

the revolving funds, and you're saying that's not so.

MR. CASELLAS: That's not so if I put the business in place, which I'm going to do and we are able to use, probably to calculate the unused number of dollars. Then we're going to have to get some of our funds to do a marketing plan. This is a privately funded operation. We have the choice to go out to market videos and CD's and so on. We're not set up to do that.

REP. ROGERS: In 1997 you have spent \$1 million 2. We expect a reprogramming request for any expenditures above that. Any dollar figure above \$1 million 2 that you've estimated you would be obligated to spend in 1997. If it's more than that we need to have a reprogramming request sent to us so we can review it, and then we'll deal with it.

MR. CASELLAS: Let me just understand this, because the revolving fund sits there and has sat there for 4 years. It started out with \$1 million dollars.

REP. ROGERS: We just discovered.

MR. CASELLAS: Right. You set it up, and it sits there.

REP. ROGERS: Its been sitting there for 4 years, now we revamp it. We think it ought to be put to good use.

MR. CASELLAS: I think it's being put to good use, sir. The problem is that if you take it away, then there will be no TAPS program, because you can't do the marketing plan --

REP. ROGERS: -- we're allowed to take it away if you don't use it.

MR. CASELLAS: You're asking me to reprogram something that you've already put in place. Money is coming in and out of there constantly. That's not the revolving fund.

REP. ROGERS: Where does the revenue come from for this?

MR. CASELLAS: Some comes from the employers. Anything that can be found, we charge roughly \$150 dollars or \$175 dollars to bring them different programs. They read this material, they listen to experts telling them this is how you can avoid liability, give them some examples, give them some cases, give them some encouragement's --

REP. ROGERS: -- and the federal government figured it's worth a million dollars 4 years ago?

MR. CASELLAS: In 1992, and as I understand it no one expected it and the point being there is, until you guys put together a plan, i.e., a marketing plan, this is supposed to be a money making operation, but you're supposed to reimburse the agency for its time of its people, and that was not done. I'll admit that was not done. That's what I mean.

REP. ROGERS: You are doing what?

MR. CASELLAS: I put together a group to come up with a plan, a business plan. You've got to have a business plan.

REP. ROGERS: I have rules. Any expenditures above the \$1 million 2 which you have estimated for 1997, you'd be required to submit a reprogramming request to the committee to reprogram those expenditures. That's what I'm saying. No one is taking away the fund. I'm saying that just like any other agencies you would have to reprogram those moneys. You don't anticipate throwing more than \$1 million dollars out in FY 98 do you?

MR. CASELLAS: No.

REP. ROGERS: As I understand it, you're clear to build a revolving fund for

services rendered by federal employees.

MR. CASELLAS: Yes sir.

REP. ROGERS: My question is, in the, I guess, the chairman is talking about FY 97. You don't intend to throw out more than \$1 million 200,000 dollars do you?

MR. CASELLAS: No. We'd end up with nothing. The whole point is not to end up with a zero account.

REP. ROGERS: You've got \$2.3 million.

MR. CASELLAS: Well, that's as of last year.

REP. ROGERS: And you expect to spend \$1 million 2?

MR. CASELLAS: That's actually going to be different. They reduced the figure in 96. They've reduced in it the last several months.

REP. ROGERS: Reduced what?

MR. CASELLAS: That \$2 million 2. That number you're looking at. That part of the revolving fund, because we reimburse it and then we're taking money out of that fund to fund business and that's what we want.

REP. ROGERS: But you've got a million dollars coming in to the fund.

MR. CASELLAS: We don't have a million dollars coming in when you think about the projection coming up.

REP. ROGERS: Last year you had over a million.

MR. CASELLAS: That's in 92 and some of the expenses that we now reimburse the agency in 97. We reimbursed in 97 expenses from 96.

REP. ROGERS: It is really pretty simple according to your budget. If you look at page 53 you have that. In 1996 actual funds, those off setting collections totaling \$1 million 1 roughly, and you have carry over of \$1 million 8 which left you at the end of 96 with \$3 million \$339,000 right.

MR. CASELLAS: Yes sir.

REP. ROGERS: In 97 you estimate in that column the same type of thing. You show collections of roughly \$1 million 1 and a balance of \$2 million \$339,000. If you want to spend \$1 million 2, you're going to have \$224,000 left. Right?

MR. CASELLAS: That's the estimate.

REP. ROGERS: What would change that?. What could possibly happen that would change that?

MR. CASELLAS: For example --

REP. ROGERS: -- your expectations.

MR. CASELLAS: Reimbursement to contributing agencies, number 1. Number 2, developing different products and preparing videos and CD's.

REP. ROGERS: Do you expect the reimbursement to be less than in 94?

MR. CASELLAS: The reimbursement to the agency to be less than in 94?

(Off mike) (Cross talk)

MR. CASELLAS: What we don't know is the registrations from the changes to these programs.

We don't know that till after the fact.

REP. ROGERS: I'm beginning to think we made a mistake when we passed the technical decision to change the revolving fund act of 19 whatever that was.

MR. CASELLAS: Well, I'm sure it won't be the first mistake we've made. Whatever

it is, I'm sorry that's the opinion, roughly provided services --

REP. ROGERS: -- it looks to me like according to your 96 actual, your 97 estimate, and your 98 estimate, it looks to me like you're going to be getting a little over \$2 million dollars in all kinds of net funds. Is that generally direct?

MR. CASELLAS: That's what that looks like. What I'm telling you is that our funds get this department to operate as it was intended to operate.

REP. ROGERS: I'm just trying to save some money.

MR. CASELLAS: Oh, I understand.

REP. ROGERS: I mean we're stretching the millions to fund everything in the world with -- (inaudible) -- revenue and accept -- (inaudible) -- and any dollar I can save anywhere can go to a needy cause. You've got \$2 million dollars lying there. We're looking at very closer and closer at unused moneys.

MR. CASELLAS: I understand that. But let's go over the -- (inaudible) -- does it make a difference that employers spend money to deal with minor differences. That's the long and short of it. I can't measure that, and really, no one can measure that. All I ask you to do is to look at the 5,800 hundred people who attended last year, and they have issues that are all very, very hot.

REP. : If I could just pursue this a little further Mr. Chairman. When you draw out of this fund, reimbursement for salaries and some kind of proportional draw for employees of your agency --

MR. CASELLAS: -- we've said some of that, what I am saying is that we've not done it with the precision that we should have and that is what I'm trying to get at.

REP. : What I think the Chairman is getting at is that he thinks the use of this fund as your actual budget is larger, in fact, your appropriated budget is larger than it reflects. You're drawing money out of this non-appropriated fund. So I'm asking what kind of funds do you draw out of there. If you have a conference, do you pay the Xerox guy out of this fund?

