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CIVIL RIGHTS IN THE 1990'S: NON-DISCRIMINATION OR QUOTAS?

THE D. BRUCE MANSFIELD LECTURE

by

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AT THE
UNIVERSITY OF AKRON SCHOOL OF LAW

It is a great pleasure for me to be here today to talk with you about civil rights policy as it is being debated in this country during the latter part of the twentieth century. During the last few years I have been fortunate to occupy a prime vantage point on this discussion, first as the Deputy Solicitor General in charge of overseeing the civil rights filings of the United States in the Supreme Court, and, for the past several months, as the Deputy Attorney General, involved in putting together the administration's position on pending civil rights legislation dealing with many of the issues that the Supreme Court has been addressing in recent years.

Throughout the late 1970's and 1980's, our courts and legislatures have confronted, again and again, the question of how to go about assuring equal opportunity in a society where historical discrimination has left members of minority groups in the position of enjoying a lesser share of the benefits that this society has to offer. More specifically, the debate has focused on the question of affirmative action -- that is the use of race or sex, or some other trait, as an affirmative basis for selecting a particular candidate -- in employment, or school admission, or what have you.

I would like today to offer some thoughts on the way that we as a country have handled the issue of reverse discrimination as a means of pursuing equal opportunity. The burden of my message is essentially positive. This is a serious and difficult issue, and we have tended to approach it as such. It has been the focus of much honest disagreement and frank debate, especially in our courts. In my view, the conclusions that have been reached have been thoughtful and sensible, if not always the precise ones that I would have preferred.

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My first observation is that there is an undeniable tension between competing approaches to racial and gender justice that have been advanced and pursued in recent years. I take as my starting point the fundamental principle embodied in the Equal Protection Clause (as well as the Declaration of Independence), that, as the elder Justice Harlan said in dissent in *Plessy v. Ferguson*,¹ the Constitution is colorblind, and does not allow for official distinction by governmental bodies on the basis of a person's race. This principle reached its long-delayed realization in the 1954 decision in *Brown v. Board of Education*,² and has been at the core of most civil rights enforcement since that time. The numerous civil rights statutes of the 1960's and '70's had as their fundamental premise the notion that treatment of persons on account of certain specified immutable traits that are unrelated to merits or ability is wrong as a matter both of morality and of national policy.

It is this principle, with which I think we all can agree, which has given the moral strength to the civil rights movement. Martin Luther King's dream of a world where people are judged based on the content of their character and not on the color of their skin, is, I think, the unchallenged and undisputed objective to which decent people aspire. And yet, at the same time, the progress toward that objective has been less rapid than one would hope. It has been significant. But there have been fits and starts, and from time to time our forward progress faces discouraging obstacles, such as we now see with the recent upturn in racial violence. It is the case that economic success has not been enjoyed equally by members of all groups throughout society. The reasons for this are complex, but the consequences are clearly regrettable.

In order to speed progress toward true equality, our political branches and our courts, during the 1970's and '80's, undertook creative efforts to assure a heightened level of minority participation by making their minority status an affirmative basis for decision. Such affirmative action or reverse discrimination has taken many forms. It has been utilized by both government and the private sector. It has been a feature of court decrees, as part of remedial plans to deal with past discrimination. It has been incorporated into voluntarily instituted affirmative action plans, designed to bring an employer's work force into closer accord with the racial or gender breakdown of the potential work force. While it has been employed most frequently in the context of employment issues, reverse discrimination has also been significant in other areas as well, including government contracting, where minority and gender set-aside provisions have been widely adopted by local governmental bodies as a means of advancing minority participation.

Anyone who has followed the course of Supreme Court litigation on these issues knows that the decisions have been difficult and certainly not all one way. At different times it has looked like one side might be about to sweep all the opposing pieces off the board and declare total victory. Perhaps it looked that way during the

¹ 163 U.S. 537 (1896), *overl*d by *Brown v. Board of Education*, 347 U.S. 483 (1954).

late 1970's, for those favoring reverse discrimination, after the Supreme Court's decision in *Weber*,³ where the Court gave very broad berth to voluntary affirmative action by a private employer. And, to many in the Reagan Administration, it looked as though total victory for the non-discrimination principle might be imminent during the mid-1980's, after the *Stotts*⁴ decision came down using language easily read to state that only the victims of discrimination could be awarded judicial relief under Title VII. Those and other sweeping victories have, over time, proven to be illusory, and we are left with a state of the law which is both more thoughtful and less tidy.

With trepidation, an open acknowledgement that one is oversimplifying, and a recognition that the last chapter has certainly not yet been written, it is possible to recite briefly the current state of the law with regard to reverse discrimination. In doing so, it is now clear that one must draw a clear distinction between actions of private employers, whose conduct is limited only by statutory restrictions, and those of a governmental body, which must meet the stricter limits imposed by the Equal Protection Clause. Following *Weber*⁵ and the 1987 decision in *Johnson v. Transportation Agency*,⁶ it appears that a private employer has significant leeway to take voluntary steps to alleviate racial or gender imbalances in a work force. While I helped write a brief for the government in the *Johnson* case that argued for tighter limitations on private affirmative action, the majority read Title VII to allow for the use of race or sex as a factor in employment decisions where there is a manifest imbalance between the employer's work force and the available labor pool.

