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THE SUPREME COURT AND CIVIL RIGHTS: A CHALLENGE FOR GEORGE BUSH

Recent Supreme Court decisions once again thrust civil rights onto America's pressing domestic policy agenda. These rulings have provoked a furious reaction in the civil rights establishment. Benjamin Hooks, executive director of the National Association for the Advancement of Colored People (NAACP), threatens "civil disobedience on a mass scale that has never been seen in this country before."[1] The NAACP and its allies launched these efforts with a march on Washington on August 26.

The Court rulings have triggered anew a critical debate over civil rights in America. George Bush seems caught in a crossfire: on the one hand he supports the Court decisions and opposes legislation to overturn them; on the other, he emphasizes his commitment to ridding the country of racial injustice. To many black leaders, the President's position seems contradictory. The reason it appears so is that only now is the Bush Administration beginning to articulate a coherent vision of civil rights. As it does so, the Administration should make clear that it is squarely on the side of minorities against discrimination, while also making the case that the policies of the entrenched civil rights establishment ill-serve its own constituency. An aggressive, coherent civil rights program will allow Bush to bypass the civil rights leadership elite and present his case directly to the people.

Legacy of Social Engineering. There is an urgent need for a new policy direction for civil rights, based on equal opportunity and individual "empowerment." The tragic reality is that after a quarter-century of social engineering disguised as civil rights, millions of minority Americans today are

1 Quoted in Paul Craig Roberts, "Prone to Racial Privilege," *The Washington Times*, July 19, 1989.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

more isolated from basic opportunities and more deeply enmeshed in a stifling dependency and despair than ever before. States the recent report of the Committee on the Status of Black Americans, a blue ribbon group empaneled by the National Academy of Sciences, "[s]ince the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated."[2] Liberal sociologist William Julius Wilson of the University of Chicago observes that, while many minority individuals have made tremendous economic strides in recent years, for millions of others "the past three decades have been a time of regression, not progress."[3] Significantly, Wilson's studies find that a social policy based largely on race-conscious programs has "tend[ed] to benefit the relatively advantaged segments of the designated groups," while "ghetto underclass individuals are severely underrepresented among those who have actually benefited from such programs."[4]

Offensive to the Constitution. Whether Wilson's conclusions are unwarrantedly too gloomy or not, there is no question that access to equal opportunity and suffering from discrimination may be worse for millions of Americans today than a quarter-century ago. The pathetic irony is that it has been precisely the race-conscious programs criticized by Wilson that the Supreme Court rejected in its recent rulings. The Court held that all policies that assign burdens and benefits on the basis of race are offensive to the Constitution and civil rights laws, and consequently may be justified only by the most exceptional circumstances.

Bush has taken an important step by endorsing these decisions. More important, however, he must place these rulings in the context of a broader policy question:

Given that racial preferences generally are unlawful;

Given that they have not helped the most disadvantaged minority Americans to advance in society; and

Given that they polarize America, distorting the meaning of civil rights from the guarantee of basic freedoms to the granting of special privileges;

Why do civil rights leaders tenaciously continue to pursue such policies?

Is it not time, the President should ask, for America to set out upon a different and more promising course to achieve genuine civil rights?

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2 Gerald David Jaynes and Robin M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* (Washington: National Academy Press, 1989), p. 6.
3 William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987), p. 110.
4 *Ibid*, p. 115.

Curiously, much of the civil rights establishment seems determined to continue pursuing its failed agenda – no matter the cost to its members, to all minorities, and to the nation. Not surprisingly, a widening rift is developing between this leadership and its putative constituents. The NAACP has lost more than 100,000 members in the past decade, and particularly is failing to attract new members among younger blacks.[5] Similarly, recent public opinion surveys disclose a broad divergence between the views of the civil rights elite and grass roots blacks.[6] This gulf likely will widen unless establishment civil rights groups redirect their energies to the realities of the 1990s.

