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TRANSCRIPT

CALIFORNIA'S PROPOSITION 209: A TEMPORARY DIVERSION ON THE ROAD TO RACIAL DISASTER[†]

*Derrick A. Bell, Jr.**

Less than a month ago my long-time friend, Chief District Judge Thelton Henderson, gave supporters of California's affirmative action programs a most welcome Christmas present. He followed up the temporary restraining order he issued shortly after Proposition 209¹ was approved by the voters with a preliminary injunction, the appeal of which through the courts would seem to frustrate the goals of this anti-affirmative action initiative for at least two years.²

Almost reflexively, I join the applause for Judge Henderson's courageous decision. Jubilation by affirmative action supporters, though, should be restrained. For, as I suggest in my title, the decision, like the affirmative action programs it seeks to protect, may prove only a temporary diversion on the road to racial disaster.³

I want to lay a foundation on which to build this theme by expansion to the allegorical and by reference to the personal. First, the allegorical: As I considered this talk, I kept thinking of my

[†] This article is the text of an address delivered at Loyola Law School on January 17, 1997. The transcript reproduced here has been edited for clarity. Source citations in the footnotes that follow have been provided by the Law Review staff to assist the reader in further research.—*Eds.*

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

2. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491 (N.D. Cal. 1996).

3. Indeed, in April, a three judge panel of the Ninth Circuit vacated Judge Henderson's decision. See *Coalition for Econ. Equity v. Wilson*, No. 97-15031, 1997 WL 160667 (9th Cir. Apr. 8, 1997).

best-known story, *The Space Traders*.⁴ In the story, it is New Year's Day in the year 2000. The boom years have ended. Technology has replaced millions of workers, and government at every level is bereft of strong leadership and in very bad shape financially. Poverty is rampant, the environment is in a shambles, and our natural resources are almost exhausted.

Suddenly, aliens from some distant world swoop down on the United States, land their gigantic ships along the outer beaches of Cape Cod, and make the nation an extraordinary offer: sufficient stores of gold to pay off its debts, chemicals to cleanse its environment, and a safe nuclear engine and fuel to replace fast disappearing fossil fuels. In return, the Space Traders want only one thing: to take away to their world all African Americans. The response: horror from virtually all blacks and some whites, barely restrained glee from many whites, much ambivalence from everyone else. After two weeks of furious debate, our national leaders, aware that the trade could both save the country and insure its prosperity for the next century, aware as well of the likely outcome when the civil rights of a minority group are submitted to a popular vote, call for a national referendum on the issue. The result: seventy percent of the citizenry voted yes, and the trade went forward.

Dawn on the day of the trade presented an extraordinary sight.

In the night, the Space Traders had drawn their strange ships right up to the beaches and discharged their cargoes of gold, minerals, and machinery, leaving vast empty holds. Crowded on the beaches were the inductees, some twenty million silent black men, women, and children, including babes in arms. As the sun rose, the Space Traders directed them, first, to strip off all but a single undergarment; then, to line up; and finally, to enter those holds which yawned in the morning light like Milton's "darkness visible." The inductees looked fearfully behind them. But, on the dunes above the beaches, guns at the ready, stood U.S. guards. There was no escape, no alternative. Heads bowed, arms now linked by slender chains, black people left the New World as their forebears had

4. DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158 (1992).

arrived.⁵

The message in the Space Trader story is both simple and irrefutable: This society is always willing to sacrifice the rights of black people to protect or further important economic or political interests. Indeed, the history of racial segregation illustrates all too well that the law and the nation only move to remedy racial injustices when such remedies further interests of importance to whites, or some of them.⁶ Again, that story and that message form the backbone of my thinking about affirmative action and, of course, about Proposition 209.

As to the personal: I want to say quite clearly that I am a product of affirmative action. I am not stupid and I work hard and would likely have had a worthwhile career without affirmative action. But that career would almost certainly not have been as a law teacher and legal writer. I absolutely would not have become a full professor at the Harvard Law School. Without the Harvard imprimatur, my unorthodox writings filled with allegory exploring the depths of racism in the law and the society would likely not have been published and, if published, would not have been taken seriously.

