1-1-2011

Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson's Proposition 209 Decision

David B. Oppenheimer
Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson’s Proposition 209 Decision

David B. Oppenheimer*

In 1996 California voters passed Proposition 209, amending the state constitution to prohibit affirmative action in public education, contracting, and employment. In an eloquent decision, Judge Thelton Henderson of the U.S. District Court held that the initiative violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Judge Henderson’s opinion explained how Proposition 209 created a special barrier for minorities and women, relying on the “political structure doctrine” announced by the Supreme Court in Hunter v. Erickson and Washington v. Seattle School District No. 1, which prohibits voter initiatives that single out minorities and makes it more difficult for them to seek governmental assistance on issues of particular importance to them. He also relied upon what I here describe as a “racism-aware” approach to applying the Equal Protection Clause, rejecting the increasingly popular, and deeply flawed “color-blindness” approach. This Essay discusses why Judge Henderson was correct in adopting a racism-aware view of equal protection analysis, critiques color-blindness as a form of “racism-blindness,” and describes the consequences of Proposition 209 for enrollments at the University of California.

In 1997 the Ninth Circuit reversed Judge Henderson’s decision, applying a color-blind approach, and finding that voters may restrict affirmative action programs for women and minorities because such programs are a form of discrimination presumptively prohibited by the Equal Protection Clause, and that the removal of programs that are barely permissible cannot be impermissible.

This Essay began as a presentation at a spring 2010 symposium discussing Judge Henderson’s decisions. In August 2010, after the

* Clinical Professor of Law & Director of Professional Skills, University of California, Berkeley School of Law (Boalt Hall). I’m grateful to my research assistants Robert Leider, Mellori Lumpkin, Camille Pannu, Julia Parish, and Sarah Williams for their assistance on this paper. Any errors are solely my responsibility.
presentation, the California Supreme Court issued its own long-awaited decision on Proposition 209. Following the color-blind approach of the Ninth Circuit, the California Supreme Court also held that Proposition 209 did not violate the Equal Protection Clause. The majority decision regarded equality law as simply prohibiting racial classifications, rather than protecting minorities from inequality. In a dissenting opinion that tracked many of the concerns and insights of Judge Henderson’s decision, Justice Carlos Moreno argued that the initiative did violate the political structure doctrine, and pointed to the adverse consequences for minorities that Judge Henderson had correctly anticipated.

In 2006 the voters of Michigan passed Proposal 2—nearly a clone of California Proposition 209—which eliminated affirmative action admissions for minorities at Michigan’s public universities, and thus abrogated the effect of the Supreme Court decision in Grutter v. Bollinger. (The Grutter decision had permitted the University of Michigan Law School affirmative action program to continue.)

On July 1, 2011, just as this Essay was going to press, the Sixth Circuit issued its opinion in Coalition to Defend Affirmative Action v. Regents of the University of Michigan, holding that Proposal 2 violated the Equal Protection Clause. The editors have kindly permitted me to add this abstract and a brief afterward discussing the Sixth Circuit decision, which further vindicates Judge Henderson’s application of the political structure doctrine and his approach to the Equal Protection Clause.

INTRODUCTION

How should we apply the Equal Protection Clause of the Fourteenth Amendment, the Constitution’s provision for racial equality? This is one of the critical questions of our time. One traditional view is that when a state actor passes laws or makes decisions that cause disadvantages to racial or ethnic minority groups, it violates the principle of equality unless it can provide a compelling justification.  

1. See Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that “legal restrictions which curtail the civil rights of a single racial group are immediately suspect[,]” but nevertheless upholding such restrictions when required by “[p]ressing public necessity”); see also, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (noting “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination”); Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948) (prohibiting judicial officers from enforcing racially restrictive covenants); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); Strauder v. West Virginia, 100 U.S. 303, 306–07 (1879) (key purpose of Fourteenth Amendment to secure equal standing of African Americans).
thus, laws or actions that disadvantage them are presumptively illegitimate.\(^2\) This view finds support in legal scholarship under the theory of “anti-subordination.” It treats the equality amendment to the Constitution as intended to protect subordinated groups from state-sponsored racial disadvantage.\(^3\)

An alternative view is that the Constitution does not recognize racial or ethnic groups as favored or disfavored, or even permit recognition of racial group identity, and is solely concerned with the state’s treatment of individuals. Under this view, state actors violate the principle of equality when they intentionally act to cause advantage or disadvantage to any individual based on his or her race or ethnicity.\(^4\) This view finds support in legal scholarship under the “anti-discrimination” principle, which posits that the purpose of the Constitution’s Equal Protection Clause is to prohibit state actors from using racial classifications.\(^5\) This principle seems to derive chiefly from colorblindness. Note that the term “anti-discrimination principle” may unintentionally mix prior concepts of anti-subordination with current colorblindness jurisprudence because both have taken place under the aegis of “antidiscrimination law.”

Under the first view, the state may recognize the existence of racism and may take actions to remedy it. For example, the state may consider racial diversity as a factor in university admissions, and may take affirmative action to ensure that a critical mass of minority students enroll in state universities.\(^6\) Under the second view, such affirmative action plans violate the Fourteenth Amendment to the Constitution because they make judgments about people based on their race.\(^7\) The second view is often described as dependent on a

\(^2\) See Carolene Prods. Co., 304 U.S. at 153 n.4 (laws that disadvantage a minority must be scrutinized more carefully than laws which disadvantage the majority); Martin Luther King, Jr., Letter From Birmingham Jail (1963) (laws passed by a majority to oppress a minority are illegitimate).


\(^4\) See, e.g., Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 758–59 (2007) (requiring strict scrutiny for all racial classifications, collecting previous authority, and then rejecting a school district’s voluntary integration program); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229–30 (1995) (holding, under the Fifth Amendment’s Due Process Clause, that “any individual suffers an injury when he or she is disadvantaged by the government because of his or her race. . . .”); id. at 238–39 (applying strict scrutiny to an affirmative action program encouraging highway construction subcontracts to go to businesses entities owned by those who have suffered social or economic disadvantage).


\(^7\) See id. at 368 (Thomas, J., concurring in part and dissenting in part).
“color-blind” reading of the Constitution, in that the analysis of a racial classification is made without seeing (blind to) the race of the person(s) affected.\textsuperscript{8} The color-blind view may, alternatively, be described as “racism-blind,”\textsuperscript{9} in that it prevents courts from examining whether policies that are neutral on their face cause disadvantages to racial minorities.