MR. CASELLAS: Well, we pay for the hotel. For the facility. You pay travel for speakers.

REP. : Okay, they go to reimbursement for services from third parties.

MR. CASELLAS: Yes sir.

REP. : What money comes back to your agency? I think that's what were interested in.

MR. CASELLAS: The registration fees of the attendees.

REP. : You mean like your employees? What kind of money comes back to EEOC.

MR. CASELLAS: Okay, I'm sorry, back to EEOC.

REP. : Do you follow what I'm saying? The fund is here and you put the money out there and then some of it comes back to EEOC. And we're trying to get an idea of what comes back to EEOC.

MR. CASELLAS: Historically, very little, because historically no one did a calculation. No one sat down and tried to figure out what it is really costing EEOC in terms of employee time, in terms of the administrative allocation. The people who are doing it are still working for EEOC. We're still doing our jobs when I go out to see their TAPS program.

REP. : Okay. Do you bill the fund \$500 dollars for your appearance?

MR. CASELLAS: I haven't. I should. That's what we should do. That's the point.

That's why we these numbers, I apologize for these numbers, but that's what this estimate is and we have witnesses. There was no business plan, for example. You have to run an agency or run a business. They didn't know how. That's the truth. They didn't know how. We're putting together a business plan, we're going to do a marketing plan, we're going to do product development. You can't even do seminars in the day of CD ROM and videos. We compete against law schools, we compete against law firms, we compete against organizations that offer this kind of training.

REP. : Let me see if I understand. You're planning to start using the fund for these types of expenses, but for example, reimbursing yourself. MR. CASELLAS: Yes. I've put together a group that is putting in place a business plan.

REP. : So your plan is to start using all of this money, or practically all of it in the normal business.

MR. CASELLAS: To reimburse to the effect that we can.

REP. : Right.

MR. CASELLAS: I mean, it's not to deplete the fund.

REP. : Right. Right now more expenses are being paid out of your general appropriated funds. (Off mike.) Out of the appropriated funds we give you.

MR. CASELLAS: Yes, yes.

REP. : If you then start paying some of those expenses out of your revolving fund, the fund we give you would not need to be enlarged. Am I right about that?

MR. CASELLAS: Theoretically, sir.

REP. : Then we've finally gotten through that. (Laughter.)

MR. CASELLAS: Theoretically, it would be on theory. I mean, you know --

REP. : -- the world operates on theories. I mean, this isn't rocket science we're talking about here.

MR. CASELLAS: If you change that law now, then you can't fund things in the future, and you can't do that. For example, we can't compete in a very real world at under \$75 dollars per person when the Bar association is charging \$50 dollars per person. We can't do it. We don't have a marketing plan yet, but that's part of what we're trying to do so that we really can get a market driven concept.

REP. ROGERS: Okay, we've cleared our -- (inaudible) --. (Laughter). We thank you very much for your testimony. Mr. Dixon, anything you want to add? Thank you for being here.

END

LANGUAGE: ENGLISH

LOAD-DATE: April 19, 1997

MEMORANDUM

TO: Tom

FROM: Neera

RE: Strengthening the E.E.O.C.

Former Senator Bill Bradley has spoken repeatedly for a stronger E.E.O.C. because he believes that there is no adequate remedy for discrimination today. Basically, he argues that the 1964 Civil Rights Bill was weak on remedies for victims of discrimination because of Southern opposition to the bill. It basically gave the EEOC no teeth as a tradeoff for passage. ✓

Senator Bradley claims that the EEOC's structural weakness has led to the current backlog of roughly 100,000 cases. In response, Senator Bradley has urged the President to give the EEOC cease-and-desist authority, along the lines of the National Labor Relations Board. [San Francisco Examiner, 2/14/97]

According to Senator Bradley:

"The issue [of enforcement] arose during the consideration of the 1964 Civil Rights Act: Do we put an administrative enforcement mechanism in the law to remedy discrimination in employment? The Republicans in the Senate said they would join the Southern Democrats and filibuster the bill if President Johnson gave the soon-to-be-created EEOC an administrative enforcement mechanism, so he dropped it out. Now, if there is an act of discrimination, what you do is file a petition with the EEOC. But there is no way to bring the issue to a conclusion. So, the case languishes indefinitely. There are now 97,000 cases backlogged at the EEOC. Imagine you're a competent mid-level clerk in a company that has promoted Whites, but rarely a Black, or you're the 25th African American who's applied for a job with a police department in a city that is overwhelmingly African American, and not one has ever been accepted and so you decide to bring a case at the EEOC. After five years you get no remedy. So then you go to court for another five years, at the end of which you may or may not get a remedy, which means for people of modest means, you don't have a remedy for discrimination because you can't afford a lawyer for ten years in order to get your promotion from a \$ 30,000 to a \$ 40,000 a year job. ✓

The EEOC should have the same power that the National Labor Relations Board has, which is cease and desist authority, the ability to bring a case to a conclusion and say, yes, there was discrimination and this is a remedy, or say, no, there was no discrimination, this is frivolous. With a more streamlined procedure for resolving charges of discrimination, companies would pay less to lawyers defending them against frivolous cases and individuals who have a legitimate claim would get a more timely resolution to the problem of discrimination. But once given real power the EEOC has to resist ridiculous interventions that allow Americans who don't want to fight discrimination an excuse to discredit the whole EEOC effort. Self-indulgence at the EEOC breeds disrespect for what should be a mechanism of our national self-respect." [Senator Bill Bradley, Vital Speeches, 2/1/96] ✓

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February 17, 1997, MONDAY, Late Sports Final Edition

SECTION: FIN; Pg. 47

LENGTH: 499 words

HEADLINE: 'Reformed' EEOC is still bogged down, critics say

SOURCE: ROBERT A. DAVIS

BYLINE: BY FRANCINE KNOWLES

BODY:

Twenty months after the U.S. Equal Employment Opportunity Commission launched a system to speed case handling, critics say the agency remains mired in problems.

Agency officials and others say gains have been made but that it's too soon to measure the results of reforms that are just now being fully implemented.

Attorney Candace Gorman, who is representing plaintiffs in a discrimination suit against R. R. Donnelley & Sons, says she has seen no significant improvements.

"I'd characterize it as basically the same," she said. "The problems start when people walk in the door. Their (staff) people aren't adequately trained, and their mission is just to get people out of there." D

Others are more charitable.

"They are responding quicker, and I have seen a tremendous turnaround in just two years," attorney Steven Platt said.

After years of complaints, including a 1988 federal report that found up to 80 percent of cases dismissed by the EEOC weren't adequately investigated, the EEOC launched reforms.