Did I merit the opportunities affirmative action provided me? Did my Harvard appointment deny some better qualified white man the position I filled? Such questions, though hotly debated, are totally disconnected from reality. Let's face it. The much-extolled word "merit" has only a serendipitous connection with making it. If we as a society truly valued merit, you would not have the governor you have, we would not have the President we have, and the make-up of our leadership in every area would be far different—and certainly far better—than it is. Indeed, outside the affirmative action debate, you virtually never hear the word. We simply assume it while making decisions on an array of factors in which ability is more a fortuity than a sought-for goal. In short, the phony pennant of merit serves as the false banner of color-blindness, used as justification for opposition to affirmative action.⁷

5. *Id.* at 194.

6. See MICHAEL LIND, *THE NEXT AMERICAN NATION*, 139-41, 171-80 (1995); Michael Skube, *The Racial Dilemma Defining Americans*, *ATLANTA J. & CONST.*, Oct. 8, 1995, at L8.

7. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 *GEO. L.J.* 1711 (1995); Judy B. Rosener, *Standards of Meritocracy Don't Add Up*, *L.A. TIMES*, Feb. 2, 1997, at D4.

I may have missed it, but if merit is really the concern, why don't the various anti-affirmative action measures include legacy admits? Studies show that those admitted to California's colleges because a parent is an alum show credentials quite like those of minority candidates.⁸ Actually, if merit were really a concern, we would ban the use of SATs and other standardized tests. They all predict performance to some degree, but they predict quite accurately the socio-economic status of the parents of those taking the tests.⁹ We maintain these so-called objective measures of academic potential because they identify and advantage those applicants from the upper classes. When they don't, as when too many Asians in California started out-performing too many whites, there is serious discussion about altering the weight given in the admissions process, for example reducing the value assigned to math scores where many Asian-Americans excelled, while enhancing the value of the reading scores where Asians did less well.

So much for merit. I think it was Christopher Jencks who supervised a major study back in the late 1960s involving a massive effort to ascertain the qualities that led individuals to enjoy success in their jobs and careers.¹⁰ The three qualities that turned up again and again were not native intelligence, academic achievement, or ability. Rather, what counted most were connections, family and otherwise, personality, and luck.¹¹ For me, affirmative action made possible the connections, and luck made affirmative action popular just when I needed it. For better or worse, affirmative action is why I have been invited to speak to you this afternoon.

Now, you have my background as an individual who benefited from affirmative action. We should, before returning to look at Proposition 209, review the debate over affirmative action in historic context. One hundred years ago last May, the Supreme Court decided *Plessy v. Ferguson*,¹² providing legal legitimacy to

8. See Ralph Frammolino et al., *UCLA Eased Entry Rules for the Rich, Well-Connected*, L.A. TIMES, Mar. 21, 1996, at A1; see also LIND, *supra* note 6, at 165-71 (discussing racial preferences in connection with higher education legacy admissions).

9. See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 965 (1996); Reagan Walker & Bill Rankin, *State University Systems: Suit Seeks to Halt All Race-Based Decisions*, ATLANTA J. & CONST., Mar. 4, 1997, at C3.

10. See CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 8-14 (1972).

11. See *id.* at 8.

12. 163 U.S. 537 (1896).

the widespread practice of racially segregating blacks in virtually every aspect of public life. Mandatory segregation, the Court ruled, was valid and, as for the protections guaranteed under the Equal Protection Clause, the Court found it sufficient if the facilities provided blacks were "equal, but separate."¹³

Writer Michael Skube in interpreting "separate but equal," the three-word phrase that baptized Jim Crow,¹⁴ noted that,

[i]n a well-tuned English sentence, the ear expects to hear the emphatic word or idea at the end. But in *Plessy v. Ferguson*, it was separation, not equality, that the [C]ourt was ensuring. There being no question about the black man's lot in American life, the consequence of the [C]ourt's ruling was that he be not only unequal but forever separate.¹⁵

The Court, of course, had not set out on its own to repeal the Civil War Amendments¹⁶ and the supporting statutes enacted during the brief Reconstruction period. Rather, the Court spoke for the majority of whites who, whether pro- or anti-slavery, did not consider, could not envision, blacks as other than an inferior people whose labor was exploited, whose cultural contributions were ridiculed and then stolen, and whose very presence provided whites of vastly different positions on the social ladder with a shared sense of superiority.¹⁷ For the mass of European immigrants, the inculcation of a common racism was a major vehicle for their acculturation and assimilation.

We should not be surprised that last year's centennial of the *Plessy v. Ferguson* separate but equal decision was allowed to pass almost unheralded by the major media. Predictably, most com-

13. *Id.* at 547; *see id.* at 542-50.

