

June 7, 1990

## **FULFILLING AMERICA'S PROMISE: A CIVIL RIGHTS STRATEGY FOR THE 1990S**

### **INTRODUCTION**

**The U.S. Congress currently is considering legislation that its proponents claim will help to create equal opportunities for blacks and other minorities and reduce the racism that persists in America. Far from that, however, the proposed Civil Rights Act of 1990 will preserve and expand America's apartheid-like system of racial hiring quotas and do nothing to promote the economic opportunities for what is becoming a permanent under class of minority Americans. Ironically, the plight of these poor is used to justify the new civil rights law, yet the remedies proposed do not address their condition. Instead, the racial quotas encouraged by the Act at best may benefit only educated and upper income minorities.**

Despite the civil rights gains of the last 25 years, one-third of the nation's black population remains in poverty and one-fourth of all Hispanic Americans live in poverty. What is needed is a civil rights bill that advances the opportunities of these and other poor Americans.

**Outdated Thinking.** The Civil Rights Act of 1990 represents an outdated view of how minority Americans can gain equality of opportunity. Sponsored by Senator Edward Kennedy of Massachusetts and Representative Augustus Hawkins of California, both Democrats, the bill offers 1960s-type solutions to a problem that requires a progressive new strategy for the 1990s. To be sure, many of the civil rights strategies employed in the 1950s and 1960s made crucial strides toward equal opportunity for minority Americans. That civil rights movement and the landmark statutes it achieved broke down barriers and won widespread support among Americans. But many of the veterans of those early battles still are locked into the thinking of that era. They focus on racial quotas, preferences, and statistical-base racial balancing mechanisms as

a weapon for advancing minorities, rather than on crafting strategies to give minorities the basic tools needed to take advantage of the opportunities hard won by Martin Luther King and other leaders of the original civil rights movement.

Fortunately, however, a new generation of minority Americans is beginning to question the relevance today of those old remedies. These Americans are proposing new solutions to propel civil rights beyond the old formula and into a new era of expanded opportunity and true equality of opportunity. The debate in Congress challenges conservatives and liberals alike to fashion a civil rights agenda that goes far beyond the outmoded approach of Kennedy/Hawkins.

**Ending a Paternalistic View.** What is needed are not racial quotas and set-asides, but an empowerment strategy that will unleash the capacity of individuals who have been excluded from the mainstream. This will require lawmakers to view differently those whom they wish to help. For too long government in practice has treated low-income Americans as people who do not have the capacity to make choices to better themselves. This paternalistic view has had a devastating effect on minority communities because it has encouraged entire racial groups to believe that they cannot succeed without discrimination in their favor and continuous aid from government. That has spawned a generation dependent on government, with low self-esteem and little hope for effecting change in their lives. With it has come broken families, soaring crime and school dropout rates, and shattered community institutions that once played a vital role in holding minority communities together.

The liberal civil rights agenda now being advanced in Congress perpetuates the myth that the poor and all minorities are somehow handicapped and must be given special preferences and handouts to succeed. This approach necessarily embraces racial quotas and the massive social welfare programs that have failed to create opportunities for the economically disadvantaged.

**Unfilled Capacity.** The conservative vision of progress, however, rests on a very different premise: that low-income and minority Americans actually have enormous unfilled capacity for achievement. By removing regulatory barriers to economic opportunity and creating an environment in which these individuals are empowered to take charge of their lives, conservatives believe that capacity for achievement will be realized.

This conservative view of progress suggests a two-pronged civil rights strategy. The first prong is vigorous enforcement of civil rights laws. Discrimination remains an all-too familiar fact of life for many Americans. Government must prosecute cases of discrimination against individuals to the full extent of the law. Title VII of the 1964 Civil Rights Act, moreover, should be strengthened to include a remedy of damages against those who willfully discriminate. Building on this enforcement strategy, the conservative civil rights strategy would call for aggressive court and legislative action to challenge modern-day Jim Crow laws that stifle minority business development. Examples include the 1931 Davis Bacon Act, which freezes out minority firms from government construction contracts, and onerous occupational licensing laws for profes-

sions ranging from cosmetology to child care. These barriers to economic opportunity, seemingly neutral in their impact on the races, actually disproportionately harm minority entrepreneurs trying to use the opportunities promised by the civil rights statutes. These remaining legal barriers, moreover, pose the greatest hurdles to the poor — the very people who have been left behind by today's civil rights movement.

**-Attacking Quotas-** This enforcement strategy also would attack racial quotas that act as a ceiling to housing and educational opportunities for minorities. Strict adherence to racial and ethnic composition ratios in public schools, for example, has capped the number of minority students who can attend magnet schools, even when those schools are operating far below capacity. These and similar racial quotas that limit the number of Asian Americans admitted to universities should be challenged by all who genuinely believe in civil rights.

The second prong of the conservative civil rights agenda is individual empowerment to control one's own life. In many respects this is the essence of civil rights and the key to true independence. As Robert Kennedy stated in 1966, "reliance on government is dependence — and what the people of our ghettos need is not greater dependence, but full independence."<sup>1</sup> Conservatives thus want to fulfill the promise of the civil rights movement by pursuing a legislative strategy designed to remove government-imposed barriers that stifle economic opportunities for the poor. Such barriers prevent the poor from making such fundamental decisions as where they will live and who will educate and care for their children.

The conservative empowerment strategy calls for enterprise zones in low-income minority communities to reduce tax and regulatory impediments now frustrating the entrepreneurial spirit of those communities. It calls for a rejection of the public education double standard that condemns poor, primarily minority students to second-rate schools, by injecting competition into the American education system. Parental choice and education vouchers for low-income families are needed to empower parents as consumers with the ability to make choices in a market that now is open only to those who are not poor. This strategy also means vesting community groups with the power and responsibility to deliver services currently managed by bureaucrats. Public housing tenants, for example, should be allowed to manage and eventually to own their own housing units, building on the successes of such efforts in Boston, St. Louis, and Washington D.C. Empowerment also means that government must make good on its fundamental responsibility of protecting its law-abiding citizens from crime, creating an environment in which they can prosper. Thus innovative ideas like a police ROTC for students from low-income communities can be an important element of the conservative civil rights strategy.

