TIME TO FIGHT FOR CIVIL RIGHTS EQUALITY

By William B. Allen

"Congress—the protector of civil rights." That watchword signals a new congressional rush to "restore" civil rights, to reverse the Supreme Court's supposedly retrograde direction. The intent is no less than the final rejection of the 14th Amendment and the principle of "the equal protection of the laws."

This mad rush is sure to create a growing consensus to overturn the court's five recent civil rights decisions, decisions in which the Supreme Court applied the law aptly, which is to say even-handedly. This season's civil rights rush leaves only two options for the rest of the country: either we surrender to blatant unfairness in our laws, all the time seeking to secure our personal hides; or we scream "enough!" and charge once more into the breach.

Some, like Rep. Tom Campbell (R-CA), have already surrendered. His "Civil Rights Restoration Act of 1989," which will be touted as proof of a bipartisan effort to overturn the court rulings, would specify (1) that only certain groups, defined by race, are protected by the 1964 Civil Rights Act, (2) that members of protected groups are entitled to representation or benefits in proportion to their numbers in the general population, and (3) that numerical disproportion is *prima facie* proof of discrimination. Employers would have to adopt strict numerical quotas to avoid spending all their time in court.

The mad rush, if successful, would establish a racially separate and unequal jurisprudence. This is best demonstrated by comparing Justice Brennan's majority opinion in *Johnson v. Santa Clara County Transportation Agency*, which civil rights leaders hailed, and his dissent in *Wards Cove Packing Co. v. Atonio*, which they almost universally assail. Brennan said in *Johnson* that "the petitioner bears the burden of establishing" discrimination. "Once a plaintiff establishes a *prima facie* case that race or sex has been taken into account in an employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. [The burden would then shift back] to the plaintiff to prove that ... the plan is invalid.... This does not mean, however, that ... the employer [must] carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff."

Brennan was willing to apply this order of burdens to white male plaintiffs, but dissented when the identical order of burdens was applied to minorities in *Wards Cove*. In that case, he argued that a "manifest imbalance" justifies employment decisions made on the basis of race or sex, for such decisions are said to "remedy under-representation."

In sum, the Civil Rights Restoration Act would establish different rules of evidence and different standards of justice, according to race and gender, for enforcing civil rights laws. The law would officially recognize distinctions that amount to legal differences. If we surrender to this philosophy, we will face a future of increasingly pervasive racial set-asides and quotas, judicial rules that assume discrimination on the basis of mere statistical disparities, and laws whose rules seem to apply only to white males—with all

others receiving special treatment and protection.

The only real option is to fight to restore the notion so eloquently expressed by Justice John Marshall Harlan in 1896: “Our Constitution is color-blind, and neither knows nor tolerates classes among our citizens.” Justice Kennedy came close in *Patterson v. McClean Credit Union* when he quoted Justice Harlan’s 1896 dissent, just short of the famous clause: “The law regards man as man, and takes no account of his color when his civil rights as guaranteed by the supreme law of the land are involved.”

Quite simply, we must eliminate once and for all routine references to race and gender in surveys, plans, projections and other official accounts of private and public work forces, unless the nature of a profession requires such categorization. The current pervasiveness of such usage illustrates the magnitude of the task before us. The first thing that must fall is the very concept of group representation, or “protected groups,” for all Americans must be protected by freedom or, in the end, none will be.

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Note: Dr. William B. Allen is chairman of the U.S. Commission on Civil Rights. This essay is adapted from remarks delivered recently at a Heritage Foundation seminar, and it was published as an op ed in the *Courier Post* (Camden, NJ) on September 22, 1989.