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The fathers of American independence were conscious of launching an experiment in democracy, a nation dedicated to the pursuit of political equality. Although they adopted a Constitution initially tolerant of slavery, they inserted a clause in that charter contemplating a future prohibition on the importation of slaves.[1] Since then, successive generations of Americans have disagreed, sometimes violently, about the course of our democratic experiment, but each time differences have arisen they have yielded ultimately to a new and loftier consensus about the nature of our Union.

The Civil War that ripped to shreds the fragile compact among the states helped to produce passage of the thirteenth, fourteenth, and fifteenth amendments—amendments that outlawed slavery, granted equal opportunity to every American, and accorded blacks the right to vote. The generation that followed gave us almost a century of "separate but equal." But from that poisoned soil emerged *Brown v. Board of Education*,[2] a decision that paved the way for finally breaking down the physical and visible barriers marked by racial differences.

The almost twenty years that followed *Brown* showed real progress toward a color-blind society. That progress, however, lost momentum in the 1970s as many civil rights leaders advanced well-intended, but poorly conceived, policies with the all-too-familiar consequence of di-

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1. U.S. CONST. art. I, § 9, cl. 1.
2. 347 U.S. 483 (1954).

viding people along color lines. In that decade, the bright future of race relations began to dim as discriminatory techniques—mislabelled as "benign" or "affirmative"—re-emerged to work their destruction on the hopes of a public anxious to find harmonious, goodwilled solutions to the problems of the past.

Today, the struggle continues for a *national* heritage blind to skin color or ethnic background. The challenge for the present generation, as for its predecessors, is to reset our sights on the nondiscriminatory ideal that guided our forefathers down the path of greater civil equality. During the past eight years the Reagan Justice Department resolutely charted such a course, and by daring to challenge the liberal orthodoxy that invariably zigzags down the road of political favoritism, has assumed an important and central role in the ongoing national debate.

When we entered office in 1981, the national debate on civil rights had largely lost sight of three fundamental ideals that define America: the principle of nondiscrimination, the primacy of the free enterprise system, and the democratic basis of all social reform. It was our considerable task to refocus attention along these traditional, and more constitutional, lines. By largely succeeding in that effort, we have set the terms for future civil rights debates. Whatever specific policies and initiatives come before the public in the future, they will not command the agreement of a stable majority of Americans, nor the approval of the Supreme Court, unless they respect those three fundamental ideals.

Achieving this respect has been no small accomplishment. By 1981, many forces within the civil rights movement had abandoned their moral dedication to equality for all and instead had embraced the concept of so-called "benign" discrimination. After spending decades seeking to forge a national consensus upon the principle of nondiscrimination, most civil rights advocates stood ready as the Reagan Administration took office to fiout not only that moral imperative, but also the American economic system and, on behalf of special interests, many of our traditional moral values. Their chosen method was no longer an appeal to the conscience of all Americans, but rather a call to guilt for some, a promise of preference for others, and a reliance on the raw power of the three institutions that are least responsive to democratic forces—academia, the media, and especially the courts—to herd along a confused and reluctant population.

The civil rights agenda they fashioned lost much of its earlier clarity and luster. Discrimination inspired by racial differences, once condemned, became condoned when it benefitted minorities. Black Americans were forced to suffer through the cruelest sort of identity crises, in which human dignity and personal performance became essentially irrelevant, and destiny was controlled by a sinister quota system.

Under that system blacks got in and through school, gained employment, and obtained promotions based on arbitrary quotas—always set in place and implemented by paternalistic whites who knew best when and where to slam shut the doors of opportunity when the preordained racial limit was "reached." Society could tolerate such discrimination, our liberal friends insisted, because it was benign, not pernicious. Americans as a whole, a people partial to common sense, were told that in order to ensure equality, free enterprise, and true democracy, they needed more racial discrimination, regulation of business, and court decrees.

Thus we saw again, only a decade and a half after *Brown* rang the death knell on "separate but equal," a frightening tilt back in that direction. The new watchword became "separate but proportional": separate school buses, separate employment lines, separate housing units—all marked by race—and all designed to move (albeit gradually) toward government-managed racial proportionality. These discriminatory policies were no more benign than the ones practiced openly under *Plessy v. Ferguson*.[3] Minorities suffered the stigma of being selected because of the color of their skin, not because of the content of their character; those rejected felt the harsh rebuke of a denial inspired by race, rather than by a competitor's superior qualifications or performance. Negative preference had wormed its way into the policy of "affirmative action" and threatened everything sacred to the American ideal of equality of opportunity. Race was pitted once more against race—perhaps in a way far more sinister because of its subtlety—as the liberal establishment rushed to hand out society's limited resources under a racial spoils system. Individual rights were drowned out by the cry for group entitlements.

