

TURNING BACK THE CLOCK: THE REAGAN ADMINISTRATION AND CIVIL RIGHTS

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Introduction

Controversy has swirled around civil rights issues in the United States for as long as these issues have been discussed. Nevertheless, for at least the past forty years, our society has basically agreed on some civil rights principles. For the past two decades, federal civil rights laws have protected citizens, to an ever expanding degree, from a variety of forms of discrimination, particularly in the areas of voting, education, and employment.¹ If national civil rights policy, as reflected in federal laws, is to be translated into real protection in the lives of citizens, however, public officials must aggressively enforce these laws. This article first will outline the national consensus to eliminate various forms of discrimination, and then will proceed to demonstrate how the Reagan Administration has inadequately enforced and otherwise undermined, if not violated outright, settled law in the field of civil rights.²

In the area of employment discrimination, national policy can be traced through both executive orders and legislative enactments regulating federal government hiring policies. Since

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¹42 U.S.C. §§ 1973–1973bb-1, 2000c–2000c-9, 2000e–2000e-17 (1976 & Supp. V 1981).

²Criticism of incumbent administrations by former federal officials is a time-honored tradition in American political life. It is also traditional for the public to discount such criticism as “partisan sniping” that adds more heat than light to national debate over government policies. Consequently, some readers will be inclined to relegate what follows here to that category. The author has sought, however, to avoid using this forum to catalogue his numerous disagreements with the Reagan Administration on matters of *policy*. Rather, this paper documents the Reagan Administration’s failure to uphold settled law in the field of civil rights.

President Roosevelt established the Fair Employment Practice Commission in 1941,³ it has been accepted policy that the federal government should not be allowed to use discriminatory criteria in hiring. Executive orders promulgated by Presidents Kennedy,⁴ Johnson,⁵ and Nixon⁶ have extended such protections against discriminatory hiring by requiring federal contractors not to discriminate in hiring for projects funded by tax revenues. Title VII of the Civil Rights Act of 1964 (amended in 1972)⁷ enacted into federal law the principle that society would not tolerate discrimination on the basis of race, sex, national origin, color, or religion by any employer—private or public, municipal, county, state, or federal. Several federal agencies, most notably the Equal Employment Opportunity Commission⁸ and the Department of Justice,⁹ are charged with enforcing this law.

Regarding discrimination in education, national policy was dramatically shaped by the Supreme Court's 1954 opinion in *Brown v. Board of Education*.¹⁰ In *Brown*, the Supreme Court outlined the elements of a national policy against racial segregation in education which have become generally accepted today. Simply put, the *Brown* Court held that state-imposed racial segregation in public education was unconstitutional.¹¹ In subsequent decisions the Supreme Court has built upon *Brown* to establish another important principle: racial integration in education is appropriate both as a societal goal and as a remedy for past discrimination in education.¹² As the Supreme Court stated

³Exec. Order No. 8802, 3 C.F.R. 957 (1941).

⁴Exec. Order No. 10,925, 3 C.F.R. 448 (1961).

⁵Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. § 2000e at 1232-36 (1976).

⁶Exec. Order No. 11,478, 3 C.F.R. 803 (1969), *reprinted in* 42 U.S.C. § 2000e at 1236 (1976).

⁷42 U.S.C. §§ 2000e-2000e-17 (1976).

⁸42 U.S.C. §§ 2000e-4, 2000e-5 (1976).

⁹42 U.S.C. § 2000e-6 (1976).

¹⁰347 U.S. 483 (1954).

¹¹*Id.* at 495.

¹²*See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Cooper v. Aaron, 358 U.S. 1, 19 (1958). The Court recently reaffirmed the validity of this principle in *Bob Jones Univ. v. United States*, 103 S.Ct. 2017 (1983), declaring that "an unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial

in 1971, "School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." The Court found that such a decision would be within the "broad discretionary powers of school authorities."¹³

Congress has shown support for school desegregation in several ways. Under the Civil Rights Act of 1964, it authorized the Attorney General to sue on behalf of children subjected to racial segregation and to join suits already filed by blacks seeking an end to such segregation.¹⁴ Moreover, in Title VI of that Act, Congress provided that the United States government may not provide financial assistance to persons or organizations that discriminate on the basis of race, color, or national origin.¹⁵ Finally, in 1972, Congress enacted the Emergency School Aid Act (ESAA) to assist school systems undergoing desegregation, whether voluntarily or pursuant to court order.¹⁶

The national consensus on voting rights began in 1870 when the Constitution was amended to provide that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous conditions of servitude."¹⁷ Since then, federal courts have struck down a host of simple-minded as well as sophisticated efforts to deprive racial minorities of the right to vote.¹⁸ Congress has also acted to ensure that the right to vote, the "fundamental political right because preservative of all rights,"¹⁹ remains available in practice as well as in theory.

discrimination in education violates a most fundamental national public policy" *Id.* at 2029.

¹³*Swann*, 402 U.S. at 16.

¹⁴42 U.S.C. §§ 2000c, 2000h (1976).

¹⁵42 U.S.C. §§ 2000d through 2000d-4 (1976).

¹⁶Pub. L. No. 92-318, 86 Stat. 354 (1972)(codified as amended at 20 U.S.C. §§ 1601-19 (1976)(repealed 1978)).

¹⁷U.S. Const. amend. XV.

¹⁸*See, e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953)(white private organization's primary election designed to exclude blacks from effective participation in electoral process); *Lane v. Wilson*, 307 U.S. 268, 275 (1939)(variation upon "grandfather clause" technique which allowed whites to avoid meeting educational qualifications imposed upon black persons seeking to register).

¹⁹*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

In 1957, Congress enacted the first federal legislation since Reconstruction designed to vindicate the rights of blacks to vote.²⁰ It passed increasingly more stringent provisions during the Eisenhower,²¹ Johnson,²² Nixon,²³ and Ford²⁴ Administrations in response to evidence of continued racial discrimination in the electoral process. In 1982, Congress extended until 2009 the voting rights provisions originally enacted in 1965.²⁵ Underlying the efforts of Congress was the principle that blacks should be encouraged to pursue peaceful means in fighting racial bias.²⁶ To that end, the government should protect them against exclusion from the electoral process.

These developments in the civil rights area over the past forty years reflect the nation's acceptance of two basic premises: first, that America has yet to fulfill the promises of "life, liberty and the pursuit of happiness" on an equal basis for large groups of its citizenry; and second, that the federal government should play a major role in vindicating civil rights. Federal antidiscrimination laws envisioned that the Attorney General and the Assistant Attorney General for Civil Rights would be advocates for those members of society least able to assert their rights.²⁷

²⁰Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of U.S.C.).

²¹Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of U.S.C.).

²²Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a through 2000h-6 (1976 & Supp. V 1981)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 through 1973bb-1 (1976 & Supp. V 1981)).

²³Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. §§ 1973, 1973b, 1973c, 1973aa through 1973bb-4 (1976 & Supp. V 1981)).

²⁴Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973-1973d, 1973i, 1973k, 1973l, 1973aa through 1973aa-5 (1976 & Supp. V 1981)).

²⁵Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C.A. §§ 1971, 1973, 1973b, 1973c, 1973aa-1a, 1973aa-6 (West Supp. 1983)).

²⁶President Lyndon Johnson publicly recognized this principle in a statement made at the time of the Selma, Alabama protest marches when he spoke of the need to move the conflict "from the streets to the Courtroom." News Conference of President Lyndon Johnson, March 13, 1965, 1 Public Papers of Lyndon B. Johnson 274 (1965).

²⁷The Civil Rights Act of 1964 and the Voting Rights Act of 1965, among

In addition, the President has the constitutional duty to "take care that the laws be faithfully executed."²⁸ It is now clear that "the laws" include civil rights laws as well.

The Reagan Administration, however, has failed to "take care" that the civil rights laws are faithfully executed. It has instead taken categorical positions against settled principles of civil rights law, irrespective of the circumstances of any particular case.²⁹ Furthermore, the administration has often joined private parties seeking to restrict or curtail rules that were established to remedy civil rights violations, rather than serving as the advocate of those subjected to systematic discrimination.³⁰

I. Employment

Congress passed Title VII of the Civil Rights Act of 1964, and expanded its scope in 1972, because it concluded that employment discrimination was deep-seated and pervasive in both the public and private sectors.³¹ Title VII outlaws practices having the purpose or effect of excluding persons from job opportunities for reasons unrelated to their capacity to do the job.³² It also provides the courts with a broad range of remedial techniques for addressing such discrimination. Though the Supreme Court has not spoken to the issue, every federal appellate court that has addressed the question concluded that, under some circumstances, numerical goals and timetables may be an appropriate part of a remedial order.³³

others, specifically charge the Attorney General with the duty to bring court challenges to patterns of discrimination in employment, 42 U.S.C. § 2000e-6a (1976 & Supp. V 1981); desegregation, 42 U.S.C. § 2000c-6a (1976); and voting, 42 U.S.C. § 1971c (1976). The Attorney General has delegated substantial portions of his responsibilities to the Assistant Attorney General for Civil Rights. *See, e.g.*, 28 C.F.R. § 51.3 (1983)(voting).

²⁸U.S. Const. art. II, § 3.

²⁹*See infra* notes 68-78 and accompanying text.

³⁰*See infra* notes 86-95 and accompanying text.

³¹H.R. Rep. No. 914, 88th Cong., 1st Sess. pt.2, 26-30 (1963); *Legislative History of the Equal Employment Opportunity Act of 1972*, Senate Comm. on Labor and Public Welfare, Subcomm. on Labor 68-69 (1972).

³²*Griggs v. Duke Power*, 401 U.S. 424 (1971).

³³*Thompson v. Sawyer*, 678 F.2d 257, 293-95 (D.C. Cir. 1982); *Association Against Discrimination, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981),

This type of remedy is the subject of several popular misconceptions, to which the following clarifications are addressed. First, the goals and timetables are not necessary in every case, but are most appropriate when the discrimination is so longstanding or particularly virulent that the employer found guilty of violating Title VII cannot be trusted to "turn over a new leaf." Furthermore, courts do not rush to impose goals and timetables or numerical quotas, but often employ alternative remedies for many years before determining that a particular case meets the above criteria.

