CIVIL RIGHTS LAW ENFORCEMENT: A TIME FOR HEALING

CLINT BOLICK*

I. INTRODUCTION

Bill Clinton will not be remembered in history as a President who followed any particular philosophical star. Generally, he is considered a moderate or pragmatist. But in one major area of public policy, Clinton tenaciously and consistently pursued a hard-core left-wing agenda: civil rights. Americans will pay the costs of that agenda for years to come, in terms of racial division, weakened civil rights law enforcement, and most tragic of all, missed opportunities.

No one could have predicted such a sad debacle. Nothing in Clinton's background suggested a particular passion for civil rights issues. During the campaign and following his election, he chastised left-wing elements of his party for racial divisiveness. He accorded a low priority to filling key civil rights posts.

But at some point, Clinton apparently calculated that he could purchase quietude from the party's often-restive left wing cheaply and effectively by turning over to it the entire federal civil rights law enforcement arsenal and tenaciously promoting racial preferences. In a sense, the gambit worked—Jesse Jackson, Kweisi Mfume, and other establishment civil rights leaders became the Clinton Administration's faithful cheerleaders, and Clinton was never seriously challenged from the left, despite abandoning much of its goals in other areas of public policy.

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* Clint Bolick is Vice President and Director of Litigation at the Institute for Justice in Washington, D.C. He served in the Reagan Administration as Special Assistant to the Commissioner at the U.S. Equal Employment Opportunity Commission (1985-86) and as an appellate attorney and Special Assistant to the Assistant Attorney General in the U.S. Department of Justice, Civil Rights Division (1986-87).

But the real-world costs of Clinton's deal with the left have been tremendous. By pursuing race-based civil rights policies, the federal government under Clinton continued to categorize and divide Americans along racial lines in areas touching the lives of everyone, from voting to education to employment to government contracts to housing. At the same time, the Clinton Administration failed to tap into and encourage a burgeoning consensus that racial preferences are wrong, but that true "affirmative action" is necessary to help the most disadvantaged members of our society, who are disproportionately minority. It was one of the few times that Clinton willfully rebuked, rather than adhered himself to, a strong popular consensus on a major policy issue.

Moreover, by turning over the federal law enforcement apparatus to a bunch of ideologues, Clinton inflicted serious damage on its effectiveness and credibility. Clinton's Justice Department and Equal Employment Opportunity Commission often resembled a Court TV version of the Keystone Cops. Not only did the agencies lose a remarkable number of cases, but they were repeatedly rebuked and sanctioned by federal courts. The agencies also pursued illegal remedies, coercion, and intimidation, weakening the rule of law that is so critical for effective and enduring protection of civil rights.

The imperative for the next Administration is simple yet urgent: to effectuate a long-overdue healing process. Not only must it bridge the racial divide among Americans, but it must also repair the damage inflicted on civil rights law enforcement during the Clinton Administration.

II. ADVICE FOR THE NEW PRESIDENT

Obviously, civil rights policies will be dictated to some extent by the philosophical predilections of any particular Administration. Democrats and Republicans differ in their approach to civil rights policies,[1] and any Administration is entitled, within certain boundaries, to implement its civil rights vision through policy.

1. I have also been critical of Republicans, particularly the administration of President George H. W. Bush, for their moral abdication and missed opportunities in the area of civil rights policies. *See, e.g.*, CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? 111-19 (1996).

But the boundaries are important: every civil rights law enforcement official must take an oath to uphold the Constitution and the civil rights laws he or she will enforce.[2] That oath obligates the official to act in conformity with the rule of law,[3] not to behave like an ideological zealot possessed of a vast federal litigation arsenal. That is the central lesson of the Clinton Administration's civil rights debacle.

The next Administration's compass on civil rights can largely be taken from the preceding Administration's mistakes. In the pages that follow, I shall outline five areas where the Clinton Administration erred and suggest ways in which the next Administration needs to take serious remedial action.

A. Objective Civil Rights Law Enforcement

As a former lawyer in both the EEOC and Civil Rights Division and as a public interest lawyer today, I have a first-hand view of the difference between the two vocations. A civil rights lawyer engaged in public interest advocacy litigates toward what he or she believes the law *should be*. A civil rights lawyer working for the government enforces the law as it *is*. The two jobs are fundamentally different: the first requires imagination, the second restraint. That is particularly true in the area of civil rights, for our nation's civil rights laws reflect the outer boundaries of a precious moral consensus.[4] To stray recklessly beyond the boundaries of the law necessarily does violence to that consensus.

