

CIVIL RIGHTS AND THE NEW FEDERAL JUDICIARY: THE RETREAT FROM FAIRNESS

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The future of civil rights law is grim. Given the current judicial climate, those who value civil rights should not be concerned about new frontiers, but rather the protection of the heart and core of the civil rights advances that were won only a generation or two ago. These advances cost the blood, sweat, and tears of blacks and whites, Southerners and Northerners, Christians and Jews, liberals, and even some conservatives. Important gains were made possible by the Supreme Court under the leadership of Earl Warren, one of the greatest justices of all time. Similar progress was initiated by the Executive Branch under Presidents Kennedy and Johnson, and by the Congress, with leadership from such diverse Senators as Everett Dirksen and Ted Kennedy. First among equals, however, were the courageous judges, guided by a sense of justice and fairness.

Sadly, if we are to avoid the rapid unraveling of the progress we have made over the past forty years, we can no longer rely on the federal judiciary. We will principally have to rest our hopes with the Congress. In five major decisions in 1989, the Supreme Court made it far more difficult for minorities to mount and win discrimination cases, while making it far easier for white males to challenge the legality of affirmative action consent decrees.¹ Although contrary arguments may be advanced, the Court clearly turned away from its historical role as the protector of the civil rights of minorities—those who need its protection the most. Instead, in a remarkable display of that dreaded quality—judicial activism—the Court perceived a need to rewrite our civil rights law and to concentrate its efforts on preserving the privileged status of the white majority.

These five opinions collectively signaled the most significant retreat in modern times from our commitment to equal justice

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1. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

under the law. In case anyone is in doubt, civil rights laws were enacted to eradicate generations of invidious discrimination against minorities—discrimination that has left, still today, a searing scar of injustice across the face of America. Civil rights laws were not enacted because white males were in need of our help.

Let me now digress a moment while we are on the subject of the Supreme Court. It has been suggested at least three times in this Symposium that the Supreme Court, under Chief Justice Burger, committed an impeachable offense in rendering a unanimous decision in *Griggs v. Duke Power Co.*² The general tenor of the discussion constituted an extraordinary disservice not only to the judiciary, but to the very process of enlightened discussion. I will not discuss *Griggs* here, but I urge that before you come to the conclusion that it is not too late to impeach former Chief Justice Burger, you read the case carefully. You will find that the criticisms you have heard this morning are fully refuted by the text of the opinion.³

To return to the issue before us, statistics regarding disparate treatment of blacks in our society are staggering. Forty-five percent of black children live in poverty, a figure computed after family assistance and other governmental benefits are added to household income.⁴ While white households have a median net worth of \$39,000, that of black households is only \$3,397—one-eleventh of the white median.⁵ Contrary to the mistaken perceptions of those in the current administration, blacks are not doing well. The economic status of blacks compared to whites has deteriorated since the 1970s, despite the salutary effects of affirmative action programs.⁶ As the gap increases, the continuing need for such programs becomes even greater.

We should support affirmative action programs for two main reasons. First, such support is the right thing to do. While this may sound overly simplistic, deep down these programs are

2. 401 U.S. 424 (1971) (holding that the requirements of a high school diploma and intelligence tests constituted a prima facie case of racial discrimination under Title VII of the Civil Rights Act of 1964 because they had a disproportionate impact on minority job applicants).

3. See *Griggs*, 401 U.S. at 433-34.

4. See Kondracke, *The Two Black Americas: Bush's Most Urgent Policy Problem*, THE NEW REPUBLIC, Feb. 6, 1989, at 17.

5. See Ellis, *The Black Middle Class*, BUS. WK., Mar. 14, 1988, at 62.

6. See generally Kondracke, *supra* note 4.

rooted in the fundamental moral conviction that all men and women are created equal. Because throughout much of our history our nation has violated this basic principle, we had no alternative but to take extraordinary steps to remedy the injustice of years past. We must now continue vigorously to enforce those measures until the effects of past discrimination are eradicated. All of us, even if we never owned a slave or thought evil thoughts, are beneficiaries of the system of discrimination. Those of us in the majority have advanced ahead of other Americans, not solely because of our intelligence, talent, or skills, but in part because of the color of our skin.

As a result of affirmative action programs, thousands have entered through doors previously closed, gaining new employment opportunities. Employers charged with discrimination have altered their personnel policies in response to lawsuits. Others have changed their procedures after observing such litigation. Private employers, as well as government at the federal, state, and local levels, have voluntarily designed and implemented equal employment policies and affirmative action plans. That is, until recently.

One of the saddest days in our nation's history occurred when the Justice Department switched from advocating the rights of the disadvantaged and oppressed to representing white males in reverse discrimination suits. In so doing, the Justice Department no longer sought to enforce civil rights law, but rather turned to undermining the legality of voluntarily adopted affirmative action plans set forth in consent decrees.⁷ The moral fabric of our society suffered a grievous blow. Yet, even when the administration tried to tell us that black was white and white was black, deep down most Americans knew that the race problem, the great American dilemma, was still far from resolved.

