Louisiana Law Review

Volume 54
Number 6 *The Civil Rights Act of 1991: A Symposium*
July 1994

Article 8

7-1-1994

Epilogue: Civil Rights in the Eighties and Nineties

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I. UNPRECEDENTED FAILURES, GREAT SUCCESSES

The Reagan-Bush years were the best of times and the worst of times for the civil rights lobby. The lobby's moral and political authority were, for the first time since the sixties, repeatedly challenged and perhaps irreparably damaged. Its erstwhile most powerful ally—the Supreme Court—became its most powerful adversary, and it suffered a series of setbacks at the Court's hands. The "bipartisan consensus" on civil rights it had claimed in the political branches of government evaporated, and major civil rights bills were twice vetoed by Presidents.[1] One of the key elements of the lobby's agenda, racial and gender preferences in hiring and promotion—in other words, quotas—was shown to be enormously unpopular.

Worse still, the lobby discovered (from its own polling, no less) that it had squandered its credibility by supporting such reverse discrimination, and that it was now widely viewed as simply another special interest group, dedicated to grabbing unfair advantages for its members, rather than to high principles of fairness.[2]

Finally, that the monolith was not only eroded but cracked was dramatically demonstrated by the Clarence Thomas-Anita Hill hearings, and by the confirmation of Justice Thomas that followed. Most blacks, male and female, backed the confirmation, which the civil rights lobby—and especially its feminist arm—had opposed.

On the other hand, the lobby was enormously successful in its legislative agenda. In fact, nearly every Supreme Court loss was countered with a victory in Congress that not only undid that loss, but left the law even more favorable (from the lobby's standpoint) than it had been before. We shall overcome, indeed. There is very little conservatives can win in the courts that they cannot lose back very quickly in the political process.

Thus, in 1980, the Court held that the Voting Rights Act barred only intentional discrimination, making it clear the Act provided no guarantee of

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1. Message to the Senate on Civil Rights Legislation, 24 Weekly Comp. Pres. Doc. 353 (Mar. 16, 1988); Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990).

2. Thomas B. Edsall, *Rights Drive Said to Lose Underpinnings/Focus Groups Indicate Middle Class Sees Movement as Too Narrow*, Washington Post, Mar. 9, 1991, at A6; William J. Bennett, *A New Civil Rights Agenda*, Wall St. J., Apr. 1, 1991, at B12.

proportional representation or other special treatment for minorities;[3] and in 1984 the Court held that federal regulatory authority extended only to the specific "program or activity" receiving federal funding.[4] Congress overturned these rulings with the 1982 amendments to the Voting Rights Act[5] and the so-called Civil Rights Restoration Act in 1988,[6] respectively. Accordingly, racial gerrymandering to guarantee safe seats for minority members in the legislature is now being institutionalized, and the Restoration Act ensured that acceptance of even an indirect federal benefit would subject every action of the beneficiary to the federal civil rights bureaucracy.

This symposium has also described how, more recently and dramatically, a series of judicial setbacks in 1989 were, despite a presidential veto in 1990, eventually undone in 1991. The Court's decisions had, among other things, made it harder for civil rights plaintiffs to rely on racial and gender "statistical imbalances" to prove discrimination,[7] and made it easier for nonminorities to challenge court-ordered quotas.[8] The Civil Rights Act of 1991 not only cut back these decisions, but dramatically increased the monetary penalties for discrimination.[9]

Even when the catalytic excuse of an unfavorable judicial decision was lacking, the lobby did well in Congress. The Fair Housing Act was extensively expanded in 1988, adding the handicapped and families with children to those protected from discrimination, increasing the level of fines substantially, and spawning a whole new regulatory bureaucracy.[10] And, in perhaps the most significant expansion of all, in 1990 the Americans with Disabilities Act triumphantly added the disabled to the list of those protected by federal civil rights laws from discrimination in, among other things, employment and public accommodations.[11]

II. A "NEW DEMOCRAT"?

All in all, the civil rights lobby stands in 1993 about where Marxism stood in 1980. Like Marxism it is, as a moral and intellectual matter, widely

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3. City of Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1519 (1980); *see also* Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272 (1982).

4. Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211 (1984).

5. Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. §§ 1971 et seq.).

6. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1681, 1687, 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107).

7. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989).

8. Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180 (1989).

9. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified principally at 42 U.S.C. §§ 1981, 1981a, 1988, 2000e to 2000e-5, 2000e-16, 12111, 12112, 12209).

10. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1635 (1988) (codified at 28 U.S.C. §§ 2341, 2342; 42 U.S.C. §§ 3601 et seq.).

11. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 29 U.S.C. § 706; 42 U.S.C. §§ 12101-12213; 47 U.S.C. §§ 152, 221, 225, 611).

discredited—indeed, as to racial and gender preferences, it is rightly viewed by most Americans as rotten to the core. And yet also like Marxism in 1980, it remains, and remains very powerful. The lobby is especially influential with the permanent Congress and its even more permanent staff.

The difference is that in 1980 Ronald Reagan was elected President, and Marxism proved unable to withstand this last challenge. But in 1992, Bill Clinton was elected, and it is becoming increasingly doubtful whether the excesses of the civil rights lobby will be challenged at all. Without such a challenge, the lobby will not collapse of the weight of its own internal contradictions and incoherence; instead, it will lick its wounds, consolidate its gains, and reemerge as a powerful force.

This would be very unfortunate. The direction—indeed, the very definition—of civil rights in the next few years will be of critical importance to the country. And just as war is too important to be left to the generals, civil rights is far too important to be left to the civil rights lobby.

If the Clinton administration, and the Democratic Party generally, are to maintain any credible claim to moderation, if as "New Democrats" they are to demonstrate a rejection of old-style Democratic special interest politics, and if they are to avoid leading the country down a path which is in no person's, and no group's, long-term interest, then they must devote some serious and independent thought to the civil rights laws, and they should do so soon.

One hopes it is not already too late. The first year and a half of the new administration indicates that it may be. The promise of a quota-correct Cabinet that "looks like America" boded ill, as did the appointment of the reputed high priestess of political correctness to head the Department of Health and Human Services. The administration's insistence that "[t]he next attorney general will be wearing a skirt"[12] ultimately demeaned everyone involved. More generally, "diversity"—the politically correct euphemism for quotas—is one of the three stated criteria the administration has for making all appointments, high and low, and no matter how much it slows the process.[13] And, according to an associate director of White House personnel, diversity now requires consideration of not only race, ethnicity, and sex, but homosexuality as well.[14] "This administration

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12. Ruth Marcus & Dan Balz, *A Campaign Promise Has Clinton Cornered/The Attorney General Saga*, Washington Post, Feb. 10, 1993, at A1.

13. *See* Ann Devroy, *Late for Appointments*, Washington Post, Mar. 2, 1993, at A1, A9; Al Kamen, *Gathering 'EGGs' at Pentagon Is Slow Work*, Washington Post, Mar. 25, 1993, at A23; Al Kamen, *Clinton, Bush Neck and Neck on Vacancies*, Washington Post, Apr. 14, 1993, at A19; Al Kamen, *Administration Still Walking on EGG Shells*, Washington Post, Apr. 19, 1993, at A21; Thomas W. Lippman, *State Department Jobs Stuck in Search for Diversity*, Washington Post, Nov. 22, 1993, at A19; Martha Farnsworth Riche, *The Bean Count Is In!*, Washington Post, Jan. 23, 1994, at C2. *See also* John B. Judis, *The Old Democrat: Is Clinton Dukakis II?*, New Republic, Feb. 22, 1993, at 18-19.

14. Gary Lee, *Beyond Military, Gays Seek Acceptance in Government Workplace*, Washington Post, Apr. 12, 1993, at A17. *See also* Max Boot, *A Different Kind of Whistle-Blower*, Wall St. J., Apr. 27, 1994, at A12.

is turning into a walking billboard for a quota society," the American Enterprise Institute's Ben Wattenberg has observed. "Everywhere you go, you hear horror stories of people who thought they were going to get jobs and ended up losing out to diversity."[15]

Another early and disturbing event was the new administration's insistence on lifting the ban on homosexuals in the armed services—consistent with commitments made to gay groups during the election campaign, but over the strong objections of most of those who know anything about the military. It would seem to show that these New Democrats are very much like McGovern Democrats after all: they don't much care what happens to the military, but they care very much about kowtowing to their narrow (and distinctly special interest) constituencies.

