

Civil Rights at the Crossroads

by DREW S. DAYS, III*

INTRODUCTION

Toward the end of 1991, the country was treated to a controversy that exemplified, as well as any, the complexities that have beset civil rights in the 1990s. You will recall that a high-ranking black Department of Education official sent a letter to organizers of the upcoming Fiesta Bowl in Arizona informing them that a minority-scholarship plan they were contemplating might violate federal law. Teams from Auburn, in Alabama, and the University of Louisville, in Kentucky, had threatened to pull out of the Bowl to protest Arizona's failure to declare Martin Luther King's birthday a state holiday. In an effort to prevent that from happening, Fiesta Bowl officials committed themselves to setting up \$100,000 scholarship funds for minority students at each school. The Department of Education Assistant Secretary announced that it would be a violation of a provision of the 1964 Civil Rights Act that prohibits racial discrimination by recipients of federal financial assistance¹ for either Auburn or Louisville to use the Fiesta Bowl scholarships solely for minority students.² He added, however, that the Fiesta Bowl organization, as long as it received no federal funds, could provide scholarships directly to minority students without violating the Civil Rights Act.³

As many of you will also remember, the plot thickened when many people, even some members of the Bush cabinet, decried the Department of Education's new rule. The result was a revised policy under which Auburn and Louisville, and other schools presumably, could use funds provided by private organizations, like the Fiesta Bowl, for minority scholarships. However, using their own university monies for such

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1. Civil Rights Act of 1964, Title VI, 42 U.S.C. §§ 2000d to 2000d-4a (1988).

2. Michel Marriott, *Colleges Basing Aid on Race Risk Loss of Federal Funds*, N.Y. TIMES, Dec. 12, 1990, at A1.

3. Letter from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to John Junker, Executive Director, Fiesta Bowl (Dec. 4, 1990) (copy on file with author).

scholarships would still violate the 1964 Act.⁴ With the appointment of a new Secretary of Education, the entire policy was suspended, pending a thorough review.⁵ The Department has recently proposed new guidelines for public comment which, if finally approved, would allow funding like that from the Fiesta Bowl sponsors to occur.⁶

I doubt that we have heard the last of this controversy, however. But I do not propose to pursue those issues here. Rather I want to underscore the point that this recent civil rights crisis arose because a black federal official found fault with the fact that organizers of a football game promised to do something to assist minority students in order to prevent a protest against Arizona's refusal to acknowledge Dr. King's birthday from ruining their multi-million dollar investment. I am certain that Dr. King would not have missed the irony of this situation.

There was a time when civil rights issues were much, much simpler; when it was rather easy to identify which side held the high moral ground. All it took was a pair of eyes and a sense of humanity to understand that black citizens of Birmingham, not Bull Connor with his fire hoses and police dogs, had right on their side and that those marching across the Edmund Pettis Bridge to demand voting rights for blacks in Alabama, not George Wallace's brutal state police, were acting in the finest traditions of the Declaration of Independence and of the Constitution.⁷ When Dr. King challenged America to make good on its claim that "all men are created equal" and all who embraced Judeo-Christian principles to acknowledge that blacks, too, were children of God and made in his own image, King's message struck responsive chords throughout the land in a way we have never seen since. The fire hoses are no longer a threat to black citizens of Birmingham who want to enjoy access to public accommodations on a nondiscriminatory basis. And one of the black protesters whose skull stopped a state policeman's riot stick on the Selma march, John Lewis, now serves in the United States House of Representatives.⁸ But America has yet to finish the job of ridding its society of the vestiges of a long and sordid history of racial discrimination, particularly in employment, voting, education, and housing.

It has become increasingly difficult, however, to convince many white, and even some black, Americans that achieving further progress

4. U.S. DEP'T OF EDUC., POLICY STATEMENT ON RACE-EXCLUSIVE SCHOLARSHIPS (Dec. 18, 1990).

5. Andrew Rosenthal, *White House Retreats on Ruling that Curbs Minority Scholarships*, N.Y. TIMES, Dec. 18, 1990, at A1.

6. DEP'T OF EDUC., NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS: TITLE VI OF THE CIVIL RIGHTS ACT OF 1964; PROPOSED POLICY GUIDANCE (Dec. 10, 1991).

7. See TAYLOR BRANCH, PARTING THE WATERS (1988); DAVID J. GARROW, BEARING THE CROSS (1986); STEPHEN B. OATES, LET THE TRUMPET SOUND (1982).