For example, courts found *Morrow v. Crisler*³⁴ to be one such case. There, the district court in 1971 had found the Mississippi state police guilty of racial discrimination in employment. The state police had *never* hired a black as a trooper.³⁵ The district court ordered the state police to refrain from discriminatory hiring practices, but did not impose an affirmative hiring program. During three years of "good faith" hiring efforts, the Mississippi state police hired only six blacks out of ninety-one new hires.³⁶ Only after these inadequate efforts did the court of appeals finally order the state police to establish an affirmative hiring program and remand the case to the district court for implementation. In doing so, it recommended the temporary adoption of a one black/one white or a one black/two white hiring quota until the percentage of blacks in the state

cert. denied, 455 U.S. 988 (1982); *Chisholm v. United States Postal Service*, 665 F.2d 482, 498-99 (4th Cir. 1981); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-44 (9th Cir. 1977), *vacated on other grounds*, 440 U.S. 625 (1979); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied sub nom.* *Adams v. City of Chicago*, 434 U.S. 875 (1977); *Morgan v. Kerrigan*, 530 F.2d 431, 434 (1st Cir.), *cert. denied sub nom.* *Doherty v. Morgan*, 426 U.S. 935 (1976); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).

Where the issue has not been decided directly, other federal courts of appeals have expressed support for the use of goals and timetables generally by approving their use in challenged voluntary affirmative action plans. *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

³⁴491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

³⁵491 F.2d at 1055.

³⁶*Id.*

police equaled the percentage of blacks in the state.³⁷ The court of appeals concluded that Mississippi would never comply with the law without the imposition of such a strict requirement.³⁸

Second, goals and timetables usually are more lenient than those that the Mississippi court imposed. Court orders in many circumstances set standards far below what workforce compositions would be under nondiscriminatory conditions.³⁹ Third, in imposing quotas, the law neither requires nor expects employers to hire unqualified people in order to satisfy judicial goals and timetables. The concept of "rigid quotas" does not mean that employers must hire or promote without regard to qualifications. If an employer fails to meet the benchmark mandated by a court but can demonstrate convincingly that a sufficient number of women, blacks, or other racial minorities were unavailable, the employer cannot be forced to hire unqualified applicants.⁴⁰

Finally, federal courts have established goals and timetables as remedies only in hiring, not promotion, situations. The rationale for this distinction is that the realistic expectations of incumbent nonminority or male employees should not be thwarted unnecessarily.⁴¹ The expectations of job applicants are insufficient to prevent the imposition of goals or timetables in

³⁷*Id.* at 1056.

³⁸*Id.* at 1055. For another example of the use of goals and timetables to remedy recalcitrant discrimination, see *Vulcan Soc'y v. Civil Serv. Comm'n.*, 490 F.2d 387, 398 (2d Cir. 1973)(court approves 3-to-1 white to minority hiring quota where minorities, representing 32 percent of the community population, composed only five percent of department employees).

³⁹See B. Schlei & P. Grossman, *Employment Discrimination Law* 1398-1412 (2d ed. 1983), for a full discussion of the use of goals and timetables as employment discrimination remedies.

⁴⁰See *Valentine v. Smith*, 654 F.2d at 510 ("A race-conscious affirmative action program is substantially related to remedying past discrimination (and is therefore constitutionally valid) if . . . (3) the plan does not result in hiring unqualified applicants."); cf. *Bratton v. City of Detroit*, 704 F.2d 882, 891-92, *reh'g denied*, 712 F.2d 222 (6th Cir. 1983)(White employees passed over in favor of blacks are not stigmatized provided that the blacks chosen are qualified.); *Van Aken v. Young*, 541 F.Supp. 448 (E.D. Mich. 1982).

⁴¹*Kirkland v. New York State Dep't. of Corrections*, 520 F.2d 420, 426-30 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976)(rights of incumbent civil service workers recognized and protected against imposition of a promotion quota).

hiring, but incumbent employees' expectations of a promotion may be substantial enough to block an otherwise valid and necessary affirmative remedy.

For more than a decade, federal prosecutors have sought, and courts have granted, remedies consisting of goals and timetables in employment discrimination lawsuits. Department of Labor officials in the Nixon Administration originally developed the idea in the course of enforcing the "Philadelphia Plan," a program designed to increase minority employment in federal or federally-assisted construction in the five-county area surrounding Philadelphia. After several years of experience, Department officials concluded that government contractors would never make changes in their workforces if the statute required them only to exercise "best efforts" and "good faith" to hire minorities.⁴² The Department responded with rulings requiring all bidders for construction contracts to institute affirmative action plans designed to increase minority hiring to levels the Department deemed acceptable.⁴³

⁴²*The Philadelphia Plan, Congressional Oversight of Administrative Agencies (The Department of Labor); Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 26-27 (1969)*(memorandum of Arthur A. Fletcher, Assistant Secretary of Wage and Labor Standards dated June 27, 1969)[hereinafter cited as Philadelphia Plan]; Silberman, *The Search for an Effective Remedy in Employment Discrimination*, 1970 N.Y.U. Ann. Labor Conf. Proc. 133, 135-40 (1971)(author was President Nixon's Solicitor of Labor).

⁴³In June and September, 1969, the Department of Labor issued two rulings enforcing the "Philadelphia Plan." *Philadelphia Plan*, *supra* note 42, at 26, 30. The June order required, among other things, that bidders for construction contracts submit affirmative action plans that included specific goals to utilize minority workers in six skilled crafts. After hearings on this question, in September the Department established specific ranges for minority workers, in percentages, for a period of four years. No bidder would be considered unless its affirmative action plan fell within the ranges established by the Department. Attorney General John Mitchell declared this enforcement program legal, 42 Op. Att'y Gen. 405, 408 (1969), and the courts upheld his decision. *See, e.g., Contractors Ass'n. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). For a full discussion of the enforcement of this executive order, *see generally*, Jones, *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 As Amended*, 59 Chi. Kent L. Rev. 67 (1982); Jones, *The Bugaboo of Employment Quotas*, 1970 Wis. L. Rev. 341; Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 724 (1972); Comment, *The Constitutionality of*

Following the Labor Department's lead, the Department of Justice during the Nixon Administration also filed a number of employment discrimination suits under Title VII which sought and obtained remedies that included affirmative hiring plans.⁴⁴ When Congress amended Title VII in 1972 to include public employers—municipal, state, and federal—it considered and expressed its approval of the courts' use of goals and timetables in certain cases to remedy employment discrimination.⁴⁵ Both the Ford and Carter Administrations also acknowledged the importance of goals and timetables to achieve equal employment.⁴⁶

'Affirmative Action' To Integrate Construction Trades: The Philadelphia Plan, 43 Temp. L.Q. 329 (1970).

⁴⁴See, e.g., *United States v. International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970)(remanded to district court for consideration of some form of affirmative action remedy).

⁴⁵During debate over the 1972 Act in the Senate, Senator Sam Ervin introduced an amendment which would have prohibited federal agencies and officials from imposing goals and timetables or other forms of numerical relief under the Executive Order or Title VII. *Legislative History of the Equal Employment Opportunity Act of 1972*, supra note 31, at 1038. Senators Harrison Williams, the floor manager, and Jacob Javits, the minority floor manager, opposed his proposal, specifically citing *Contractors Association*, 442 F.2d 159, and *United States v. Ironworkers' Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 980 (1971), as evidence of judicial support for such remedies and the necessity for their use to achieve effective relief in certain cases. *Legislative History*, supra note 31, at 1046, 1048. Senator Ervin's amendment was defeated by a vote of 43 to 22. *Id.* at 1037-38.

⁴⁶The "Policy Statement on Affirmative Action," adopted during the Ford Administration, 41 Fed. Reg. 38,814 (1976), and included as an appendix to the 1978 *Uniform Guidelines on Employee Selection*, 29 C.F.R. § 1607.17 (1983), reads as follows:

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described . . . above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim, goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market.

Id.

The current administration has nevertheless taken the position that it will not under any circumstances seek hiring goals and timetables to remedy proven employment discrimination.⁴⁷ No matter how purposeful, longstanding, or widespread the discrimination, and no matter how recalcitrant the employer, the Reagan Justice Department will limit itself to remedies that history illustrates are unlikely to provide effective relief to minorities and women. One of the alternative approaches this administration has embraced is the use of recruitment goals.⁴⁸ Under this approach, the employer must develop a pool of qualified applicants for jobs which roughly approximates the demographics of the general population presumed to be eligible for consideration. Ironically, although the approach imposes goals and timetables at a point once removed from the hiring

⁴⁷In one of his earliest public statements, the current Assistant Attorney General for Civil Rights, William B. Reynolds, stated as follows:

With respect to suits brought by the Department of Justice to enforce Title VII and similar statutes, our policy can be simply stated: The Justice Department will not retreat one step from its historic commitment to enforce the federal civil rights laws, but we will no longer insist upon, or in any respect support, the use of quotas or any other numerical or statistical formulae designed to provide to *nonvictims* of discrimination preferential treatment based on race, sex, national origin or religion. To pursue any other course is, in our view, unsound as a matter of law and unwise as a matter of policy.

Remarks before the Fourth Annual Conference on Equal Opportunity at 2-3 (October 20, 1981, Washington, D.C.)(emphasis added).

The Reagan Administration has made much of the distinction between victims and non-victims of employment discrimination, arguing that the former but not the latter are entitled to relief under Title VII. As a matter of law, however, all of the courts cited *supra* note 33, have reached an opposite conclusion: numerical requirements were imposed or approved that benefited minorities or women who were not required to show that they had been the specific targets of the employer's pattern of discriminatory conduct. At least five members of the United States Supreme Court (Justices Brennan, White, Marshall, Blackmun, and Powell) appear to approve of such remedial action. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978)(medical school allowed to consider race and background in admission decisions). There is simply no convincing legal support for this administration's position.