Where action by a governmental body is concerned, however, the strict commandment of the Equal Protection Clause is triggered, and reliance on a protected trait as a basis for action is only proper in very limited and carefully circumscribed situations. As in other cases raising a question of equal protection of the laws, such conduct must be justified not simply by an ordinary concern in state policy, but rather by a compelling state interest. That test has been further elaborated in terms of a two-step analysis. The first step in justifying such a practice is the specific identification of prior discrimination that is being remedied. More than a vague reference to general societal conditions or to statistical imbalance is required. Without first singling out the particular history of discrimination that the action is designed to address, action by the government in utilizing a race- or gender-conscious remedy will be treated as unjustified discrimination in violation of the Equal Protection Clause.

But the mere identification of prior discrimination needing a remedy does not suffice to justify affirmative discrimination under the Equal Protection Clause. The

³ *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

⁴ *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

⁵ 443 U.S. 193.

⁶ *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

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race-conscious remedy adopted must also be shown to be narrowly tailored to address the wrong that has been identified. This is not a concept that one can define with great precision, and perhaps it is easier to identify in its absence than its presence. Take, for example, last spring's minority set aside case of *City of Richmond v. Croson*.⁷ There the city's plan provided that 30 percent of contract money should go to a list of minorities which include Eskimos and Aleuts, which groups are virtually unrepresented in the Richmond area, and who could not remotely be shown to have experienced serious discrimination there. Certainly that was not a remedy that could be described as narrowly tailored to fit a wrong needing remedy.

One can argue about the correctness of this resolution of the affirmative action issue, and many people have been doing just that for some time. It is not perfect. It leaves a decided tension between the principle of non-discrimination, which is fundamental, and the remedial objective of securing more extensive representation of groups which have suffered discrimination in the past. There is no doubt that the Supreme Court has allowed for the possibility that people will be chosen for jobs because of traits that we would like to view as totally irrelevant. But, at least where governmental action is in issue, that can happen only in limited situations. Furthermore, one is left with the sense from the Supreme Court's language that race- and sex-conscious remedies are viewed, even in the limited circumstances where they are acceptable, as temporary measures, suitable at this time in our history, but not necessarily for the indefinite future.

My purpose today is not principally to argue for a particular conclusion with regard to the conflict between non-discrimination and reverse discrimination. I happen to believe that there is much to be said for the accommodation that the court has reached, at least where the Equal Protection Clause is concerned. It has the advantage of allowing for some remedial flexibility, but only allows for the utilization of a race-conscious or gender-conscious approach where much thought has been invested into seeking other alternatives. It also limits and focuses the remedy in a way that will minimize its intrusion on the fundamental moral principle that discrimination -- for whatever reason -- must not be a common tool in the armamentarium of American justice.

The primary message I do want to convey is that whatever I or anyone else may think about the merits of the position that the Supreme Court has reached, the question of affirmative action is one that merits substantial debate and discussion. The answers are never going to be crystal clear. This is one of the ways, in the words of the Chinese curse, that we are destined to live in interesting times. It is a conundrum, and in a democracy such issues are dealt with by ventilation and debate. That is as it should be, and it is our security that whatever resolutions are reached, whether by a court or a legislature, must stand up in the light of day.

⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
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It is in that vein that I would like to talk to you about the proposed Kennedy-Hawkins civil rights bill,⁸ which was announced in early February, and whose sponsors are pressing for early passage. This is an omnibus -- perhaps better described as a blunderbus -- bill, in the broadest sense of that term. It purports to reverse five major decisions of the Supreme Court from the 1988 term, and a number of other more minor decisions from that and prior years. There are definitely some things in it that deserve your support. The Bush Administration has endorsed similar legislation in two areas relating to Supreme Court decisions of last term. In *Patterson v. McLean Savings*,⁹ where the Court read narrowly the applicability of 42 USC 1981, relating to intentional racial discrimination in contracting, we have urged the revision of that statute so as to assure its coverage of intentional discrimination in any aspect of dealings relating to governmental or private contracts. Also, in *Lorance v. AT & T Technologies*,¹⁰ where the Court construed Title VII in a way to bar many of those affected by intentionally discriminatory seniority provisions from ever having a day in court, we have also urged a change restoring to such plaintiffs the right to sue.

Other aspects of the bill make far less sense. It undertakes a total reconceptualization of our federal employment discrimination law, Title VII -- which has served us well for 25 years -- in a way that will greatly expand plaintiffs' damage remedies. There is good reason to expect that this would convert the statute from a mechanism designed to put discrimination victims back into their rightful place, into an engine of litigation which will create a lottery atmosphere. Rather than working to settle discrimination litigation quickly, in order to get plaintiffs back to work and end the dissension which is harmful to both morale and productivity, one can expect that plaintiffs and lawyers alike will persist in court for years in hopes of hitting the jackpot big.

