



UNITED STATES
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CIVIL RIGHTS

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ONE AMERICA FOR ALL AMERICANS

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by

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At the outset I will defer to my colleagues' evident superiority to speak for themselves. You might regard the Commission on Civil Rights as something of a Pequod, though I am by no means in pursuit of some Moby Dick nor in my person an Ahab. I am rather an Ishmael, if I may say so, most assuredly in this world but no less assuredly not of it—the which I invite you to interpret as meaning that, as I speak here, I am myself alone.

Congress, Protector of Civil Rights:

“Congress—the protector of civil rights.” That watchword signals a new congressional rush to “restore” civil rights. The present quiet murmur will soon become a mad rush, accelerated by the demands of diverse interest groups. In the immediate aftermath of the Supreme Court’s 1989 spring term, numerous voices urged Congress to do something to rectify the supposedly retrograde direction of the Court. The informed observer, though, might have detected in these demands the emergence of a new goal for the civil rights movement, lawlessness. For Congress expects to provide exceptions to otherwise general laws on behalf of so-called “protected groups.”

As one public official put it, “What is required is legislative action to address (and reverse) every single point the court made and sooner rather than later.” The character of the action was summed up by another critic, who observed that, while each of the recent Supreme Court decisions turned on what the Administration has correctly termed “technical legal issues,” the problem arises from the fact that, taken altogether, “these decisions show a systematic tilt against civil-rights claims.” What follows is a conspiracy to maintain that, while the Supreme Court has applied the law aptly, which is to say even-handedly, an even-handed application of the law is insufficient.

Only two options remain for the rest of the country: either surrender to blatant unfairness in our laws, all the time seeking to secure our personal hides; or scream “enough!” and charge once more into the breach, dear friends. Since the supposed retrograde motion of recent Court opinions justifies the latest mad rush, I shall take the time this morning to discuss the alternatives in terms of the Court decisions. After reviewing how we come to face this question, we shall examine an American future based on surrender. Next, we shall examine an American future based on charging into the breach. Then I shall leave you to ask yourselves what stuff you are made of.

Permit me to acknowledge first that what I call the civil rights ratchet (not to confuse with racket), constantly raising the ante for adhering to American principles, has already been set in motion. Tom Campbell, a Republican Congressman newly elected from California's silicon valley, proposes to lead his country deeper into the hell of a society divided by racial terms of reference and race-conscious social remedies. His "Civil Rights Restoration Act of 1989," HR2598, is elegantly simple and concise, providing to amend Title VII of the 1964 Civil Rights Act to specify, first, that only certain groups are protected by that act, and, secondly, that members of those protected groups are entitled to representation in positions or benefits within our society in proportion to their numerical presence in the society as a whole, and, finally, that the existence of a disproportion in such numbers will constitute prima facie proof of discrimination.

I hasten to assure you that the groups with which Mr. Campbell is concerned are not the groups of dental hygienists or prospective dental hygienists. He means rather those groups of persons, black, red, brown, yellow, and female. And he means not to protect their rights as individuals but their representation as groups. Further, he adds critical interpretive language which becomes the explicit foundation for the entire 1964 Civil Rights Act. That is what occurs when he says that the groups are "receiving protection under" Title VII, making explicit for the first time that white males are not protected (Supreme Court opinions to the contrary notwithstanding), neither by Title VII nor by the entire Civil Rights Act which uses the same enumerations through all of its titles. Originally, of course, Title VII makes it an unfair practice for an employer to discriminate against any individual with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, sex, or national origin.

The reason for this extraordinary development? I should like to think that Mr. Campbell had read my 1987 critique of the Supreme Court's *Johnson* decision, and the closing request for an authoritative enactment fixing the standards of racial and gender balance that would be consistent with that opinion. Unfortunately, however, he neither proposed an adequate balancing test nor confined himself to upholding the Court's decisions. Instead, developments at the Court since 1987 have to depart from the *Johnson* standard (an interpretation with which I do not agree).

