Statement of Commissioner William B. Allen
Concerning *Johnson v Transportation Agency, Santa Clara County*[*]

Preface

Argument alone cannot dislodge the presumption in favor of officeholders who speak authoritatively concerning the meaning of our laws and Constitution. For that reason the following critique of the Supreme Court's opinion and judgment in the case, *Johnson v. Transportation Agency, Santa Clara County*, addresses rather more our general understanding than any action agenda. Place matters in their proper context and the necessity of this approach will be readily apparent.

The critique does not shrink from demonstrations that the Justices do not deserve our attention on the basis of any intrinsic merit in their reasonings and judgment. They reason poorly and decide unwisely (as, for example, in denying the palpable demonstrations that petitioner Johnson had in fact been constructively hired for the position in question but subsequently denied it solely on the basis of his gender). It is rather their office that commands our attention. For whether they reason well or ill, we gauge the range of our conduct by their judgments.

We can demonstrate how awkwardly circumstanced we are because of this relationship. We know today that not only Justices but many high officeholders are not only ignorant of but ill-disposed toward our Constitution and the attendant conditions of its development. We pledge allegiance to the republic created by that Constitution, while the general perception of it is forged by voices altogether antagonistic to it and which also misrepresent it. Can a pledge of allegiance make any sense in that context, any more than a spirit of law abidingness when that law is being shaped by lawless judicial interpretation? I believe the answer is yes and shall try to explain why.

Put affirmative action aside for the moment and consider only the diverse statements about the imperfections of the American founding coming from high officials in this bicentennial season. According to their voices, American founding history is a sham and a delusion. Yet, the evidences they offer are all false! In a court of law we could not admit them as experts because we may so easily demonstrate that they do not tell the truth when they say the founders favored slavery, did not include blacks and women in the Declaration, and, the ultimate charge, regarded a black person as only three-fifths of a human being.

All of these charges are refuted, I say, not by me but by the very surface of the founding documents and their circumstances. The compromise over slavery in the Constitution, for example, actually represented a movement away from the absolute protection for slavery that a threat from South Carolina had introduced in the convention. The Declaration does not only speak of men when it declares "all men are created equal." It also affirms that governments "are instituted among men." It would be hard to insist that women were thought to be ungoverned! But beyond that, Jefferson protested that nefarious practice of keeping "open a market where MEN should be bought and sold." That

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these MEN were black and male and female no sophist would deny and, one may say, was a fact of which Jefferson was intimately aware. Thus, the usage of the Declaration excluded none and was self-consciously universal. So, too, with the three-fifths clause both in its original form (Confederation Congress, 1783) and in the Constitution. Not only did the framers not depreciate the value of a black man per se, they specifically counted free blacks and whites, including indentured servants, as whole persons. The three-fifths calculation applied only to the credit for representation and taxation to be granted to slave-owners in States permitting slaves. The slaves were black, to be sure, but the fundamental distinction the calculation was based on was between free and slave. No negative aspersions were involved in this particular provision.

Is it not then wonderful, despite this record, that authoritative opinion inculcates the opposite view at every point? Are we to suspect high officeholders of lying, of intentionally seeking to subvert the foundations of this republican order? I think not. I think we rather behold the effects of meager study and blind submission to a reigning orthodoxy. The general opinion that is represented here certainly had a particular origin, but that is not important here. What does count is the fact that, on the basis of this general opinion in the name of which Justices and others act, we must expect decisions and expressions unfriendly to the Constitution.

To return to affirmative action, this helps to explain not only how such decisions are made but what their force is in our society. The situation of affirmative action today is not unlike that of slavery 200 years ago. The first constitutional debate in Congress was over slavery; it ended with the House asserting that Congress had some power over slavery but declining to exercise it. Although the greater and better part of the citizens of the United States found slavery incompatible with the principles of and their hopes for the republic, they could undertake no remedial steps that did not also prevail over the opinion of the slaveholders.

Thus a powerful minority, not otherwise dominating the Nation, held the key to this problem—a key, as we know, of which no use was made. Similarly with affirmative action, even its supporters acknowledge an ultimate loyalty to the notion of a colorblind Constitution, just as slaveholders had conceded that slavery was incompatible with the Declaration. But, just as slaveholders could not find the practical expedient to free themselves immediately from their contradiction, so, too, supporters of affirmative action insist that it is for the moment practically impossible to forgo race- and class-conscious law.