Among reforms implemented in June, 1995, was a priority handling system, which helped the agency reduce its backlog by 30 percent in 18 months, from a high of 112,000 in mid-fiscal 1995 to less than 80,000, said Gilbert F. Casellas, EEOC chairman. O

Locally, the EEOC's backlog fell from more than 5,000 to less than 3,300, while its number of investigators dropped from 36 in fiscal 1995 to 27 today, EEOC regional director John P. Rowe said.

Under the priority system, charges are rated based on the quality of the evidence, witnesses and potential for successful resolution.

An "A" case has the highest priority because evidence and witnesses indicate it's likely that discrimination took place. "B" cases aren't as clear and are pursued as resources allow. "C" cases have the least likelihood of success and are closed.

"I think we have addressed the concerns of many critics about the pending backlog," Casellas said.

Others suggest the priority system creates incentives to dismiss cases and avoid investigations.

"It's a bad system if it's good charges they've gotten rid of," said Rick Seymour, director of the employment discrimination project for the Lawyers' Committee for Civil Rights Under Law.

Casellas says he has taken steps to address that issue by ending previous administrations' policies of evaluating staff on the number of case closures.

He and Rowe acknowledge that problems continue but say it's too soon to judge the full impact of the changes.

The priority system is only part of reforms adopted a year ago, and new local enforcement plans have just been put in place at many sites around the country, they said.

The program includes allowing the agency to hire mediators to resolve issues between parties. The agency also is targeting high-profile cases, such as the Mitsubishi sexual harassment case in Illinois.

"We have changed an approach that's been in place for years. You aren't going to get immediate results," Casellas said.

GRAPHIC: The Equal Employment Opportunity Commission's local backlog fell from more than 5,000 cases to less than 3,300, regional director John P. Rowe says. See related chart page 47.

LANGUAGE: English

LOAD-DATE: February 20, 1997

Sun-Sentinel (Fort Lauderdale, FL)

April 10, 1997, Thursday, FINAL EDITION

SECTION: BUSINESS, Pg. 3D

LENGTH: 379 words

HEADLINE: EEOC RENEWS ATTACK ON DISCRIMINATION;
ACTION DOUBLES IN FIRST PART OF '97

BYLINE: Bloomberg News

DATELINE: WASHINGTON

BODY:

Companies once again are finding themselves on the wrong end of Equal Employment Opportunity Commission lawsuits.

After a year in which the number of lawsuits filed by the U.S. civil rights enforcement agency dropped dramatically, the EEOC is stepping up its legal attack on employers that violate federal anti-discrimination laws.

In the first three months of fiscal 1997, the agency nearly doubled the rate at which it files complaints and intervenes in private lawsuits. That increase comes after a year in which the EEOC focused primarily on reducing the backlog of charges filed with the agency by workers, often by declining to file suit.

"It's like a pendulum," said former EEOC general counsel Don Livingston, now a lawyer with the firm Akin, Gump, Strauss, Hauer & Feld. "It swung over to emphasis on reducing the backlog. They looked over and said, whoops, we weren't focusing enough on litigation, so the pendulum since has swung back." D

Although the EEOC still isn't filing as many lawsuits as it did in previous years, agency officials say they're devoting their limited resources to higher-impact cases, such as the pending class action suit against Mitsubishi Motor Manufacturing of America.

The EEOC last year outlined a new enforcement strategy, which gives priority to class-action suits, cases involving companywide discrimination, and cases likely to develop key legal principles. In the past, the agency's policy was to pursue every meritorious case, a system that tended to bog agency lawyers in cases that affected only a few people. D

The EEOC also has opened itself to criticism that it's merely piling on in big cases, intervening only after private attorneys have made progress.

That's what happened in the highly publicized race discrimination lawsuit against Texaco, according to former EEOC general counsel Charles Shanor. The agency intervened only after private attorneys secured a \$ 176 million settlement that included appointment of an independent task force to ensure racial diversity at the oil company.

In fact, in some of the biggest recent discrimination cases including suits against Mitsubishi, Home Depot and Publix Super Markets the EEOC got involved only after the private plaintiffs filed suit.

LOAD-DATE: April 16, 1997

IV. *Conclusions*
noting
long-run
I. Summary
Problem
exit solution
Source

IV. Proposals for Reform

In this section, I will explore various proposals for reforming the enforcement scheme for employment discrimination claims. To this point, I have largely concentrated on addressing two stark alternatives--the current structure measured against eliminating the agency and thereby relying on private attorneys to enforce individual claims of discrimination.ⁿ²⁰³ But other alternatives might be more desirable in trying to fashion a superior enforcement regime, and I will now discuss several possible alternatives, as well as the elimination of the agency.

-----Footnotes-----

ⁿ²⁰³ I am here qualifying the enforcement scheme because it is certainly conceivable that an agency could provide greater enforcement of class action cases than a private system might, given the costs and risks of prosecuting such actions. That said, it was earlier demonstrated that the vast majority of the EEOC's work involves individual claims of discrimination therefore displacing the agency in its current form would not alter the prosecution of class action cases. See *supra* text accompanying note 66.

-----End Footnotes-----

[*57]

A. Eliminating the Agency

The previous analysis has demonstrated that the EEOC currently serves two, or perhaps three, functions. As its primary function, the agency processes thousands of claims, determining that the vast majority of them are without merit. In addition, the EEOC provides a forum for low-value claims that might not otherwise exist insofar as the monetary value of these claims might be too low to justify either a plaintiff's effort in securing counsel or an attorney's effort in pursuing the case given that the expected fees may not justify the opportunity costs or time necessary to prosecute the case properly.ⁿ²⁰⁴

-----Footnotes-----

ⁿ²⁰⁴ But see *supra* part III.A.2, where it was shown that the expected fees

may exceed the expected damages in a case.

- - - - -End Footnotes- - - - -

It could also be argued that the EEOC serves an additional function by providing a forum for individuals to file claims with a corresponding hope that the government will act to remedy the claimed violation. This function could be classified as a process value, one that may enhance the system's legitimacy by providing a message of governmental concern with eradicating discrimination. Yet, assuming the EEOC serves this function, it is far from clear that it is desirable even from a process perspective because there is plainly a deceptive aspect to the entire process. Presumably, the hope that is invested in filing a claim stems from the possibility that some relief might be provided, whether that relief be in the form of money or other institutional change. But as the data indicate, very few of the individuals who rely on the EEOC will obtain any remedy at all. Almost certainly, if plaintiffs knew that the agency found cause in only five percent of the findings it renders, while another ten percent of the claims resulted in favorable settlements, they would likely feel much less sanguine about the value of the process and whatever potential value the system offered would be lost. Indeed, the message the current system sends is that the government believes most discrimination claims are without merit, which is a far cry from a message of governmental concern or a commitment to eradicating discrimination.