Civil rights law enforcement officials are lobbied relentlessly by establishment civil rights groups, business groups, and officials of federal, state, and local governments. Their job is to listen to all of them but ultimately to follow the law.

Bill Clinton obliterated the line between special-interest advocacy and civil rights law enforcement. Establishment civil rights groups were given free rein over civil rights law enforcement. The advocacy groups and civil rights law

2. The U.S. Constitution requires this. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

3. *See* BOLICK, *supra* note 1, at 111-19.

4. *See id.* at 23-38.

enforcers became one and the same, destroying any facade of effective civil rights law enforcement.

Things initially appeared more optimistic. As a candidate, Clinton's rhetoric on civil rights and race relations was soothing and conciliatory. "America needs to restore the old spirit of partnership, of optimism, of renewed dedication to common efforts," he declared.[5] During the campaign, Clinton assailed the rap singer Sister Souljah for her provocation of violence against whites.[6] Once elected, President Clinton lashed out against the "bean counters" who wanted him to play "quota games" with Administration appointments.[7]

But the optimism was short-lived, and reality hijacked rhetoric. Clinton appointed to *every* major civil rights post in his Administration an alumnus of an establishment civil rights organization. To the crucial position of Assistant Attorney General for Civil Rights, Clinton appointed Professor Lani Guinier, who previously litigated for the NAACP Legal Defense Fund ("LDF"). After Guinier's radical views were exposed to the public and her nomination was imperiled in the Senate, Clinton withdrew the nomination.[8] But subsequent picks were Guinier clones: Deval Patrick and Bill Lann Lee both also worked for LDF.[9] Patrick's deputies included Kerry Scanlon, another LDF alumnus, and Isabelle Pinzler, director of the Women's Rights Project at the American Civil Liberties Union.[10]

At the EEOC, Clinton appointed as chairman Gilbert Casellas, formerly with the Puerto Rican Legal Defense and Education Fund.[11] As commissioners, Clinton named Paul Igisaki, who served as director of the Asian Law Caucus; and Paul Miller, who was the litigation director for the Western

5. William Raspberry, Editorial, *Clinton Election Win Brings Forth Signs of Hope*, AUSTIN AM.-STATESMAN, Nov. 12, 1992, at A19.

6. *See* Ronald A. Taylor, *Clinton Raps Sister Souljah's Remarks*, WASH. TIMES, June 14, 1992, at A4.

7. *Id.* at 98.

8. *See id.* For an analysis of the views that led to the withdrawal of Guinier's nomination, see *id.* at 83-95.

9. *See id.* at 98; Clint Bolick, Editorial, *Bill Lann Lee's War on Charter Schools*, WALL ST. J., Mar. 22, 1999, at A23.

10. BOLICK, *supra* note 1, at 98.

11. *See* Roberto Rodriguez, *Casellas Tapped for Top EEOC Post: Latinos Decry Underrepresentation in Top Government Jobs*, BLACK ISSUES HIGHER EDUC., June 30, 1994, at 22.

Law Center for Disability Rights.[12] The commission's legal counsel, Ellen Vargyas, worked for the National Women's Law Center.[13]

At the U.S. Department of Education, Clinton named Norma Cantu as Assistant Secretary for Civil Rights the former regional director of the Mexican-American Legal Defense and Education Fund.[14] Roberta Achtenberg, named Assistant Secretary for Fair Housing and Equal Opportunity at the U.S. Department of Housing and Urban Development, was executive director of the National Center for Lesbian Rights.[15] And Clinton elevated as Chairperson of the U.S. Commission on Civil Rights Mary Frances Berry, who had come to national attention in 1985 when she opined that "civil rights laws were not passed to give civil rights to all Americans," but only for the benefit of "disfavored groups" such as "blacks, Hispanics, and women."[16]

Clinton's bean-counting and quota games were so obsessive that they imperiled civil rights law enforcement. *The Washington Post* assailed the Clinton Administration for leaving the EEOC chairman's post unfilled for 21 months as it searched for a nominee who was "not just Hispanic," but specifically of "Puerto Rican descent."[17] Meanwhile, the agency compiled a massive backlog of eighty thousand discrimination complaints.[18]

By picking ideological activists, Clinton exposed his civil rights nominees to serious scrutiny by the U.S. Senate, which exercised its important "advise and consent" role. After the embarrassing withdrawal of the Guinier nomination, Clinton suffered a second setback when his appointment of Bill Lann Lee to the same position faced certain defeat in the Senate Judiciary Committee.[19] Instead of withdrawing Lee, Clinton

12. *See* BOLICK, *supra* note 1, at 99.