This Essay examines how Judge Thelton Henderson’s decision in the Proposition 209 case correctly applied what I call a “racism-aware” analysis to reject a voter initiative limiting affirmative action for minorities and women, and how the U.S. Court of Appeals for the Ninth Circuit, and more recently the California Supreme Court, mistakenly applied a color-blind analysis in upholding the initiative. I argue that Judge Henderson correctly rejected a color-blind/racism-blind approach to reading the Constitution, embracing instead an approach that properly requires state actors to be racism-aware.

\textbf{RACISM-BLINDNESS VERSUS RACISM-AWARENESS}

Advocates of color-blindness assert that all race-conscious actions should be viewed identically—as racial discrimination—whether they are intended to assist those who have been disadvantaged by racism or to perpetuate racial inequality. For example, in a recent case, Chief Justice Roberts’s majority opinion stated that the purpose of \textit{Brown v. Board of Education} was not to prohibit school segregation, but to end the use of race as a factor in school assignments.\textsuperscript{10} The analysis ignores the history of school segregation, which was used to subordinate African-American students, not simply to separate them from white students. Expressing exasperation with proponents of state-sponsored affirmative integration efforts, Chief Justice Roberts complained, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” What Justice Roberts has missed in this explication is that fifty years after adopting his solution—banning discrimination—it remains a problem, requiring a remedy. By regarding affirmative action and segregation as equally improper, Justice Roberts and his conservative colleagues treat the

\textsuperscript{8} Parents Involved, 551 U.S. at 861–62 (Breyer, J., dissenting).


\textsuperscript{10} Parents Involved, 551 U.S. at 747.

\textsuperscript{11} \textit{Id.} Treating the statement as, perhaps, self-evident, the Chief Justice offered no empirical support for the proposition that ending affirmative integration efforts will lead to integration, or to the end of racial discrimination or segregation.
problem (discrimination against racial minorities, a continuing pervasive problem) as indistinguishable from one of its solutions. Under the color-blind view, state-sponsored integration is little different from state-sponsored segregation.12

By contrast, supporters of affirmative action assert that color-blindness blinds us to the continuing inequality that disadvantages minorities; color-blindness depends on pretending that racism no longer exists.13 In a dissenting opinion from a leading “color-blind” decision striking down an affirmative action program, Justice Stevens complained that the majority was disregarding “the difference between a ‘No Trespassing’ sign and a ‘welcome mat.’”14 Justice Stevens’s support for affirmative action remedies stems from his recognition that the Fourteenth Amendment’s original purpose was “primarily to guarantee the constitutionality of the race conscious measures established in the Freedmens Bureau Acts, which were subsequently affirmed through the Civil Rights Act of 1866, and to address the problems of racism during the post-Civil War period.”15 As Justice Stevens affirmed, the historical evidence demonstrates that the Fourteenth Amendment was specifically intended to permit Congress to take affirmative action to protect black Americans from discrimination. The color-blindness doctrine relies on a misreading of history, a misreading that substantially blocks continuing movement toward substantive equality, and perpetuates inequality.16

Currently, the Supreme Court is closely divided in determining which vision of race equality will guide its future jurisprudence. A majority of the Justices have endorsed the color-blindness rationale with regard to school board decisions to adopt racism-aware integration plans, and to require proof of individualized intent to discriminate to establish a violation of the equality principle.17 However, a majority also endorsed a racism-awareness view in permitting a university to consider race in enrolling a diverse student body.18

This Essay will examine how Judge Thelton Henderson’s decision in the Proposition 209 case correctly applied a racism-aware analysis to reject a voter initiative limiting affirmative action for minorities and women, and how the U.S. Court of Appeals for the Ninth Circuit, and more recently the California

12. The Court has recognized one exception, allowing states (and courts) to use race-conscious measures when desegregating state institutions that engaged in prior unconstitutional state-sponsored racial segregation. See, e.g., id. at 772 n.19; United States v. Fordice, 505 U.S. 717, 729 (1992) (holding that “adoption and implementation of race-neutral policies alone [does not] suffice to demonstrate that the State has completely abandoned its prior dual system”).
14. Id. at 245.
17. Parents Involved, 551 U.S. at 747.
Supreme Court, erroneously applied a color-blind analysis in upholding the initiative.

**THE BACKGROUND OF CALIFORNIA’S PROPOSITION 209**

In 1996, the voters of California passed Proposition 209, an initiative that amended the state constitution to prohibit the state and its subdivisions from granting preferences based on race, sex, color, ethnicity, or national origin in public education, employment, and contracting. Despite California’s diverse population, its registered voting population did not reflect this diversity, as exit polls showed that a majority of white voters and a majority of male voters supported the initiative, while a majority of women voters opposed it, as did a majority of African Americans, Latinos, Asian Americans, Catholics, and Jews.

The day after the election, the Coalition for Economic Equity, an umbrella group for ten local and national civil rights groups, joined by thirteen other civil rights groups and eleven individuals, filed a civil action in the U.S. District Court for the Northern District of California seeking a temporary restraining order, a declaration that the initiative violated the U.S. Constitution, and an injunction prohibiting it from taking effect. The case was assigned to Chief Judge Thelton Henderson.

Judge Henderson was particularly well positioned to apply a racism-aware perspective to the case. He had been one of just two black students in his Boalt Hall graduating class in 1962. He was the first African-American attorney in the Civil Rights Division of the U.S. Department of Justice. He served until he was forced to resign in 1965 for giving Dr. Martin Luther King, Jr. a ride in a government car when King’s own car broke down on a dark and lonely road outside Selma, Alabama—even though this act likely saved Dr. King from a lynching. Judge Henderson then became the first black legal services lawyer in East Palo Alto, California, and took a position as an assistant dean at nearby Stanford Law School, where he began to recruit black students after learning that Stanford Law had no black graduates until 1968. He handled race discrimination cases as a legal services lawyer and in private practice. By the time he was assigned to the Proposition 209 case, he had served on the district court for over fifteen years and had heard numerous discrimination law cases.

One of Judge Henderson’s earlier cases was particularly germane. In the 1970s, the voters of San Francisco adopted an affirmative action plan for their city and county’s contracting for goods and services. They did so in light of findings that minority-owned firms made up nearly half the contracting

---

19. CAL. CONST. art. 1, §31(a).
21. Id.
availability in the city but were awarded less than 10% of the work. The plan was adopted after lengthy hearings established a long history of exclusion from contracting opportunities for small businesses owned by minorities and women. In response to the plan’s adoption, an association of white-owned contractors challenged the plan, and Judge Henderson heard the case. Judge Henderson found:

[W]ith respect to prime construction contracting, the disparities between the number of available Asian, Black, and Hispanic owned locally based firms and the number of contracts awarded to such firms was statistically significant, not attributable to chance, and supported an inference of discrimination. Specifically, the study found that Asian construction contractors had a 23.6 percent availability, but received only 4.3 percent of prime construction contract dollars. The analogous figures for Black construction contractors were 13.3 percent and 2.2 percent, and for Hispanics, 11 percent and 3.4 percent.