Surrender, or How to Build a Bigger Lebanon:

There finally surfaced in the Court this spring something resembling the long-awaited conservative majority—a gang of five. It is not always a self-consistent gang, and sometimes its internal tensions are more interesting (and more threatening) than differences with the standard dissenters. That is certainly true of tensions between O'Connor and Scalia (with perhaps Kennedy) over the question of how color-blind the Constitution is. But at all events we can point to five major decisions carried by the gang of five this spring, and in which each one of the five took a turn speaking for the Court. O'Connor in *Richmond v. Croson*, White in *Wards Cove v. Atonio*, Scalia in *Lorance v. A.T. & T.*, Rehnquist in *Martin v. Wilks*, and Kennedy in *Patterson v. McLean Credit Union*.

Initially the surrender model, with *Richmond v. Croson*, means that we abandon the goal to eliminate race as a policy foundation in our society. While Justice Scalia most eloquently demonstrated that implication in concurring with Justice O'Connor's decision to retain "strict scrutiny" even in benign discrimination cases by states and municipalities, surely the best evidence of what the future holds is found in Justice Stevens' concurrence, in which he elaborated a rule that, by the time of *Martin v. Wilks*, he then completely repudiated.

Dealing with *Croson's* racial set-asides for municipal contractors, Stevens held that "...it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt." Further, Stevens added, to impose "a common burden on such a disparate class merely because each member of the class is of the

same race stems from reliance on a stereotype rather than fact or reason". These remarks called into question the policy of assigning benefits to non-victims at the expense of innocent persons, the very policy Stevens inconsistently affirmed in his later *Wilks* dissent: "Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs." He thus resisted the Court's argument, in *Wilks*, that white employees had an equal right to file a civil rights action in Birmingham, alleging impermissible discrimination, even though the city was acting under a consent decree to cure past discrimination against blacks. In *Wilks*, the Stevens who before thought it intuitively wrong to blame folk for what they had not done, now argues that policy requires the injustice.

The lobbyists' argument against the *Wilks* decision is perhaps hardest of all to understand. For in that case the Court did not overturn the affirmative action plan. It held, merely, that white persons had as much right to sue as other persons, and were required to make no stronger a prima facie case than were black persons in order to have their claim taken seriously. All the objections seem to aim at this even-handed result as somehow offensive, despite clear indications that, once the white employees' suit has been heard, it is very likely to be rejected. To surrender to the objections, then, means that differential burdens of proof, based on race, should apply to legal actions challenging discrimination —what my colleague, Commissioner Robert Destro, has aptly labeled, a "jurisprudence of minorities."

Justice Marshall has accepted the differential standard. In *Croson* he quoted his *Wygant* dissent to the effect that "agreement upon a means for applying the equal protection clause to an affirmative-action program has eluded this Court every time the issue has come before us." He thought that the nation's experience with bigotry was more than sufficient to justify the set-aside program in Richmond, and therefore eliminated the need for the ordinary prudence of congressional and court oversight. In this decision (*Croson*) where the Court actually applied the theories of a Carter Administration Assistant Attorney General for Civil Rights, Marshall suspected the Court majority of being unfriendly to blacks only because it sought to hold blacks and whites to a single standard of accountability. It becomes increasingly clear that Justice Marshall sincerely believes (what he had already expressed in the *Bakke* case long ago) that we can articulate no standard whereby blacks and whites today shall be treated in the same manner.

It is time to respond to them that maintain that the task of repairing the historical injuries of slavery and discrimination more than justifies burdening innocent persons who may have profited in the past. Proponents of this view often try to reduce it to the idea of a sacrifice in the interest of the common good—or a greater good—the same, say, as if someone had to accept the unpleasant fate of a noisy roadway situated next the home that he had, perhaps, even purchased for its quiet. Immediately, of course, the examples do not differ at all, so long as a citizen were no less eligible for the one sacrifice as the other. But that condition cannot be satisfied. For, while all persons may be liable, without regard to race, to suffer the inconvenience of the roadway, only some, designated by race, must suffer the unfairness of racial preferences.