13. *See id.*

14. *See* Tamara Henry, *Civil Rights Crusader Begins New Mission*, USA TODAY, June 17, 1993, at 4D.

15. *See* Pilita Clark, *Lesbian Confirmed in Senior US Post*, THE AGE, May 26, 1993, at 13.

16. *See* BOLICK, *supra* note 1, at 99.

17. *Appointments Dithering*, WASH. POST, June 14, 1994, at A20.

18. *See* Ronald Brownstein, *Key Civil Rights Post Left Empty as Search Falters*, L.A. TIMES, May 22, 1994, at A1.

19. *See Lee's Bid for Civil Rights Post Dead, Committee Chairman Says*, CHI. TRIB., Nov. 10, 1997, at 3.

bypassed the Senate and installed Lee as "Acting" Assistant Attorney General,[20] draining the Civil Rights Division of the constitutional imprimatur of Senate confirmation and making a further mockery of the Division's role as a law enforcement body.

Once appointed, Clinton's civil rights officials imported wholesale the advocacy groups' agendas and invested them with the power of the federal government, abandoning any pretense of objective law enforcement. The civil rights officials knew their position on a case even before they knew the facts. Assistant Attorney General Deval Patrick, for instance, denounced the U.S. Supreme Court's racial gerrymandering decision in *Shaw v. Reno*[21] as "alternately naive and venal" and organized a seven-member team to defend against "every single challenge" to allegedly unconstitutional districts.[22]

Recommendation: The seminal action the new Administration must take is to restore the rule of law in civil rights enforcement. As a first step, it should demonstrate that civil rights is a priority by acting swiftly to fill important civil rights posts. Of particular importance is the next Assistant Attorney General for Civil Rights. Rather than tapping a nominee from a special-interest group, the President should look for someone who has a dedicated commitment to civil rights, and who has written thoughtfully on the subject with an eye toward positive-sum solutions rather than divisive race-based policies.[23]

The temptation to appease the establishment civil rights groups by turning over to them the nation's civil rights law enforcement arsenal might seem irresistible. But as the experience of the Clinton Administration demonstrates, the costs are too high. Civil rights policy must be set and enforced by individuals who understand that fidelity to the rule of law is an essential requisite for securing civil rights for all Americans.

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20. *See* John F. Harris & Helen Dewar, *President Bypasses Congress, Appoints Lee on 'Acting' Basis*, WASH. POST, Dec. 16, 1997, at A1.

21. 509 U.S. 630 (1993).

22. BOLICK, *supra* note 1, at 105.

23. *See generally* STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997).

B. Racial Preferences

For more than a decade, the U.S. Supreme Court has applied "strict scrutiny" to all government action that discriminates among individuals on the basis of race.[24] Strict scrutiny requires the government to demonstrate that the racial classification is narrowly drawn to serve a compelling government interest.[25] In 1989, the Court struck down the City of Richmond's thirty percent set-aside for government contracts on the grounds that the program was not narrowly tailored to redress the city's past discrimination.[26] Six years later, in *Adarand Constructors, Inc. v. Pena*,[27] the Court made clear, once and for all, that *all* racial classifications, even those created by the federal government, are presumptively unconstitutional.

In practice, strict scrutiny is nearly always fatal. Federal courts repeatedly and consistently strike down racial preferences in public employment and contracting.