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1 Quoted from "Empowerment: A Vision for the 1990s," Task Force on Empowerment, House Republican Research Committee, U.S. House of Representatives.

George Bush has a tremendous opportunity to forge a new civil rights agenda that fulfills the equal opportunities promised by the original civil rights movement. He should start by vetoing the Kennedy/Hawkins bill and the destructive racial quotas that it promotes. The President already has made a solid step in this direction, promising in a May 17, 1990, speech to veto any civil rights bill "whose unintended consequences are quotas." Next, he should propose new policy initiatives that express his vision of civil rights, rooted in empowerment and a firm commitment to prosecute actual discrimination. In what may prove to be a historic speech on civil rights, Bush on May 17 first articulated the critical connection between civil rights and empowerment, proclaiming that any changes in civil rights law must embrace "a broader agenda of empowerment." As John F. Kennedy did in 1961, Bush should issue an executive order that puts forth his vision of an empowerment civil rights agenda. This executive order should instruct the federal government to implement Bush's civil rights strategy of removing racial and economic barriers to individual independence.

## THE STATE OF CIVIL RIGHTS

Since its origins in the American revolutionary era, the quest for civil rights always has meant securing for individuals the power to control their own destinies. The past quarter-century has witnessed both major triumphs and serious setbacks in this quest. The civil rights laws of the 1960s opened the doors of opportunity to millions of previously excluded Americans in such crucial areas as employment, education, voting, and public accommodations.

Indeed, *Washington Post* columnist Courtland Milloy, who is black, has written that "black Americans are probably America's greatest success story. Enslaved a little more than a hundred years ago, there are now 2 million of them living affluently."<sup>2</sup> Milloy notes that between 1967 and 1987 the number of black households earning \$50,000 or more grew from 212,000 to 764,000, an

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2 Michael Novak, "The Invisible Man," American Enterprise Institute, *On the Issue*, from *Forbes*, February 19, 1990.

increase of 360 percent. The total income of America's 28 million blacks is larger than the gross domestic product of all but ten nations.<sup>3</sup> Since the mid-1960s, moreover, the number of African-American elected officials has quadrupled. And black politicians now govern four of America's six largest cities.

In recent years, however, the focus of many civil rights policies has shifted from securing equal opportunity to securing equal outcomes among racial and ethnic groups, through quotas, set-asides, busing, and welfare. Though advocated as temporary measures necessary to undo rapidly the lingering effects of past discrimination, these devices have grown increasingly entrenched.<sup>4</sup> Indeed, many "establishment" civil rights leaders<sup>5</sup> demand adherence to this agenda as a civil rights litmus test.<sup>6</sup>

**Little Help for Disadvantaged.** This agenda is destructive for many reasons, but the most damning indictment — delivered by critics spanning the philosophical spectrum from Charles Murray to William Julius Wilson — is that it hasn't worked.<sup>7</sup> Sociologist Wilson, of the University of Chicago, notes that while many blacks have enjoyed economic progress in recent years, for millions of others "the past three decades have been a time of regression, not progress." As Wilson explains, "[R]ace-specific policies... , although beneficial to more advantaged blacks... , do little for those who are truly disadvantaged."<sup>8</sup> Adds Robert Woodson, President of the Washington, D.C.-based National Center for Neighborhood Enterprise, a grass roots organization that promotes self-help solutions to local community problems, "Affirmative action does not help the black dishwasher or the untrained black youth."<sup>9</sup> A

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3 *Ibid.*

4 See, e.g., Clint Bolick, *Changing Course: Civil Rights at the Crossroads* (New Brunswick, N.J.: Transaction Books, 1988), P. 53-78.

5 See, e.g. Clint Bolick, *In Whose Name? The Civil Rights Establishment Today* (Washington, D.C.: Capital Research Center, 1988).

6 National Urban League President John E. Jacob, for instance, asserts that "[t]he goal of parity is the one constant that must be shared by anyone who presumes to hold a leadership position in the black community." John E. Jacob, "Black Leadership in a Reactionary Era," *The Urban League Review* (Summer 1985), p. 42-43.

7 See Bolick, *Changing Course*, pp. 84-91. As economists James P. Smith and Finis R. Welch recently concluded, "[A]ffirmative action apparently has [had] no significant long-range effect" on the wage gap between blacks and whites. *Closing the Gap: Forty Years of Economic Progress for Blacks* (Santa Monica, California: The Rand Corporation, 1986), p. 95. Rather, the principal effect of race-conscious strategies, according to William Julius Wilson, is a "growing economic schism between lower-income and higher-income black families." William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987), p. 110.

8 *Ibid.*, pp. 110 and 42. Wilson's dismal economic prognosis was largely confirmed by the recent report of the Committee on the Status of Black Americans. Gerald David Jaynes and Robin M. Williams, eds., *A Common Destiny* (Washington, D.C.: National Academy Press, 1989).

9 Robert L. Woodson, "Race and Economic Opportunity," *NPI Policy Review Series*, National Center for Neighborhood Enterprise, 1989, p. 3.

civil rights agenda that promotes racial set-asides for the middle-class, writes *Washington Post* columnist William Raspberry, "is like demanding that the society supply aspirin for your uncle because your nephew has a headache. Isn't it time to abandon this bait-and-switch game in favor of truth in labeling?"<sup>10</sup>

### *The Victims of Racial Politics*

The failure of race-specific assistance programs to arrest the growing cleavage between disadvantaged and more successful blacks is borne out by census data. There has been, as Harvard political economist Glenn Loury has shown, "significant improvement in the earnings of employed black workers over the period 1940-1980."<sup>11</sup> But, says Loury, the average gains in black workers' earnings have not been "enjoyed equally by all black workers." In fact, earnings inequality within the black population has increased during the last 25 years, and remains greater than income differentials among white workers.

**Fact:** In 1959, the bottom 40 percent of black men earned 8 percent of the total earnings of all black men. By 1984 that bottom 40 percent earned only 4 percent of total earnings. Conversely, the top 20 percent of black men in 1959 earned 50 percent of total black male earnings. By 1984 this same 20 percent earned 60 percent of the total.<sup>12</sup>

**Fact:** From 1970-1986, the proportion of black families with incomes over \$35,000 grew from 15.7 percent to 21.2 percent, and the proportion with incomes over \$50,000 nearly doubled, from 4.7 percent to 8.8 percent. Yet during the same period, the proportion of black families with incomes of less than \$10,000 also grew, from 26.8 percent to 30.2 percent.

