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REVIEW ESSAY

Race in America: Unfinished Business*

THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA. By Nicholas Lemann. New York: Alfred A. Knopf. 1991. Pp. 410. \$24.95 (\$13.00 paperback (Vintage Press)).

CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS. By Thomas Byrne Edsall with Mary D. Edsall. New York: W.W. Norton & Co. 1991. Pp. xii, 339. \$22.95 (\$10.95 paperback).

*Joel L. Selig***

I.

Los Angeles recently brought America's racial divide to the front burner, episodically. First there was the Rodney King beating. Then there was the verdict of acquittal, the riot, and the beating of the

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The text of this essay, with introductory remarks omitted here, was delivered as a lecture at the University of Wyoming College of Law on October 23, 1992, on the occasion of the author's installation as Centennial Distinguished Professor of Law.

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white truck driver, Reginald Denny. Then there was the Sister Souljah controversy.¹

Although race always lurks beneath the surface of American life and consciousness, we have a short attention span, and awareness of the need to heal our racial divide frequently dissipates in the aftermath of an immediate crisis such as Los Angeles. Today, it remains a matter of conjecture whether, when, and in what guise America may again place the racial issue on its front burner. Will race play a constructive role, firing a melting pot that will help show a troubled world the way from Soweto, Johannesburg, and Alexandra — and from Beirut, Belfast, and Sarajevo — to the shining city upon a hill? Or will race remain on the back burner, fueling the poisonous brew that has been our most tragic addiction since the days of slavery?

As a former civil rights lawyer who came of age in the Kennedy era, I don't know the answers to these questions. But I found plenty of food for thought, and many significant insights, in the two books by perceptive journalists which are the occasion for this essay.²

Nicholas Lemann's thoughtfully constructed work explores the origins and consequences of the migration of African-Americans from the Southern countryside to the cities of the North, West and South.³ This migration, "one of the largest and most rapid mass internal movements of people in history," involved six and a half million, of whom five million moved after 1940 as a consequence of the mechanization of cotton farming.⁴ The migration "made race a national issue in the second half of the [twentieth] century — an integral part of the politics, the social thought, and the organization of ordinary life in the United States."⁵ Lemann believes one of the enduring consequences of the great black migration is that "[r]ace relations [stands] out nearly everywhere as the one thing most plainly wrong in Amer-

1. Sister Souljah, a rap singer, was quoted as saying, "If black people kill black people every day, why not have a week and kill white people?" Richard Cohen, *Sister Souljah and Clinton's Gumption*, WASH. POST NAT'L WEEKLY ED., June 22-28, 1992, at 28. The controversy that followed had to do with Bill Clinton, Jesse Jackson, internal Democratic party politics, and Clinton's efforts to appeal to a broader presidential constituency. See *id.* Although there was some question whether Sister Souljah's remarks should be taken literally or merely as an artistic representation of black anger, the parties to the controversy appeared to agree that racially motivated violence is deplorable regardless of the race of its perpetrators.

2. NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991) [hereinafter LEMANN]; THOMAS B. EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991) [hereinafter EDSALL].

3. In the 1970s and 1980s, the patterns of black migration began to change, to look more like white patterns, and to include migration back to the South. Barbara Vobejda & D'Vera Cohn, *Blacks Left Northern States for Boom Areas in '80s*, WASH. POST, July 5, 1991, at A1 (reporting 1990 census figures).

4. LEMANN at 6.

5. *Id.* at 7.

ica, the flawed portion of the great tableau”⁶ He argues that “[t]he ghettos, and race relations in general, are the one area in American domestic life . . . where the vocabulary of crisis and national responsibility is not in the least trumped-up.”⁷ He also expresses the hope and the belief that “the racial situation as it stands today is not permanent — is not, should not be, will not be.”⁸

Lemann’s book is a masterpiece of thematic journalism. It is also a call to arms. I was in no need of persuasion, but today many others are. For those who are receptive to reasoned historical and journalistic argument, Lemann provides an illuminating account of how white and black America, uneasily but unavoidably joined in a common history and a common destiny, got from where we were prior to the civil rights era to where we are today. He employs an original and effective format, combining social and political history and analysis with accounts of the personal experiences of several black families who made the journey from the Mississippi Delta to Chicago (and, in some cases, back to Mississippi). He also offers suggestions for breaking through the current paralysis and resuming the effort to build a brighter common future.⁹

The Edsalls’ work analyzes the political evolution that has brought us from the racial progress of the New Frontier and the Great Society of the 1960s to the retrogression, racial division, and stalemate of the 1980s and 1990s. The Edsalls chronicle how the Republican party’s use of “the overlapping issues of race and taxes” enabled it to capture the White House in five of the six elections from 1968 to 1988, and to “shap[e] a new polarization of the electorate — a polarization which has replaced the traditional New Deal cleavages that sustained the Democratic party from 1932 to 1964.”¹⁰ They explain how the collision of race and taxes with two other forces — the “rights revolution” and the “rights-related reform movement” within the Democratic party¹¹ — created a “chain reaction . . . forcing a

6. *Id.*

7. *Id.* at 353.

8. *Id.* at 7.

9. Although Lemann’s book, like this essay, focuses on African-Americans, there are of course many other groups who have suffered discrimination in America. Nevertheless, the black experience, which began with slavery and progressed through Jim Crow to the present, is different. It is the product of a uniquely cruel and long-standing history of oppression and a uniquely stubborn set of barriers to assimilation and integration. Although a significant part of what I will discuss here is applicable to other minorities as well, my principal focus — like Lemann’s — will be on African-Americans. I hope that I will not be misunderstood as ignoring or discounting the situations of other groups who remain at serious disadvantage in our society. I would also note that many responses to the needs of black Americans — including, for example, the enactment and enforcement of civil rights laws, and efforts to improve education and job training in urban ghettos — are responsive to the needs of Latinos and other minorities as well.

10. EDSALL at 3.

11. *Id.* at 4. The Edsalls define these forces as follows:

realignment of the presidential electorate.”¹² Of these four forces, “race has been the most critical, and the most powerful, in effecting political change.”¹³ It “has provided a mechanism to simultaneously divide voters over values, and to isolate one disproportionately poor segment of the population from the rest of the electorate.”¹⁴ Thus, “in the years following the civil rights legislation of the 1960s, racial attitudes . . . became a central characteristic of both ideology and party identification, integral to voters’ choices between Democrats and Republicans, and integral to choices between policy positions on a range of non-racial issues traditionally identified with liberalism and conservatism.”¹⁵

the rights revolution, a revolution demanding statutory and constitutional protections for, among others, criminal defendants, women, the poor, non-European ethnic minorities, students, homosexuals, prisoners, the handicapped, and the mentally ill; and . . . the rights-related reform movement focusing on the right to guaranteed political representation that took root within the Democratic party in the late 1960s and throughout the 1970s.

Id.

12. *Id.* (emphasis omitted).

13. *Id.* at 5.

Lemann also emphasizes the central role of race in the Republican presidential coalition.

LEMANN at 200-01. Lemann states:

[T]he Republican party seized upon the political opportunity presented by the Democrats’ embrace of civil rights, and induced the South to switch from Democratic to Republican in presidential elections. The great migration then delivered the coup de grace to the Democrats as a presidential party: it hastened the movement of millions of middle-class white voters to the Republican suburbs, and it caused millions more blue-collar voters who didn’t move to stop voting for the Democratic candidate for president.

Id.

14. EDSALL at 5.

15. *Id.* at 151.

The Edsalls also explain the economic class implications of the new polarization. *Id.* at

5-6. The Edsalls state:

Just as race was used, between 1880 and 1964, by the planter-textile-banking elite of the South to rupture class solidarity at the bottom of the income ladder, and to maintain control of the region’s economic and political systems, race as a national issue over the past twenty-five years has broken the Democratic New Deal “bottom-up” coalition — a coalition dependent on substantial support from all voters, white and black, at or below the median income. The fracturing of the Democrats’ “bottom-up” coalition permitted, in turn, those at the top of the “top-down” conservative coalition to encourage and to nurture, in the 1980s, what may well have been the most accelerated upwards redistribution of income in the nation’s history — a redistribution fed by the tax, spending, and regulatory policies of the Reagan and Bush administrations.

Id.

In another recent book, the perceptive conservative Republican political analyst, Kevin Phillips, has documented exhaustively the upwards redistribution of income to which the Edsalls refer, and the failure of the Reagan-Bush redistributive policies to benefit the middle class. KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990). This latter failure, and the increasing recognition of it by middle and working-class Reagan Democrats, presents a major threat to the continued dominance of the race-driven top-down presidential coalition — provided the Democrats can capitalize on it, which in 1988 they failed conspicuously to do. *See id.* at xxii (“[T]he 1988 debate largely ignored . . . the new political economics, intensifying inequality and pain for the poor,

The Edsalls justly criticize the Democrats for unnecessarily allowing a variety of political vulnerabilities to develop. However, I would have wished them to be more critical, rather than merely descriptive, in their treatment of the Republicans' successful exploitation of race. The Democrats surely have been guilty of mistakes and excesses which raise issues both of policy and of political tactics. But I believe a moral issue is raised by the fact that the Republicans have played the race card in all but one of the presidential elections from 1964 to the present.¹⁶ In any event, the Democrats' mistakes per-

the unprecedented growth of upper-bracket wealth"); *id.* at 5, 29-31, 42, 45-46, 47, 50-51, 84, 146, 214-15 (criticizing Dukakis' failure sufficiently to promote "populist economics" as a campaign theme); EDSALL at 260 ("[T]he troubling extremes over the past decade of affluence and poverty for both whites and blacks [and other factors] have substantially changed the political dynamic."); *id.* at 261 (noting Republican party strategists' recognition of "both the threat and the opportunity inherent in the changing outlook of the electorate"); *id.* at 222-25 (recounting Republicans' successful use of Willie Horton issue "to wrap the collective agenda of race, rights, and values around the neck of the Democratic presidential nominee").

16. The 1964 Republican nominee, Senator Goldwater, had voted against the 1964 Civil Rights Act, having declared that "despite the recent holding of the Supreme Court, I am firmly convinced — not only that integrated schools are not required — but that the Constitution does not permit any interference whatsoever by the federal government in the field of education." EDSALL at 40-41. Goldwater became "the first Republican since Reconstruction to carry the [five southern] states most deeply opposed to integration" *Id.* at 41. The Edsalls explain:

Goldwater's success demonstrated that conservative ideology provided a new avenue for the Republican party into the South, an avenue that permitted the GOP to carry the most anti-black electorate in the nation without facing public condemnation. For a substantial segment of the white South, conservatism became a cloak with which to protect racial segregation.

At the same time, in a development that would soon have national relevance, Goldwater demonstrated that the socioeconomic class structure of the New Deal alignment in the deep South could be fractured by the issue of race.

Id.

In 1968, former Vice President Nixon "developed strategies essential to capitalizing on the issue of race, while avoiding the label of racism." *Id.* at 74. The 1968 Nixon campaign employed a southern strategy, demonstrating "that it was possible to affirm respect for the law, signaling at the same time that he would relieve pressure on beleaguered whites." *Id.* at 75. The messages used included clear signals of racial conservatism on the then dominant civil rights issues of school desegregation and open housing. *Id.* at 75-76.