The problem is that such preferences are ubiquitous. To challenge them one-by-one would require massive resources. The federal government alone enforces at least 160 racial preferences.[28] Just as law enforcement officials were required following *Brown v. Board of Education* to act "with all deliberate speed" to eradicate school segregation,[29] so too is it the responsibility of law enforcement officials at every level of government—pursuant to their constitutional oath—to fully and faithfully implement Supreme Court decisions holding racial preferences presumptively unconstitutional.[30]

Instead of seriously examining federal programs for

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24. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) ("[O]ur decisions always have employed a . . . stringent standard—however articulated—to test the validity of the means chosen by a State to accomplish its race-conscious purposes."); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (holding that "[racial] classifications" created by the States "are subject to the most exacting scrutiny").

25. *See id.*

26. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

27. 515 U.S. 200 (1995).

28. *See* BOLICK, *supra* note 1, at 59.

29. 349 U.S. 294, 301 (1955).

30. Toward that end, my colleague at the Center for Equal Opportunity, Roger Clegg, and I launched the Project for All Deliberate Speed, which urges state attorneys general to implement *Croson* and *Adarand* with respect to racial preferences at the state and local government level. To date, compliance with those decisions has been slight, to put it mildly.

compliance with *Adarand*, the Clinton Administration minted a "mend it, don't end it" policy that provided a facade for preserving intact the preference apparatus in its entirety. They applied complex new standards employing such gobbledygook as "benchmarks," "availability," and "price credits."[31] Predictably, when the new benchmarks were applied, every single one of the 160 federal preferences survived.[32] The Clinton Administration managed to overturn the constitutional mandate of strict scrutiny by bureaucratic fiat.

Clinton's Justice Department went so far as to argue that abolishing racial preferences is illegal. As *amicus curiae* supporting an absurd legal attack[33] on Proposition 209, the California Civil Rights Initiative that abolished racial preferences in public employment, contracting and education, the Justice Department argued that Proposition 209 contravened federal civil rights laws.[34] The U.S. Court of Appeals for the Ninth Circuit decisively rejected that argument and upheld the initiative.[35]

The actions of Clinton's Civil Rights Division marked open defiance of Supreme Court precedents. As a consequence, racial preferences continue to permeate the landscape and to divide Americans along racial lines.

Recommendation: The Civil Rights Division and other federal civil rights law enforcement agencies should enforce the law with respect to racial classifications. Imagine that! It would represent a marked departure from the *sub rosa* policy and overt practices of the past eight years.

First, the new Administration should review racial preferences at the federal level for conformity with *Adarand*. It should direct other agencies to repeal such preferences or advise Congress to take such action if the preferences are statutorily mandated. Second, the Justice Department should insist that state and local governments bring their practices into compliance with *Croson*—with all deliberate speed.

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31. *See* Clint Bolick, Editorial, *Deval Patrick's Legacy at Justice*, WALL ST. J., May 14, 1997, at A23.

32. *See id.*

33. *See* Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision was Wrong*, 2 TEX. REV. L. & POL. 59 (1997).

34. *See* Coalition for Econ. Equal. v. Wilson, 122 F.3d 692, 703-04 (9th Cir. 1997).

35. *See id.* at 711.

Critics surely would predict dire consequences if such actions were taken. Not at all. Many preference statutes actually require affirmative action for members of "socially and economically disadvantaged" groups; it's just that agencies in turn use racial classifications to define groups that are presumptively "disadvantaged."[36] Once racial classifications are stripped away, the programs would operate—for the first time—to benefit solely and exclusively people who are in fact disadvantaged. The only losers would be people who are not disadvantaged. It is difficult to argue against such a reform either on moral or practical grounds. Such reform also would revitalize the concept of true affirmative action.[37]

C. Curbing Illegal Practices

Recognizing the clear edict of Supreme Court decisions, yet hopelessly addicted to racial preferences, the Civil Rights Division under Clinton repeatedly employed extra-legal practices to achieve through extorted "voluntary" consent decrees what it could never achieve through litigation. In so doing, the Division severely tarnished its reputation and further damaged the rule of law.

Examples abound. Early in the Clinton Administration, the Justice Department settled a case against Chevy Chase Savings & Loan.[38] No clear allegations of discrimination were ever made, but the Justice Department accused the company of "shun[ning] an entire community" by failing to open branch offices in certain minority census tracts.[39] Rather than defending itself in protracted litigation and risking further damage to its reputation, the savings & loan agreed to open new branch offices in designated areas, to advertise in minority-targeted media, and to "invest $11 million in the African American community," including funds for mortgage

36. *See* Bolick, *supra* note 31.