***

In addition to statistics, the San Francisco Board of Supervisors was presented, over the course of several hearings, with written and oral testimony from many MBEs who complained that discriminatory practices kept them excluded from prime contracts with the city.

***

The city found that the weight of the evidence before it and the [Human Rights Commission] in 1983, 1984, 1988, and 1989, supported the conclusion that the city had engaged in discriminatory practices with respect to minority contractors and that remedial action was warranted.\(^2\)\(^4\)

After recounting and explaining why the city’s lengthy record supported inferences of discrimination against minority contractors, Judge Henderson found a “strong basis in evidence for taking corrective action and that its asserted remedial purpose is genuine.”\(^2\)\(^5\) The case provided a clear understanding of how local governments could be racism-aware and adopt constitutionally permissible affirmative action programs to address continuing discrimination. Judge Henderson acknowledged that the Constitution’s equal protection guarantee and the government’s concern with addressing racial discrimination have often been at odds with each other.\(^2\)\(^6\) He held, however, that a history of discrimination among a people is not easily reversed by a mere mandate preventing discrimination.\(^2\)\(^7\) He concluded that “certain circumstances may require the force of a race conscious remedy to dislodge ingrained patterns and bring the promise of complete equality within the grasp of, if not this,

\(^{24}\) Id.
\(^{25}\) Id. at 1453 (internal quotation marks omitted).
\(^{26}\) Id. at 1448.
\(^{27}\) See id.
future generations.”

PROPOSITION 209'S FEDERAL COURT REVIEW

In the Proposition 209 case, Judge Henderson analyzed the legality of the initiative by asking whether it illegitimately disadvantaged minority groups and women by preventing them from petitioning local government to enact affirmative action programs, as in the San Francisco example. For authority, he looked to two other cases in which voter initiatives limiting local civil rights efforts were stymied. In each, the U.S. Supreme Court had found a violation of the Equal Protection Clause.

In the first case, Hunter v. Erickson, the voters of Akron, Ohio, repealed the city council’s fair housing ordinance and amended the city charter to require a referendum on any further fair housing law. Other Akron laws required only a vote by the city council. In the second case, Washington v. Seattle School District, the state of Washington, by voter initiative, passed a prohibition on school busing for desegregation purposes while permitting busing for all other purposes. The effect was to prevent the Seattle schools from implementing a voluntary desegregation plan that had majority support in Seattle but not in the state as a whole. Racial and ethnic minorities, who were a substantial voting bloc in Seattle (but not statewide), had broadly supported the busing plan.

In both cases, the Court held that the initiatives violated the Constitution by moving the forum for deciding topics of special interest to racial minorities, and thus divesting them of their power to influence government action. In each case, majority voters had erected a higher barrier for minority group members to petition for government action, violating their right to equal protection of the laws under the Fourteenth Amendment. In Hunter, the ordinance treated “racial housing matters differently” from other kinds of housing disputes, such as discrimination based on political grounds, or circumstances where tenants sought better maintenance or rent control. It burdened only the minority, because the “majority needs no protection against discrimination.” The Court concluded that the city “may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote.”

In Seattle School District, the Court reasoned that the initiative removed “the authority to address a racial problem—and only a racial problem—from

28. Id.
32. Hunter, 393 U.S. at 389.
33. Id. at 391.
34. Id. at 393.
the existing decisionmaking body, in such a way as to burden minority interests.”

By moving the decision-making authority to a “new and remote level of government” the Seattle residents seeking “the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate,” while other school assignment decisions were left with local school boards.

These cases announced what has subsequently been described as the “political structure” doctrine, which prohibits majority voting resulting in the dilution, removal, or divestment of minority political power from local governments. Judge Henderson found that Proposition 209, like the initiatives in Washington and Akron, created a separate and higher barrier of the same sort for minority group members and women seeking governmental affirmative action programs, and thus violated the political structure doctrine. Judge Henderson reached this conclusion by viewing petitioners’ claims through the lens of racism-awareness. His opinion set forth the ways in which minority group members and women had been disadvantaged in seeking government employment, government contracts and subcontracts, and admission to University of California (UC) and California State University (CSU) campuses. Further, it outlined the ways in which these groups would be further disadvantaged in each of these areas if the initiative took effect.

Judge Henderson pointed out that if Proposition 209 were enacted, the political process would be restructured to disadvantage only those proposing legislation that benefited women or minorities. Such an outright exclusion would be an egregious violation of these groups’ equal protection rights. Citing Hunter and Seattle School District, Judge Henderson stated such a restructuring would be “tantamount to vote dilution.”

Judge Henderson’s opinion details how minority group members and women, having a particular interest in seeking affirmative action plans, had worked to pass affirmative action plans and had voted against the initiative. He pointed to the example of San Francisco, where voters had adopted an affirmative action plan but were subsequently deprived of the power to maintain such plans. In San Francisco, he explained, voters could adopt affirmative action plans for veterans, people with disabilities, people over forty years old, or other groups that voters felt should have assistance to level the

36. Id. at 483.
37. Id. at 474.
38. Id. at 476.
39. See id. at 467.
41. Id. at 1499.
42. Id.
43. Id. at 1510.
44. Id. at 1495.
45. Id. at 1496.
playing field, but could no longer adopt such plans to level the field for women and minorities. 46

Turning to the arguments made in support of the initiative, Judge Henderson explained:

[Defendants argue that Proposition 209, unlike the Washington and Akron initiatives, expressly prohibits classifications based on race and gender, and thus cannot be read to create such classifications. Defendants essentially ask this Court to read the plain language of Proposition 209, which concededly contains no classification on its face, and go no further. While it would certainly streamline the inquiry, this approach is expressly disapproved in Hunter and Seattle. Despite the facial neutrality of the challenged enactments in both of those cases, the Supreme Court looked beyond the plain language of the measure in question and inquired whether, "in reality, the burden imposed by [the] arrangement necessarily falls on the minority." 47

Judge Henderson saw that the initiative was unconstitutional because he viewed it through a racism-aware lens. He recognized the initiative's purpose and effect as directed at harming minorities, despite the neutrality of its language, because he looked past the language with awareness of how racism operates. He rejected a color-blind approach as myopic.

