

Chapter I

Rights at Risk

In June 1997, then-President Bill Clinton launched his “Initiative on Race,” saying such a national effort “is the unfinished work of our time, to lift the burden of race and redeem the promise of America.”

Today those words echo as a distant memory. The Clinton initiative faltered and faded from public consciousness. Then soon after we entered the new millennium with a new Administration, the nation was confronted with the shock and tragedy of the September 11 terrorist attacks. The urgent need to protect national security and combat terrorism understandably became all-consuming and seemed to blot out other concerns.

Now, as the Bush Administration enters its second year, an economic decline and domestic tax policies may curtail government resources needed to combat discrimination and to provide assistance to the disadvantaged. Racial and other forms of discrimination appear to have faded from national consciousness, even as remedies for denials of equal opportunity receive unfriendly attention from the courts and the executive branch.

I. The Judicial Assault on Rights

Perhaps the most far-reaching assault on civil rights remedy is the judiciary’s dismantling of the principles of affirmative action that had guided previous decisions — the idea as expressed by former Justice Harry Blackmun that “in order to get beyond race we must first take race into account.” Taking a cue from the five-Justice majority that has ruled against race-conscious action in several cases, some lower courts have gone even further to strike down voluntary efforts by colleges and universities to pursue policies of diversity and inclusiveness in admitting students. A similar assault is taking place in the area of elementary and secondary education.

In the 1990s, the conservative Supreme Court majority issued three decisions closing the books on court-ordered desegregation with the proposition that if school officials were acting in good faith courts should relinquish jurisdiction even if vast educational inequities remained.

Now, some federal courts have gone a step further and said that school officials may not act *voluntarily* to avoid racial isolation of schools (through such devices as magnet

schools) even when they justify their policies as educationally and socially sound.

These decisions have reversed the progress of earlier years and led to a trend toward resegregating America. That trend has been reinforced by failures to fully enforce the fair housing laws and by the dissolution of federal programs designed to give low-income people access to affordable housing outside areas of highly concentrated poverty. At the same time new patterns of urban sprawl have succeeded the suburbanization trends of the 1940s, 1950s, and 1960s. Increasingly, large numbers of affluent whites have found homes far from central cities and jobs to accommodate them have been located along interstate highway corridors. The results, in addition to inefficient use of resources, have been segregation and lack of access by low-income people of color to jobs and services. Dialogue about how to change this through “smart growth” policies seems not to be high on government’s agenda.

The Supreme Court’s assault on civil rights remedies has not been limited to decisions curbing affirmative action. Among the most important decisions of the Burger Court during the 1970s were opinions affirming that the Civil Rights Act of 1964 prohibited not simply acts of deliberate discrimination but practices that had an adverse impact on minorities and women that could not be justified as necessary to the operation of a business or other institution. So, for example, if a police or fire department imposed height, weight, or strength requirements for recruits that disadvantaged women and could not be justified as necessary to performance of the job, these would be struck or modified under Title VII of the 1964 Act. If a public school consigned children to a dead-end track for “educable mentally retarded” without considering whether they might succeed better if mainstreamed, the tracking could be treated as a violation of Title VI of the 1964 Act.

When the Court wavered in this view in the 1980s, Congress passed the Civil Rights Act of 1991, specifically affirming its purpose to provide a remedy for nonpurposeful discrimination.

But in 2001, the Court’s five-member majority again curbed the right of people suffering such discrimination to obtain a remedy under Title VI of the Civil Rights Act of 1964, holding that a Latino woman had no right to challenge in court an Alabama law that barred non-English speakers from obtaining driver’s licenses. Even if the Bush Administration decides to enforce Title VI with vigor, a proposition by no means certain, hundred of thousands of people who are subjected to discrimination in education, housing, transportation, the administration of justice, and many other areas will be stripped of a remedy.

The Court majority has not stopped at narrowing long accepted interpretations of the rights declared by the Constitution and Congress; it has also challenged the authority of Congress and state legislative bodies to enact protections for civil rights. Thus in two cases radically reinterpreting the 11th Amendment, the five-member majority has held that state officials are sovereignly immune from damage suits for their acts of discrimination against older people and people with disabilities.

So, too, the same majority has decided that the Commerce Clause, long accepted as a basis for federal laws protecting the social and economic interests of individuals, could not provide a basis for a law prohibiting violence against women.

Similarly, although section 5 of the 14th Amendment grants Congress affirmative power to implement the Amendment’s protections, the Court majority has decided that extensive hearings and findings by Congress

may not justify some laws providing a right of action against discrimination.

In sum, a narrow majority of the Supreme Court has begun over the last decade to reshape American jurisprudence in ways that thwart individuals seeking to participate fully in society and that squelch the efforts by coordinate branches of government to remove barriers to equal opportunity.

The judicial nominations that President Bush will make during his term in office and how the Senate uses its advice and consent powers will determine whether this trend will continue far into the future or whether some balance will be restored to the Courts' decision-making.