37. For the case in favor of socioeconomic affirmative action instead of racial preferences, see RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 83-209 (1996).

38. *See* Holly Bass, *Chevy Chase Federal Reaches $11 Million Pact: Accord Settles U.S. Charges that S&L Didn't Offer Mortgages to Blacks*, WALL ST. J., Aug. 23, 1994, at A2.

39. Sharon Stangenes, *Bank Settles Allegations of Lending Bias; Agreement Part of Widening Push by Justice Department*, CHI. TRIB., Aug. 23, 1994, at 1.

subsidies and below-market rates.[40] It is highly unlikely that such innovative "remedies" would have emerged in a litigated judgment even if the Justice Department had proven that some law had been violated.

In 1995, Assistant Attorney General Deval Patrick announced he would take the City of Fullerton, California to court unless it agreed to quota hiring for its police and fire departments.[41] The complaint was not based on actual claims of discrimination. Instead, it relied on statistics: the Justice Department wanted the city to produce a 44.3 percent minority applicant pool, including 9.1 percent blacks, even though the city was only 37 percent minority and 1.9 percent black.[42] Apparently the Justice Department drew its statistics from the more heavily minority Los Angeles metropolitan area, even though Fullerton is in Orange County, which lies about 22 miles from the city of Los Angeles.[43] Unless it agreed to a consent decree, Fullerton faced years of time and millions of dollars to defend itself against what it considered baseless charges. In addition to expanded and targeted recruitment, the city, under the terms of the consent decree, would have been forced to subject its hiring decisions to Justice Department scrutiny unless racial parity goals were achieved; the consent decree would also have required the city to hire on a priority basis minorities who applied (or who felt discouraged from applying) for entry-level positions since 1985 and to offer them back pay and benefits.[44]

In another case brought in 1996, a judge threw out the proposed consent decree, in part because the remedy would have been unconstitutional.[45] The Civil Rights Division was prosecuting the North Carolina Department of Correction for a "statistical 'shortfall'" in hiring female prison guards.[46] Like many defendants, the state agency chose to capitulate rather than fight. As part of the proposed 51-page consent order, the agency agreed, among other things, to hire female correctional

40. Clint Bolick, Editorial, *Extortion, Not Enforcement, by the Civil Rights Division*, WALL ST. J., Apr. 5, 1995, at A13.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See* Clint Bolick, *A Judge Takes On Clinton's See-No-Quota Quota Policy*, WALL ST. J., Apr. 17, 1996, at A21.

46. United States v. North Carolina, 914 F. Supp. 1257, 1268 (E.D.N.C. 1996).

officers "in numbers that reflect their availability in the relevant labor market"; to create a $1.3 million "organizational structure" that included such officials as a "Title VII compliance investigator" and a "social research assistant"; and to provide $5.5 million in back pay to any woman, selected by the Justice Department, who applied for such positions or "would have applied . . . but for her reasonable belief" that she would have suffered discrimination.[47] The consent decree even required the state to provide road maps to the prisons, in case the aggrieved victims didn't know where it was they were being discouraged from working.[48]

Judge Terrence W. Boyle refused to rubber-stamp the decree. "Were this agreement properly before the Court, it would be flatly rejected," the Court declared.[49] "Not only does the agreement appear to be unlawful and unreasonable, it is also doubtful the agreement comports with the Constitutional requirement that male employees and prospective applicants be afforded the equal protection of the law."[50] The court admonished that "[j]ust as an accused is entitled to [a showing] of probable cause before being subjected to criminal prosecution, so too is a defendant facing the awesome power of the federal government in a Title VII context" entitled to a determination of whether "reasonable cause might exist for prosecution of the claim."[51] The court also condemned the Justice Department for prosecuting a purely statistics-based lawsuit with victims recruited "only after prospects of a large cash reward ha[d] been revealed."[52]

These and other cases illustrate how little the Clinton Administration's Civil Rights Division felt bound by law. Extortion disguised as negotiation, statistics dressed up as discrimination, and quotas masquerading as remedies are all touchstones of ideological zealots, not objective enforcers of law.

