrimination in public housing without majority electorate approval.<sup>241</sup> Justice White, delivering the opinion of the court, stated that the law requiring citywide approval "places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others."<sup>242</sup> In *Seattle School*, the Supreme Court examined a state ban on school busing with broad exceptions, except as to race, which effectively barred desegregation.<sup>243</sup> Justice Blackmun, writing the majority opinion, said:

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States, 323 U.S. 214 (1944) (levels of scrutiny are intended to guard against state actions rooted in animus or stereotype).

236. See *Econ. Equity*, 946 F. Supp. at 1493-1507.

237. 429 U.S. at 265-66. See also discussion *infra* Section IV-A.

238. See discussion *infra* Section IV.

239. 393 U.S. 385.

240. 458 U.S. 457.

241. *Hunter*, 393 U.S. 385.

242. *Id.* at 391.

243. *Seattle School*, 458 U.S. 457.

[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation — and only such legislation — is singled out for peculiar and disadvantageous treatment, the governmental action plainly “rests on ‘distinctions based on race.’” And when the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the “special condition” of prejudice, the governmental action seriously “[curtails] the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>244</sup>

The Ninth Circuit read these cases as stating the principle that the state may not disadvantage minorities by placing more obstacles to enacting legislation in their paths than those of any other group, in particular by requiring them to enact legislation at higher levels of government than other groups.<sup>245</sup> In applying this principle, however, the Ninth Circuit, accepting the district court’s finding that minorities were burdened as to seeking legislation, held minorities were not unconstitutionally burdened because a) Proposition 209 did not “reallocate political authority in a discriminatory manner,”<sup>246</sup> and b) Proposition 209 did not burden an individual’s right to equal treatment.<sup>247</sup>

Firstly, in its examination of the *Hunter* and *Seattle School* doctrines, the Ninth Circuit ignored why the political structure doctrine exists. The doctrine exists to root out facially neutral laws, passed with invidious purposes, that impose political burdens on minorities.<sup>248</sup> The highly suspect and formalistic parsing in which the Ninth Circuit engaged does not reflect the language of either *Hunter* or *Seattle School* and is not the “sensitive inquiry” that is

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244. *Id.* at 485-86 (citations omitted). In a footnote, Justice Blackmun notes that it is not the mere repeal of a desegregation plan that is impermissible, it is “the State’s race-conscious restructuring of its decisionmaking process that is impermissible.” *Id.* at 485 n.29. In a separate footnote, he states, “singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation.” *Id.* at 486 n.30.

245. *Econ. Equity*, 122 F.3d at 703.

246. *Econ. Equity*, 122 F.3d at 706-07.

247. *Id.* at 707-08.

248. See *Hunter*, 393 U.S. at 392-93 (discussing the legislature’s justifications for law, which indicates a concern with purpose, not merely effect of restructuring); *Seattle School*, 458 U.S. at 486 n.30 (explicitly discussing purpose).

called for in *Arlington Heights*.<sup>249</sup> Even a case that the Ninth Circuit quoted to distinguish Proposition 209 from the laws at issue in *Hunter* and *Seattle School* indicates that the purpose in enacting a law is paramount. The Ninth Circuit quoted from *Crawford v. Board of Education*<sup>250</sup> that “the simple repeal or modification of desegregation or antidiscrimination laws, *without more*, never has been viewed as embodying a presumptively invalid racial classification.”<sup>251</sup> This “more” is evidence of an impermissible purpose. The Ninth Circuit failed to examine whether “more” is present, although the district court had already found that the law was racially focused,<sup>252</sup> and the Ninth Circuit accepted the district court’s finding that the law would burden minorities seeking affirmative action programs.<sup>253</sup> *Hunter* and *Seattle School* are cases where political restructuring was evidence of impermissible purposes, a fact the Ninth Circuit ignored when analyzing those cases.

The Ninth Circuit contradicted itself in determining whether Proposition 209 discriminated on the basis of race or addressed racial matters neutrally. The Ninth Circuit accepted the finding of the district court that Proposition 209 burdened minorities over other groups in seeking affirmative action programs.<sup>254</sup> This is because minorities under Proposition 209 will have to pass an amendment to the California constitution in order to enact an affirmative action program, while other groups seeking preferences will not. Under *Hunter* and *Seattle School* this was enough to trigger strict scrutiny<sup>255</sup> because, by requiring minorities to act at the state level, their vote had been diluted.<sup>256</sup> In distinguishing Proposition 209 from *Seattle School*, however, Judge O’Scannlain pointed out that the Supreme Court in *Seattle School* noted that Washington State could have removed *all* discretion from the localities in enacting school legislation, instead of only that discretion relating to racial

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249. 429 U.S. at 266.

250. 458 U.S. 527 (1982).

251. *Crawford*, 458 U.S. at 539, *quoted in Econ. Equity*, 122 F.3d at 705-06 (emphasis added).

252. *Econ. Equity*, 946 F. Supp. at 1504-06. Judge O’Scannlain never addressed this finding by the district court.

253. *Econ. Equity*, 122 F.3d at 705.

254. *Id.*

255. *Seattle School*, 458 U.S. at 485-86.

256. *Econ. Equity*, 946 F. Supp. at 1510.

busing.<sup>257</sup> Also, Washington State had allowed localities to deal with racial matters in general and not reserved to itself the sole right to do so.<sup>258</sup> The Ninth Circuit ultimately found that California merely withheld from localities all discretion to act on racial matters, which is distinguishable from the selective withholding in *Seattle School* that triggered strict scrutiny.<sup>259</sup> The Ninth Circuit's holding in this part is that, though Proposition 209 burdens minorities, it does not do so impermissibly because it burdens minorities consistently with respect to all areas of the law and, as such, is not a racial classification. Yet, Proposition 209 does not withhold all racial policy making. It only withholds those policies relating to preferences in education, employment, and contracting, leaving preferences or discriminations in other areas to the discretion of the localities.<sup>260</sup> If, as Judge O'Scannlain allowed, minorities as a class are burdened (which seems to be a classification), how does a general burden make the classification any less suspect? By formalistically separating the "political structure" doctrine from its purposes, the Ninth Circuit undercut the whole exercise of judicial scrutiny.

Secondly, the Ninth Circuit held that a law that restructures the political process can only violate the constitution if it denies equal treatment.<sup>261</sup> It then ostensibly distinguished Proposition 209 from the laws in *Hunter*, *Seattle School*, and *Romer v. Evans*<sup>262</sup> because the laws at issue in those cases prevented "equal treatment."<sup>263</sup> The Ninth Circuit reasoned that the "political structure"

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257. *Econ. Equity*, 122 F.3d at 707.