14. Jim Crow is "[t]he systematic practice of discriminating against and suppressing Black people." THE AMERICAN HERITAGE DICTIONARY 968 (3d ed. 1992).

15. Skube, *supra* note 6, at L8 (italics added). *See also Plessy*, 163 U.S. at 551 (discussing the implications of enforced separation). The Court stated:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . "[T]his end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate."

Id. (citations omitted).

16. U.S. CONST. amends. XIII, XIV, XV.

17. *See Plessy*, 163 U.S. at 560 (Harlan, J., dissenting); *see also* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2189 (1989) ("Segregation laws, by giving whites a false sense of superiority and blacks a false sense of inferiority, degrade human personality.").

ments about the case were cushioned in reminders that fifty-eight years later, in 1954, the Court in *Brown v. Board of Education*¹⁸ declared the separate but equal doctrine unconstitutional.¹⁹

The *Brown* decision, though, was less the long-sought remedy for racial segregation than a reinforcement of the two-part principle of this country's racial policies I cited at the outset—one that encompasses affirmative action and is worth reiterating.

Part One: The society is always willing to sacrifice the rights of black people in order to protect important economic or political interests of whites. The *Plessy v. Ferguson* decision represents a prime example of Part One, less because it gave segregation the status of constitutional law than because it sacrificed black rights in order to gain the support of whites for business-oriented economic policies that harmed a great many white people.

Part Two: The law—and society—recognize the rights of blacks and other people of color only when such recognition serves some economic or political interests of greater importance to whites. Lincoln's reluctant issuance of the Emancipation Proclamation²⁰ to help the faltering effort to save the Union was an example of Part Two in action. Similarly, after World War II, the United States, now the world leader in efforts to win the allegiance of mostly nonwhite, third-world nations, discovered that practicing Jim Crow at home made it tough to advocate democracy abroad.²¹

The *Brown* decision, by promising to close the gap between the country's ideals and its practices, provided an immediate boost to America's foreign policy efforts.²² Here was Part Two of the racial policy principle at work. But while the Jim Crow signs came down after prolonged battles in the courts and on the streets, the society quickly devised means to limit the substantive value of the pro-civil rights decisions and the new civil rights laws enacted

18. 347 U.S. 483 (1954).

19. *See id.* at 495.

20. ABRAHAM LINCOLN, THE EMANCIPATION PROCLAMATION, 12 Stat. 1268-69 (1863), reprinted in DOCUMENTS OF AMERICAN HISTORY 420-21 (Henry Steele Commager ed., 1949).

21. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) [hereinafter Bell, *Interest-Convergence*]. While America was trying to "win the hearts and minds of emerging third world peoples[,] . . . 'U.S. prestige and leadership ha[d] been damaged by the fact of U.S. segregation.'" *Id.* (citations omitted).

22. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 113-20 (1988) (discussing the Cold War foreign policy aspects of the *Brown* decision and the favorable foreign responses to it).

during the 1960s.²³

Disenchantment set in when whites began to recognize that racial equality for blacks meant more than condemning the use of fire hoses and police dogs on peacefully protesting children in a deep-South town. It meant, as well, taking steps to correct for decades when blacks were excluded, remedies that sometimes required whites to surrender their expectations of privileges and priorities long available simply because they were white.

In the early 1970s, a great many corporations, government agencies, and educational institutions decided that affirmative action programs were a relatively inexpensive response to the urban rebellions, particularly those sparked by Martin Luther King's assassination.²⁴ Without really altering patterns of hiring, admitting, and promoting that privileged well-off or well-connected whites, minority admission or hiring policies were designed to bring some blacks, Hispanics, women—not too many you understand—into previously all-white and mostly male domains.²⁵ Some of these programs worked better than others, and they all served the interests of the sponsoring institutions as much and usually more than they did those previously excluded who were let in the door.

But as the job market tightened and anxiety about their future well-being increased, more and more whites opposed these programs—whatever their effectiveness.²⁶ This opposition was encouraged by politicians at every level who were quite willing to win elections by blaming the nation's malaise on affirmative action programs. Given the nation's history of scapegoating serious economic problems on blacks and other minority groups, it is not surprising that polls reveal that a majority of whites, particularly white men, are rather easily convinced that their well-being is eroding, not because of policy decisions by corporate heads and their elected representatives, but by blacks who, they believe, use

23. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 882-83 (12th ed. 1991).