Proposing Real Solutions. Meanwhile, a rare opportunity exists for the Bush Administration and other conservatives to refashion the terms of the civil rights debate, by proposing real solutions to the problems facing minorities in a way consistent with traditional civil rights values. Specifically, the Administration should focus on the real-world barriers, some discriminatory and others not, that separate individuals from opportunity. The most compelling challenges include:

♦ ♦ vigorously enforcing civil rights laws without racial preferences;

♦ ♦ promoting effective affirmative action initiatives focusing on human capital development and economic mobility – giving minorities the tools to take advantage of economic opportunities;

♦ ♦ eradicating arbitrary impediments to entry-level entrepreneurial opportunities;

♦ ♦ expanding educational choice;

♦ ♦ providing incentives and opportunities for the poor to emancipate themselves from welfare; and

♦ ♦ protecting Americans from crime.

Each of these areas addresses the primary objective of the civil rights struggle: securing for individuals the right to control their own destinies. The Bush Administration can go far toward completing the unfinished business of

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5 Clint Bolick, *In Whose Name? The Civil Rights Establishment Today* (Washington: Capital Research Center, 1988), p. 25.
6 Linda S. Lichter, "Who Speaks for Black America?" *Public Opinion*, August/September 1985, pp. 41-44, 58.

civil rights by fashioning and energetically pursuing a strategy to promote individual autonomy.

THE SUPREME COURT'S DECISIONS

The key theme in the Court's civil rights rulings earlier this year was the rejection of racial quotas. The two civil rights decisions that have evoked the strongest reaction are *City of Richmond v. J.A. Croson Co.*[7] decided this January, and *Wards Cove Packing Co. v. Atonio*, handed down in June.[8] Both involved aspects of the racial quota issue.[9]

In *Croson*, a majority of the Court for the first time embraced the principle that all racial classifications are constitutionally "suspect" – thus triggering the most stringent degree of judicial scrutiny, and rendering them unconstitutional unless they are narrowly tailored to achieve a compelling governmental purpose. In this 6-3 ruling, the Court found that a Richmond, Virginia, program to set aside 30 percent of government contracts for minority business enterprises could not survive this exacting standard.

Upholding Equality Under Law. Writing for the Court, Justice Sandra Day O'Connor declared that Richmond's assertion that there was generalized discrimination in the construction industry "cannot justify the use of an unyielding racial quota" to apportion public contracts on the basis of race.[10] The city's reservation of 30 percent of its public contracts for specified racial groups was not premised on discrimination suffered by the set-aside's beneficiaries, Justice O'Connor reasoned. Moreover, she concluded, even if a remedy for discrimination were appropriate, the city first would have to consider race-neutral means, as well as alternatives that imposed less harm on innocent third parties.

The *Croson* ruling does not break with the basic civil rights principles, as its critics contend. To the contrary. It upholds the bedrock principle of equality under law. The decision does not invalidate all uses of race in governmental decision making; it does not negate the limited use of race-specific remedies in instances of egregious discrimination, for instance, nor does it proscribe race-conscious affirmative recruitment efforts that do not limit opportunities

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7 109 S.Ct. 706 (1989).

8 57 U.S.L.W. 4583 (U.S. June 5, 1989).

9 Other important civil rights rulings this term included *Martin v. Wilks*, 57 U.S.L.W. 4616 (U.S. June 12, 1989), which allowed white firefighters to challenge a consent decree establishing preferences for blacks; *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705 (U.S. June 15, 1989), in which the Court declined to overturn a previous ruling extending the Civil Rights Act of 1872 to private contractual relationships but refused to expand the law to cover racial harassment, which is covered by the 1964 Civil Rights Act; and *Public Employees Retirement System of Ohio v. Betts*, 57 U.S.L.W. 4931 (U.S. June 23, 1989), in which the Court by a 7-2 vote protected a retirement plan that was not intended to discriminate against older workers from challenge under the Age Discrimination in Employment Act.

10*Croson*, p. 724.

for third parties. What it does do is spell an end to the widespread use of unfair, special racial preferences to appease special interest groups or, what has been more significant, as a substitute for steps to end all discrimination.

Statistical "Proof." The *Atonio* decision is perhaps even more important because it deals not with the use of racial quotas *per se*, but with "adverse impact," the legal doctrine that is the engine of racial quotas.

"Adverse impact" is the concept by which proof of discrimination has been sought in statistics rather than in direct or comparative evidence of an employer's intent to discriminate. Adverse impact assumes that racial (or other) groups typically will enjoy similar rates of success for everything. Example: if blacks and whites apply in equal numbers for ten job openings, adverse impact theory suggests that, absent some explanation, roughly five whites and five blacks will be hired.