Even the "Buppies," the black urban professionals, continue to confront serious barriers to career advancement. While we have witnessed limited improvement at the lower-level entry positions, racial minorities now confront the glass ceiling, which blocks access to the upper echelons of the corporate ladder. No matter how hard they work, they ordinarily remain mid-level managers rather than advancing to top management

7. See Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 897.

positions. The rest of the picture is also dismal. We are still far from a truly integrated society. Racial divisions and racial tensions remain strong, sometimes on the surface, but more frequently bubbling just beneath. Under these circumstances, we cannot remain morally indifferent to the gaping economic and social inequalities. We must persist in our efforts to close the gap and to provide greater opportunities through more vigorous and effective affirmative action programs.

Second, we must continue to support affirmative action programs because we simply have no alternative. Unless we choose to live in a society deeply divided between the “haves” and “have-nots,” with the constant potential for explosive confrontations, we have no choice but to press forward. In this regard, a 1989 study by the National Research Council states: “We cannot exclude the possibility of confrontation and violence The ingredients are there: large populations of jobless youths, an extensive sense of relative deprivation and injustice, distrust of the legal system, frequently abrasive police-community relations, highly visible inequalities, extreme concentrations of poverty, and great racial awareness.”⁸

The potential for a recurrence of the urban unrest and riots of the late 1960s is ever-present. A recent study by the Sentencing Project, reported in the *Los Angeles Times*,⁹ found that almost one out of every four black men in their twenties is in jail, on probation, or on parole. This is not the place to assess why that is the case. For our purposes, it matters not whether blacks are singled out for arrest because of their race, or arrested because they commit a disproportionate number of crimes. What does matter, though, is that a whole generation of young blacks is being lost. The divisions between different groups in our society are widening. Unless we continue to make substantial efforts toward swift and full integration, we are headed toward disaster. We, as a society, must muster the national will to avert such a crisis. Providing more opportunities means allocating more resources to the black community—specifically, providing jobs at all levels of the employment spectrum. The unemploy-

8. NAT'L RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 31 (1989).

9. *One in Four Young Blacks in Jail or in Court Control*, *L.A. Times*, Feb. 27, 1990, at 1, col. 1.

ment rate of blacks is twice as high as that of whites,¹⁰ and the relative odds of a young black being employed continue to deteriorate. Affirmative action is the most effective means of helping to change that ratio.

What we do not need are courts that second-guess and undermine local governmental efforts to correct past discrimination through affirmative action programs. One Ninth Circuit opinion, authored by one of our ablest young judges, a favorite of the Federalist Society, demonstrates how absurd the results can be when such a course is pursued by courts. In *Associated General Contractors of California, Inc. v. City and County of San Francisco*,¹¹ our court struck down a preference for minority-owned businesses provided by a San Francisco ordinance, but upheld the preference in that same ordinance for women-owned businesses. In so concluding, the court applied a lower level of scrutiny to the female set-asides than to those for racial minorities. The court reasoned that because blacks are entitled to greater protection than women, discrimination against the white majority should be viewed under a stricter level of scrutiny than discrimination against men *or* women.¹² Thus, in a remarkable feat of prestidigitation, we elevated the white male to the highest possible level of protection—under a rule of law designed to protect racial minorities. This is just one illustration of how perverse judicial reasoning has become, as hostile courts seek to turn civil rights law on its head.

There are other issues that demonstrate the growing insensitivity of two of the three branches of our government to individual rights. Governmental and judicial officers who are insensitive to civil rights are frequently insensitive to other fundamental rights, including the right of women to control their own bodies,¹³ and the right of homosexuals to engage in the most basic of human activities—consensual sexual conduct.¹⁴ Our President and Attorney General even want to amend the Constitution so as to limit symbolic expression.¹⁵ The basic constitutional rights of convicted criminals are similarly being

10. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Labor Statistics*, MONTHLY LAB. REV., Oct. 1990, at 49, 65.

11. 813 F.2d 922 (9th Cir. 1987).

12. See *Associated General Contractors*, 813 F.2d at 942.

13. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

14. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

15. See, e.g., *President Soft-Pedals Flag Measure*, N.Y. Times, Oct. 19, 1989, at A20, col. 3.

eroded. Recently, for example, the Supreme Court eviscerated the right of federal habeas corpus for state prison inmates. In two death penalty cases, both decided by five-to-four votes, the Court essentially held that states can execute people even though their convictions were obtained, or their sentences imposed, in violation of the Constitution.¹⁶ By denying inmates the right to base their appeals on constitutional decisions issued after their convictions became final, the Court deprived death-row prisoners in these cases of the opportunity to raise fundamental constitutional objections that might have entitled them to a reversal of their capital sentences. Even worse, the Court's characterization of any evolution in the law as a "new rule of federal constitutional law,"¹⁷ has essentially frozen much constitutional law as of the date of the relevant decisions. Under this odd view, many of the greatest constitutional developments of our times would have been foreclosed.