II. The First Months of the Bush Administration

On the crucial question of judicial appointments, the direction of the Bush Administration seems ominous. The President said as a candidate that he would seek to appoint more justices like Antonin Scalia and Clarence Thomas to the Supreme Court. His Administration ended the role that the American Bar Association had played for half a century in screening the qualifications of candidates and sought the advice of the right-wing Federalist Society in finding nominees. And the early nominations of Mr. Bush to key positions on Circuit Courts of Appeals included people with long records of opposing the use of federal authority to protect civil rights.

While many senators have professed concern about the direction of the federal courts, they have been reluctant to state clearly that they would oppose nominees whose record and philosophy demonstrate an unwillingness to protect the least powerful members of American society. If senators mount only token resistance to the apparent Bush Administration strategy of filling appellate va-

cancies with nominees who mirror the views of Justices Scalia and Thomas, erosion of the promise of equality of opportunity will continue.

In its appointments of persons to key civil rights positions in the executive branch, the Bush Administration appears to have adopted a policy of populating henhouses with foxes. One exception is the nomination of an experienced person with a strong civil rights background as Chair of the Equal Employment Opportunity Commission. But the pivotal job of Assistant Attorney General for Civil Rights at the Justice Department has been filled with a person who has very little experience in the area. He reports to an Attorney General with a history of defying civil rights laws and must work with a Solicitor General who has a record of opposing civil rights remedies in the courts. And, reportedly, he has been surrounded in the Division with members of the Federalist Society whose mission is to narrow the application of civil rights laws. While it is still early in the Administration, the decision of the Civil Rights Division to withdraw support in a court of appeals from an important claim of sex discrimination in employment may be a harbinger of things to come.

Similarly, the Administration has successfully nominated a General Counsel at the Department of Education and is seeking confirmation as Assistant Secretary for Civil Rights two people who are on record as opposing major remedies the Department employs in implementing the civil rights laws. Both lack any experience in the field of education. One important issue pending at the Department is whether to issue guidance on testing to school officials throughout the nation. The guidance, adopted by the Clinton Administration after careful study, calls upon educators to ensure that tests that may have an adverse impact on students of color or those with disabilities or limited English proficiency meet professional standards of validity, reliability, and fairness.

Although it was supported by all major education associations, civil rights groups and test publishers, the Bush Administration withdrew the guidance and put it on the shelf presumably for further study. If the stated opposition of the Bush Administration nominees to remedies for nonpurposeful discrimination is allowed to prevail, the cause of education reform espoused by the Bush Administration, as well as fair treatment for students, will receive a setback.

Other policies being pursued by the Bush Administration threaten the interests of minorities and the poor. When the new century began, surpluses in the federal budget encouraged many to believe that new investments in employment, education, housing and health could provide opportunity for those worst off in American society. Now, an economic recession, the costs of defending against terrorism, and — most of all — a huge tax cut sought and obtained by the Bush Administration for the direct benefit of the affluent have wiped out the surplus and all but extinguished the hopes of many who would have benefited by an investment in their futures. Further, steps taken by the Administration to dismantle or water down regulatory protections of the environment and of the health and safety of workers are having disproportionately adverse impacts on people of color and the poor.

In the area of administration of justice, concern about such matters as racial profiling and the detention and deportation of immigrants on insubstantial grounds appears now to have been overshadowed by the fears generated by the September 11 attacks.

Finally, whatever one's view of the legitimacy of the outcome of the November 2000 election it is clear that people of color are still disproportionately disenfranchised by outmoded voting equipment and local prejudice or indifference.

III. The Road Ahead

During his Administration, President Bill Clinton held the banner high for the loftiest goals of equal opportunity. He told young people that:

[T]he alternative to integration is not isolation or a new separate but equal; it is disintegration.

His policies sometimes failed to match his rhetoric. Provisions he sponsored or agreed to in the welfare reform and immigration laws have added misery to the lives of many poor women and children and people of color. He appeared to lack the will to fight for the confirmation of his court nominees. But he preserved government's positive approach to protecting the rights of its people by "mending" rather than "ending" affirmative action policies. And through strong and capable appointments in key areas of the executive branch he helped ensure that civil rights laws would be enforced to provide opportunities for those who had suffered discrimination.

Like his predecessor, George W. Bush appears to have an understanding of the sensibilities and concerns of disparate groups of people. In his successful campaign for an education reform bill he spoke often of the "soft bigotry of low expectations" of poor children and children of color. In the aftermath of September 11, he sought to ward off racial recriminations by appealing for fair treatment of Muslim and Arab Americans.

But Mr. Bush's open and positive views stand in stark contrast to the declared agenda of the core of his political party. That core seems determined, with the President's concurrence, to reshape the federal courts so as to undo the civil rights and social justice gains of the last half of the 20th century. It seems determined to pursue legislative and executive policies that will widen the

gap between the haves and have-nots. These results are not inevitable. Occasionally, the advocates of more positive social and economic policies prevail, as when the Bush Administration recently advocated a restoration of food stamp benefits to noncitizens.

But the trend is unmistakable. What is needed now is a conscious, bipartisan effort

to restore momentum and balance to the nation's quest for opportunity for all its people. Lacking this, we may awaken some day from our understandable preoccupation with national security to find ourselves a nation more divided, less equal — and therefore less secure — than before.