Thus, as we entered the 1980s, the signs around us were ominous indeed. The influence and membership of the Ku Klux Klan and other violent racist groups were on the rise; blacks and other minorities were still locked out of full participation in the voting process; quota programs operated as discriminatory "ceilings" that limited the employment and housing opportunities available to minority applicants; forced busing programs had produced massive "white flight" leading in many public school districts to resegregation rather than desegregation; and the civil rights banner of nondiscrimination, under which so many had marched so proudly in Washington, D.C. in 1963, was in tatters.

The Reagan Justice Department responded with unshakeable resolve and a variety of innovative steps to bring the Nation's civil rights policies into line with the better angels of its nature. The issue of public

3. 163 U.S. 537 (1896).

school desegregation is illustrative. Through the 1970s the civil rights movement had come to rely on forced busing as the principal, indeed the only acceptable, remedy for racial segregation in public schools. As a consequence, public school systems around the country experienced the ravages of community divisiveness, parental alienation, fiscal crisis, a general preoccupation with transportation over education, and even racial violence. Together these ills drove white families to seek education for their children outside the very public school systems whose integration the Nation sought. For many Americans civil rights was not a dream at all, but a shelter for the basest forms of group resentment and dictatorial power. Like racial favoritism in employment and education, forced busing threatened our national commitment to civil rights and the principle of nondiscrimination.

In response, the Reagan Justice Department succeeded in convincing the judiciary, and at least a few in academia and the media, that racial preferences are inherently discriminatory and cannot be countenanced under law except in the most extraordinary circumstances, and that "magnet schools" can provide a constructive, positive, and educationally promising alternative to forced busing as a desegregation remedy. The Department did not win every case or every policy argument, but it did not have to do so. The Department moved opinion in the cases and policy arguments it won and influenced the reasoning of members of the Supreme Court in the cases it lost.

In areas in which the civil rights consensus of the 1960s had endured, the Department nurtured the principle of nondiscrimination, making clear that nondiscrimination is an essential part of conservative social policy. By essentially every measurement, we set new and unprecedented Department standards in enforcing the Voting Rights Act; successfully prosecuted violent activity by the Ku Klux Klan and other hate groups; pursued housing discrimination through a newly created Housing Litigation Section; and advanced the rights of handicapped and institutionalized persons.[4] In short, as the Reagan Administration successfully opposed deviations from the principles of nondiscrimination and democracy in employment and education, it strengthened and rapidly extended those principles into new areas.

As a result of these efforts, which too often were not appreciated or understood, the country today stands on the verge of a broad national consensus based on the principle of nondiscrimination. The necessary

4. *See generally* CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, ENFORCING THE LAW (1987). The report, compiled by the career staff of the Civil Rights Division at the Assistant Attorney General's request, details the unprecedentedly high rate of enforcement of civil rights statutes by the Division between January 20, 1981, and January 31, 1987, including the commencement of 543 suits in which the United States was a plaintiff or plaintiff-intervenor. *See id.* at I-A.

legal safeguards for minority economic achievement, which early leaders such as Booker T. Washington found absent in their time, are now in place. For the first time in our history there is irrefutable evidence—due in part to the Reagan Administration's vigorous enforcement of antidiscrimination statutes—that those once closed out by society now enjoy support across every inch of the political spectrum. The major obstacles that remain in the path of complete social and economic integration for minorities in America are shaped far less by discrimination than by serious failures in our public education system, our inability to deal effectively with crime and drugs in the inner cities, our understanding of traditional social values, and our confidence in the capability of our economic system to reward those who invest in it regardless of their race.

I do not suggest a redefinition of civil rights in terms of education and economic initiatives. Civil rights concern equality of opportunity under the law, not socioeconomic policy. But respect for full equality of opportunity is not simply a civil rights concern; it is also among the highest objectives of our national social, educational, and economic agendas. Educational and economic initiatives cannot well serve our lofty national purpose of full equality of opportunity if those who stand to benefit find their efforts perpetually defeated by socioeconomic barriers that stand in the way of developing their full potential.