258. *Id.*

259. *Id.*

260. CAL. CONST. art. I, § 31. Conceivably, a locality could pass a law giving preferences to a racial or sexual group in welfare laws, the provision of counsel, jail accommodations, subsidized housing, etc., so long as these laws met the same strict scrutiny other affirmative action laws are required to withstand. The state could also pass a law requiring segregation in prisons. See *Johnson*, 321 F.3d 791 (O'Scannlain, J.) (upholding segregation of prisoners by race in California prisons).

261. *Econ. Equity*, 122 F.3d at 707-08.

262. 517 U.S. 620 (1996).

263. *Econ. Equity*, 122 F.3d at 708-09. The Ninth Circuit's logic ignored that many conservatives considered the challenged amendment in *Romer* as proscribing "special treatment" for homosexuals. *Romer*, 517 U.S. at 638 (Scalia, J., dissenting) ("The amendment prohibits *special treatment* of homosexuals, and nothing more."). The constitutional burden on homosexuals seeking anti-discrimination laws is irrelevant to

doctrine does not protect structuring against affirmative action programs because, first, these programs seek preferential treatment and are subject to strict scrutiny, and second, a state can ban them all together.<sup>264</sup> This reasoning is flawed. It assumed that the constitutional burden of the benefit sought by minorities mattered in the examination of a law burdening their ability to seek the preference. The Equal Protection secured by the Fourteenth Amendment, however, is not concerned with the programs minority voters seek, it is concerned with their ability to seek them; the constitutional burdens they face have nothing to do with diluting their ability to vote. For example, in order to institute a school busing program, such as that in *Seattle School*, a state may have to survive strict scrutiny. But that factor did not affect the decision in *Seattle School* and should not have affected the analysis with respect to the constitutionality of Proposition 209. The Ninth Circuit opinion ignored that an affirmative action program based on race could be implemented constitutionally.<sup>265</sup> The fact it must undergo strict scrutiny does not negate the right of a minority to institute a constitutional program at the same political level as any other group, despite Judge O'Scannlain's barely masked hostility to the plaintiff's claims.<sup>266</sup>

The Ninth Circuit opinion is flawed in other ways. In a discussion regarding whether a majority of the electorate can discriminate against itself, Judge O'Scannlain accepted a dubious premise and contorted it to reach the desired result. Judge O'Scannlain stated that it "make[s] little sense to apply 'political structure' equal protection principles where the group . . . constitutes a majority of the electorate."<sup>267</sup> He went on to state in a footnote that to hold that a majority could impose a political structure upon itself in vio-

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whether the state's law is permissible. *Id.* at 633 (Kennedy, J.) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

264. *Id.* at 708-10.

265. See, e.g., *Bakke*, 438 U.S. 265; *Adarand*, 515 U.S. 200; *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) (O'Scannlain, J.) (examining constitutionality of King County's affirmative action program).

266. See *Econ. Equity*, 122 F.3d 692.

267. *Id.* at 705. Women and majorities together, and women alone, constitute a majority of the California electorate.

lation of Equal Protection would be “inimical” to democracy.<sup>268</sup> This ignored four major considerations. First, a majority of voters can violate a constitutional provision. Arguably, this happens whenever an unconstitutional law is passed. Second, Judge O’Scannlain’s contention is premised on an assumption that women and minorities as groups equally value the ability to institute remedial preference programs. Judge O’Scannlain wrongly lumped together the differing equal protection interests of women and minorities in affirmative action programs. Minorities overwhelmingly opposed Proposition 209 while women were almost evenly split.<sup>269</sup> Third, the facts in the case were directly contrary to the court’s premise. Women, the majority of the electorate, were narrowly opposed to the measure, yet it still passed.<sup>270</sup> Finally, Judge O’Scannlain’s discussion lacked any probative value as to the Equal Protection questions. He missed the entire point of judicial inquiry in assuming that a majority could not discriminate against itself in repealing affirmative action.<sup>271</sup> If that logic were used in examining legislative purpose in implementing an affirmative action program, almost all affirmative action programs would be permissible because it is the majority instituting a program to its detriment.<sup>272</sup> Nevertheless, this was an “eminently sensible conclusion” to the Ninth Circuit.<sup>273</sup>

Finally, the Ninth Circuit failed to heed its own advice, losing “sight of the forest for the trees” in its examination of Equal Protection and strict scrutiny.<sup>274</sup> Judge O’Scannlain quoted *City of Richmond v. J.A. Croson Co.*<sup>275</sup> for the proposition that classifications rooted in “notions of racial inferiority or simple racial politics” are

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268. *Id.* at 705 n.13.

269. *Election '96: State Propositions: A Snapshot of Voters*, L.A. TIMES, NOV. 7, 1996, at A29. This could be interpreted to imply that minorities placed a greater value on affirmative action than did women.

270. *Id.* Women voted against the measure 52% to 48%.

271. *Econ. Equity*, 122 F.3d at 704.

272. *But see, e.g., Coral Constr.*, 941 F.2d 910 (striking down affirmative action program). A majority of an electorate could also act with “self-hate” or stereotype in passing a law, acting with animus or stereotype towards itself, in violation of Equal Protection.

273. *Econ. Equity*, 122 F.3d at 704.

274. *Id.* at 709.

275. 488 U.S. 469 (1989).



the targets of strict scrutiny.<sup>276</sup> While focused on the trees of whether an individual has a right to seek a constitutional preference, the court of appeals ignored that Proposition 209 was passed in a jungle of racial politics,<sup>277</sup> the seeds of which were probably rooted in California's long history of racism and racist politics.<sup>278</sup> Judge O'Scannlain ignored the fact that Proposition 209 only burdens the beneficiaries of affirmative action, who all happen to fall into two suspect classes — women and minorities. The Ninth Circuit noted that the "Equal Protection Clause is not violated by the mere repeal of race-related legislation . . . that [was] not required . . . in the first place."<sup>279</sup> This both ignored that this is not a "mere repeal" but rather a flat prohibition on future legislation,<sup>280</sup> and that the purposes underlying the prohibition probably would not have survived properly applied strict scrutiny enforcing the anti-racism principle.

Why this issue was not raised or examined closely is certainly debatable. It may have been raised and discounted, although this is unlikely considering the complete absence of the argument from the court opinions. The ACLU may not have made the argument based on a feeling that a court would not likely examine the motivations of an entire electorate.<sup>281</sup> They may not have made the argument to avoid implications of implying the citizens of California were racist or from an uncertainty of how far a court would go in gleaning evidence of impermissible intent from the facts.