Once in office, Nixon engaged in a number of politically motivated battles on racial issues with the Supreme Court, the Senate, and the civil rights bureaucracy (including the Civil Rights Division of the Department of Justice, where I was then working), "min[ing] conflict for profit," "strengthen[ing] his credentials as a racial conservative," and appealing to white northerners as well as to southerners on racial issues. *Id.* at 81-83; *id.* at 81, 83.

In March 1972, "as [President] Nixon prepared for the general election nine months away, he began an all-out assault on busing" for purposes of school desegregation, thereby "disassociating himself . . . from the enforcement efforts that the executive branch was under court and legislative mandate to carry out." *Id.* at 89; *id.* at 88. Also in 1972, Nixon, "seeking to secure the shifting loyalties of the white working class, turned presidential rhetoric against the major civil rights initiative of his own first administration — the Philadelphia Plan." *Id.* at 97. (The Philadelphia Plan required contractors on federally-assisted construction projects to attempt to meet numerical goals and timetables for minority participation in employment opportunities. *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 162-64 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).) The Edsalls comment:

In retrospect, two elements of Nixon's 1972 campaign strategy are striking: 1) the degree to which the underlying theme of race is repeatedly stressed, in the re-

mitting such tactics to work against them may have come to an end.

ferences to busing and to affirmative action; and, 2) the extraordinary degree to which Nixon anticipated the social-issue agenda of the conservative Republican revolution that swept Ronald Reagan into office in 1980.

EDSALL at 97.

The 1980 nominee, former Governor Reagan, had opposed the 1964 Civil Rights Act, the 1965 Voting Rights Act, fair housing legislation, and a holiday honoring Martin Luther King, Jr. *Id.* at 148. The Edsalls describe Reagan's use of racial appeals in the 1980 campaign:

One of Reagan's favorite and most often-repeated anecdotes was the story of a Chicago "welfare queen" with "80 names, 30 addresses, 12 Social Security cards" whose "tax-free income alone is over \$150,000." The food stamp program, in turn, was a vehicle to let "some fellow ahead of you buy T-bone steak" while "you were standing in a checkout line with your package of hamburger."

These campaign appeals and strategies on the part of Reagan and the Republican party revived the sharply polarized racial images of the two parties . . . that had characterized the Johnson-Goldwater contest. By 1980, the racial polarization of the two parties was to prove highly profitable to Republicans, with racial conservatism contributing decisively to the GOP advantage.

Id. (footnotes omitted).

The same strategy of exploiting racial polarization worked for President Reagan again in 1984. *Id.* at 211-12. The Edsalls describe Reagan's use in 1984 of race-coded rhetoric:

For disaffected white voters, Reagan drew the connection between taxes and "groups" and "special interests" — adding to Republican rhetoric phrases and words that now bore a new meaning — signifying for many working and middle-class voters the reliable opposition of Reagan and the Republican party to benefits targeted at blacks, feminists, homosexuals, and others seeking new rights, protections, or preferences from government.

Id. at 206.

Vice President Bush used the same strategy in 1988. "[T]he Bush campaign, under [Lee] Atwater's guidance, mastered the trick of selecting racial/social issues that achieved the fundamental goal of maintaining the election-day alliance between the country clubbers and the populists on a national scale." *Id.* at 222. This time the race card was Willie Horton. The Edsalls explain the racial aspect of that appeal:

The focusing of public attention by the Bush campaign on the prison furlough of Willie Horton tapped not only voter resentment over the prisoners' rights, prison reform, and criminal defend[er]s' rights movements, but tapped these concerns through a particularly threatening and dangerous archetype: of the black man as the rapist of a white woman.

Id. at 19.

More recently, President Bush vetoed the 1990 Civil Rights Act and threatened to veto the 1991 Act, repeatedly characterizing both pieces of legislation as "quota bills" until, having exploited the racial politics of the quota issue, he signed the 1991 bill into law but simultaneously caused new controversy by restoking the racial fire. See Ann Devroy, *President Signs Civil Rights Bill*, WASH. POST, Nov. 22, 1991, at A1 ("[The] Rose Garden ceremony . . . was overshadowed by the hasty withdrawal of a proposed presidential order that would have ended government affirmative action and hiring guidelines that benefit women and minorities."); *id.* ("Bush was forced to reaffirm his support for affirmative action and his staff spent much of the preceding 24 hours in turmoil, rewriting the president's statement to remove most, but not all, of the sections that outraged backers of the legislation, civil rights groups and members of the president's Cabinet and senior staff.").

At the 1992 Republican convention, the race card was subsumed in the "family values" theme. Thomas B. Edsall, *The Republicans' Value-Added Strategy*, WASH. POST NAT'L WEEKLY ED., Aug. 24-30, 1990, at 15. Edsall states:

With pocketbook issues currently working to the advantage of Bill Clinton and the Democratic Party, Republican strategists charted their own offensive on the question of "family values" — a convenient catch phrase for a series of deeply polarizing sexual, cultural and racial conflicts arising from the changing role of women, the gay rights movement, the deterioration of the nuclear family and the emergence of

For the Clinton presidential candidacy, one of whose messages is racial healing, also has been informed by the lessons the Edsalls teach about the losing strategy recent Democratic nominees have followed, and the need to address the concerns of the Reagan Democrat constituency.¹⁷

The Edsalls and Lemann are in agreement that the stakes involved in the developments they describe are enormous. The Edsalls believe that America's social order and sense of shared citizenship are dangerously threatened.¹⁸ Lemann sees the unfinished business of race in America as a crisis,¹⁹ but he argues against despair:

Racial progress has almost never been a populist or popular cause, except, of course, among blacks. The alliance that in

minority-preference civil rights policies.

Id. The family values strategy was subsequently reassessed and toned down as a result of negative feedback concerning its political impact. E.J. Dionne Jr., *Having Some Second Thoughts*, WASH. POST NAT'L WEEKLY ED., Aug. 31 - Sept. 6, 1992, at 15.

If my recollection serves me accurately — and I find nothing in the Edsalls' book that contradicts my recollection — President Ford in 1976, unlike Goldwater, Nixon, Reagan and Bush, did not run on race. *Cf.* EDSALL at 149 (noting that Nixon and Ford were "more moderate on civil rights than Goldwater," and that in 1980, with Reagan as the nominee, "the public image of the Republican party became again sharply more conservative on racial issues," as compared to 1972 and 1976).

17. See generally Thomas B. Edsall, *The Disguised Debate [for White America's Vote]*, WASH. POST NAT'L WEEKLY ED., Aug. 10-16, 1992, at 13 ("Clinton took his party's liabilities on 'values' issues head-on when he accepted the . . . nomination . . . 'in the name of all the people who do the work, pay the taxes, raise the kids and play by the rules — in the name of . . . our forgotten middle class.'").

18. EDSALL at 287-88. The Edsalls conclude their book with the following observation:

At stake in all this is something far more important than partisan victory. First, stagnation at the bottom of the income distribution, together with the poverty, disappointment, and rage of America's disadvantaged minority populations, threatens our social order. Secondly, at stake is our sense of ourselves as inhabiting an intelligible moral universe, committed to a form of social and economic organization that offers at least rough justice to its citizens in exchange for their participation. And thirdly, at stake is the American experiment itself, endangered by a rising tide of political cynicism and alienation, and by basic uncertainties as to whether or not we are capable of transmitting a sense of inclusion and shared citizenship across an immense and diverse population

Id.

The Edsalls' third point, interestingly, echoes a similar observation made by Archibald Cox in the different but not entirely unrelated context of constitutional interpretation. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 378 (1987). Cox states:

In the end, among a free people, both constitutionalism and the belief in law require an extraordinary degree of tolerance and cooperation Tolerance and the will to cooperate flow from a larger belief in the worthwhileness of the common enterprise Whether enough of us still have enough belief in the worthwhileness of our common fate for the spirit of tolerance and cooperation to prevail, and whether we share sufficient common ideals with sufficient confidence, along with the extent of belief in the rule of law, will determine the survival of constitutionalism.

Id.

19. See *supra* text accompanying notes 6-8.

the past has produced racial reform is one between blacks and white liberals, and they have been able, in the best cases at least, to bring a recalcitrant public around to agreement with their views. That the next important step in American race relations now appears politically perilous is entirely typical, and it need not prevent progress from taking place. The real impediment in the short run is not a lack of political support — which in racial matters always comes after the fact, if it comes at all — but a weakness of spirit.²⁰

With this I am in profound agreement, and I believe that the most important question facing America today is how we may regain, reaffirm and act on the spirit we sometimes seem to have lost.

II.

I found my way to law school in 1965 as a result of my exposure to the civil rights movement and to the late Paul Freund's undergraduate course in constitutional law.²¹ After completing my first year of law school, I spent the summer of 1966 teaching mathematics at Miles College in Birmingham, Alabama. My students were prospective freshmen whose matriculation was conditioned on remedial work in math or English because they did not meet the already relaxed standards for unconditional admission to this historically black private institution. At the beginning of the summer, some of my students — all high school graduates — were reading and/or doing arithmetic at the sixth grade level. I hoped that my colleagues and I, as well as the faculty of Miles College, could help them to overcome the deficiencies of their primary and secondary educations, particularly since I knew that some of them would go on to become teachers in black schools in Birmingham and elsewhere. Most of my students were more able than one might have thought from their standardized test scores, and their determination was admirable. But I will never forget the

20. LEMANN at 351.

21. Paul A. Freund, Carl M. Loeb University Professor, emeritus at the Harvard Law School, died at the age of 83 on February 5, 1992. *Paul A. Freund (1908-1992)*, HARV. L. BULL., June 1992, at 16. At a memorial tribute, retired Justice William J. Brennan, Jr., said:

Law, Paul Freund told us, is like art. And Paul's chosen medium was complexity. Both law and art, Paul wrote, "seek to accommodate change within the framework of continuity, to bring heresy and heritage into fruitful tension." "The basic dilemmas of art and law," he said, "are, in the end, not dissimilar, and in their resolution — the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity — lies the clue to creativity that will endure."

Id. at 18.

Once I was in law school, the most important further professorial influence on my constitutional philosophy was Archibald Cox. See Joel L. Selig, Book Reviews, 25 LAND & WATER L. REV. 625 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) and ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* (1987)).

time one of them arrived 20 minutes late for my class and, when I asked why he was so late, responded, "I'm on C.P.T." "What's that?" I asked. "Colored people's time," he replied. This comment made me quite uncomfortable, as he knew it would. My response was, "I don't think that's funny, and I expect you to be on time." In fact, it was funny, but the subtext was not, for the irony and the lack of respect were aimed not just at me but also at himself. The only comfort was that I really did expect him to be on time and that, after our interchange, he was.

How many young black men today suffer from the absence of such expectations? How many have devoted their considerable talents to success in the illegal drug economy or other criminal activities — despite their knowledge that this is wrong — because of lack of self-esteem; lack of confidence that they are equipped to make it, or would be permitted to make it, in the legal economy; and bitterness at the wrongs they believe they have suffered, and at the indifference or outright hostility with which they believe mainstream white America views their situation, indeed their very existence?²² Does this excuse criminal conduct? Certainly not. Does it fully explain such conduct? Of course not: deficiencies of character and values afflict individual members of all racial groups. But if we ignore the existence, the pain, and the desperate needs of a segment of our society burdened with the weight of a legacy of racial oppression, we do so at our moral and material peril as well as theirs.

