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ABSTRACT

Today, the United States stands at a critical crossroad with regard to civil rights; the choice is between an officially colorblind society and a government-supported, race-conscious one. The purpose of the 13th, 14th, and 15th Amendments was to end a discriminatory system and to erect in its place a regime of race neutrality. In 1896, the separate-but-equal doctrine of "Plessy" turned back the clock, and it was not until "Brown v. Board of Education" (1954) that the Supreme Court acknowledged that race neutrality is required by the Equal Protection Clause. Judicial decisions and civil rights legislation of the late 1950s and the 1960s all endorsed the principle of race neutrality. Today, however, there are those who reject this principle in favor of preferential treatment for all members of the previously disadvantaged racial group. Such a system defeats the very purpose it intends to serve, for race-based preferences cut against the grain of equal opportunity, and in the process society becomes more racially polarized. The cure for racial discrimination is not to impose burdens on innocent individuals because of color, but to reach out to all individuals and extend to them a full measure of opportunity and consideration based on merit. (CMG)

Department of Justice

REMARKS

OF

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BEFORE

THE ANNUAL CONFERENCE OF STATE ADVISORY
COMMITTEE CHAIRPERSONS
U.S. COMMISSION ON CIVIL RIGHTS

MONDAY, SEPTEMBER 12, 1983
NATIONAL HOUSING CENTER
WASHINGTON, D.C.

I am especially pleased to participate in today's discussion on the topic: "Civil Rights Goals for the Year 2000 and the Means for Achieving Them." We certainly can all agree that there is a compelling need at the present time for this Nation to rededicate itself to the fundamental aspirations that have long shaped civil rights policy in this country and consider carefully how these aspirations may at last be converted into reality. We stand today at a critical crossroads in civil rights. The path America chooses in the months and years immediately ahead will definitively shape the course of events in this vitally important area into the Year 2000 -- and, most probably, for all time.

The choice we face, as I see it, can be succinctly stated. It is a choice between an officially colorblind society, on the one hand, and a government-supported, race-conscious society, on the other. It is a choice between viewing and treating our fellow citizens as unique individuals, or dealing with them simply as indistinguishable components of racial, sexual, or ethnic groups.

A quick glance backward at the Nation's previous efforts to eliminate the cancer of racism and discrimination from our Government and society is a useful guide for the choice of the future. By examining what the "goals" of the civil rights movement have been in the past and why these "goals" were pursued, we can, I think, better chart the course for tomorrow.

While my remarks today will focus on race discrimination, the discussion applies with equal force to discrimination on account of sex, ethnic origin, and religion as well.

America's first enduring step towards providing equality for all races was, of course, passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, guaranteed to all citizens equal protection under the law and protected the right to vote from racial discrimination. History faithfully records that the purpose of these Amendments was to end forever a system which determined legal rights, measured status and allocated opportunities on the basis of race and to erect in its place a regime of race neutrality. Thus, in the 1866 debates on the Fourteenth Amendment, the Equal Protection Clause was described as "abolish[ing] all class legislation in the States [so as to do] away with the injustice of subjecting one caste of persons to a code not applicable to another."

Thirty years later, in 1896, a Supreme Court Justice, the elder Justice Harlan, correctly recognized that these Civil Rights Amendments had "removed the race line from our governmental systems." Plessy v. Ferguson, 163 U.S. 537, 555 (1896). In Plessy v. Ferguson, he 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.

Unfortunately, as we all know, his was a lone, dissenting voice in that case. A majority of the Supreme Court turned back the clock on civil rights, holding that racial distinctions were permitted under the Fourteenth Amendment. The separate-but-equal doctrine formulated by the Plessy majority held sway in America for over half a century, a period in which many State and local governments regulated the enjoyment of virtually every public benefit -- from attendance in public schools to the use of public restrooms -- on the basis of race. It was not until 1954 that the patent injustice of governmental allocation of benefits along racial lines ultimately -- indeed inevitably -- brought the Supreme Court to its finest hour: the case of Brown v. Board of Education, 349 U.S. 294 (1954).

In Brown, the Supreme Court finally laid to rest the separate-but-equal doctrine. The Court acknowledged with eloquent simplicity that the Equal Protection Clause requires race neutrality in all public activities. "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). Race consciousness as a tool for assigning school children was flatly and unequivocally condemned.