The process value of the EEOC is further limited given that plaintiffs who obtain attorney representation have what appears to be a sixty to sixty-five percent chance of obtaining some relief. n205 The empirical data presented in this Article suggests that individuals who are able to obtain counsel will have a far greater likelihood of obtaining relief and that relief is also likely to be approximately twice as high as that which might be obtained by the EEOC. This may, of course, be due to the kind of claims that are filed, or left, with the agency. But if that is true, it suggests that the claims for which individuals are unable to obtain representation are, in fact, without merit or less meritorious [*58] than those which are currently removed from the system by private attorneys. Otherwise there would be no clear explanation for the differential success rate on the claims that are left with the agency. Surely one must question the need for the EEOC to provide a forum for the inexpensive filing of nonmeritorious complaints. n206 Similarly, if it is not the nature of the cases that explains the differential success rate, then the problem would seem to lie with the manner in which the agency is handling cases--either dismissing more cases than the evidence would warrant or systematically settling cases for less than private attorneys are able to obtain. Either of these explanations obviously counsels against maintaining the agency system.

- - - - -Footnotes- - - - -

n205 See supra text accompanying notes 83-84.

n206 As currently structured, the EEOC is a rather expensive and elaborate means for providing a complaint process, assuming the purpose is to provide some notion of process to those who are disgruntled. If process without any meaningful probability of relief is the intent of the system, then it would seem more desirable to have a system where there is no pretense to investigation following the filing of a complaint. Of course, absent the prospect of an investigation, there would be little value to the process. But what I am suggesting here is that there is little real value to the current process and a sham procedure would at least have the advantage of substantial cost savings.

- - - - -End Footnotes- - - - -

The one distinct function the EEOC appears to serve with respect to claim adjudication is providing a market for lowvalue claims. n207 The entire structure, however, may not be necessary to fulfill that limited function, and it may also be the case that if the EEOC were disbanded private attorneys, state agencies or public interest groups would fill the role currently satisfied by the agency. Therefore, if the alternative is between the agency as currently structured and eliminating the agency so as to rely on private attorneys, it appears that the latter system would provide a superior enforcement scheme, especially when one factors into the balance the many cases that are currently dismissed for failure to comply with the administrative procedures. As a result, it seems clear that, in the aggregate, the plaintiff class would fare better without the agency structure, and there does not appear to be any clear loss to defendants other than the possibility of paying out greater compensation to the [*59] victims of discrimination.

- - - - -Footnotes- - - - -

n207 The EEOC also serves important policy functions such as developing guidelines governing certain areas of the law. See, e.g., 29 C.F.R. section 1604.11(a) (1995) (establishing guidelines for defining sexual harassment). If the agency were abolished, this function could presumably be preserved by either transferring the power to draft guidelines to either the Department of Labor or the Department of Justice, both of which have some responsibility for enforcement of employment discrimination laws. One significant advantage as a policymaking body the EEOC can have over the Department of Justice is that, unlike the EEOC, the Department of Justice is one of the largest employers subject to employment discrimination claims and its role as a defendant in such suits can often conflict with what might be in the best interests of plaintiffs. Thus, it is also possible that it would be desirable to preserve the EEOC as a policymaking body in some form.

- - - - -End Footnotes- - - - -

B. Should the EEOC Be Optional?

Another possible reform would be to make the filing of a claim with the EEOC optional. This would have the advantage of leaving the decision whether to avail oneself of the agency to claimants and attorneys, allowing them to determine and pursue what is in their own best interests. n208 Those individuals who were able to obtain counsel and for whom an agency investigation would be of little value could decide to file directly in court, bypassing the agency entirely. To complete this reform, it might also be possible to change the legislation so that filing a claim with the agency would be binding on the parties subject to appellate review in order to avoid wasteful de novo court hearings. n209 This would have the advantages of remedying the nonbinding quality of the current structure and of shifting responsibility to the party for making the choice--and accepting the consequences--of proceeding through the agency or directly in federal court. n210

-----Footnotes-----

n208 This is effectively the procedure that currently exists for race discrimination claims since individuals have a choice to file under either Title VII or section 1981, and under the latter statute the claim is not filed with the EEOC. Additionally, filing a charge prior to commencing a federal suit is optional for Equal Pay Act claims. See supra note 1.

n209 The Fair Housing Act provides for a similar procedure where either party can opt to proceed in federal court following a cause determination by the agency responsible for enforcing the act. See 42 U.S.C. section 3612(a) (1988) (providing right to elect to proceed administratively or in federal court). The final order of the Secretary of Housing & Urban Development is thereafter reviewable by the United States Court of Appeals. 42 U.S.C. section 3612(i) (1988).

n210 It might also be possible, as Professor Craver has suggested in his comments on this Article, to require plaintiffs who lose in federal court after having received a no-cause finding from the agency to pay the defendant's attorneys' fees for the court litigation.

-----End Footnotes-----

Moving to a system in which filing with the EEOC would be optional produces some procedural difficulties, particularly in trying to create a reasonable transition period, as well as in finding ways to provide adequate information to claimants regarding their available options. Without such information, given how entrenched the current procedures appear to be, many claimants might unwittingly proceed through the EEOC without knowing their options, or even knowing that the system had been changed. This problem could be remedied if the EEOC provided

clear and accurate information to the claimants prior to the commencement of the filing, and it might also be possible to provide a grace period during which claimants could remove their claims from the EEOC so as to take their case to federal court within a designated [*60] period of time. n211

-Footnotes-

n211 It might, of course, also be possible to keep the existing nonbinding procedures while simply making those procedures optional as well. At that point, however, one must wonder what the value would be in having a nonbinding and optional procedure, particularly where such a system would likely impose excessive costs on defendants who would have a very difficult time assessing their likely litigation expenses.

-End Footnotes-

There may also be a concern that those individuals who opt to proceed through the EEOC would ultimately receive a form of second-class justice, with those individuals likely being concentrated disproportionately among low-damage claimants. That perception may be muted somewhat, however, when one realizes that for many individuals the current system is, in fact, optional since it is currently possible to withdraw claims from the EEOC prior to the completion of investigations, and race claimants have the option to proceed by filing a section 1981 cause of action. Under the present system, those who already have attorneys or the wherewithal to withdraw their claim from the EEOC have a distinct advantage; rendering the entire process optional would simply institutionalize that advantage and eliminate the needless but potentially costly practice of filing a claim in order to receive a right-to-sue notice.