The summer of 1966 was very different from the summer of 1992 in a number of ways. Those of us white folks who came from Boston or other such places to Birmingham were comfortable in the black community because we shared its goals and participated in its efforts. When I went with a black colleague to a black nightclub to take in some soul music, I was noticed but not made to feel out of place. When I went with a white colleague to a service in a black church as a gesture of respect, we were approached warmly and asked to say a few words to the congregation.²³ A guarded sense of optimism was abroad in the land. The Klan was not marching around the perimeter of the Miles campus as it had done in previous years. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 had recently been signed into law. The War on Poverty had begun. Progressives were in control of the presidency, the Congress, and the

22. See generally Lynne Duke, *Hoping for Their Shot*, WASH. POST NAT'L WEEKLY ED., Aug. 10-16, 1992, at 10 ("Young black men struggle with their dreams in a hostile reality") (subheadline).

23. The congregation was a large one, and our words would also be broadcast to the presumably even larger radio audience. I have never been sure whether the warmth of the hospitality outweighed the terror of the stage fright. Fortunately, my colleague agreed to speak for both of us.

Warren Court. Of course, the race problem was far from having been laid to rest. It remained, as it remains today, a white problem as much as a black problem, for it is whites whose attitudes and actions created the caste system and who are morally diminished by its perpetuation. But in 1966 the country was moving in the right direction. Idealism and hope crowded out cynicism and fear. Today, precisely the opposite often seems to be the case.

My own sense of optimism continued throughout the 15-year period when I had the privilege of working in the government and in private organizations to enforce our civil rights laws. During the first part of this period, the Civil Rights Division of the Department of Justice had its problems in the Nixon administration, and it sometimes aligned itself with the wrong side in highly publicized cases. But the first Attorney General under whom I worked — a pipe-smoking felon named John N. Mitchell — correctly told a group of civil rights workers: “You will be better advised to watch what we do instead of what we say.”²⁴ Beneath the protective cover of what the politicians said, the Division did a pretty good job of civil rights law enforcement, even in the most sensitive area of school desegregation (where some criticism was quite justified).²⁵ My colleagues and I went into black neighborhoods day and night, in middle-class and working-class communities and in ghetto housing projects, calling on potential witnesses unannounced, flashing our Justice Department badges as we identified ourselves as being from the Civil Rights Division. We generally encountered cooperation even in places where the first impression, prior to our explanation, might have been that we were bill collectors or narcotics agents. The black citizens on whom we were calling assumed, correctly, that the Department of Justice was on their side. And a civil rights lawsuit signed by John N. Mitchell’s signature machine packed a hefty punch with defendants (and their lawyers), many of whom must have said to themselves: “If *he* thinks we’re violating the civil rights laws, then maybe we are.” In later years, despite the efforts of the Reagan administration to weaken the interpretation and enforcement of civil rights laws, one could still take heart from the fact that until recent appointments decisively shifted its center of gravity, the Supreme Court generally was holding the line.²⁶

24. RICHARD HARRIS, *JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA* 206 (1970).

25. See David L. Norman, *The Strange Career of the Civil Rights Division's Commitment to Brown*, 93 YALE L.J. 983, 985-88 (1984). See also Brief for the United States at 55-56, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (“More than 100 school systems that the United States has sued to eradicate segregation have achieved unitary status and have been relieved of the continuing active supervision of the district courts.”).

26. See Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1016 (1989) (Supreme Court decisions on affirmative action from 1984

Now, more than 25 years after the summer of 1966, how different the atmosphere seems! After nearly 12 years of the Reagan and Bush administrations, the federal executive and judicial branches are viewed, with substantial justification, as unreceptive or actively hostile on many questions of civil rights enforcement and other matters of vital interest to African-Americans.²⁷ The War on Poverty is derided by many as having only made matters worse.²⁸ The general public's faith in the honesty and efficacy of our government has been shaken by a series of major blunders, scandals, failed or prematurely terminated presidencies, and congresses perceived as ineffective or worse. Public cynicism toward government was deliberately reinforced by the only two-term presidency in this period: more than any of its recent predecessors, the Reagan administration encouraged Americans to believe that government is their enemy and the problem, not their

to 1989 "reflect significant judicial resistance to an Administration bent on making dramatic changes in civil rights doctrines"); Drew S. Days, III, *Holding the Line*, 20 CREIGHTON L. REV. 1 (1986) ("The attack on civil rights has been unrelenting ever since [Reagan] took office. Although he hasn't succeeded for the most part, it hasn't been for lack of trying.").

27. See Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 346 (1984) ("[The Reagan administration] 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."); Jack Greenberg, *Evolving Strategies in Civil Rights*, 25 SUFFOLK U. L. REV. 117, 124 (1991) ("[T]hose opposed to the aims of Civil Rights groups [found] champions in the presidencies of Nixon, Reagan, and Bush, who have in turn appointed judges with values antithetical to those of civil rights' proponents."); [Judge] Constance Baker Motley, *The Supreme Court, Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643, 655 (1991) ("a weariness in this country with civil rights issues that parallels that of the last century [after Reconstruction]" is reflected in actions of Supreme Court and recent presidents); [Judge] Stephen Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 142 (1991) ("Sadly, if we are to avoid the rapid unraveling of the progress we have made over the past forty years, we can no longer rely on the federal judiciary. We will principally have to rest our hopes with the Congress."); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 65 (1991) (criticizing decisions of Supreme Court "judges who increasingly do not share the concerns which prompted Congress to act or who disagree with the wisdom of Congress' chosen means of redressing its concerns and then undercut statutes by refusing to extend them in instances where they rightfully should apply"); Ruth Marcus, *Using the Bench To Bolster a Conservative Team*, WASH. POST NAT'L WEEKLY ED., Feb. 25 - Mar. 3, 1991, at 31 ("President Bush is cementing Ronald Reagan's conservative transformation of the federal courts in the biggest turnover of federal judges since the New Deal . . .").

For a comprehensive and balanced analysis of the 29 race discrimination cases decided by the Supreme Court during the five terms from 1986 to 1990, see Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267 (1992). Professor Landsberg concludes:

No doctrinal revolution has been completed. The Court is at a crossroad. One road leads to abandonment of most of the antidiscrimination law structure the Burger Court had erected. The other leads to careful narrowing of Burger Court precedents. . . . We still await the answer to the question whether "the counterrevolution that had been staved off during the Burger years might finally come to pass."

Id. at 1334-35 (citation omitted).

28. See David S. Broder, *The Chief Myth-Maker*, WASH. POST NAT'L WEEKLY ED., May 27 - June 2, 1991, at 4 (reporting and criticizing President Bush's May 4, 1991, commencement address at University of Michigan, which labeled Great Society a "crusade" that "backfired"); LEMANN at 200 ("[A]ll through his political career, one of Ronald Reagan's favorite sayings was, 'In the 1960s we fought a war on poverty, and poverty won.'").

friend or a solution, and it turned that credo into a self-fulfilling prophecy by putting the fox in charge of the hen house at many federal agencies and departments. I witnessed the results of this process firsthand at the Civil Rights Division of the Justice Department, where Reagan administration political appointees failed to appreciate the obligations of responsible law enforcement.²⁹

III.

Where do we stand today in the effort to address America's racial problems? One's overall evaluation is affected both by subjective factors and by whether one chooses to emphasize that the glass is half full or that it is half empty. For example, as Lemann points out, "[i]t is true that the ghettos have deteriorated badly in the past three decades, but an important part of the explanation is that millions of people left them and found better lives elsewhere."³⁰ Furthermore, statistics can obscure as well as illuminate, because they can be marshalled in favor of seemingly contradictory propositions.³¹ Nevertheless, a group of 90 chief executives of major corporations and universities calling themselves the Business - Higher Education Forum probably got it about right two years ago. This group's "candid appraisal of race relations" in America emphasized three economic and social realities:

The first is that many minority-group members are succeeding. The black middle class has tripled in size in a generation. More than 40 percent of working-age blacks now are middle class. . . .

The second reality is that another third of America's minorities live on the margin, with such limited skills and so little education they must scramble to survive. . . .

The third reality is the one most of us would choose to ignore: the persistence of poverty for three out of 10 minority

29. For a detailed examination of the Reagan administration's management of the Civil Rights Division, see Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785; William Bradford Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001 (replying to Selig, *supra*); Joel L. Selig, *The Reagan Justice Department and Civil Rights: Professor Selig Responds to Assistant Attorney General Reynolds*, 1987 U. ILL. L. REV. 431 (responding to Reynolds, *supra*).

30. LEMANN at 344.

31. For example, one can truthfully say that "[t]he income gap between rich and poor widened in the 1980s" Spencer Rich, *Rich Got Richer, Poor Got Poorer, Study Says*, WASH. POST, July 24, 1991, at A4 (reporting results of study by Center on Budget and Policy Priorities, "a liberal think tank"). But it is also true that "[s]ubstantial numbers of low-income Americans moved up the income ladder in the 1980s" David Wessel, *Low-Income Mobility Was High in 1980s*, WALL ST. J., June 2, 1992, at A2 (reporting results of Treasury Department study).

citizens, many of them trapped in an underclass plague of drugs, delinquency and broken families.³²

There are other, more dramatic statistics, with which many of us are familiar. For example, while "[o]ne out of every five American children . . . lives in poverty"³³ — a fact shocking in itself without regard to the comparable racial statistic — "[m]ore than two out of every five black children live in poverty."³⁴ For decades the black unemployment rate generally has been more than twice the white unemployment rate.³⁵ Black males, who are about 6 percent of the U.S. population, "are about 47 percent of all U.S. [prison] inmates."³⁶ "Nearly two-thirds of all black children — 63.7 percent, to be exact — are born out of wedlock, compared with 14.9 percent of white babies."³⁷ Racial disparities continue to exist across an entire range

32. David S. Broder, *Three Realities About Race*, WASH. POST, June 28, 1990, at A25. See also EDSALL at 231-32 ("Income in the top fifth of black families grew by 33.3 percent from 1973 to 1987, while growing by only 24.5 percent among the top fifth of white families. Among the bottom 40 percent of black Americans, however, the movement relative to their white counterparts has been backwards.').

33. *Poverty and Wealth in America*, WASH. POST NAT'L WEEKLY ED., Oct. 7-13, 1991, at 27.

34. *Id.* See also Barbara Vobejda, *Children's Poverty Rose in '80s*, WASH. POST, Aug. 12, 1992, at A3 ("Among the 100 largest cities in the country, the percentage of children living in poverty went up from 24.8 percent in 1979 to 28 percent a decade later The figures were much higher among minority children, with as many as two-thirds in poverty in some cities.") (reporting Children's Defense Fund findings based on 1990 census figures).

The figures cited in the text and in Vobejda, *supra*, predate the 1991 census data recently beginning to be released. The more recent data show an increase in poverty from 1990 to 1991. Spencer Rich, *Ranks of Poverty Swell by 2 Million*, WASH. POST, Sept. 4, 1992, at A1, A4 ("[T]he proportion of Americans in poverty increased from 13.5 percent in 1990 to 14.2 percent — the highest figure since 1984 and a rate exceeding that of any year of the 1970s. The poverty figure for blacks was 32.7 percent, and 28.7 percent of Hispanics were below the poverty line.'). See also *id.* at A4 ("Nationally, children suffered the largest poverty-rate increase of any age group, from 20.6 percent in 1990 to 21.8 percent. 'One of every four children under age 6 now lives in poverty,' said [the head of the Center on Budget and Policy Priorities].").

35. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 38, 386, 392, 402, 403 (1991) (unemployment statistics by race in selected years from 1960 to 1990); U.S. DEP'T OF COMMERCE, USA STATISTICS IN BRIEF (1991) (white and black unemployment rates, respectively, for 1980, 1985, 1988, 1989, 1990: 6.3, 14.3; 6.2, 15.1; 4.7, 11.7; 4.5, 11.4; 4.7, 11.3); CITIZENS' COMM'N ON CIVIL RIGHTS, ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990s 9 (1989) ("In 1987, 13 percent of blacks in the work place were unemployed compared to 5.3 percent of white workers, a continuation and worsening of the more than 2:1 ratio that has persisted through good economic times and bad over the past four decades.'). Duke, *supra* note 22 (unemployment rate of young black men more than double that of young white men); Richard Polenberg, *Divided by the Color Line*, WASH. POST NAT'L WEEKLY ED., Apr. 6-12, 1992, at 35 ("Typically, the unemployment rate for blacks has been more than twice that for whites: In 1990, the rate for black men in their middle and late twenties was 13 percent, compared with 5.5 percent for whites.") (reviewing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1991) and quoting statistics provided therein).

36. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 12 (1991) (12.4 percent of 1989 total (males and females) population was black); Lynne Duke, *Young Black Men in Crisis: Scholars See Complex Web of Cause and Effect*, WASH. POST, May 28, 1991, at A8 (47 percent of inmates are black males).

37. Polenberg, *supra* note 35.

of other variables, such as health care and infant mortality, to name only two.³⁸ Of course, all of these disparities reflect the general socio-economic disparity between whites and blacks, but that social and economic inequality reflects a long history of racial discrimination, as does the concentration of African-American and other minorities in our decaying central cities.³⁹ For this reason, Senator John Kerry of Massachusetts was addressing not just an economic issue, but also a racial issue, when he asked an audience of students to consider:

"a different part of the reality of America today; a violent, drug-ridden, rat-infested reality; a reality in which the institutions of civilized social life have broken down; of disintegrated families; boarded up storefronts; schools that have become armed camps and crack houses replacing community centers as the focus of neighborhood life.

"I ask you to consider a reality . . . where young men die violently at a rate exceeding that of any American war; where only one child in three finishes high school and even then, too often, can barely read; . . . where far too many families are on welfare for far too long; and where far too many children carry guns instead of lunch boxes to school."⁴⁰

What is the relationship between the current economic and social situation of black America and the body of federal civil rights law that has developed to prevent present racial discrimination and help overcome the continuing effects of past discrimination? The record is mixed, reflecting successes as well as failures. I will discuss part of the record here, without attempting to survey the entire landscape.

To begin with one example of success, there is no doubt that Title VII of the Civil Rights Act of 1964⁴¹ already has revolutionized employment practices in this country and opened up previously unavailable job opportunities for blacks, women, and other minorities. The same can be said of the controversial device known as "affirmative action," which may be ordered by a court as a remedy for a proven history of unlawful discrimination, agreed to in consent decrees that resolve what otherwise would be contested litigation, or adopted more or less voluntarily by private sector or public sector

38. See CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 35, at 10 ("Equal opportunity in the area of health care remains an elusive goal."); *id.* at 11 ("Black babies are now twice as likely to die within the first year of life as white babies.").

39. On concentration in urban areas, see *infra* notes 52-54 and accompanying text.

40. David S. Broder, *The Shame of Our Cities*, WASH. POST NAT'L WEEKLY ED., Apr. 13-19, 1992, at 4 (quoting Kerry's speech at Yale University).

41. 42 U.S.C. §§ 2000e to 2000e-17 (1988) (as amended through 1988) (amended 1991) (prohibiting discrimination in employment).

employers.⁴² We see the results of the success of this body of law throughout the workforce. On the other hand, there are still second and third-generation issues and areas of resistance that require continuing attention, and rearguard legislative action has been necessary to restore the integrity of those pieces of the fabric of employment discrimination law which the current Supreme Court has attempted to unravel.⁴³ Moreover, progress in providing opportunities to traditionally disfavored groups is more difficult, more threatening to other groups, and more productive of resentment and resistance, in a recessionary or slow growth economy than in a rapidly expanding economy. In addition, if our recent losses of relatively low-skill but well-paying manufacturing jobs indicate a trend that will continue, this will increasingly close off to more and more people — both white and minority — what has been a traditional avenue of entry into the middle class.⁴⁴

There is one point in the employment area that is very important but often misunderstood. Title VII and affirmative action have been criticized on the basis that while they have helped middle-class blacks and other minorities, they have done little to improve the economic situation of the underclass.⁴⁵ This criticism sometimes seems to assume

42. For a comprehensive discussion of federal law regarding affirmative action in employment, see Joel L. Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301 (1987); Joel L. Selig, *Affirmative Action in Employment After Croson and Martin: The Legacy Remains Intact*, 63 TEMP. L. REV. 1 (1990).

43. See Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304 (1992).

44. See PHILLIPS, *supra* note 15, at 16-17 ("[B]y Reagan's last year in office, evidence of a wide range of occupational declines — for manufacturing employees, farmers, people in the oil industry, young householders and the working poor — was more or less irrefutable."); *id.* at 20 ("[I]n recent years, wages have been falling."); *id.* at 19 ("The high-paying jobs lost . . . had been more than just employment; they had been cultural and economic ladders to middle-class status for millions of families all across industrial America."); Hobart Rowen, *Blind to Economic Reality*, WASH. POST, Sept. 10, 1992, at A29 ("The Great American job machine . . . is shifting gears — downward. Solid middle-class jobs, the kind that allow a single worker to be the family breadwinner, have been disappearing in record numbers and are being replaced more often than not by lower-wage jobs.") (quoting FORTUNE MAGAZINE).

45. Some who articulate this kind of criticism do not do so with benevolent motives toward minorities or sincere concern for the underclass. On the other hand, for an example of intelligent and well-intentioned criticism of this nature by a prominent black law professor, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 71 (1991) ("What has happened in black America in the era of affirmative action is this: middle-class black people are better off and lower-class black people are worse off."); *id.* at 71-72 ("One need not argue that affirmative action is the cause of increasing income inequality in black America to understand that it is not a solution."). Carter also suggests (unfairly, in my view) an ulterior motive for the acceptance of affirmative action strategies. *Id.* at 72. Carter argues:

A society like ours, which tends to be a bit parsimonious when it comes to fairness that requires taxes, will obviously choose the cheapest among its various options for providing what will be described as racial justice. If the nation adopts the civil rights agenda involving racial preferences, the costs of which fall invisibly, and rejects the civil rights agenda requiring the expenditure of money to help the worst off among us, the true inheritors of the decades of oppression, that is not the fault of a civil rights leadership that has promulgated both. It is the fault of a society that prefers

that it is neither necessary nor appropriate to help middle-class minorities, as if none of them ever had experienced, or was any longer in danger of experiencing, discrimination in employment. In addition, it overlooks the fact that neither Title VII nor affirmative action was intended to make jobs available to workers who lack necessary qualifications. Title VII and affirmative action can and do open up job opportunities for qualified workers, and they enhance existing incentives to acquire necessary qualifications. In some contexts they also make available to whites as well as minorities training opportunities that otherwise would be unavailable.⁴⁶ They have helped large numbers of African-Americans and other minorities move into the middle class. But they do not purport to take the place of educational and other necessary efforts to convert the presently unemployable into employable beneficiaries of nondiscrimination and affirmative action.

The tangible impact of the 1968 Fair Housing Act⁴⁷ on residential segregation has been considerably less than the impact of Title VII and affirmative action on discrimination in the workplace. A recent study based on 1990 census data concluded that "[d]espite their movement into some integrated neighborhoods, blacks remained the nation's most highly segregated group, with 62 percent living in mostly black blocks. And most whites . . . continue to live in predominantly

its racial justice cheap.

Id.

Despite my disagreement with many of Carter's arguments, I find some of the propositions he advances both eloquent and persuasive. For example, see *id.* at 66 (discussing affirmative action for black professionals) ("The reason for the search is to find the blacks among the best, not the best among the blacks."); *id.* at 89 (describing his "vision of professional achievement and racial preference" as "the affirmative action pyramid") ("The role of preference narrows as one moves upward."); *id.* at 90 ("The preferences cannot go on forever. Sooner or later, talent and preparation, rather than skin color, must tell.").

See also WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 19 (1978). Wilson states:

[E]qual employment legislation and . . . affirmative action programs . . . [have] helped clear the path for more privileged blacks, who have the requisite education and training, to enter the mainstream of American occupations. However, such government programs do not confront the impersonal economic barriers confronting members of the black underclass, who have been effectively screened out of the corporate and government industries. And the very attempts of the government to eliminate traditional racial barriers through such programs as affirmative action have had the unintentional effect of contributing to the growing economic class divisions within the black community.

Id. Cf. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 154 (1987) ("[A]s long as a racial division of labor exists and racial minorities are disproportionately concentrated in low-paying positions, antidiscrimination and affirmative action programs will be needed even though they tend to benefit the more advantaged minority members.").

46. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 198-99, 208-09 (1979) (upholding collectively-bargained affirmative action plan creating new in-plant skilled craft training program and reserving 50% of openings for blacks).

47. 42 U.S.C. §§ 3601 to 3619 (1988) (as amended) (Title VIII of Civil Rights Act of 1968) (prohibiting discrimination in residential housing).

white neighborhoods"⁴⁸ Similar research based on the 1970 and 1980 censuses "also showed very little change in residential segregation since the passage of civil rights laws in the late 1960s."⁴⁹ Moreover, "[c]hallenging the axiom that suburban homes and better jobs for minorities will help integrate American society, a University of Chicago analysis released [in 1987] . . . said that middle-income black Americans are still largely segregated despite their improving economic status."⁵⁰ Recent studies also have documented that overt discrimination in housing continues to occur.⁵¹

Although fair housing legislation has made housing available on a nondiscriminatory basis to large numbers of minorities and broken many patterns of overt and rigid residential segregation, the big picture has not changed for the great majority. And there is one pervasively detrimental aspect of residential segregation that continues fundamentally unchanged: our metropolitan areas seem to have become more rather than less firmly divided into separate enclaves, with the white and the affluent living in the suburbs, and the poor and minorities living in the central cities.

Almost 25 years ago, a national commission formed in the wake of widespread race riots warned that "[o]ur nation is moving toward two societies, one black, one white — separate and unequal."⁵² Today, racial separation between central cities and suburbs remains a pervasive feature of our urban landscape. Many metropolitan areas retain "the racial shape of a donut,"⁵³ with a ring of predominantly white suburbs surrounding a hole in which most African-Americans and Latinos are concentrated. Restrictions on land use and development in major metropolitan areas precluding or severely limiting low-cost housing in the suburbs have contributed significantly to this

48. Barbara Vobejda, *Neighborhood Racial Patterns Little Changed*, WASH. POST, Mar. 18, 1992, at A7 (reporting on study by consulting firm hired by federal government to analyze residential segregation).