These excuses for racial injustice would be more patently clear if we placed them in juxtaposition with policies and practices everyone experiences and understands. But what is better understood than the progressive income tax? American society has accepted that people differently situated will pay taxes in different ratios, hence unequally. This is deemed in the common interest and thought by most to be fair. The reason, in brief, is that the distinction producing different treatment under the law is adventitious rather than invidious—meaning that it could theoretically happen to anyone. Thus, they who are situated so as to pay more are making a contribution—a sacrifice—for the common good.

Suppose, however, that the progressive tax scale were calculated rather by race than by

level of income—call it the affirmative action tax. Historically, the differences would be statistically imperceptible—satisfying Congressman Campbell’s standard. Whether you said white folk or rich folk had to pay more, you would still be collecting largely from the same people. Thus, you have the same practical result. But I ask, do you also have the same moral result? Does it not matter that at least some of the white folk are actually poor, while at least some of the black folk are actually rich? It is clear that a progressive tax based on actual income affects people equally, as to race, while the other is unequal and unfair. The question is not whether but how sacrifices are made in the common interest. Under a “jurisprudence of minorities” sacrifices are made unevenly—and based on invidious distinctions which deny by imputation the existence of a common good.

Reviewing the Court’s decisions this spring, one sees that the cases were anything but merely technical. To that extent the civil rights advocates are right, while the Administration is wrong. In *Croson*, Justice O’Connor for the Court maintained that the judicial standard of strict scrutiny must apply no less surely to cities run by blacks than to cities run by rednecks. Further, the Court might eventually contemplate loosening the judicial theory of “discrete and insular minorities” as a basis for law and policy. When the Court first adopted that theory fifty years ago, it was on the assumption that ordinary majoritarian political institutions would not protect minorities. The new question is, how far such judicial guardianship is still required where the evidence of policy is that minorities do prevail and, indeed, where “minorities” even constitute the political majority sometimes?

A painfully clear example of the problem that we face has arisen in Alabama and elsewhere, where white citizens have begun to file suits under the 1965 Voting Rights Act. As hard as it is to believe, some observers, including the *New York Times*, have actually paused to wonder whether “Federal voting rights laws cover white voters?” Although a city such as Birmingham has a black majority, and its white minority sees itself as frozen out of local office by an at-large system, some civil rights advocates—as they call themselves—actually believe the law suits and tools used by blacks should not be extended to whites who now find themselves in the position about which blacks have long complained. When I was a school-child we were taught a ditty that aimed to inoculate us against this very prospect: “Oh how a minority, upon becoming a majority, hates a minority!”

In *Wards Cove*, Justice White spoke for the majority and maintained that statistical comparisons had to meet a comparability test before they could establish prima facie evidence of discrimination. Thus, a comparison between the basketball team and the graduating medical interns who treated the team’s injuries would serve no purpose for measuring discrimination, whether as between their immediate employers or carried out the implications of its earlier decision in *Watson v. Fort Worth Bank and Trust*, and in which the Court widened the role of subjective factors in “disparate impact” or statistical cases but at the cost of bringing them closer to “disparate treatment” or individual cases in terms of rules of evidence. Thus, the Court maintained that, where discrimination is charged, a discriminatory practice must be identified.

In *Lorance v. A. T. & T.* Justice Scalia expressed the majority’s view that Title VII meant to create a preference for administrative regulation over litigation. Accordingly, not even “protected classes,” in this case women, could be exempted from the effect of the statute. Scalia effectively admitted that the statute produced an unfair result, and thereby invited Congress to reconsider the policy of discouraging litigation and regular compensatory and punitive damages. A district court judge in Birmingham has challenged the prevailing understanding, as well as the wisdom, of discouraging litigation and truncating constitutional guarantees, such as the right to jury trial. *Beesley v. Hartford Fire Insurance Co.* may begin a period of reappraisal. Nevertheless, it will still be up to Congress to say definitively that Title VII is compatible with American principles. In the absence of such reconsideration, however, the Court must give effect to the will

of Congress. Objectors to the decision, moreover, have, not focused on the policy option; they have instead wondered whether women did not deserve better from the law. The question is, better than whom?