And all of this took place *before* the nomination of Lani Guinier to head the Justice Department's Civil Rights Division.[16]

III. FIVE PRINCIPLES

Conservatives must accept, of course, that most of what will happen in the Clinton administration will not be to their liking. But a rational perspective on civil rights issues is not only in the country's long-term interests, but in President Clinton's short-term political ones. And perhaps it is not too much to hope that the administration's rocky first year will teach it this lesson: How much better off I would have been, the President might conclude, had I not let a "civil rights" campaign commitment distort my first major decision as commander-in-chief, and had I been able simply to choose the person best qualified to be Attorney General. We can also take heart from the President's refreshing flash of anger at the feminist "bean-counters," even if he ultimately did do their bidding.[17]

The basic rules offered below are, then, entirely compatible with a Democratic administration, if indeed it is serious about being "moderate" and rejecting interest group politics-as-usual.

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15. Ruth Shalit, *Unwhite House*, New Republic, Apr. 12, 1993, at 12.

16. The list in the main text of troubling policies in the first year of the Clinton administration is by no means exhaustive. For other examples, see Mary Jordan, *Minority Scholarship Rules Relaxed*, Washington Post, Feb. 18, 1994, at A16 ("The Clinton administration yesterday announced its long awaited policy on the use of minority scholarships, reversing the 1991 ruling by the Bush administration that said many of them were illegal."); Laurie McGinley, *Scarcity of Minority Doctors Vexes Clinton*, Wall St. J., Sept. 29, 1993, at B1 (noting that the Clinton health-care proposal includes "as a goal the doubling to 3,000 the number of 'underrepresented' minorities, such as blacks and Mexican-Americans, enrolled in the first year of medical school by the year 2000"); Joshua Abramowitz, *Quotas in Clinton's Health Plan*, Wall St. J., Apr. 7, 1994, at A14 ("Quotas have come to medicine. If the Clinton administration has its way, medical students will be chosen to train for specialist positions, . . . in part on the basis of their race and ethnicity."). *See also infra* note 23.

17. Ruth Marcus, *Clinton Berates Critics in Women's Groups*, Washington Post, Dec. 22, 1992, at A1.

A. *Racial and Gender Preferences Are a Bad Thing*

Bad morally, bad practically, bad politically—and as bad in the long-run for minorities as for nonminorities. The objections to quotas need not be rehearsed at length. They punish the blameless and stigmatize their beneficiaries. They foster resentment among nonminorities and a victim mentality among minorities. When someone is hired for or promoted to a job that he cannot do, or cannot do as well as his colleagues, it becomes necessary to cover the lie with a lie: to deny in the next job evaluation that there is a problem, to promote him to the next job in spite of it, and to cover up his even greater failure there. Quotas are bad for race relations and bad for productivity. They are, finally, politically very unpopular.

Preferences will be even more divisive and unworkable as America becomes, increasingly, a multiracial and multiethnic society. America has always in the past drawn strength from the diversity of her people. But quotas turn diversity into a Balkanizing wedge, splintering the country. Diversity is transformed from a strength to a weakness.

The federal government should not use them itself, it should not require that its contractors use them, and it should not ask courts to impose them in its civil rights litigation. Ideally (but this is probably too much to ask), the administration will actually *challenge* them in court.

Also, the administration should not be seduced by those who argue that, yes, quotas are bad, but using race or gender as simply "one factor" is not, and besides there is no harm so long as only "qualified" minorities and women are hired. Either this "one factor" will be decisive in the hiring decision or it will not. If it is not, then it need not be weighted at all and, if it is, then it is practically no different from a quota: someone is not getting hired because he is the wrong sex or she is the wrong color. And job selection has never been about hiring people who are merely "qualified"; it has always been about hiring, as best as the employer can calculate, the *most* qualified.