⁴⁸Reynolds' Remarks, *supra* note 47, at 9-10.

decision, the concept remains the same. The administration has no apparent answer to the question of what happens when an employer meets the recruitment goals and timetables but still fails to *hire* meaningful numbers from the groups previously subjected to discrimination. If the answer is that the courts will then impose hiring goals and timetables, the administration's proposal is merely an example of the wheel being reinvented at the painful expense of those rightfully deserving employment on a nondiscriminatory basis.⁴⁹

II. School Desegregation

Reagan Administration officials have portrayed its position on school desegregation as one of mere opposition to the use of "busing" as a remedy, not of opposition to the elimination of state-imposed segregation of the races in public education.⁵⁰ The alternatives to busing proposed by the administration—alternatives which prior administrations tried and rejected as inadequate—offer little likelihood of achieving meaningful desegregation. This administration's commitment to them raises serious questions about the extent of its commitment to the eradication of segregation in public schools.

⁴⁹The Justice Department's categorical opposition to the use of numerical standards in employment is reflected in the handling of its own equal employment opportunity responsibilities under Executive Order No. 11,246. *See supra* note 5. The Department recently refused to include statistical goals in an equal employment opportunity plan which it is legally required to submit to the Equal Employment Opportunity Commission. It also refused to submit a precise breakdown of its workforce according to job categories by race, sex, or disability. EEOC Chairman Clarence Thomas rejected the Department's plan in a letter dated September 2, 1983 to Attorney General William F. Smith in which he said that "the use of goals in federal employment is presently required, has been required for some time and is necessary for this Commission to carry out its responsibilities under Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973." *Rejection of Justice Plan by EEOC Chairman*, 114 [News and Background Information] Lab. Rel. Rep. (BNA) No. 5, at 46-47 (Sept. 19, 1983).

⁵⁰*School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 614 (1981)(Statement of William B. Reynolds, Assistant Attorney General, Civil Rights Division).

In considering the viability of busing as a remedy, it is crucial to have a clear understanding of the circumstances under which the courts will approve the use of busing. The Supreme Court has said that busing must be used where it is necessary to dismantle a segregated system.⁵¹ Before busing is ordered, however, courts must consider the times and distances of bus rides under the proposal to avoid placing burdens on students that will adversely affect their health or education.⁵² Courts should also take into account the age of the children involved when determining the acceptability of a busing plan.⁵³

Furthermore, the Supreme Court has expressly reminded lower courts that a busing remedy need not achieve system-wide racial balance in order to meet constitutional requirements.⁵⁴ Consequently, where a segregated system is seventy percent white and thirty percent black, desegregation does not require that each school in the district reflect that ratio. There may be some all-black schools, all-white schools, or schools of racial proportions in between where the facts indicate that this configuration represents the "greatest possible degree of actual desegregation."⁵⁵

Where Congress has spoken on the issue of busing, it has expressed its desire that busing be used sparingly in desegregation plans. In the Education Amendments of 1974,⁵⁶ it urged courts to employ busing as a remedy of last resort. In addition Congress has for some years now attached a rider to the appropriation for the Department of Health, Education and Welfare (now the Department of Education) prohibiting the Department from requiring busing beyond the nearest school in any administratively-imposed desegregation plan. As a statutory and constitutional matter, Title VI and the due process clause of the Constitution prevent the federal government from supporting segregated school systems with tax dollars. Congress has concluded, however, that where the Department of Education finds

⁵¹*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 29-30.

⁵²*Id.* at 30-31.

⁵³*Id.*

⁵⁴*Id.* at 22-25.

⁵⁵*Id.* at 26.

⁵⁶Equal Educational Opportunities and Transportation of Students Act, 20 U.S.C. §§ 1712-1718 (1976).

that children must be bused beyond the nearest school in order to desegregate the district, it should refer the matter to the Department of Justice. The Attorney General can then bring suit so that the ultimate determination of the appropriate remedy is decided by a federal judge rather than by the Department of Education's "bureaucrats," as the sponsors of the rider called them.⁵⁷

In the vast majority of cases, federal judges have been faithful to the Supreme Court's guidelines and to the concerns of Congress. Statistics on busing for desegregation indicate that only a small fraction of children enrolled in public schools today are bused solely for purposes of desegregation. In 1980, for example, over 97% of public school busing was for purposes having nothing to do with desegregation.⁵⁸ The extensive use of busing in this country is explained by the fact that the yellow school bus has become to American education in the twentieth century what the little red school house was in the nineteenth. As communities have moved from the one-room arrangement to more complex, comprehensive, and regional forms of educating their children, the school bus has become an absolute necessity.

Unpersuaded by these facts testifying to the value of busing, the Reagan Administration has categorically decided to reject busing as a desegregation remedy.⁵⁹ Even in cases where

⁵⁷For a full discussion of the constitutionality of limiting the Department of Education's power to order transportation remedies in favor of Department of Justice litigation to achieve similar results, see *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980)(holding such a limitation facially constitutional but reserving question of constitutionality as applied).

⁵⁸N.Y. Times, Dec. 4, 1980, at A31, col. 3.

⁵⁹Assistant Attorney General Reynolds stated in 1981:

In keeping with this overarching philosophy [that the Constitution must be color-blind], the Justice Department will, in school cases as in all other cases handled by the Civil Rights Division, refrain from seeking race-conscious remedies, such as court-ordered busing, solely for the purpose of achieving a particular racial balance.

Address, Education Commission of the States, National Project on Desegregation Strategies Workshop at 8 (September 27, 1981, Chicago, Ill.). Though his Chicago remarks might lead one to conclude that Mr. Reynolds was simply

the segregation is pernicious and where busing, within limits set by the Supreme Court and Congress, could achieve meaningful desegregation, this administration will only seek remedies which experience has shown to be patently less effective.⁶⁰ Its explanation is that busing simply has not worked.⁶¹ This position is demonstrably false. One can point to hundreds of communities that have used busing successfully and stably to desegregate themselves.⁶² Hillsborough County, Florida, for example, de-

engaging in a restatement of what *Swann* requires, his subsequent formulations clearly demonstrate his rejection of busing as an acceptable remedy. For example, less than a month later he told a Senate Subcommittee: "Accordingly, the Department will henceforth, on a finding by a court of de jure racial segregation, seek a desegregation remedy that emphasizes the following three components, rather than court-ordered busing" *Court-Ordered Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743 and S. 1760 Before Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 592 (1981)*(statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division)[hereinafter cited as *Court-Ordered Busing*]. See *infra* text accompanying note 79 for a description of the administration's alternative approaches.

⁶⁰For a description and critique of the alternative remedies proposed by the Reagan Administration, see *infra* notes 79-80 and accompanying text.

⁶¹In the words of Assistant Attorney General Reynolds, "Stated succinctly, we have concluded that involuntary busing has largely failed in two major respects: It has failed to elicit public support, and it has failed to advance the overriding goal of equal educational opportunity." Reynolds' Remarks, *supra* note 47, at 592.

The Supreme Court long ago held that public opposition to desegregation techniques was not a proper legal consideration. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). The second assertion has been rebutted by, among others, a 1981 study by a team at Vanderbilt University which examined "some 1,200 studies, reports, commentaries and court cases and included 175 interviews with persons with desegregation experience at local, state and national levels." *Court-Ordered Busing*, *supra* note 59, at 117-50 (statement of Willis D. Hawley, Dean, Peabody College, Vanderbilt University, Nashville, Tenn.). Dr. Hawley's study concluded, in fact, that "desegregation enhances rather than diminishes the academic achievement of minorities, especially when children are desegregated at an early age. Moreover, desegregation does not seem to impair, and may even facilitate, the achievement of whites." *Court-Ordered Busing*, *supra* note 59, at 129. This conclusion was not limited to school systems that employed techniques other than busing to achieve desegregation.

⁶²One of those "success stories" is the Charlotte-Mecklenburg school system itself. See Daniels, *In Defense of Busing*, N.Y. Times, April 17, 1983, § 6 (Magazine), at 34.

segregated in 1971 and remains so today.⁶³ Studies commissioned by the Department of Health, Education, and Welfare in the early 1970s demonstrated that sufficient integration could be achieved with relatively little increase in cost to the school district or burden to the students.⁶⁴

Reagan Administration officials have not been content merely to refuse to seek busing remedies in newly-instituted desegregation cases. They have also supported proposed federal legislation that would deprive federal district courts of jurisdiction to order busing remedies; that would allow challenges to existing desegregation orders that require busing, even in communities that have successfully weathered the transition to a constitutional school system; and that would deprive the Attorney General of any power to seek busing remedies.⁶⁵ Congress has rejected this proposed legislation thus far. If enacted, however, the bill could place the federal government in a position where, although it could identify a public school district which was operating in violation of the Constitution, it would be powerless to correct the situation. For this reason, Justice Department officials from the Eisenhower, Nixon, Johnson, and Carter Administrations have argued against the legislation's constitutionality.⁶⁶ Only the Reagan Administration believes otherwise.

The current administration's opposition to traditional means of preventing segregation in public schools goes far beyond the issue of busing. After all, President Carter was personally opposed to busing.⁶⁷ But he made it clear that his appointees were to follow the law, not his personal preferences.

⁶³*Id.* at 92.

⁶⁴G. Orfield, *Must We Bus* 135-40 (1978).

⁶⁵Greenhouse, *Busing Bill Backed by Administration*, N.Y. Times, May 7, 1982, at A1, col. 2; Taylor, *Busing Curb is Legal, Attorney General Says, But He's Cooler to School Prayer Bill*, Wall St. J., May 7, 1982, at 8, col. 2.

⁶⁶Four former Attorneys General and three former Solicitors General signed a letter in March, 1982 which was sent to members of the Senate Judiciary Committee expressing their unanimous view that Congress may not restrict federal court jurisdiction to enforce *Brown* and their opposition to various legislative proposals designed to achieve that result. 128 Cong. Rec. S2890-91 (daily ed. March 29, 1982); Taylor, *4 Ex-Attorneys Generals Denounce Bill to Bar Court-Ordered Busing*, N.Y. Times, Apr. 5, 1982, at A21, col. 3.

⁶⁷*Interview*, U.S. News and World Report, May 24, 1976, at 19, 23.