24. See Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2399-2400 (1989).

25. See Norman Hill, *Race in America: Through a Glass, Darkly*, 7 PUB. PERSP., Feb.-Mar. 1996, at 1. Hill discusses hiring black women in executive positions as "closing a 2 for 1 affirmative action gap (female and black) . . . in what they perceive . . . as a remaining bastion of white male supremacy." *Id.* at 2.

26. See Bell, *Interest-Convergence*, *supra* note 21, at 522-23; see also Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 661 (1989) (discussing the change in business attitudes toward affirmative action in the 1970s).

racial discrimination as an ever-ready excuse for demanding preferences while disdaining performance.²⁷ As they did in the latter part of the nineteenth century, Supreme Court decisions in the area of civil rights in general and affirmative action in particular, have swung into line with public opposition—so much so that strict scrutiny has become useless to deal with continuing racial discrimination and has become a tool for undoing modest efforts to counteract that discrimination. As a former student, Radhika Rao, described the Court's action in finding a Richmond, Virginia, set-aside ordinance unconstitutional:

In *City of Richmond v. Croson*, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the "separate but equal" analysis in *Plessy v. Ferguson*, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.²⁸

The obvious similarities of approach in an end-of-the-nineteenth century decision, *Plessy*, when compared with an end-of-the-twentieth century decision, *Croson*, sends a clear message that we ignore at our peril. For today, a slender but seemingly firm Supreme Court majority views programs to remedy long-established patterns of discrimination as a greater evil than the more subtle, but not less pernicious, patterns of racial bias that continue to be practiced widely and without challenge. A color-blind Constitution has become the battle cry for those on the Court who, in the very face of its devastation, maintain that discrimination is a thing of the past.²⁹ The spirit of *Plessy's* separate but equal standard is revived in the Court's willingness to employ

27. See Oppenheimer, *supra* note 9, at 947-53; Hill, *supra* note 25, at 1.

28. Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1040-41 (1990) (quoting Radhika Rao's reflections written during a fall, 1989, Civil Rights at the Crossroads Seminar); see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

29. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995); see also *id.* at 2118-19 (Scalia, J., concurring) (stating that the government has no compelling interest in compensating for *past* racial discrimination).

disingenuous terms to disguise its continued willingness to sacrifice black rights to further white interests.

As unnerving as its decisions is how closely the Court's racial rhetoric mirrors that of its late-nineteenth century predecessors. Justice O'Connor's opinions in particular contain the "see no evil" approach of the Court in the *Civil Rights Cases*,³⁰ where Justice Bradley, ignoring the systematic persecution of blacks through threats and violence including hundreds of lynchings each year, struck down a series of federal acts enacted to protect black rights and relied on a nonexistent reality to admonish:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.³¹

Many of you are familiar with that quote. In the early years of my career, it represented the thinking of a past era happily consigned to an inglorious judicial history. Its resurrection, in modern but still scarily familiar guise, serves as bitter proof that legal rationales for the subordination of black people may lie dormant in this country, but they never die.

It is Judge Henderson's failure to acknowledge these recurring patterns of involuntary sacrifice of minority interests to allay or deflect other concerns that gives his Proposition 209 opinion its cut flower quality: beautiful to look at but of likely limited longevity. Basically, his opinion finds that Proposition 209 violates the equal protection guarantee because it restructures the political process in a nonneutral manner.³² Specifically, it erects unique political hurdles only for those seeking legislation intended to benefit women and minorities—who must now obtain a constitutional amendment to achieve this goal—while allowing those seeking preferential legislation on any other ground unimpeded access to the political

30. 109 U.S. 3 (1883); see also *Adarand Constructors, Inc.*, 115 S. Ct. at 2117 (discussing the proper standard of review).

31. *The Civil Rights Cases*, 109 U.S. at 25.

32. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1508 (N.D. Cal. 1996).

process at all levels.³³

In support, the opinion relies heavily on two precedents: *Hunter v. Erickson*³⁴ and *Washington v. Seattle School District*.³⁵ In *Hunter* the Supreme Court struck down the results of a referendum both repealing a fair housing ordinance and requiring a city-wide vote for the adoption of any future such law.³⁶ As Judge Henderson saw it, the Supreme Court's analysis of section 137³⁷ turned on two particular features of the measure. First, section 137 raised equal protection concerns because it singled out an issue of particular interest to racial minorities—racial discrimination in housing. Had the measure imposed a new political burden on all legislation, the Supreme Court was quick to point out, it would not have run afoul of the Fourteenth Amendment.³⁸ Second, section 137 was suspect because it imposed a novel political burden on all future efforts to enact fair housing legislation.³⁹ Had citizens of Akron used the referendum process simply to repeal the fair housing ordinance previously adopted by the Akron City Council, this action alone would have raised no equal protection difficulty.⁴⁰