8. See DAVID J. GARROW, PROTEST AT SELMA (1978).

in civil rights is still a moral imperative. Memories have faded—naturally or conveniently among some—of the civil rights struggles of the '60s; and many are too young to have any memories at all of that period. Critics of affirmative action are quick to observe that we now have a society in which young whites can honestly claim that they personally never engaged in acts of racial discrimination and young blacks cannot claim to have been the victims of the type of blatant racism that characterized the '50s and '60s.⁹

Moreover, the issues have become, like that of minority scholarships, rather complicated. This is not to say that wrongs do not exist that need to be rectified; it is just harder to explain to the person on the street the nature of the wrong and the necessity of the remedy. It is true that Congress enacted several new pieces of civil rights legislation in the 1980s. But doing so was not easy and even these successes were not necessarily reflective of a widespread national consensus that Congress' actions were right and just. Part of the problem has been that the civil rights efforts have been defensive, rather than offensive, for the past decade, largely as a result of restrictive Supreme Court rulings.

CIVIL RIGHTS LEGISLATION IN THE 1980S: DEFENDING THE GAINS OF THE 1960S AGAINST AN INCREASINGLY HOSTILE SUPREME COURT

In 1980, for example, the Court gave a provision of the Voting Rights Acts of 1965 a limited reading in striking down lower courts' holdings that Mobile, Alabama's at-large electoral system discriminated against blacks.¹⁰ Congress was able to enact an amendment to the Voting Rights Act in 1982, effectively negating any future impact of the Court's *Mobile* decision.¹¹ However, it did not do so without a struggle, including overcoming strong Reagan Administration approval. Opponents claimed that the Voting Rights Act Amendments of 1982 would result in electoral "quotas" and "proportional representation."¹²

Success in this campaign was attributable to early and effective organization by the civil rights community, both in Congress and at the grassroots level.¹³ But I doubt that many Americans truly understand

9. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984); NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION* (1975).

10. *Mobile v. Bolden*, 446 U.S. 55 (1980).

11. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (amending 42 U.S.C. §§ 1971, 1973-1973-b (1988)).

12. See, e.g., ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?* 123-25 (1987); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purposes vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633 (1983).

13. THERNSTROM, *supra* note 12, at 79-136; Armand Derfner, *Vote Dilution and the Vot-*

yet how at-large electoral systems, the very essence of the "one person, one vote" principle (since everyone votes for all the offices at issue), can be racially discriminatory. That they have been in the past and continue to be so in certain parts of the country even today,¹⁴ does not alter the fact that the national consciousness has failed to grasp this reality.

In 1984, the Supreme Court limited the reach of a provision of the 1972 Education Amendments,¹⁵ prohibiting sex discrimination by recipients of federal financial assistance.¹⁶ The ruling's logic applied as well to that provision of the 1964 Civil Rights Act barring racial discrimination at the center of the Fiesta Bowl controversy.¹⁷ Put simply, the issue was whether a recipient of federal funds in one part of its operation could discriminate, nevertheless, in another part of its operation without violating federal law; could a college that received federal funds for its physics program, for example, still engage in sex or racial discrimination in athletics with impunity? I think this issue, if one puts it in terms of a federal recipient's using essentially accounting sleight-of-hand to persist in discriminatory practices, has the potential to take on moral dimensions.

But the actual debate in Congress turned principally on the proper definition of a federally funded "program or activity."¹⁸ And I doubt that the general public ever comprehended the significant impact of the Supreme Court's narrow reading and the importance of a legislative response. Perhaps this explains why it took Congress several attempts, over almost four years, to pass the Civil Rights Restoration Act of 1987.¹⁹ Framed as it was, this issue was unlikely to spur people to march, stand up and be counted, and make their voices heard in support of reform. Civil rights forces were emboldened, however, by the fact that the Restoration Act became law despite President Reagan's veto.

The third piece of civil rights legislation enacted in the 1980s, the Fair Housing Act Amendments of 1988,²⁰ was not responsive, as such, to restrictive court rulings. However, efforts to amend the original 1968 Act had been ongoing at least since the late 1970s, largely to provide

ing Rights Act Amendments of 1982, in MINORITY VOTE DILUTION 151-56 (Chandler Davidson ed., 1984); ROBERT R. DETLEFSEN, CIVIL RIGHTS UNDER REAGAN 156-64 (1991).

14. See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

15. Education Amendments of 1972, Title IX, 20 U.S.C. §§ 1681-1688 (1988).

16. *Grove City College v. Bell*, 465 U.S. 555 (1984).

17. *United States v. Alabama*, 828 F.2d 1532, 1548 (11th Cir. 1987) (per curiam), *cert. denied*, 487 U.S. 1210 (1988) (*Grove City* held to apply to Title VI of the Civil Rights Act of 1964).

18. See John S. Garvey, *The "Program or Activity" Rule in Antidiscrimination Law: A Comment on S. 272, H.R. 700, and S. 431*, 23 HARV. J. ON LEGIS. 445 (1986).