Reagan Justice Department officials, by contrast, have refused to take advantage even of inferences and presumptions that courts have developed to fairly allocate the burdens in school desegregation litigation.⁶⁸

A brief description of the most important of these judicial inferences will demonstrate the effect of current Justice Department policy on the enforcement of school desegregation. After almost twenty years of reviewing school desegregation cases, the Supreme Court decided in 1973 that it was very unlikely that black or Hispanic plaintiffs seeking desegregation would be able to prove that the racial composition of every school, in every section of a district, resulted from intentionally segregative actions by school officials. Experience had taught the Court, however, that where plaintiffs could show that the school board had closed schools, opened schools, or changed boundaries or grade structures in one substantial part of the system to create or maintain segregation, it was likely that the same segregative intent infected the rest of the system as well. Drawing from rules of evidence and burdens of proof familiar to other areas of the law, the Court determined that where plaintiffs could present evidence of such segregation, a system-wide remedy would be appropriate unless the school board could rebut the presumption that its illegal action pervaded the district.⁶⁹ The Supreme Court merely placed the burden on the party possessing any arguably exculpatory evidence to produce it. This is a rule born of both painful experience and logic.

This administration has taken the position, however, that it will not rely upon this presumption in litigating school desegregation cases. The Justice Department is prepared to initiate system-wide desegregation litigation only when it uncovers *direct* evidence of pervasive intentional discrimination.⁷⁰ Federal

⁶⁸*See, e.g.*, *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)(finding of state-imposed segregation in a substantial portion of school district creates a rebuttable presumption of an entirely segregated district requiring a system-wide remedy).

⁶⁹*Id.* at 205-13.

⁷⁰Mr. Reynolds stated, "In deciding to initiate litigation, we will not make use of the *Keyes* presumption but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials." *Court-Ordered Busing*, *supra* note 59, at 592.

prosecutors have decided to eschew the benefit of a judicially-created presumption in any attempt to establish the existence of illegally segregated school districts.

The Supreme Court and lower federal courts have also developed and refined their position with respect to the duty of school districts to eradicate "root and branch"⁷¹ the vestiges of unconstitutional segregation. For more than a decade following *Brown*, the courts placed the entire burden of desegregation on the backs of black parents, children, and teachers. To comply with the law, school boards merely had to remove legal barriers to black students' attendance at formerly all-white schools. Experience with various forms of these so-called "freedom-of-choice" plans demonstrated that such approaches would not overcome the powerful inertia that generations of segregated pupil assignment plans had created.⁷² Most school boards continued to assign children to the all-black or all-white facilities they had attended prior to the order to desegregate. Children who desired to exercise their right to a desegregated education had to come forward and transfer to a different school. Given the remaining social and practical barriers facing a black child seeking to transfer to a previously all-white school, only the most courageous black children dared to do so. Such barriers were openly revealed in Little Rock in 1957, where President Eisenhower found it necessary to dispatch federal troops to enforce a court order requiring nine black children to be enrolled in the previously all-white high school.⁷³

In the face of these obstacles, the Supreme Court concluded, in *Green v. County School Board of New Kent County*,⁷⁴ that the school boards themselves, the violators of the Constitution, should bear the responsibility for establishing "unitary" (desegregated) systems. According to the Court, the school

⁷¹*Green v. County School Bd.*, 391 U.S. 430, 438 (1968); *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).

⁷²*See, e.g., Green v. County School Bd.*, 391 U.S. 430, 441-42 (1968). Three years after the institution of the "freedom-of-choice" plan in New Kent County, no white children had enrolled in the previously all-black school, and only fifteen percent of black children had enrolled in the previously all-white school. The Court found these figures to be conclusive evidence that the plan did not adequately dismantle the pre-existing dual system.

⁷³*Cooper v. Aaron*, 358 U.S. 1 (1958).

⁷⁴*Green*, 391 U.S. at 438-39.

boards had the affirmative duty to develop desegregation plans that promised "realistically to work, and . . . realistically to work now."⁷⁵ To ensure that black children could enjoy their right to a school system free of state-imposed racial segregation, the court found it necessary to declare that black children—indeed, the entire community—are entitled to a desegregated school system.⁷⁶

The Reagan Administration rejects the concept of a school board's affirmative duty to desegregate. The present Assistant Attorney General for Civil Rights has stated that he sees the federal government's responsibility in attacking segregation to be only "to remove remaining state-enforced racial barriers to open student enrollment."⁷⁷ Under this vision, the victims of discrimination must once again shoulder the major burden of vindicating their civil rights. Lest there be some doubt as to his meaning, the present head of the Civil Rights Division has added that he does not believe "that the Government can compel an integrated education. . . . We are not going to compel children who do not want to choose to have an integrated education to have one."⁷⁸

The Reagan Administration's approach to school desegregation not only runs afoul of the law, but disregards the experience of prior administrations as well. The present Assistant Attorney General for Civil Rights stated in 1981 that some alternatives to busing which "seem to hold promise for success include voluntary student transfer programs, magnet schools, enhanced curriculum requirements, faculty incentives, in-service training programs for teachers and administrators, school closings in systems with excess capacity and new construction in systems that are over-crowded, and modest adjustments to attendance zones."⁷⁹ Prosecutors and judges have utilized all of these procedures for years in desegregation cases. Unfortunately, experience has shown that rarely, if ever, will these

⁷⁵*Id.* at 439.

⁷⁶*Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284, 289 (5th Cir. 1963).

⁷⁷*Court-Ordered Busing*, *supra* note 59, at 583.

⁷⁸N.Y. Times, Nov. 20, 1981, at A14, col. 1.

⁷⁹*Court-Ordered Busing*, *supra* note 59, at 592-93.

procedures be effective without some mandatory student assignment.⁸⁰

Heedless of current legal requirements and the lessons of the past, Reagan Administration officials propose to ignore the *Green* duty to desegregate and instead will limit their efforts to remedying "disparities in the tangible components of education" between minority and white students attending one-race schools.⁸¹ What they seek is no less than a relitigation of *Brown v. Board of Education*.⁸² There, the Supreme Court noted that its decision could not "turn on merely a comparison of . . . tangible factors in the Negro and white schools," but rather upon "the effect of segregation itself on public education."⁸³

⁸⁰See Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 652-56 (1983), for an extended discussion of this experience.

A recently released study on magnet schools done by private consultants for the Department of Education reaches a similar conclusion. It reported as follows: "The districts showing the most progress in districtwide desegregation using magnets employ a variety of methods both voluntary and involuntary, as part of a total desegregation plan, including pairing, rezoning, two-way busing and mandatory assignment." James H. Lowry & Associates, *Survey of Magnet Schools Analyzing a Model for Quality Integrated Education* 32 (1983)(executive summary).

Quite recently the administration entered into a settlement with the Bakersfield, California school district, Consent Decree, *United States v. Bakersfield City School District*, C.A. No. CV-F-84-39 (E.D.Cal. Jan 25, 1984), that relies entirely upon voluntary techniques, such as magnet schools, despite the weight of evidence, primarily in the form of social sciences research, that magnet school plans, standing alone, have proven inadequate to achieve meaningful desegregation. See *Adams v. United States*, 620 F.2d 1277, 1295 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980)(St. Louis plan which included but was not limited to the use of magnet schools held constitutionally inadequate); Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 Law & Contemp. Probs. 1, 25-30 (1978)(discussion of conflicting case law on the subject concludes that when magnet schools were found acceptable, social science research or testimony was generally discredited). The agreed-upon plan in Bakersfield contains no "fall-back," mandatory assignment provisions to take effect in the event no appreciable desegregation occurs. Consent Decree, at 11-12. Pear, *U.S. Shifts Tactics on Desegregation of Lower Schools*, N.Y. Times, Jan. 26, 1984, at A1, col. 1.

⁸¹*Court-Ordered Busing*, *supra* note 59, at 593. *U.S. Weighs Suits Charging Unequal Minority Education*, N.Y. Times, Oct. 5, 1981, at B14, col. 3.

⁸²*Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁸³*Id.* at 492.

Although the black and white schools involved in the *Brown* series of cases "have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers and other 'tangible' factors,"⁸⁴ the Court concluded that "separate educational facilities are inherently unequal."⁸⁵

Consistent with its backward-looking attitudes toward school desegregation, the Reagan Administration has elected to take the side of school boards with long histories of resistance to compliance with *Brown* and subsequent Supreme Court decisions. For example, the Justice Department took the unusual step in late 1982 of urging the Supreme Court to hear a challenge by the Nashville, Tennessee school board.⁸⁶ Normally, the Government does not take a position on a case filed in the Supreme Court by other parties until the Court has granted review.⁸⁷ Yet the Justice Department joined forces with a school board that had not begun *any* desegregation until 1971, 17 years after *Brown*.⁸⁸ According to the Court of Appeals for the Sixth Circuit, the board had not eradicated the effects of state-imposed segregation by 1979, a quarter of a century after the Supreme Court declared such segregation unconstitutional.⁸⁹ The Supreme Court, rejecting the blandishments of both the Nashville board and the Justice Department, denied review in a two-line order from which not one Justice dissented.⁹⁰

The Department also joined the East Baton Rouge, Louisiana school board in a challenge to a desegregation plan ordered into effect three years ago.⁹¹ It was the first comprehensive

⁸⁴*Id.*

⁸⁵*Id.* at 495.

⁸⁶Brief for the United States as Amicus Curiae in Support of Petitioners, *Metropolitan County Bd. of Educ. v. Kelley*, 103 S.Ct. 834 (1983)(denying cert.).

⁸⁷Normally, the United States enters such cases where the Supreme Court specifically requests its views. R.L. Stern & E. Gressman, *Supreme Court Practice* 499 (5th ed. 1978).

⁸⁸*Kelley v. Metropolitan County Bd. of Educ.*, 687 F.2d 814 (5th Cir. 1982), cert. denied *sub nom.* *Metropolitan County Bd. of Educ. v. Kelley*, 103 S.Ct. 834 (1983).

⁸⁹687 F.2d at 815-16.

⁹⁰*Metropolitan County Bd. of Educ. v. Kelley*, 103 S.Ct. 834 (1983)(cert. denied). Greenhouse, *High Court Bars Appeal on Busing by Nashville and the Justice Dept.*, N.Y. Times, Jan. 25, 1983, at A1, col. 3.