Although Judge Henderson felt that neither of these two features of section 137, standing alone, would have offended the Fourteenth Amendment,⁴¹ the Supreme Court held that the confluence of the two factors—the targeting of a racial issue and the reordering of the political process—constituted a racial classification that required the most exacting judicial scrutiny.⁴²

Proposition 209, Henderson concludes, fails to meet constitutional standards for the same reasons as the referenda in *Hunter* and *Seattle*.⁴³ State officials argued that these cases are distinguishable because Proposition 209 does not create, but specifically bars, classifications based on race.⁴⁴ But Henderson said that one must look beyond Proposition 209's neutral language and inquire

33. See *id.*

34. 393 U.S. 385 (1969).

35. 458 U.S. 457 (1982).

36. See *Hunter*, 393 U.S. at 392-93 (striking AKRON, OHIO, CITY CHARTER § 137 (1964)).

37. See *Coalition for Econ. Equity*, 946 F. Supp. at 1500.

38. See *Hunter*, 393 U.S. at 390-92; *id.* at 393-94 (Harlan, J., concurring).

39. See *Coalition for Econ. Equity*, 946 F. Supp. at 1500.

40. See *Hunter*, 393 U.S. at 390 n.5.

41. See *Coalition for Econ. Equity*, 946 F. Supp. at 1500.

42. See *Hunter*, 393 U.S. at 391-92.

43. See *Coalition for Econ. Equity*, 946 F. Supp. at 1509-10.

44. See *id.* at 1502.

whether, “*in reality*, the burden imposed by [the] arrangement necessarily falls on the minority.”⁴⁵ He then makes a fairly detailed survey of the Proposition 209 campaign and the issues in the debate prior to its passage.⁴⁶ Rather clearly, he concludes, the goal as viewed by both sides was to eliminate affirmative action from all state activities.⁴⁷

For his part, Henderson, unlike the current Supreme Court majority, refused to divorce the legal issue from the “raging controversy” out of which it arose.⁴⁸ Thus, while California insisted that *Hunter* and *Seattle* burdened nonminorities and was unlike Proposition 209 that outlaws preferences that inflict injury on nonminorities, Henderson responded that *Seattle* and *Hunter* were not cases about the limits on state-sponsored remedies for past discrimination, but “are more appropriately understood as cases about access to the political process.”⁴⁹

Henderson’s encompassing of both history and the “real world” is precisely what the Supreme Court majorities have not done in recent racial cases—although it was the basis for striking down the Colorado antigay and lesbian referendum in *Romer v. Evans*.⁵⁰ In the voting rights cases challenging the state’s creation of majority black districts to compensate for decades of gerrymandering and other devices to dilute the black vote, the Court has regularly rejected the claim that the Voting Rights Act of 1965⁵¹ and its amendments is a sufficiently compelling justification for these districts.⁵²

In its most recent review of a set-aside case, *Adarand Constructors, Inc. v. Peña*,⁵³ the Court ended any question that it would apply the strict scrutiny test to all government classifications, even if that placed in serious jeopardy efforts approved by earlier Courts to correct for the long-time exclusion of minorities from government construction contracts.⁵⁴ In dissent, Justice Stevens

45. *Id.* (quoting *Seattle Sch. Dist.*, 458 U.S. at 468).

46. *See id.* at 1493-98.

47. *See id.* at 1506.

48. *See id.* at 1503.

49. *Id.*

50. 116 S. Ct. 1620 (1996).

51. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1973gg-10 (1994)).

52. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) and the authorities cited therein for a discussion of the voting rights cases.

53. 115 S. Ct. 2097 (1995).

54. *See id.* at 2113, 2118.

wrote:

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.⁵⁵

Unhappily, this view is held by only a minority of the Court. And under the "color-blind" rhetoric of the majority, whites are treated as the discreet and insular minority and minorities and their supporters must prove a compelling state interest to gain approval of remedial policies containing racial classifications. While it is appropriate that courts balance harms to individuals against the benefits of redistributive policies, the Supreme Court has gone further. When the potential harm falls on an identifiable group of whites, the Court transforms the expectations that whites developed under the existing system into a property right which always defeats the entitlements of blacks.