Removing those barriers is the real challenge for the future. Racial classifications—both those regarded as pernicious and those wrongly portrayed as benign—have occupied the center stage of race relations in this country for too long. Whatever benefits some people may have thought could be realized by compelled enrollment, or by assignment of minorities to jobs solely because of their race, the time has long since passed when those arguments carry any weight. We have learned by hard experience that favoring some while disfavoring others because of skin color inescapably burdens the selection process with the heavy yoke of discrimination. The process yields no winners; all suffer equally the indignity of being judged by accident of birth, not measurement of worth. Under this approach, the color-blind ideal to which we all pay homage remains a distant dream.

We fought the battle of racial quotas, minority set-asides, and forced busing in the 1980s and had considerable success. After a determined, eight-year effort by the Reagan Justice Department to persuade the Supreme Court, a comfortable majority of the Court in *City of Richmond v. J.A. Croson Co.*[5] held, in clear and unequivocal terms, that all forms of official preference for members of any racial group, both

5. 109 S. Ct. 706 (1989).

those that suffered historically from discrimination and those that did not, are presumptively unconstitutional.[6] All persons who are victims of racially preferential policies are entitled to sue for damages. Fully embracing the main points of the amicus curiae brief filed by the Civil Rights Division and the Solicitor General, the Court held that racial preferences can overcome the presumption of unconstitutionality only when they survive the strict scrutiny generally applied to every racially biased law and government action.[7] In the context of minority set-asides in public contracts, that conclusion means that racial preferences are lawful only when they are narrowly tailored remedies of last resort for particular acts of identified prior discrimination.

In the context of employment discrimination, moreover, the Court has lessened the risk that employers who intend no discrimination in hiring or promotions may be liable nevertheless for mere "under-representation" of minorities. For instance, in *Watson v. Fort Worth Bank & Trust*,[8] the Court concluded that an employee who alleges that certain employment practices are discriminatory because they have an unintended "disparate impact" on minorities must bear the burden of proof throughout the suit.[9] The Court reasoned that, in enacting Title VII of the Civil Rights Act of 1964, Congress specifically intended that employers not be liable merely because their work forces are racially unrepresentative.[10]

The *Croson* case and the recent trend of the Court's employment discrimination decisions[11] represent a new beginning. As a result of the Reagan Administration's success, a vision of our country as a place where people advance, or not, solely because of their race is now legally impossible to implement, at least on the wide scale necessary to justify its costs. Thus we have moved beyond the limited horizons that those "corrective" measures set, and have edged the country perceptibly closer to policies indifferent to both ethnicity and skin pigmentation.

Today, therefore, the real battlefields lie elsewhere. For too long too little attention has been paid to ensuring that those who seek a public education actually receive one. Awarding grades or diplomas to youngsters barely able to read or write, to add or subtract, serves no

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6. *Id.* at 721 (O'Conner, J., plurality); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that race-based preference programs of public employers are unconstitutional).

7. *Croson*, 109 S. Ct. at 721 (O'Conner, J., plurality).

8. 108 S. Ct. 2777 (1988).

9. *Id.* at 2784.

10. *Id.* at 2787-88 (O'Connor, J., plurality). In a separate concurrence, Justice Stevens agreed in essence with most of Justice O'Connor's opinion, but expressed the view that some aspects of the opinion were not necessary to decide the case. *Id.* at 2797 (Stevens, J., concurring). Justice Kennedy did not participate in the decision. *Id.* at 2796.

11. *See* Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987).

legitimate purpose. The debate currently raging over the National Collegiate Athletic Association's (NCAA) Proposition 42, which sets minimal academic standards for college athletes in need of scholarship assistance, is not really an argument over race; it is at the core an argument about education. If young athletes graduating from our public high schools were actually educated, then the absurdly low NCAA standards would provide no cause for coaches to be exercised or administrators excited. But not all students are educated, and consequently students in metropolitan school systems across this land (whether they drop out or stay in) lack the tools needed to be even remotely competitive in college or the job market.

Our public education system needs a major overhaul. The curriculum is generally poor, teaching standards are lax, grades are often inflated irresponsibly, and there is far too little school discipline. These problems are not inspired by race. They are failures spawned by our silly tolerance for newfangled theories of education which undercut ageless and fundamental learning principles—principles like rigorous discipline, respect for authority, commitment to learning above sports and social activities, and promotion according to achievement. They also are the result of parents' inattention to education, bad administration, an abiding fear of criticism from civil rights activists if minorities are held back or graded fairly, and the lack of accountability to the community.