In *Martin v. Wilks* Chief Justice Rehnquist held that the rights guaranteed by Title VII are personal, individual rights and not group rights. Accordingly, individual white employees could file suit even where against an existing consent decree which resulted from a prior suit filed by black citizens. Objectors maintain that this creates a kind of multiple jeopardy for black gains, by allowing deals struck with public (or presumably private) employers to be challenged on reverse discrimination grounds. The majority opinion, however, emphasized that such suits would be subject to the identical rules of evidence required in other discrimination suits. Accordingly, if nothing impermissible were accomplished in the consent decree or its implementation, no gains could be threatened.

Finally, in *Patterson v. McLean Credit Union* Justice Kennedy upheld for the majority the decision in *Runyon v. McCrary*, namely that a Reconstruction era civil rights act applied to private acts of discrimination—at least insofar as the discrimination took the form of interfering with the right to make and/or enforce contracts. Accordingly, racial harassment on the job was not covered, although it is covered for most employees by Title VII of the 1964 Civil Rights Act.

In order to understand how the demand for congressional action will apply in each of these cases, provided we surrender to such action, we need to review one other case, *Johnson v. Transportation Agency of Santa Clara County*. When that case was decided in 1987 it was hailed by the same civil rights advocates who now call for overturning the Court. They count it a victory that a more qualified white male had lost his suit for a position that had been awarded to a less qualified female.

What did *Johnson* say about the critical questions of rules of evidence and the status of white males? Justice Brennan spoke for the majority, and he said this: “the petitioner bears the burden of establishing” discrimination. He quoted a different majority in *Wygant* to sustain his point (when the question was, What must a white male do in order to show that he was the victim of discrimination?): “The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,” and we see no basis for a different rule regarding a plan’s alleged violation of Title VII.”

Brennan next laid out the precise order of burdens: “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. If such a plan is articulated as the basis for the employer’s decision, the burden shifts to the plaintiff to prove that the employer’s justification is pretextual and the plan is invalid... That does not mean, however, ... that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.”

This is the identical order of burdens that is laid out in *Wards Cove* and relied upon in *Wilks*, and about the application of which to minorities civil rights advocates now complain. The symmetry is inescapable, and the difference no less obvious. Brennan, who dissents in *Wards Cove* and *Wilks*, will nevertheless apply the same order of burdens to white male plaintiffs. But when it comes to minorities in similar cases, something called a “manifest imbalance” will suffice; for the purpose is to “remedy under-representation” and not to ensure justice.

The new rule, then, that the “Civil Rights Restoration Act of 1989” will accomplish, is a rule that will establish different rules of evidence and different standards of justice, by race and gender, for the enforcement of civil rights laws. The law would officially recognize distinctions

that amount to legal differences. In contemplating the future to which we thus resign ourselves we could do worse than to recall the reason that George Washington so constantly prayed for the “same justice for rich and poor.” He seemed instinctively to realize that, if society once separates the moral and legal interests of rich and poor, it will render them far less disposed to cooperate with one another.

The summary of the surrender model, in short is, from *Croson* a future of set-asides and quotas more and more pervasive, and the continuation of the “suspect classification” rationale even when the suspect class dominates ordinary political institutions;” from Atonio, racial and gender preference schemes based merely on statistical inference, assumptions of guilt on mere charges of discrimination (unless one is a white male), and only an affirmative defense being permitted to defendants (i.e., what is your alibi?); from Lorange, we extend the *Carolene* exemption, from the ordinary judgments of the courts, into administrative requirements, creating an exemption that construes the limits of the law to read, “for white males only;” from *Wilks* we derive no personal rights for white males wherever the side-effects of cleaning up discrimination are in question; and, from McLean the equal protection of the laws will be held insufficient to protect minorities, who must also enjoy uniquely affirmative interventions on their behalf.

Resistance, What Alternatives Remain?