Recommendation: To regain respect for civil rights laws and the federal officials who enforce them, the new Administration

47. *Id.* at 1260.
48. *See id.* at 1261-62.
49. *Id.* at 1263.
50. *Id.*
51. *Id.* at 1264.
52. *Id.* at 1274.

should consider a number of factors before engaging in prosecution. First, is there more evidence of discrimination than mere statistics? If indeed an employer is engaging in widespread discrimination, surely there must be instances in which better-qualified minority or female candidates lost opportunities to less-qualified individuals. If not, the statistics may point to something other than discrimination, such as an educational system that disproportionately produces poorly qualified job applicants.[53]

Moreover, civil rights law enforcement officials should consider themselves bound by federal law and the Constitution in fashioning remedies. Consent decrees, as acts of the government, are bound in that same fashion. They should not be viewed as Christmas trees beneath which boundless ideological wishes are fulfilled. At the EEOC under Chairman Clarence Thomas, our policy was to obtain full relief for individual victims of discrimination. Preference policies, by contrast, reward non-victims and often penalize innocent people. Remedies should be tailored to the actual wrongs that have been committed.

That does not mean light-handed civil rights enforcement. To the contrary. Full relief for individual victims of discrimination is often far more costly than preference remedies, which often require nothing more than that the employer hire different people. My advice here merely obligates law enforcers to act only when a law has actually been broken, and to ensure that the punishment fits the crime. This ought not be a revelation, but law enforcement that hews to such basic rules would mark a drastic change from the reckless policies and practices of the Clinton Administration.

D. Voting Rights

How many times does the Supreme Court have to repeat itself? The Constitution does not permit—and certainly neither it nor the Voting Rights Act requires—a system of "political apartheid."[54] As Justice Anthony Kennedy has declared, the goal of ending discrimination "is neither assured nor well

53. *See* BOLICK, *supra* note 1, at 51-68.
54. Shaw v. Reno, 509 U.S. 630, 647 (1993).

served . . . by carving electorates into racial blocs."[55] Racial classifications in political line-drawing evoke the same strict constitutional scrutiny as all other forms of race discrimination.

But the Justice Department, true to the vow of former Assistant Attorney General Deval Patrick, has defended every racially gerrymandered electoral district. What's more, it has used its vast discretionary "pre-clearance" powers under the Voting Rights Act to induce state and local governments to violate the Constitution by drawing political lines to enhance minority voting power.

Racial gerrymandering assumes that race is the primary criterion of an individual's political identity. It assumes, falsely, that black politicians can only be elected by blacks and whites by whites. It creates a floor for minority political power, but also a ceiling, for it tends to conglomerate minorities. By so doing, it drains many districts of minority populations and thereby diminishes the obligation of white elected officials to represent minority interests and vice-versa. In sum, like other types of racial classifications, it increases race-consciousness and polarization.[56]

The Supreme Court repudiated Clinton's Civil Rights Division repeatedly on voting rights issues. In *Shaw v. Reno*,[57] the Court remanded the case to the district court for consideration of a bizarrely shaped district that "winds in snake-like fashion through tobacco country, financial centers, and manufacturing centers 'until it gobbles up enough enclaves of black neighborhoods'."[58] Two years later, in *Miller v. Johnson*,[59] the Court invalidated congressional districts in Georgia that were gerrymandered in conformity with a Justice Department-backed "max-black" plan.[60] Then, in 1997, the Supreme Court held by a 7-2 vote that the Justice Department had misused its pre-clearance powers under the Voting Rights Act to induce public officials to discriminate in drawing political boundaries in order to maximize the number of safe

55. Miller v. Johnson, 515 U.S. 900, 927 (1995).
56. *See* BOLICK, *supra* note 1, at 83-95.
57. 509 U.S. 630 (1993).
58. *Id.* at 635-36.
59. 515 U.S. 900 (1995).
60. *Id.* at 907.

black seats.[61] Again, it was the Division's practice to coerce "voluntary" settlements in order to procure illegal remedies.

Recommendation: Given the congressional redistricting that will follow the 2000 elections, the issue of racial gerrymandering looms large. Either the Justice Department will counsel state governments to redistrict in a nondiscriminatory fashion—as the Constitution requires—or it will persist in encouraging racially drawn districts, subjecting the political landscape to protracted upheaval in the courts.