What is the cause of such disparities? If racism were the answer, it would present a barrier for all blacks. And as Loury concludes, "[E]mployment discrimination is not a major factor." Rather, he points out, such practical factors as education contribute significantly to income differentials among blacks as well as between blacks and whites. Annual earnings of college-educated black males, for example, rose by 6 percent relative to whites between 1969 and 1984. The disintegration of the traditional family among poor blacks, however, accounts for much of this disparity: The poverty rate for black families headed by a single mother is 50 percent — more than four times the rate for intact, two-parent black families. The median income of two-parent black families now is 88 percent that of comparable white families, and the disparity is closing at a rate of 5 points a year.<sup>13</sup>

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10 "Playing on White Guilt," *Washington Post*, May 14, 1990.

11 Testimony of Professor Glenn C. Loury, before the Committee on Labor and Human Resources of the U.S. Senate, concerning S. 2104, the Civil Rights Act of 1990, February 23, 1990.

12 *Ibid.*

13 "Restoring the Black Family," *Family* (The Family Research Council), September/October 1989. Woodson, *op. cit.*, p. 11.

**Fact:** Between 1960 and 1988 the percentage of black women aged 15-44 married with a spouse present in the household declined from 51.4 percent to 29.1 percent. For whites, the decline was 69.1 percent to 54.5 percent. Between 1960 and 1988 the percent of black children living with a black married couple fell from 67 percent to 38.6 percent, while the number of black children living with a never-married person rose by more than 1400 percent, from 2.1 percent to 29.3 percent. By 1988, 61.2 percent of black children were born to an unmarried woman.<sup>14</sup>

Liberal solutions of quotas, forced integration, and other race-based approaches to civil rights clearly do not empower most blacks. Black men, particularly, are even more alienated from the economic mainstream. The last 25 years, for example, have witnessed a pronounced downward trend in the number of black men participating in the labor force. **Fact:** In 1962, almost 60 percent of young black males were employed, but by 1985 only 44 percent were employed.<sup>15</sup> The reason for this dramatic decline was not that jobs disappeared – in fact, it was a period of remarkable job creation. Nor is racism the culprit. The principal destructive influence was a burgeoning welfare system that subsidized family breakups and nonemployment.

**Victim Identity.** Liberal civil rights policies also have had a more insidious effect on the economic advancement of blacks. Shelby Steele, Associate Professor of English at San Jose University, has written that the prevalence of racial quotas and preferences has ingrained in blacks an identity of themselves as victims. This identity as victim, argues Steele, who is black, perpetuates a sense of low-self esteem among blacks and a feeling of powerlessness, which stifles individual initiative and responsibility. Writes Steele:

Social victims may be collectively entitled, but they are all too often individually demoralized. Since the social victim has been oppressed by society, he comes to feel that his individual life will be improved more by changes in society than by his own initiative. Without realizing it, he makes society rather than himself the agent of change. The power he finds in victimization may lead him to collective action against society, but it also encourages passivity within his own life.<sup>16</sup>

Steele notes that after the death of Martin Luther King, the civil rights movement's message of equal opportunity was supplanted by a focus of blacks as victims entitled to special reparations from white society. "The 1964 civil rights bill," writes Steele, "was passed on the understanding that equal

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14 Loury. *op. cit.*

15 Novak, *op. cit.*

16 Shelby Steele, "I'm Black, You're White, Who's Innocent," *Harpers*, June, 1989.

opportunity would not mean racial preference. But in the late 1960s and early 1970s, affirmative action underwent a remarkable escalation of its mission from simple anti-discrimination enforcement to social engineering by means of quotas, goals, timetables, set-asides and other forms of preferential treatment."<sup>17</sup> These policies remain the agenda of the liberal civil rights establishment.

Recent Supreme Court rulings, however, may signal a turning point for the future direction of civil rights policy. In a series of decisions last year,<sup>18</sup> the Court called squarely into question the use of racial quotas as well as the assumptions on which race-conscious measures are based.<sup>19</sup> Yet old guard civil rights leaders and their congressional allies reacted to these rulings swiftly and predictably, condemning them and urging "corrective" legislation. Senator Kennedy and Representative Hawkins introduced legislation to overturn most of the rulings and further expand the scope of the civil rights laws.

## WHY THE KENNEDY/HAWKINS BILL FAILS MINORITY AMERICANS

Undergirding the Kennedy/Hawkins legislation is the assumption that every significant difference in statistical outcomes among racial or ethnic groups is attributable to discrimination and curable by quotas.<sup>20</sup> This assumption is flawed. While discrimination remains a serious obstacle for minorities, it is not the primary barrier to opportunity afflicting the economically disadvantaged. Observes the National Center for Neighborhood Enterprise's Woodson, "Vague cries for 'peace, jobs, and freedom' are meaningless when a permanent (and growing) underclass of more than one-third of all black Americans, unskilled and undereducated, remains untouched by civil rights gains, the war on poverty, increased black political power, and a mammoth social welfare industry."<sup>21</sup> Civil rights policies that fail to recognize this fact and to confront real obstacles to progress are doomed to repeat the failures of the past.

At the heart of the Kennedy/Hawkins bill are provisions that will make it all but impossible for employers to defend themselves against a claim of discriminatory hiring practices. Under the proposed law, a business that fails to

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17 Shelby Steele, "A Negative Vote on Affirmative Action," *New York Times Magazine*, May 13, 1990.

18 *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(striking down Richmond's minority contract set-aside program); *Wards Cove Packing Co. v. Antonio*, 109 S.Ct. 2115 (1989)(making it less difficult for employers to defend employee selection practices against discrimination charges that are based solely on statistics without evidence of discrimination); *Martin v. Wilks*, 109 S.Ct. 2180 (1989)(allowing challenges to racial quotas contained in consent decrees by those who are affected); and *Patterson v. McLean Credit Union*, 109 S.Ct. 2362 (1989)(holding that the Civil Rights Act of 1866, which prohibits discrimination in the making of contracts, does not cover instances of racial harassment).