This judicial insistence on colorblindness in our public school systems was precisely the conclusion urged by the school children's attorney, Thurgood Marshall. Expressly rejecting the notion that the Constitution would require the establishment of "non-segregated school[s]" through race-conscious student reassignments, Mr. Marshall argued to the Court that: "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 drive to eliminate racial discrimination in virtually every aspect of American life. Nearly two centuries after the Declaration of Independence recognized the concept of equality as a "self-evident" truth, the principle was finally being written into law. Out of the turmoil, bitter debate and strife of the 1950's there began to emerge in the 1960's a broad recognition -- a consensus -- that official colorblindness and equal opportunity were not just legal commandments, but moral imperatives, that could no longer be denied.

None was more passionately committed to the colorblind principle of equal opportunity for all than the leaders of the civil rights movement, who had for so many years

courageously marched in bold defiance of those bent on ordering society according to the color of a person's skin. Preferential treatment based on race was, to them, intolerable, regardless of the purpose. Roy Wilkins, while he was Executive Director of the NAACP, stated the position unabashedly during congressional consideration of the 1964 civil rights laws. "Our association has never been in favor of a quota system," he testified. "We believe the quota system is unfair whether it is used for [blacks] or against [blacks] . . . [W]e feel people ought to be hired because of their ability, irrespective of their color . . . . We want equality, equality of opportunity and employment on the basis of ability."

Similarly, Jack Greenberg, Director-Counsel of the NAACP Legal Defense Fund, in urging the Supreme Court to invalidate a state statute requiring that a candidate's race be designated on each ballot, argued: "[T]he fact that this statute might operate to benefit a Negro candidate and against a white candidate . . . is not relevant. For, it is submitted the state has a duty under the Fifteenth Amendment and the Fourteenth Amendment to be 'color-blind' and not to act so as to encourage racial discrimination . . . against any racial group." 1/ The Court agreed and struck down the offending statute.

1/ Jurisdictional Statement Brief, Anderson v. Martin, 375 U.S. 399 (1964), p. 11-12 (emphasis added).

The principle of race-neutrality was fully endorsed as well by the Congress of the United States with passage of a series of important new laws designed to make equal opportunity a reality: the Civil Rights Act of 1957, 1960 and 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. That Congress intended these enactments to establish a standard blind to color distinctions is reflected in both the statutes' language and their legislative histories. For example, Senator Humphrey, the principal force behind passage of the 1964 Act in the Senate, 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. 110 Cong. Rec. at 11848.

The curiosity is that there are those today who challenge the colorblind ideal that was so staunchly defended in the 1960's by the real titans of the civil rights movement and the authors of the civil rights acts and the Fourteenth Amendment; there are those who take issue with the civil rights rallying cry of "race-neutrality" that filled the streets of this country with so many marchers just decades ago; and there are those who choose to disregard the Supreme Court's often repeated admonition that

racial distinctions of whatever sort are "by there very nature odious to a free people whose institutions are founded upon the doctrine of equality." E.g., Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

These critics argue that strict "race neutrality" must give way to a system which, because of past discrimination based on race, accords a preference to all members of the previously disadvantaged racial group. The quest for equal opportunity for those holding to this view has been turned in a new direction: their insistence is now upon equality of results. Numerical parity, or at least numerical proportionality, has for them become the test of nondiscrimination. Regulation and allocation by race, they maintain, are not wrong per se. Rather, their validity depends upon who is being regulated, on what is being allocated and on the purpose of the arrangement. If a racial preference will achieve the desired statistical result, its discriminatory feature can be tolerated, we are told, as an unfortunate but necessary consequence of remedying the effects of past discrimination -- using race "in order to get beyond racism" is the way one member of the Supreme Court put it. Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

It is no secret, of course, that this Administration categorically rejects such an approach. "The lesson of the great decisions of the Supreme Court and the lesson of

contemporary history have been the same for at least a generation," noted the late Alexander Bickel in his book The Morality of Consent (at p. 133). "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society," he added. Ibid. We subscribe, therefore, to the position advanced so often and defended so ardently by the late Justice William O. Douglas. "The Equal Protection Clause commands the elimination of racial barriers," he stated, "not their creation in order to satisfy our theory as to how society ought to be organized . . . ." 2/

Remedial goals, quotas, or set-asides based on race perpetuate the very evil that the Fourteenth Amendment seeks to remove: they erect artificial barriers that let some in and keep others out, not on the basis of ability, but on the basis of the most irrelevant of characteristics under law -- race. They turn upside down the dream of Dr. Martin Luther King, Jr. -- the dream that some day society will judge people "not by the color of their skin, but by the content of their character."