In the United States of 200 years ago, there were practical expedients untried, because they could not win the prior consent of the slaveholders. Today those who oppose affirmative action insist that there are superior modes to realize the promises of American institutions and principles, but our expedients cannot operate in the presence of affirmative action. Thus, they are excluded while affirmative action is the law. Many factors and interests sustain affirmative action. Doubtless one of the most significant, however, is the preponderance of support among American blacks. It may fairly be said that, whatever else happens, no important change of American law is possible in this regard that does not at the same time prevail over the opinions of American blacks. Hence, a powerful minority, not otherwise dominating national life, holds the key to the solution of this problem.

When we speak of the opinions of Justices, therefore, and whether they are learned or mere repetitions of stale, uncritical formulas, we do not pretend thereby to have eliminated the exigent character of Court judgments. How far we can follow a Court—and therefore a public opinion—hostile to fundamental conceptions of liberty will remain a most intriguing question. In the assessment that follows, however, we assume not only a commitment to carry out the law to the farthest extent but also the obligation to seek to alter opinion in such a manner as to obviate the recourse to questions more fundamental.

Part I: *Johnson* as Reason

I divide this statement into two parts in order to signal that the analytical portion makes no pretense of showing any regard for the artificiality of legal reasoning. Legal reasoning today is significant only insofar as it permits us to say what is the latest expression of the law, not what is right or wrong. On that impoverished view, one might liken it to the directions that guide a scavenger hunt. Accordingly, the second portion of this statement is merely an approximation (a first order approximation) of the legal obligations imposed by *Johnson*.

I concur in the statement of Chairman Pendleton. In addition, I wish to add some direct reflections on the Court's judgments in two respects, first with regard to the character of the opinion, and then in respect to the obligations of the law.

The majority opinion written by Justice Brennan stretches our powers of imagination beyond the reasonable. Something called "The Plan" springs to life and assumes reflective and commanding postures. The Plan "notes." The Plan "observes." The Plan "implements." And so on. Indeed, everything that occurred, according to the majority, happened "pursuant to the Plan" (the affirmative action plan of Santa Clara County, California).

Thus arises a paradox, on the stated facts of the case. Petitioner Paul Johnson competed against Diane Joyce and seven other applicants for the position of road dispatcher. Johnson and Joyce were both presumably well known to the appointing authority, since both were already employed within the Santa Clara County Transportation Agency. Johnson received preferment based on testing/interview performance, prevailing not alone over Joyce but over five other applicants deemed qualified. All of this took place under the existing authority of "The Plan." When, then, the county affirmative action coordinator intervened (at the request of Joyce) to overturn the constructive hiring of Johnson, the intervention gave rise to the question of whether "The Plan" was being followed. Without any showing whatever that the transportation agency did not follow "The Plan" in selecting Johnson, the agency was directed to appoint Joyce, in accord with "The Plan."

In the absence of a positive contrary showing, we must assume that all who live by the "The Plan" also live in conformity with "The Plan." Thus, according to the majority's reading of the facts of this case, the Santa Clara County affirmative action plan could produce either of two exactly opposite results. It could produce appointments with respect for gender distinctions but not on that basis, or it could squarely discriminate on the basis of gender. Either would be acceptable, on the majority's reading.

The reason that either of the opposites—nondiscrimination against males or discrimination against males—seems acceptable is that the Court conceded the title to the county to act arbitrarily and to judge summarily where these, and these only, were the allowable options. Commissioners Berry, Guess, and Ramirez seek to minimize the impact of this conclusion through the declaration that the differences between Johnson and Joyce were minimal. They rely on the Court's belief that "any difference in qualifications between Johnson and Joyce were minimal, to say the least." But here lies a problem: the two-point difference between Johnson and Joyce must appear insignificant on a colloquial or non-expert reading. To say the least, neither we nor the Court have any idea what to make of such raw scores. On the other hand, we do have a conversion instrument that would make those raw scores commensurable with other human performance—and thus say much to us about qualifications. We know that, of seven qualified applicants, a two-point difference placed Joyce below, and Johnson above, the 50th percentile. That is certainly no minimal difference. It may even signal the distinction between "barely qualified" and "qualified." This, in turn, amplifies our understanding of the Court's grant of arbitrary authority to the County of Santa Clara.