19 See Clint Bolick, "The Supreme Court and Civil Rights: A Challenge for George Bush," *Heritage Foundation Backgrounder* No. 728, September 28, 1989.

20 See Bolick, *Changing Course*, pp. 56-60.

21 Woodson, *op. cit.*, p. 3.



meet certain racial and ethnic percentages in the composition of its work force must prove that such disparities are not due to discrimination. This is a reversal of normal legal standards. Usually, a claimant must prove that a defendant has violated some legal standard in order to prevail. Under the proposed legislation, however, the claimant need only show that racial hiring percentages have not been met, and the burden then shifts to the employer to prove the absence of discrimination. Thus the employer is presumed guilty unless innocence is proved.

**Insurmountable Standard.** In addition to this shifting of the burdens, the legislation proposes another hurdle that will make it impossible for an employer actually to prove that he or she does not discriminate. Under the Kennedy/Hawkins bill, if the work force of a business fails to meet the prescribed racial composition, the only way that an employer can rebut the presumption of discrimination is by proving that his or her hiring criteria bears "a substantial and demonstrable relationship to effective job performance." This is an insurmountable legal standard, and a reversal of the Supreme Court's 1989 ruling in *Wards Cove Packing Co. v. Antonio* that a business need only show that a challenged hiring practice "serves, in a significant way, the legitimate goals of the employer." Under the elevated hurdle proposed by the Kennedy/Hawkins bill, such reasonable and non-racial hiring criteria as requiring a high school or college diploma could fail to meet the "substantial and demonstrable" test necessary to rebut a claim of discrimination. A company that merely shows that it applies the same standards to everyone, regardless of race, will be found guilty of discrimination.

Faced with such hurdles, rational employers will turn to racial quotas as the only reasonable means to protect themselves from lawsuits. To avoid litigation, employers will have no recourse but to hire a certain percentage of their employees based not on merit or qualifications, but solely on the basis of race. Indeed, writing in the weekly lawyers' newspaper *Legal Times*, liberal columnist Stuart Taylor, Jr. notes that the bill would "pressure employers surreptitiously to use quotas to improve their statistics." This is not a positive direction for civil rights. As George Bush said in his May 17 Rose Garden speech on civil rights, "The focus of employers in this country must be on providing equal opportunity for all workers, not on developing strategies to avoid litigation."

**Presumption of Discrimination.** Another adverse impact of the Kennedy/Hawkins bill would be to establish "quota ceilings" on the number of minorities employed in low-skilled jobs. One of the issues in the *Wards Cove* case was a disparity in the company's work force between the number of minorities employed in low-skilled factory jobs and upper-level management positions. Under the proposed Kennedy/Hawkins bill, such a disparity would create the presumption of employer discrimination. The result: rather than hiring more minorities for management level positions, many employers simply would reduce the number of minorities employed in low-skilled positions so as to avoid the unequal percentages that would result in liability.

By its narrow focus on statistical disparities and racial quotas, the Kennedy/Hawkins bill would codify the racial divisions that continue to fuel racial tensions between whites and minorities. Rather than equal opportunity for all, the bill would offer racial entitlements for a select few. What is needed instead is a positive civil rights strategy geared toward empowering all individuals with the independence they need to make the choices necessary to succeed. The two key elements of this new civil rights agenda are vigorous enforcement of anti-discrimination laws and progressing from the old agenda of affirmative action to a new strategy of affirmative empowerment.

## CONSERVATIVES AND THE CIVIL RIGHTS LAWS

The conservative civil rights agenda must be more than opposition to racial quotas. Conservatives must assert a strong affirmative commitment to enforcing civil rights laws and prosecuting discrimination. Civil rights law enforcement officials should take their lead from U.S. Appeals Court Judge Clarence Thomas, who served as chairman of the U.S. Equal Employment Opportunity Commission (EEOC) from 1982 to 1990. Thomas demonstrated that vigorous civil rights law enforcement need not mean quotas. He reorganized and streamlined a previously ineffective agency; he established a policy of full relief for victims of discrimination (the EEOC previously settled for quotas, which employers were happy to accept); and he shifted the agency's focus away from cases involving statistics to those involving individual victims — the very people who could not find help elsewhere. As a consequence, Thomas was able to secure more relief for more victims of discrimination than ever before had been obtained.

The new civil rights strategy should reject quotas as an unfair and racially divisive remedy, and instead seek tough penalties against discriminators and full relief for victims of actual discrimination. This would require amending the employment provisions of the 1964 Civil Rights Act to strengthen damage remedies,<sup>22</sup> an approach supported by Clarence Thomas, former Attorney General Edwin Meese, and former Assistant Attorney General William Bradford Reynolds. In the desegregation context, conservatives should push for monetary damages instead of busing. Rather than merely reassigning students to achieve racial balance, damages in the form of education vouchers should be a remedy available to successful plaintiffs. Currently, the preferred judicial remedy in desegregation cases are such "equitable remedies" as busing and racial quotas. These forms of relief advance "group" rather than "individual" remedies. Yet as Clarence Thomas demonstrated during his tenure at the EEOC, remedies that focus on individual relief are possible and far more effective. A remedy of education vouchers would secure better the goal of equal opportunity by enabling parents to choose the best education opportunities available for their children.

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<sup>22</sup> See Bolick, "The Supreme Court and Civil Rights," p. 8.