The disadvantage to the optional procedure is that it provides only limited reform. There would likely be no decrease in the volume of nonmeritorious filings with the EEOC and the agency would likely continue to provide poor service to those who opted for that route. While moving to an optional system may provide a socially salutary ability to blame those who choose the EEOC, it would seem better if one were able to achieve more wholesale reform as a way to reduce the volume of claims and increase attention on those claims most warranting relief. An optional proceeding would get us only part way to the desired goal.

C. The EEOC as a Legal Services Corporation

Another possibility would be to transform the agency entirely by having the EEOC focus on claims the market is not likely to serve. Given that the primary value the EEOC currently provides is a forum for low-damage cases, and assuming those are the cases for which the agency is necessary, there are several possible means to retain this feature of the current system without requiring

the maintenance of the entire agency structure. One problem in constructing an agency to resolve low-damage cases is creating a monetary jurisdictional baseline for the agency. Because damages are available for proof of intentional discrimination, it would be difficult to arrive at the equivalent of a small claims forum for employment discrimination claims, unless the claimant [*61] was willing to waive a right to obtain damages beyond a specified level. n212

- - - - -Footnotes- - - - -

n212 A level of \$ 50,000, which corresponds to the lowest damage cap provided under Title VII, might be one feasible level, though this may open the agency to a great many claims and also force the agency to involve itself only with small employers. It seems ironic, if not foolhardy, to have the government agency concentrate its enforcement efforts only on small employers.

- - - - -End Footnotes- - - - -

Instead of concentrating on the level of damages, it may be more desirable to create an agency structure for low-income claimants--particularly since there is likely to be some relation between low-damage claims and low-income individuals. n213 In fact, it might be possible to have Legal Services offices assume this work of the EEOC for eligible low-income claimants using the eligibility criteria already in place for Legal Services. n214 If this procedure were adopted, instead of filing a claim with the EEOC a claimant would seek assistance from the Legal Services Corporation. To be sure, the Legal Services offices are overburdened and adding to their workload may be either undesirable or infeasible under any circumstances. But if the focus is on the responsiveness of the system to low-income plaintiffs, the questions are whether Legal Services attorneys are any more burdened than the EEOC, or whether Legal Services attorneys would provide any less service to low-income plaintiffs. Although there may be an increased burden on the Legal Services Corporation, low-income plaintiffs would likely fare just as well with Legal Services as with the EEOC. Moreover, if the law were changed to permit Legal Services attorneys to recover their attorneys' fees from Title VII litigation, the alternative may appear more promising than the EEOC. n215 Allowing Legal Services offices to handle discrimination suits may, however, seriously interfere with their ability to provide adequate service for their other clients.

- - - - -Footnotes- - - - -

n213 See supra note 122.

n214 This would presumably require a change in the Legal Services Corporation's statutory authorization, which currently prohibits the Corporation from providing assistance on any fee-generating case. See 42 U.S.C. section 2996f(b)(1) (1988).

n215 To alleviate some of the burden, some portion of the EEOC's budget might be transferred to the Legal Services Corporation. Of course, this may not be a feasible political option given that for years there have been attempts to eliminate the Legal Services Corporation and it is currently experiencing a significant cut in its own budget.

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Therefore, rather than shifting the work to Legal Services offices, it might be preferable to scale down the EEOC to the point that it concentrates on cases where it can be of particular value. Along these lines, the EEOC might serve as an agency solely for low-income plaintiffs, becoming in effect a Legal Services agency for discrimination complaints. If it is only the class of low-income plaintiffs who benefits from the agency system, then perhaps we may want to [*62] retain the system only for that class of plaintiffs. n216

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n216 As noted throughout this Article, it is difficult to make the strong assumption that low-damage cases are correlated with low-income plaintiffs.

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Of course, it is not necessary to limit the EEOC solely to low-income claimants. In addition to serving low-income plaintiffs, the EEOC might continue to pursue certain policy functions such as issuing regulations or filing amicus briefs, and it might also be retained for the purpose of administering new causes of action. In terms of current legislation, the EEOC might continue to process all claims filed under the ADA for a specified period of time. The ADA is a distinctly different statute from other antidiscrimination statutes--in particular, the statute's breadth raises many questions regarding how a disability is defined and it will require a substantial amount of time before some of the definitional and jurisdictional issues are resolved. n217 There are also many new questions surrounding an employer's obligations under the statute since, unlike other acts, the ADA provides employers with a cost defense as to what constitutes a reasonable accommodation. n218 In these areas, the EEOC might perform a valuable function in helping to shape the law and resolve the many ambiguities that accompany any new legislation.

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n217 For example, the ADA covers "qualified individuals with a disability" which the Act defines as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. section 12111(8) (1988 & Supp. V 1993). The Act also includes provisions for reasonable

accommodation and undue hardship, terms that because of their statutory definition do not have clear legislative parallels in other employment discrimination statutes. See 42 U.S.C. section 12111(9) & (10) (1988 & Supp. V 1993).

n218 42 U.S.C. section 12112(b)(5)(A) (1988 & Supp. V 1993) (providing employer with a defense when a reasonable accommodation would amount to an undue burden on the employer).

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Somewhat ironically, the EEOC cannot now fulfill this function for ADA claims because the agency is overwhelmed with tens of thousands of other claims arising from different statutes. Allowing the EEOC to focus on particular claims, or the claims of low-income individuals, would enable it to concentrate on areas where its expertise or resources could be put to their most valuable uses. n219 Keeping ADA claims at the EEOC would also alleviate some of the burden on the federal courts that would result if a private enforcement scheme was substituted for the current agency structure insofar as the ADA represents the fastest growing portion of the EEOC's current docket. n220

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n219 If the EEOC were retained for new statutes, it could also have a definite time period, perhaps processing claims for eight years from the statute's effective date.

n220 See supra note 42.

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D. Increasing the Powers of the EEOC?