Regrettably, in the criminal law field, courts have moved from an era of concern about individual rights to an era in which the dominating motive is a desire to uphold convictions at any cost. Starting at the top, courts regularly search out ways to circumvent constitutional protections. As I have suggested, however, decisions in this area are just part of a pattern of general disregard for individual rights, except, of course, when money or real property are at issue. To the extent that civilization judges a society by the manner in which it treats its most unfortunate members, we are clearly in for bad reviews. It is indeed ironic that just when Eastern Europe is returning to the democratic fold, just when human rights are at their zenith throughout the world, we in America are in retreat.

Since the judicial system seems determined to turn its back on minority rights, we must now look to Congress with the hope that one branch of the federal government, at least, will be true to the dictates of the Constitution. In February 1990, a bipartisan group in Congress introduced the Civil Rights Act of 1990¹⁸ to correct the most egregious problems created by the

16. *See* *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Teague v. Lane*, 489 U.S. 288 (1989).

17. *Penry*, 109 S. Ct. at 2937.

18. 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).

quintet of decisions last Term. Time does not permit a full discussion of the provisions of the Act here.¹⁹ Let me only mention that the recent Court decisions have wrought such havoc with our civil rights law that even the Bush administration agrees that two of the five cases must be undone.²⁰

In conclusion, I leave the esoteric new frontiers to others. I ask only that we resurrect our national spirit of compassion, of fairness, of obligation to others less fortunate, and that we end, once and for all, this ten year old era of selfishness, insensitivity, and smug self satisfaction—the “I got mine, and if you weren’t so lazy or shiftless, you’d have gotten yours” mentality. Let us return to the time not so long ago when government

19. First, the bill would restore the reading of Section 1981 to its previous construction, which forbade all forms of intentional racial discrimination in contractual relations, including on-the-job racial harassment. Since the court held in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), that on-the-job racial harassment is not protected by Section 1981, nearly one hundred claims of federal fair employment litigation have been dismissed.

Second, the bill would specify that the clock on a Title VII claim begins to run from the time the unlawful practice occurs or when the practice is adversely applied, whichever occurs later. This rule is intended to ameliorate the harsh effects of *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989), which requires employees to file suit at the time a new seniority system is adopted, even if they could not have anticipated the potential negative consequences. These are the two provisions of the bill that are so necessary that even the Bush administration supports them.

Third, the bill would restore the *Griggs* disparate-impact test under Title VII that was undercut by *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). The bill would restore the prior status quo by placing the burden of proof on the employer to demonstrate the business necessity of employment practices that have a disparate impact on protected groups.

Fourth, the bill would clarify that, in mixed motive cases, the employer will be liable if a discriminatory attitude was a motivating factor for an employment decision, even if other permissible factors also motivated the decision. This provision would correct the problem created by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Finally, the Civil Rights Act of 1990 would protect existing consent decrees in race discrimination cases. Through notice provisions and opportunities for interested parties to be heard, the legislation would provide a mechanism for achieving finality in a case. This would alleviate the need to relitigate the same challenge, a problem created by *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Through these proposals and others that expand the Title VII remedial scheme, the legislation, if adopted, will help restore some of the protections previously accorded minorities.

20. Regrettably, but not surprisingly, President Bush vetoed the Civil Rights Act of 1990, notwithstanding his acknowledgment that portions of it were needed in order to correct unjust decisions by the Supreme Court. See Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). The Congress will undoubtedly attempt to remedy this injustice by reenacting the bill in the next session. Barring unforeseen changes on the political scene, however, there is little reason to believe that the President will change his position with respect to the legislation. The administration's recent performance with respect to minority scholarships offers little encouragement to anyone on either side of the issue. See *Struggle at White House; Mishandling of Scholarships for Minorities Reflects Search for a Civil Rights Agenda*, N.Y. Times, Dec. 20, 1990, at A1, col. 2.

cared about people, and when society and the courts cared about justice, about equality, about ending our greatest national shame: the effects of generations of racial discrimination. Our legal system has gone through similar times of racial insensitivity before, such as the era of *Dred Scott*²¹ and *Plessy v. Ferguson*,²² and we have come out of those eras resilient. When one branch of government falters, others tend to take over. The job will not be done by one thousand—or even one million—points of light. It can be done, however, by a compassionate and fair-minded government with the help and support of a decent American people.

21. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

22. 163 U.S. 537 (1896).