In the process, strict scrutiny protection for "discrete and insular minorities"⁵⁶ is turned on its head.

First, blacks can no longer evoke the strict scrutiny shield in the absence of proof of intentional discrimination—at which point strict scrutiny is hardly needed.

Second, whites challenging racial remedies are entitled to strict scrutiny automatically *if* the remedy has a racial classification. Thus, for equal protection purposes, whites become the protected discrete and insular minority.

55. *Id.* at 2120 (Stevens, J., dissenting) (citations omitted).

56. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

There is no easy exit from this dilemma on the horizon. It is a built-in barrier to all manner of social reform, including measures having no direct bearing on race. It is a dilemma that Judge Henderson handles by assuming that civil rights law and the Court have not changed since 1969 or even 1982: that the Court and the country are as supportive of civil rights and remedies as they were then. It is this "back to the future" faith that may suffice if, as in *Hunter, Seattle*, and yes, in *Romer*, a majority of the Court is unwilling to affirm manifestations of bigotry openly displayed via the referendum process.

Whatever the eventual outcome of the case, Judge Henderson's temporary ban on Proposition 209's enforcement provides affirmative action advocates with breathing room to build support for these programs. It will certainly not lessen the hostility many whites feel toward minorities, immigrants, and the poor. Indeed, this antagonism may grow with the frustration felt by many who view Judge Henderson's decision as a judicial power-grab robbing them of a victory achieved at the polls.

In many areas, the controversy over affirmative action has likely led many managers to reduce their programs to little more than the mention of it on their letterheads. The tightening of the job market will hasten this trend whatever the final litigation outcome on this issue. The same can be said of California's Proposition 187,⁵⁷ intended to blame state policy failures on immigrants. Political displacement of this character has, throughout the nation's history, served as a convenient and comforting substitute for the economic well-being and social status that most whites lack. While so many whites ease their insecurities by fixating on the supposed inadequacies of blacks, the corporate monopolizing of the technological revolution is both creating an ever-widening chasm in wealth, income, and opportunity and steadily eliminating the jobs that are the cornerstone of the nation's stability.⁵⁸

Sadly, the presence of affirmative action serves as a smokescreen for the real causes of job anxiety. Indeed, were a modest tax assessed on every employer who dishonestly told a rejected white applicant that he was not hired because the company was obliged to look for a minority or a woman, the national debt

57. The Initiative Statute—Illegal Aliens—Public Services, Verification and Reporting, Cal. Prop. 187 § 1 (1994) (defining initiative's purposes).

58. See generally CHARLES A. REICH, *OPPOSING THE SYSTEM* 73-75 (1995) (describing economic insecurity and social breakdown).

could be substantially reduced, perhaps eliminated.

The growing reliance on automation, the deportation of jobs to third-world countries, and the importation of cheap, foreign labor, all have worsened the unemployment problem. Yet only outgoing Secretary of Labor Robert Reich was willing to point an accusatory finger at the nation's largest corporations whose downsizing tactics are ruining the lives of millions in order to retain or even enhance profit levels.⁵⁹ As a result, there are growing numbers of once-employed and now unemployed skilled workers, both white collar and blue collar, executives, and professionals.⁶⁰

Job anxiety is now sufficiently severe that even the politicians are having trouble blaming it all on affirmative action. Advocates report that their inability to correct misimpressions was a major factor in Proposition 209's passage.⁶¹ Your Republican governor launched his presidential bid on a vehicle fueled by anti-affirmative action rhetoric.⁶² Significantly, he dropped out of the race.⁶³ Just as significantly, the Democratic National Committee

59. See Robert B. Reich, *Prospective on Job Security: Government Can't Fix It Alone*, L.A. TIMES, Feb. 29, 1996, at B1; Allan Sloan, *The New Buzzwords on Wall Street: Job Cuts? What Job Cuts?*, WASH. POST, Apr. 30, 1996, at D3; Richard W. Stevenson, *Bobbing and Weaving on Issue of Layoffs*, N.Y. TIMES, May 18, 1996, at 31.