49. *Id.*

50. Jay Mathews, *Middle-Class Blacks Still Largely Segregated, Researchers Find*, WASH. POST, Dec. 30, 1987, at A4.

51. CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 35, at 7. The Commission states: In the late 1970s, a major study covering 40 metropolitan areas concluded that a black homeseeker who visits four real estate agents will encounter at least one instance of discrimination 72 percent of the time for rentals and 48 percent of the time for sales. Later regional studies from Boston, Denver, and the Washington, D.C. areas showed similarly high levels of discrimination persisting into the 1980s. In 1985, the Department of Housing and Urban Development estimated that 2,000,000 instances of housing discrimination were still occurring every year.

Id.

52. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

53. *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1186 (8th Cir. 1974) (quoting *Mahaley v. Cuyahoga Metropolitan Hous. Auth.*, 355 F. Supp. 1257, 1260 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974)), *cert. denied*, 422 U.S. 1042 (1975).

racial separation. In its turn, racial residential separation contributes to a series of other problems, including racial isolation in the schools, deterioration of central city services as a result of race-related economic and political factors, and relative inaccessibility to minorities of suburban employment opportunities. The Fair Housing Act has not yet had an appreciable impact on the pattern of racial separation between cities and suburbs.⁵⁴

Of course, there is some question whether the Fair Housing Act was intended to solve this problem and, even if its sponsors hoped that it might, whether realistically it could accomplish the task.⁵⁵ In any event, it has not done so, and the consequences of the problem remain severe. As the late Judge J. Skelly Wright observed, "This is not a mere matter of neighborhoods. We have always had racial, ethnic, and economic neighborhoods; perhaps we always will. This is different. In each metropolitan area we are setting up two geographically, politically, and economically distinct civilizations."⁵⁶

One obvious response to the situation Judge Wright describes would be to replace the anachronistic political structure of separate central cities and suburbs with metropolitan government. This would not by itself necessarily produce racial residential integration, but it could contribute to that goal if it were combined with strong local fair housing enforcement and changes in land use practices — both of which might then be more feasible politically. In any event, it would recognize and reflect the benefits suburban residents derive from their proximity to central cities and the reality of interdependence between cities and suburbs; it would require and facilitate the pooling and more equitable allocation of resources to serve shared interests and achieve common ends; and it would lead to a sense of community between cities and suburbs that is so necessary for both to flourish in an atmosphere free of the fear and resentment produced by a separation increasingly akin to apartheid. The difficulty, of course, is a familiar Catch-22: in the absence of an unlikely judicial mandate, it is not enough that a sense of community might result from such a restructuring — rather, the sense of community probably must already exist in order for the restructuring to occur. Over the past 12 years the hope that this might happen has looked more, rather than less, like pie in the sky.⁵⁷ It remains to be seen whether in future

54. For a detailed discussion of the Justice Department's efforts to attack exclusionary land use and development restrictions, see Joel L. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DAVIS L. REV. 445 (1984).

55. See *id.* at 454-56; *id.* at 461-63 n.66, 465-66, 503-04.

56. J. Skelly Wright, *Are the Courts Abandoning the Cities?*, 4 J.L. & EDUC. 218, 220 n.10 (1975).

57. The further erosion of the sense of community and the further hardening of white

years we will continue in the same direction or reverse course.

A metropolitan approach would be no less necessary for fully integrated schooling to exist in many of our large urban areas. But in most cases this possibility may be no less remote than the prospect of overall metropolitan government. It is remote because of the political improbability that city and suburban school districts will merge or that extensive metropolitan desegregation plans will be implemented voluntarily, and because the Supreme Court in the 1974 Detroit school case made it difficult to compel such results through constitutional litigation.⁵⁸ A recent study found that "America's big-city school systems became increasingly segregated during the 1980s," and that "achieving 'lasting and substantial' desegregation in many of the nation's largest cities is 'an exercise in futility' because of white flight to the suburbs."⁵⁹ The same study found that Latinos were even more likely than blacks to attend segregated schools.⁶⁰

However, despite the troublesome situation in many large cities, there are many other places where school desegregation has been effective and successful. The percentage of southern blacks attending schools with whites increased from 0.001% to 91.3% from 1954 to 1972.⁶¹ Although desegregation has been more difficult to achieve in some northern school systems, there have been many instances of success there as well.⁶² The overall picture is mixed. Moreover, despite the desperate academic and social situations about which we frequently hear, some degree of progress exists among the many indications of failure. For example, 1990 census figures show that "[a]mong blacks aged 25 and older, 63 percent are high school graduates, up from 31 percent in 1970. The 1990 figure for the total population is [75] percent."⁶³

and suburban attitudes are the primary reasons why the prospect for metropolitan government is now even more unlikely than it was 12 years ago. In addition, the fact that many central city governments are now controlled by African-Americans may present another obstacle to metropolitan government: resistance by blacks to the resulting loss or dilution of black political power. The dilemma here for African-Americans may be to weigh the degree of their power against the impact of their power: the ultimate value of power may increase with the resources of the entity with respect to which power is held, even if the degree of power and consequent degree of control over the resources may decrease.

58. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (interdistrict remedy available only if interdistrict violation shown).

59. Mary Jordan, *Big-City Schools Became More Segregated During 1980s, Study Says*, WASH. POST, Jan. 9, 1992, at A3 (reporting on study by Professor Gary Orfield of Harvard University based on data from 1990 census and Education Department).

60. *Id.*

61. U.S. COMM'N ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN* 50 (1974).

62. *E.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (Columbus, Ohio); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (Dayton, Ohio).

63. Barbara Vobejda, *Black High School Attainment Doubles*, WASH. POST, July 24, 1992, at A4. The figure for Hispanics is only 50 percent. *Id.*

It is also encouraging to note that the present Supreme Court has not yet undermined the basic structure of school desegregation law, even though it has had opportunities to do so.⁶⁴ Indeed, its recent decision in the Mississippi higher education case is perhaps surprisingly constructive, and certainly surprising in its near unanimity.⁶⁵ However, it would be rash to predict that less constructive rulings with regard to elementary and secondary education will not be forthcoming in the future. The most likely area of danger involves the potentially serious problem of currently desegregated school systems seeking to implement retrogressive student assignment plans, such as plans reverting to attendance zones coinciding with segregated neighborhoods, thereby decreasing the level of desegregation previously attained.⁶⁶ In any event, given the legal situation regarding interdistrict cases, and the Supreme Court's 1973 decision in the Denver case that de facto segregation is not unconstitutional,⁶⁷ it is unlikely absent residential integration that we will see a great deal of additional school desegregation beyond what has already taken place.

As in the employment area, the overall situation in the area of voting discrimination is significantly better than in schools or housing.⁶⁸ Since enactment of the Voting Rights Act of 1965,⁶⁹ black voter registration in eleven southern states increased dramatically, from approximately 29.1% of the voting age population in 1960 to 56.5% in 1982, by which time the number of black elected officials had increased to over 5,000 nationwide.⁷⁰ As of January 1990, the nationwide total of black elected officials was 7,355.⁷¹ The right of African-Americans and other minorities to vote is now secure. However, there remain complicated issues of voting discrimination law involving matters other than the basic right to register and cast a ballot, and the resolution of these second-generation issues surely will affect the

64. *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) (district court has authority to relinquish supervision and control of school district in incremental stages, before full compliance has been achieved in every area of school operations); *Board of Educ. of Oklahoma City v. Dowell*, 111 S.Ct. 630 (1991) (standard for dissolving school desegregation decree considers good faith compliance and elimination to extent practicable of all vestiges of past discrimination).

65. *United States v. Fordice*, 112 S.Ct. 2727 (1992) (racially neutral policies not necessarily sufficient to fulfill affirmative duty to desegregate State system of higher education).

66. See Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 839 (1988) ("As more school boards adopt retrogression plans and black plaintiffs challenge them, the nature and validity of the corrective function of law are at stake. The corrective function demands approval of plans which properly address effects of past discrimination and disapproval of plans which reinstate effects of past discrimination."); *Freeman*, *supra* note 64; *Dowell*, *id.*

67. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973).

68. See Greenberg, *supra* note 27, at 123 ("The Voting Rights Act created a profound change [in] the American political scene.")

69. 42 U.S.C. §§ 1973 to 1973bb-1 (1988) (as amended) (protecting voting rights).

70. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 488 (1982).

71. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 266 (1991). As of September 1989, the nationwide total of Hispanic public officials was 3,783. *Id.* at 267.

degree of minority voting strength and the effectiveness with which minority interests are represented in many future situations.⁷² Nevertheless, even with the law in those areas still developing, black and Hispanic political power have been important factors in many elections for some time.

The foregoing should suffice to indicate that the effort to remove legal barriers to equality, and to impose legal requirements of non-discrimination and affirmative action to overcome the present effects of past discrimination, has been successful to a substantial extent, but is far from having eliminated the uniquely pervasive complex of economic and social difficulties faced by African-Americans.

What impact has this effort and the great black migration that preceded it had on the attitudes regarding race that motivate the behavior of individual whites and blacks and that define to a substantial degree the state of race relations? Here again, the overall picture is freighted with contradictions and ambiguities. In theory, most Americans accept the concept of racial equality; and most would answer in the affirmative to Rodney King's question, "Can we all get along?" But the Rodney King, Reginald Denny, and Sister Souljah episodes, and the responsive chords struck by David Duke and Louis Farrakhan, illustrate that there is vitality at the extremes in both white and black America.

At a somewhat more subtle but nevertheless effectively polarizing level, the effort of politicians in recent years to cultivate and profit from white backlash and the sense of white grievance has legitimized overtly and covertly racist attitudes to a degree that one might have thought unimaginable after the civil rights revolution of the 1960s. Indeed, as the Edsalls demonstrate, these attitudes are a central force behind the Republican presidential coalition which has controlled our national executive branch for 20 of the last 24 years. Lemann offers the following incisive view of the big picture:

72. See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833-34 (1992). Issacharoff states:

A quarter century of federal policing of the electoral processes has markedly transformed the political landscape. Gone are the poll taxes, the literacy tests, and the other overt barriers to voter registration. Gone as well under the impact of one-person, one-vote is the artificial numerical inflation of the voting strength of one community at the expense of another. Yet, despite these changes, voting rights claims continue to mount. For the past decade, changes in the substantive law governing voting rights claims have enhanced the efficacy of legal protections of the right to vote, clearing the way for greater judicial supervision of the electoral process.

Id. (footnotes omitted). See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (comparing concept and strategy of "black electoral success" to concept and strategy of "proportionate interest representation").

