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RECENT DEVELOPMENTS IN CIVIL RIGHTS LAW (AS PRESENTED AT THE COMMON CAUSE 20TH ANNIVERSARY CELEBRATION AT ST. MARY'S SCHOOL OF LAW ON NOVEMBER 3, 1990).

ARCHIBALD COX*

Thank you Dean Aldave and thank you all for your welcome. Its truly a double pleasure to be here this afternoon and maybe a triple one. Quite sincerely, it was a double pleasure both to visit the St. Mary's Law School and to be in the western part of Texas, and to celebrate the twentieth birthday of Common Cause. It's particularly a pleasure to be in Texas where the first of the state organizations was established. However, I was surprised to see how many people had given up their Saturday afternoon to listen to me. That makes it a threefold pleasure.

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As the Dean said, I am going to speak about recent developments in civil rights law. This is an appropriate subject for a Common Cause gathering because even though Common Cause has not played a leading role in the civil rights coalition, our desire to open up the government necessarily and properly embraces a desire to open up not only the government but the entire system to people of all the many different rainbow of colors that make up our society.

Civil rights is a subject on which I find it difficult to offer many generalizations. One can say, unhappily, that there is some loss of momentum in the civil rights movement both in the law and in politics. I am not sure I understand all the reasons for this loss of momentum, and maybe I am politically prejudiced, but one of the reasons seems to have to do with the tactics of the party controlling the Presidency. It is hard to generalize because the Supreme Court of the United States, on which I shall focus is so badly, not divided, but splintered on this subject. On the one hand, we had Justice Brennan, Justice Marshall and Justice Blackman, in the order of seniority, who were enthusiasts for civil rights. Then came three or four Justices, who I don't think of as a block, but whose positions would vary from case to case. Justice Stevens, Justice Byron White, Justice O'Connor and sometimes even the Chief Justice would come down on a modestly pro civil rights stand. In recent years there have been two Justices way off by themselves—Justices Scalia and Kennedy. Now of course we have Justice Souter from New Hampshire, where there is no civil rights problem because the people are nearly all of one ethnic background, taking the place of Justice Brennan. This fragmentation makes it hard to foresee the future, so I think I have to be somewhat eclectic and particular in what I have to say.

Let's talk, first, a little about school desegregation. I can't resist an effort to establish a fairly broad perspective on this subject. As I think of developments in constitutional adjudication or constitutional law in the Court in sweeping terms, *Brown v. Board of Education*[1] not only marks the great stride forward in civil rights, but it also symbolizes the very new turn that Court decisions going beyond the area of civil rights took at that time. Looking back in history, the role of the Supreme Court in passing on the constitutionality of statutes or executive actions invariably had been either to say "Yes, you can make

1. 349 U.S. 294 (1955).

this change through legislative or executive action," or to hold up its hand and say "No." In over-simplified non-legal language this meant that the Court vetoed the statute.

Change came from legislation, but beginning with the *Brown* case and then moving into other fields, the Court began for the first time in our history, to start using constitutional decisions as instruments of social and political reform. The "one person one vote" cases are illustrations of this shift in political reform. I describe this as a fact, not in any sense of deprecating what it was. This also meant that the Court would have to take on a second and very new kind of job—the job of prescribing, enforcing, and administering broad scale remedial action. The school desegregation and busing decrees are perhaps the biggest of these broad scale remedial undertakings, undertakings which, in a number of metropolitan areas, have involved the expenditure of millions of dollars for construction, school buses, and the like. In Boston this new job even required the courts to decide which teachers would be laid off and which would be kept on in times of necessary layoffs, due to rebellion by the Boston school board.[2]

This is a strange thing for judges to be doing, just the way it was a strange thing for judges to start running mental health hospitals because the old administration had been declared unconstitutional, or in many states, supervising administration of prisons. These are things that people my age would never have thought were normal judicial undertakings if they had occurred in the 1930s or 1940s.

These were the steps the Court embarked on, but the key question about the Supreme Court is where will the new conservative majority go? The conservative majority includes those who were dissenters from many of these earlier decisions, or critics of many of them. Will they undo them all, or will they feel that they must decide according to existing laws and follow them? (I didn't mean to imply that *Brown* would ever be overruled. That of course would be silly.)