**Economic Barriers.** Aggressive enforcement of civil rights laws also means pursuing litigation and legislation to remove regulatory barriers to economic opportunity. In the courts and legislatures, conservative civil rights advocates should join with members of minority groups to challenge on civil rights grounds such economic barriers as the 1931 Davis-Bacon Act, which prevents minority firms from securing government construction contracts. This law requires that inflated "prevailing wages" be paid on all government construction contracts. In practice, this has meant that only firms willing and able to pay union scale wages can secure government construction contracts. Such firms typically are large, established, white-owned businesses that can afford to pay inflated wages. Smaller, more competitive minority firms that cannot absorb such costs thus are prevented from securing the contracts, even though they can perform the work at lower cost. The law also discourages the hiring of low-skilled workers by establishing high entry-level wages. The predictable combined impact of these restrictions is the disproportionate exclusion of minority entrepreneurs and laborers, which was an explicit goal of the bill.<sup>23</sup>

**Limiting Competition.** Occupational licensing laws and regulations that restrict the formation of new businesses also should be confronted for their disparate impact on minorities. Many of these restrictions are unrelated to public health or safety objectives, and in fact often are promoted by the professions themselves to limit competition. Like the Jim Crow laws of an earlier era, these laws often impede minority participation in professions and businesses. Taxicab regulations, for example, strictly limit the number of entrepreneurs in a business that otherwise would be easily accessible to minorities. Licensing laws also exclude from professions those who are demonstrably qualified, but who cannot satisfy arbitrary and formalistic requirements. These licensing restrictions commonly are prevalent in such entry-level trades and professions as cosmetology, barbering, photography, stenography, interior decorating, and pool cleaning.

More rigorous enforcement of civil rights laws also requires confronting quota "ceilings" in education and housing. To achieve racial balance in public schools and housing, government authorities set rigid quotas that operate to exclude minorities. Example: In California universities, Asian American students are excluded from admission because they are "overrepresented" among eligible candidates for admission.<sup>24</sup> Example: In Kansas City magnet schools, black youngsters are denied admission so the school district can hold seats empty for white students.<sup>25</sup> These experiences illustrate how race-based

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<sup>23</sup> See *Congressional Record-House*, February 28, 1931, pps. 6504-6521.

<sup>24</sup> See Dan C. Heldman, "Ending College Admission Quotas Against Asian-Americans," Heritage Foundation *Executive Memorandum* No. 240, June 30, 1989; Representative Dana Rohrabacher, "College Admission Quotas Against Asian-Americans: Why Is the Civil Rights Community Silent?" *Heritage Lectures* No. 236.

<sup>25</sup> See "Blacks sue over KC desegregation plan," *The Washington Times*, July 17, 1989.

policies, however well-intentioned, can ultimately harm the very individuals they are purported to benefit.

### *Affirmative Action*

If one term exists in the American lexicon that conservatives need to recapture, it is “affirmative action.” Conservatives generally have been perceived to be “opposed” to affirmative action. If affirmative action means quotas, such opposition is warranted. But “affirmative action” need not be synonymous with quotas; conservatives, therefore, should not be considered adversaries of affirmative action as it was originally intended.

Affirmative action as practiced in the mid-1960s recognized that many individuals were ill equipped, for reasons of past discrimination, to take advantage of the equal opportunities secured to them for the first time by the newly enacted civil rights laws. Affirmative action thus meant providing tools to enable those who had been held back by discrimination to compete effectively in the market. It did not mean racial hiring quotas.

**Origin of a Term.** The term first was used by John F. Kennedy in his Executive Order No. 10925, issued in 1961. As Hoover Institution economist Thomas Sowell has noted, Kennedy’s order specifically provided that affirmative action was not intended as a system of racial quotas or hiring preferences. Instead, it was an effort to disseminate information about federal jobs to encourage previously excluded groups to apply, and to insure fairness in hiring and promotion regardless of race. Thus, Kennedy ordered federal contractors to “take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>26</sup>

Senator Hubert Humphrey, the Minnesota Democrat and architect of the Civil Rights Act of 1964, also took pains to distinguish affirmative action from racial quotas. During Senate debate on the civil rights bill, Humphrey instructed his colleagues that the bill “does not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or group.”<sup>27</sup> But Thomas Sowell recounts that “the original meaning of ‘affirmative action,’ as a general attempt to inform and recruit applicants from groups long excluded from employment and other opportunities, quickly gave way to its current meaning — choosing among applicants on the basis of numerical group results.”<sup>28</sup>

The firm opposition to racial quotas expressed by most liberals in the 1960s was well founded. Quotas (sometimes called “goals and timetables”) could

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26 Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: William Morrow & Company, Inc., 1984) p. 39.

27 *Ibid.*

28 Thomas Sowell, “Weber and Bakke, and the Presuppositions of ‘Affirmative Action,’” in W.E. Block and M.A. Walker, eds., *Discrimination, Affirmative Action, and Equal Opportunity* (Vancouver: The Fraser Institute, 1982), p. 61.

not accomplish the original – and still salient – objectives of affirmative action. All quotas do is to redistribute opportunities as part of a zero-sum game: every person's gain means another's loss. Quotas, moreover, do not help the economically disadvantaged gain the skills necessary to compete effectively. Thus affirmative action comprised solely of quotas has aided better-qualified minority candidates while not addressing the real-world needs of people outside the economic mainstream. As William Julius Wilson argues, future affirmative action must consist of efforts "targeted to truly disadvantaged individuals regardless of their race or ethnicity."<sup>29</sup>

## CONSERVATIVES AND EMPOWERMENT

The second element of a new civil rights agenda is individual empowerment. This empowerment means giving individuals the opportunity to realize their potential and achieve economic independence by giving them the power to choose the conditions under which they live – such as how their family will be educated and where they will live. Liberal social welfare programs do not empower the poor. Rather they empower government and an industry of social service providers that prospers by managing the lives of the poor. The conservative idea of empowerment, by contrast, derives from the movement's roots in market economics and classical liberalism – power not as control over others but as the freedom to control one's own affairs, the essential ingredient of liberty.

A civil rights strategy based on empowerment focuses on enabling individuals to choose how they will improve their condition. The aim is to help low-income Americans by expanding opportunities rather than by merely redistributing them. The impetus for such efforts is not the coercive power of government, but consumer choice in the market. To achieve empowerment, the new civil rights strategy must confront remaining systemic obstacles that prevent individuals from controlling their own destinies. At least four such obstacles exist: stifling regulation of entrepreneurial opportunities, poor public schools, the welfare system, and crime. All of these barriers disproportionately burden people outside the economic mainstream, who disproportionately are minorities.