19. Pub. L. No. 100-259, 102 Stat. 28 (1988).

20. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

victims of racial discrimination with stronger remedies.²¹ The 1988 amendments are largely technical, as well, except in two respects: for the first time housing discrimination against the disabled and families with children was prohibited by federal law.²²

If one wishes to find a moral imperative in this legislative action, it has to relate to the rights of the disabled. Americans are coming generally to believe, I think, that denying people with disabilities meaningful access to jobs, housing, education, and transportation is no longer acceptable. The recent enactment of the Americans with Disabilities Act of 1990,²³ an omnibus federal law providing significantly expanded opportunities, is further evidence of this changed environment.

THE 1988-89 SUPREME COURT TERM AND CONGRESS' RESPONSE: THE DEATH AND REBIRTH OF DISPARATE IMPACT

The Supreme Court in its 1988-89 Term, however, set in motion a chain of events that seriously slowed the momentum of civil rights reform. In a series of decisions, the Court significantly narrowed prior interpretations of provisions of both the Civil Rights Act of 1964²⁴ and of a civil rights statute that dates from the Reconstruction era.²⁵ In the latter case, it held that the statute prohibited racial discrimination in the making of employment contracts but not discriminatory practices once the complainant was hired.²⁶ Put crudely, the Court's reading would preclude a white employer from requiring a black applicant to accept a job with the understanding that he or she would be treated less favorably than whites. But, once hired on a nondiscriminatory basis, the black employee would have no recourse under the Reconstruction Era statute, said the Court, for the employer's racial harassment, for example. Suffice it to say that this reading was not dictated by the statute's language. Rather, it was in my estimation reflective of a desire by the Court majority to reduce the availability of an alternative cause of action for employment discrimination to that provided by Title VII of the Civil Rights Act of 1964.²⁷ As a result of this ruling, a black woman, who claimed that she had been told by her supervisor repeatedly that "blacks are known to work slower than whites by nature" because "some animals are faster

21. See James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 355 (1988).

22. 42 U.S.C. §§ 3604(a)-(e), 3605, 3606, 3607(b), 3617, 3631 (1988).

23. Pub. L. No. 101-336, 104 Stat. 327 (1990).

24. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-16 (1988).

25. That law is now codified at 42 U.S.C. § 1981 (1988).

26. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

27. See Constance Baker Motley, *The Supreme Court, Civil Rights Litigation, and Debra Vu*, 76 CORNELL L. REV. 643, 654 (1991) (ascribing this intent to the *Patterson* Court).

than other animals" in the course of a pattern of racial harassment, was left empty-handed by the Supreme Court.²⁸ Thereafter, many others with similar claims suffered the same fate, watching their employment discrimination lawsuits filed years before summarily thrown out of court.²⁹

More devastating to civil rights enforcement, however, was the Court's decision effectively overruling one of its own precedents of almost eighteen years. To give a bit of history, in 1971 the Court ruled that Title VII of the Civil Rights Act of 1964, which prohibits various forms of employment discrimination, could be violated not only by practices designed to treat persons unfairly because of their race, sex or national origin. It also prohibited practices that disproportionately burdened racial and ethnic minorities or women unless such practices could be shown genuinely to assess candidates' suitability for the job in question.³⁰ In the 1971 *Griggs* decision, the Court held that a North Carolina power company could not justify its imposition of a high school diploma requirement or the use of aptitude batteries, both of which presented significant obstacles to black employment or advancement. The Court took special note of the fact that whites who had been hired earlier without their having to meet such requirements were performing quite well in their jobs.³¹

Until 1989, the Supreme Court and lower federal courts had developed a relatively consistent body of law in the "disparate impact" (or discriminatory effect) employment discrimination area. In essence, these precedents held that once plaintiffs established that an employment screening device had a discriminatory impact, the employer's burden was to convince a court that the device was justified in terms of its ability to select qualified employees. Failing to do this, the employer would lose.³² In its 1989 *Wards Cove* decision,³³ however, the Court in effect both freed the employer in such cases from making a showing of "business-necessity," or "job-relatedness," to use two of the relevant phrases from the earlier case law, and placed the ultimate burden on the plaintiff, of establishing that the screening device violated Title VII. Here is not the place to get into an involved discussion of evidentiary burdens. But, all

28. *Patterson*, 491 U.S. at 213 (Brennan, J., dissenting).

29. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, THE IMPACT OF *Patterson v. McLean Credit Union* (Nov. 20, 1989) (on file with author).

30. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Cf. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (weakening *Griggs* standard). See also Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (to be codified at 42 U.S.C. § 2000e-2(k)) (restoring *Griggs* standard).

31. *Griggs*, 401 U.S. at 431-32.

32. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

33. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

other things being equal, minority or women plaintiffs who would have won a "disparate impact" employment discrimination case prior to the Court's 1989 decision were likely to lose that case under the new allocation and nature of evidentiary burdens dictated by *Wards Cove*.³⁴

Civil rights groups appealed to Congress shortly after these Supreme Court decisions for overruling legislation. The result of this effort was the introduction the following spring of the proposed Civil Rights Act of 1990.³⁵ That legislation sought not only to address the Supreme Court's narrow readings of the Reconstruction Era and 1964 Civil Rights Acts, but also to strengthen protections for racial minorities and women against employment discrimination. The Bush Administration's initial response was generally unfavorable, however. It agreed in principle that corrective legislation was appropriate to respond to two of the Supreme Court's 1988-89 Term decisions, but expressed, by way of its Attorney General, overall approval of the Court's rulings.³⁶

Beginning in the summer of 1990, President Bush announced his desire to sign a civil rights bill and urged civil rights groups to work with other administration officials to draft an acceptable piece of legislation.³⁷ Thus began a minuet of negotiations involving civil rights groups, members of Congress, and administration officials that lasted over several months without meaningful progress. The ultimate result was that both Houses of Congress passed legislation, altered in several respects to make it acceptable to the President. But the President vetoed the bill³⁸ and Congress failed to override that veto.³⁹ Although the legislation had many parts, the President based his veto primarily on opposition to provisions having to do with the restoration of the pre-1989 "disparate impact" test. He contended that they were designed to establish "employment quotas."⁴⁰

Congress did not give up efforts to pass legislation overturning the Court's restrictive rulings of the 1988-89 Term, however. Those efforts

34. See Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990).

35. S. 2104, 101st Cong., 2d Sess. (1990).

36. Letter from Attorney General Richard Thornburgh to Senator Edward Kennedy (Apr. 3, 1990).

37. Ann Devroy, *White House Shifts on Civil Rights Act: Differences with Pending Legislation Described as 'Minimal'*, WASH. POST, May 15, 1990, at A1; William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 640-41 (1991).

38. Veto Message on S. 2104, 101st Cong., 2d Sess., reprinted in 136 CONG. REC. S16,562 (1990) (daily ed. Oct. 24, 1990).

39. 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990) (veto sustained in Senate by vote of 66-34).

40. Veto Message, *supra* note 38.

proved ultimately successful with the passage of the Civil Rights Act of 1991⁴¹ which went into effect, with President Bush's signature, in November of last year. Speculation continues to swirl over how the President, who had condemned Congress' earlier attempts as "quota" bills, could have found the largely identical Civil Rights Act of 1991 worthy of support. I find it plausible that the damage David Duke's campaign for governor of Louisiana was doing to the Republican Party's image as a conservative, but not racist, political force and the bruising confirmation fight over Clarence Thomas' appointment to the Supreme Court persuaded the President that he needed the Civil Rights Act of 1991 to salvage his reputation as a moderate on race issues.⁴² Whether he will continue to see his support of the 1991 Act as a political plus as the presidential campaign progresses this year, only time will tell.⁴³

The victory that the Civil Rights Act of 1991 represents is one that I join many in celebrating. In fact, I would like to think that I contributed in my own small way to that success. However, I do not think that its passage should cause us to overlook certain basic truths about the current state of civil rights. First, the American people have never fully understood or accepted the importance of the "disparate impact" or discriminatory effect standard in ridding our society of the vestiges of racism and sexism.⁴⁴ Even people who claim to be in favor of civil rights advancement often ask, "why should someone be held to have violated civil rights laws if they had no purpose or intent to discriminate?" There is something very basic to our culture about maintaining a congruence between evil motive and discrimination: no evil motive, no bad actors, no discrimination.⁴⁵ This logic, however, places on the most vulnerable in our society the burden, among others, of ferretting out easily hidden and difficult to prove intentional bias and prejudice. Failing that, they must simply accept practices that bar access for them to meaningful participation in the workplace, in housing, and in the political process.

Second, some members of the Supreme Court have never liked the "effects" test in civil rights law⁴⁶ and now have a majority to establish

41. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

42. See C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, WASH. POST, Nov. 14, 1991, at A23; William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill Was Really Passed: The Administration Did Compromise*, WASH. POST, Nov. 18, 1991, at A21.

43. See, e.g., John Aloysius Farrell, *The GOP Race Softens Rights-Rule Diligence*, BOSTON GLOBE, Mar. 6, 1992, at 3 (describing how in face of criticism of Civil Rights Act of 1991 by Republican presidential candidate, Patrick Buchanan, EEOC issued policy guidelines aimed at cabining the reach of the new law by preventing retroactive application).

44. See Paul Gewirtz, *Discrimination Endgame: A Civil Rights Summer Primer*, NEW REPUBLIC, Aug. 12, 1991, at 18.

45. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978).

46. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Burger, C.J.,

that view as law.⁴⁷ Those Justices must know that the public will have difficulty grasping the nature of the Court's subtle but basic shift, by way of evidentiary rulings, in the law. Moreover, they are probably aware that the person on the street will not find anything particularly wrong, in any event, with making plaintiffs prove that discrimination exists rather than having employers prove that it does not. I think that we can expect that the Court, even in the face of the Civil Rights Act of 1991, will make other efforts to limit use of the "disparate impact" or "discriminatory effects" approach in civil rights cases.