The question of remedies came up at the last term of the Supreme Court. One case the Court decided involved the city of Yonkers, New York,[3] where racial discrimination was not present in the schools, although I think it probably had been in the past. In planning the city of Yonker's public housing projects, of which there were many, the city very carefully located the housing projects so as to make sure that

2. Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982).
3. Spallone v. United States, __ U.S. __, 110 S. Ct. 625, 107 L. Ed. 2d (1990).

they were only in the areas where minorities (in Yonkers nearly all were black) lived and not to locate them in any of the white residential areas. That resulted in a law suit. It was proved to the satisfaction of the federal judge that the city's motive was to preserve racial separation residentially—that the city was discriminating. The federal judge not only ordered the city to stop, but as a remedy ordered them to put new public housing on sites that would result in something approaching a greater racial balance. The decree was entered and the city council refused to appropriate the money. The question became—what will happen? The judge entered an order finding both the city and the individual members of the city council in contempt and imposed fines on the individual council members of so much a day until they adopted the necessary ordinance. That's pretty stiff medicine. I don't mean bad but nevertheless pretty stiff. The council members appealed to the Supreme Court. If the Court were really going to reject the remedial undertakings of the old Court, I think it would have probably said, "You can't do any of it." The Court did reverse the finding of contempt and fines imposed on individual council members, on a very narrow ground. The Court said that first the trial court must find the city in contempt and impose a coercive fine on it, and if that doesn't work, the trial court should take the next step. I find some encouragement in this narrow ground because, on the whole, my disposition is to approve what the district court had been doing.

The other case, *Missouri v. Jenkins*,[4] does deal with school desegregation. The Kansas City schools had been heavily segregated years ago in some part by law and in some part by school board decisions as to where it would draw district lines for school assignments, where it would built new schools, and so on. The district court quite a few years ago, after finding that there was de jure segregation, segregation by violations of the Constitution, entered a very elaborate decree requiring, in legal jargon, the establishment of a "unitary school district." The decree required a degree of racial balance in every school, construction of magnet schools (which would have been new buildings), busing, expenditures, and indeed the plan would cost millions of dollars. It would have required doubling the tax rate. Again the school board refused to raise taxes. The district court thereupon entered its own order imposing a property tax doubling the old property

4. 495 U.S. __, 110 S. Ct. 1651, 109 L. Ed.2d 31 (1990).

tax to raise the necessary money. That action went to the Supreme Court. If the Court were rejecting what has come to be called the activism of the Warren Court, it would have said that the whole undertaking is wrong, or that if this school district doesn't want to raise the money, then the trial court will have to find some other lesser remedy, which you could hardly do, for the past segregation. However, while the Court did modify the decree, it didn't reject out of hand what I have described as a rather stiff, far-reaching remedy. The Court said that although a court cannot levy taxes, it can enjoin the enforcement of the state statutes which prevent the school district from levying the taxes. The Court then proceeded to do just that, clearing the way, one hopes, for the school district to raise taxes. The dissenting Justices would have swept the whole thing out; but the five to four decision did preserve, one hopes, the essence of the remedy and perhaps leave the way open for further sanctions.

There is a third and telling case now before the Supreme Court in the area of school desegregation and remedies for past de jure segregation. It is going to throw light on the general question, how long can a federal court continue to impose remedies which require a large measure of integration and racial balance in the schools on school districts which have engaged in de jure racial discrimination in the past. Simplifying the facts of *Board of Education of Oklahoma City v. Dowell*[5] case, there was unconstitutional discrimination in the school district. After a long time and much litigation, the district court entered a decree that required busing, new schools, and pairing old residential districts, with the result that, so long as this was done, there would not be any school that was predominantly white, black, hispanic, or American-Indian. This decree would create a good deal of racial balance in all the schools. The decree was phrased so that, if the residential patterns changed, the school board would be required to make changes in pupil assignments to match the changes. The decree was followed (we are now jumping a number of years), and a time came when the schools were balanced. The district court dismissed the suit but left the decree in force. There were again demographic changes, so that the schools became imbalanced racially. The school board had stopped carrying out the plan. The black plaintiffs then went back to court, to move for enforcement of the decree that had been left outstanding and further relief. The lower court refused

5. __ U.S. __ , 111 S. Ct. 630, __ L. Ed.2d __ (1991).

to enter such an order. It said that the old violations had been remedied once the pupil population of the various schools was racially balanced, that what happened after that wasn't the result of any violations of the Constitution, and that therefore the court shouldn't be concerned with it. The Tenth Circuit Court of Appeals reversed the district court's ruling.[6]

The case is now in the Supreme Court, and seems to be an important case all over the country. A great many cities have followed a decree for achieving racial balance, sometimes at great expense. Then there have been further demographic changes in the population, and the once balanced schools became imbalanced. So, does the court keep enforcing the decree? If so, for how long? Does the court concern itself with requiring a degree of racial balance, integration if you prefer, or if racial balance is achieved, once, for sixty seconds, has the effect of the past been wiped-out and that's all that a court can require? I don't know how the decision will come down. I find it very hard to predict the outcome. The sixty seconds I referred to surely is not long enough. It also seems to me that racial balance is a good thing for a school board to maintain, but a question which I find it harder to make up my mind about is how long *a court* can maintain racial balance. The *Dowell* case will throw a lot of light on whether the new conservative Court is going to continue to be vigorous in civil rights cases or draw away. I fear drawing away will affect the national trend, and that our efforts to achieve justice among all ethnic and language groups will be set back.