An empowerment strategy to unlock the pent-up capacity of lower-income minority Americans requires many actions on several fronts. Among them:

1) **Remove obstacles to entrepreneurs.** Economic liberty is a fundamental civil right. Yet this liberty to pursue a livelihood free from excessive or arbitrary interference is the forgotten civil right. This right was destroyed by the 1873 *Slaughter-House* cases<sup>30</sup> in which the Supreme Court ruled erroneously that economic liberty was not included among privileges or immunities of citi-

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<sup>29</sup> Wilson, *op. cit.*, p. 117.

<sup>30</sup> 83 U.S. 36 (1873).

zenship protected by the Fourteenth Amendment. As a consequence, entrepreneurial opportunities are burdened by a pervasive array of regulations at every level of government, from the 1931 Davis-Bacon Act and federal minimum wage laws to local occupational licensing laws and government-conferred business monopolies. These laws, most of which were enacted not to promote public health or safety but to limit competition, stifle the tradition of bootstraps capitalism that is America's beacon to the enterprising poor. In essence, these restrictions cut off the bottom rungs of the economic ladder, so vital to the poor and those who have suffered discrimination, thereby destroying traditional methods for upward mobility.<sup>31</sup>

Conservatives should champion an Economic Liberty Act, which would require governmental entities to limit regulations restricting entry into trades or businesses to demonstrable public health, safety, or welfare objectives. Conservatives also should challenge as civil rights violations the most arbitrary and oppressive economic regulations.<sup>32</sup> In this way, conservatives not only would help complete the legal work of the original civil rights movement, but would open the most important door to economic independence: self-employment and business creation.

**2) Introduce parental choice into education.** Education is the key to progress. It is the great equalizer of the races, the most powerful tool for eliminating racism. But interposed between precious educational opportunities and those who need them the most stand America's often substandard public schools. And the greatest number of victims of that system are those who have no other choice — the inner city schoolchildren whose opportunities for advancement are crushed at schools that seem answerable to no one. Minorities disproportionately are the victims of America's dismal public school performance. Dropout rates for black and Hispanic students exceed those for whites, especially in urban areas. In the Chicago public schools, for example, the 1988-1989 school year dropout rate for whites was 13.9 percent, compared with a 23.3 percent rate for Hispanics and a 60.9 percent rate for blacks.<sup>33</sup> These young dropouts may in one sense be making a rational

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31 See Bolick, *Changing Course*, p. 94-104.

32 Landmark Legal Foundation's Center for Civil Rights last year successfully challenged a District of Columbia ordinance prohibiting street corner shoe shine stands, and is currently challenging Houston's "anti-jitney law" and a National Park Service regulation that has destroyed the native Virgin Islander charter boat industry.

33 Chicago Public Schools, Board of Education. Chicago defines a dropout as any student, sixteen or older, who has been removed from the enrollment roster for any reason other than death, extended illness, graduation, or completion of an equivalency program. Also included are transferring students whose records have not been requested by another public or private school.

choice: why stay in a substandard public school? But the tragedy is that unlike individuals of moderate and upper incomes, these low income students and their families have no opportunity to transfer to better schools.

America needs to empower low-income minorities and others as consumers with a choice of schools, by providing to parents a portion of the dollars spent on schooling in the form of a tax credit or voucher to purchase the education that best suits their children's needs. Studies show that choice and competition in education work, particularly for those who have lacked the most basic educational opportunities.<sup>34</sup> Moreover, polling shows that vouchers are especially popular among inner city minority parents.<sup>35</sup> Returning to parents choice of, control over, and responsibility for the education of their children is the first step in expanding educational opportunities.

The successes of educational choice initiatives in such states as Minnesota and in low income communities, like East Harlem, New York, should continue to be highlighted and serve as a model for expanded efforts. Conservatives, too, should craft educational empowerment strategies that support and build on such educational voucher plans as that achieved in Milwaukee, Wisconsin, owing to the efforts of State Representative Annette "Polly" Williams, a black Democrat who represents low-income inner city constituents.

**3) Make welfare a ladder, not a permanent crutch.** The welfare system has fueled a self-perpetuating cycle of dependency, which has influenced minorities disproportionately. Intended as a temporary helping hand in the case of the able-bodied, the welfare system not only has encouraged millions to remain on its rolls, but also in most instances has rewarded destructive behavior and penalized those who sought to become independent. Example: if a father walks out on his family, they become eligible for welfare. If instead of leaving, he takes a low-paying job to try to fulfill his responsibility, the family often is financially worse off.

The welfare system is particularly damaging to minorities because many of these families are at the margin, where welfare is an attractive option. Moreover, the "official" leadership of the black and Hispanic communities has added to the problem by urging government to increase benefits for those on

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<sup>34</sup> See Clint Bolick, "A Primer on Choice in Education: Part I – How Choice Works," Heritage Foundation *Backgrounder* No. 760, March 21, 1990.

<sup>35</sup> Alec M. Gallup, "The 18th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," *Phi Delta Kappan*, September 1986, pp. 58,59. A 1989 Gallup/Phi Delta Kappan poll found that 67 percent of non-whites favor educational choice.

the rolls, while doing little to support proposals to reward those who strive to become independent.

The federal government should encourage economic emancipation by reducing dependency on welfare and rewarding those who work. This strategy requires a major reform of the welfare system and anti-poverty programs to encourage independence and reward those who take their responsibilities seriously. Among the key reforms needed:<sup>36</sup>

- ◆ ◆ Expand the Earned Income Tax Credit, which supplements the earnings of very low-paid workers through the tax code.<sup>37</sup> This would reward work, encourage many on welfare to climb the ladder of employment, and ensure that families would move out of poverty if they joined the work force.

- ◆ ◆ Make some form of work mandatory for all welfare programs serving the able-bodied.

- ◆ ◆ Attach a portion of the earnings of all absent fathers, married or unmarried, if their family is on welfare. If the father claims to be unemployed, require him to enroll full time in a government work program.

- ◆ ◆ Encourage home ownership among the poor through "urban homesteading" programs, and an acceleration of tenant management of public housing.<sup>38</sup>

- ◆ ◆ Enact "enterprise zone" legislation, which would reduce tax and regulatory barriers to job creation in the inner city.

4) **Crack down on Crime.** The new civil rights agenda should emphasize the most fundamental of civil rights: freedom from crime. Personal security is the primary justification for government. Government, however, is failing to protect its law-abiding minority citizens against crime.

