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ABSTRACT

In these remarks, William Bradford Reynolds, Assistant Attorney General of the Civil Rights Division, Department of Justice, discusses American civil rights in the light of past and present Federal policy. A review of constitutional provisions, legislation, and court litigation reveals how policy has variously provided for equality and perpetuated racial discrimination in different social sectors. Mr. Reynolds emphasizes that twice before, the United States has almost achieved a racially-neutral, discrimination-free society, only to revert to sanctioning race as a criterion for regulating rights and allocating opportunities. In the 1970s, it is suggested, the overwhelming concern with racial balance over racial neutrality and the concomitant emphasis on mandatory busing, quotas, and other race-conscious affirmative action techniques, have fostered divisiveness and brought the nation to another civil rights crossroads. Within this climate, Mr. Reynolds emphasizes, the Reagan administration commits itself to a policy of race neutrality rather than race-conscious affirmative action, and accordingly supports voluntary desegregation, injunctive relief mandating racially-neutral employment decisions, and enhanced recruitment efforts to attract qualified minorities into the labor force. (Author/MJL)

Department of Justice

REMARKS

OF

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CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE

AMERICAN BAR ASSOCIATION CONFERENCE

SECTION OF
INDIVIDUAL RIGHTS
AND RESPONSIBILITIES

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CIVIL RIGHTS AT THE CROSSROADS:
WILL THE CLOCK BE TURNED BACK?

I am especially pleased to participate in today's discussion on the topic: "Civil Rights at the Crossroads: Will the Clock Be Turned Back?" The question unfortunately has an all too familiar ring. For, we must, in candor, begin any thoughtful treatment of the subject of civil rights with full acknowledgment that America has stood at the crossroads before. I therefore will dare to exercise a degree of editorial license and suggest to you that a more accurate phrasing of today's topic would be "Civil Rights Again at the Crossroads: Will the Clock Be Turned Back?"

The answer that automatically springs to virtually everyone's lips is a resounding "No" -- as well it should be. My remarks today will seek to explain why this Administration is deeply committed to ensuring that the clock's forward movement, so recently restarted, will remain perpetually in motion.

That racial injustice in America remains a timely topic of discussion among lawyers in 1982 -- more than a century after ratification of the Civil War Amendments -- is itself a devastating indictment. The obstinance of this societal cancer cannot be attributed solely to

its many complexities; nor does the explanation reside in the resilience of prejudice. Rather, the blight of racial discrimination lingers in America largely because of this country's retreat from the course set at earlier crossroads.

Twice before, the Nation has boldly struck out on the path of race neutrality toward achievement of a society free from discrimination. On both occasions, the advance along that high road was halted and the clock turned back when race was accepted -- indeed, officially sanctioned -- as a criterion on which to regulate rights, allocate opportunities, and otherwise order society.

Civil Rights stands again at the crossroads, and the decisions made today will determine whether the tragedy of racial injustice in America will be on the agenda of the next generation of lawyers or will become, at long last, the exclusive concern of historians.

In charting a course for the future, the history of our national experiences with racial distinctions serves as the surest guide. From the birth of this Nation, discrimination on account of race has stained the fabric of American law. The Declaration of Independence proclaimed the principle that all men are created equal, yet omitted any denunciation of slavery. The United States Constitution, as origina ly ratified, accorded to black slaves a

fractional status beneath that of free persons for purposes of apportioning representatives and taxes among the several States; 1/ it granted to black citizens none of the rights associated with citizenship. This injustice was sustained by the Supreme Court in the infamous Dred Scott decision, 2/ which held not only that the Constitution does not endow black Americans with citizenship, but that Congress lacks power to prohibit slavery in United States' territories. Thus, race served as a basis on which legal rights were measured, status determined, opportunities allocated, and freedom accorded from the beginning of the Republic until the 1860's, when the inequities of slavery could be tolerated no longer and the country was torn apart by civil war.

The Nation emerged from that first crossroads with the Thirteenth, Fourteenth, and Fifteenth Amendments. As a result of this trilogy, slavery was abolished, the right to vote was protected from racial discrimination, and persons of all races were guaranteed equal protection under the law. History faithfully records that the Framers of the Civil War

1/ U.S. Const. Art. I, § 2, cl. 3.