We may come to the bottom line of an alternative future—a future of resistance—much more rapidly. The tone was set by a recent study from the Heartland Institute, “Disadvantaged Business Set-Aside Programs: An Evaluation,” which expressly recognized that the decision in *Richmond v. Croson*, far from dismantling set-asides, only limited the licenses of states and municipalities to impose them. The point, they held, is that the means themselves neither produce the desired end nor are just. “The notion that it is an outcome that is either just or unjust, rather than an individual’s actions,” they wrote, “leads to conclusions that contradict many of our common notions of justice. For example, the rule seems to say that we may discriminate against a black person yesterday, pay a different black person for the injury today, and call it even. Under this principle, one black person is pretty much the same as another.” The point of resistance is precisely to move our polity toward the day when “one black, one woman, one minority” is not pretty much the same as another—when counting noses is no longer an objective of public policy.

To resist those who would stampede Congress into overturning the Court is not necessarily to defend the Court. One reason we do not defend the Court is because the arguments of the civil rights advocates’ “better selves” seem more compelling. In the aftermath of *Croson* last spring, they gathered many of their best legal minds in Cambridge, Massachusetts, and declared that “the Supreme Court has insisted that affirmative action programs be carefully designed—not dismantled.” They went on: “A call for fairness and flexibility in affirmative action programs should never be equated with a call for retrenchment and retreat.” Unfortunately, they did not think that “fairness” required even-handedness. Their position at this point, in a word, is exactly identical to that of the Supreme Court, which accepts “that there is a critical moral and constitutional difference between... employing race to correct historic discrimination—or even to promote diversity—and... using race to advance debilitating stereotypes...” In light of this record, it seems that civil rights advocates’ demands for new congressional enactments only uses the pretext of adverse court opinions to push still further the regime of race-oriented laws and regulations.

To charge into the breach at this juncture is to seek to liberate our country, which is no less held hostage by immoderate civil rights demands than our countrymen in Lebanon are held by immoderate nationalism—as much victims to our fears and guilts as to their murderous captors. It is to liberate our countrymen from that panglossian demagoguery which distinguishes itself by exploiting difference. It is a future in which Jesse Jackson needs a new profession.

We are committed to dismantling invidious barriers to preferment in our society, but not at the expense of equality. Because of that we seek a future in which, sooner or later, we open and make plain a route whereby a white male, as well as all other persons, can make good his claim not to suffer discrimination on the basis of his race or his gender. Until we do this, our law will be incomplete and our society endangered.

Resistance does not imply defending Supreme Court opinions but rather pressing the Court to complete previously half-hearted motions in the direction of sound principle, on the one hand, and to repudiate erroneous formulations on the other. A serious resistance may also contemplate new legislation from Congress—above all legislation to put a stop to the ratchet effect, whereby every year new increments are piled onto the sloppy, uncoordinated mess we call civil rights laws. For the problem with calls for congressional enactments is not the reliance upon Congress. The problem is the unfairness of the legislation sought. Already this year we have the Americans with Disabilities Act, designed to complete the assimilation of handicapped persons to the status of minorities. But no one anywhere is asking the question, how shall the ADA relate to the overall structure of civil rights laws and fundamental American equality.

The opportunity to press demands for revision in court opinions as well as comprehensive legislation is great indeed, on account of the evident acceptability our political system accords to expressions of disagreement with the Supreme Court and widespread demands for revision. In every Congress for the past twelve years or so, Congress has acted to overturn a Supreme Court decision in civil rights and related areas. Therefore it is now commonly accepted that the American people should expect their representatives to correct judicial errors, and that they do not need to settle for the judicial bottom line.

Why should we seek revisions in Court decisions? Just look at the five cases we are considering from this spring. The *Croson* majority still maintains the legitimacy of set-asides. Justice O'Connor expressed the problem squarely: "...we confront once again the tension between the 14th Amendment's guarantee of equal treatment [under law] to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on... minority groups in our society." O'Connor resolved that tension in favor of policy instead of principle, and we must insist that policies without firm principles are merely arbitrary.

O'Connor raised, without settling, the question of the Constitution's color-blindness. Justice Kennedy, in *Patterson*, stepped right through that open door, albeit cautiously. He introduced in a key role in a majority opinion of the Supreme Court for the very first time the language from Harlan's 1896 dissent in the "separate but equal" case. "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."