The Ninth Circuit used a different approach and thus reached a different conclusion. There, the panel examined the case through the lens of color-blindness, viewing the essence of an equal protection claim as the creation of racial classifications, rather than discrimination against minorities. Reversing Judge Henderson's decision, the court reasoned that under the Constitution, affirmative action and racial discrimination were essentially the same thing: a classification based on race, sex, or ethnicity. Thus, the court wrote: "A law that prohibits the state from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." 48 They described the law as "neutral" 49 because it prohibited affirmative action for whites and men as well as minorities and women, unintentionally evoking the observation of Anatole France that "the law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges and stealing bread." 50

The Ninth Circuit did not see how Proposition 209 harmed minorities, not because it was color-blind, but because it was racism-blind. Had the panel examined the initiative through the lens of racism-awareness, it would have seen that the initiative was anything but neutral. Judge Henderson recognized that the initiative would reduce the number of minority students attending the University of California, the number of minority employees in state and local

46. Id.
47. Id. at 1502.
48. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997).
49. Id. at 707.
50. ANATOLE FRANCE, THE RED LILLY 87 (1905).
government employment, the number of minority owned government contractors, and the number of minority employees working for government contractors and employers.

**PROPOSITION 209 REVIEWED IN THE CALIFORNIA SUPREME COURT**

Following the Ninth Circuit's 1997 decision rejecting the challenge to the initiative (codified in the California Constitution, article I section 31), several cases were litigated in the California and federal courts that attempted to enforce its provisions. In some cases, courts found that various government programs were not preference programs, and thus outside the prohibition of Section 31. In others, programs were struck down as prohibited preference plans. But until August 2010, none of these decisions re-examined the constitutionality of Proposition 209 under Judge Henderson's reading of the political structure doctrine.

In *Coral Construction, Inc. v. City and County of San Francisco*, the California Supreme Court took up the question of whether Proposition 209 violated the political structure doctrine, revisiting the analysis applied by Judge Henderson and rejected by the Ninth Circuit. The case began in 2001 when plaintiff Coral Construction commenced action against the City and County of San Francisco, seeking declaratory judgment and injunctive relief against the successor to the city ordinance upheld by Judge Henderson in *Associated Contractors*. The ordinance provided bid discounts for Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs). The plaintiff argued that the ordinance violated Section 31. The City defended by arguing that Section 31 violated the Equal Protection Clause of the Constitution under the political structure doctrine. The Superior Court granted plaintiff's motion for summary judgment, finding that the ordinance violated Section 31. The California Supreme Court granted review and held that Section 31 did not violate the Fourteenth Amendment.

As with the previous ordinance from the 1980s, the ordinance required prime contractors to use MBEs and WBEs at levels set forth by the city or to "make good faith efforts" to target preferential outreach to these businesses. The city implemented the ordinances in response to legislative findings which consisted of: testimony recounting discrimination against women and minorities in Bay Area contracting, statistical studies showing both MBEs and WBEs were underutilized, and findings by the City that City employees

---

52. *Coral Constr., Inc. v. City & Cnty. of San Francisco*, 235 P.3d 947, 947 (Cal. 2010).
53. *Id.* at 952.
54. *Id.* at 953.
55. *Id.* at 954.
56. *Id.*
engaged in substantial discriminatory conduct to assist white male contractors and avoid the use of MBEs and WBEs as city contractors.\textsuperscript{57}

Adopting the same reasoning as the Ninth Circuit in the initial challenge, the California Supreme Court majority decision, by Justice Werdegar, reasoned that racial preferences are a form of discrimination, and thus presumptively unconstitutional.\textsuperscript{58} Adopting a color-blind view of the Fourteenth Amendment, Justice Werdegar described the state of constitutional law permitting affirmative action as a highly limited exception to the general rule prohibiting all racial classifications, regardless of the beneficiaries.\textsuperscript{59} She argued that because the right to preferences for minorities is barely permissible under the Constitution, it cannot be compelled under the Constitution, and the deprivation is unlike the deprivations in the Washington and Akron cases.\textsuperscript{60} Nothing in either case, she wrote, "supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require."\textsuperscript{61}

The majority opinion failed to acknowledge that the policies prohibited by the voters of Akron and Washington were also not required by equal protection. Equal protection does not require a city to pass a fair housing law, nor require a state to permit busing for desegregation. The problem in each case was the creation of a special barrier preventing local minority voters from effectively lobbying local government on an equal footing as other voters, on issues of particular importance to them.

The majority failed to recognize that by shifting the decision of whether to adopt a constitutionally permissible affirmative action program from a city (where minorities have a significant voice) to the state level (where they do not), Section 31 places a greater burden on minorities than on whites, on an issue of very substantial concern to minorities. As Judge Henderson found, residents seeking affirmative action programs for the elderly, veterans, or persons with disabilities may do so at the local level. Those seeking affirmative action programs for minorities may not. The San Francisco example, in which local voters supported an affirmative action program, points out the importance of the difference.\textsuperscript{62} But none of this mattered because, under the California Supreme Court's view of equal protection, the Constitution does not protect minorities; it protects against the acknowledgement of race in government decision-making.

\textsuperscript{57} \textit{Id.} at 986.
\textsuperscript{58} \textit{Id.} at 957.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 984.
\textsuperscript{61} \textit{Id.} at 959.
\textsuperscript{62} The opinion does address the anomaly that the Washington case concerned busing to achieve racial integration, which like affirmative action is sometimes permitted but is not required by the Constitution, by speculating that it would be decided differently today given the changing views on school busing. \textit{Id.} at 959–60.
Justice Corrigan concurred in the judgment, but wrote separately on the applicability of the political doctrine cases. She concluded that the doctrine had no application to Section 31, because the doctrine is concerned with protecting minority rights, while Proposition 209 prohibited preferences for the majority, not for minorities. “Section 31” she wrote:

does not single out racial issues or racially oriented legislation for special treatment. It applies broadly to discrimination or preferential treatment ‘on the basis of race, sex, color, ethnicity, or national origin.’” The inclusion of gender among the affected groups is particularly important, because it significantly broadens the application of the measure. The voters did not focus on a politically powerless racial minority, making it uniquely difficult for that group to achieve beneficial legislation. To the contrary, they passed a sweeping reform abolishing preferential treatment for a range of groups that includes everyone in the state, in various ways.63

Justice Corrigan’s analysis is unsatisfactory for several reasons. First, to pretend that Section 31 applies to “everyone in the state” ignores the Section’s real meaning and effect. The target of the proposition was affirmative action programs for minorities and women; whites and men lost no preferences they had enjoyed prior to Proposition 209’s passage. And it was whites and men who provided the votes to pass the proposition, over the objection of minorities and women. Moreover, the Akron initiative prohibited everyone in Akron from achieving a council vote on a fair housing law, not just black Akron residents seeking fair housing. The Washington initiative prohibited white busing opponents, as well as black busing supporters, from passing a busing plan. But in Washington, as in Proposition 209, it was minority supporters who were harmed by the passage of invidious legislation, and it was white opponents who celebrated the “success” in restricting busing. And while Proposition 209 is neutral on its face, the campaign was primarily directed at affirmative action programs for minorities, and it is minorities who have suffered the most from the end of governmental affirmative action in the state, particularly in the area of public university admissions.