The Ninth Circuit opinion reveals how judicial bias, at best, and animosity, at worst, undermines the protections of the Equal Protection Clause.<sup>282</sup> The Ninth Circuit, even while paying lip ser-

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276. *Econ. Equity*, 122 F.3d at 708 (quoting *Croson*, 488 U.S. at 493).

277. See discussion *supra* Part II-B-ii.

278. TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (Univ. of Cal. Press 1994).

279. *Econ. Equity*, 122 F.3d at 706 (quoting *Crawford*, 458 U.S. 527, 538).

280. CAL. CONST. art. I, § 31. Unlike the situation in *Palmer v. Thompson*, 403 U.S. 217 (1971), where both whites and blacks were burdened by the closing of city pools to avoid desegregation, this "mere repeal" only harms minorities and women.

281. But see Jodi Miller, *Affirmative Action: "Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle Stat-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 9 (1999), for a discussion of voter referenda.

282. While the tone and reasoning of Judge O'Scannlain's opinion in this case reflects outright hostility to the plaintiffs' claims, his other opinions dealing with similar issues in *Coral Construction*, 941 F.2d 910, and *Johnson*, 321 F.3d 791, are far more fair in

vice to the district court's findings,<sup>283</sup> turned a blind eye towards what most people, and certainly most minorities, know from experience — that race permeates everything.<sup>284</sup> Sadly, the Ninth Circuit has a modicum of support in muddled Supreme Court doctrine.<sup>285</sup> Unfortunately, the judges that should protect minorities too often let political considerations infect their analysis,<sup>286</sup> bandage their suspect reasoning with confused doctrinal phrasing,<sup>287</sup> and pretend as if racism no longer affects the direction of law or politics.<sup>288</sup> The opposing perspectives of judicial notice and judicial blindness are sharply illustrated by the varying outlooks of the two African-American Supreme Court justices.

C. *Upholding Affirmative Action: Justice Marshall vs. Justice Thomas*

The diverging methods the Supreme Court can employ in examining race are illustrated by the philosophies of Thurgood Marshall and Clarence Thomas, the two African-Americans to have served on the Court. Thurgood Marshall was appointed in 1967 by

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tone and reasoning. The inconsistency between these cases and *Economic Equity*, 122 F.3d 692, along with the suspect reasoning employed in deciding *Economic Equity*, raises questions.

283. *Econ. Equity*, 122 F.3d at 705 (accepting district court's determination that Proposition 209 burdens minorities).

284. See, e.g., CORNELL WEST, *RACE MATTERS* (1993). See also, HARPER LEE, *TO KILL A MOCKINGBIRD* (Warner Books 1982) (1960) (describing a young girl's experience in 1930s Alabama); WALTER MOSLEY, *ALWAYS OUTNUMBERED, ALWAYS OUTGUNNED* (Pocket Books 1998) (describing episodically the stories of a black man in 1990s Los Angeles); JOHN LEGUIZAMO, *FREAK: A SEMI-DEMI-QUASI-PSEUDO AUTOBIOGRAPHY* (Riverhead 1997) (one man play about growing up Latino in New York City); CHANG-RAE LEE, *NATIVE SPEAKER* (Riverhead Books 1996) (describing identity crisis of an Asian American); CHRIS ROCK, *BRING THE PAIN* (HBO 1996) (comedy routine about many racial issues).

285. See the discussion and use of *Adarand*, 515 U.S. 200, and *Palmore*, 466 U.S. 429, in Judge O'Scannlain's opinion, as well as the quotations he uses from various other cases.

286. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Bakke*, 438 U.S. 265; see also David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790 (1991); David Margolick et al., *The Path to Florida*, VANITY FAIR, October 2004, at 310 (discussing how conservative members of the Court decided the 2000 election).

287. See Chang, *supra* note 286.

288. See discussion *supra* Section II.

President Johnson and served until retiring in 1991.<sup>289</sup> Clarence Thomas was appointed by President George H.W. Bush to replace Marshall and took his seat in 1991.<sup>290</sup> Justice Marshall was the legendary litigator who argued *Brown v. Board of Education* on behalf of the NAACP.<sup>291</sup> Justice Thomas served as Chairman of the Equal Employment Opportunity Commission under President Reagan.<sup>292</sup> Each was on a different side of the political spectrum and, as their dissents in two very important affirmative action cases show, on opposite sides of how the reality of race should affect Equal Protection jurisprudence.

Dissenting from the decision in *Bakke*, Justice Marshall wrote of the history of discrimination against blacks, and then stated: “The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”<sup>293</sup> He went on to take notice of the societal problems and issues confronting African Americans — including shorter life expectancy, higher infant mortality rates, greater poverty rates, higher unemployment rates<sup>294</sup> — some of which remain today, twenty-five years later.<sup>295</sup> He further wrote: “In light of the . . . history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.”<sup>296</sup> Marshall argued that remedial uses of affirmative action are necessary because of, and justified by, the decades of state oppression.<sup>297</sup>

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289. *Members of the Supreme Court of the United States*, available at <http://www.supremecourtus.gov/about/members.pdf>.

290. *The Justices of the Supreme Court*, at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 18, 2005).

291. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

292. *The Justices of the Supreme Court*, at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 18, 2005).

293. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 395 (1978) (Marshall, J., dissenting).

294. *Id.* at 395.

295. *See supra* discussion Part II.

296. *Bakke*, 438 U.S. at 395.

297. *Id.* at 400-02. Of course, educational diversity is also a permissible goal, which is not necessarily related to remedial affirmative action.

Justice Thomas, dissenting from *Grutter v. Bollinger* twenty-five years later,<sup>298</sup> took a different approach. His dissent began with a quote from Frederick Douglass about letting African-Americans be independent from the interference of whites, even if well intentioned.<sup>299</sup> Thomas asserted his belief that “blacks can achieve in every avenue of American life without the meddling of university administrators.”<sup>300</sup> Thomas then attacked the majority reasoning in light of his strict interpretation of the Constitution, largely arguing that educational diversity is not a compelling state interest.<sup>301</sup> While Justice Thomas gave glancing reference in a footnote to the condition of blacks in society, he dismissed educational affirmative action as irrelevant to the problem.<sup>302</sup>

Has so much changed between *Bakke* in 1978 and *Grutter* in 2003 to justify such different dissents from these two justices? Recent history would not seem to reflect such a radical change in the need for remedial or educational affirmative action.<sup>303</sup> Each justice anchored his opinion on the strong points of his argument — Marshall, that history demands allowance of remedial action, and Thomas, that the Constitution does not allow action that discriminates. Thomas, however, is on the weaker ground, both doctrinally and morally. First, the large sum of Supreme Court precedent and original intent allow interpretations of the Equal Protection Clause which permit affirmative action programs.<sup>304</sup> Thomas can argue for a strict construction of the Fourteenth Amendment, but the text of the Constitution is not the only reference point for constitu-

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298. 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).