60. This is not a temporary downturn. Advances in computer and communication technology have rendered much of their work superfluous, and the availability of cheap and exploitable foreign labor has proven a temptation few company heads seem able to resist. Even the largest companies now hire on a part-time basis or contract work out as needed. These arrangements usually involve low pay, few benefits, and no security. According to recent books, for example, LIND, *THE NEXT AMERICAN NATION*, *supra* note 6; REICH, *OPPOSING THE SYSTEM*, *supra* note 58; JEREMY RIFKIN, *THE END OF WORK* (1995), these conditions will worsen steadily in the absence of strong correctives that neither government—and certainly not business—seem willing even to discuss, much less undertake.

61. See Jerome Karabel & Lawrence Wallack, *Proponents of Prop. 209 Misled California Voters*, CHRISTIAN SCI. MONITOR, Dec. 5, 1996, at 19; George Skelton, *An Assembly That Acts Like a Parliament*, L.A. TIMES, Aug. 7, 1995, at A3 (explaining that getting the correct information to voters would be one of the opponents' main challenges); See also Sam Howe Verhovek, *Texas Capital Ends Benefits for Partners*, N.Y. TIMES, May 9, 1994, at A8 (discussing a similar problem in the failure of Texas Proposition 22 (1994) which would have provided benefits for employees' unmarried partners).

62. California Governor Pete Wilson briefly ran for President in 1996. See Cathleen Decker, *Backers of Affirmative Action Face Tough Task*, L.A. TIMES, Aug. 7, 1995, at A3; Ernie Sloan, *Connerly: Man With a Mission*, ORANGE COUNTY REG., Jan. 23, 1996, at A14.

63. See Cathleen Decker, *Wilson Drops Out of White House Race, Blames Cash Woes*, L.A. TIMES, Sept. 30, 1995, at A1; Rick Orlov, *Wilson Drops Out of '96 GOP Field*; L.A. DAILY NEWS, Sept. 30, 1995, at N1.

reportedly refused to commit any significant money to help fight the measure.⁶⁴ What this means is that anti-affirmative action thinking is so deeply fixed in the minds of many that, while its open advocacy is no longer a guarantee of election, the support of affirmative action may be an invitation to defeat.

"Given all that you have been saying," you may ask, "how would you have ruled were you in Judge Henderson's position?"

First, I admit that I might have ruled as he did for reasons concerning the courts and their functioning unknown to me that justify his action. But unless these factors were very strong, I would write an opinion that indicated the relevance of earlier referendum cases like *Hunter* and *Seattle*. Reluctantly, I would then express doubt as to their continued viability after the Court's recent cases that make it easy for whites to challenge remedies for racial injustice and make it almost impossible to design effective remedies relying on racial classifications that, in the absence of overt discrimination, can withstand the "strict scrutiny" test.

I would, in my opinion, as I have done in this speech, lament the Supreme Court's retreat on civil rights in general and affirmative action in particular. I would review in detail all the reasons that affirmative action is an appropriate remedy for discriminatory policies, both those of the past and those that are continuing, perhaps citing to the report by Professor David Oppenheimer,⁶⁵ and I would survey the damage to minorities but more particularly to whites if the state abandons affirmative action policies.

I would review the economic factors that led so many whites and some minorities to support Proposition 209, and I would review the history of such economic scapegoating. There is no denying that I would admit affirmative action has increased, point out in detail how much more affirmative action has helped whites and the society's image than it has minorities, and how, without it, the losses blacks are experiencing at every turn will be increased with adverse costs and consequences to everyone.

And having painted as bleak a picture of a future without affirmative action as I could, I would then deny the preliminary injunction and set the case for trial. Given my support for affirmative action, my decision might disappoint my friends and delight my enemies. I would expect to be denounced as the Ward Con-

64. See Michael A. Fletcher, *Clinton Move to Center, Cabinet Changes Leave Black Supporters Concerned*, WASH. POST, Nov. 15, 1996, at A10.

65. See OPPENHEIMER, *supra* note 9, at 958-96.

nerly⁶⁶ of academe. Alas, it would not be the first time. It happened to Martin Luther King, Jr., when he expanded his program from civil rights to jobs and poverty and then to the Vietnam War.⁶⁷ I am not Dr. King but like him, I am willing to state the conclusions that my experience have led me to reach.

In my experience, we who advocate social reform grant litigation a spotlight larger than anything judicial decisions can achieve—particularly in the long term. Civil rights groups commit an inordinate amount of their always limited resources to litigation efforts, and lawyers—in the process—tend to usurp the stage from grassroots political leaders. These leaders and their troops are essential to minimizing the effects of an adverse decision and, paradoxically enough, are even more important in the wake of a favorable judicial decision.