Crime falls disproportionately on minorities, creating an additional barrier to those striving for economic independence and social responsibility. Black households in 1988, for example, were 60 percent more likely to be burglarized and three times more likely to be robbed than white households. Black households suffer more than twice the number of motor vehicle thefts and al-

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36 See also, Stuart M. Butler, "Razing the Liberal Plantation: A Conservative War in Poverty," in *National Review*, November 10, 1989, p. 27; Stuart M. Butler, "Welfare," in Charles L. Heatherly and Burton Yale Pines, eds., *Mandate For Leadership III: Policy Strategies for the 1990s* (Washington, D.C.: The Heritage Foundation, 1989) p. 253; Stuart M. Butler and Anna Kondratas, *Out of the Poverty Trap* (New York: The Free Press, 1987).

37 See Stuart M. Butler, "The Peace Dividend: It Belongs to the People, Not Congress," Heritage Foundation *Backgrounder* No. 752, February 9, 1990.

38 See John Scanlon, "People Power in the Projects: How Tenant Management Can Save Public Housing," Heritage Foundation *Backgrounder* No. 758, March 8, 1990.



most 65 percent more incidents of aggravated assault than whites.<sup>39</sup> The probability of being murdered is six times greater for blacks than for whites.<sup>40</sup> Hispanics, too, are far more likely than whites to be victims of crime. From 1979-1986, for example, Hispanic Americans were victims of violent crime at a rate twice that of non-Hispanics.<sup>41</sup>

If conservatives and the inner-city poor can make common cause on any issue, it should be crime. Strong anti-crime measures directed toward urban centers, along with meaningful protection of victims' rights, form the foundation of an effort to better secure vulnerable individuals in their persons and their property. Creating a crime-free environment in poor communities will require several changes in the law to favor the victim over the victimizer. Among them: "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 and probation. Government also should reprioritize its law enforcement strategy in poor communities. Law enforcement should focus on preventing and prosecuting crimes against persons and property in the ghettos, and increasing penalties for such crimes.

Ridding America's minority communities of the source of crime also will require empowerment strategies to involve communities in the fight. One idea that merits study is a proposal currently before Congress to create a police ROTC program for poor communities.<sup>42</sup>

Under the plan, students would receive college tuition in exchange for serving on the police force of their community after graduation. Such additions to urban police forces would free more officers to perform such vital functions as foot patrol on the streets of poor communities.

## WHAT GEORGE BUSH SHOULD DO

Obviously, George Bush can do a great deal to advance a conservative strategy on civil rights — one that will do far more to advance civil rights than the Kennedy/Hawkins legislation. He enjoys enormous popularity among both white and minority Americans. The time is ripe for a Bush-led civil rights strategy that would build on the foundation laid in the 1960s. The President thus should draw on his popularity and credibility by restoring momentum to a quest for civil rights that has strayed off course for the past generation. Already, Bush has taken an important step in this direction with his May 17 Rose Garden speech on civil rights. In that ground-breaking speech, he vowed to veto any civil rights bill that would promote racial quotas, and he re-

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39 See Joseph Perkins, ed., *A Conservative Agenda For Black Americans* (Washington, D.C.: The Heritage Foundation, 1987, 1990) pps. 31-32.

40 Bolick, *Changing Course*, pp. 116-118.

41 "Hispanic Victimization," Bureau of Justice Statistics, January 1990.

42 S. 1299, "The Police Corps Act of 1989." Sponsors include Republican Senators Specter, Heinz, Rudman, Coats, and Lott. Democrats include Senators Sasser, Bradley, Lieberman, and Dodd.

defined civil rights to include empowerment strategies for the poor. Next, the President should:

1) **Veto the Kennedy/Hawkins bill.** To sign into law a civil rights bill that promotes racial quotas would be to surrender to racism. And to sign a civil rights bill that fails to include empowerment initiatives for the poor would ignore the civil rights of those who are struggling the most. The Kennedy/Hawkins bill champions a failed policy agenda and does little to solve the most pressing civil rights problems. If the bill passes Congress, Bush should veto it and immediately shift the terms of the debate from quotas to empowerment.

2) **Issue an Executive Order on Empowerment.** In 1961 President John F. Kennedy issued Executive Order 10925 that mandated affirmative action throughout the federal government. Now, nearly three decades later, George Bush should issue a new executive order building on Kennedy's vision and propelling government into a new era of civil rights action.

This executive order should require all federal agencies, departments, and offices to review existing policies and regulations and eliminate those that stifle the economic empowerment of minorities. Like Kennedy's executive order, Bush should require the federal government to take affirmative action to recruit minorities and also to break down barriers to their economic liberty. Bush should order the federal government to restructure affirmative action to encourage empowerment efforts aimed at increasing human capital and removing obstacles to the economically disadvantaged.

The Bush executive order also should require that every new government regulation be accompanied by an "Empowerment Impact Statement" that addresses how the regulation would help to empower low-income Americans to manage their own affairs and attain economic liberty.

3) **Establish a Commission on Economic Mobility.** In his 1961 Executive Order, Kennedy established the President's Committee on Equal Employment Opportunity to "scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination...." Bush likewise should appoint a presidential commission to examine contemporary obstacles to minority opportunities, and to recommend within a specified time period legislation designed to eradicate those obstacles. This effort should be similar to that which preceded the development of the Age Discrimination in Employment Act of 1967. By establishing this Economic Mobility Commission Bush would lay the groundwork for opening far more opportunities for economically disadvantaged minorities than would the Kennedy/Hawkins bill.

4) **Strengthen Damage Provisions of the Civil Rights Act.** Under the Civil Rights Act of 1964, an employer found guilty of discrimination need only provide a job and back pay to the aggrieved party. This penalty is not sufficient to deter future discrimination. To remedy this, Bush should propose to Congress

amendments to the law to allow recovery of treble punitive damages against employers who willfully or persistently violate the law.

**5) Propose a Comprehensive Welfare Reform.** Congress in 1988 enacted the Family Support Act. Touted as a major reform of the welfare system that would reduce welfare dependency, the legislation in fact is little more than an expansion of existing programs. Moreover, a Congressional Budget Office analysis of the statute predicts that it will actually add people to the welfare rolls.