The Court first employed this doctrine in the landmark *Griggs v. Duke Power Co.*[11] decision in 1971. The Court found that the employer's use of certain tests, which screened out black applicants at a disproportionate rate, were simply a cover for discrimination since they did not serve any legitimate business purpose.

Expensive and Futile. Subsequent decisions by lower courts and federal agencies applied *Griggs* expansively. Before long, virtually any statistical racial disparity resulting from an employer's hiring or promotion factors was considered evidence of discrimination, forcing the employer to defend the business "necessity" of its practices. Such efforts by employers typically proved expensive and futile, even for those who had adopted objective standards explicitly to prevent discrimination, and commonly ended with settlements or judicial orders requiring quotas. As businesses grew wise to this practice, they started abandoning race-neutral standards and adopting instead "voluntary" quotas as an insurance policy against lengthy, costly, and hopeless litigation.

The abandonment by American businesses of nondiscriminatory tests and other objective standards for employee selection has cost billions of dollars in lost national productivity, eroding the nation's international competitiveness. Perhaps much worse, the notion that every racial disparity is the result of discrimination and is "curable" by a quota left unaddressed the central problems of economic mobility and human capital development that often prevent disadvantaged individuals from taking advantage of employment opportunities. Too often, the misuse of "adverse impact" resulted in the use of quotas as a cheap but only surface-deep remedy that glossed over far deeper societal problems.

In the *Atonio* decision, the Court signalled an end to this by ruling that, while adverse impact is a tool to detect discriminatory practices, it must not

11 401 U.S. 424 (1971).

be a device to generate quotas. The Court instructed that the use of statistics in employment discrimination cases must be focused sufficiently to raise a plausible inference of discrimination (for example, identifying the specific employment practice involved, and comparing job applicants who are actually qualified for the job rather than the population as a whole), and that employers may defend their practices by articulating a business justification. This ruling does not prevent minorities from proving discrimination by pointing to alternative policies that would produce less adverse impact for the group in question but serve the employer's needs equally well. In its *Atonio* ruling therefore, the Court fulfilled the objective of the Civil Rights Act of 1964, which, as described by Senator Hubert Humphrey, its principal architect, "does not limit the employer's freedom to hire, fire, promote, or demote for any reasons – or no reasons – so long as his action is not based on race."[12]

The Court's recent decisions reflect the commitment of America's civil rights laws to ensure equal opportunity rather than forced equality of result. They limit the use of racial considerations to the most exceptional of circumstances, thus completing the task initiated 35 years ago in *Brown v. Board of Education*.[13] They vindicate the intent of the Civil Rights Act's framers by removing the ugly blot of discrimination from the marketplace while leaving employers otherwise free to manage their concerns. They ensure that the courthouse doors are open to victims of discrimination, regardless of race. For these reasons, the Court's decisions are triumphs in the quest for civil rights.

HOW THE BUSH ADMINISTRATION SHOULD RESPOND

How George Bush deals with these rulings will determine whether he will make a difference in the area of civil rights. His Administration has a rare opportunity to move beyond the most divisive issues of recent years if it seizes the initiative.

As a start, the Administration should not retreat from its defense of the recent Supreme Court decisions, even in the face of a campaign to overturn them legislatively. It should not join the campaign for reversal of the Court rulings. Bush needs to emphasize repeatedly that the decisions do not constitute any significant change in the law. Not a single precedent was overturned. The Court, for the first time, simply said an emphatic "no" to a civil rights establishment that had grown accustomed to securing through the courts what it could not accomplish in the legislature.

12110 Cong. Rec. 5,423 (1964).
13347 U.S. 483 (1954).

The problem for these advocacy groups is that Congress has refused consistently to embrace quotas in any legislation, because a strong majority of Americans (including a majority of blacks) opposes preferential treatment based on race although they firmly support the traditional civil rights objective of equal opportunity.[14] These groups thus have relied on judicial activism and indirect legislative tactics, including assaults on judicial and executive nominees (such as William Lucas, Bush's nominee for Assistant Attorney General for Civil Rights) who oppose quotas.