2/ Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

Amendments intended to outlaw all official regulation by race and to establish a regime of race neutrality. As Senator Jacob Howard stated in 1866 during debate on the Fourteenth Amendment, the Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." 3/

Nonetheless, the ideal of nondiscrimination embodied in the Fourteenth Amendment was perverted by those unwilling to abandon race as a determinant in the governmental ordering of societal arrangements. "[I]n the nature of things," said the Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 544 (1896), the Fourteenth Amendment "could not have been intended to abolish distinctions based on color . . . ." Thus, the Court turned the clock back, ruling that Mr. Plessy, who was one-eighth black, could be excluded by law from a railroad car reserved exclusively for whites.

A lone voice, the elder Justice Harlan's, decried the Court's "conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights

3/ Cong. Globe, 39th Cong., 1st Sess. I 2765 (1865).

solely upon the basis of race." Id. at 559. Insisting that the Civil Rights Amendments had "removed the race line from our governmental systems" (id. at 555), Justice Harlan declared: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color . . . ." Id. at 559.

Yet, the separate-but-equal doctrine formulated by the Plessy majority held sway in America for over half a century. During this period, many State and local governments regulated the enjoyment of virtually every public benefit -- from attendance in public schools to the use of public rest rooms -- on the basis of race. Private discrimination, unfettered by legal restraints, was widespread.

Just as Justice Harlan's forceful dissent predicted, the separate-but-equal doctrine exacerbated racial polarization, aroused hostility, and "create[d] and perpetuate[d] a feeling of distrust between [the] races." Id. at 560. The patent injustice of governmental allocation -- albeit equally -- of benefits along racial lines ultimately -- indeed, inevitably -- brought America in the early 1950's to a second civil rights crossroads: the case of Brown v. Board of Education.

In Brown, the Supreme Court at long last ended the reign of the separate-but-equal doctrine, ruling that separate public education facilities are inherently unequal. The Court acknowledged with eloquent simplicity that the Equal Protection Clause mandates racial neutrality in all aspects of public facilities and functions: "At stake," declared Chief Justice Warren for a unanimous Court, "is the personal interest of the plaintiffs in admission to public schools . . . on a [racially] nondiscriminatory basis." Brown v. Board of Education, 349 U.S. 294, 300 (1954).

The Court's emphasis on racial neutrality in the assignment of school children echoed the oral argument made by their attorney, Thurgood Marshall. Expressly rejecting the notion that the Constitution would require the establishment of "nonsegregated school[s]" through race-conscious student reassignments, Mr. Marshall asserted: "The only thing that we ask for is that the State-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on." So long as the children are assigned "without regard

to race or color, . . . nobody," argued Mr. Marshall, "would have any complaint."

The Brown decision spurred a judicial and legislative quest to condemn racial discrimination, both public and private, in virtually every aspect of American life. Once again, the country emerged from the crossroads along the path of nondiscrimination. During the decade following Brown, the Supreme Court consistently denounced racial distinctions as being, in Chief Justice Stone's words, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

Indeed, in 1964 the Court prohibited even mere governmental encouragement of private "race-conscious[ness]" in Anderson v. Martin, 375 U.S. 399 (1964), a case involving a State statute requiring that the race of each candidate for public office be accurately designated on each ballot. Noting that any governmental encouragement of racial bloc voting would tend to favor the race having a numerical majority, the Court held that the State could not constitutionally encourage racial discrimination disadvantaging anyone, whether black or white. The State's signation of a candidate's

race was, according to a unanimous court, of "no relevance" in the electoral process. Id. at 402-03.

This judicial insistence on race neutrality was paralleled in the Congress, which enacted the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968. That Congress intended these enactments to establish a standard blind to color distinctions is compelled by both the statutes' language and their legislative histories. Indeed, the issue of racial preferences was confronted directly in the debates preceding passage of the Civil Rights Act of 1964. For example, the proponents of Title VII, which prohibits discrimination in employment, uniformly and unequivocally denied claims by the bill's opponents that the measure would countenance race-conscious preferences. Hiring preferences favoring black employees would violate Title VII "just as much as a 'white only' employment policy," observed Senator Williams. "[H]ow can the language of equality," he asked those arguing the case for racial preference, "favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense." 110 Cong. Rec. 8921 (1964). Senator Muskie, another key supporter

of the 1964 Act, expressed a similar understanding of the legislation: "Every American citizen," said Muskie," has the right to equal treatment -- not favored treatment, not complete individual equality -- just equal treatment." Id. at 12614. Senator Humphrey agreed. The principal force behind passage of the 1964 Act in the Senate, Humphrey repeatedly stated that Title VII would prohibit any consideration of race in employment matters, using on one occasion these words:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. Id. at 11848.