Third, and finally, the Bush Administration was also comfortable with the Supreme Court's shift away from discriminatory effects to discriminatory intent standards in civil rights cases, despite its ultimate decision to support the Civil Rights Act of 1991. Doing away with the "effects" test was one of the central goals of the Reagan Administration.⁴⁸ Even though it was not fully successful in that respect,⁴⁹ its successor administration hoped it might have better luck. The presidential veto and the failure of the override vote on the 1990 bill conveyed a basic message. Given the complexity of the issues dealt with by the Supreme Court in its 1988-89 Term rulings and the equal complexity of Congress' attempt to overrule those decisions, the administration could employ a buzzword like "quota" to explain its opposition to civil rights legislation without significant political cost.⁵⁰ Indeed, I think that even many people who consider themselves pro-civil rights had difficulty understanding what all the shouting was about. Very few members of the media, for example, were up to explaining the problem that the Civil Rights Act was designed to address, falling back instead on pat, incorrect characterizations of the bill as an attempt "to make it easier for plaintiffs to win

with Rehnquist, Powell & O'Connor, JJ., arguing that Title VI of the Civil Rights Act of 1964 prohibits only intentional discrimination).

47. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Now-Justice Thomas has for years been opposed to the disparate impact standard. See Report concerning EEOC plans to revise Uniform Guidelines, submitted by Clarence Thomas to Office of Management and Budget (Feb. 25, 1985), quoted in *BNA Daily Labor Report* (June 7, 1985) at A-3; *EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedure: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 23 (1985) (Rep. Augustus Hawkins quoting from past writings by Thomas).

48. See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, REPORT TO THE ATTORNEY GENERAL—REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (Nov. 4, 1987); DETLEFSEN, *supra* note 13, at 60-66.

49. See Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003 (1989).

50. See Veto Message of President Bush on S. 2104, entitled "Civil Rights Act of 1990," reprinted in 136 CONG. REC. S16,562-3 (daily ed. Oct. 24, 1990).

employment discrimination suits.”⁵¹

Without going into the provisions of the proposed Civil Rights Act of 1990 in great detail, let me explain my reason for calling the term “quota” a buzzword in that context. President Bush’s position was that the proposed Civil Rights Act of 1990 imposed so heavy a burden on employers to justify screening devices having a disparate impact that they would be inclined to resort to “hiring by the numbers,” that is, hiring enough blacks or women to avoid any disparate impact and thereby avoiding a lawsuit. In the first place, the test itself, showing a “significant relationship to successful performance of the job,” did not appear to create insurmountable proof problems, given the *Griggs* regime in which employers did succeed in meeting a similar standard.⁵² Second, the proposed legislation included, in an effort to allay the President’s fears, a specific disclaimer with respect to quota hiring. Third, and finally, there was no credible evidence that quotas had been widely resorted to under the pre-1989 legal regime.

The President, it seems to me, had the duty to establish that American employers, who make business decisions every day because they think they are right despite possible lawsuits, would resort to quota hiring, irrespective of applicants’ qualification in this context. Instead, the President placed the burden on civil rights advocates to prove the contrary. Many of these same arguments were raised anew by the Bush Administration in opposition to the proposed Civil Rights Act of 1991.⁵³ In my estimation, the President’s ultimate support for that bill represented not a change of heart but rather a change in political strategy.⁵⁴

CIVIL RIGHTS AT THE CROSSROADS: THE FUTURE OF AFFIRMATIVE ACTION IN THE 1990S AND BEYOND

I have gone on at some length, I realize, about recent legislative developments. Let me return to Dr. King. We are, in my estimation, at a crossroads with respect to civil rights in this country, very much like that Dr. King confronted in the year or so before he died. What he real-

51. See, e.g., Adam Clymer, *Civil Rights Bill is Passed By House*, N.Y. TIMES, Nov. 8, 1991, at A15.

52. See Memorandum from Fried, Frank, Harris, Shriver & Jacobson to the NAACP Legal Defense and Educational Fund, Inc., *From Griggs to Wards Cove: Job Performance, a Uniformly Applied Standard in Title VII Cases* (July 26, 1991); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

53. See Adam Clymer, *Bush Denounces Civil Rights Bill Advocated by House Democrats*, N.Y. TIMES, May 31, 1991, at A1.

54. See *Civil Rights: Much Ado About the Wrong Thing*, THE ECONOMIST, Nov. 9, 1991, at 51 (attributing decision to sign civil rights bill to Bush Administration’s desire to distance Republicans from Clarence Thomas sexual harassment controversy and from politics of David Duke).