Finally, there is a short answer to those who ask rhetorically how considering race can be so bad when considering other seemingly extraneous factors is well-established and unobjectionable. This argument was made most recently in defending the Cabinet quota-mongering: If a Cabinet must be balanced between East and West, then why not among racial and ethnic groups? It is also made in the college admissions context: If a tuba player can get a preference, then why not an Hispanic? The answer is that racial and ethnic discrimination are historical evils, that we are trying to put such discrimination and stereotyping behind us, and that there are laws—indeed, a constitutional amendment—to this effect. Clarinet players are unlikely to view tuba players bitterly and resentfully if the latter receive preferences; we did not fight a civil war because half the country thought that Wyomingites were so fundamentally different from the rest of us that they could be chattels.

Racial preferences are not the only item on the Left's civil rights agenda, but an obsession with equality of group outcomes rather than with individual

opportunities underlies a great deal of it. For instance, opposition to school choice does not at first blush appear to be a related matter, but it is. A government monopoly on education is essential if all classes of children are to receive the same (bad) schooling. It is in particular the best way to ensure all schools are racially balanced, which, in turn, is the best way to promote equality of race outcomes rather than of students' opportunities. To put it more directly, a government monopoly is a good way to ensure no parents (and especially no white parents) are getting something other parents (and especially any minority parents) are not—even if the opportunity is open to everyone. Of course, the result is one that constrains all parents and limits opportunities for all children, including minorities.

B. All Discrimination Is Not Equal

It is perhaps too much to ask that the President embrace Jefferson's maxim "That government is best which governs least," even if Bill Clinton chose symbolically to arrive at his inauguration from Monticello. But our federal government remains one of limited powers, and anyone should be willing to admit cheerfully that many irrational and even harmful actions by private individuals are not appropriately within the federal province.

In the civil rights context, in particular, each federal intervention carries with it a price. The enforcement bureaucracy that must be set up to enforce an enacted law will inevitably distort that law. Thus, the colorblind text of the Civil Rights Act of 1964 gave us a plethora of federal agencies devoted to the institutionalization of reverse discrimination. Further, as the regulated entities become smaller and the regulated decisions more personal, we become—or should become—more and more uncomfortable with a role for Big Brother. Finally, Washington does not have the resources to expunge every wrong deed, even if it wanted to.

What all this means is that the government should be selective in the kinds of discrimination it outlaws. There are, to begin with, what we might call "horizontal" and "vertical" distinctions to be drawn. That is, discrimination on the basis of race, ethnicity, religion, sex, age, handicap, and homosexuality each raise different issues; similarly, discrimination in voting, education, public accommodations, housing, and employment each raise distinct issues as well.[18]

Federal intervention was long overdue when voting rights were being denied because of race; it does not follow at all, however, that a federal presence is needed because Mrs. Murphy does not want to rent her spare room to a gay

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18. The distinction between public and private discrimination adds another dimension, which is of course crucial as a matter of constitutional law. Because much government-sponsored discrimination will remain (or become) illegal no matter what the Clinton administration does, that distinction is not stressed here. I will note in passing, however, that the Supreme Court's definition of suspect classes and government's monopoly in certain areas are among the reasons why some kinds of discrimination (racial, voting) are different from others (age, employment).

couple. Moreover, it does not even follow that, because *racial* discrimination in housing may require a federal response, *gender* discrimination in housing does; or that, because it is intolerable that the right to *vote* be denied because of handicap, that there be a federal law requiring all private *schools* to accept a child with any handicap.

When I served in the Civil Rights Division at the Department of Justice, a running joke was the number of referrals we had from the Department of Housing and Urban Development to sue trailer parks that refused to rent to families with children. The 1988 amendments to the Fair Housing Act made discrimination on the basis of "familial status" as illegal as race discrimination, and HUD sent us far more cases involving the former than the latter. The reader can decide whether adults-only trailer parks pose a serious threat to the national well-being.