One final proposal might be to try to strengthen the EEOC by providing it with greater adjudicatory powers including the power to impose sanctions and assess punitive damages. These new powers might also be combined with legislation making the EEOC's findings binding subject to deferential appellate review as some commentators have recently suggested. n221 These proposals, however, ignore the actual operation of the EEOC, which issues cause findings in so few cases and resolves comparatively few cases in favor of plaintiffs that allowing the EEOC to have the final word on claims of discrimination--without a substantial restructuring of the agency--would be tantamount to providing employers a license to discriminate. Indeed, given the low number of cause findings, making the EEOC procedures mandatory and binding would almost

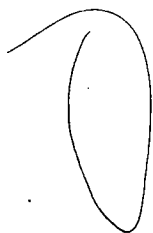
certainly reduce the number of settlements that are currently obtained, since employers would no longer fear federal court enforcement of any kind and could rest on the knowledge of the low probability that any particular claimant would obtain relief through the EEOC. The interests of plaintiffs along with the history of the EEOC surely counsel against increasing the agency's responsibility without fundamentally restructuring the agency in order to provide a true enforcement mandate. This latter issue would require, at a minimum, that the EEOC's budget be substantially increased and that the increased budget go primarily toward an increase in investigators or attorneys to handle cases. n222 Absent this restructuring, strengthening the powers of the agency or moving toward a system that is binding on the parties seems to offer little hope of a better enforcement system. n223



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n221 This was the original procedure that was sought by the early proponents of Title VII. See supra note 14. The idea was revived recently by David Strauss where he also suggested that individuals should not be able to bring claims in federal court but instead have recourse only to the administrative process. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Geo. L.J. 1619, 1655 (1991). The thrust of Strauss's argument is that the employment discrimination laws should concentrate on class action cases in order to alter substantially the labor market condition of those groups designed to benefit from the laws. *Id.* While class action litigation may bring greater overall benefits, it is difficult to imagine an adjudicatory system that would not allow meaningful access to the courts for the individual victims of discrimination.

n222 An increase in funding seems highly unlikely given the way Congress has typically treated the agency. During the last 15 years, Congress has met the agency's budget request on only two occasions. See Nancy Montwieler et al., *EEOC: Substantial Increase in EEOC Budget is Unlikely to Survive GOP Congress*, Daily Lab. Rep., Feb. 7, 1995, at B2.



n223 Given that one of the central concerns of the proposal to eliminate the agency is to protect cases that are currently dismissed for failure to comply with the administrative process, it might be possible to change these procedures as a less drastic alternative to eliminating the agency. The procedures that currently result in litigation, however, are a critical feature of the administrative process and would not lend themselves to modification without seriously limiting the purpose of the entire system. For example, many of the current dismissals stem from a failure to file a claim within the statutory time limits, and expanding the time limits might alleviate some of the dismissals. Yet, increasing the time limits would also undermine the prompt resolution of claims and would increase the processing time of cases. If plaintiffs had 2 years to file a claim rather than the existing 300 day time limit, then it may

take even longer--on average 4 years--before the cases ever reached federal court. Rather than modifying the procedures, it seems it would be preferable to treat employment discrimination claims like other tort claims relying on attorneys to investigate and file the claims promptly instead of modifying a seriously broken system.

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[*64]

V. Conclusion

What this analysis suggests is that it is time to fundamentally rethink the necessity and proper role of the EEOC. Whatever the EEOC's original mission, and whatever the original hope, today the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits. The EEOC resolves too few claims favorably for employees; it handles cases that would otherwise be pursued by private attorneys, and its cumbersome procedures result in a large number of potentially meritorious cases being dismissed for failure to comply with those procedures. The failures of the EEOC are particularly glaring in that they involve an issue of great national importance--the elimination and remediation of unlawful discrimination. To some, it may appear that the proposals discussed here place too much faith in the ability of attorneys to act rationally with full information so as to optimally enforce our employment discrimination laws. But it is no more faith than we place in the rest of our litigation system and it is a faith that seems better placed with private attorneys than with the EEOC, which has demonstrated time and again its inability to warrant any such trust or faith.

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assumptions that were at the root of the Wagner and Taft-Hartley Acts equally pertinent to public and agricultural employees? What modifications might you expect to see in adapting federal labor law to these two groups? (Re-consider these issues as the course progresses.)

3. Was the Supreme Court in the *Hearst* case deserving of congressional reprimand for not borrowing the common law agency test when determining who is an "employee" within the protection of the NLRA? Did the Court in fact give undue deference to the NLRB in giving content to the statutory definition?

4. Was the Supreme Court decision in the *United Insurance* case consistent with the congressional purpose reflected in the 1947 exclusion of "independent contractors" from Section 2(3)? Are the Court's reasons for judicial deference convincing? Is the application of the common law agency test outside the Board's expertise, as the Court suggests (at least as of 1969, when the case was decided, or today)?

5. Given the detailed itemization of excluded employers and employees in Section 2 of the NLRA, is it appropriate for the NLRB to fashion other implied exclusions, such as for managerial and confidential employees? Are such implied exclusions consistent with Section 14(c) of the Act?

6. When college and university faculty members formulate decisions regarding admissions, grading, degree requirements, curriculum, and personnel, are they acting as "professional" employees within the coverage of the NLRA, or as "managerial employees" impliedly outside of the Act's coverage? Assume that a faculty is found to be subservient to the college administration on such educational matters, that they are held by the NLRB to be non-managerial employees, and that they designate a union as bargaining representative. Can the union aggressively bargain for enhanced decisionmaking authority without fear that its success will warrant stripping the faculty of statutory coverage and the union of its representative status? See *College of Osteopathic Medicine & Surgery*, 265 N.L.R.B. 295 (1982).

B. NLRB ORGANIZATION AND PROCEDURE

Although it is customary to speak of "the Board" as if the National Labor Relations Board and its large staff of employees thought and acted as a single person, this usage is highly misleading. In reality, the NLRB is composed of various categories of persons exercising quite different responsibilities. The adjudicative responsibilities of the agency are ultimately entrusted to the five Members of the Board, appointed by the President of the United States for five-year terms with the consent of the Senate. In the course of the Taft-Hartley amendments of 1947, the Congress also established the office of General Counsel,

c. T. Kammholz & S. Straus, *Practice and Procedure Before the National Labor Relations Board* (4th ed. 1987); F. McCulloch & T. Bornstein, *The National Labor Relations Board* (1974); E. Miller, *An Administrative Appraisal of the NLRB* (3d ed. 1980); L. Modjeska, *NLRB Practice* (1983);

Murphy, *The National Labor Relations Board—An Appraisal*, 52 Minn.L.Rev. 819 (1968). A particularly rich source of information about NLRB procedures is the Board's own *Casehandling Manual* (which is no longer a "confidential" document).

appointed to a four-year term by the President with the consent of the Senate. The General Counsel has authority to investigate charges of unfair labor practices, to decide whether complaints should be issued on the basis of these charges and to direct the prosecution of such complaints. The General Counsel also represents the Board in court proceedings to enforce or review Board decisions.

To assist the Board members and the General Counsel in discharging their responsibilities, a large staff has been created. Organizationally, the staff is divided between the Washington office and over thirty Regional Offices. The Regional Offices are under the general supervision of the General Counsel. Each Regional Office is under the direction of a Regional Director aided by a Regional Attorney. Their staff consists principally of Field Examiners and Field Attorneys, who investigate charges, conduct elections, and prosecute complaints at hearings before Administrative Law Judges (called Trial Examiners prior to August 1972).

of the Board?