ized was that his nonviolent approach to attacking discrimination, although extraordinarily effective in striking down blatant segregation in the South and spurring Congress to act, was unlikely to have significant impact upon the lives of millions of blacks without jobs, adequate housing, education or medical care in the large urban centers in the North, particularly. That was why his attempts to organize in Chicago proved a dismal failure.⁵⁵ That was why he went to what turned out to be his last campaign to march with striking sanitation workers in Memphis in April, 1968 and why he had organized and planned to lead, had he lived, the Poor People's Campaign and March on Washington for Jobs and Housing.⁵⁶ What he sought was recognition of an "economic bill of rights," among other goals.⁵⁷

What Dr. King came to understand was that full equality for blacks in this country will come about only when the civil rights struggle becomes at one with a campaign to ensure that America provides *all* of its citizens with real opportunities to make a living wage, obtain decent housing, receive adequate medical attention, and be meaningfully educated. I do not think that Dr. King's understanding is any less true in 1992 than it was in 1968. This is not to say that blacks, certain other minorities, and women do not have special claims upon the nation for redress. They do. It is not to say that the battles for civil rights waged since 1968 were unjustified or in vain. They were not. Many members of historically discriminated against groups have gained opportunities to better their lives that would not have occurred without federal legislation and successfully litigated civil rights cases.

It is not even to suggest that the fight should be abandoned for congressional legislation to prevent retrenchment by the Supreme Court and to achieve certain incremental advances in civil rights protections. But I do believe that the advances since 1968 for blacks nationally, particularly, appear relatively modest when compared to the major strides in the status of blacks that occurred in the South between the *Brown* decision in 1954 and Dr. King's death in 1968.⁵⁸ And, as my earlier comments about recent developments in civil rights were intended to communicate, we may be headed toward a period of ever-diminishing returns in this connection.

Moreover, we have to recognize that massive enforcement of the

55. See GARROW, *supra* note 7, at 491-525.

56. See GARROW, *supra* note 7, at 265-88, 575-624.

57. See MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1964).

58. See John Bound & Richard B. Freeman, *Black Economic Progress: Erosion of the Post-1965 Gains in the 1980s?*, in *THE QUESTION OF DISCRIMINATION* 32, 39 fig. 2.2 (Steven Shulman & William Darity, Jr., eds., 1989) (economic gains by blacks as compared with whites leveled off after early 1970s).

Civil Rights Act of 1964, the Fair Housing Act of 1968 and the Voting Rights Act of 1965, if such a remarkable state of affairs were to occur, would not alter significantly the lives of millions of black and other minority people who live at, or beyond, the margins of mainstream America. Their tragic lives are chronicled in the increasingly depressing statistics on overall poverty, health care, infant mortality, unemployment, homelessness, crime victimization, drug addiction, and incarceration. One has only to visit areas where blacks and other racial and ethnic minorities tend to be concentrated in our urban centers around the country to grasp the magnitude of these problems. The social infrastructures (churches, clubs, civil centers, unions) have disappeared; those able to achieve some, even shaky, grasp of middle-class life have moved out; social services have fled; and the physical structures often look like Dresden after the Allied bombing raids during the Second World War. William Julius Wilson has accurately described this depressing trend among urban blacks in his book, *The Truly Disadvantaged*.⁵⁹

This reality also helps situate the affirmative action debate that has been raging for at least the last fifteen years, starting with the *DeFunis*⁶⁰ case, having to do with a minority admissions program at the University of Washington Law School in 1974, to the recent flap over minority higher education scholarships. The Supreme Court avoided a decision on the merits in *DeFunis*, but almost every year since the *Bakke*⁶¹ decision in 1978, it has had to confront affirmative action challenges of one sort or another. It has been a roller-coaster ride, to put it mildly, with the Court's striking down some programs and upholding others, usually by very close votes, in employment, education, public works contracting, and communications.⁶² Given the current make-up of the Supreme Court, I think that we can expect that there will be increasing judicial resistance to programs that rely explicitly on race, national origin, and sex criteria.⁶³

Let me emphasize that the Court's treatment of affirmative action programs has had, and will continue to have, profound symbolic impor-

59. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

60. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

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

62. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transp. Agency, Santa Clara*, 480 U.S. 616 (1987); *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Firefighters Local Union v. Stotts*, 467 U.S. 561 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Steelworkers v. Weber*, 443 U.S. 193 (1979).

63. See, e.g., *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (Thomas, J.) (invalidating FCC affirmative action program favoring acquisition of broadcast media by women-owned business); *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (Scalia, O'Connor & Kennedy, JJ., & Rehnquist, C.J., dissenting) (arguing that similar preference for minority-owned business is unconstitutional).

tance because it is one measure of how the society views continuing efforts to eradicate the vestiges of discrimination and to transform major institutions that have been "white, male clubs" for too long. We know as students of the law that Supreme Court decisions are about specific cases and are not usually designed to make general pronouncements with respect to conduct not before the Court for consideration.