Let me turn now to some cases that were also decided at the last term of the Supreme Court, and that the much fought over civil rights bill, recently passed by Congress and vetoed by President Bush, sought to overturn. I find no way to avoid getting into particulars.

The first of those cases was known as *Ward's Cove Packing Co. v. Atonio.*[7] The case arose in Alaska as a class action suit brought by members of various Eskimo tribes and others in Alaska against Wards Cove, contending that the company discriminated against them on grounds of race or national origin—ethnic grounds. The complaint was not that the company made case by case instances of discrimination, but that the company had adopted certain practices for judging

6. Board of Ed. v. Dowell, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, __ U.S. __, 111 S. Ct. 630, __ L. Ed.2d __ (1991).

7. 490 U.S. 642 (1989).

who were eligible for skilled jobs. It was alleged that these practices had the effect of discriminating in favor of non-Eskimo and mostly white workers from the west coast of the United States who would go to Alaska for the season to fill the skilled jobs. It was shown that in general terms the number of Aleuts and other Eskimo tribes (I'll say Eskimo if you permit me) in the skilled jobs was disproportionate to the proportion of Eskimos in the unskilled jobs. The skilled and the unskilled employees ate and lived in segregated patterns. On that basis the lower courts had entered judgment against Wards Cove Packing. The Supreme Court set the judgment aside saying that the way a plaintiff in an employment discrimination case alleging a practice that results in race discrimination may proceed is to show that the proportion of minority employees in a particular group (here the skilled employees, electricians, plumbers, pipefitters and the like) was smaller than the proportion in the available labor pool. That had been done. The Court also said that if the plaintiffs could show that much, then the burden of going forward with evidence would shift to the employer. The employer would then have to try to show that its practice, such as requiring a high school degree, was necessary for effective performance of the job. The company had to come forward with that sort of evidence. If the plaintiffs showed that there were two or three tests applied to applicants and that racial disparity resulted, the plaintiffs then had to prove specifically which of the tests, or which two or three of the tests, brought about the racially disparate effect. It wouldn't be enough to show that the tests operating together had that effect. The Court also held that the employer must show that these practices tested qualities related to the effective performance of the job. It was up to the plaintiffs, those alleging discrimination, to persuade the jury that the tests did not test qualities related to the effective performance of the job. The plaintiffs had the burden of proof and it was only the burden of going forward that rested on the employer where there was a disparate impact shown.

Those rulings gave rise to violent bitter criticism among plaintiffs' lawyers in employment discrimination cases, among civil rights activists, the civil rights movement, and the criticism resulted in the so called Civil Rights Bill of 1990 that the President vetoed. Part of the bill was directed at overruling those holdings in the *Wards Cove* case.

I thought the bill, as first written, went much too far. I'm not an expert in such cases, so I say this with some diffidence. But the civil rights bill seemed to require the employer to prove that the test in-

quired into qualities that were *necessary* to do the job at all. It would not have been enough for the employer to show that having those qualities is necessary to do the job effectively or efficiently. This seemed to me to be an inefficient burden to put on employers. However, as I looked at the last provisions of the bill that was passed, the civil rights movement and those seeking change had pulled back to some phrase indicating the quality tested for must be reasonably related to the performance of the job, not the earlier very strict standard. I would have thought this to be a proper compromise.

There were several other provisions of this kind in the proposed civil rights act, and I think there may be time to talk about one other case. It is one that puzzles me. The lawyers among you may find that maybe you know the case but you may find it puzzling too. The name of the case was *Martin v. Wilks*.[8] It involved a fire department in Birmingham, Alabama. There is no question, of course, that employment in the fire department for many years was confined to white workers and further to white men. There is also no doubt that in Alabama this discrimination was sanctioned by law and violated the equal protection clause of the Constitution. After a period of time a decree was entered which, among other things, provided that in considering fire fighters for promotion as officers (there had been some black fire fighters hired by this time), the Department should alternate between black and white firefighters. I think it was one white and then one black who would be eligible for promotion. The decree was entered as a consent decree. A number of years later, several white employees with greater seniority than the black employees who were being offered promotions ahead of them, brought suit contending that they were, as a result of this consent decree, the victims of racial discrimination violating the equal protection clause. The lower courts held that the white employees couldn't attack the decree at that late date, even though they had not been parties the original suit. Here is the puzzle. That ruling was inconsistent with the well settled legal principle that if you are seeking an injunction or any other kind of a judgment, and want to bind someone other than the primary defendant, you must name them as parties and bring them into the case if you are the plaintiff. Otherwise, they can lie back and challenge the judgment later or just plain disregard the judgment later. The Supreme Court applied what I describe as a settled procedural rule to