Unfair Labor Practice Cases.

The General Counsel may issue a complaint only upon a formal charge that the employer or the union has engaged in an unfair labor practice. Such a charge may be filed by "any person" in the office for the region in which the alleged unfair labor practice occurred. (Copies of standard NLRB forms for filing unfair labor practice charges may be found in the Statutory Supplement to this casebook.) Section 10(b) of the Act requires that a charge be filed and served upon the charged party within six months of the alleged unfair labor practice. When a charge is filed, the Regional Director normally requires the person making the charge to submit the supporting evidence in the form of affidavits, lists of witnesses, etc. The charged party (respondent) will then be asked to submit a reply and a Field Examiner or Attorney will make a thorough investigation of the facts and surrounding circumstances. For example, if a charge is filed against the employer, the NLRB staff member interviews the union officials and employees concerned, locates other witnesses, goes to the plant and may discuss the case with company officials.

Reviewable decision?

Do they have staff to investigate all complaints?

If this preliminary investigation discloses that the charge is without foundation, the case is likely to be dropped forthwith. Otherwise, further investigation may ensue and there will commonly be an informal conference at the local office of the Board, attended by both the respondent and the charging party, at which the alleged unfair practices are thoroughly discussed and possible settlements considered. It is important to emphasize the informality of these investigations, conferences and settlements. Except for such steps as are required by sound administration, including the reduction to writing of any settle-

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ment agreement, the entire procedure up to this point is conducted with all possible informality and an eye to amicable adjustments.

The overwhelming preponderance of unfair labor practice cases have traditionally been disposed of in one way or another in the Regional Offices by these informal personal negotiations. In the fiscal year ending June 30, 1988 (the most recent year for which the Board has compiled figures), for example, of the 30,100 unfair labor practice charges that were "closed," 96 percent were closed by the NLRB Regional Offices prior to a formal hearing. (Within those cases, approximately 34 percent were disposed of by dismissing the charge, 31 percent by voluntary withdrawal of the charge, and 31 percent by settlement.)

If it is impossible to dispose of an unfair labor practice case in the Regional Office, formal proceedings are commenced by the filing of a complaint. The General Counsel has delegated to the Regional Directors authority to issue complaints except in cases "involving novel and complex issues." Should the Regional Director refuse to issue a complaint, the matter may be appealed to the General Counsel. If the General Counsel declines to issue a complaint, the charging party normally has no further recourse. NLRB v. United Food & Comm. Wkrs. Union, Local 23, 484 U.S. 112, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987).

Upon the issuance of a complaint the Board may petition the district court, under Section 10(j) of the Act, for appropriate interlocutory relief preventing continuance of the unfair labor practice. Although rarely sought (only 17 were sought in fiscal year 1988) and rarely issued (11 in that year), Section 10(j) injunctions have been issued against unions as well as employers, the more common employer violations being discriminatory discharges, recognition of minority unions and bad faith or "surface" bargaining, and the more common union violations involving strike violence and hiring-hall discrimination.

The complaint, which is drafted by the Regional Attorney or a member of his or her staff, specifies the violations of the Act which the respondent is alleged to have committed and contains a notice of the time and place of hearing. The Act and the Board's rules give the respondent the right to answer a complaint. The answer is filed with the Regional Director, as are all motions made prior to the hearing.

The hearing is usually held in the city or town where the alleged violation occurred, before an Administrative Law Judge appointed from the Division of Administrative Law Judges in Washington (or from one of the geographically decentralized divisions which the Board has recently established). The case is prosecuted for the Board by an attorney from the Regional Office. The charging party is permitted to intervene, and its attorneys may take part in the proceedings. The respondent, of course, may and usually does appear by an attorney. Section 10(b) of the Act provides that unfair labor practice proceedings

"shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts" under the rules of civil procedure adopted by the Supreme Court. Evidence is introduced through witnesses and documents, just as in an ordinary civil trial. At the conclusion of the hearing both parties are entitled as a matter of right to argue orally before the Administrative Law Judge and file a written brief. In practice, however, it has not been customary for either party to make an oral argument.

After the hearing is completed, the Administrative Law Judge prepares a decision containing proposed findings of fact and recommendations for the disposition of the case. The Administrative Law Judge's decision is then filed with the Board, and a copy is served on the respondent and any other parties. Exceptions to the Administrative Law Judge's decision may then promptly be filed by counsel for any party, including the General Counsel. Permission to argue orally before the Board itself must be specially requested in writing, and it is granted only in unusual cases. If no exceptions are filed, the Board normally adopts the decision of the Administrative Law Judge.

In cases in which exceptions have been filed and briefs submitted, the Executive Secretary forwards the complete record to one of the five Board members, determined by rotation. Board members, through their legal staff of some twenty attorneys for each member, prepare a draft decision. In routine cases, a panel of three members will consider the case. When a draft opinion is sent to the other panel members, copies are also sent to members who are not on the panel so that they may consider whether the case is sufficiently important to warrant decision by the full Board; any member may ask to have a case referred to the full Board. Panel opinions may be approved by the participating members without any formal conference, but where there is a difference of opinion or an important issue is at stake a conference is held. In cases sufficiently important for decision by the full Board there is always a conference. Afterward, the opinion is prepared, approved by the members and issued by the Board.

The five members of the Board decide in this fashion more than one hundred unfair labor practice cases a month. It is obvious that in most of them the basic responsibility rests with the administrative law judge and the legal assistants who prepare draft decisions for the Board. Only a relatively small number of really important cases could receive full consideration from the members themselves, however conscientiously they attended to their duties.

The Rules and Regulations issued by the Board provide for handling a charge that a labor organization has violated Section 8(b) in the same manner that the Board handles charges against employers. In the case of strikes and other concerted activities alleged to violate Sections 8(b)(4), 8(b)(7), or 8(e), however, the Regional Office must give its investigation precedence over all other cases not of the same

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character. If there is reason to believe that the charge is true, the Regional Director is required by the Act to file a petition for "appropriate injunctive relief pending the final adjudication of the Board" (Section 10(l)). The proceeding before the Board is then expedited and upon the Board's final decision, any order of the district court expires. As already noted, the Regional Director may seek an injunction under Section 10(j) (if approved by the General Counsel and the Board itself) against union unfair labor practices defined under other subsections of Section 8(b).

