

UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY

CLINT BOLICK*

My objective in these brief remarks is to make a case for a positive, forward-looking civil rights strategy, and to sketch the contours of that strategy, especially in the context of law. Those who advocate the traditional civil rights principles of individual liberty and equality under law have consigned themselves in the last half century or so to a marginal role in the civil rights debate. Most alarmingly, we have frequently ceded the moral high ground in matters of civil rights to the political left, limiting our role to that of an adversary or a passive bystander.

The results of our absence have been devastating, not the least for those in whose name the modern civil rights establishment purports to speak. The epitaph for more than two decades of social engineering disguised as civil rights has been pronounced not only by Charles Murray,¹ but by prominent scholars traditionally associated with the left like William Julius Wilson² and others. If one had wanted to craft a social policy that would relegate many blacks and other minorities permanently to a separate and subordinate caste, he could not possibly have woven a more debilitating tapestry of dependency and despair than that of racial quotas, set-asides, busing, criminal rights, and the welfare state. Millions of individuals in our society are more isolated from basic opportunities than ever before. Once again the culprit is the coercive apparatus of government, wielded today by those who feign benevolence but impose misguided policies with tragic results.

So the time is ripe for a new approach to civil rights. Such an approach will not, however, come from the left. Having debated such civil rights establishment luminaries as Ralph Neas, Benjamin Hooks, and Joseph Lowery in the past year, I have been astonished at their lack of vision. Lurking beneath Sena-

* Director, Landmark Legal Foundation Center for Civil Rights. For a more extensive presentation of the author's arguments, see C. BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY (1990).

1. See C. MURRAY, LOSING GROUND (1984).

2. See W. WILSON, THE TRULY DISADVANTAGED (1987).

tor Edward Kennedy's Civil Rights Act of 1990³ is the dreaded "Q" word, from which the left cringes as a vampire from a crucifix: quota. Quotas, in one form or another, remain the centerpiece of the left's civil rights agenda, and that leaves us a whole lot of room to develop a positive alternative.

Before conservatives can plausibly promote such a strategy, we must surmount very serious obstacles of our own making. Conservatives have worked hard and, unfortunately, with great success during the past fifty years to destroy their credibility in matters of civil rights. We will have to work even harder to overcome that legacy. To do so, we must accept two core premises. The first is that the foundation of any forward-looking civil rights strategy is the vigorous enforcement of the civil rights laws. These laws have opened the doors of opportunity to millions who were previously excluded; properly enforced, they can continue to do so. As Clarence Thomas demonstrated while Chairman of the Equal Employment Opportunity Commission, vigorous enforcement does not have to mean quotas. It *does* mean, however, getting serious about civil rights. Instead of standing shoulder to shoulder with the white racist government in Yonkers, New York, conservatives should have been in Howard Beach, New York, condemning the racially inspired killing of a young black man—and we should have been there *before* Jesse Jackson.

The second hurdle is the pervasive notion that reverse discrimination is somehow the most compelling civil rights issue of our era. As Stuart Butler of the Heritage Foundation recently remarked, "[credibility] is not engendered by conservative attorneys chasing fire trucks to see if any members of the Teamsters Union are upset about affirmative action."⁴ I do not mean at all to suggest that we should abandon our quest for a color-blind Constitution, but rather that a civil rights program that consists exclusively of opposition to reverse discrimination is patently inadequate.

Once we have surmounted these self-imposed obstacles, we can get about the task of charting a positive new direction for

3. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

4. Butler, *Razing the Liberal Plantation*, NAT'L REV., Nov. 10, 1989, at 28, 28.

civil rights. The best strategy is one that returns to the original objective of civil rights: an empowerment strategy that secures for individuals the power to control their own destinies through economic liberty, educational choice, emancipation from dependency, and freedom from crime. Conservatives must implement a strategy in which "affirmative action" is not a racial spoils system for the most advantaged, but a program of human capital development and economic mobility for the least advantaged.

In the legal arena, this empowerment strategy translates into a sustained and methodical effort to reinvigorate the guarantees of individual liberty and equality under law as embodied in the Fourteenth Amendment.⁵ As our ultimate goal, we should dedicate ourselves to bringing down the twin pillars of jurisprudential oppression in the area of civil rights: *Plessy v. Ferguson*⁶ and the *Slaughter-House Cases*.⁷ We talk so often of judicial activism that creates rights out of thin air, but these two cases illustrate vividly the even more pernicious judicial activism that reads precious liberties out of the Constitution.