299. *Grutter*, 539 U.S. at 349.

300. *Id.*

301. *Id.* This is interesting, because when Justice Thomas was born in Georgia in 1948, segregation was still legal. Educational diversity is so compelling that segregation of schools is “inherently unequal,” *Brown*, 347 U.S. at 495. Educational diversity was compelling enough that presidents mobilized troops to enforce desegregation.

302. *Grutter*, 539 U.S. at 354 n.3. But see U.S. CENSUS BUREAU, *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 2* (2002), and NAT’L CTR. FOR EDUC. STATISTICS, *ANNUAL EARNINGS OF YOUNG ADULTS, BY EDUCATIONAL ATTAINMENT* (1999), for statistics showing the correlation between the level of education attained and income.

303. See discussion *supra* Part II-A-ii.

304. See *Grutter*, 539 U.S. 306; *Bakke*, 438 U.S. 265. Other cases, while striking down laws, have never prohibited affirmative action per se.

tional principles.<sup>305</sup> Second, Thomas ignored the history of racism that makes affirmative action necessary and thereby lacked the sense of justice that Marshall possessed in his dissent. By ignoring the history and present state of race in America, and instead hewing closely to the original text, Thomas would enforce the injustices bred by the old understandings of that text — understandings that allowed segregation, anti-miscegenation laws, poll taxes — a morally suspect interpretive choice.<sup>306</sup>

As seen from the difference between Justice Marshall's and Justice Thomas's philosophy, a judge can acknowledge the history of racism and its present effects on the state of minorities, or he can ignore them or relegate them to a footnote. Unfortunately, if the highest ranking (and only) minority member of the nation's highest court is arguing that affirmative action is irrelevant to the social ills affecting minorities, what are lower courts, legislators, and the public to think? Perhaps they will think that the interests of "innocent whites," which receive consideration (and not in a footnote), are more important than the interests of minorities, mentioned either in dissent or in footnotes?

Disappointingly, there has not been an even application of the anti-racism principle. From district courts to courts of appeals to the Supreme Court, judicial decision makers usually fail to see the core issues in cases involving race or hide behind doctrines which do not necessarily enforce the principles underlying the Equal Protection Clause. While some commentators argue that this is a reason for courts to not involve themselves in disputes regarding affirmative action,<sup>307</sup> others argue for a more consistent application of legal principles.<sup>308</sup> Because it is a duty of the courts to enforce constitutional principles, judicial intervention is not only warranted, but mandatory where violations of Equal Protection occur. The consistent application of previously formulated legal principles in those circumstances, however, will not be enough to stop viola-

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305. See, e.g., *Brown*, 347 U.S. 483 (using social studies to find that segregation was inherently unequal).

306. It was this interpretation that supported *Plessy v. Ferguson*, 163 U.S. 537 (1896).

307. See Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (arguing that affirmative action is a political question).

308. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790 (1991).

tions of the anti-racism principle, particularly where the perpetrators are savvy enough to avoid displays of gross racism. The solution is for courts to apply strict scrutiny, with an understanding of how racism is currently displayed, when a state acts to end an affirmative action program. This scrutiny should require the state to rebut a presumption of impermissible purposes by making a reasonable finding of fact that the program in question has succeeded or failed and should be discontinued or modified.

#### IV. A NEW ANALYSIS FOR CHALLENGES TO MEASURES ENDING AFFIRMATIVE ACTION

If the Court takes seriously the anti-racism principle first articulated in *Strauder v. West Virginia*<sup>309</sup> and *Yick Wo v. Hopkins*,<sup>310</sup> then it must apply greater scrutiny to measures undertaken to end affirmative action. The concerns underlying the need for close judicial scrutiny stated in *Korematsu v. United States*<sup>311</sup> are also present when a state acts to end affirmative action. A close examination, such as that called for in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>312</sup> of the issues surrounding anti-affirmative action efforts often will reveal an underlying purpose rooted in racial animosity and stereotypes. If the judicial analysis of the permissibility of implementing an affirmative action policy can recognize the complicated and shifting nature of the racial issues involved,<sup>313</sup> there is no reason that a similar examination cannot be made of efforts to end affirmative action. Where a white majority acts to end affirmative action programs, a court should exercise strict scrutiny with a better understanding of how racism is manifested in the world today. This scrutiny will enable courts to protect against the new hidden racism and ensure that affirmative action programs are ended at appropriate times and for permissible purposes.

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309. 100 U.S. 303 (1879).

310. 118 U.S. 356 (1886).

311. 323 U.S. 214 (1944).

312. 429 U.S. 252 (1976).

313. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995).

### A. *The Justification for Strict Scrutiny*

When a state passes a law with a racial classification, that law is presumptively in violation of the Equal Protection Clause.<sup>314</sup> This may reflect the increased probability that a law with a racial classification was passed with a purpose rooted in racism or stereotype.<sup>315</sup> There is also a normative proposition that racial classifications are intrinsically wrong despite their purpose.<sup>316</sup> The state bears the burden of rebutting the presumption of unconstitutionality by showing the racial classification “is precisely tailored to serve a compelling governmental interest.”<sup>317</sup>

A facially neutral law that is enforced discriminatorily is also subject to strict scrutiny.<sup>318</sup> One indicator of discriminatory enforcement is disproportionate impact.<sup>319</sup> Although a law may have a disproportionate impact, disparate impact alone is not enough to subject it to strict scrutiny.<sup>320</sup> Because legislators must balance numerous concerns when drafting a piece of legislation, courts give

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314. *Korematsu*, 323 U.S. at 216.

315. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 109. This is a product of both the historical record of laws with racial classifications reflecting impermissible purposes, as well as that the probability is quite low that the legislature may have legitimate purposes when differentiating between races.