8. 490 U.S. 755 (1989).

this race discrimination in employment case and consent decree; accordingly it held that the white employees could maintain their suit.

The problem is that it seems terribly unfortunate to have an affirmative action decree correcting the effects of past discrimination suddenly be subject to relitigation three, four, five, maybe ten years later. The way to prevent such a problem is to require process to be served on all of the employees effected by the original suit. This would give the white employees a chance to come in at the time the decree is entered, and require them to come in at this time. The problem with such an approach is that if they are brought in, there is likely to be a contest instead of the consent decree which the city would be willing to be have entered for political reasons. The white employees potentially injured by the afirmation action would never consent. Thus, there would be a minimum of several years, perhaps even ten years, of delay in remedying unconstitutional racial discrimination, while the case was litigated up and down the court system. Although the ruling of the lower courts seemed unfair, this isn't very satisfactory solution either. I don't know what I think about this; that is why I put it to you as I do. One thinks the remedy ought to be swift, but one also thinks everybody really affected in their jobs and in their job opportunities, ought to be given a hearing. The answer, of course, is to speed up the processes of justice, but that's a long and arduous task as every lawyer or judge knows. While there were provisions about speeding up justice in the bill that the President vetoed, I can't make out just what their effect would have been. It probably would have been to require the white employees, as it was in Birmingham, to come in before the decree was entered and risk the greater delay.

I wanted to say a few words about "affirmative action." This is the giving of one or another kind of preference to members of various groups such as Blacks, Mexican-Americans, Chicanos, other Hispanic individuals, native American Indians, and possibly others who have been for long periods of time the victims of discrimination. This has often been done by law as in states in the southern half of the United States, and in other times as a matter of practice all over the country. How far should a government or government-funded institution like a state university seek to go to open the system up by giving some kind of preference to those previously disadvantaged groups? These are the groups which, as those of you who have read the cases will know, are described as the victims of "societal discrimination" rather than of specific acts of discrimination, such as a violation of law by an em-

ployer, a university or a state. This has been a subject that has divided the Supreme Court from the time the first case in this area, the *Bakke* case against the University of California,[9] came before it. The Justices have been split several ways on this issue, and when you think about it is a tough problem not easy to make up your mind about.

On the one hand, it certainly seems in the interests of a good, just, and humane society to open opportunities up to those who, as a result of the prejudices or acts of discrimination of the past, just do not have those opportunities open to them. I argued the *Bakke* case for the University of California, defending the preferences that it sought to give blacks and minorities in admission to the medical college at Davis.

I recognize, however, that there are things to be said on the other side that are—I don't think preponderant—but they are worrisome. In the first place, once you start down this road, where do you stop? In Boston the Irish would certainly claim that they were the victims of discrimination for decades, and so would many Italians. If the state starts giving preferences, why not quotas for every group? Where does it stop once you start? If you give preferences on a wide scale doesn't that cost everyone, including the members of the disadvantaged minorities, some of their respect, dignity, and importance as individual human beings? Wouldn't there be a tendency for each of us to become number 345 Old New England, number 456 Mexican-American, and so on along the line? On the other side, as Justice Blackman said, to get away from race consciousness we must begin by being race conscious. Let me go back to the other side. Where do you stop? When do you stop? How do you know when to stop? My own view is that the University of California was right and that affirmative action plans when done carefully are right, but I do think one has to come to that conclusion after wrestling with both the pros and the cons of the situation.

About ten years ago the Supreme Court had a case before it involving the constitutionality of an act of Congress[10] which provided that out of each grant made to states, cities, municipalities, or counties for public works, 10% should be set aside for minority owned contracting

9. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

10. Fullilove v. Klutznick, 448 U.S. 448 (1980).

firms.[11] That was challenged as a violation of the equal protection clause implied in the fifth amendment. This appears to be the type of case, and those familiar with constitutional rights will recognize it as the kind of case, calling for the Court's "strictest scrutiny" test, a discrimination justifiable only by a "compelling interest." A divided Court, with Chief Justice Burger writing, upheld the law.