Framing the Debate. Various bills seek to overturn the Supreme Court decisions. One benefit of these bills is that they will spark a legislative debate framed squarely in terms of racial quotas.[15] But if enacted, the bills would reestablish the quota regime that existed before the recent rulings. Bills by Senator Howard Metzenbaum, the Ohio Democrat, and Representative Tom Campbell, the California Republican, for instance, would overturn the *Atonio* decision and make it once again all but impossible for employers to defend their personnel practices, even nondiscriminatory ones, against lawsuits based solely on statistics. A bill by Senator Paul Simon, the Illinois Democrat, would attempt to insulate from constitutional scrutiny state and local set-asides conferring benefits for selected racial groups. Senator Edward Kennedy, the Massachusetts Democrat, is expected to introduce "omnibus" legislation aimed at overturning several of the decisions in a single package.

The Bush Administration should stand firmly against legislation to impose racial quotas. It should defend the Court's decisions as expressions of the core value of equality under law and as resolving issues that have bitterly divided Americans in the past. But defending the Court must merely be the Administration's first step to demonstrate its commitment to civil rights. It then must devise and advocate an assertive civil rights strategy designed to secure for all Americans the right to control their own destinies – the very essence of civil rights.

AN AGENDA THAT ENSURES GENUINE CIVIL RIGHTS

A civil rights agenda for the 1990s should declare its goal to be to dismantle the barriers that prevent too many Americans from sharing what for the vast majority of Americans is the reality of the American Dream.

These barriers take many forms, requiring a variety of tactics to dismantle them. What is obvious now is that the conventional wisdom of treating every racial statistical disparity as a manifestation of discrimination – and "curing" it with a quota – is ineffective. The President instead should endorse policies that would provide a genuine opportunity for all Americans, particularly

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14See, e.g., Lichter, p. 42.
15To date, legislative initiatives introduced to overturn the Court's Supreme Court rulings include S. 1261 (Metzenbaum), S. 1235 (Simon), and H.R. 2598 (Campbell).

minorities and the poor, to achieve the fullest rewards from their talent and aspirations.

1) Strengthen the civil rights laws.

Not only are quotas inherently wrong and ineffective, but they also do not really penalize those who discriminate; they merely shift the cost of discriminating to those innocent individuals who must step aside in favor of the quota beneficiaries. Under the 1964 Civil Rights Act, for example, an employer found guilty of discrimination need only provide a job and back pay, a penalty that does not deter future discrimination. To remedy this, Bush should propose to Congress amendments to the law to impose punitive damages on employers who wilfully or persistently violate the law.

Another problem is that existing laws focus only on employers and ignore such "non-employer entities" as state licensing boards – that impose arbitrary barriers to entry into trades and professions that disproportionately exclude minority individuals. A beauty shop, for instance, may be willing to hire black beauticians, but if a licensing board arbitrarily denies certification, such individuals may find themselves without a remedy.

The Administration thus should propose that Congress extend the law to cover licensing rules that prevent Americans from using their skills in the market.

2) Reinvigorate affirmative action.

Although it is now confused with racial preferences, affirmative action originally was intended to open up opportunities secured by the civil rights laws for those individuals who previously had been excluded by racial discrimination. Affirmative action was to be a way of providing those outside the economic mainstream with the tools necessary to take advantage of the opportunities secured by the civil rights laws.

It now is time to restore affirmative action to its original purpose. By the year 2000, two out of three new workers will be minorities, immigrants, or women. As American business encounters severe skilled labor shortages, more opportunities will exist than ever before for these work force newcomers. But these same people disproportionately lack the skills, experience, and mobility to take advantage of the opportunities provided by the economy.

U.S. companies are ambitiously trying to correct this through such efforts as literacy training, basic skills training, public school partnerships, day care, transportation of inner-city workers to the suburbs, and eliminating barriers for the handicapped.[16]

16See Clint Bolick and Susan Nestleroth, *Opportunity 2000: Creative Affirmative Action Strategies for a Changing Workforce* (Washington: U.S. Department of Labor, 1988).

The Administration should foster this welcome trend by redefining affirmative action to focus on tools rather than numbers. Through tax credits, regulatory reforms, urban enterprise zones, and law enforcement mechanisms, the federal government can expand opportunities by eradicating the practical impediments that prevent the economically disadvantaged from joining the economic mainstream.