⁹¹Motion by the United States to Stay Further Proceedings in the Court

desegregation plan ever instituted in that district.⁹² The administration argued in favor of a "voluntary" desegregation plan that, by its own calculations, would have increased the number of schools dominated eighty percent or more by one race from the current fifteen to as many as thirty-seven.⁹³ As a result, children in more than one-third of the district's schools would be in largely segregated facilities.⁹⁴ Ironically, the Reagan Administration's voluntary approach, which the federal district judge had rejected several years ago when the school board offered it, was ultimately rejected by the school board itself. The board concluded that it would be more expensive than the plan presently in effect.⁹⁵

of Appeals, *Davis v. East Baton Rouge Parish School Bd.*, No. 81-3476 (5th Cir. August 16, 1982). The Department sought the stay in order to "afford [it] an opportunity to prepare and present a more effective and less intrusive desegregation program than the plan presently in operation." *Id.* at 3. Greenhouse, *Busing Issue: New Attacks*, N.Y. Times, Aug. 12, 1982, at A25, col. 1.

⁹²*Davis v. East Baton Rouge Parish School Bd.*, 498 F. Supp. 580, 582 (M.D. La. 1980).

⁹³Taylor, *New Busing Plan Proposed by U.S. for Baton Rouge*, Wall St. J., Dec. 13, 1982, at 4, col. 1.

⁹⁴*Id.*

⁹⁵After the Board's rejection, the Department discontinued its efforts to have an alternative plan adopted by the court. Department of Justice Press Release, February 18, 1983. The Department of Justice also originally pointed with some pride to a January, 1983 order entered by the district court in the Chicago desegregation case, *United States v. Board of Educ.*, 554 F. Supp. 912 (N.D. Ill. 1983), because it did not mandate busing as part of the remedy. *U.S. Endorses Chicago's Proposal for Voluntary School Integration*, N.Y. Times, Feb. 13, 1982, at A1, col. 2; *U.S. Judge Backs Chicago School Plan for Desegregation*, Wall St. J., Jan. 7, 1983, at 4, col. 3.

Only recently, however, the same district court concluded that the Reagan Administration had not made a good faith effort to locate and provide funds necessary for Chicago to carry out the plan effectively, as the federal government had promised in a consent decree that formed the basis for the Board's decision to desegregate. *United States v. Board of Educ.*, No. 80 C 5124 (N.D. Ill. June 30, 1983). The Justice Department took an immediate appeal. Malcolm, *U.S. Appeals Chicago School Desegregation Order*, N.Y. Times, Aug. 26, 1983, at A10, col. 3. In addition, President Reagan vetoed efforts by Congress to provide additional funds to Chicago for desegregation. Pear, *Reagan's Veto of Chicago Aid Assailed*, N.Y. Times, Aug. 15, 1983, at A16, col. 3; Pear, *Integration Fund Veto: Power of a Judge*, N.Y. Times, Aug. 16, 1983 at A12, col. 4. The district court's determination that the consent decree had been violated was affirmed by the Seventh Circuit Court of Appeals;

Viewing Reagan Administration school desegregation policy as a whole, one can only conclude that the administration is not enforcing the law of school desegregation faithfully. Instead, it has rejected evidentiary tools and remedial techniques crucial to the eradication of racial segregation; opted for approaches that have proved ineffective in the past; and supported school districts seeking to delay or avoid altogether meaningful compliance with *Brown*.

III. Voting

In 1957, President Eisenhower signed the first civil rights law enacted by Congress since Reconstruction.⁹⁶ Official violence and intimidation against blacks in the South to prevent them from registering and voting spurred Congress to action.⁹⁷ Through this legislation, Congress authorized the Attorney General to sue on behalf of blacks who were denied access to the ballot box because of their race. The Civil Rights Act of 1957 also established a new unit in the Justice Department, the Civil Rights Division, to spearhead this litigation program.⁹⁸ The Civil Rights Act of 1960 continued and expanded Federal efforts to remedy problems of voting discrimination.⁹⁹

By the time President Johnson took office, however, it was evident that existing federal mechanisms for combating discrimination in voting were only modestly successful at best. As Justice Department officials reported to Congress, litigation challenging biased voting practices was expensive, time consuming, and often viewed with great hostility not only by the local officials being sued but also by federal judges sitting on such cases.¹⁰⁰ Even where courts ruled one type of discrimina-

however, the remedy imposed by the trial court was modified in part. *United States v. Board of Educ.*, Nos. 83-2308, 83-2402, 83-2445 (7th Cir. Sept. 9, 1983).

⁹⁶Civil Rights Act of 1957, *supra* note 20.

⁹⁷H.R. Rep. No. 291, 85th Cong., 1st Sess. 4-6 (1957). *See also* President's Committee on Civil Rights, *To Secure These Rights* 35-40 (1947)(description of efforts by Southern officials to prevent or discourage minority participation in the electoral process).

⁹⁸Attorney General William P. Rogers set up the Division on December 9, 1957. Report of the U.S. Commission on Civil Rights 128-133 (1959).

⁹⁹Civil Rights Act of 1960, *supra* note 21.

¹⁰⁰*Voting Rights: Hearings Before the Senate Comm. on the Judici-*

tory practice illegal as a result of federal litigation, local election officials could and often did avoid the ruling merely by substituting another barrier.¹⁰¹ The only recourse available to Department of Justice lawyers attempting to counter such a tactic was to file another lawsuit. The series of marches from Selma, Alabama led by Dr. Martin Luther King, Jr. in early 1965 forcefully revealed the willingness of the Southern opponents to equal voting rights for blacks to bypass legal stratagems and resort to billyclubs and rifle butts to maintain the status quo.¹⁰²

Out of all this experience came the Voting Rights Act of 1965.¹⁰³ Rather than relying solely upon litigation as the tool for addressing discriminatory practices in voting, Congress settled upon a novel approach. The 1965 Act provided that all future changes in state laws affecting voting in those states (primarily in the South) where opposition to black participation had been most intense would first have to be approved ("precleared") by the Attorney General of the United States or by a special federal court of three judges sitting in Washington, D.C. As the Supreme Court noted in upholding the Act's constitutionality, Congress had decided that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered"¹⁰⁴ The 1965 Voting Rights Act was designed to change all that. Election rule changes, in suspect jurisdictions, that had the purpose *or effect* of discriminating on the basis of race or color would not be precleared. Even where plaintiffs could not establish proof of intentional discrimination on the part of election officials, any changes in voting procedures that put blacks at a disadvantage in the electoral process would violate the new law.¹⁰⁵

ary, 89th Cong., 1st Sess., on S.1564, *To Enforce the 15th Amendment to the Constitution of the U.S.* 13-14 (1965)(Testimony of Nicholas deB. Katzenbach, Attorney General).

¹⁰¹*Id.*

¹⁰²S.B. Oates, *Let the Trumpet Sound, The Life of Martin Luther King, Jr.* 344-65 (1982).

¹⁰³Pub. L. No. 89-110, 79 Stat. 437.

¹⁰⁴*South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966).

¹⁰⁵MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 Cath. U.L. Rev. 107 (1979). Much

Congress and the Justice Department found, however, that deepseated opposition to black electoral participation, developed over generations, does not subside in a matter of a few years, no matter what enforcement mechanism is available to federal officials. Hence, in both 1970,¹⁰⁶ under the Nixon Administration, and in 1975,¹⁰⁷ during the Ford Administration, Congress extended the 1965 Act. Partially as a result of supportive testimony from Executive Branch officials,¹⁰⁸ Congress found in each instance that voting discrimination against blacks was still sufficiently prevalent to justify continuing the Act's special preclearance provisions. Indeed, in 1975 Congress also concluded that voting discrimination against Hispanics in the Southwest bore a close resemblance to that experienced by blacks in the South. Consequently, Congress not only extended the Act but also amended it to cover those barriers to voting affecting members of "language minorities."¹⁰⁹

Under the 1975 extension of the Act, special provisions—including the preclearance mechanism—would expire in August, 1982. In view of this fact, a House subcommittee with jurisdiction over civil rights legislation commenced a series of hearings in the spring of 1981. The purpose of these hearings was to determine whether sufficient voting discrimination remained to justify the extension of the Voting Rights Act beyond 1982.¹¹⁰

of the litigation under the Voting Rights Act has concerned efforts to force compliance by "covered jurisdictions" (the 22 states affected in whole or in part by the preclearance provisions). *See, e.g.,* *City of Rome v. United States*, 446 U.S. 156 (1980); *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110 (1978); *United Jewish Orgs. Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *City of Richmond v. United States*, 422 U.S. 358 (1975); *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

¹⁰⁶Voting Rights Act Amendments of 1970, *supra* note 23.

¹⁰⁷Voting Rights Act Amendments of 1975, *supra* note 24.

¹⁰⁸*See, e.g., Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., 535 (1975)*(statement of J. Stanley Pottinger, Assistant Attorney General for Civil Rights, Ford Administration).

¹⁰⁹*See also* *Briscoe v. Bell*, 432 U.S. 404, 405-06 (1977)(Court reviews legislative history of 1975 "language minorities" amendment in course of rejecting challenge to those amendments).

¹¹⁰*See Extension of the Voting Rights Act: Hearings Before the Subcomm.*

Despite requests from the House of Representatives, no Reagan Administration official appeared before the subcommittee to testify on this question.¹¹¹ In October 1981, the House passed an extension of the Act by a vote of 389 to 24.¹¹²

It was not until January 27, 1982, after the Senate had begun to consider the extension issue, that the Attorney General and other Justice Department officials decided to testify.¹¹³ They advanced proposals that, in two critical respects, would have substantially weakened the bill adopted so overwhelmingly by the House. First, the administration officials recommended revisions to the House bill that would have made it substantially easier for jurisdictions covered by the preclearance provisions to avoid the requirement that their election changes be approved in advance by the Justice Department or the special federal court.¹¹⁴ In its consideration of whether these so-called "bail-out" provisions should be relaxed, the House of Representatives heard no testimony indicating that the preclearance jurisdictions then covered by Section 5 had made significant improvements in the protection of voting rights.¹¹⁵ Despite this lack of testimony supporting a looser standard, the House bill as passed did in some respects relax the more stringent requirements included in the 1965 Act.¹¹⁶ Without presenting the supporting evidence missing in the House, the Reagan Administration argued before the Senate for an even looser "bail-out" standard than the House had adopted.

The Reagan Administration's second weakening proposal

on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st. Sess. 2 (1982).

¹¹¹*Id.* at 2373-74 (May 20, 1981 letter of Rep. Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, to Attorney General William F. Smith, inviting him to testify before the subcommittee on June 3, 10, or 11, 1981).