To give another example, there is substantial reason to doubt the appropriateness of a federal law barring discrimination against homosexuals in all employment. This is not a question on which there is—or need be—a national consensus, nor is it a matter in which there is historical justification for a federal presence. By the same token, the social costs of such a law are not negligible. A federal fiat that homosexuality is a condition no more to be criticized than one's race or religion is of dubious civic soundness. It is also contrary to widespread and often religiously-based belief and, especially as the size of the employer gets smaller, will trench upon the associational and privacy interests of other citizens.[19]

There is another way in which not all discrimination is equal, and which was at the heart of much of the acrimony over the Civil Rights Act of 1991. *Deliberately* treating someone different because of some immutable characteristic is different from adopting a facially neutral rule that has a disproportionately adverse *effect* on some groups of people. For example, it is one thing to refuse to hire blacks; it is something quite different to require a high school diploma for

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19. *Cf.* Kenneth J. Cooper, *Hill Bans Gay Bias in Quake Aid*, Washington Post, Feb. 19, 1994, at A1 ("With two words inserted in the California earthquake assistance package that President Clinton signed into law a week ago, the federal government has for the first time banned discrimination on the basis of 'sexual orientation' in a federal program.").

A state antidiscrimination law can be dubious, too, of course. Alaska now prohibits discrimination against unmarried couples who wish to rent housing, and this law was recently upheld by the Alaska Supreme Court against a claim that this violated the religious free exercise beliefs of the landlord. Swanner v. Anchorage Equal Rights Comm'n, No. S-5362, 1994 WL 41377 (Alaska Feb. 11, 1994) (summarized in 62 U.S.L.W. 2540 (Mar. 8, 1994)). Alaska is not alone in having such a law. *See* Jerry DeMuth, *Courts Tackle Housing Bias Against Unmarried Couples*, Washington Post, Mar. 5, 1994, at E6; George F. Will, *Redefining Sin in The Bay State*, Washington Post, Mar. 13, 1994, at C7. Even more progressive is Vermont, whose supreme court ruled it was unlawful discrimination on the basis of handicap for a resort, which was seeking to upgrade its image, to fire a chambermaid who refused to wear her dentures to work. The court was interpreting the state's Fair Employment Practices Act, Vt. Stat. Ann. tit. 21, §§ 495-496 (1987 & Supp. 1993). Hodgdon v. Mt. Mansfield Co., 624 A.2d 1122 (Vt. 1992).

all applicants, which in turn has the (unintended) effect of excluding more blacks than whites.

It might be objected that the latter qualification, assuming it really was adopted with no discriminatory purpose, is not really discrimination "because of race" at all. After all, some sort of animus or deliberateness seems implicit in the term. That is correct, but the Supreme Court ruled otherwise in 1971,[20] and that error was codified twenty years later in the Civil Rights Act of 1991. Thus, absent a statutory amendment, "disparate impact" litigation will be with us for the indefinite future, at least in many employment cases.

The intent/effects distinction is important in the school desegregation litigation the new administration has inherited as well. There are literally hundreds of school districts under court-ordered desegregation plans, and the Left will argue these districts should be prevented from assigning students to neighborhood schools because such assignment would have the "effect" of "resegregating" the school system. It is, again, questionable at best whether the adoption of a neutral policy for good and nondiscriminatory reasons is discrimination at all. And, conversely, the social costs of forbidding neighborhood schools are high. Assigning children to schools near where they live is one of the least expensive and most popular means of assignment, and it is a good way to ensure that schools have community support and parental involvement.

The penchant for illegalizing practices, however benignly and meritocratically intended, whenever they have disproportionate effects on a particular group, is of course directly related to the quota issue. For it is another way of ensuring that the "numbers come out right," that there is politically correct "diversity" and "balance."

C. We Have a Market Economy

Not only social, but also economic, costs of prohibiting discrimination must be weighed. Obviously decisions about whether to enact civil rights laws will not be made with only market considerations in mind. But neither should the decisions be blind to those considerations. Thus, anyone proposing an intervention by the federal government into economic decisionmaking in the private sector bears the burden—and it should generally be a heavy burden—of justifying that intervention.