Indeed, at another point, Senator Humphrey's exasperation with the opposition's argument prompted him to make the following offer: "If . . . in title VII . . . any language [can be found] which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another . . . ." Id. at 7420.

These judicial and legislative pronouncements reflected a national concensus that racial classifications are wrong -- morally wrong -- and ought not to be tolerated in any form or for any reason. Spokesmen both within and outside of Government advanced the principle, but its true essence was best captured, in my judgment, by Dr. Martin Luther King, Jr., when he dreamed aloud in the summer of 1963 of a nation in which his children would "not be judged by the color of their skin, but by the content of their character."

That dream began to fade in the 1970's when the quest for equality of opportunity gradually evolved into an insistence upon equality of results. The concept of racial neutrality blurred into the concept of racial balance, on the representation that the former could not be fully realized unless the latter was achieved. Our constitutional ideal of color-blindness -- so recently rescued from the separate-but-equal era and so ardently defended during the civil rights advances of the 1950's and 1960's -- yielded yet again to the race-conscious thinking of an earlier day. Although the argument this time was grounded on the noblest of intentions, its premise was equally flawed and the consequences no more tolerable.

Regulation and allocation by race are not wrong per se, we were told; rather, they depend for validity upon who is being regulated, on what is being allocated, and on the purpose of the arrangement. Thus, regulation by race was proffered by its new proponents as an unfortunate but necessary means of achieving a truly race-neutral society. Race must be considered, it was argued, "[i]n order to get beyond racism." 4/

With characteristic eloquence, Professor Alexander Bickel exposed the casuistry of this argument, remarking:

> The lesson of the great decisions of Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. . . . Having found support in the Constitution for equality, [proponents of racial preferences] now claim support for inequality under the same Constitution. 5/

In equally telling language, Bickel warned against turning the clock back from the principle of racial neutrality.

4/ Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978)(Blackmun, J., concurring).

5/ A. Bickel, The Morality of Consent 133 1975).

"The history of the racial quota," he admonished, "is a history of subjugation, not beneficence. . . . [The] quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Id.

Another champion of equal opportunity and individual liberty, Justice William O. Douglas, was no less adamant in his rejection of race-conscious solutions. In 1974, in connection with the first case to come before the Supreme Court involving the allegedly benign use of race to allocate to minorities a certain number of places in a professional school, Justice Douglas stated:

> A DeFunis [and, one might add, a Bakke or a Weber] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. . . .
>
> . . . .
>
> . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> . . . So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause. 6/

6/ DeFunis v. Odegaard, 416 U.S. 312, 33, 342, 343-44 (1974)(Douglas, J., dissenting)(emphasis added).

Nonetheless, the lesson of history was ignored, and the use of race as a classification criterion once again became commonplace during the decade of the 1970's. In the area of public education, the predominant court-ordered relief for denials of the right upheld in Brown -- that is, the right to "admission to public schools on a [racially] nondiscriminatory basis" -- became mandatory race-conscious student assignments, often entailing long, involuntary bus rides to schools far from the student's home. See, e.g., Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971). Racial balance -- rather than racial neutrality -- became the overriding concern in school desegregation decrees, and the tentative nod by the Supreme Court in Swann to mandatory student transportation as one available desegregation technique evolved into nothing short of a judicial obsession with the "yellow school bus."

Rather than achieving racial balance, however, this preoccupation with mandatory busing has generally produced racial isolation on a broader scale. In case after case, economically able parents have refused to permit their children to travel unnecessary distances to attend public schools, choosing instead to enroll them in private schools or to move beyond the reach of the desegregation decree.

Justice Powell recently commented on this phenomenon in the following terms:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race systems. 7/

After more than a decade of court-ordered busing, it cannot reasonably be disputed that the effort to desegregate through wholesale reliance on race-conscious student assignment plans has failed. The destruction to public education wrought by mandatory busing is evident in city after city: Boston, Cleveland, Atlanta, Detroit, Wilmington, Memphis, Denver, and Los Angeles are but a few of the larger and thus more celebrated examples. Nor is it difficult to understand why. The flight from urban public schools contributes to the erosion of the municipal tax base which in turn has a direct bearing on the growing inability of many school systems to

7/ Estes v. Metropolitan Branches of the Dallas N.A.A.C.P, 444 U.S. 437, 450 (1980)(Powell, J., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

provide a quality education to their students -- whether black or white. Similarly, the loss of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs. As a consequence, the promise of Brown v. Board of Education remains unfulfilled.