If Justice Corrigan is asking us to conclude that because women are a majority of the population, they cannot be treated as a political minority, then she ignores the evidence of the real social and economic disadvantage—which is too well established to be dismissed by judicial fiat—that political minorities continue to experience. If she means that the state may discriminate against racial minorities as long as it also discriminates against women, then she has turned equal protection on its head. Moreover, although Section 31 prohibits sex-based affirmative action, the campaign focused almost exclusively on the issue of race-based affirmative action, and particularly on affirmative action for minorities seeking admission to public universities.

63. Id. at 966 (internal citations omitted).
In a solo dissent, Justice Moreno followed the reasoning of Judge Henderson's opinion, applying the political structure doctrine to the intent and impact of the proposition, instead of its facial neutrality. He concluded that Section 31 directly singled out non-white racial groups and changed the political process to place structural barriers against any future attempts by minorities to obtain beneficial legislation. Section 31, then, directly contravened the political structure doctrine articulated by the Supreme Court in *Hunter* and *Seattle*.

It did not have to end this way. In 1966, the California Supreme Court considered whether the voters had violated the Equal Protection Clause by passing Proposition 14, a voter initiative that overturned a fair housing law enacted by the legislature. Prior to 1964, homeowners were free to discriminate as they chose in renting or selling residential property. The legislation, passed in the summer of 1964, prohibited racial discrimination by property owners, regardless of the race of the seller/lessor or the buyer/lessee. A few months after the fair housing law's enactment, California voters adopted Proposition 14, overturning the legislation by a vote margin of over 2–1. The initiative was facially neutral, in the same manner as Proposition 209. The result was that California law returned to its pre-1964 status, in which housing discrimination was legal.

Under the reasoning of the current California Supreme Court, Proposition 14 would have been upheld because it ostensibly put everyone in the state on the same footing, free to discriminate or not as they chose. The Proposition 209 court might have added that Proposition 14 could not be seen as anti-black because it permitted blacks to discriminate against whites just as whites could discriminate against blacks.

But the court in 1966 understood equal protection through the lens of racism-awareness. It held, by a vote of 5–2, that the purpose of Proposition 14 was to assist property owners, through the power of state action, in discriminating against racial minority groups. The U.S. Supreme Court then affirmed the California Supreme Court's majority decision invalidating Proposition 14.

**THE PRACTICAL EFFECTS OF PROPOSITION 209 ON ENROLLMENT AT THE UNIVERSITY OF CALIFORNIA**

Judge Henderson predicted that if Proposition 209 took effect, it would significantly reduce the number of African-American and Latino students at the

---

64. *Id.*


66. *Mulkey*, 413 P.2d at 834.
University of California. Unfortunately, Judge Henderson’s prediction has proven accurate, and the number of these minority students at the University of California (UC) has plummeted, particularly at its Berkeley and Los Angeles campuses. In the period from 1996 to 2008, the percentage of African-American new high school graduates in California ranged between 7 to 8 percent.\(^6\)

**Table 1**

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of California New High School Graduates Who Are African American</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>7.3</td>
</tr>
<tr>
<td>1996</td>
<td>7.2</td>
</tr>
<tr>
<td>1997</td>
<td>7.1</td>
</tr>
<tr>
<td>1998</td>
<td>7.0</td>
</tr>
<tr>
<td>1999</td>
<td>7.1</td>
</tr>
<tr>
<td>2000</td>
<td>7.2</td>
</tr>
<tr>
<td>2001</td>
<td>7.3</td>
</tr>
<tr>
<td>2002</td>
<td>7.4</td>
</tr>
<tr>
<td>2003</td>
<td>7.5</td>
</tr>
<tr>
<td>2004</td>
<td>7.6</td>
</tr>
<tr>
<td>2005</td>
<td>7.7</td>
</tr>
<tr>
<td>2006</td>
<td>7.8</td>
</tr>
<tr>
<td>2007</td>
<td>7.9</td>
</tr>
<tr>
<td>2008</td>
<td>8.0</td>
</tr>
</tbody>
</table>

At the Berkeley and Los Angeles campuses, UC’s flagship schools, the percentage of African-American students enrolling as undergraduates was close to 7 percent of the total undergraduate population in the period leading up to Proposition 209. In 1998, a year after the Proposition took effect, this figure dropped by half.\(^6\) The population of African-American undergraduate students has since increased to nearly 4 percent at Berkeley and nearly 5 percent at Los Angeles, still well below the pre-209 percentage, and well below the available statewide pool of eligible, qualified applicants.

---

68. *Id.*
In the period from 1995 to 2008, the percentage of Latino high school graduates in California grew from just under 30 percent to just over 38 percent.\textsuperscript{71}

Table 3
Percentage of Latina/o California New High School Graduates\textsuperscript{72}

The percentage of Latino students enrolling as undergraduates at Berkeley was just over 15 percent in the period leading up to Proposition 209, and enrollment dropped to 7 percent in 1998.\textsuperscript{73} The percentage of Latino students

\textsuperscript{70} id.