With this result from a reading of the facts of the case and the Court's reasoning, we are forced to ask why. How does the Court justify such a counterintuitive result? The answer: not easily! nor well! According to the Court, the question being judged was not whether gender had been taken into account but whether it had "impermissibly" been taken into account in violation of Title VII of the Civil Rights Act, as amended. The relevant amendments prohibit discrimination or adverse categorization on the basis of gender and several other factors. In addressing the question, the majority announced an exclusive concern with the "scope" of Title VII, severing the law from any questions of constitutionality since, purportedly, no constitutional questions had been raised. (This, abstracting from the fact that the relevant amendments to Title VII had explicitly injected the constitutional question relative to public employers. Needless to add, it never occurred to the majority to recur to the axiom of the Declaration of Independence that vouchsafed the rights of all.)

The significance of the decision not to confront the constitutional question lies in the effect of that decision on the majority's reading of the facts. The Court's prior affirmative action history would have been relevant in trying the constitutional question but not, according to the logic, to trying the scope of the statute. The opinion is not informed, therefore, by the evidence that the present "Plan" represents a reaction in Santa Clara County, not to a tradition of segregation but to the county's own frustration with the results of equal employment opportunity.

The county mandated in its "Plan" work force adjustments in harmony with demographic representations of identified population subgroups. Thus, if 10 percent of the population were black, so too should the work force be. If 50 percent were women, so too should the work force be. If 3 percent were Asian, so too should the work force be. The mandate applied not merely across the board, but through specified job categories. In the transportation agency's "Plan," the goals of the county mandate were to be attained by means of annual statistical improvements in the "representation" of the designated subgroups. The concentration was to be on the "underrepresented" as opposed to the "overrepresented" subgroups.

The transportation agency made the transition from vague, long term social objectives to concrete, short term goals by means of a specific action plan—namely, to locate qualified applicants in the relevant geographical area and then to distribute them actuarially relative to anticipated vacancies. The number identified at each actuarial increment would become the short term goal. A less complicated way to state this bureaucratese is to say that they guessed at probable job openings (firings, retirings, etc.) and made a judgment about the availability of members of the subgroups to fill them. Whatever number of availables they came up with, up to the number of vacancies, became the short term goal. It is, therefore, almost a conscious lie, when the Court declares that the "Agency's Plan thus set aside no specific number of positions for minorities or women." They set aside a specific percentage of each group on a long term basis and specific numbers year by year, up to the number prescribed by the long term goal operating as an arithmetic factor.

The Court's sleight of hand may be captured as follows. It is possible to describe the dynamics of a Supreme Court judgment without ever mentioning the number nine or any number. Doing so, however, will not alter the fact that a determinant number of opinions alone will and must decide in any given case. The pretense that Santa Clara County's goal is not a quota merely because the county forswears an immediate declaration as to a number is either intellectual duplicity or stupidity. Although reasoning on that order may determine the law, we can take comfort that the disease need not be catching.

A last word on the "overrepresented," such as female clericals: although the quota system mentioned here would be harmless in a perfectly elastic, evenly distributed labor market, a different story unfolds to the extent that humans form their ambitions and career objectives differentially (however subject to evolution). In the latter case, a necessary deduction would be substantial, legally imposed unemployment or misemployment in certain categories. It does not apply immediately only because the Court and the county forswear any intention to do anything about overrepresentation. On the other hand, the warning lights have already lit for the future of Asians in American higher education!

The two primary notions, the calculation of work force representativeness and non-applicability of equal employment considerations, go to the heart of the Court's reasoning. It does, however, distinguish itself by other feats of legerdemain. According to past opinions, for example, such a "Plan" would be flawed if it were permanent as opposed to temporary. The lower court concluded from the absence of a termination date that the "Plan" was permanent. The High Court majority ruled, however, that the "Plan" only spoke explicitly of "attaining," not "maintaining a work force mirroring the labor force in the County." Thus, though acknowledging that the "Plan" called for an open-ended attainment of work force quotas, the majority pretended that the absence of one word, maintenance, meant that the county would have ended the "Plan" as soon as it reached its goal (which, by the way, was not supposed to be a real goal!). This is rather like arguing that a person who buys a car without a service contract really doesn't mean to keep the car, for we all know that cars require maintenance to be kept. Yet, to the extent that it is common knowledge that maintenance is the means to provide permanence, why should we have to make it explicit?

