

CIVIL RIGHTS, ECONOMIC PROGRESS, AND COMMON SENSE

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From his comments, it certainly is evident that Judge Reinhardt disagrees with the people of the United States as they have conducted themselves in the last three presidential elections.¹ I believe that we have progressed considerably over the last decade in terms of a society that is fair to all of its people; we have significantly limited policies under which members of certain groups within society receive special privileges, whether or not there has been any harm visited on these individuals, at the expense of individuals who have committed no harm themselves. The panel topic of "New Frontiers in Civil Rights" indicates where we are: on the edge of some real opportunities. As Clint Bolick pointed out so eloquently,² the question, in terms of strategies and challenges, is whether we will move in a new and constructive direction, or whether we must remain mired in the controversies that were the basis of Judge Reinhardt's remarks. There is no question that what we really need, if we are truly interested in helping all Americans, is to provide the opportunity for everyone to become part of the American dream. Opening the doors of opportunity will require measures that focus on the positive, not on the negative divisiveness that has characterized too many of the policies of the administrations lauded by Judge Reinhardt.

It is interesting to note that there are groups in Washington—the Heritage Foundation, the Landmark Legal Foundation, and many others—that are working very hard to develop and implement the strategies mentioned by Clint Bolick.³ This

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1. See Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 142 (1991).

2. See Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137 (1991); see also C. BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 35 (1988).

3. Mr. Bolick presents a three-part strategy. First, he advocates both the rigorous enforcement of civil rights laws without enforcement of quotas and the extension of the civil rights program beyond mere opposition to reverse discrimination. Second, he supports the implementation of an "empowerment strategy" that is designed to secure for individuals the power to control their own destinies through economic liberty, educational choice, emancipation from dependency, and freedom from crime. Finally, he

is where the real future of civil rights must lie if we are to have an America that we can be prouder of, one in which all citizens have a greater share in the prosperity. All segments of America have fared better over the last decade because of the prosperity that accompanied the longest period of peace-time economic expansion in the history of our country.⁴ There are some conditions, however, that present a real challenge to the new frontiers in civil rights.⁵ In a better America, these conditions deserve our attention and should not be stifled by divisive debate.

The question of whether we can move on to new and more constructive frontiers has been answered by the Supreme Court. The Court has increasingly responded to the question put to our first panel, "To whom do civil rights belong?", by stating that civil rights in fact belong to everyone. Civil rights do not inhere within the limited province of any particular segment of society, nor should they inhere to the detriment of other segments of society. Increasingly, the courts have been telling us that discrimination against anyone is wrong, regardless of race, gender, or national origin. And the concept of a color-blind society, which is inherent in the Civil Rights Act of 1964⁶ and was the principal theme of speech after speech by Martin Luther King, Jr.,⁷ is today conceded by every member of the Supreme Court.⁸ If you read the majority opinion in some

calls for the reversal of the "twin pillars of jurisprudential oppression," *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), which, he argues, exhibit "pernicious judicial activism." Bolick, *supra* note 2, at 139.

4. See, e.g., *The Distribution of Income*, NAT'L REV., Aug. 18, 1989, at 12.

5. See C. BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 3 (1990).

6. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

7. The texts of Dr. King's speeches may be found in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (J. Washington ed. 1986). For biographical information concerning Martin Luther King, Jr., see T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); and D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986).

8. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., for the Court, joined by Kennedy, J.); *Johnson v. Transportation Agency*, 480 U.S. 616, 676 (1987) (Scalia, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting); *United Steelworkers of America v. Weber*, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 324 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("Color blindness must now be seen as an aspiration rather than a description of reality."). Since these remarks were delivered, Justice David Souter replaced Justice Brennan on the Court.

cases, and the dissents in others, you will find that each justice believes that the ultimate objective of civil rights law is to achieve a color-blind society. In a few cases, however, the minority, and sometimes even the majority, states that we are not quite ready to achieve this kind of society. As a result, certain types of discrimination have been allowed to persist, for a variety of reasons.⁹ In general, though, it is clear that the Court is moving toward a color-blind society.