Many cities and states (I'm afraid I don't know about Texas) began adopting somewhat similar measures. The city of Richmond was one, and its ordinance was involved in a case know as the *Croson*[12] case, which was decided last year. The decision was the subject of much criticism as it came out. The city of Richmond ordinance which was set aside, provided that 30% should be set aside for minority contracts. The Court invalidated the 30% figure earmarked for minority contractors. I think the decision was easily foreseeable and that 30% is an awfully high figure. This wasn't just for the benefit of contractors in Richmond or even in Virginia. Any contractor anywhere in the United States would be eligible, so it was hardly a concern of the city of Richmond. There had been no record built by the city authorities of past discrimination, although when one says Richmond, Virginia, it immediately suggests slavery and prejudice. However, the Supreme Court's opinion by Justice O'Connor was very stern and condemned in almost absolute terms any affirmative action. There was nothing in the Civil Rights Bill that the President vetoed on that subject because I think the civil rights lawyers couldn't decide how to draft a remedy.

Despite the *Croson* decision, right at the very end of the term the Court suddenly turned around and by a six to three vote approved some affirmative action. The Federal Communications Commission had adopted over the years a rule which provided that in a contested proceeding, for a new broadcast license for instance, if there was no holder of the license for that channel or wave length, then a minority owned applicant would have a certain preference over others, in order to gain a diversity in broadcast programs. Congress in a some what backhanded way had approved the Federal Communications Commission rule, and it was challenged as a violation of equal protection

11. Local Public Works Capital Development and Investment Act of 1976, Pub. L. No 94-369, 90 Stat. 999, (as amended 42 U.S.C.A. 6705 (f)(2)).

12. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

and as being an unconstitutional racial classification.[13] However, by a vote of six to three the Court approved the FCC rule. The Court's formula approach was to ask whether Congress was seeking to pursue an objective within its power. (I interpolate "Was diversity in broadcasting as an objective within Congress' power.") The affirmative action racial classification would then be constitutional if it was designed to achieve such an objective and was substantiality related to achieving that objective. The Court, in this case, said that this test had been met to the satisfaction of the FCC and therefore to its, the Court's, satisfaction.

Again, this issue divided the Court and indicates the splintering among the Justices on this point. There were six votes to hold the FCC rule Constitutional. Justice O'Connor, in a narrowly reasoned dissent, said no, the racial classification is unconstitutional. Justice Kennedy and Justice Scalia said any race conscious action, affirmative, benign as its sometimes called, espousing hostile views against a group, or any race conscious classification, is unconstitutional.

Well, one says, trying to appraise the entire picture, Justice Brennan has retired and his place will taken by Justice Souter. What is likely to be the result the next time such issues are raised?

I have already talked longer, probably, than is permissible. I just can't resist discussing things very particularly. I have one general word reaching beyond civil rights about the future course of the Court. In particular, what I see as the core dilemma facing the new, more conservative, Supreme Court, is that the conservatives in the days of the Warren Court and some of the days of the Burger Court including the decision in the abortion cases, faulted the majority on two grounds. First they faulted the results. The conservatives didn't like the results because they went contrary to their political and social beliefs. Secondly, the conservatives faulted the majority for being too activist, for making new law and not following the law in books, or for being too quick to hold unconstitutional an act of a state legislature or of Congress.

Time goes by, the conservative majority seems just about to have developed, although they are not all of exactly one view; and now I think they have to chose between the two courses. Are they going to get the results they would like? In that event they now have to over-

13. Metro Broadcasting Comm. v. Shurberd Broadcasting of Hartford, Inc., __ U.S. __, 110 S. Ct. 2997, 111 L. Ed.2d 445 (1990).

turn what is today the law. In the alternative, are they going to say "No, we believe the judges should be governed by law, so we have got to stick pretty closely to the existing law." Finally, will they go with Justice Rehnquist's often written opinions proclaiming that he is not for strict review of state or federal statutes, and that there is a strong presumption of their constitutionality. However, whenever it comes to affirmative action, Justice Rehnquist has been quick to set the statutes aside.

I think these sort of choices are going to have to be made. I don't know how; and I don't think it is easy to predict. I am not among those who think that *Roe v. Wade* is going to be discarded if not in a year or two then in five years. It seems to me that the decision has been the law for some time and that someone, indeed perhaps Justice Souter, might say that if he were free to decide the issue for the first time he would not go with the majority in *Roe v. Wade*, but that presently it is the law and as a judge, where the need to make this kind of fundamental choice arises it is his duty to follow the law.

I hope you found some interest in what I have said today. I stop now, and that is the most general conclusion I have for you today. Thank you very much.