The Court's reasoning on the temporal character of the "Plan" resembles its reasoning on the facts of the case touching Johnson's rights—namely, the Court denied that

Johnson was denied anything to which he had a right. The Court must be wrong here (as any good common law jury would surely find), and it tacitly acknowledges this by focusing on Johnson and not the other candidates over whom Joyce had been selected. Why does Johnson stand out? Because the selection process had narrowed to a choice of Johnson! On the facts presented even in the majority's opinion, it is plausible to assume that the decision to appoint Johnson had been made through normal channels, and that in an atmosphere which had indeed raised at least an expectation of Johnson's constructive title to the job. What happened next, then, was not a simple decision to appoint Joyce, but a decision to override the process (which already included affirmative action criteria) and on the basis of gender alone to appoint Joyce over Johnson. [N.B.: This is the source of the entire fallacy of Justice O'Connor's concurrence. She failed to note that gender was considered twice, not once, and therefore considered inappropriately the second time. Insofar as she wished only to defend some consideration of gender, it had been provided for already. Had she noticed that, she would have dissented.] It was a decision to deny Johnson what he had earned (a form of title with which the Court is no longer conversant but one that will ever be morally compelling). The decision of the appointing official—under the direction of the county affirmative action officer—was effectively that the county would not be harmed by appointing Joyce (which appears correct on narrow grounds), without regard for what befell Johnson. This is what the Court has shown us, though it has not the courage or the art to say it.

Johnson is not alone. Every use of race or gender operates as an exclusion. Where the exclusion of certain designated minorities, by race or ethnicity, or the exclusion of females, may result, the Court holds it is insupportable and by no stronger argument today than what can be wrung from the expression, "traditionally segregated." The exclusion of the combined class of white males—a minority by race plus gender—is the mandate of the law and the necessary inference of the Court's reasoning.

This enormous transition in American principles (this abandonment of American principles) stands on an argument in behalf of "effecting a gradual improvement in the representation of minorities and women" in the key centers of social and political life. Thus, the question ceases to be a matter of individual rights and becomes instead a matter of social symbolism. Nowhere in this or any other opinion, however, does the Court undertake to state cogently the sources and content of this symbolism, conveyed by the sole word, "representation." The gravamen of this consideration will become clear if we contrast the word "representation" with the word "presence." If the Court's goal were gradually to effect an improvement in the presence of minorities and women in key centers of social and political life, there would be implied named individuals whose rights and fates were at stake. Their presence would answer to their unmerited absence. Presence, replacing absence, would terminate the cycle. But what is representation? Is it political, as where many choose few to speak on their behalf? If so, how can the choice of the spokesman be placed in the hands of the persons to whom the many are represented rather than in the hands of the persons represented? Is it artistic, as in the theatre we regard a play as a representation? If so, who is the artist, and on what just grounds do we limit his expression? Is it merely statistical, as in a representative sample? If so, must we not impose scientifically precise conditions of randomness to achieve the stated end? We behold in these reflections the massive evidence of the Court's confusion. The fact is, the Court's majority simply has no very firm conception of what it is talking about. It is out

of its league.

There is a perverseness involved in considering one laborer in any given industry the "representative" of others who have their own rights to vindicate irrespective of what happens to people who "look like them." They may very well prefer to hold that job themselves rather than be "represented" through the accident of race or gender. Their wishes, other factors not intervening, ought to be the law's command. In what way, then, does one laborer thus represent others? He doesn't share out his pay among them. His tax obligations do not discharge them from like obligations. Nor can they even be sued for liability when he screws up! This metaphorical style of reasoning, upon which the Court relies, obscures an ill-disguised contempt for ordinary souls (the Johnsons of the world) and the notion that their individual claims and desires deserve no particular respect. They are counted en masse, by noses, and thus only do they count.