Government decisionmaking does not run an economy very well. This point is rooted in intellectual modesty: the insight that it is folly for one person or small group of persons to think they can assimilate the vast amount of data underlying an economy better than all the independently-thinking-and-acting individuals of a free citizenry. This is, of course, the point made by Friedrich Hayek and others in this century—indeed, it is a point made quite well by the century itself. It has, however, roots that go back at least to Burke, who had the

20. Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971).

same insight about modesty in a temporal context. That is, to Burke it was deadly arrogance for one generation to think it had all the answers and to ignore its inherited institutions, and the arrogation of economic decisionmaking to a centralized bureaucracy was, to Hayek, the same fatal conceit.

It is disheartening, then, that the presumption against federal intervention in our economy appears to be fading faster and faster—disheartening since the folly of such central planning is *the* lesson of the twentieth century. But fading it is.

Our leaders have forgotten that laws prohibiting discrimination by nongovernmental actors have the same drawbacks that any government intervention in the economy does. When the federal government decides that private entities will be forbidden from making economic decisions in a particular way, there are likely to be systemic costs. The government seldom acts more rationally than private entities in the aggregate do. Moreover, a bureaucracy will have to be set up and maintained, and will frequently be so aggressive in enforcing the law that the law itself becomes distorted. Another enforcement cost will be the inevitable false claims—the couple that brings an expensive discrimination suit on grounds of sexual orientation, when it is quite clear that the real reason they did not get the apartment is because it had already been rented to someone else.

Thus, an article published last year in *Forbes*[21] concludes that the institutionalization of reverse discrimination spawned by the civil rights laws is, after adding together all its direct and indirect costs, costing the economy billions of dollars a year. In 1991, the article estimates, the quota shortfall was well over $225 billion, or four percent of the GNP.[22]

Now, this is not to say that in this extraordinary area the case for careful and limited federal intervention cannot be made under any circumstances. But the intervention should be as limited as possible, and the burden is on those favoring intervention to demonstrate its utility on a case by case basis, recognizing again that there are distinctions to be made among race, ethnicity, religion, sex, age, handicap, and homosexuality; among voting, education, public accommodations, housing, and employment; and between intentional discrimination and disproportionate effects.

The effect on the economy of prohibiting racial discrimination in voting and public accommodations will be very different than prohibiting age and handicap discrimination in employment. The former was, if anything, beneficial; the latter will prove a significant regulatory burden.

Similarly, enforcing the constitutional ban against segregation by race in public schools, for instance, does no violence whatsoever to the country's underlying classical liberal principles. Telling a new computer company what educational qualifications it may set for its programmers will.

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21. Peter Brimelow & Leslie Spencer, *When Quotas Replace Merit, Everybody Suffers*, Forbes, Feb. 15, 1993, at 80.

22. *Id.* at 99.

The economic costs inquiry is especially important when the new proposal will bar not only intentional discrimination, but also neutral practices that have a "discriminatory effect." For instance, it may be proposed to the new administration that it argue that a bank's decision not to make loans to applicants with a poor credit history can be challenged as racially discriminatory—so long as that policy will exclude more minorities proportionately than nonminorities, and even if there is no doubt that the policy was adopted for economic reasons rather than racial ones. Such an argument by the new administration would seem quite dubious, even if it were conceded that the bank could still "win" (minus its attorney fees) if it convinced a judge its economic reasons were sound. Federal judges are unlikely to be knowledgeable arbiters of good banking policy, and requiring them to perform this role will add an additional regulatory burden on banks, resulting in higher costs for *all* the banks' consumers.[23]

One hopes that these nuances will be born in mind by the Clinton administration whenever new statutes or regulations are proposed, and that the social and economic costs and benefits of any new proposal are then weighed in deciding whether a new federal prohibition is justified.

D. Rhetoric Has Consequences

The potentially poisonous effects of antiquota rhetoric have been widely decried, and greatly exaggerated. It is the typical minuet: The Left vilifies the Right, the Right defends itself, at that point the Left accuses the Right of being "divisive," and then the editorial writers call for everyone (but really only the Right) "to lower their voices."