Nevertheless, its opinions also often set a tone that affects the way in which the average citizen conducts his or her affairs. Consequently, a Supreme Court decision about an affirmative action plan in employment may influence an employer's evaluation of minority or female applicants: do I have to be concerned about the fact that I have no black or female employees? Or is such a consideration irrelevant? Or more irrationally but predictably, are racist or sexist jokes back in fashion or do I still have to watch my language?

But what are the direct consequences of affirmative action decisions? If one talks about programs that have employed race or sex as criteria to remedy findings of discrimination by courts or administrative agencies, I think that large numbers of minorities and women have gained employment or better wages and conditions as a result.⁶⁴ Voluntary affirmative action programs in higher education, including scholarship aid, have made it possible for racial minorities to gain access to opportunities that would otherwise have been foreclosed. Similarly, voluntary programs in employment⁶⁵ and public contracting⁶⁶ have also opened up doors that had previously been locked. However, it should also be noted, not all affirmative action programs have been well-conceived, properly administered or particularly successful, for that matter.⁶⁷ My view is that there continue to be situations that need and justify affirmative action efforts and that support for such programs established under those circumstances ought to continue.⁶⁸

Take, for example, the Fiesta Bowl controversy. What the Department of Education's original policy pronouncement failed to note was that both Auburn, in Alabama, and University of Louisville, in Kentucky, are parts of state higher education systems with proven histories of racial discrimination and segregation.⁶⁹ Nor did the press release note

64. See PAUL BURSTEIN, *DISCRIMINATION, JOBS AND POLITICS* 130-54 (1985).

65. See, e.g., *Johnson v. Transp. Agency, Santa Clara*, 480 U.S. 616 (1987).

66. See, e.g., *Associated Gen. Contractors v. City & County of San Francisco*, 748 F. Supp. 1443 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991).

67. See *Drew S. Days, III, Fullilove*, 96 *YALE L.J.* 453, 457-62 (1987).

68. See *City of Richmond v. J.A. Croson: Impact and Response—Hearings Before the Subcomm. on Urban and Minority-Owned Business of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 11-32 (1990) (testimony of Drew S. Days, III).

69. For Alabama's history, see *Lee v. Macon County Bd. of Educ.*, 317 F. Supp. 103 (M.D. Ala. 1970), *remanded*, 468 F.2d 956 (5th Cir. 1972); *Alabama St. Tchrs. Ass'n v. Ala-*

that as a remedy for decades of unconstitutional segregation in its university system, Kentucky had during the 1980s submitted to the government a desegregation plan, one component of which was increased financial aid to black students attending white institutions.⁷⁰ Also omitted was any mention of the fact that Alabama operated segregated institutions of higher education up through the 1980s, triggering an enforcement suit by the federal government.⁷¹ There are undoubtedly people who would quarrel with the creation of such scholarships even at Auburn and Louisville. But, to me, given the history and context, the rationale is clear and defensible.

THE NEED FOR A NEW STRATEGY: ENLARGING THE PIE

Having said all of the foregoing about affirmative action, I want to point out, however, that for most poor minorities and women, affirmative action is of limited significance. Despite what critics of affirmative action have said about "naked quotas,"⁷² in order to take advantage of special programs for minorities and women, the candidates have to be at least minimally qualified, and when one gets to questions of upper level jobs or admission to higher education institutions, the so-called minimal qualifications are beyond the reach of the vast majority of poor Americans of any race. So, for all the achievements of affirmative action—viewed by its most enthusiastic supporters—it does not begin even to scratch the surface of the socio-economic problems that beset most disadvantaged minority groups and women. This leads me to think that affirmative action, although it should continue to have a place in public policy for the time being, cannot be regarded as the core strategy in this respect.

One of the implicit premises of the civil rights effort, once the most obvious forms of racial discrimination had been declared unconstitutional or illegal, was that America offered a limited socio-economic pie

bama Pub. Sch. & College Auth., 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969); *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd*, 328 F.2d 892 (5th Cir. 1964). For that of Kentucky, see JEAN L. PREER, *LAWYERS V. EDUCATORS* 96-97 (1982).

70. Michael A. Olivas, *The Federal Attack on Minority Scholarships is Mean-Spirited and Unwarranted*, *CHRON. OF HIGHER EDUC.*, Dec. 19, 1990, at B1, B2. Accepted by the Department of Education in 1982, the Kentucky desegregation plan expired in 1987. The status of the state's plan is still under review. Kentucky was not included in a group of four previously segregated southern university systems that in 1988 were found by the Department of Education to be in compliance with their federal obligations. MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION* 938 (1989).

71. After Alabama repeatedly failed to submit a satisfactory desegregation plan to federal educational authorities, the United States filed suit against the state university system. That litigation is still pending. *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987) (per curiam), *cert. denied*, 487 U.S. 1210 (1988), *on remand*, *Knight v. Alabama*, 1991 WL 286238 (N.D. Ala. Dec. 30, 1991).