Congress and the civil rights establishment, however, are fighting what I would term a "retrograde battle" to preserve the racial spoils system discussed earlier in the Symposium.¹⁰ I fear that the congressional deliberations over the so-called Civil Rights Act of 1990¹¹ will prove to be a continuation of an unproductive debate resembling interest-group politics, rather than a debate about applying civil rights equitably. Judge Reinhardt certainly removed any lingering doubts that I might have had about this by his remarks here.

One thing the present Supreme Court has not done, and specifically has refused to do, is to rewrite the law. For example, in *Patterson v. McLean Credit Union*,¹² a decision often criticized by some self-described civil rights advocates, the Court essentially stated, "If Congress wants racial harassment included in Section 1981, then let it write it in."¹³ The Court refused to rewrite the statute, even though it agreed that there was probably

9. See *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990) (upholding Federal Communications Commission's minority broadcasting program as effective in promoting broadcast diversity); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (upholding affirmative action hiring program of county transportation agency as effective in improving representation of minorities and women); *United States v. Paradise*, 480 U.S. 149 (1987) (upholding affirmative action program used in hiring Alabama state troopers); *International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) (upholding affirmative action plan for Cleveland firefighters); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding as valid the Minority Business Enterprise provision of the Public Works Employment Act of 1977); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that Title VII prohibitions against racial discrimination do not condemn all private, voluntary, race-conscious affirmative action plans, including that promulgated by the United Steelworkers of America and Kaiser Aluminum and Chemical Corporation).

10. See, e.g., Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

11. 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).

12. 109 S. Ct. 2363 (1989).

13. See *Patterson*, 109 S. Ct. at 2379.

room for improvement in the statute. Instead, the Court left it to Congress to rewrite its statutes, thus rejecting the path of judicial activism followed too often in years past.

Indeed, if we must have the discussion whether the civil rights debate should remain focused on the problems of the 1960s, or whether we should move into the 1990s, then at least we should approach this new frontier with a more civil and more constructive tone. Perhaps then we can find a way, even while debating the old history and the old issues, to move toward the new strategies that Clint Bolick articulates so well. Such strategies present a real solution to the problems that Judge Reinhardt identified.

There are three principles that ought to guide us as we approach this new frontier in civil rights. The first is candor. One of the things that has characterized this Symposium, to a greater degree than any other I have attended on the topic of civil rights, is that people here have been willing to speak out and address the real issues, facts, controversies, and disputes in an honest and forthright way. It has been said that patriotism is the last refuge of scoundrels;¹⁴ I might suggest that cries of racism are the first refuge of persons who would try to suppress any real debate on civil rights. Too often, in Washington one cannot present the evidence and arguments that have been discussed at this Symposium without being labelled a racist and being castigated in one of Washington's daily newspapers. It thus seems to me that the only way to grapple with these issues is to rely on the refreshing candor that has been exhibited here.

The second principle I wish to articulate is that fairness must be an integral part of any application of a law, if that law is to gain acceptance by the public. People have an inherent understanding of what is, and what is not, fair. We must therefore ensure that civil rights laws are applied in a fair and equitable manner.

The third important principle in this debate is the need for the refined definition of terms and improved analysis of the issues. For example, we need to understand the difference between state action, that is, where the government acts, and private action, where a private entity acts without being co-

14. Samuel Johnson was quoted as saying, "Patriotism is the last refuge of a scoundrel." J. BOSWELL, *LIFE OF JOHNSON* 615 (R.W. Chapman ed. 1953) (3d ed. 1799) (entry of April 7, 1775).

erced, based on reasons, values, and ideas that such an individual or institution thinks are important. Professor John Hart Ely believes that Stanford should provide additional opportunities for minority students, even though they may not meet traditional standards, so that the university may achieve diversity within its student body.¹⁵ It is proper for a private institution to express its values in this way. It is entirely improper, however, for government to impose such a regimen upon any institution, business, or other group that it regulates.