Bush should explain to Americans that there will be no progress in the war against poverty until there is a change in the strategy used to fight the war. He should assemble a cabinet-level task force, led by Housing and Urban Development Secretary Jack Kemp, to develop a comprehensive series of welfare reforms to promote the empowerment of poor Americans.

**6) Coordinate Empowerment Efforts.** The beginning of an empowerment infrastructure already exists. In addition to public policy organizations dedicated to self-help, Secretary of Housing and Urban Development Jack Kemp and Education Secretary Lauro Cavazos are pushing empowerment strategies in their agencies. In Congress, Representative Steve Bartlett, the Texas Republican, has formed an empowerment caucus comprised of conservative and moderate Republicans. And the moderate Democratic Leadership Council last month endorsed a policy plank calling for equal opportunity rather than equal results. These developments reflect a growing determination among conservatives to confront civil rights issues, and a growing receptivity to what conservatives have to say.

Outside of Congress, organizations and individuals are showing what can be accomplished by poor Americans if they are given the opportunity to use the capacities they have. The public housing tenant management movement, for example, has brought dignity and hope to dozens of once crime-ridden and blighted projects. An education reform movement has spawned more than 300 new black independent schools, most of them created by parents and community groups in poor neighborhoods. Robert Woodson's National Center for Neighborhood Enterprise has helped to highlight the successes of numerous additional empowerment efforts nationwide, and provided technical assistance to self-help groups in minority communities. And the National Association of the Southern Poor, headed by Donald Anderson, has carried the self-help message to rural Southern communities, sparking a rejuvenation of formerly crime-ridden and depressed communities.

George Bush needs to draw greater attention to the movement for minority empowerment. He needs to give this movement at least equal standing in the debate over civil rights, and to instruct agency officials to do likewise. As long as the perception exists that only minority leaders espousing the tired liberal agenda are legitimate spokesmen for black and Hispanic Americans, the economic emancipation of these groups will be painfully slow.

**7) Repeal the Davis Bacon Act.** The 1931 Davis Bacon Act is the federal equivalent of local Jim Crow laws that prevent minorities from competing for

economic opportunities. The law's requirements that federal construction contracts pay the "local prevailing wage" inflates wage rates. The result: many small minority firms that cannot afford to pay such inflated rates are excluded from government construction contracts. The law also discriminates against minority tradesmen who are willing to work for less than union wages. In fact discriminating against black workers seems to have been one of the reasons for passing the 1931 law. Said Alabama Congressman Miles Allgood during the February 28, 1931, floor debate on the bill, "That contractor has cheap colored labor...and it is labor of that sort that is in competition with white labor . . . This bill has merit ... it is very important that we enact this measure."<sup>43</sup>

Despite its devastating impact on black firms and tradesmen, and its effect of increasing federal construction costs by \$1.5 billion annually, the 60-year-old Davis Bacon Act remains law. The reason: Congress refuses to abolish it out of fear of offending organized labor. George Bush should launch a campaign to convince Congress to repeal the Act. As part of this effort, he should instruct Labor Secretary Elizabeth Dole and other appropriate executive branch agencies to conduct a thorough examination of the Act's impact on minorities. Bush should make repeal of the Davis Bacon Act the centerpiece of his civil rights strategy to eliminate the remaining vestiges of America's Jim Crow laws.

**8) Require that Congress be Subject to Civil Rights Laws.** Congress routinely exempts itself from the laws it passes, including the nation's major civil rights statutes. Although the executive branch is subject to the provisions of the 1964 Civil Rights Act, Congress is not. Thus the 37,000 employees of the legislative branch are without the civil rights protection guaranteed to all other Americans. This has led some observers to describe Congress as the "last plantation." Undeterred, however, Congress is attempting to exempt itself from new civil rights laws. The Kennedy/Hawkins bill, for example, fails to require that Congress comply with its provisions.

George Bush, in his May 17 Rose Garden speech, called on Congress to apply to itself all existing and proposed civil rights laws. This is sound policy. Bush should hold Congress to that standard, and refuse to sign any civil rights bill that fails to subject Congress to its provisions.

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<sup>43</sup> *Congressional Record - House*, February 28, 1931, p. 6513.

## CONCLUSION

In his February testimony before the Senate Labor and Human Resources Committee, Harvard's Glenn Loury summed up the current civil rights challenge:

Today the nation faces a challenge different in character though perhaps no less severe in degree than that which occasioned the civil rights revolution. It is important, though, to be clear about just what that challenge is, and what it is not. The bottom stratum of the black community has compelling problems which can no longer be blamed solely on white racism, which will not yield to protest marches or court orders, and which force us to confront disquieting aspects of lower class black urban society. The profound alienation of the ghetto poor from mainstream American life has continued to grow worse in the years since the triumphs of the civil rights movement, even as the successes of that movement has provided the basis for an impressive expansion of economic and political power of the black middle class. Finding ways to effectively address the problems of the inner-city poor, of all races, is the challenge which confronts us today.<sup>44</sup>

The abandonment of employment and educational objectivity and the reflexive use of quotas exacerbate racism and fail to address the serious problems faced by America's truly underclass. What is needed are efforts to confront remaining obstacles so that minorities can take advantage of the opportunities secured by the civil rights laws. The economic barriers separating minorities from the American mainstream are the type of barriers that affirmative action originally was intended to overcome: practical obstacles, some the result of discrimination and some not, that prevented individuals from securing the opportunities promised by civil rights laws. By pursuing an affirmative action strategy of redressing problems of economic mobility and human capital development, the unfinished business of the civil rights movement can be completed.

Conservatives since the 1960s have consigned themselves to a marginal role in the civil rights debate, acting as opponents to civil rights or passive bystanders while liberals dictated the terms of the debate. Many civil rights policies of the past quarter century have failed to aid the most disadvantaged individuals in our society. These policies also have perpetuated racial divisions

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<sup>44</sup> Loury, *op. cit.*

among Americans. This dismal status quo can change only if conservatives reclaim the moral high ground and assume a positive leadership role in civil rights issues in the coming decade. This leadership can be achieved by pursuing a strategy of vigorous law enforcement and individual empowerment.

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