As a law enforcement agency, the Justice Department's role is to enforce the Voting Rights Act and the Constitution, in harmony with Supreme Court decisions. It should no longer use its pre-clearance powers to force the establishment of illegal boundaries. Instead, the Division should lend its considerable resources and authority to aid states and localities in fashioning nondiscriminatory political boundaries.[62] Such a process would not dilute minority voting strength, for nondiscriminatory boundaries will yield many majority-minority districts. But it also will produce districts where minority politicians must vie for white votes and vice-versa. Such a process not only is constitutionally mandated, but also will reduce racial division.

E. Educational Opportunities

In this area, the Justice Department and U.S. Department of Education's Office of Civil Rights ("OCR") could play a major role in boosting opportunities for minorities. But during the Clinton Administration, civil rights officials were locked into 1960s thinking, viewing the educational landscape as essentially unchanged from the segregation era. In the process, it jettisoned the true goal of *Brown v. Board of Education*[63]—equal educational opportunities—with the antagonistic goal of race balancing.[64]

That is particularly true in the area of school desegregation. Forced busing and judicial control of school districts was an extraordinary remedy that was intended to be temporary, with

61. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1999).

62. The Center for Equal Opportunity has written to states offering its guidance in developing parameters for race-neutral redistricting.

63. 347 U.S. 483 (1954).

64. *See* BOLICK, *supra* note 1, at 69-81.

the goal of restoring local control as soon as districts became "unitary" rather than segregated. But today, in hundreds of communities across the country, school districts continue to operate under desegregation decrees, many of which are several decades old and still require forced busing to achieve or maintain racial balance.[65] Due to white flight, many of the school districts are increasingly minority. Resources often have followed whites to suburbia, and inner-city schools have deteriorated. Hence the perverse irony that forced busing has achieved neither racial integration nor equal educational opportunities.

The Supreme Court has instructed on numerous occasions that courts should terminate control of school districts once official discrimination has been purged from the school system; this emphatically does not mean perpetual racial balance.[66] But again, the Clinton Civil Rights Division thumbed its nose at Supreme Court precedents, acting rarely and reluctantly to release school districts from judicial control.

Instead, the Civil Rights Division was willing to use desegregation decrees to thwart educational reforms that would benefit minority schoolchildren. Charter schools—innovative public schools that are freed from a number of bureaucratic regulations—are an option in many states that offer high-quality educational opportunities and parental choice. Particularly in large cities, charter schools disproportionately benefit minority schoolchildren.

The Clinton Administration professed strong support for charter schools as a matter of public policy. But the Civil Rights Division moved to block charter schools in Louisiana, Texas, South Carolina, and Mississippi—even when they were designed to serve overwhelmingly black student populations.[67] In East Baton Rouge, Louisiana, the Justice Department invoked a desegregation decree to block United Charter School, which would have served 650 at-risk children, nearly all of

65. *See id.* at 74.

66. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Bd. Of Educ. of Oklahoma City Pub. Schools v. Dowell, 498 U.S. 237 (1991); Spangler v. Pasadena City Bd. Of Educ., 427 U.S. 424 (1976).

67. *See* Clint Bolick, Editorial, *Bill Lann Lee's War on Charter Schools*, WALL ST. J., March 22, 1999, at A23.

them black.[68] In St. Helena, Louisiana, it thwarted a charter school for educationally at-risk schoolchildren even though the school district was 91 percent black and consisted of one elementary school, one high school, and one junior high, making it impossible to racially balance.[69]

Meanwhile, OCR's Assistant Secretary Norma Cantu launched an investigation into the State of Ohio's high school proficiency examinations—even after a federal district court found that the tests were not racially biased.[70] The 2.6 percent of graduating seniors who failed the exam—about one-third of whom were black—were offered a ten-hour summer remediation course and another chance to pass.[71] But the racially disproportionate results were intolerable to Cantu, who backed down only after strong congressional reaction.[72]

As in other areas of civil rights enforcement, Clinton's team unrepentantly fought for racial balance, with underlying concerns about opportunity sometimes never entering the equation. Given the serious educational deprivations facing minority (particularly black) schoolchildren,[73] a law-enforcement agenda focusing on racial balance rather than opportunity operates to the serious detriment of the intended beneficiaries.