Kennedy's caution is shown by his stopping one phrase short of the controverted language, the "Constitution is color-blind." But his boldness shines in his willingness to use the citation the Court has shied away from for two generations to defend the Court's judgment that there exists today a firm national policy and sense of justice that supports prohibiting racial segregation and discrimination. On that basis, the Court upheld *Runyon*.

Some of Kennedy's argument, however, is rather wish than reality. For the consensus is not clear that "race-based measures" are no less discriminatory than old Jim Crow. Accordingly, the campaign that is needed is to build the consensus for which Justice Kennedy longs, and to build it with sufficient momentum to resolve positively Justice O'Connor's tension.

The future for resisters lies in focusing the challenge on set-asides, after *Croson*, on the national level—to go after *Fullilove*. (I never did understand why Congress did not simply prefer bounties, anyway!) Out of the *Wards Cove* decision there remains a need to structure rules of

evidence in discrimination cases so as to connect charges of discrimination with concrete practices rather than random effects and chance events. This certainly means to expose Mr. Campbell's attempt to legislate the conclusions of science by declaring statistics to prove causation. From *Lorance* we learn that an injustice enforced by the Court was actually imposed by Congress—which summons us to expect from Congress recognition and a remedy of the defect. It does not justify an unfair statute that it is applied equally. Where the dearest personal rights of Americans are involved, Congress had no business to discourage litigation in the first place (which amounts to protecting wrong-doing). Out of *Wilks* we are encouraged to think that Asians will benefit from the affirmation that all Americans are protected from discrimination by race—even where affirmative action is involved. Our task is to assure that they also understand the compelling attractiveness of this proposition, as they seek to break down barriers to elite universities and to break through the all too real “glass ceiling” in industry and government.

And from *Patterson* nothing can dwarf the significance of the establishment of Harlan's color-blind language, which ought to be the language with which we teach our offspring to speak. We will require, moreover, to make good the contract guarantee opened up in that case. The promise is more far-reaching than has been grasped or than the Court has elaborated thus far. *Patterson* maintains that conduct within the contractual relation is expected to be regulated by private efforts that are, in turn, protected through guaranteed access to enforcement procedures (instead of friendly affirmative interventions). Our task is to press the cases that will demonstrate to every disadvantaged person in America just how far ahead this will leave him.

The future for the resister, in short, is one in which the prevalence of the discussion of right and wrong over the discussion of policy will be a prelude to completely refashioned policies. Before anyone demands to know what we are going to do about the legacy of discrimination, we must articulate clearly the principles on the basis of which anything we do will be defensible. The idea of formulating public policy—or legal precedent—in a vacuum, can only lead in the end to unintentional justifications of despotism. If standards of right and wrong are not the foundation of our efforts, then actions indifferently right and wrong (which means mostly wrong, because accomplished by force) must follow.

What we shall accomplish, quite simply, is to eliminate once and for all routine references to race and gender in surveys, plans, projections, and other official accounts of private and public workforces—wherever the logic of the profession itself does not impose such categorizations. The fact that such usage is pervasive and deeply rooted describes the nature of the task before us—the first thing that must fall, accordingly, is the very concept of group representation or, more precisely, “protected groups.” All Americans must be protected by freedom, or, in the end, none will be.

If any specific proposals have escaped me on this occasion, it is by chance. I have meant primarily to speak to the circumstances in which we must deliberate about what to do and not to prescribe. I am confident that, if we undertake that deliberation seriously, we will well arrive at the expedients that answer to our necessities. And permit me to anticipate a criticism as well. As I said at the outset, I speak here in propria persona. Nevertheless, you can be certain that some wag will be quoted tomorrow as decrying this “evidence” of the Commission's distance from the task of securing America's protected groups. I could wish it were so. They say the Commission on Civil Rights lacks credibility, and I've finally figured out what they mean. For if we were wrong, they would simply say, “you're wrong!” But they say, instead, that we lack credibility, for to lack credibility is to be right, but unheeded.