[T]he [great black] migration hardly created a harmonious, racially synthesized country. It was disruptive; it engendered hostility. The fabric of city life in the United States changed forever. . . . The ideal of high-quality universal public education began to disappear. Street crime became an obsessive concern for the first time in decades. The beginning of the modern rise of conservatism coincides exactly with the country's beginning to realize the true magnitude and consequences of the black migration, and the government's response to the migration provided the conservative movement with many of its issues. The idea that government programs don't work, and can't work, comes out of the Great Society, and particularly the war on poverty So does the idea that most middle-class people are paying too much federal income tax to support harebrained social betterment schemes In intellectual life, the neo-conservative movement, whose influence on Republican policy-making has been enormous, was founded by former liberals who lost faith in large part over the issue of race in the North; in Irving Kristol's famous apothegm, "a neo-conservative is a liberal who has been mugged by reality," it's not difficult to guess what color the mugger was.⁷³

Former Secretary of the Army Clifford Alexander, testifying before a Senate committee in 1991, said that before the committee could address the problems of young black men in crisis, the senators needed to understand themselves:

"White America continues to paint pictures of black America that determine our opportunities," said Alexander. "You see us as less than you are. You think that we are not as smart, not as energetic, not as well suited to supervise you as you are to supervise us, that we are looking for something extra, a government program that gives us something we do not deserve. You think our sons and daughters are taking the places in colleges that, if the world were only 'fair,' would go to your white children instead."⁷⁴

That encapsulates much of the attitudinal component of white America's race problem (to which other components, such as fear of

73. LEMANN at 200.

74. Duke, *supra* note 36 (quoting testimony before Senate Banking, Housing and Urban Affairs Committee).

the underclass, are added).⁷⁵ I used to think the attitudinal problem was generational, and that negative attitudes would decrease and dissipate over time. I thought I saw evidence of this during my years in law enforcement. For example, when I was serving trial subpoenas in 1970 on white sheet metal worker apprentices in Newark, New Jersey, I was heartened by the fact that a number of these young people — who were old enough to have been aware of the civil rights issue as it played out in the 1960s — volunteered the information that they had no objection to bringing blacks and Latinos into the apprenticeship program and the union. They said it was their fathers and uncles who had a problem with it, and it was indeed their fathers and uncles who controlled the union and did their best to keep minorities out.⁷⁶ I wonder whether the inclusionary attitude I found in 1970 prevails to the same degree among those who grew up in the '80s rather than the '60s, and who have been subjected in recent years to the unrelenting rhetoric of white backlash.

As to black attitudes about whites and about being black in white America, I will refrain from further speculation here. But I do want to share some comments made by a federal district judge in the course of a trial in which I participated. My clients had brought an employment discrimination case against the Akron, Ohio, police department, a case in which the judge ultimately found that the pre-employment test the city had used for many years — a test that excluded most black applicants — was racially discriminatory and not job-related.⁷⁷ The Mayor of Akron testified at the trial that he did not believe blacks wanted to be police officers, and that “if they don’t want to be policemen, they are not going to be policemen and

75. See also EDSALL at 235 (“In political and social terms, the underclass serves to reinforce the most damaging racial preconceptions about black America.”). The Edsalls state: [I]n all of these ways . . . the underclass and the acuteness of the problems of black poverty function to help sustain a right-of-center conservative coalition: through the reinforcement of racial stereotypes; through the creation of entire neighborhoods where reproductive patterns, lifestyles, and work patterns are alien to, and disapproved of by, much of the rest of the population; and through the development of racially conflicting views on the causes of poverty, crime, and black disadvantage. Insofar as the underclass is made visible through all of these phenomena — visible through the rippling out of crime beyond urban ghettos into downtown business districts and into suburbs, and magnified by television and newspaper coverage — the underclass has become a powerful factor in sustaining a presidential coalition dominated by the affluent.

Id. at 243-44.

76. The case referred to is *United States v. Local 10, Sheet Metal Workers*, 3 Empl. Prac. Dec. (CCH) ¶ 8068 (D. N.J. 1970) (preliminary injunction); 6 Empl. Prac. Dec. (CCH) ¶¶ 8715, 8718, 6 Fair Empl. Prac. Cas. (BNA) 1036 (D. N.J. 1973) (final decision and decree).

77. *Arnold v. Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975), *aff’d*, 12 Empl. Prac. Dec. (CCH) ¶ 11,000, 12 Fair Empl. Prac. Cas. (BNA) 1613 (6th Cir.), *remanded*, 12 Empl. Prac. Dec. (CCH) ¶ 11,224, 16 Fair Empl. Prac. Cas. (BNA) 396 (6th Cir. 1976); *on remand*: 448 F. Supp. 1025 (N.D. Ohio 1978).

there isn't anything any of us can do about it.''⁷⁸ This and other parts of the Mayor's testimony provoked a spontaneous series of questions and comments by Judge Thomas D. Lambros which were spellbinding when delivered, and a transcript of which is one of my treasured possessions. Here is a small portion of Judge Lambros' comments:

I think there is something that we all have to learn about discrimination, its anatomy and its dynamics. . . .

. . . [O]ur own environment has a great deal to do with how we think and how we react. And although we go to school together as black and white, the truth of the matter is we, in the vast majority of the cases, live in separate sectors of the city and we do lead different lives and we are influenced by our environment and our background. And we are all human beings.

But I am wondering if white men really fully comprehend what goes on in the minds of black people. And I am wondering whether or not black people fully comprehend what goes on in the minds of white people. And I am just wondering whether or not we have resisted those opportunities to try to communicate with one another.

Now, what concerns me is, with the evidence that is present with respect to the percentages of black[s] in [the city's police and fire departments], I am wondering whether or not we have speculated as to the problem and speculated and rationalized a reason by suggesting they are not interested, there is no incentive. Have we really tried to find out and get to the root of the problem . . . ?⁷⁹

IV.

If one agrees that the present condition of black America is a problem that calls for action, there is no shortage of ideas as to what that action should be. It is not my purpose here to pick and choose among the ideas that have been advanced. I believe that there is a place for most of them in a concerted attack. For example, one does not have to be under the illusion that we face only a black problem and not a white problem in order to agree that increases in self-help, self-discipline, and responsibility as well as rights, are an important

78. Excerpt of Proceedings at 9-10, *Arnold v. Ballard*, No. C 73-478 (N.D. Ohio, May 7, 1974) (copy on file at Land & Water Law Review office).

79. *Id.* at 19-21.

part of the answer.⁸⁰ But anyone who suggests that that is the whole solution probably does not really care whether the problem is solved, and certainly ignores the heavy responsibility that white America bears for the creation and perpetuation of an intolerable situation.

Effective enforcement of our civil rights laws is another important part of the solution.⁸¹ Of course, civil rights enforcement alone cannot solve all the social problems to which it is addressed. Nevertheless, it is essential that the job be done properly — for its own sake, for the sense of progress it creates, and for the contribution it makes to the health of the social fabric. Our civil rights laws have enabled us to come a long way on the road to racial justice, but there is still a long way to go. A problem that took centuries to create and perpetuate will not be solved overnight, and in the sweep of our history it was only yesterday that racial separation and oppression, rigidly enforced by the state as well as by private parties, had a firm choke hold on most of black America. It would be unrealistic to think that the complete elimination of discrimination will be easy or swift. It is not unrealistic, however — and it is essential — to replace the current sense of retrogression and drift with the sense, and the reality, of continued progress.

Beyond self-help, civil rights enforcement, and voluntary efforts to integrate schools and housing, cities and suburbs, other tools are at hand to attack the social and economic difficulties of black America. Many approaches would help other minorities and white beneficiaries as well. For example, Lemann argues convincingly that “programs that come under the banner of ‘intervention,’ in which the government becomes a guiding presence in the lives of the ghetto poor, do demonstrably work.”⁸² The facts are that a sustained effort to help the ghettos was not really attempted in the 1960s or there-

80. See Marian Wright Edelman, *Do's and Don'ts for Black Graduates*, WASH. POST, May 16, 1990, at A19 (“It is the responsibility of every black adult . . . to make sure that black children hear what we have learned from the lessons of life . . .”) (enumerating ten lessons) (adapted from commencement address at Howard University); William Raspberry, *Social Traps, Individual Effort*, WASH. POST, Mar. 4, 1991, at A13 (“[T]o say that the social trap in which they find themselves was laid by others is not the same as saying they have no role in fashioning their escape.”).

81. *E.g.*, CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 35, at 3. The Commission states: During the 1960s and 1970s, although the precise level of activity varied with every Republican and Democratic administration, federal agencies charged with implementation of the civil rights laws developed techniques of enforcement that produced positive results. In contrast, during the 1980s, these methods of enforcement have fallen into disuse. Strong leadership and a commitment by federal agencies to fully enforce the laws are necessary if we are to continue achieving progress in eradicating prejudice and discrimination in the future.

Id.

82. LEMANN at 349.

after;⁸³ that many Great Society programs were effective;⁸⁴ and that, as Lemann says, "[c]learing away some of the dense mythic fog surrounding the war on poverty and its successor programs is essential before we can try to complete the work those programs started."⁸⁵

In our free and democratic society, government remains the principal instrument of collective action for the common good. As Lemann points out, "[t]hat the idea of the federal government's ameliorating race relations seems strange today is only a symptom of a much broader problem, which is that we are insufficiently unified as a society to be able successfully to undertake ambitious, organized national projects of any kind."⁸⁶ What is required to break our paralysis is unifying leadership. President Bush displayed such leadership in the Persian Gulf war. What a pity he did not take advantage of the opportunity for domestic leadership that was his in the aftermath!

Creative solutions did not begin or end with the Great Society or the War on Poverty. For example, Senator Nunn has proposed to use our military forces to help meet domestic community service needs in a manner that would make use of the human and financial resources invested in defense rather than simply dismantle them in the wake of our victory in the Cold War.⁸⁷ Senators Boren and Wofford have suggested a resurrection in an urban setting of New Deal kinds of programs such as the Works Progress Administration and the Civilian Conservation Corps, pointing out that "[w]hat worked for FDR was work — not the dole, not welfare, but work, both in

83. *Id.* at 219. Lemann states:

But we hadn't tried everything. We never tried making Head Start a universal program, or expanding it beyond the preschool years. We never tried the kind of major public-works program that the Labor Department pushed for in the 1960s. We never tried putting enough police on foot patrol in the ghettos to make a real dent in the disastrous level of crime there. We never replaced the welfare system with something designed to get poor people into the mainstream of society.

Id. See also Nicholas Lemann, *The War on the War on Poverty*, WASH. POST NAT'L WEEKLY ED., May 18-24, 1992, at 23 ("From the outset, the effort was hobbled by naysayers") (sub-headline); *id.* at 24 ("[T]he most obvious and powerful instrument at hand — the federal government's economic and social-welfare policy-making apparatus — hasn't been directed in a concerted, intense way toward fixing the ghettos for almost a quarter-century.").

84. LEMANN at 219. Lemann states:

Of the billions the federal government spent, by far the lion's share went to the elderly, the sick, the disabled, and the hungry, and in all those areas the problems it addressed were substantially solved. The black middle class grew faster during the Great Society period than at any other time in American history.

Id.

85. *Id.* at 344. See also *id.* at 219 ("[T]he idea endures that anything the federal government might do for the black poor will surely fail, and it has become a powerful force in its own right; misapprehensions about the past have a way of determining the future.").

86. *Id.* at 352.