316. *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., dissenting) (stating: “I believe that there is a moral . . . equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race. . . . Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.” Internal quotes and cites omitted). Justice Thomas is wrong. There is an enormous moral difference between laws designed to treat minorities as sub-human, such as anti-miscegenation laws and other Jim Crow laws, and laws designed to remedy the effects of oppression or encourage diversity in education. It is baffling how this is not apparent, particularly to someone who was born in Georgia when segregation was still legal and also benefited from affirmative action. Furthermore, as history demonstrates, affirmative action can have positive effects upon the state of minorities, and legal doctrines can shape social mores, thus increasing social equality. See discussion in text, *supra* notes 125-32.

317. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

318. *Arlington Heights*, 429 U.S. at 266; see also *Yick Wo*, 118 U.S. 356; *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

319. *Arlington Heights*, 429 U.S. at 266; see also *Yick Wo*, 118 U.S. 356; *Gomillion*, 364 U.S. 339.

320. See *Arlington Heights*, 429 U.S. at 265; *Washington v. Davis*, 426 U.S. 229, 242 (1976).

great deference to legislative decisions.<sup>321</sup> Nevertheless, where “there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.”<sup>322</sup> If a state acts with purpose rooted in animus, then the action is invalid.<sup>323</sup>

There are many ways a state could act to end affirmative action. The action could take the form of a specific repeal, a general ban applicable to current and future programs,<sup>324</sup> a regulatory change,<sup>325</sup> or a court order. If a prospective ban is passed, and there are no existing programs, or those programs are exempted from the ban, other issues are raised.<sup>326</sup> Regardless of the method,

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321. *Arlington Heights*, 429 U.S. at 265.

322. *Id.* at 265-66 (citing *Brest*, *supra* note 315, at 116-18).

323. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding Colorado amendment invalid because purposes rooted in animus bore no rational relationship to a legitimate state purpose); *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu*, 323 U.S. at 216.

324. Although it may seem odd to sue to stop the “enforcement” of a repeal, there is precedent. *See Romer*, 517 U.S. 620 (Colorado amendment would have repealed municipal anti-discrimination laws); *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491-92 (N.D. Cal. 1996).

325. A regulatory change could include federal or state agency changes in affirmative action program requirements, criteria, or agency policy that harm beneficiaries of affirmative action. It could also include changes in criteria governing admissions to colleges, the administration of minority scholarships, or funding of student organizations.

326. There are two main issues involved in prospective bans where no affirmative program is currently in place or affected. First, assuming a state with no affirmative action programs prospectively bans future programs, a potential plaintiff’s standing is highly suspect. The plaintiff would have to allege that she would have benefited from a program that would have been enacted if there was no ban. This is not the concrete and particularized injury required by the standing doctrine. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). There might remain, however, other possible injuries such as a political structure disadvantage resulting in a cause of action under the *Seattle-Hunter* doctrine. See discussion in text, *supra* notes 214-20, 239-66, for an overview of the *Seattle-Hunter* doctrine. If such an injury were alleged, the plaintiff would have standing to allege further violations under a “conventional” Equal Protection analysis, *see* discussion in text, *supra* notes 221-38, in effect piggybacking on the political structure injury.

Second, if standing were resolved, any formulation or use of the proposed test results in an impossible burden for the state to overcome to enact a prospective ban. It is impossible to prospectively show with detail that affirmative action programs that do not yet exist would be ineffective or unnecessary. Application of the test to such situations would result in all prospective bans on affirmative action being ruled unconstitutional. This would effectively create a *per se* rule. While there are policy arguments to be made for such a rule, that result should not occur because of a formalistic application of the proposed test. It is imaginable that a state with no affirmative action pro-



when a state acts to end affirmative action, its efforts should be subject to strict scrutiny for numerous reasons.<sup>327</sup>

First, the purpose inquiries relevant to the imposition of an affirmative action program are just as relevant, if not more, to measures ending those programs. If a majority effort to implement a minority preference program (to the majority's detriment) may be impermissibly rooted in either racial animus or stereotype, it is more likely that a majority working to end such a program (to the minority's detriment) is acting with forbidden purposes. This is particularly likely to be true where the majority knows that the minorities will face a detrimental impact. If an inquiry into purpose is warranted in the first instance, it is certainly warranted in the second. Indeed, if a state passed an affirmative action program to remedy the effects of past discrimination it may be just as likely that the previous underlying racism is present as a motivation in ending the program, particularly in a voter referendum.

Secondly, although the language of voter initiatives like Proposition 209 or the repeal of an antidiscrimination law do not contain a racial classification,<sup>328</sup> the debates surrounding these measures are inextricably tied to racial issues and deserving of the same caution those issues engender in legislation with racial classifications. The supposition that because a statute does not contain a classification it is non-discriminatory and undeserving of heightened scrutiny is formalistic because it removes benefits permissibly

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grams, with no past discrimination, and with educational diversity, might undertake to subordinate equality and remedial concerns to anti-classification concerns. That situation is outside the scope of consideration here, but much of the analysis is still applicable to such a circumstance, even if it is presently unlikely that it could occur.

327. Before the law could be scrutinized, the plaintiff would have to overcome the threshold issues of standing and immunity. To establish standing, a plaintiff must show a "concrete and particularized" injury. *Lujan*, 504 U.S. at 560. Second, is a "causal connection between injury and [defendant's] conduct[.]" *Id.* (citations omitted). Third, the court must be able to redress the injury by a favorable decision. *Id.* at 560-61. Similar to challengers to affirmative action programs, challengers to repeals would have standing. The injury alleged would be the loss of the benefit from affirmative action, the loss of which is caused by the state's action, and the injury would be redressed by a favorable court decision overturning the repeal.

As to immunity, under *Ex parte Young*, 209 U.S. 123 (1908), and subsequent cases, a state official (and thereby the state) can be sued for prospective relief from constitutional violations. See JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 11-12 (Foundation Press 2000).

328. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 705-06 (9th Cir. 1997).

assigned by classifications and only affects those classes benefiting from the law. This reasoning suffers from an ignorance, perhaps willful, of the manner in which race can permeate a debate over passage of the law,<sup>329</sup> and likely, decisions.<sup>330</sup>

Finally, under the logic of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>331</sup> most debates surrounding measures to end affirmative action will evince a discriminatory purpose as a motivating factor. It is not necessary for animus or stereotype to be the primary factor, so long as it is a “motivating” factor.<sup>332</sup> It is arguable that any evidence of impermissible purpose should trigger greater scrutiny because it may indicate a wider problem of invidious purpose or use of stereotype that can only be guarded against by judicial inquiry. For example, *Arlington Heights* lists the historical background of the decision to take an action as well as the specific sequence of events leading to the challenged action as areas for inquiry.<sup>333</sup> In California’s efforts to end affirmative action, the historical background of the decision and sequence of events unarguably indicate purposes and debates mired in racial politics.<sup>334</sup>

This is particularly important where such measures are passed by voter referendum. Voter initiatives, although popular and consistent with democratic values, can undercut important republican safeguards.<sup>335</sup> Legislatures are better equipped than the general

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329. See, e.g., LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION* (Univ. of Cal. Press 1998); Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000); Adam Clymer, *Divisive Words: New Analysis: G.O.P.’s 40 Years of Juggling on Race*, N.Y. TIMES, Dec. 13, 2002, at A1.