David Garth, the political guru, warned pro-choice advocates in the wake of *Roe v. Wade*,⁶⁸ “The Supreme Court decision did more than just legalize abortion, . . . [i]t neutralized you, it robbed you of your rallying cry, your most provocative issue, your activist identity.”⁶⁹ Garth urged Planned Parenthood to become active politically, a recommendation they rejected.⁷⁰ The anti-abortion forces, on the other hand, energized by the decision, did become politically active and the results of their efforts are all too plain.

Judicial approval of affirmative action in its earlier years, as ambivalent as it was, caused advocates to relax and rely on their victories in court to translate automatically into acceptance in the community. It didn't happen with abortion rights and it certainly did not happen with affirmative action. What Garth is saying is that victory in a social reform case leads to a passivity that undermines the action that gives life to a cause and meaning to a belief. We should strive to win in court but must view defeat as motivation for further struggle, not a signal to concede defeat.

Almost a year ago, the Fifth Circuit found the affirmative ac-

66. Ward Connerly spearheaded a national movement seeking to replace race-based affirmative action with meritocracy in college admissions and government contracting. See Rosener, *supra* note 7, at D4. See generally Amy Wallace, *He's Either Mr. Right or Mr. Wrong*, L.A. TIMES MAG., Mar. 31, 1996, at 12 (providing a brief biography of Connerly).

67. See David J. Garrow, *Martin Luther King, Jr., and the Spirit of Leadership*, in WE SHALL OVERCOME 11, 25-27 (Peter J. Albert & Ronald Hoffman eds., 1990).

68. 410 U.S. 113 (1973).

69. FAYE WATTLETON, LIFE ON THE LINE 209 (1996).

70. See *id.* at 208-10.

tion program at the University of Texas unconstitutional.⁷¹ The program, withdrawn early in the litigation, used a dual admissions technique specifically banned by the Supreme Court in the 1978 *Bakke* case.⁷² Two members of the appeals panel went further and questioned the continued validity of *Bakke*, finding that "diversity" is not a compelling interest after all, that there are no significant continuing effects of past discrimination at the University of Texas Law School, and threatened: "[I]f the law school continues to operate a disguised or overt racial classification system in the future, its actors could be subject to actual and punitive damages."⁷³

The Supreme Court declined review declaring that, because the adjudicated plan was no longer in effect, it would be an inappropriate vehicle to review the continuing validity of affirmative action programs in the admissions process.⁷⁴ The *Hopwood* decision thus remained in effect in the Fifth Circuit, and several law schools, including private ones, announced that they were shutting down their affirmative action programs. Dean Barbara Bader Aldave of the St. Mary's University Law School has refused to accept the decision. In speeches and writings widely distributed in Texas, she has said:

I can promise you this: Unless and until my superiors order me to stop, we at St. Mary's University School of Law are going to ignore the *Hopwood* decision and adhere to the guidelines of *Bakke*. I am immensely proud that 41 percent of the students in our first year class are members of minority groups, and that our school now has a higher percentage of Mexican-American students than any other law school in the United States. At least as long as I am the dean, St. Mary's University School of Law will continue to turn out highly qualified lawyers, judges, legislators and public servants, and they will continue to come from all of the diverse racial and ethnic groups that make up our society.

. . . I hope that many of you will join me in according to the Supreme Court the respect that it deserves, and in spreading the good news that the *Bakke* decision is still

71. See *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).

72. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

73. *Hopwood*, 78 F.3d at 959.

74. See *Texas v. Hopwood*, 116 S. Ct. 2581, 2582 (1996).

the law of the land.⁷⁵

Dean Aldave's stand is courageous. She, like Judge Henderson, retains a faith in her cause that is not diminished by a wavering Court. One can be sure that whatever the outcome of the judicial decisions in *Hopwood* and on Proposition 209, their commitment to the cause will carry them on. They understand that life is a struggle and that commitment to that struggle brings a sense of satisfaction that cannot be enhanced by victory and cannot be diluted by defeat.

Here, then, is the challenge of Proposition 209 and all the other dangers we who are minorities in power, money, and race face during these turbulent times. We respond against overwhelming odds because we know that doing nothing will only worsen, not improve, our condition. We rise and take risks with the knowledge that, win or lose, we are on the side that we believe is right.

75. Barbara Bader Aldave, *Hopwood v. Texas: Much Ado About Nothing?*, *TEX. LAW.*, Nov. 11, 1996, at 43.