87. Helen Dewar, *Nunn Urges Military Shift*, WASH. POST, June 24, 1992, at A17.

the WPA and the CCC."⁸⁸ Military facilities and military personnel, in or out of uniform, could be involved in such programs, as the Army was in the CCC.⁸⁹ There have been proposals for tying universally available federal student aid to a tour of national service,⁹⁰ as well as more general proposals for mandatory public service.⁹¹ Many other creative ideas also are available.⁹²

In evaluating various approaches toward improving the situation of African-Americans, an important strategic question arises. Should the focus be on race or on poverty? Should the emphasis be on race-specific remedies, or on non-race-specific remedies?⁹³ The question is

88. David Boren and Harris Wofford, *Lessons of the '30s*, WASH. POST, May 21, 1992, at A25. Cf. MICKEY KAUS, *THE END OF EQUALITY* 125 (1992) (proposing replacing welfare for able-bodied poor with offer of WPA-style public employment).

89. See Boren and Wofford, *supra* note 88.

Other commentators, noting the military's relatively high degree of success in creating a non-racist meritocracy of which Colin Powell is only the most prominent product, and further noting that "thousands of men and women — senior noncommissioned officers and junior officers in their thirties — face involuntary separation from their military careers because of the post-Cold War budget cuts," have asked this question: "Why not take these young Colin Powells and let them lead a new CCC . . . ?" David S. Broder, *The Military Model*, WASH. POST, May 13, 1992, at A23 (reporting and endorsing the views of David Gergen and Stephen Ambrose).

90. KAUS, *supra* note 88, at 81-84 (describing various national service proposals); *id.* at 81 ("Senator Nunn and Congressman McCurdy of the Democratic Leadership Council introduced legislation that would have made federal student aid contingent on one or two years of service."); *id.* at 82 ("[T]he Nunn-McCurdy Bill . . . promises national servers a \$10,000 voucher, good for a scholarship or a first home purchase, in addition to a 'stipend' of \$100 a week plus health benefits.").

91. HAYNES JOHNSON, *SLEEPWALKING THROUGH HISTORY: AMERICA IN THE REAGAN YEARS* 470 (Anchor Books 1992) (1991). Johnson states:

Requiring young Americans to choose among service in the military, environmental cleanup projects, drug clinics, or public hospitals can be seen as American society's price for the benefits of citizenship and a way to help dissipate some of the negativism and cynicism that surrounds the idea of government and those who serve the public.

Id.

92. There is, for example, HUD Secretary Kemp's idea of urban enterprise zones. Jack Kemp, *A New Agenda for Ending Poverty*, WASH. POST NAT'L WEEKLY ED., May 11-17, 1992, at 29. I am skeptical of this and other "ghetto development" ideas for reasons such as those elaborated by Lemann. See LEMANN at 346-48; *id.* at 347 ("[G]hetto development hasn't worked."); *id.* at 290 ("Kemp [frequently] called for a new war on poverty, based on the principle of the regeneration of the ghettos through self-help and 'empowerment' — which, though Kemp didn't seem to realize it, was exactly the principle that hadn't worked in the first war on poverty."); *id.* at 348 ("[T]he advocacy of community-development projects has a crowding-out effect, causing discussion of other, better remedies to cease."); *id.* ("[W]e should be trying to bring the ghetto poor closer to the social and economic mainstream of American society, not encouraging them to develop a self-contained community apart from the mainstream."). However, experiments along these lines could be one part of a consensus, compromise program. But see also Michael Kinsley, *'Enterprise Zones': Just Another Boondoggle*, WASHINGTON POST, May 7, 1992, at A25 ("The businesses most easily tempted into enterprise zones by any given package of incentives will be those from areas almost as bad.").

93. See LEMANN at 289 (Some among "the black leadership . . . [are] convinced . . . that an open call for action to help the ghettos would surely run afoul of white racism. . . . So the focus is kept on deracialized proxy issues: children, welfare reform, economics, drugs, homelessness."). See also *id.* at 353. Lemann states:

Our lack of faith in Americans' ability to put aside selfish concerns and address the

difficult, because race-conscious remedies such as those involved in school desegregation, affirmative action in employment, and set-asides for minority business enterprises have been socially and politically divisive and have fueled the political chain reaction adverse to minority interests which the Edsalls have so perceptively analyzed.⁹⁴ But there is a strong case to be made for an overall approach that is race-conscious.⁹⁵ I have supported the careful and responsible use of race-conscious remedies in the employment context, for example, and have tried to explain how this may be accomplished consistently with the statutory and constitutional law which the Supreme Court has developed on the subject.⁹⁶ Carefully crafted race-conscious measures often are necessary and appropriate to remedy a proven history of discrimination, and they often are a desirable and permissible basis for voluntary action addressing our racial problems. On the other hand, many of the economic and other needs of African-Americans

big problems has produced a conviction, even among people who want to mount a new assault on ghetto poverty, that it would have to be camouflaged in some way. So the call to action is always couched as something else: as a new family policy, or children's policy, or drug policy, or civil rights policy. New antipoverty initiatives are thought to be doomed to failure unless they are buried in the tax code or loaded up with middle-class beneficiaries to give political cover. Those aspects of ghetto life that are characterized by self-destructive behavior rather than by victimization of the innocent — drug use, out-of-wedlock childbearing, dropping out of school — are, quite often, played down for fear that Americans will leap to the conclusion that the black ghetto poor are undeserving and should be written off.

Id.

94. See EDSALL at 125. The Edsalls state:

No issue has captured the fundamental tension between two basic American goals — the maintenance of an egalitarian society and the elimination of the consequences of illegal discrimination — better than racial preferences and affirmative action. No issue more clearly divides public opinion between white and black America, and few issues are more sharply disagreed upon by the Republican and Democratic parties.

Id. Cf. LEMANN at 353 ("Programs for middle-class blacks — affirmative action and minority set-asides — are never going to set the country aflame with a sense of righteous purpose.").

95. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1122 (1991) ("Race-neutral strategies simply postpone our society's inevitable rendezvous with its history of racism.").

See also Lyndon B. Johnson, *To Fulfill These Rights*, Commencement Address at Howard University (June 4, 1965), reprinted in WASHINGTON POST NAT'L WEEKLY ED., May 11-17, 1992, at 28. President Johnson's words from 1965 still ring true in 1992:

You do not take a person who, for years, has been hobbled by chains and . . . bring him up to the starting line of a race and then say, "you are free to compete with all the others." . . .

. . . Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences — deep, corrosive, obstinate differences — radiating painful roots into the community, and into the family and the nature of the individual.

These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with.

Id.

96. Selig, *supra* note 42.

and other minorities — such as health care, job training, and better quality education, for example — can be addressed on a nonracial basis. They probably should be so addressed to the extent that they are based more on economic status or other factors than on race and are experienced by large numbers of white Americans.⁹⁷ For despite the unique virulence and pervasiveness of the victimization of blacks, we cannot wholly ignore the fact that the proliferation of other victim groups defined by race, ethnicity, and other characteristics has diffused and decreased support for race-specific remedies, and increased the sense of weariness and beleaguerment among whites who do not qualify for that kind of victim status or preferential treatment.⁹⁸ This is, of course, even more true in a period of general economic hardship.

I do not believe, therefore, that there is an all or nothing, yes or no, answer to the strategic question concerning the use of race-conscious as opposed to race-neutral remedies. Crime, for example, is not inherently a racial issue, though its impact frequently falls most heavily on minority communities. It can be addressed by race-neutral means. On the other hand, the problems of police-community relations of which the Rodney King episode was a symptom cannot be fully addressed without a degree of race-consciousness. Nor can certain problems of the criminal justice system, such as the racially discriminatory use of peremptory challenges,⁹⁹ or racial discrimination in the application of capital punishment.¹⁰⁰ I know of no way to remedy school segregation without making race an element of the remedy. On the other hand, I am not persuaded that it is either necessary or desirable in the absence of a history of past discrimination for a university to establish race-exclusive scholarships available only to minority students. I would much rather see all scholarships granted on the basis of need without regard to race, thereby meeting the needs of deserving minority students and of deserving white students without discrimination. I would acknowledge, however, that this issue becomes clouded when some scholarships are or have been awarded on the basis of "merit" without regard to need and the argument is then made that race should be taken into account as one

97. Cf. Greenberg, *supra* note 27, at 127 ("The most intractable issue which affects America's blacks is that many social and economic conditions have reached a point where civil rights laws, while essential, affect them only partially.").

98. See EDSALL at 135 ("Liberalism had produced a climate in which key segments of the white electorate felt besieged in the preserves they had built, in their homes, neighborhoods, jobs, schools, and unions.").

99. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (Equal Protection Clause forbids racially discriminatory peremptory challenges by prosecutor).

100. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (evidence failed to prove either defendant's sentence or Georgia's capital punishment system violates Equal Protection Clause or Eighth Amendment); *id.* at 320 (Brennan, J., dissenting); *id.* at 345 (Blackmun, J., dissenting); *id.* at 366 (Stevens, J., dissenting).

factor among many comprising "merit" in an effort to attract a diverse student body.¹⁰¹ And if in the past a university has determined "merit" on a racially discriminatory basis, that changes the issue entirely, because at that point race-conscious remedial action would certainly be justified if not required.¹⁰²

To the extent that some aspects of deprivation in black America can be dealt with more effectively, or are more likely to be dealt with at all, by worthwhile and effective race-neutral approaches that are more politically saleable than race-conscious remedies, I would be happy to see them resolved on that basis. White poverty in a wealthy nation is no less inherently objectionable and no less worthy of attention than black poverty. The same is true of lack of education, shelter, and health care. Any attack on these problems necessarily will benefit African-Americans disproportionately, because the problems are disproportionately present in black America. However, to the extent that poverty and other crippling disadvantages are disproportionately prevalent among African-Americans because of our history of racial discrimination, they are doubly inconsistent with our

101. Nevertheless, I am uncomfortable with the idea that educational institutions should dispense scholarship resources on a racial basis rather than on the basis of need in order to compete with other institutions to enroll minority students, or to enroll the better minority students. In this regard, I do not believe that race-exclusive scholarships are merely analogous to and no more objectionable than scholarships reserved for quarterbacks, mezzo-sopranos, nuclear physicists, or residents of a particular state. Race-exclusive scholarships — unlike athletic or science scholarships, for example — raise serious questions of unfair discrimination based solely on race. And to the extent that race-exclusive scholarships are not based on need, they provide benefits on the basis of race to some minority students who do not need them at the expense of white and other minority students who do.

102. See *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991) (University of Maryland scholarship program open only to black students is not unlawful), *rev'd*, 956 F.2d 52 (4th Cir. 1992) (adequate finding of identifiable present effects of University's past discrimination is necessary to make race-based scholarships lawful) (reversing summary judgment in favor of University and remanding for further consideration).

For the U.S. Department of Education's latest position on this subject, see *Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance*, 56 Fed. Reg. 64,548 (1991) (proposing to interpret Title VI so as to permit taking race into account in scholarship decisions, and to permit race-exclusive scholarships, in certain specified circumstances).