This analysis raises an urgent question: given the insufficiency and inferiority of the Court's reasoning, what are the obligations of the Commission on Civil Rights in regard to the ruling? Let it be affirmed at once: the Court's ruling is absolutely binding on the Commission, just as it is practically binding on the people as a whole, its pernicious effects to the contrary notwithstanding. The Court's ruling may be distinguished from its argument, however. We, whether at the Commission or the people at large, are under no obligation to conform our opinions to the dim lights of the Justices. This is especially true where Court opinions are manifestly inferior as logical and moral arguments. There has been much debate about the notion of original intent. It can admit of no debate, however, that the founders clearly intended Supreme Court Justices to be more accomplished reasoners than majorities of late have been—not only legally but morally, philosophically, historically, and religiously.

I have offered a cursory examination of the Court's reasoning, relying on no outside authority. I could, of course, have developed the perspective of the dissenting opinion. I could as well have recurred to the stirring language of a colorblind Constitution from the Harlan dissent in *Plessy*, language that wended its way into the heart of the people's Constitution in spite of Supreme Court and entrenched political inertia. I conceive it as important, however, that we take the full measure of what serves us as law today. I do not conceal that I foresee ruinous consequences proceeding from the Court's ruling, not all of them traceable to the Court itself. Much of the difficulty begins with the Court's giving too great credit to Congress' hyperbolic intention to "eliminate the lasting effects of discrimination." This exceeds their power to realize. Although Congress can assure and safeguard the opportunity for the people of this country to accomplish that goal, Congress can never provide for it directly. And it is by now clear that their exerting themselves on behalf of extreme pretensions is an immediate cause rather of decline than of progress in civil rights. It is regrettable that the Court has enlisted as a handmaiden in their demarche.

Part II: *Johnson* as Law

The *Johnson* decision imposes upon this Commission and the society in general (including public agencies) efforts to improve gradually the representation of women and minorities in work forces. This is an extrapolation from the strict decision, approving the

affirmative action plan of Santa Clara County, read by way of the existing obligation to enforce Title VII of the Civil Rights Act in light of this authoritative interpretation. The specific statistical plan of quotas and decisions based squarely on gender or race in *Johnson* is not the sole recourse for affirmative action purposes, nor was it presented as such by the Court. On the other hand, insofar as it effectively attains the mandated condition, "representativeness," and does so comparatively more effectively than other recourses, it acquires a legal and moral priority. In particular, for this Commission it would take a strong justification to defend devoting time to other measures, under pressure of the ruling in *Johnson*.

The consequences of this reading of the law are manifest. The myriad statutory and regulatory provisions that mandate affirmative action would now have renewed life and vigor. Heretofore, compliance efforts throughout some governmental agencies and the private marketplace, from churches and schools to multinational corporations, have been little more than demonstration projects in comparison with what the law demands. Worse, these efforts may be characterized as a mere form of paper compliance, burdening the society with noxious reports, producing the occasional show case, like Diane Joyce, but otherwise neither being carried out in good faith nor producing any markedly discernible impact on the society.

The law is the law. Our voices are not stopped. We may tell the truth about the law: it is bad law. It may well destroy this society if fully enforced. Yet, it is the law. Accordingly, it is in my view the immediate and urgent task of this Commission to demand that it be fully and effectively enforced. It is not clear where the Court discovered the mandate of gradualness in the law. We can take no comfort in its presence, however, for we know not what pace of accomplishment will qualify as gradual. A timeline of 20 years will be short to some and long to others. For this Commission, then, which has no direct enforcement authority, I believe that the idea of gradualness should be subsumed under the notion of immediacy. We would then demand the immediate, full, and effective enforcement of the law.

There will remain ambiguity about the objective of correcting "imbalances" in the work force and elsewhere. The law, according to the Court, requires correcting imbalances. An imbalance, however, is not per se an asymmetrical or non-analogical distribution *vis-á-vis* the general population. Therefore, it requires prior, authoritative determination just what kind of imbalance is meant. The Court has been content to resign that power into the hands of individual agencies, public and private. That, however, invites the abuse of interpreting as imbalance whatever "appears to us an imbalance." Such concepts are far from manifest, though the Court spoke of "manifest imbalance." They would be manifest only if supported by an equilibrium argument, of which I know none. Accordingly, believing it critical that this lacuna be filled, I ask that the Commission apply to Congress and the President for an authoritative determination, a statute fixing standards of imbalances, whereby we could more effectively pursue the task of monitoring and encouraging the enforcement of the law.