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23. This example is not hypothetical. Mortgage discrimination is in fact a top issue in the Clinton administration, and both "disparate treatment" (intentional discrimination) and "disparate impact" (neutral policies with disproportionate effect) have been targeted. *See* Associated Press, *Agency to Step Up Vigilance on Loan Discrimination*, Washington Post, Mar. 13, 1993, at E2; Robert S. Bennett et al., *Lending Practices Examined*, Nat'l L.J., Aug. 16, 1993, at 27; Jerry DeMuth, *Lenders Add Programs for Minorities*, Washington Post, Oct. 30, 1993, at E1; Department of Justice Press Release, *HUD, Justice to Coordinate Attack on Mortgage Lending Discrimination*, Nov. 4, 1993; Jerry Knight, *U.S. Proposes Sanctions For Loan Bias by Banks*, Washington Post, Dec. 9, 1993, at A1; Jerry Knight, *Justice Targets Discrimination In Lending*, Washington Post, Dec. 14, 1993, at D1; Jerry Knight, *2 Banks Settle Discrimination Allegations*, Washington Post, Jan. 22, 1994, at B1; Roger Fillion, *U.S. Readies Guidelines On Lending*, Washington Post, Feb. 19, 1994, at C2; Guy Gugliotta, *10 U.S. Agencies Launch Effort to Curb Loan Bias*, Washington Post, Mar. 9, 1994, at D1; Kenneth R. Harney, *Guidelines Discourage Discrimination*, Washington Post, Mar. 19, 1994, at E3 (while many minorities "may get a fairer shot at obtaining a home loan this year because of new [federal] guidelines," some applicants "could be rejected out of hand—or pay higher than necessary loan fees—as an unintended result of the anti-discrimination rules"). The new policy has been criticized in conservative quarters. *See* Llewellyn H. Rockwell, Jr., *Discreditable Reports*, Nat'l Rev., July 19, 1993, at 45; Editorial, *Eye of the Beholder*, Nat'l Rev., Sept. 20, 1993, at 18; Robert S. England, *Assault on the Mortgage Lenders*, Nat'l Rev., Dec. 27, 1993, at 52; *see also* Editorial, *Helping Black Entrepreneurs*, Wall St. J., Dec. 13, 1993, at A14; *cf.* Steven Lipin, *Mortgage Lending to Minorities Rose At Many of Biggest U.S. Banks in 1992*, Wall St. J., Aug. 30, 1993, at A2.

Thus, NAACP leader Benjamin Hooks in 1989 likened the Supreme Court to Klansmen because of its decisions unfavorable to the civil rights lobby,[24] and the civil rights lobby proposed legislation that went far beyond overturning those (eminently reasonable) decisions. The Bush administration labeled this proposal (perfectly accurately) as a "quota bill." This label was then lamented as pandering to white racism, and the administration was told to lower its voice.

Less remarked is the pernicious effect of false antidiscrimination rhetoric, which is now a mantra of victimhood. Indeed, a great danger is that the new administration will decide to appease the civil rights lobby with such false rhetoric, on the theory that such speeches are harmless.

They are not. Any irrational discrimination is to be lamented, but it is intellectually dishonest to pretend that racial discrimination, in particular, is the systemic problem that it was thirty years ago. That pretense does more to retard the progress of minorities and to aggravate racial divisions than David Duke ever will.

If someone is struggling to get out of a well, it is at best unhelpful to keep reminding him of how he got there in the first place. It does no good to encourage him to think not of how to build a ladder, but of how unfair it is that he should have to build one. And it is positively hurtful to tell him that, once he gets out, the chances are that he will be thrown there again by forces beyond his control, because those forces remain everywhere. To use another metaphor: We would not think much of a "friend" who constantly reminded a woman recovering from a divorce of how badly she had been treated, how damaged and depressing her life became since her husband left, and how unpromising the prospects for reclaiming her life were.