330. PAUL M SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 101-04 (Belknap 1993). In a series of questions, where whites were questioned in varying orders about affirmative action and characteristics of blacks, when characterizations of blacks were discussed first, 26% of whites would characterize blacks as “irresponsible.” *Id.* When affirmative action was discussed first, however, the negative characterization leapt to 46%. *Id.* The authors contend that this is a reflection of the divisiveness of affirmative action. *Id.*

331. 429 U.S. 252 (1977).

332. *Arlington Heights*, 429 U.S. at 265.

333. *Id.* at 267.

334. See *supra* discussion Part II-B-ii.

335. Jodi Miller, *Affirmative Action: “Democracy in Free Fall”: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 9 (1999).

public to evaluate and formulate legislation due to their expertise and resources.<sup>336</sup> Also, legislative debate allows for compromise, whereas voter referenda do not.<sup>337</sup> Indeed, the machinery of referenda is political persuasion, which limits voter education,<sup>338</sup> particularly in a topic as complicated as affirmative action.<sup>339</sup> Most importantly, a voter initiative allows a majority to dominate minority interests with little of the safeguards that a representative government ensures.<sup>340</sup> Although legislative purpose may be difficult to ascertain in referenda because of the scale of the debate, the misunderstanding among voters, and the size of the electorate, this should not dissuade judicial scrutiny. In some ways, it may make judicial scrutiny of referenda easier.<sup>341</sup> Because the concerns underlying strict scrutiny of laws implementing affirmative action are present when ending affirmative action, when a state chooses to end affirmative action, it should be automatically subject to strict scrutiny.

*B. A New Test to Detect Impermissible Purpose*

Even if a court chooses to apply strict scrutiny, it is unclear what the current tests for impermissible purpose would be in such a case. Whereas courts have been extremely diligent in examining the implementation of affirmative action programs,<sup>342</sup> they have been less exhaustive in their examination of state actions to end

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336. *Id.*

337. *Id.*

338. *Id.* Although information is available for the motivated voter, the motivation and education level of any single voter with respect to issues at stake in referenda is questionable, particularly when considering an issue with the complexity of an affirmative action program.

339. See CHÁVEZ, *supra* note 329, at 207.

340. Miller, *supra* note 335, at 8. An example of this is California's passage of Proposition 209. There whites comprising 74% of the electorate ended affirmative action although minorities voted overwhelmingly to retain it. See text *supra* note 147.

341. For example, polling data may be indicative of the various reasons a voter or block of voters acted. Secondly, it may make the racial nature of an issue apparent. In California's vote on Proposition 209, whites overwhelmingly voted to end affirmative action while minorities voted against the measure. Although "facially neutral," the vast majority of the electorate apparently did not see it as such.

342. See *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) (O'Scannlain, J.) (striking down affirmative action law after applying strict scrutiny).

affirmative action.<sup>343</sup> While *Arlington Heights* gives a non-exhaustive list of subjects for inquiry,<sup>344</sup> the factors in *Arlington Heights* may be ineffective at detecting a racist motivation in actions to end affirmative action. *Arlington Heights* considers the historical background of the decision, the specific sequence of events leading to a decision, whether there has been a procedural or substantive departure from prior decisions, and the legislative history.<sup>345</sup> With the coding of racist language, it is easy for a court using the *Arlington Heights* factors to miss or ignore the evidence of impermissible purpose.<sup>346</sup> Alternatively, a court may not use the *Arlington Heights* factors at all, especially if the issue of impermissible intent is not raised.<sup>347</sup>

Despite this, some of the factors considered in cases like *Regents of the University of California v. Bakke*<sup>348</sup> and *City of Richmond v. J.A. Croson Co.*<sup>349</sup> are useful because they are more relevant to considerations of measures ending affirmative action programs than to examinations of laws implementing them. While *Bakke's* and *Croson's* considerations of "innocent white victims" are barely justifiable in the context of implementing affirmative action,<sup>350</sup> in the

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343. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (O'Scannlain, J.) (the deficiencies of O'Scannlain's examination of the issues are addressed *supra* Part III-B). If one compares Judge O'Scannlain's opinion in *Economic Equity and Coral Construction*, 941 F.2d 910, with *Johnson v. California*, 321 F.3d 791 (9th Cir. 2004) (upholding segregation of prisoners by race in California prisons) in light of *Arlington Heights*, 429 U.S. 252, a court could infer that his substantive inconsistency may trigger closer scrutiny of his decisions. See *id.* at 267; see also discussion of Spann, *supra* note 186. It is unclear what form this review would take.

344. *Arlington Heights*, 429 U.S. at 266-68.

345. *Id.* at 266-68.

346. Although a good starting point, the *Arlington Heights* factors do not work well enough to uncover hidden racism. Despite Justice Powell's discussion of the complex factors involved in decisionmaking, *id.* at 265 ("Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."), the stark impact cases he gave, *id.* at 266, or the cases he used to illustrate the factors for examination, *id.* at 267-68, do not reflect the complexity of motivation he acknowledged.

347. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

348. 438 U.S. 265 (1978).

349. 488 U.S. 469 (1989).

350. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790, 803-09 (1991). See also Seth D. Harris, 49 N.Y.L. SCH. L. REV. 577 (2005) (comparing the "innocence" of whites who benefit from discrimination with family members of fictional mobster Tony Soprano, who benefit from his criminal activities).

context of ending affirmative action, those considerations point to the conclusion that the “innocent white” majority is acting with racial animus or stereotype. For example, the Supreme Court’s concern that affirmative action may promote racism among frustrated whites<sup>351</sup> adds to the appearance of racist purpose in ending affirmative action. Following the Court’s logic, with affirmative action programs having been in place since the Johnson administration, it is highly likely that affirmative action programs have already fomented racism or stereotypes which would affect the purposes and motivations of people considering any measure to end such programs.<sup>352</sup> This was born out by the motivations of the originators of the Proposition 209 campaign in California, where Thomas E. Wood began the drive to pass Proposition 209 because he perceived that opportunities were being taken from him by minorities.<sup>353</sup>

There is also a correlation between the reasons for requiring that a legislature make contemporaneous findings of fact and state a permissible purpose when implementing affirmative action programs,<sup>354</sup> and requiring the same when the state acts to end affirmative action. In both cases, this requirement is probative of whether the state acted on an impermissible stereotype. For example, if a state enacted an affirmative action program to redress past discrimination and made the proper findings of fact outlining the present effects of discrimination, in order to end that program, the state should need to show that the program has achieved the desired results and is no longer necessary, or has failed and must be dis-

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Indeed, there is even a similarity between Powell’s language in his consideration of innocent third parties and Southern Senators’ defense of segregation. *Compare Bakke*, 438 U.S. 265, 298 (1978) (“[T]here is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”), with 100 CONG. REC. 7252 (1954) (Senator Eastland, discussing *Brown*, said, “Will not the commingling of the races in public schools have a detrimental effect upon white children?”).

351. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 514 (1980); *Bakke*, 438 U.S. at 298.

352. This probability is supported by studies. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 101-04 (Belknap 1993).

353. LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION 2-17* (Univ. of Cal. Press 1998). Wood teamed with Glynn Custred to start the voter initiative to end affirmative action. It is questionable where Wood’s perception crossed into unfounded stereotypes.

354. *Bakke*, 438 U.S. at 307-09. The permissible purposes for an affirmative action program are redressing past discrimination or educational diversity. *Id.*

carded or modified. This will help rebut a presumption that the state acted on an unfounded racial stereotype that such programs are no longer necessary or do not work.<sup>355</sup>

This would also help rebut any indication that the repeal of an affirmative action program was rooted in racial animus. If the state made a finding in implementing an affirmative action program that past state discrimination led to the current inequitable distribution of opportunity, and ending an affirmative action program would reintroduce that distribution, the state could be viewed as purposely resurrecting the past discriminatory distribution of resources. This is different from the basis of disproportionate impact claims, such as in *Washington v. Davis*.<sup>356</sup> In implementing an affirmative action program, the state made a policy decision from which ending the program would be a substantive departure triggering greater scrutiny under *Arlington Heights*.<sup>357</sup> In the disproportionate impact cases, there was no prior state policy from which to depart.<sup>358</sup>

Because of these considerations, when a state acts to end an affirmative action program, a court should apply strict scrutiny and require the state to rebut a presumption that it acted with an impermissible purpose by making contemporaneous findings of fact of the fulfillment or failure of the original objectives of the affirmative action program. The court should also be extremely sensitive to the presence of racial politics and “coded” rhetoric in the state’s debates when examining purposes. Where these politics and rhetoric appear, a court should be extremely wary, even if a contemporaneous finding was made, because the finding may have been skewed in light of political pressures or unreasonable in light of the actual facts. Therefore, the fact finding should be reasonable in light of the existing social tensions. To perform these inquiries ade-

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355. CHÁVEZ, *supra* note 353, at 215-22 (discussing advertising campaigns that questioned necessity or effectiveness of affirmative action programs without findings of fact). Governor Wilson also ignored the complications of statistics and studies, focusing on the racial politics when ending affirmative action at the University of California. *Id.* at 61-63.

356. 426 U.S. 229.

357. See *Arlington Heights*, 429 U.S. at 267.

358. See *id.*; *Davis*, 426 U.S. 229. In *Davis*, the test was already skewed towards whites, and in *Arlington Heights*, the zoning statute pre-existed the plans for the development. In neither case, there was no departure from a prior policy.

quately, courts will have to be much more sensitive to the realities of race in United States than they have been and aggressively pursue any hint of impermissible purposes.

C. *The New Test Applied*

If this test had been adopted and applied to the facts in *Coalition for Economic Equity v. Wilson*,<sup>359</sup> the results of that case would have been much different. The parties and the courts in the litigation surrounding Proposition 209 ignored an anti-racism Equal Protection argument, focusing exclusively on the political structure arguments.<sup>360</sup> Under the new test, strict scrutiny would automatically apply, particularly because the issue was decided by voter referendum.<sup>361</sup> The state would then have to prove contemporaneous findings of fact that the original purposes for enacting affirmative action programs had been fulfilled, and that racial politics or coded rhetoric did not influence the fact finding. Contrary to the Ninth Circuit's assertion that "we must have more than a vague inkling of what the law actually does" to decide whether the law is in conflict with the Fourteenth Amendment,<sup>362</sup> once standing is found,<sup>363</sup> the alleged impermissible purpose is enough to place the law in violation of the Constitution.<sup>364</sup>

In enacting Proposition 209, California did not make any legislative findings of fact because the measure was passed by voter initiative. The text on the ballot did not include any findings of fact.<sup>365</sup> The ballot pamphlets had no findings with respect to the need for

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359. 122 F.3d 692 (9th Cir. 1997).

360. *Econ. Equity*, 122 F.3d 692; *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996). Note that the parties and courts forgot that the purpose for the political structure doctrine is to protect against impermissible purposes. See *Hunter v. Erickson*, 393 U.S. 385, 392-93 (1969).

361. See discussion *supra* Part IV-A.

362. *Econ. Equity*, 122 F.3d at 700.

363. See discussion, *supra* note 327.

364. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Indeed, impact alone is nearly irrelevant, unless stark, *id.*, or impacting whites. See David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790, 803-09 (1991).

365. *Econ. Equity*, 122 F.3d at 696.

affirmative action.<sup>366</sup> Moreover, the scope of the ban on affirmative action was statewide and applied to programs at all levels of state and local government, which supports the inference that no adequate fact finding was made. The legislative findings on the success or failure of affirmative action required to show that a state acted without an unsupported stereotype would have likely been quite lengthy and detailed, particularly in a state the size of California. There is little likelihood that of 4,736,180 Californian residents voting to enact Proposition 209, a decisive percentage did so without acting on some stereotype or animosity.<sup>367</sup>

Similarly, the manner in which the arguments were framed in the debate should trigger greater judicial scrutiny. From the advertising campaigns,<sup>368</sup> to the political decisions,<sup>369</sup> to the ballot pamphlet,<sup>370</sup> the entirety of the Proposition 209 debate was inextricably mired in racial politics and coded rhetoric. This infection of the debate would have required California to show that the racist politics and rhetoric did not affect the fact finding (if it had been made) and decision, which in a referendum like California's would be impossible. One benefit of a stringent standard would be to force the complicated debates surrounding affirmative action programs into the legislature, which is at least theoretically more capable of a reasoned and nuanced consideration of the issues involved. Because California could not have met either of its burdens under the test in its enactment of Proposition 209,<sup>371</sup> the Proposition should have been struck down under the Equal Protection Clause.