\textsuperscript{73} UC Berkeley Fall Enrollment Data, http://opa.berkeley.edu/institutionaldata/archiveenroll.htm#three (last visited June 15, 2010).
enrolling as undergraduates at Berkeley has since increased to 11.7 percent.\textsuperscript{74}

The percentage of Latino students enrolling at UCLA was just over 20 percent in the period leading up to Proposition 209, and dropped to 10 percent in 1998.\textsuperscript{75} The Latino undergraduate population has since increased to 16 percent, while the percentage of Latino high school graduates has risen to 38 percent.\textsuperscript{76} Thus, in the period just before Proposition 209, approximately 67 percent of potential Latino students were enrolled at UCLA. By 2008 this figure had dropped to 42 percent of potential high school graduates. Similarly, in the period just before Proposition 209, Berkeley’s share of potential Latino students was approximately half of what would have been expected had all qualified students been enrolled. In 2008, this figure was 30 percent.

\begin{table}
\centering
\caption{Percentage of Latino/a New California High School Graduates, Berkeley and UCLA\textsuperscript{77}}
\begin{tabular}{cccccccccccc}
\hline
\hline
\hline
\end{tabular}
\end{table}

These trends within the undergraduate population were amplified at the graduate and professional school level. In 1994, African-American students composed 12 percent of Berkeley Law School (Boalt Hall)’s incoming student population. In 1997, the first class admitted under Proposition 209, there was only one African-American student in an incoming class of 270 first-year law students. The number of African-American students at Berkeley Law has since increased to 5 percent, still less than half the pre-Proposition 209 enrollment.\textsuperscript{78} Meanwhile, the overall percentage of African-American graduate students at all University of California (UC) campuses has dropped from approximately 4 percent of the student body in 1994 to approximately 2.6 percent in 2008.\textsuperscript{79}

\textsuperscript{74} UC Berkeley Fall Enrollment Data, http://opa.berkeley.edu/institutionaldata/archiveenroll.htm#three (last visited June 15, 2010).
\textsuperscript{75} Statistical Summary: Student Enrollment Tables Fall 1998 (Feb. 11, 1999), http://www.ucop.edu/ucophome/uwnews/stat/enrollment/er1998/pla98.html.
\textsuperscript{76} UCLA Admissions History: New Freshman Admissions by Ethnicity (June 5, 2010), http://www.aim.ucla.edu/admissions/admissions_ethnicity_FR.asp.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
Table 5
Percentage of African Americans enrolled at Boalt Hall

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>18</td>
</tr>
<tr>
<td>1991</td>
<td>16</td>
</tr>
<tr>
<td>1992</td>
<td>14</td>
</tr>
<tr>
<td>1993</td>
<td>12</td>
</tr>
<tr>
<td>1994</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>8</td>
</tr>
<tr>
<td>1996</td>
<td>6</td>
</tr>
<tr>
<td>1997</td>
<td>4</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
</tr>
<tr>
<td>1999</td>
<td>0</td>
</tr>
<tr>
<td>2000</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>6</td>
</tr>
<tr>
<td>2002</td>
<td>8</td>
</tr>
<tr>
<td>2003</td>
<td>10</td>
</tr>
<tr>
<td>2004</td>
<td>12</td>
</tr>
<tr>
<td>2005</td>
<td>14</td>
</tr>
<tr>
<td>2006</td>
<td>16</td>
</tr>
<tr>
<td>2007</td>
<td>18</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
</tr>
<tr>
<td>2009</td>
<td>14</td>
</tr>
</tbody>
</table>

In 1994, 13 percent of incoming Berkeley Law students were Latino. In the wake of Proposition 209, the percentage dropped to 5 percent in 1997. The population of Latino law students has since increased back to 13 percent, while the Latino population in California has increased dramatically. Similarly, the percentage of Latino graduate students at all UC campuses has dropped from approximately 7.6 percent in 1994 to approximately 7.3 percent in 2008, despite the substantial increase in the population of Latinos in the state.

Table 6
Percentage of Latina/o students enrolled at Boalt Hall

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>18</td>
</tr>
<tr>
<td>1991</td>
<td>16</td>
</tr>
<tr>
<td>1992</td>
<td>14</td>
</tr>
<tr>
<td>1993</td>
<td>12</td>
</tr>
<tr>
<td>1994</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>8</td>
</tr>
<tr>
<td>1996</td>
<td>6</td>
</tr>
<tr>
<td>1997</td>
<td>4</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
</tr>
<tr>
<td>1999</td>
<td>0</td>
</tr>
<tr>
<td>2000</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>6</td>
</tr>
<tr>
<td>2002</td>
<td>8</td>
</tr>
<tr>
<td>2003</td>
<td>10</td>
</tr>
<tr>
<td>2004</td>
<td>12</td>
</tr>
<tr>
<td>2005</td>
<td>14</td>
</tr>
<tr>
<td>2006</td>
<td>16</td>
</tr>
<tr>
<td>2007</td>
<td>18</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
</tr>
<tr>
<td>2009</td>
<td>14</td>
</tr>
</tbody>
</table>

African Americans, Latinos and Native Americans comprise 44 percent of California’s population, but similarly to UC’s law schools, are only 17.8

80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
percent of the first year medical students at the eight UC medical schools.\textsuperscript{85}

Table 7

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of African Americans Enrolled in UC Graduate Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>9</td>
</tr>
<tr>
<td>1996</td>
<td>8</td>
</tr>
<tr>
<td>1997</td>
<td>7</td>
</tr>
<tr>
<td>1998</td>
<td>6</td>
</tr>
<tr>
<td>1999</td>
<td>5</td>
</tr>
<tr>
<td>2000</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>3</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
</tr>
<tr>
<td>2003</td>
<td>1</td>
</tr>
<tr>
<td>2004</td>
<td>0</td>
</tr>
<tr>
<td>2005</td>
<td>1</td>
</tr>
<tr>
<td>2006</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>3</td>
</tr>
<tr>
<td>2008</td>
<td>4</td>
</tr>
</tbody>
</table>

Table 8

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of Latino/as Enrolled at UC Graduate Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>9</td>
</tr>
<tr>
<td>1996</td>
<td>8</td>
</tr>
<tr>
<td>1997</td>
<td>7</td>
</tr>
<tr>
<td>1998</td>
<td>6</td>
</tr>
<tr>
<td>1999</td>
<td>5</td>
</tr>
<tr>
<td>2000</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>3</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
</tr>
<tr>
<td>2003</td>
<td>1</td>
</tr>
<tr>
<td>2004</td>
<td>0</td>
</tr>
<tr>
<td>2005</td>
<td>1</td>
</tr>
<tr>
<td>2006</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>3</td>
</tr>
<tr>
<td>2008</td>
<td>4</td>
</tr>
</tbody>
</table>

The passage of Proposition 209 caused a precipitous decline in the number of racial and ethnic minorities enrolled in California institutions of higher education. Although the drop has partially rebounded from deepest low


points immediately following passage of the proposition, minorities remain
greatly underrepresented as compared with their pre-209 representation and in
relation to their increasing availability in the pool of recent California high
school graduates.