¹¹²127 Cong. Rec. H7011 (daily ed. Oct. 5, 1981).

¹¹³*Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992 and H.R. 3112, Bills to Amend the Voting Rights Act of 1965 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 66 (1982)(statement of William F. Smith, Attorney General)[hereinafter cited as *Voting Rights Act*].

¹¹⁴*Id.* at 70.

¹¹⁵*See* S. Rep. No. 417, 97th Cong., 2d Sess. 45 nn.163, 164 (1982).

¹¹⁶*Id.* at 46.

would have diluted the effect of Section 2 of the Voting Rights Act.¹¹⁷ Section 2 authorized private parties or the Attorney General to bring lawsuits seeking an end to voting discrimination.¹¹⁸ It contained no preclearance mechanism, and it had nationwide application, available equally in Montana and Georgia for the redress of voting discrimination.¹¹⁹ The preclearance provisions, in contrast, were temporary, and applied only to nine states entirely and to portions of thirteen others.¹²⁰

The judicial standards for challenging discriminatory at-large elections had become hostile to plaintiffs by the time Congress was considering an extension of Section 2 in 1981. In 1965 and again in 1966, the Supreme Court had suggested that plans minimizing or canceling out minority electoral strength, "designedly or otherwise," would be unconstitutional.¹²¹ Prior to 1976, therefore, it had been widely assumed that official state practices having the *effect* of discriminating against blacks violated the fourteenth amendment, absent the presence of some valid governmental justification that would offset such a presumption.¹²²

¹¹⁷42 U.S.C. § 1973 (1976 & Supp. V 1981).

¹¹⁸*See, e.g.,* Toney v. White, 476 F.2d 203 (5th Cir.), *modified and aff'd*, 488 F.2d 310 (5th Cir. 1973)(en banc)(affirming injunctive relief against future racially discriminatory purges of voter rolls prior to primary and order voiding election).

¹¹⁹S. Rep. No. 417, *supra* note 115, at 6.

¹²⁰H.R. Rep. No. 227, 97th Cong., 1st Sess. 4-7 (1981).

¹²¹Burns v. Richardson, 384 U.S. 73, 88 (1966); Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

¹²²*See, e.g.,* Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976)(per curiam)(Court explicitly refuses to approve lower court's view that at-large elections were unconstitutional unless their use would afford a minority group greater opportunity for political participation, or unless use of single-member districts would infringe protected rights); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir.), *cert. denied*, 405 U.S. 925 (1972) (reorganization plan approved because it did not operate to minimize or cancel out the voting strength of black citizens); *see also* Kirksey v. Bd. of Supervisors, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977); Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976). For a full discussion of "intent vs. effects" standards in voting discrimination cases prior to 1980, see Parker, *The Results Test of Section 2 of the Voting Rights Act, Abandoning the Intent Standard*, 69 Va. L. Rev. 715 (1983). *See also* Hartman,

Even under a conservative reading of this precedent, which would have required that discriminatory intent be shown, it was assumed that such intent could be shown through a "totality of the circumstances" approach. Such a showing might include, for example, historical evidence of barriers to minority participation in slating and running candidates, or of electoral requirements designed to encourage "racial bloc voting" in which all or most white voters would vote for white candidates when whites and blacks opposed each other. Thus even under the conservative interpretation, at-large election systems were presumably vulnerable to court challenge on grounds that such systems effectively "fenced out" racial minorities from any meaningful role in a community's political life.¹²³

In 1973, the Supreme Court in *White v. Regester*¹²⁴ struck down such at-large voting arrangements in two Texas counties because of a variety of practices that rendered blacks and Hispanics politically powerless despite their significant populations. Relying on *White*, other plaintiffs attacked at-large electoral systems around the country.¹²⁵ However, in no instance were plaintiffs successful merely by showing that blacks or other minorities were not elected to office in proportion to their representation in the population. The courts required far more before finding a constitutional violation. For example, the Fifth Circuit held that where blacks did not have difficulty in participating meaningfully in the political process, and where the state policy favoring at-large elections was not rooted in racial discrimination, an at-large reapportionment plan was constitutional.¹²⁶

Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial 'Intent' and the Legislative 'Results' Standards, 50 Geo. Wash. L. Rev. 689 (1982).

¹²³See *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973).

¹²⁴412 U.S. 755 (1973).

¹²⁵See, e.g., *Zimmer*, 485 F.2d 1297.

¹²⁶*Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975); see also *Gilbert v. Sterrett*, 509 F.2d 1389 (5th Cir.), cert. denied, 423 U.S. 951 (1975) (minority group not entitled to an apportionment which will maximize its political advantage, or to a redistricting in which at least one district would contain a black majority); *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975).

In 1976, however, the Supreme Court, acting in employment¹²⁷ and housing¹²⁸ cases, made explicit that fourteenth amendment challenges to allegedly discriminatory practices would have to establish that such official action was purposeful. A showing of discriminatory effect would be insufficient. Still, both cases seemed to permit the use of an "effects test" for suits brought under statute rather than the Bill of Rights. In *Washington v. Davis*,¹²⁹ the employment case, the Court pointed out that Title VII was not necessarily ruled by the fourteenth amendment's purposeful standard, and therefore that a statutory challenge might succeed on a showing of either purpose or effect. In the housing case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹³⁰ the Supreme Court declined to address the question of whether a discrimination suit brought pursuant to the Fair Housing Act of 1968 (referred to as Title VIII) should be judged by a similar "purpose or effect" standard because the question had not been considered by the lower courts. Neither decision expressly disapproved of the basic approach to at-large election challenges that the *White* case articulated.

All this changed, however, in 1980 when the Supreme Court was asked to overturn determinations by both trial and appellate federal courts that Mobile, Alabama had unconstitutionally discriminated against blacks by creating and maintaining an at-large electoral system. Despite a black population that reached almost 40% and a history of political activity on the part of black voters and candidates, no black or candidate favored by blacks had ever been elected to Mobile's three-person Commission. The lower courts found, based upon an analysis of various factors affecting voting in Mobile, that the at-large system was intentionally designed and perpetuated precisely with this exclusionary consequence in mind.¹³¹ The Supreme Court reversed, concluding in a plurality decision that the Mobile system was not unconstitutional on the record compiled by the lower

¹²⁷*Washington v. Davis*, 426 U.S. 229 (1976).

¹²⁸*Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹²⁹426 U.S. at 238.

¹³⁰429 U.S. at 271.

¹³¹*Bolden v. City of Mobile*, 423 F. Supp. 384, 397-98 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978).

courts.¹³² The Court held that since there were no official obstacles in the way of blacks who wished to become candidates and since blacks could register and vote in Mobile “without hindrance,” plaintiffs had not proved that the discrimination was intentional. The Court reaffirmed its earlier holding that fourteenth amendment challenges require proof of intent¹³³ and extended the same standard to voting challenges under the fifteenth amendment.¹³⁴ The Court also implied that a suit brought under Section 2 of the Voting Rights Act of 1965 would also require proof of intent.¹³⁵

In its deliberations with respect to extension of the Voting Rights Act, the House of Representatives concluded that Section 2 ought to be amended to allow challenges to voting practices, such as at-large electoral systems, that had the effect of excluding racial minorities from any meaningful participation in the political process. Congress felt that the *White* “totality of the circumstances” test would give plaintiffs a fairer chance of ending truly exclusionary voting practices than was possible under the *Mobile* principles.¹³⁶ Yet, under the House proposal, localities would not be forced to change their election practices merely on a showing of disproportionality. In order to make absolutely clear that the absence of elected minority officials would not, standing alone, establish a violation of Section 2, an explicit disclaimer was included in the revision that overwhelmingly passed the House.¹³⁷

When the Senate addressed the question of amending Section 2, the Reagan Administration mounted a major campaign against any change in the old provision. President Reagan,¹³⁸

¹³²*City of Mobile v. Bolden*, 446 U.S. 55 (1980).

¹³³*Id.* at 66.

¹³⁴*Id.* at 65.

¹³⁵*Id.* at 60–61.

¹³⁶H. Rep. No. 222, *supra* note 120, at 28–30.

¹³⁷The text of the amended § 2 in the House bill, H.R. 3112, stated: “The fact that members of a minority group have not been elected in numbers equal to the group’s proportion of the population shall not, in and of itself, constitute a violation of this section.” H.R. 3112, 97th Cong., 1st Sess., 127 Cong. Rec. 1981, at A1, col. 3.

¹³⁸*Reagan’s Qualified Backing of Voting Act Likely to Sway Senate to Ease Some Rules*, Wall St. J., Nov. 9, 1981, at 20, col. 3; *Pear, Reagan Backs Voting Rights Act But Wants to Ease Requirements*, N.Y. Times, Nov. 7, 1981, at A1, col. 3.

the Attorney General,¹³⁹ and the Assistant Attorney General for Civil Rights¹⁴⁰ all argued that the change in Section 2 adopted by the House would result in the striking down of at-large election schemes wherever racial minorities were underrepresented and in the substitution of proportional representation mechanisms all over the country.¹⁴¹ The administration's opposition caused a stalemate in the Senate for over six months until several key Republican Senators broke ranks and threw their support behind compromise language proposed by Senator Robert Dole of Kansas.¹⁴² Dole's approach, which was adopted in the bill that the Senate finally passed, simply quoted language directly from the *White* decision itself to make crystal clear that proportional representation was not the objective, but that a full showing of discriminatory intent was unnecessary.¹⁴³ The Senate thereafter passed a twenty-five year extension of the provisional sections of the Voting Rights Act and the amended Section 2 by a vote of 85 to 8.¹⁴⁴

¹³⁹*Voting Rights Act*, *supra* note 113, at 70-72. *Attorney General Urges Congress to Reject Voting Rights Rule That House Approved*, Wall St. J., Jan. 28, 1982, at 10, col. 2.

¹⁴⁰*Voting Rights Act*, *supra* note 113, at 1659-63 (Testimony of William B. Reynolds, Assistant Attorney General, Civil Rights Division). *See also* Pear, *Top Justice Officials Join Battle on Voting Rights*, N.Y. Times, Mar. 20, 1982, at A10, col. 1; Pear, *Justice Dept. Aide Warns Senators on Passing the Voting Rights Bill*, N.Y. Times, Mar. 2, 1982, at A11, col. 3.