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366. *Id.* at 696-97 ("And two wrongs don't make a right! Today, students are being rejected . . . because of their RACE. Job applicants are turned away because [of] their RACE[.]"). Instead of fact finding, the ballot pamphlet took the stereotypical concepts of affirmative action programs and used the stereotypes to incite the "victims" of affirmative action programs along racial lines.

367. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (Belknap 1993). See also TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (Univ. of Cal. Press 1994).

368. LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 216-17, 227-33 (Univ. of Cal. Press 1998).

369. *Id.* at 66-67.

370. *Econ. Equity*, 122 F.3d at 696-97.

371. This includes the application of Proposition 209 banning future programs. The issue of whether the state action is a repeal of existing programs or a prospective ban on future programs is only relevant to standing. See discussion *supra* notes 326-27.



Another example of how the new test could be applied is a hypothetical action by a state university to end a minority scholarship program.<sup>372</sup> Rutgers University, a state university in New Jersey, awards the James Dickson Carr Scholarship to an outstanding, underrepresented minority student.<sup>373</sup> Suppose that this scholarship was implemented to allow an underrepresented minority, who displayed great academic promise, but who lacked sufficient funds to afford school, to attend Rutgers. Imagine Rutgers made the initial determination for the permissible purpose of promoting educational diversity. Now envision a poor white student who is admitted to Rutgers, but can only afford to attend by taking out student loans. Once at Rutgers, this white student writes the Board of Governors of the university<sup>374</sup> seeking an end to “unjust discrimination on the basis of race.” This student copies a candidate for governor, who hoping to follow Pete Wilson’s success in California, makes the minority scholarship a campaign issue.

The incumbent governor, worried about how the media is portraying the controversy, orders the Board of Governors to examine Rutgers’ policy on minority scholarships. The Board of Governors acts and finds that ten percent of minority students receive scholarships based in part on race, and that the loss of those scholarships would jeopardize an unknown percentage of these students’ ability to attend Rutgers. The Board also finds that although educational diversity is an important goal, they are going to discontinue the minority scholarships because they are “unfair to white students.” A

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372. This is based on a scenario from Stuart Silverstein, *Pepperdine Defends Its Minority Scholarships*, L.A. TIMES, Jan. 22, 2004, at B1 (discussing challenges to race-based scholarships and scholars programs), as well as Gov. Pete Wilson’s efforts to end affirmative action at the University of California.

373. A list of scholarships available at <http://studentaid.rutgers.edu/catalog/undergradadmissions.asp> reads:

James Dickson Carr Scholarship. Awarded to outstanding minority students selected on the basis of academic promise, as demonstrated in high school work and SAT or ACT scores, and on the basis of participation in extracurricular activities in school and community.

This scholarship is administered directly by Rutgers University’s Office of Admissions. Special thanks to Ben from the Rutgers’ admissions office who helped with that information, but did not give his last name.

374. Rutgers is governed by the Board of Governors, who are comprised of eleven voting members, six appointed by the governor of New Jersey, and five appointed by an advisory Board of Trustees. *Governing Boards of the University*, available at <http://ruweb.rutgers.edu/governance/>.

minority student, facing the loss of his scholarship, files suit in federal court.<sup>375</sup>

Under the new test, the state action to end affirmative action would be automatically subject to strict scrutiny. The state would have to prove by a reasonable finding that the goals of the original affirmative action program had been fulfilled or the program had been unsuccessful, and that racial politics and rhetoric did not influence the decision. In the hypothetical, it is unlikely, but possible, for the state to meet its burden.<sup>376</sup>

The question of whether the affirmative action program had fulfilled its goal would depend on the evidence relied on at the implementation of the program and the evidence used to support its repeal. For example, if minority enrollment had increased to a percentage that reflected educational diversity, then the goals of the program may have been achieved. Nevertheless, the finding that upon ending the program minority enrollment would fall would be a countervailing consideration in evaluating the reasonableness of the decision. Furthermore, the normative proposition being the same — that educational diversity is a goal — there is a substantial departure from pursuing that goal with an affirmative action program to pursuing the goal without a program.<sup>377</sup> This substantial departure may indicate a purpose rooted in racism or stereotype. Therefore, depending on the strength of the statistics, it is unlikely that a state could meet its burden, especially if the debate has been affected by any racial politics.

In the hypothetical, it is unclear the extent to which racial politics would have played a roll in ending the minority scholarship program. The governor ordering a review, itself, probably would not be enough. If the gubernatorial campaign featured affirmative action as an area of wide contention and debate, however, and the governor pressured the Board,<sup>378</sup> that would be enough to trigger a

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375. The student would have standing, much like the plaintiffs in *Economic Equity*, 946 F. Supp at 1491-92, because he could allege the loss of the benefit, caused by the enforcement of the repeal, which can be redressed by the court. See also discussion, *supra* note 327.

376. Much of the probability of success for the state in defending its action may depend on more particularized facts than are able to be included here.

377. See *Arlington Heights*, 429 U.S. at 267.

378. Similar to the ending of affirmative action at the University of California. See CHÁVEZ, *supra* note 368, at 56-67.

court's much closer scrutiny of the basis of the findings of fact. This would also be true if there was campus unrest as various student groups lobbied the Board using racial politics, or if the Board members showed racial coding or racial politics in their debates on the program.<sup>379</sup>

As these examples show, a reconsideration of how racism is displayed and acted upon in measures ending affirmative action programs will enable courts to stop this new hidden racism and allow governments to end affirmative action at appropriate times and for permissible reasons.

## V. CONCLUSION

There is no more important application of the Equal Protection Clause than its protection against invidious purposes. If courts cannot adequately examine the purposes behind nominally neutral legislation targeted at minority interests, then racism will continue to limit the opportunities of traditionally oppressed people. Permissible affirmative action programs are implemented after rigorous inquiry; ending them should require the same meticulous examination. Only by acknowledging the similarity of the principles involved and the manner in which racism manifests itself in the world today can the opportunities of all be protected by principled courts enforcing the Fourteenth Amendment.

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379. See *Arlington Heights*, 429 U.S. at 267.