A recent UC report documents how the exclusion of minorities from
California's UC system increased following Proposition 209. The report found
that, compared with the demographics of California high school students as a
whole, minorities remain underrepresented in both undergraduate and graduate
studies.88 In recent years, UC schools have enrolled minority students in higher
absolute numbers than prior to the passage of Proposition 209.89 But
considering the increasing population of minority students in California high
schools, the racial equity gap has actually widened between the number of
eligible minorities and those actually enrolled at UC schools.90

The study revealed a more ominous situation regarding the
underrepresentation of minority students at the graduate level. Minorities
remained greatly underrepresented at UC business schools and at UC law
schools.91 Individual departments within the UC system often had more drastic
underrepresentation, with some departments lacking any female or minority
members.92 Only the percentage of minorities enrolled at UC medical schools
approximated the enrollment levels found prior to the passage of Proposition
209, which remained substantially below the projected enrollment given the
available population.93 Such underrepresentation, the report found, "clearly
limits the University's ability to contribute to a diverse leadership cadre for
California."94

UNDERSTANDING PROPOSITION 209'S RACIALLY DISPARATE EFFECTS
THROUGH RACISM-AWARENESS

One can approach an understanding of the underrepresentation of Black
and Latino students at UC from either of the two legal perspectives outlined
above. If the Ninth Circuit's and California Supreme Court's color-blind view
is correct, then although California higher education admission practices
impose a disproportionate impact upon minorities, this disproportionate impact
is not wrongful: minority applicants have the same chance to compete for
scarce admission slots as any other applicant. Their admission outcomes result
from who they are as individuals, with admission committees examining their

[88. See, e.g., STUDY GROUP ON UNIVERSITY DIVERSITY: OVERVIEW OF REPORT TO THE
89. Id. at 5.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.]
MCAT or LSAT score, grade point average, and extracurricular activities. The playing field for all is level, and membership in a group neither helps nor hurts them.

A racism-aware perspective approaches these facts more broadly, taking account of their social context. Here, racial prejudice can affect outcomes in two different ways. First, candidates for admission to institutions of higher education do not enter from a level playing field. Minorities are far more likely to begin their academic careers in underfunded and underequipped schools. One report found that "$614 less is spent on students in the districts educating the most students of color as compared to the districts educating the fewest students of color." As a result, keeping a color-blind admissions policy perpetuates previous inequalities. The effect is not to level the playing field, but to leave one group disadvantaged.

As Judge Henderson correctly noted, color-blindness leaves minorities without recourse to the political process to cure discriminatory barriers: a California public university, for example, can take account of harm caused by a person’s poverty but not societal harm inflicted because of someone’s race. The partial rebound of minority enrollment after Proposition 209 likely resulted from the UC schools placing more emphasis on other ways in which applicants face disadvantage. By allowing applicants to explain disadvantages they face (e.g., harms caused by poverty), the UC schools admit more applicants from groups that disproportionately face such difficulties. But it is incongruent to suggest that the Civil War Amendments—designed to stamp out the "relic[s] of slavery"—permit state actors to take account of the harms caused by poverty but not the harms caused by racism.

Additional support for a racism-awareness doctrine can be found in comparative equality law. For example, in the United Kingdom, the 2010 Equality Act requires state actors to pay “due regard” to the racial impact of their actions, a variation on racial-awareness. And throughout the European
Union, state actors that adopt policies that have an adverse impact on minorities or women are subject to liability for indirect discrimination, regardless of their intent. They are thus charged with being aware of the consequences of their actions, at the risk of liability. In the United States, this principle of "adverse impact liability" is only imposed under the employment discrimination statutes, not under the Constitution.

A racism-aware perspective also allows institutions of higher education to realize the benefits accruing from diversity. The Grutter Court recognized the immense educational benefits that flow from learning in a diverse classroom. In today's global economy, it is imperative that tomorrow's professionals be exposed to "widely diverse people, cultures, ideas and viewpoints." The military has stated that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." The Court highlighted that higher education is the "training ground for our Nation's leaders"; therefore, it is probably most important that admissions policies be viewed through a lens of racism-awareness.

Moreover, racial disadvantage is compounded by the different mechanisms of discrimination and inequality. Thus, disadvantage in education is exacerbated by disadvantages in healthcare, government services, housing, civic participation, employment opportunity, access to business services, and the operation of the criminal justice system. Drawing on an earlier article I wrote on the impact of Proposition 209, I ask the reader to consider the position of this hypothetical, but realistic, seventeen-year-old African-American high school senior, as he considers applying to college:

[I]t is likely that his or her (hereafter his) African-American parents earn substantially less than similarly educated whites. They are less

---


103. Id. at 331.

104. Id.

105. Id.

106. Id. at 334.

107. See Oppenheimer, supra note 51, at 23–27.

108. Among high school graduates, African Americans earn 78 cents for every dollar earned by white Americans. Among college graduates, African Americans earn 84 cents for every dollar earned by white Americans. Even among 25–34 year old college graduates who have lived their entire lives under the protection of the civil rights laws, the earnings gap is still 15 cents on
likely to be hired or promoted than similarly qualified whites, and earn less even if they do hold similar jobs. Even correcting for income, they have far less wealth than whites of similar income, in significant part because whites have typically been granted or inherited the wealth-building advantages of home ownership through government subsidized loans that were restricted to whites until the 1970’s, and are still disproportionately granted to whites. If these African-American parents were able to buy a home, it was probably in a minority neighborhood, where home values rise less quickly than in white neighborhoods, yet they were more likely to pay a higher (“sub-prime”) interest rate than whites with similar income and credit ratings. They were more likely to need a car to get to and from that home, because subsidized public transportation is disproportionately provided to white neighborhoods, even though the need is greater in minority neighborhoods, where fewer people can afford to own cars. Car ownership remains out of reach for more African Americans than whites in part because car dealers charge whites less than blacks for identical cars, and dealers charge a higher interest rate to blacks than they do to whites with the same credit ratings.


113. Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991) (White men were offered cars at $818 over dealer cost while black men were asked for $1,534 over dealer cost and black women were asked for $2,169 over dealer cost; Ayers estimates that blacks pay an extra $150,000,000 annually for new cars because of race-based price discrimination.).

neighborhoods is that minority neighborhoods have less political influence. This also means there is less attention paid to other public infrastructure investments, including garbage collection, street sweeping, road and sign repair, street lights, fire fighting, water and sewer systems, libraries, parks, and other services that support neighborhood development. Why? Partly because the Republican Party has written off the black vote and often works to suppress it.\(^5\) But it is also because there are fewer black voters per capita because so many black men (currently one in four) have been disenfranchised by our criminal justice system,\(^116\) in which African Americans—as compared to similarly situated whites—are more likely to be: stopped by the police;\(^117\) searched when stopped;\(^118\) arrested;\(^119\) booked on felony charges;\(^120\) refused "OR" (own recognizance) release;\(^121\) refused a low bail;\(^122\) refused deferral;\(^123\) charged with a felony;\(^124\) tried, convicted; denied probation; denied an alternative sentence; sentenced to prison;\(^125\) and denied parole. That is, at every step of the criminal justice system African Americans are treated less well than similarly situated white Americans.\(^127\) Our seventeen-year-old African-
American high school junior has probably had more encounters with the police, and more serious encounters, than a seventeen-year-old white American high school junior who has engaged in the same conduct.