While on the topic of state action, I submit that our ultimate goal should be a society that not only provides opportunity and is fair, but is also cognizant of the way in which these ends are attained. We desire a just society in which people are treated fairly and lawfully, in which their constitutional rights are protected and preserved, and in which they are allowed to enjoy these rights. This is why we need civil rights laws and why we need protection against crime—another important aspect of Clint Bolick's strategy.¹⁶

As a nation, we also desire an integrated society. Affirmative action is absolutely critical in order to attain such a goal. Along with Judge Reinhardt, I believe that affirmative action is extremely important and should be continued, and perhaps even enhanced. I suspect we differ as to how affirmative action ought to be implemented. The form of affirmative action I support does not include any element of discrimination on the basis of race or gender.

The affirmative action program I envision entails expanded outreach and increased opportunities. It involves training. Under the affirmative action-quota approach, persons who lack qualifications often land in uncomfortable situations. For example, students often enter universities under such programs with the prospect of failing or feeling uncomfortable. Does one devise a special grading system in order to get them through school? This is hardly an appealing outcome.

I would suggest that there is a better approach. Any true solution must have as its foundation the idea that everyone should start on an equal plane. The military has followed this

15. Professor Ely moderated the second panel of the Symposium. In the discussion following the panel members' presentations, Professor Ely endorsed the Stanford affirmative action policy.

16. See C. BOLICK, *supra* note 5, at 4.

concept with its system of academy preparatory schools, which potential students may attend if their educational background is weaker than that of their fellow students. Instead of imposing a mandatory twenty-point differential in the admissions process, a more productive policy would be to provide an opportunity for those who have the potential for higher education to attend a preparatory school *before* entering college. Students participating in this program would then enter college ready and able to compete on an equal basis.

There once was a model for this type of program right here at Stanford University. When I was attending college, some football players went to Menlo Junior College for a year so that they could compete equitably with their peers at Stanford. They then entered college just like everyone else. This is the type of remedy that would truly be effective in building an integrated society. The same thing is true for training programs. Of course, these programs should not be available on race-based criteria, but instead should be open to anyone who is considered to be disadvantaged.

We all want an economically prosperous society, and we want all people to share in it. That is why we need social policies of the type that Clint Bolick proposes.¹⁷ We need social policies that will transform welfare into a program that empowers people to get out of poverty and that seeks to prevent children from being born into poverty. Under the welfare policies of the past generation or so, there has developed a social problem of generation after generation of people living on public assistance.¹⁸ The economic principles followed by the United States in the 1980s have been demonstrably successful. These principles are now the hope of the rest of the world. Former proponents of socialism are now turning to market-oriented policies. By ensuring that economic benefits and opportunities are available to all of our citizens, we can promote the same principles in this country that we advocate for the Third World and Eastern Europe.

In a speech he delivered recently at the Heritage Foundation, Professor Glenn Loury eloquently summarized where the responsibility for this task lies.¹⁹ Professor Loury explained that

17. See Bolick, *supra* note 2.

18. See, e.g., C. MURRAY, *LOSING GROUND* (1984).

19. See Address by Glenn Loury, Heritage Foundation (Feb. 12, 1990).

placing greater emphasis on the personal responsibility of blacks would take a lot of pressure off political leaders from outside the black community. He noted that this would allow these leaders to pursue changes in the structures that constrain all poor citizens, including the black poor, in a way that effectively imposes responsibility on individuals—and provides the freedom for the disadvantaged to exercise their inherent and morally required capacity to choose. He argued further that there is an intrinsic link between these two sides of the responsibility coin—between acceptance among blacks of personal responsibility for their actions and acceptance among all Americans of their social responsibilities as citizens.

If we can get past the unproductive controversy over whether civil rights only pertain to a few or whether these rights should be available to all, if we can pursue new strategies as we enter the 1990s rather than re-fighting the battles of the 1960s and 1970s, if we can preserve the even-handed decisions through which the Supreme Court has moved us toward a color-blind society, then we really will have approached a new frontier in civil rights and in overall prosperity.