¹⁴¹*See, e.g., Voting Rights Act*, *supra* note 113, at 1204-13, 1216-26 (statement of Frank R. Parker, Director, Voting Rights Project, Lawyers Comm. for Civil Rights Under Law, in which he provides a detailed listing of pre-*Bolden* decisions rejecting the concept of proportional representation). Indeed, as early as 1971, the Supreme Court had explicitly rejected the view that the Constitution entitled minorities to proportional representation. *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

¹⁴²Hunt, *Voting Rights Extension by the Senate Seems Likely as Dole Engineers Compromise*, Wall St. J., May 4, 1982, at 8, col. 1; Roberts, *Panel Delays Action on Voting Rights as Compromise is Sought*, N.Y. Times, Apr. 28, 1982, at A25, col. 1.

¹⁴³S. Rep. No. 417, *supra* note 115, at 81-82.

¹⁴⁴128 Cong. Rec. 7139 (daily ed. June 18, 1982). Roberts, *Voting Rights Act Renewed on Senate by Margin of 85-8*, N.Y. Times, June 19, 1982, at A1, col. 5. *See* Parker, *supra* note 122, at 747-50, and Hartman, *supra* note 122, at 724-27, for a detailed description of events leading up to final Senate approval and passage by the full Congress of the Voting Rights Act Amend-

In signing into law the bill passed by Congress, President Reagan attempted to convey the impression that efforts by his administration had been responsible for the enactment of such a strong measure, stating that "this legislation proves our unbending commitment to voting rights."¹⁴⁵ As the foregoing description of the administration's efforts indicates, however, the truth is otherwise.¹⁴⁶ Administration officials remained silent for almost a year on whether the Act should be extended at a time when the House of Representatives was seeking its assistance and leadership. When the administration broke its silence, it was to propose measures that would have weakened the compromise bill that had already passed the House. For many months thereafter, the administration blocked passage in the Senate on grounds having little legal or factual basis. When compromise language was adopted, it came not from the administration, but from liberal Republican Senators. Few could miss the stark contrast between the posture of this administration, sitting on its hands while the Congress struggled, and the vigorous and constructive assistance provided by earlier administrations, particularly the Johnson and Ford Administrations, at the time of original passage in 1965 and the 1975 extension of the Voting Rights Act.

IV. Voluntary Efforts

The Reagan Administration has also opposed voluntary efforts to achieve greater desegregation and job opportunities for minorities. Its commitment to voluntary school desegregation appears to be limited to supporting districts, such as East Baton Rouge, Louisiana, that seek to retard the process of dismantling dual systems.¹⁴⁷ Several years ago, the school boards of Seattle, Tacoma, and Pasco, Washington decided to institute voluntary

ment of 1982. *Voting Rights Measure Approved by Congress*, N.Y. Times, June 24, 1982, § 2, at A11, col. 1.

¹⁴⁵*Remarks on Signing H.R. 3112 into Law*, 18 Weekly Comp. Pres. Doc. 846-47 (June 29, 1982). See also Miller, *Ronald Reagan and the Techniques of Deception*, The Atlantic 65 (Feb. 1984); Raines, *Voting Rights Act Signed by Reagan*, N.Y. Times, June 30, 1982, at A16, col. 1.

¹⁴⁶For a fuller description of this incident, see Miller, *supra* note 145.

¹⁴⁷See *supra* notes 91-95 and accompanying text.

desegregation, uncoerced by court order or federal government administrative rulings.¹⁴⁸ The school boards had concluded that the high levels of racial segregation in their schools, whatever the causes, were educationally undesirable. Several citizens in those communities, having failed to persuade their school boards against instituting such programs, mounted a challenge under the state's initiative procedure.¹⁴⁹ Using this procedure, these citizens engineered the passage of a law that effectively barred any further voluntary desegregation in the affected school districts.¹⁵⁰ The school districts responded by bringing a suit to have the new law declared unconstitutional, and were joined in this effort by the Carter Justice Department. Both the federal trial and appellate courts concluded that the law was unconstitutional.¹⁵¹ By the time the Reagan Administration came into office, the litigation was scheduled to come before the United States Supreme Court. The new administration's response was to join those seeking to establish the constitutionality of the Washington law restricting voluntary desegregation, and to argue that state, not local, autonomy and control over school system management must be respected despite clear legal precedent to the contrary.¹⁵²

The Supreme Court had established in a number of earlier desegregation cases the importance of local autonomy in the management of school systems.¹⁵³ This concern with preserving local autonomy was a major factor in the Court's 1974 decision in *Milliken v. Bradley*,¹⁵⁴ where it declined to approve a metropolitan desegregation plan for Detroit. Nevertheless, in the *Seattle* case, the Reagan Administration argued that what was

¹⁴⁸*Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 459-461, 464 n.7 (1982); *Government Pulls Back on Two School Cases*, N.Y. Times, Sept. 13, 1981, at E22, col. 1.

¹⁴⁹*Seattle School Dist.*, 458 U.S. at 462 n.4 (a description of Washington's initiative procedure).

¹⁵⁰*Seattle School Dist.*, 458 U.S. at 461-65.

¹⁵¹*Seattle School Dist. No. 1 v. Washington*, 473 F. Supp. 996 (W.D. Wash., 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980).

¹⁵²*Government Pulls Back*, *supra* note 148. Turner, *U.S. Shift on Busing Puts Seattle in the Spotlight*, N.Y. Times, Sept. 21, 1981, at A16, col. 1.

¹⁵³*Swann*, 402 U.S. at 16; *Brown*, 349 U.S. at 299.

¹⁵⁴*Milliken v. Bradley*, 418 U.S. 717 (1974).

at issue was state, not local, autonomy.¹⁵⁵ Localities should not be allowed to initiate desegregation programs that did not "sit well" with voters in other communities in the state. The Supreme Court was unpersuaded by this line of argument, and reaffirmed its commitment to the principle of local autonomy.¹⁵⁶ The Washington law, said the Court, by leaving all areas of school operation except desegregation in the hands of local officials, unconstitutionally differentiated "between the treatment of problems involving racial matters and that afforded other problems in the same area."¹⁵⁷

The Reagan Administration's support for voluntary efforts to end discrimination in employment has been equally nonexistent. In 1979, the Supreme Court had considered whether labor and management could legally agree to establish an employee training program that reserved half of the openings for black workers. In *United Steelworkers of America v. Weber*,¹⁵⁸ the Court rejected a challenge to such a plan set up by Kaiser Aluminum and the United Steelworkers. It held that Title VII of the Civil Rights Act, which prohibits discrimination in employment, did not bar efforts by "the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."¹⁵⁹ The Court also noted, in approving the Kaiser plan, that the plan had three important redeeming features. First, it did not require the discharge of white workers and their replacement by blacks. Second, it did not create an absolute bar to the advancement of white workers, since half of those trained would be white. Third, the plan was a temporary measure, not designed to maintain racial balance but simply to eliminate a manifest racial imbalance.¹⁶⁰

The current Assistant Attorney General for Civil Rights has gone on record stating that *Weber* was wrongly decided, and

¹⁵⁵Memorandum for the United States 8-9, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).

¹⁵⁶458 U.S. 457.

¹⁵⁷*Id.* at 480 (quoting from *Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970)(three-judge court), *summarily aff'd*, 402 U.S. 935 (1971)).

¹⁵⁸443 U.S. 193 (1979).

¹⁵⁹*Id.* at 209.

¹⁶⁰*Id.* at 208-09.

that he intends to do everything possible to have it overturned.¹⁶¹ Only recently he made good on his promise to seek to overturn *Weber* by opposing an agreement that black officers and city officials had reached in settlement of an employment discrimination lawsuit.¹⁶² In *Williams v. City of New Orleans*,¹⁶³ a federal district court judge had rejected the part of the agreement requiring promotion to officer grades of one black for every white policeman until black officers constituted fifty percent of all ranks of the police department. That court held that such an arrangement unreasonably affected white, female, and Hispanic officers and was unsupported by the record. On appeal, the Fifth Circuit found that the fifty percent provision *was* supported by the record.¹⁶⁴ It found that only three percent of the New Orleans Police Department's sergeants and lieutenants were black, and that no blacks served as captains or majors, even though New Orleans is 55% black, approximately 67% of applicants for entry to the police department are black, and 48.2% of the black applicants pass the examination and qualify for appointment.¹⁶⁵ Moreover, the appellate court concluded that, based on the record, the percentage of black sergeants, lieutenants, captains, and majors in 1980 would have been 40.7%, 29.4%, 37.4%, and 30.5% respectively had there been no discrimination.¹⁶⁶ On the question of the burden upon the expectations of white employees, which the Second Circuit found crucial in striking down the imposition of a promotion quota,¹⁶⁷

¹⁶¹Taylor, *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, Wall St. J., Dec. 8, 1981, at 4, col. 2.

¹⁶²Motion of the United States to Intervene as a Party Appellee and For Leave to File Suggestion of Rehearing *En Banc* in Excess of the Page Limit and Suggestion of Rehearing *En Banc* for the United States as Intervenor-Appellee and Brief of the United States as Intervenor-Appellee for Rehearing *En Banc*, *Williams v. City of New Orleans*, No. 82-3435 (5th Cir. 1983).

¹⁶³543 F. Supp. 662 (E.D. La.), *rev'd*, 694 F.2d 987 (5th Cir. 1982)(panel decision).

¹⁶⁴694 F.2d 987.

¹⁶⁵*Id.* at 990, 993-94.

¹⁶⁶*Id.* at 994.