72. Carl Cohen, *Naked Racial Preference*, *COMMENTARY*, Mar. 1986, at 24.

and that, consequently, success for minorities and women probably involved getting a piece of that existing pie, not enlarging it. It was an acceptance of civil rights as a zero-sum game. This operating premise was not necessarily wrong-headed. Certain opportunities have been opened up, but the larger structural issues have been avoided. Congress and the courts have been willing, for example, to restructure the workplace to address racial and sex discrimination, but they have not been willing to ensure full employment.⁷³

They have been willing to ensure meaningful participation of minorities in the electoral process, but they have not embraced techniques for expanding generally citizen access to the ballot box.⁷⁴ They have been willing to support school desegregation, including educational enhancements in certain cases, but have not acted to ensure that the schools provide training adequate to the demands of our increasingly technological society.⁷⁵ Blacks cannot be turned away from certain hospital emergency rooms because of their race, but they can be denied service because they are poor.⁷⁶ Employers have to hire minorities and women on a nondiscriminatory basis, but they do not necessarily have to provide health insurance benefits.⁷⁷ There are some laudable programs in these respects at the state and local level. But the picture there is generally bleak as well.

I believe, however, that this strategy of sharing a limited pie, rather than working to enlarge the pie, has almost run its course. We should begin focusing on a bigger pie and those individuals and organizations historically identified with the civil rights movement should be at the forefront of this effort. This was the message of Jesse Jackson's Rainbow Coalition. That it was developed in the context of a partisan (indeed, intra-party) debate and personally associated with a somewhat controversial public figure created complications for the message. But, even so, Jackson was able to appeal in the 1988 Democratic primaries increasingly to a widening cross-section of the American electorate beyond his original black base—farmers, miners, residents of Appalachia, the young,

73. The last significant initiative in this area, the Humphrey Hawkins Full Employment Bill, failed to win passage in the late 1970s. For an account of that bill's legislative history, see Harvey L. Schantz & Richard H. Schmidt, *Politics and Policy: The Humphrey Hawkins Story*, in *EMPLOYMENT AND LABOR RELATIONS POLICY* 25-39 (Charles Bulmer & John L. Carmichael eds., 1980).

74. Legislation liberalizing voter registration procedures was introduced in Congress last year but was not enacted into law. See National Voter Registration Act of 1991, S. 250, 102d Cong., 1st Sess. (1991).

75. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

76. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

77. See Milt Freudenheim, *Employers Winning Wide Leeway to Cut Medical Insurance Benefits*, N.Y. TIMES, Mar. 29, 1992, at 1 (explaining how the ERISA statute has been construed as preempting state statutory attempts to limit employer discretion to cut health benefits).

and the elderly.⁷⁸

It is a message worth working to place in the political mainstream. For we have to recognize that, although there were 9.7 million blacks and 5.5 million people of Spanish origin living below the poverty line in 1987, there were 21.4 million whites in the same predicament. The percentages of members of the two minority groups living below the poverty line were admittedly several times higher than that of whites. But numerically more whites were living in poverty than minorities.⁷⁹ My point is that we should not let comparative percentages between whites and minorities obscure the fact that whites, in terms of raw numbers, are a larger group of disadvantaged persons than minorities. Cuts in government financial aid for needy students have taken their toll on the chances of poor white students, as well as of minority students to obtain higher education. Consequently, when one looks at employment and underemployment, health care, adequacy of educational opportunity and housing, this fact has to be kept in mind. It points the way to coalition-building and to a broadened sense of moral imperative.

I am fully aware that there are numerous and vocal critics of President Johnson's Great Society programs⁸⁰ and a feeling abroad in the land—as cities, private businesses, and S & L's contemplate or experience bankruptcy, and the federal deficit rises—that we should be thinking smaller rather than bigger in terms of what government can and should do. I am also aware that strong forces of racism and sexism (just to name a few "isms") will make it difficult to forge the type of socio-economic coalition I am suggesting. But I think that there is no other alternative. "Where there's a will, there's a way," goes the adage. Where will the money come from? The answer may lie in figuring out who got the billions of dollars that used to be in the vaults of failed savings and loans. Where do we find funds to build domed, climatically controlled stadiums? How much do we spend as a nation on cosmetics, fast foods, and candy bars? How were all the multi-billion-dollar mergers and acquisitions of the 1980s achieved? Junk bonds are not the full explanation.

Dr. King's Poor People's Campaign did not deserve to die with him. It is as relevant and necessary today as it ever was. It is the turn that civil rights at the crossroads must take.

78. See ADOLPH L. REED, *THE JESSE JACKSON PHENOMENON* (1986).

79. CENTER ON BUDGET AND POLICY PRIORITIES, *SMALLER PIECES OF THE PIE 9* (1985).

80. See, e.g., CHARLES A. MURRAY, *LOSING GROUND* (1984); GEORGE F. GILDER, *WEALTH AND POVERTY* (1981).