With respect to *Plessy*, we must complete the work started in *Brown v. Board of Education of Topeka*.⁸ The Equal Protection Clause is a limitation on the government's ability to make distinctions among individuals in an unequal or arbitrary fashion. In *Plessy*, the Court embraced the notion that race is a "reasonable" basis on which to make such distinctions.⁹ Ironically, the left has kept the flickering flame of *Plessy* alive by embracing this profoundly defective notion, and in our jurisprudence we must discredit it until the Supreme Court finally and absolutely lays it to rest. An Equal Protection Clause restored to its full vigor can be a powerful restraint on those who would use the coercive power of government to redistribute rights and opportunities, and can thereby finally serve its intended function as a mighty bulwark for individual liberty.

The *Slaughter-House Cases* present an even more formidable challenge. In *Slaughter-House*, the Supreme Court read the Privi-

5. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

6. 163 U.S. 537 (1896).

7. 83 U.S. (16 Wall.) 36 (1872).

8. 347 U.S. 483 (1954).

9. See *Plessy*, 163 U.S. at 550-51.

leges or Immunities Clause,¹⁰ and the vital liberties it was intended to protect, out of the Constitution.¹¹ Foremost among the rights the amendment's framers intended to protect was economic liberty—the right to pursue a business or occupation free from arbitrary or excessive government interference. Today, economic liberty is the least protected freedom, making a mockery of America's reputation as a beacon of opportunity. The victims of this judicial abdication, like most victims of civil rights deprivations, are individuals outside the economic mainstream, predominately minorities and the poor.

All of our litigation at the Landmark Center for Civil Rights, from our successful challenge last year to the District of Columbia's Jim Crow-era ban on street corner shoe-shine stands on behalf of entrepreneur Ego Brown,¹² to our planned assault on the Davis-Bacon Act,¹³ is designed to undermine, piece-by-piece, the foundations of *Plessy* and *Slaughter-House*, until they collapse once and for all.

Conservatives can make a difference in civil rights. Since the Landmark Center for Civil Rights opened its doors less than two years ago, we have built a client base among the disadvantaged whose pleas were ignored by the civil rights establishment. We have represented Ego Brown. We represent Demond Crawford, who, in shades of Adolph Plessy, was denied access to an I.Q. test by the State of California because he is one-half black.¹⁴ We represent Junie Allick, a third-generation sea captain who is defending his right to sail for a living in St. Croix against a National Park Service regulatory scheme that has systematically destroyed the native Virgin Islander charter-boat industry.¹⁵ We represent Joseph Price, a black schoolteacher who is challenging his involuntary transfer pursuant to a Prince George's County, Maryland, quota policy that seeks racial bal-

10. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

11. See *Slaughter-House*, 83 U.S. (16 Wall.) at 81.

12. See *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989).

13. See Davis-Bacon Act, 40 U.S.C. § 276a (1988). The Davis-Bacon Act, also known as the "prevailing wage law," provides that any federally funded construction contractor must pay the local prevailing rate for labor, as set by the Department of Labor. The Act has been criticized for its exclusionary effect on unskilled labor and on non-union contractors.

14. See *Crawford v. Honig*, No. C-89-0014 (N.D. Cal. filed May 20, 1988).

15. See *Allick v. Lujan*, No. 89-2269 (D.D.C. July 16, 1990) (LEXIS, Genfed library, Dist file).

ance on every teaching staff.¹⁶ We represent Alfredo Santos, whose efforts to provide jitney transportation services to the poor Hispanic residents of east Houston were curtailed under a 1924 law designed to protect the now-defunct streetcar industry.¹⁷ We represent Mark Anthony Nevilles, a black kindergarten student who was excluded from the magnet school across the street by virtue of a racial quota that holds empty seats open for whites in the name of doing justice for blacks.¹⁸

The irony in Mark Anthony Nevilles's plight is remarkable: A youngster is being bused past his neighborhood school to an inferior school farther away solely because he is black, which is precisely the situation presented in *Brown v. Board of Education*. Have we traveled so far and so painful a distance in thirty-five years, only to find ourselves back where we started?

Beyond the practical reasons for a new strategy is an even more compelling one: Our nation's moral claim is staked in its doctrinal commitment to civil rights. The last twenty-five years have witnessed the tragic redefinition of civil rights from those fundamental rights we share equally as Americans into special benefits for some and burdens for others. This abandonment of traditional civil rights principles is tearing this nation apart and weakening its commitment to civil rights. We must restore the noble quest for individual liberty and equality of law that is the essence of civil rights. To achieve that goal will require imagination, passion, persistence, and an unyielding commitment to principle.

16. See *Stone v. Board of Educ. of Prince George's County*, 53 Fair Empl. Prac. Cas. (BNA) 785 (D. Md. 1990).

17. See *Santos v. City of Houston*, No. 89-1245 (S.D. Tex. filed Apr. 11, 1989).

18. See *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (D. Mo., motion to modify on behalf of Ronika Newton, et al., filed July 13, 1989).