¹⁶⁷*Kirkland v. New York State Dep't of Corrections*, 520 F.2d at 426-30. For a discussion of this opinion, see *supra* text accompanying note 41. The Second Circuit has itself recently approved a consent decree in the *Kirkland* litigation that included race-conscious remedies despite the objection of white

the Fifth Circuit pointed out that "the present great disparity between numbers of blacks and non-blacks is due to past discriminatory practices, and that 'temporary' affirmative action quotas are an acceptable and approved remedy to redress long-term past discriminatory practices."¹⁶⁸

At the time of this writing, the Reagan Justice Department is seeking to have the Fifth Circuit reverse itself on the issue of the fifty percent quota arrangement. Although the appeals court acknowledged that a non-discriminatory promotion process in the police department would have produced black representation close to the fifty percent level in 1980, the Justice Department is arguing, contrary to the view of both the black plaintiffs and New Orleans officials, that the figure is too high in 1983.¹⁶⁹

intervenors. *Kirkland v. New York State Dep't of Corrections*, 711 F.2d 1117, 1130-31 (2d Cir. 1983), *cert. denied sub nom.* *Althiser v. New York State Dep't of Corrections*, 104 S.Ct. 997 (1984).

¹⁶⁸*Williams*, 694 F.2d at 996. The Justice Department has also joined white policemen in Birmingham, Alabama in their suit against a similar promotion quota. The quota was embodied in a consent decree to which the Justice Department agreed in August, 1981. Memorandum of Opinion, *United States v. Jefferson County*, C.A. No. 75-P-0666-S (N.D. Ala. August 18, 1981). See also Pear, *U.S. to Support Whites in Suits on Bias Decree*, N.Y. Times, March 5, 1984, at A1, col. 2.

The Department's decision to renege on its commitments under the consent decree and to intervene on behalf of white plaintiffs challenging the consent decree is reflected in a February 10, 1984 letter from Assistant Attorney General Reynolds to Judge William M. Acker, Jr., Memorandum of Opinion, *supra*. The Department's volte-face reportedly has caused consternation not only among members of the administration of Mayor Richard Arrington, a black, but has also been criticized by former mayor David Vann, who is white. Smothers, *In Birmingham, Whites Now Get U.S. Legal Aid*, N.Y. Times, March 20, 1984, at A18, col. 1.

¹⁶⁹Motion of United States, *supra* note 162. In *Williams*, the Reagan Administration seeks to advance its theory that only actual victims of discrimination can enjoy the benefits of race-conscious relief. See *supra* note 47. The Justice Department has recently attempted to persuade other courts of this argument without success, for both substantive and procedural reasons. Examples of the former are *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom.* *Bratton v. City of Detroit*, 704 F.2d 878, *reh'g denied*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984); *United States v. City of Cincinnati*, 32 Empl. Prac. Dec. (CCH) ¶ 33,660 (S.D. Ohio January 31, 1983)(preliminary injunction granted to require the city to take account of the affirmative action plan embodied in a prior consent decree in

The administration's position in the New Orleans case is not only legally and factually unsupportable, but has damaging implications far beyond the circumstances of this particular litigation.¹⁷⁰ One of the central themes of the congressional debates prior to both the original passage of Title VII and its amendment in 1972 was the importance of *voluntary* resolution of employment discrimination suits. In fact, Congress built this theme into the provisions of Title VII itself, by granting a certain period of time for the Equal Employment Opportunity Commission to pursue conciliation efforts before the allegedly "aggrieved party" can bring suit.¹⁷¹ Furthermore, as Justice Blackmun so aptly pointed out in his *Weber* concurrence, prohibiting employers from attempting voluntarily to address evidence of discrimination in their operations places them in an absolutely untenable position. If employers fail to act, they run the risk of

laying off workers). Another recent Justice Department effort in this area, based on procedural grounds, failed when the Supreme Court dismissed the case as moot. *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 103 S.Ct. 2076 (1983). The administration will have another opportunity to present its arguments during the current Supreme Court term in *Firefighters Union No. 1784 v. Stotts*, No. 82-206, *cert. granted*, 103 S.Ct. 2451 (1983). *Stotts*, like *Boston Firefighters*, raises the issue of whether racial criteria may be used in lay-off situations to preserve minority hiring percentages achieved pursuant to an earlier Title VII consent decree.

¹⁷⁰The Reagan Administration itself was not originally in accord as to what position it should take in the *Williams* case. The Equal Employment Opportunity Commission had prepared a brief supporting the Fifth Circuit panel. The Department of Justice's position, challenging the ruling, ultimately prevailed and became the administration's stance in the case. The EEOC's draft brief, never filed with the Fifth Circuit, is reprinted in 1983 Daily Lab. Rep. (BNA) No. 67, at E1-13 (April 6, 1983). *EEOC Reverses Stand on New Orleans Suit Due to Pressure from Justice Department*, Wall St. J., Apr. 7, 1983, at 16, col. 1; *Pressure Seen in Vote to Withdraw Brief on Quotas*, N.Y. Times, Apr. 8, 1983, at D15, col. 5.

The EEOC appears, however, to adhere to the view that so-called "non-victims" of employment discrimination can benefit from race-conscious remedies, such as goals and timetables or quotas, as reflected in its recent settlement of a longstanding suit against General Motors. The \$42 million settlement requires GM, among other things, to make good faith efforts towards assuring specific employment goals for minorities and females in various categories of production, skilled trades apprenticeships, and journeymen jobs. *GM's \$42 Million Job Discrimination Settlement*, 114 [News and Background Information] Lab. Rel. Rep. (BNA) No. 5, at 144-45 (Oct. 24, 1983).

¹⁷¹*Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974).

being sued successfully by racial minorities or women for employment discrimination. Under such circumstances, the federal courts, not they, will have the final say as to what remedy will be imposed. If they act voluntarily, however, they must confront the possibility that white or male workers will sue charging "reverse discrimination."¹⁷²

The Reagan Justice Department's program can serve only to "chill" any inclination that employers might have to resolve voluntarily claims of discrimination against minorities or women. The Wall Street Journal reported in 1982 that the Administration's stance on affirmative action was wreaking havoc in some of America's major corporations, where efforts to increase the representation of minorities and women had been making great strides.¹⁷³ According to the Journal, some of the Reagan Administration's "actions and rhetoric are taken by middle managers as a signal that they no longer need to be concerned about corporate affirmative-action efforts."¹⁷⁴ As a consequence, the article reported, "increasingly, corporations are convening special meetings to warn managers that equal-employment laws haven't changed, that companies remain liable to lawsuits, and that their corporate equal-employment programs are still in force."¹⁷⁵

¹⁷²Weber, 443 U.S. 193, 209-22.

¹⁷³Greenberger, *Job-Bias Alert: Firms Prod Managers to Keep Eye on Goal of Equal Employment*, Wall St. J., May 17, 1982, at 1, col. 6.

¹⁷⁴*Id.*

¹⁷⁵*Id.* A recent Department of Labor study confirms what these major corporations already knew: that affirmative action of the type criticized by the Reagan Administration has been highly effective in promoting the employment of blacks, women and Hispanics. *A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women*, A Report of the Office of Federal Contract Compliance Programs Employment Standards Admin., U.S. Dept. of Labor (January 1983). Pear, *Study Says Affirmative Rule Expands Hiring of Minorities*, N.Y. Times, June 19, 1983, § I, at 16, col. 1. Yet the Labor Department's position in this regard, which sets limits on the extent to which federal contractors may use affirmative action, has been particularly disruptive of corporate affirmative action programs. Greenberger, *Federal Shift in Hiring Rules Stirs Criticism*, Wall St. J., Mar. 15, 1983, at 29, col. 3. In fact, even Clarence Thomas, head of the EEOC, recently admitted publicly that the Reagan Administration's stance has caused some employers to believe that laws against job bias no longer applied. *E.E.O.C. Chief Cites Trouble in Resolving Some Bias Cases*, N.Y. Times, June 2, 1983, at B9, col. 1.

While it is laudable that some leading members of the "Fortune 500" are insisting that their staffs continue to respect equal employment opportunity laws and press on with affirmative action, one has to wonder how long they can hold out in the face of federal opposition toward such practices. And once corporate America's commitment to remedying voluntarily the effects of employment discrimination has been undermined, it is hard to predict how many years will be required to rebuild what this administration will have destroyed. In the meantime, we are likely to see more lawsuits, more court orders, more disputes over implementation, in sum, more labor unrest, at a time when the energies of business should be devoted to increasing productivity and providing jobs for America's unemployed.

Conclusion

Civil rights enforcement at the national level during the period of almost forty years before the Reagan Administration took office had several salient features. First, successive administrations, irrespective of party, attempted to build upon the previous principles of civil rights law to achieve increasingly effective enforcement of basic civil rights. Though there were variations with respect to emphasis and allocation of resources from administration to administration, the momentum of civil rights enforcement was basically forward. Second, despite differences in ideology, each administration was willing to alter its initial views on civil rights enforcement in the face of reality: techniques that proved ineffective were abandoned in favor of more potent approaches. Third, no administration openly challenged the authority of Supreme Court rulings, even those it did not wholly embrace, or announced publicly an intention to ignore the dictates of those decisions in undertaking to "faithfully" uphold the law.

The Reagan Administration has been the exception. It has consistently shown an inclination in matters of civil rights to move in precisely the opposite direction from former administrations. It has sought to undermine the achievements of preceding administrations, Republican and Democratic. Mechanically repeating stock phrases about "busing being bad" and

“quotas being unfair” as articles of faith, its officials have demonstrated an extreme ideological rigidity, refusing to yield in the face of even the most compelling facts and reasoning to the contrary. Its proposed alternatives to accepted remedies, which were tried and rejected as inadequate in the past, show at the very least a lack of imagination, and could be fairly characterized as less than good faith efforts to protect the victims of discrimination. And it has turned its back on Supreme Court precedents that have proven to be valuable tools for lower federal court efforts to foster greater desegregation and job opportunities for minorities.

The end result of Reagan Administration policies is difficult to predict. Thus far, federal courts, including the Supreme Court, have almost uniformly rebuffed the Reagan Justice Department’s attempts to roll back civil rights precedents. There is no reason to think that the courts will not remain steadfast over the next few years, even if the Reagan Administration wins a second term. The most likely casualty of all of these about-faces on civil rights may be the good will of millions of Americans. Whatever their initial attitudes, a substantial number of citizens have come to accept the need for solving our nation’s problems of racial discrimination and exclusion once and for all. It is this intangible recognition by individuals nationwide that holds the ultimate promise of equality of opportunity for all citizens. The spirit of voluntary compliance with civil rights laws engendered by so many years of “carrot and stick” federal enforcement is integrally threatened by an administration which upholds civil rights laws only grudgingly. The damage easily done in four years may take a generation to repair.