In the fields of employment and college admissions, a parallel "pursuit of racial balance" in the 1970's, proceeded under the banner of "affirmative action." Discarding the notion that a race-based employment or admissions preference is permissible only when necessary to place an individual victim of proven discrimination in the position he would have attained but for the discrimination, proponents of this concept of "affirmative action" focused their sights more broadly. Preferential treatment was sought not simply for those persons who had in fact been injured, but for entire groups of individuals, based only on race or sex.

Quotas, set-asides and other race-conscious affirmative action techniques gained increasing acceptance among federal bureaucrats and judges, and by the end of the 1970's, racial considerations influenced, indeed controlled, employment decisions of every kind, from hirings to lay-

offs. It mattered not that those preferred solely because of race had never been wronged by the employer, or that the preferential treatment afforded them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing. The preoccupation was on removing from the work force any racial imbalance among employees in a discr job unit, no matter how large or small. Lost in the scramble for strictly numerical solutions was the fundamental principle that "no discrimination based on race is benign, . . . no action disadvantaging a person because of color is affirmative." 8/

The use of race in the distribution of limited economic and educational resources in the past decade led to the creation of a kind of racial spoils system in America, fostering competition not only among individual members of contending groups, but among the groups themselves. As noted commentator George Will aptly put it, this sort of allocation of opportunity has operated "to divide the majestic national river into little racial and ethnic creeks," making the United States "less a Nation than an angry menagerie of factions scrambling for preference . . . ."

8/ United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 254 (1979)(J. Rehnquist, dissenting).

Thus, as America entered the decade of the 1980's, the clash between the warring concepts of racial balance and racial neutrality, between equality of opportunity and equality of results, and between individual rights and group entitlements propelled the Nation to another civil rights crossroads. Conveniently for the American people, arrival at the crossroads coincided with a Presidential election, and the civil rights positions of the two major candidates pointed in different directions. The Democrats embraced a concept of race-conscious affirmation action designed to achieve equality of results. In contrast, President Reagan's belief, as reflected in the Republican platform, was that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."

Can the election be regarded as a referendum on competing civil rights philosophies? Let me offer the thoughts of Theodore White, who has been analyzing Presidential elections for years. In his new book, America in Search of Itself, Mr. White has this to say:

> My thinking is that by the time of the 1980 election, the pursuit of equality had created a system of interlocking dependencies, and the American people were persuaded that the cost of equality had come to crush the promise of opportunity. These ideas struggled with each other all through the campaign, and the one idea prevailed over the other. This could make the election of 1980 a watershed in history. 9/

This Administration's commitment -- the Nation's commitment -- to the right of every person to be free from racial discrimination has shaped our formulation of new approaches in the area of civil rights remedies. In school desegregation cases, our remedial formula emphasizes desegregation techniques that promote voluntary integrative student transfers and at the same time enhance the quality of public education. In the area of equal employment opportunity, we have rejected the use of racial quotas and other preferential techniques, relying instead on injunctive relief mandating racially neutral employment decisions and enhanced recruitment efforts designed to attract greater numbers of qualified minorities into the work force.

Will we turn the clock back to the race-conscious era from which the Nation is just now emerging? Will we again

9/ T. White, America in Search of Itself: The Making of The President 1956 - 1980, 419 (1982).

ignore the lesson of our tragic history and compromise the high ideal of race neutrality embodied in the Fourteenth Amendment and the Brown case? Will we doom our quest to "get beyond" racism by borrowing the tools of the racist? The answer is an emphatic "No."

We have once again started along the high road of race-neutrality -- the road that holds the only promise for realizing the Nation envisioned by Dr. King. In our zeal to eradicate discrimination from society, we must not again allow consideration of race to intrude upon the decisional processes of Government. Let that be our unyielding commitment and we will leave for our children a land of equal opportunity where it can truly be said that the content of their character, not the color of their skin, determines their destiny.

Thank you.