For commentary on the general issue, compare Michael A. Olivas, *Federal Law and Scholarship Policy: An Essay on the Office for Civil Rights, Title VI, and Racial Restrictions*, 18 J.C. & U.L. 21, 27 (1991) (urging educators to reject earlier Education Department positions) and Rachel Spector, Note, *Minority Scholarships: A New Battle in the War for Affirmative Action*, 77 IOWA L. REV. 307, 331, 332, 345 (1991) (criticizing current Education Department position and arguing that minority students do not receive a proportional share of nontargeted scholarships based on "merit"; that need-based aid does not target the best prepared minority students; and that race-based minority scholarships can survive strict scrutiny) with Jay B. Howd, Comment, *Race-Exclusive Scholarships in Federally-Assisted Colleges and Universities — Will They Survive?*, 16 S. ILL. U. L.J. 451, 475-76 (1992) (arguing that universities should use race-neutral methods to achieve race-conscious goals) and Jon A. Ward, Note, *Race-Exclusive Scholarships: Do They Violate the Constitution and Title VI of the Civil Rights Act of 1964?*, 18 J.C. & U.L. 73, 102 (1991) (arguing that race-exclusive scholarships are lawful to remedy university's own prior identifiable discrimination, but unlawful to remedy societal discrimination).

ideals and their alleviation is of special urgency. In addition, to the extent that self-destructive behavior is an element in the depressed situation of African-Americans or any other group, it is unrealistic and unhelpful to ignore that aspect of the problem.¹⁰³ Whatever non-racial approaches we may adopt, we still must confront the American racial dilemma. As Lemann rightly concludes:

The result of . . . well-intentioned fuzzing up of the true nature of the tragedy in the ghettos is a loss of moral urgency, and all causes need moral urgency if they are to be fulfilled. . . . The United States has an undeniable strain of racial prejudice in its character, but it also has a racial conscience, which periodically comes to the fore. What brings it out is the demonstration of conditions in black America that are intolerable and that are clearly linked to the country's history of departing from its democratic ideals in the case of blacks.¹⁰⁴

I have no doubt that America is capable of continuing and ultimately finishing the task of overcoming its history of racial discrimination and oppression. I believe that, with the proper leadership, we can summon both the will and the wallet to do so. No doubt it will be more difficult to find the necessary resources as quickly as we would like, given the listless state of our economy¹⁰⁵ and the reckless increases in our budget deficits and national debt,¹⁰⁶ which would

103. See EDSALL at 15-16. The Edsalls explain:

The repudiation of racist expression had an unintended consequence . . . for liberalism and for much of the Democratic party: an almost censorious set of prohibitions against discussion of family structure among the black poor, absent fathers, crime, lack of labor-force participation, welfare dependency, illegitimacy, and other contentious race-freighted issues.

This . . . permitted the political right to capture the debate. . . .

Declining liberal influence over the domestic policy debate meant . . . that inadequate recognition was given not only to issues of structural unemployment, low wage scales, and the global transformations that were reshaping American industry, but that inadequate recognition was also given to the successful role of the federal government in expanding the black middle and upper-middle classes. . . .

The symptoms of social disorder, which the Democratic left to a large extent has excluded from public debate for most of the past twenty-five years, and which black leaders have resisted talking about in morally unambiguous terms, have become so severe in the nation's cities — and, most difficult of all, so closely associated with race and with liberalism — that continued Democratic avoidance of these issues risks the national party's already-eroded credibility with the voting majority.

Id. (footnote omitted).

104. LEMANN at 353.

105. See Hobart Rowen, *Recovery in Slow Motion*, WASH. POST NAT'L WEEKLY ED., Aug. 17-23, 1992, at 5 ("Even if all of [Governor Clinton's] planned policies are given a chance, it will take a long time to recover from the Reagan-Bush economic legacy.").

106. It has plausibly been suggested that David Stockman, the Reagan administration's first Director of the Office of Management and Budget, welcomed increased deficits as a

continue to limit the amounts available for new domestic spending even if taxes were raised substantially. But this is still a wealthy country, and although our present economic difficulties may slow us down, they need not stop us from beginning to move again in the proper direction. What is required is that we put aside cynicism and defeatism and start to think big — start to think American — once again. Such a revitalization of our can-do spirit is required both by self-interest and by moral imperatives.

V.

To me, the argument from self-interest seems so obvious that only rigid ideology or irrational prejudice can fully explain the extent to which it has been ignored in recent years. It is true that from the days of slavery until the end of nonmechanized cotton farming, it was in the interest of white plantation owners to maintain economic, social, and educational inequality and deprivation among African-Americans, and to perpetuate the myth of black inferiority they invented as a rationalization for the caste system they created.¹⁰⁷ But it is in no American's self-interest to perpetuate those conditions or that myth today.

An increasingly large proportion of today's and tomorrow's entry-level workforce will consist of blacks and other minorities.¹⁰⁸ Unless we improve the educational and other circumstances of this workforce, we will become increasingly less competitive as our productivity fails to keep pace in the global marketplace. Our growing underclass represents a vast human resource that we cannot afford to continue to waste. Nor can we long maintain our position of leadership in the world if we are seen as ignoring the inconsistency be-

device to force domestic budget cuts. JOHNSON, *supra* note 91, at 110-11. Johnson states: Stockman saw the implicit failure of supply-side theory as an opportunity, not a problem. It provided a chance to have gigantic tax cuts *and* military increases — yet also dismantle despised social welfare programs that had accumulated since the New Deal. His secret solution was to let the federal budget deficits rise, thus leaving Congress no alternative but to cut domestic programs.

Id. Senator Moynihan has gone one step beyond this and suggested that higher deficits were created deliberately by the Reagan administration to force Congress to cut domestic spending. *Id.* at 111 n.*. Stockman has denied that the "giant deficit" was created "deliberately" but acknowledged that "[we] let it happen . . ." DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: WHY THE REAGAN REVOLUTION FAILED* 267-68 (1986). Stockman also has acknowledged that he viewed the deficit as an opportunity and a rationalization for forcing domestic budget-cutting reform. *Id.* at 53-54, 68-69, 127, 132-33.

107. See LEMANN at 24-26; *id.* at 24 ("White people in the Delta responded to their need to believe in the system of economic and political subjugation of blacks as just, fair, and inevitable by embracing the idea of black inferiority . . .").

108. See JOHNSON, *supra* note 91, at 416 ("In California, and across America, minorities, black and Hispanic, [are] the fastest-growing proportion of the population. But they [are] also the poorest, least well-educated segment, and generally less able to compete in a technical world.").

tween our democratic ideals and the reality of racial inequality and deprivation in our midst. If violent crime and the drug trade continue to flourish in our inner-city communities, they will poison those communities, and their effects will spill over into and threaten the rest of our society. Similarly, the perpetuation of hostility and resentment in our urban ghettos will continue to threaten our domestic peace and tranquility. The promise of the future for all Americans hinges on our ability to replace fear and division with hope and unity.

As Governor Clinton said in his nomination acceptance speech, "We need each other. For too long politicians told most of us that what's wrong with America is the rest of us: them. Them the minorities. Them the liberals. Them, them, them. But there is no them; there's only us."¹⁰⁹ What is desperately required is national leadership on our national race problem — leadership that appeals to our best instincts rather than to our worst. One of today's most astute and widely respected political reporters and commentators, David Broder, wrote in the aftermath of this year's Los Angeles riot:

There is no more important test of character for an American president than what he does to heal the scars that slavery and racism have left on this society. That is the curse that is killing us, and everything else is secondary. The last president who acted on that conviction was Lyndon Johnson, who left office almost a quarter-century ago, when Los Angeles was last in flames. We cannot wait another 25 years for such a president. We just can't.¹¹⁰

It remains to be seen whether the candidate elected this year will be the kind of president Broder describes. I don't know whether any of the candidates will. But I do know this: ultimately, what will provide and sustain the kind of leadership we need, and allow it to be effective, is a reawakening of the idealism and moral energy of the American people. Some may consider it unrealistic to expect that to occur any time soon.¹¹¹ But today no less than during the

109. Reprinted in WASH. POST, July 17, 1992, at A26.

110. David S. Broder, *Now the 'Character Question' Has Been Written in Fire*, WASH. POST, May 5, 1992, at A25. See also LEMANN at 221 ("Johnson . . . was the only president in this century who was willing to put the American dilemma firmly at the center of his domestic agenda.").

111. See, e.g., Greenberg, *supra* note 27, at 128 ("Do we have a country that is willing to take from the rich and give to the poor for the purpose of promoting racial equality? At this point, as far as I can tell, we do not."). See also Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1559-60 (1991) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR*

heyday of the civil rights movement, the unfinished business of race in America presents a moral issue with pervasive social consequences.¹¹² On such an issue, there is no room for moral neutrality:

RACIAL JUSTICE (1987); STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990); and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)). Delgado concludes:

Unless liberalism is able radically to transform itself, it will likely continue to weaken. What will replace it as a civil rights strategy? My guess is nothing. Society's need for legitimacy will assure that a few blacks ascend, while opposition to spending and mass programs will guarantee that most fall further and further behind. Conditions for change like those present in the 1960s are missing. The white leadership is timid or indifferent; the white middle- and blue-collar classes are frankly hostile to racial reform. There is little pressure at the international level for the United States to transform itself. In time, these conditions may change; in particular, demographic shifts will one day begin to add special urgency. But if I am right, in the short run liberalism will continue to decline, and nothing coherent will replace it, while conditions for blacks and other people of color will worsen. Race, our most enduring problem, is likely to remain, for now, as intractable as ever.

Id. See also EDSALL at 242-43. The Edsalls state:

The political [consequence] of [recent] trends in employment, work force participation, crime, single parenthood, and welfare dependency is to further isolate and separate the black poor from the rest of society. The geographic isolation fostered by the growth of a predominately white suburbia is being compounded, at the lower levels of the income distribution, by the creation of economic and behavioral boundaries separating the races.

Together, these developments further incorporate race as a pervasive factor in the public perception of the country's social and economic structure. That incorporation, in turn, establishes race as pervasive in political and public policy decisions. Long-term poverty, and all the problems associated with it, [become] identified as a black condition, increasingly separable from the mainstream of society, and, for many whites, separable from governmental and public obligation. If entrenched poverty is seen more as a condition of race than of class, and if the problems linked to such poverty — illegitimacy, joblessness, drug abuse, criminality — have all worsened *after* enactment of anti-discrimination laws, after affirmative action programs in the public and private sectors, and after a substantial expansion of government investment in programs geared to the poor, then public commitment to maintain, let alone to increase, this support declines.

Id. But see also *id.* at 260 ("While such forces as those listed above work to keep race alive as a wedge issue, there are factors pushing in the opposite direction. . . . Suburban voters, among others, are experiencing a revived sense of moral disquiet over economic, racial, and social inequities . . ."). See also *id.* at 216. The Edsalls state:

[Complex social developments] suggest the potential for a *lessening* of racial isolation in the next decades, and include not only the sustained growth of the black middle class, but . . . also the continued ascension of increasing numbers of blacks to positions of power and authority in the public and private sectors; the increased willingness of whites to vote for a black candidate; and the possibility that partisan competition for black support will break the logjam now impeding black economic and social advancement. . . .

Conversely, however, there is another set of forces at work in America *intensifying* racial separation, particularly the separation, if not segregation, of poor blacks — and these forces have the potential to institutionalize racially separate structures in the political and economic spheres.

Id.

112. Cf. LEMANN at 291 ("Political support for a concerted effort to help the underclass is not likely to materialize until it is understood as a moral cause.").

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if we do not choose to move forward, then we will move backward. If we wish to remain one nation, indivisible, the direction we must choose is clear. I believe that idealism and moral energy are at the core of what it means to be American and of what has made America great. When the spirit of reform is tapped, there is no limit to what we can accomplish.