In the area of mixed-motive employment decisions, where, for example, a particular decision to terminate comes about based on both proper and improper motivations, the Supreme Court in the *Price Waterhouse*¹¹ decision concluded that the employer can prevail by proving that the adverse action would have been taken in any event, even if the improper discriminatory motive had not existed. In that instance, Justice Brennan concluded for the majority, it cannot be said that the termination resulted from any discriminatory action, since it would have come about were no such motive present. Notwithstanding this reasoning, the bill provides that a plaintiff in such a circumstance can recover damages from the employer -- apparently for the employer's act of thinking an improper thought, although it had no consequence to the plaintiff. Such a provision is unprecedented in the law and, I think, raises serious constitutional questions under the First Amendment.

⁸ S.2104, H.R. 4000, 101st Cong., 2d Sess. (1990).

⁹ *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

¹⁰ *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989).

¹¹ *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

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My greatest concern, however, lies with the aspects of the Kennedy-Hawkins bill that would quietly institutionalize reverse discrimination and, more specifically, quotas as a basic fact of American life. These parts of the bill, which concern the Court's decisions in *Ward's Cove Packing Co. v. Atonio*¹² and *Martin v. Wilks*,¹³ are being promoted by the sponsors in a much less than candid way. We are told repeatedly that the bill has nothing to do with quotas. It is just a restoration of civil rights that previously existed, before the Supreme Court took them away. Nothing could be further from the truth.

In *Wards Cove Packing*,¹⁴ the Court recognized three fundamental principles relating to the allocation of burdens in employment discrimination cases alleging discriminatory or disparate impact. The Kennedy-Hawkins bill seeks to reverse all of them. Moreover, the bill would establish a proof scheme wherein a plaintiff need only show that the employer's selection process viewed as a whole produces a statistical imbalance. If he or she does so, the burden of proof would shift to the employer to either negate the showing of imbalance, or to demonstrate that any selection device which does produce a disparate selection rate is essential to the employer's business.

This is a very heavy burden which will be virtually impossible for an employer to carry. Previous Supreme Court cases have demanded only that there be a reasonable relationship between the selection device and the job for which it is being utilized. The new test would demand that the device be not merely job-related, but that it be something that the employer can not do without. If it is enacted into law, one can be certain that a rational employer is going to avoid the path of litigation which he or she can not possibly win. The only way to do that is to make sure that no statistical imbalance results from the hiring and promotion decisions made. That means that, explicitly or implicitly, hiring will be done in accordance with a quota. The authors of Kennedy-Hawkins do not want to talk about that.

In the *Wilks*¹⁵ case, the court was confronted with the question of whether white firefighters in Birmingham who had not participated in a previous litigation retained the right to challenge on constitutional grounds the consent decree which had been entered in that litigation. The consent decree utilized a hiring and promotion quota as a mechanism to remedy a history of prior discrimination. Without deciding the merits of the plaintiffs' challenge to the consent decree, the Supreme Court decided as a matter of ordinary civil procedure and due process that they have a right to a day in court in order to have those constitutional claims heard. The Kennedy-Hawkins bill would reverse that conclusion as well. It would single out federal employment discrimination cases to be treated differently from all other

¹² *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

¹³ *Martin v. Wilks*, 109 S.Ct. 2180 (1989).

¹⁴ 109 S.Ct. at 2118-2127.

¹⁵ 109 S.Ct. at 2182-88.

types of civil litigation, and make them virtually immune from challenge by parties whose rights they effect and who have never had an opportunity to have their claims heard.

Where a person had notice of the prior proceeding, or lacking that, if his or her interests were adequately represented there, or, even failing that, if the court determines that reasonable efforts were made to provide notice to interested persons, the person will be foreclosed from challenging the prior decision. This approach is completely at odds with the basic principle of American jurisprudence that a person has a right to a day in court. It is designed to protect civil rights decrees, including those implementing quota remedies, from further judicial scrutiny by people wanting to assert that the decrees cannot stand under the Supreme Court's limitations on the use of reverse discrimination.

I believe that these provisions of the proposed legislation are unsound. And I believe that if they are honestly discussed and seen for what they are, they will be rejected. They are not responsive to the Supreme Court's call to hard thinking about these difficult issues. They are not an effort to learn to live with real tensions in our beliefs and priorities. The campaign for adoption of the Kennedy-Hawkins legislation is rather more like trying to smuggle an elephant by insisting that it is a mouse. The sponsors simply insist that the bill has nothing to do with quotas and other race-conscious remedies. They are aided in that undercover operation by the complexity of the provisions, and the sheer volume of material that has been put forward in the bill. I ask your help in piercing this veil of obscurity, and insisting that these issues so central to our national conscience be made the subject of a full and open discussion.