What has his experience been at school? He has probably been disciplined more than white students who engaged in the same conduct. His school probably has far fewer resources than schools serving white neighborhoods, including textbooks, classroom space, science labs, language labs, computers, library resources, academic counseling, pre-college counseling, college preparatory classes, advanced placement classes, food service facilities, and athletic facilities. He will probably get little or no meaningful pre-college counseling, and thus will not know which classes he needs to take to qualify for UC or CSU, nor how he should be preparing for the SAT. His teachers are far less likely to have teaching experience or even permanent teaching credentials. While teacher expectations tend to be strong predictors of student performance, his teachers are likely to expect less of him academically than they do of otherwise similarly situated white students.

If he has looked for a summer or part-time job, he has probably encountered substantial racial discrimination. Employers are less likely to offer him a job than similarly or even less qualified white applicants. In one recent study employers actually preferred white ex-cons over equally qualified black applicants with no criminal record. If he was offered a job, the pay was probably lower and the job responsibilities less desirable than that offered to white students of the same age, experience and qualifications.

If all of this has not left our seventeen-year-old student feeling like an outsider in his own country, he merely needs to go shopping in any

---


130. STEPHEN J. CARROLL ET AL., CALIFORNIA'S K-12 PUBLIC SCHOOLS: HOW ARE THEY DOING 71 (2005) (teachers in primarily minority schools in California are five times more likely to lack credentials compared with teachers in primarily white schools).


133. See, e.g., Turner, supra note 109.


135. See, e.g., Turner, supra note 109.
local mall or downtown business district. It is likely that as he enters most stores he will be regarded as a likely potential shoplifter, followed or watched by store personnel. If he stands near a white person on an elevator or at a check-out counter, he is likely to notice that white person clutching his wallet or her purse, probably unconsciously. If he walks down a quiet street, he will probably have the experience of white people crossing the street to avoid getting too close to him.

CONCLUSION

Racism-awareness analysis requires us to take into account the difference in life experience of this hypothetical black teenager as he contemplates applying to college. Although he is still just a child, through no fault of his own he has been subjected to discriminatory practices that have grotesquely limited his opportunities. To suggest that it would be constitutionally improper to take these race-based disadvantages into account requires that we be blind to racism. It is that blindness that Judge Henderson rejected.

Judge Henderson's rejection of color-blindness in his opinion in the Proposition 209 case gives us a new perspective through which to examine Fourteenth Amendment Equal Protection claims. It suggests that in addition to the color-blind and race-conscious approaches, we can examine equality claims through the lens of "racism-awareness." Racism-awareness requires us to be sensitive to the continuing effects of racism in our society, and it maintains that state actors, consistent with the Fourteenth Amendment, may undertake programs designed to remedy the pernicious effects of racial discrimination.

AFTERWARD

In 2006 the voters of Michigan passed Proposal 2—a near-clone of California Proposition 209—which eliminated affirmative action admissions for minorities at Michigan's public universities, and thus abrogated the effect of the Supreme Court decision in Grutter v. Bollinger.\footnote{539 U.S. 244 (2003)} The principal proponent of Proposal 2 was Ward Connerly, the former University of California Regent who spearheaded the campaign in support of Proposition 209 ten years earlier, and has subsequently directed several other state campaigns to limit affirmative action.

On July 1, 2011, just as this Essay was going to press, the Sixth Circuit issued its opinion in Coalition to Defend Affirmative Action v. Regents of the University of Michigan, holding that Proposal 2 violates the Equal Protection Clause.\footnote{Coal. to Defend Affirmative Action v. Regents of the Univ. of Michigan, Nos. 08-1387/1389/1534; 09-1111, slip op. at 3 (6th Cir. July 1, 2011)} The editors have kindly permitted me to add this brief afterward discussing the Sixth Circuit decision, which further vindicates Judge

\footnote{539 U.S. 244 (2003)}
\footnote{Coal. to Defend Affirmative Action v. Regents of the Univ. of Michigan, Nos. 08-1387/1389/1534; 09-1111, slip op. at 3 (6th Cir. July 1, 2011)}
Henderson’s application of the political structure doctrine, and his approach to the Equal Protection Clause.

The Sixth Circuit’s opinion—written by Judge Cole, joined by Judge Daughtrey, and with a dissent by Judge Gibbons—closely followed Judge Henderson’s approach to the political structure doctrine. The court, in sum, found that “Proposal 2 unconstitutionally alters Michigan’s political structure by impermissibly burdening racial minorities.”138 Explaining the political equality theory underlying the doctrine, the court explained: “The Supreme Court’s statements in Hunter and Seattle clarify that equal protection of the laws is more than a guarantee of equal treatment under the law substantively. It is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities. In effect, the political process theory hews to the unremarkable belief that, when two competitors are running a race, one may not require the other to run twice as far, or to scale obstacles not present in the first runner’s course.”139

In addition to a cogent analysis of the political structure doctrine, the Sixth Circuit majority (relying primarily on language from the district court) responded to the dissenting opinion of Judge Gibbons that mirrored the argument of Justice Corrigan in the California Supreme Court—the position that because women are a majority, the political structure doctrine cannot apply to an initiative ending affirmative action for minorities and women. The Sixth Circuit majority responded:

The argument that racial minorities plus women constitute a majority of the population, and therefore Proposal 2 does not discriminate against minorities . . . borders on nonsense. The attempt to cobble together an artificial coalition of women and racial minorities in an effort to construct a numerical majority of citizens ignores the fact that affirmative action programs generally are targeted to benefit insular groups that separately have suffered from discriminatory practices in the past because of perceived traits unique to that group alone. Lumping minority groups into a contrived category does not allow any greater political influence over the process of advocating for affirmative action programs to achieve racial parity or otherwise render the process of changing the state constitution “bothersome but no more than that.”140

The Sixth Circuit opinion recognized, as Judge Henderson did, that colorblindness is a form of racism-blindness, in which formal equality becomes a substitute for effective equality. It avoided the increasingly common trap of

138. Id.
139. Id. at 9.
privileging the appearance of sameness over the achievement of sameness. One can only hope that its opinion will force further reexamination of the political structure doctrine and our approach to the Equal Protection Clause, and further consideration of the importance of racism-awareness in understanding equality law.