We are beginning to awaken, I sense, to the reality that a solution to these ills lies not in louder calls for more civil rights laws or more civil rights law enforcement. Even those advocates once closely identified with that familiar response now are beginning to understand that their refrain has grown old and unhelpful.[12] The Reagan Administration's remarkable—indeed, in most respects precedent-setting—enforcement record amply demonstrates that neither the civil rights laws, nor the law enforcers, are to blame. Rather, the solutions must come from confronting the range of educational deficiencies more directly, at their source—not primarily at the federal level (although federal support is part of the equation), but principally from the grass roots up: the parents, the school boards and school superintendents, and the classroom teachers.

Competent administrators are needed, those who are unafraid to use good, old-fashioned discipline against disruptive students or students uninterested in attending classes. Teachers must be found who will strive harder to improve learning techniques and curriculum, utilizing, for example, teaching enhancement ideas such as the exciting Mag-

12. *See* Days, Fullilove, 96 YALE L.J. 453 (1987).

net-School Initiative Program.[13] Serious consideration also must be given to some form of voucher program in order to increase educational opportunities for those caught in an inferior public school environment.

This list does not begin to exhaust the possibilities; nor is that the point. The point is that the educational woes in this country's public school systems no longer are easily explained in terms of racial discrimination. It is imperative that we move beyond that battlefield and engage the adversary on other fronts, in other ways, and with a greater degree of sensitivity to the problems and their cure, if the promise of equal opportunity is to be fully shared.

Nor can we stop with education. While treating that concern is an essential first step to addressing other important concerns, nonetheless it is only a first step. We suffer today from a wholesale breakdown of societal values. Respect is flagging for the individual, the family, and the community. Large segments of our population now hold in contempt moral standards that once mattered. Pornographic magazines and movies lacking any redeeming social value are commonplace on our newsstands and in our theaters. Violence and mayhem are a feature of our everyday life, not only in the inner city but also increasingly in the suburbs. For too many, religious worship and church affiliation are no longer weekly features of family life.

Much of this litany can be traced to our public education system. But along with the breakdown of public education, we have seen a distressing failure of education in other contexts. Parental guidance is nonexistent in many homes. Community leaders willing to blink at, or openly condone, every repulsive, obscene, or violent depiction offered for viewing cannot escape blame. Nor can those who mock our criminal justice system by facilitating the return of admitted criminals to the streets without a second thought for the victims, or by taking offense at the carrying out of the death penalty for convicted murderers, avoid responsibility.

As we enter the 1990s fewer people are receiving a quality education, and thus fewer are in a position to compete meaningfully for available jobs at a time when information and high-technology increasingly drive our economy. More people are in the streets, and an increasing

13. The Black College Satellite Network, working closely with the Reagan Justice Department, has established a telecommunications network available to colleges and public schools across the country. The network is to be used as part of the Magnet-School Initiative Program, bringing new and innovative educational programs into the classroom as teaching aids, whether it be an important conference on a topic of current interest, a series of seminars delivered by prominent community leaders expert in a particular field, or a Shakespearean play tied to a particular literature course. Access to the network also provides students a unique introduction to the field of telecommunications and related communications-oriented studies. The learning possibilities literally are unbounded.

number of those are homeless. Crime is up. Drug use and abuse is on the rise. At a time when many of our leaders, including many teachers, speak of morality as a code word for hypocrisy and intolerance rather than as an essential condition for freedom, moral suasion is no longer a weapon in our arsenal.

Can we blame these ills on racial discrimination any longer? Certainly not! To be sure, too much racial bias sadly remains today, and we can never relax our efforts to remove this blight from our existence. But the challenge of the decade that lies ahead is to admit that the devastating failures of today are not the civil rights causes that divided a nation and a people in years gone by. The obvious and not-so-obvious barriers that once marked blacks as inferior and second-class citizens largely have been eliminated. Having cleared the road to equal opportunity of much of that debris, we find still standing in the way impediments of another sort, stemming principally from a breakdown in both our educational and our moral systems. These breakdowns are not endemic to one race or another; they are shared and deeply concern all races. As Americans, together we must turn our attention and energies to finding lasting solutions. Otherwise, the promise of a society that offers to each of us equal opportunity will remain an unrealized dream—even after the day when, I hope, we will without discomfort embrace one another indifferent to shadings of color or matters of heritage.