Perhaps the cruelest irony is that, in the broadest sense, color-conscious numerical measures pose the greatest threat to members of minority groups because it is they who are, by definition, outnumbered. In the individual sense, members of all racial groups stand to suffer, because an individual's energy, ability, enthusiasm, imagination and effort can take him or her no farther than permitted by his or her group's

2/ DeFunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting; emphasis added).

allotment or quota. What has long been a pursuit of equality of opportunity is thus in danger of becoming a forfeiture of opportunity in absolute terms: individual opportunity is being sacrificed at the expense of group-oriented ambitions measured in terms of proportional representation and proportional results. And this is in spite of the fact that, as Justice Powell observed in his controlling opinion in Bakke, "[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups." 3/

The more insistent Government is on the use of racial preferences -- whether in the form of quotas, goals or any other numerical device -- to correct what is perceived as an "imbalance" in our schools, our neighborhoods, our work places, or our elected bodies, the more racially polarized society becomes. Such a selection process inevitably encourages us to stereotype our fellow human beings -- to view their advancements, not as hard-won achievements, but as conferred benefits. It invites us to look upon people as possessors of racial characteristics, not as the unique individuals they are. It submerges the vitality of personality under the deadening prejudgments of race. The very purpose intended to be served is defeated, for race-based preferences cut against the grain of equal opportunity. And, while we are told repeatedly that

3/ University of California Regents v. Bakke, 438 U.S. 265, 298 (1978) (Opinion of Powell, J.).

this is temporarily necessary in the interest of achieving "equal results," let us not forget that it was the same justification (i.e., achieving "equal results") that sustained for over half a century the separate-but-equal doctrine -- which likewise looked to membership in a particular racial group as an accepted basis for according individuals different treatment.

That sobering thought provides a ready answer to those who argue that we must use race to get beyond racism. History teaches all too well that such an approach does not work. It is wrong when operated by government to bestow advantages on whites at the expense of innocent blacks; it assumes no greater claim of morality if "the tables are turned." More discrimination is simply not the way to end discrimination. We are all -- each of us -- a minority in this country: a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race, gender or ethnic origin. Whatever group membership one inherits, it carries with it no entitlement to preferential treatment over those not similarly endowed with the same immutable characteristics. Any compromise of this principle is discrimination, plain and simple, and such behavior is no more tolerable when employed remedially, in the name of "affirmative action," to bestow a gratuitous advantage on members of a particular group, than when it is divorced

from such beneficence and for the most invidious of reasons works to one's disadvantage.

What course, then, for civil rights enforcement into the year 2000, and beyond? My answer is: the same course navigated by Justice William O. Douglas, by Senator Hubert H. Humphrey, by Dr. Martin Luther King, Jr., by Roy Wilkins, and by the framers of the 1964 civil rights laws and the Fourteenth Amendment. As they fully recognized, the most direct route to a colorblind society is along the path of race-neutrality. And, this Administration has refused to stray from that path.

Where we have found unlawful discrimination to exist, we have enforced the civil rights laws to their maximum, both to bring such behavior to an abrupt halt and to ensure that every person harmed by such conduct is made whole. Each worker who was not hired or promoted because of race will be restored to his or her rightful place. Every child whose educational opportunity has been compromised because of race will have that opportunity restored.

But we will continue to challenge -- just as quickly and just as forcefully -- the remedies of overreaction. Racial quotas or goals in the workforce or the school room will not be sought, nor will they be accepted.

At the same time, we fully recognize the significant benefits our citizens obtain from attending a culturally diverse school and laboring in a multi-racial workforce. To recognize

the legitimacy of these benefits, however, is not to justify or support racial preferences in hiring, firing and promotions, nor to tolerate school assignments by race to achieve racial percentages.

Rather, the only sensible policy-course -- the one we follow -- is to expand recruitment, to reach out and include those minorities who were previously excluded, and then to judge all applicants on their individual merit, without discrimination. In education, the policy must be to expand educational opportunities with special magnet schools and other curriculum-enhancement programs, and then to allow all children to attend these or other schools within the system regardless of race or residence. With this approach, the callous injustice of racial discrimination can be cured -- not by imposing burdens on innocent individuals because of color, but by reaching out to all individuals and extending to them a full measure of opportunity and consideration based on merit.

Professor William Van Alstyne pointed in the right direction in his Chicago Law Review article "Rites of Passage: Race, the Supreme Court and the Constitution" (46 Chi. L. Rev. 775). As he there stated:

> . . . one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life -- or in the life or practices of one's government -- the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less

> well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

If we follow that sound advice, there is every prospect that by the Year 2000 the evil of discrimination that has plagued us for so many years can begin to be discussed largely as a problem of the past, rather than a "brooding omnipresence" that continues to haunt us for the future. If we do not, but rather choose the course of color-consciousness, my prediction is that -- as benign as the intent may be -- we will some twenty years from now be no closer to a realization of the dream of Dr. Martin Luther King, Jr. than we are today.

I leave you with that to ponder.

Thank you.