America's great strength has been its constant focus on the future and its refusal to dwell on the past. It has always discounted excuses and put a premium on self-help. That—for better, not worse—is the national ethos. The self-appointed spokesmen for minority groups do their poorest constituents no favor by seeking to reverse that ethos for them. To the contrary, such rhetoric ensures that many will assume self-help is a futile lie. And, of course, it will anger those falsely accused of being racist oppressors.

President Clinton should never decry the racism that still exists in this country without, in the same sentence, making it clear that such racism is a much diminished anachronism, and that we have moved on. No young American of any background should be discouraged from realizing his or her potential.

E. The Real Problems Are Not Civil Rights Problems

We have been conditioned to assume poverty problems are of a piece with civil rights problems, but of course that is wrong. Indeed, it is wrong both analytically and empirically. There is no reason that the principal afflictions of

24. Bruce Fein, *Civil Rights Duplicity?*, Washington Times, Aug. 1, 1989, at F3.

the poor should include discrimination, and even nonconservatives would concede, for instance, that many if not most poor people are not black, and that most black people are not poor.[25]

It is, therefore, not only incorrect but irresponsible to suggest that the problems of the poor will be solved by bigger and better civil rights laws. All the quota bills in the world will not help an unmarried thirteen year-old's baby, who will grow up in a drug-infested tenement and attend hopelessly inadequate, and physically dangerous, public schools. You cannot really blame racism for the fact that two out of three black children are born out of wedlock,[26] or that one in every four young black men has run afoul of the criminal justice system.[27] You cannot blame racism or the debate over the civil rights bill for the Los Angeles riots.

Those problems reflect an abandonment of religious morality and a meltdown of social mores. It is a social pathology that is neither racial nor racist. Reasonable men and women may disagree over what the federal government can do about this—indeed, they may disagree about whether the federal government can do anything at all, except try not to make things worse than it already has made them—but there should be agreement on this: The road out will necessitate people in the inner cities taking responsibility for their own lives, not blaming their predicament on someone else.[28]

IV. CONCLUSION

The intellectual bankruptcy, yet still formidable political clout, of the civil rights lobby; the divisiveness of the racial and gender preferences which the lobby still presses; the high costs and diminishing returns of additional, unending "antidiscrimination" rules and regulations; the dishonesty of much civil rights rhetoric today; and the increasing irrelevance of discrimination to what ails our society—all this leads to a rather obvious conclusion.

Just as only a Republican could go to China, it may be that only a Democrat can go to the civil rights lobby—and tell *it* to "lower its voice." More civil rights laws are not needed; more aggressive enforcement of the laws we already have is not needed; more preferences for minorities and women are certainly not needed.

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25. *See, e.g.*, Editorial, *A Lot Done, a Lot to Do*, Washington Post, Mar. 7, 1993, at C6.

26. Martin Peretz, *Cambridge Diarist*, New Republic, Nov. 5, 1990, at 46.

27. Bill McAllister, *Study: 1 in 4 Young Black Men Is in Jail or Court-Supervised*, Washington Post, Feb. 27, 1990, at A3.

28. Last year, Benjamin Chavis, Jr. replaced Benjamin L. Hooks as executive director of the NAACP, but it seems unlikely that the rhetoric—and refusal to embrace "an ethic of self-reliance"—will change. *See* W. Hampton Sides, *Ben Again: The NAACP's Dead End*, New Republic, May 10, 1993, at 10-11. *See also* Lynne Duke, *NAACP Rights Fund to Expand Role*, Washington Post, Mar. 11, 1993, at A10; Arch Puddington, *The NAACP Turns Left*, Commentary, Jan. 1994, at 35; Associated Press, *40 Years After Desegregation Ruling, Education for Blacks Is Still Inferior, Chavis Says*, Washington Post, May 22, 1994, at A3 ("'There isn't a school district in America that is treating our children fairly,' he [Chavis] said.").

The fact that systemic, invidious discrimination is now a thing of the past is an achievement that all Americans—and especially those who were active in the civil rights movement—should be proud of. A heavy burden has been lifted from America's shoulders, and a dark blot has been cleansed from the national character. That so much was accomplished, that society was truly transformed, in less than a generation is a cause for celebration, not denial. The time has come to declare victory in the civil rights war, and move on.