3) Propose an Economic Liberty Act. Thousands of bureaucratic regulations at every level of government are slowly suffocating entrepreneurial opportunities that previously had been available for Americans outside the economic mainstream. From excessive and unnecessary licensing requirements to government-imposed business monopolies, these regulations impose their harshest burden on minorities and the poor.[17] Typical have been the District of Columbia's recently overturned Jim Crow-era ban on streetcorner shoeshine stands, Houston's ban on shared-ride "jitney" services, and the National Park Service's monopolistic licensing process for charter boat permits.[18] These regulations present insurmountable barriers to aspiring entrepreneurs.

Bush should call on Congress to pass an Economic Liberty Act requiring all levels of government to ensure their economic regulations to provide access to entrepreneurial opportunities for all citizens. Specifically, such an act would require governments at every level to tailor their economic regulations to demonstrable public health, safety, and welfare concerns. Too often these laws mainly are intended to restrict competition for the benefit of the few. An Economic Liberty Act would allow the free enterprise system once again to create opportunities for upward mobility.

4) Promote choice in education.

No greater barrier to upward advancement for poor inner-city youngsters exists than the dreadful condition of public education. Education always has been the primary tool for economic advancement in American society, yet those who need it the most are least likely to have access to it. Urban public schools are too often drug-infested, crime-ridden, and educationally inferior — not for lack of resources, for billions of dollars are invested in them, but for lack of any real incentive to improve. Meanwhile, poor urban schoolchildren have nowhere to go but to the public schools.

They must be given a choice. And this choice would create the competition needed to improve public education. Several states are experimenting with educational choice. Minnesota, for example, has launched an "open enrollment" plan that allows parents to enroll their children in any public school in the state, rather than restricting them to one area or school district.

17See Karen Diegmueller, "New Luster for Economic Liberty," *Insight*, April 10, 1989, p. 18; Clint Bolick, "From Dependency to Dignity," *Reason*, November 1987, p. 22.
18John R. Emswiller, "Agencies Block Competition by Small Firms," *The Wall Street Journal*, July 26, 1989..

Studies demonstrate that inner-city schoolchildren achieve more if they are not bound to defective public schools.[19]

Bush should commit his Administration to promoting educational competition and choice at the state level, in order to give an educational right to choose to society's most disadvantaged citizens.

5) Promote emancipation from welfare dependency.

Creative incentives designed to free Americans from the welfare-fueled cycle of dependency and despair are an important component of giving minorities genuine equality of opportunity. One example is "urban homesteading" by which public housing is turned over to qualified tenant groups for resident management, and ultimately for home ownership. Another would be to make it easier, by streamlining regulations, for community organizations to obtain the contract to supply basic municipal services in poor neighborhoods.

6) Protect Americans from crime.

The civil rights establishment for decades has defended the rights of criminals rather than protecting the rights of potential and actual victims of crime. Yet the right to be free from crime is the most fundamental civil right. And minorities and the poor are far more likely to be crime's victims than are other Americans.

The Bush Administration should launch an aggressive campaign to fight crime and to champion the rights of crime victims as a central part of its civil rights strategy. The focus should be on the inner city, where crime not only takes life and property but creates a pervasive climate of fear and isolation. The Administration too should promote comprehensive "victim's rights" laws that compel criminals to make restitution to their victims and require prosecutors to take the victim's interests into account in sentencing, probation, and other aspects of the criminal law process.

CONCLUSION: THE UNLIMITED POTENTIAL

Much of the current distortion of the principles of civil rights, and the angry response to the recent Supreme Court rulings, result from the lack of any positive alternative. The Bush Administration must offer such an alternative vision.

Americans are committed to civil rights, but this commitment is fraying because of confusion over the meaning of civil rights and who they belong to. This alarming development can be reversed only by returning to the core values of civil rights – equality under law and individual libery – and by renewing the commitment to ensuring those rights for all Americans.

19*Changing Course*, p. 104-112.

Devising A Bold Strategy. For the Bush Administration, this means articulating a clear, forward-looking civil rights vision. It means vigorous enforcement of the antidiscrimination laws and resisting the false allure of surface-deep quick-fixes such as racial quotas. Beyond that, it means devising a bold strategy, recognizing that many citizens have never fully enjoyed the opportunities that America's laws were intended to provide.

Civil rights is today at a crossroads in which the policies of statesmanship mirror the politics of pragmatism. The Administration should take full advantage of this unusual opportunity.

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