Recommendation: The new Assistant Attorney General should make it a priority to scour all extant school desegregation decrees (1) to determine whether any current racial imbalance is directly attributable to past segregation and (2) if so, to devise a plan to attain unitary status as quickly as possible. Such efforts should focus to the greatest possible extent not on race balancing, but on providing choices and opportunities to the intended beneficiaries of desegregation.

The goal of such a review, at the outset, should be to restore local control to all school districts in the nation no later than 2004—fifty years after *Brown*. That will not leave future

68. The Institute for Justice now represents United Charter School in its efforts to open.

69. *See* Bolick, *supra* note 67.

70. *See* BOLICK, *supra* note 1, at 106.

71. *See id.*

72. *See id.*

73. *See* CLINT BOLICK, TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT 34-67 (1998).

discrimination unaddressed—where states engage in intentional discrimination, it will remain actionable. But the reality today is that the vast majority of school officials are anxiously looking for ways to fulfill the promise of equal opportunity—not to evade it.

Beyond that, the Justice Department should support, rather than oppose, new methods to expand educational opportunities for minority young people. Charter schools and school vouchers have shown enormous promise in closing the education gap between black and white schoolchildren. The mandate of civil rights is to open the schoolhouse doors, not to block them.

III. CONCLUSION: A TIME FOR HEALING

Shamefully, the record of the Clinton Administration is one of open defiance of Supreme Court decisions on civil rights. It has defended, perpetuated, and even expanded racial discrimination, acting perversely in the name of civil rights. It has been eight wasted years.

Eight *precious* years: For as the politicians have been dithering and demagoguing, mainstream Americans have been searching—increasingly successfully—for solutions to the racial divide.[74] In addition to voluntary integration, intermarriage, interracial adoption, and other methods of social interaction, Americans seem to be reaching a consensus on race issues that has eluded most politicians.

The consensus is reflected in remarkably consistent polling on affirmative action and related issues. Most polls find that large majorities of Americans, spanning the color line, oppose policies that discriminate on the basis of race, ethnicity, or gender in public contracting, employment, and education. Hence it is no surprise that voters in California[75] and Washington[76] voted by large margins to abolish such practices.

But the same polls find that a majority of Americans also support something called "affirmative action"—even if they

74. For a superb compendium on the state of race relations, see STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997).

75. *See* CAL. CONST. art. I, § 31.

76. *See* WASH. REV. CODE § 49.60.400 (2000).

oppose preferences.[77] This suggests that most Americans believe in extending a helping hand to the truly disadvantaged—but not on the basis of race. Race is both overinclusive and underinclusive as a surrogate for victimization. Most people believe that it is laudatory to help someone who has been denied the basic opportunities of citizenship, but that it is profoundly wrong to confer benefits or burdens on the basis of race. In fact, that understanding is at the core of our very concept of civil rights.

The next President has a tremendous opportunity—squandered, sadly, by his predecessor—to build upon this consensus. That means redefining affirmative action away from a euphemism for racial preferences and toward efforts calculated to help disadvantaged Americans earn a share of the American Dream.[78] It also means working to eliminate remaining barriers to opportunity through school vouchers, community renewal, freedom from crime, and economic liberty.[79]

For over 150 years, civil rights law enforcement has been primarily a federal responsibility. Federal civil rights law enforcement officials should be at the fulcrum of efforts to heal racial division, not at odds with it. Where discrimination persists—and there is no question that it remains a widespread problem—the federal government should move aggressively to curb and punish it, and to make the victims whole. But the federal civil rights apparatus should not be placed at the disposal of an ideological elite, for whom civil rights laws are merely a convenient and potent means to achieve a radical political agenda. Rather, civil rights leaders should adhere to the law, and to the precious moral consensus that produced it. If they do, we may be able to deliver—at long last—on the promise of opportunity for all Americans.

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77. *See, e.g.*, Sam Howe Verhovek, *In Poll, Americans Reject Means But Not Ends of Racial Diversity*, N.Y. TIMES, Dec. 14, 1997, at A1.

78. One example is Florida Governor Jeb Bush's "One Florida" program, which abolished most racial preferences in public contracting and education but replaced them with vigorous outreach efforts and programs to aid economically disadvantaged people.

79. *See* BOLICK, *supra* note 73, at 34-153.