Board orders carry no sanctions, although every Regional Office includes a compliance officer who determines whether Board orders are being complied with and endeavors to secure voluntary compliance. If the respondent does not comply with a Board order, the Board must secure enforcement by filing a petition in a federal court of appeals; this action is taken on behalf of the Board by its Enforcement Division (which is a part of the Office of the General Counsel), and the enforcement petition is uniformly filed in the circuit in which the unfair labor practice was committed. The Board may in fact secure such an enforcement order even when there has been no refusal to comply. Similarly, if the respondent desires to have the Board's order reviewed and set aside, it may file a petition for that purpose since under Section 10(f) it is a "person aggrieved." That section gives such a person a choice of courts of appeals, for review may be sought where the unfair labor practice was committed, or where the person does business, or in the Court of Appeals for the District of Columbia. Respondents frequently avail themselves of the right to seek review without waiting for the Board to file a petition for enforcement, particularly since this will give the respondent the power to select the circuit for review, a choice sometimes thought to be significant in the ultimate outcome of the case. If the decision of the Board denies relief in whole or in part to the charging party, that party becomes a "person aggrieved" who may also seek appellate review. The Supreme Court has also held that a party who is not aggrieved by the Board's decision, and whose position is sustained by the Board, may nonetheless intervene to protect its interests in the event another party petitions for review or for enforcement. *UAW, Local 283 v. Scofield*, 382 U.S. 205, 86 S.Ct. 373, 15 L.Ed.2d 272 (1965).

Upon the filing of a petition for enforcement or for review by a court of appeals, the pleadings, testimony and transcript of proceedings before the Board are certified to the court, and the case is put on its ordinary appellate docket. No objection that has not been urged before the Board may be considered by the court, save in exceptional cases. In such proceedings, the court is authorized to enter a decree setting aside, enforcing, or modifying the order and enforcing it as so modified. Review of the decree of a court of appeals may be had in the Supreme Court upon the granting of a petition for a writ of certiorari in the same manner as other cases.

In reviewing an order issued by the NLRB, courts must accept the Board's findings of fact "if supported by substantial evidence on the record considered as a whole" (Section 10(f)). This general standard of review eludes precise definition. "Substantial evidence" requires more than a scintilla; taking account of the facts and inferences on both sides of the issue, there must be enough evidence to support the agency's conclusion in a reasonable and reasoning mind. In other words, the court must not freely substitute its judgment for the Board's, yet it need not approve findings that the judges consider unreasonable or unfair. The deference given to the Board's findings is based in part on the fact that the administrative law judge is in a position to observe the witnesses at first hand. It is also partly due to the fact that the Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The degree of deference which the courts will pay to the "expertness" of the Board tends to vary according to the nature of the question involved. In particular, if the issue is a highly technical one, far removed from the ordinary experience of the judge, the court will be less likely to disturb the Board's findings, particularly if the Board has set forth the basis for its findings with reasonable clarity and if its reasoning and conclusions do not appear inconsistent with its decisions in related cases.

In defining the scope and nature of judicial review, courts have traditionally distinguished between questions of law and questions of fact. In practice, this distinction is often difficult to draw with precision. Certain decisions, for example, involve "mixed questions of law and fact," as in *NLRB v. Hearst Publications*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), where the Board was interpreting the statutory term "employee" but in so doing considered various factual questions, such as the business relationship of newsboys to the newspaper and the economic power of the former in dealing with the latter. Other decisions which appear to involve pure questions of fact, may actually contain principles of law. For example, if the Board should conclude that employers who grant a wage increase during a representation campaign interfere with the free choice of the employees in voting for or against the union, the Board is not merely deciding the factual question of the effect of the increase upon the minds of the employees; the Board is also laying down a principle of law that the risk of interference in the generality of cases is sufficiently large that such increases should be prohibited entirely without requiring the burdensome and perhaps impractical task of investigating the effects of the employer's action in each case.

One may question how much actually turns on formal distinctions between questions of law, questions of fact, and mixed questions of law and fact. Where elements of law are involved in the issues under review, the Supreme Court has at times freely substituted its own

judgment for that of the administrative agency while at other times it has declared that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939). The degree of deference accorded by the courts has not seemed to turn necessarily on any formal definition regarding the nature of the question involved. Instead, though it is difficult to generalize on the question, courts have tended to assume greater responsibility in passing upon issues of law where (1) they require a weighing of other statutes or policies not confided to the special jurisdiction of the Board; (2) they involve common-law or constitutional considerations rather than "technical" matters requiring administrative expertise; (3) they involve controversial questions which demand the prestige of judicial resolution; or (4) they require the interpretation of statutory language in the light of legislative history rather than specialized judgments of a kind which the agency is peculiarly qualified to make.

The principles which guide appellate courts in reviewing questions of law and fact are plainly of a very general nature leaving much to the discretion of the judges involved. In exercising this discretion, courts will presumably be influenced to some degree by such other factors as the respect they hold for the capabilities and impartiality of the Board and the coGENCY and comprehensiveness of the arguments made by that agency in support of its conclusions. These factors are unavoidably subjective and may therefore cause considerable variation from one court to another concerning the nature of review. It is for this reason, perhaps, that there is often a significant disparity among circuit courts in their rates of affirmance of NLRB decisions. For example, among the circuit courts deciding more than a dozen Labor Board cases in the Board's 1988 fiscal year, 94.7 percent of its decisions reaching the Third Circuit court were affirmed in full there, while the Fourth Circuit court affirmed in full only 53.3 percent of the Board decisions it reviewed. (Examining the five-year period 1983-87, however, one finds the disparities muted, varying from a 55.4 percent affirmance rate in the District of Columbia Circuit to 82 percent in the Ninth Circuit.) Statistics such as these suggest that the principles governing the scope and nature of judicial review should be taken as providing only the most general indication of the nature of review to be accorded by any given court in a particular case. See generally Note, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U.Cinc.L.Rev. 653 (1989).

Since the order made by the federal court of appeals in a proceeding under the Act is an equity decree, it may be enforced by proceedings for contempt. The Board has been held to have exclusive authority to prosecute civil contempts with the result that neither unions nor employers may petition the court for this purpose.

Representation Cases.

In addition to the work that the Regional Office does in unfair labor practice cases, it also plays the most important day-to-day role in processing representation cases. Election petitions are filed in the Regional Office, and the bulk of these seek the holding of a representation election in order to determine the desires of the employees concerning the selection of a union for collective bargaining. (Other elections may be held to decertify a union already representing employees in bargaining.) Such representation petitions may be filed either by an employer upon whom a demand for recognition and bargaining has been made by a union, or by a union seeking to represent employees (and demonstrating that it has what is known as a "showing of interest" from thirty percent of the employees within the bargaining unit, generally evidenced by signed cards authorizing that union to be bargaining agent). A copy of the standard NLRB form of petition for representation election is set forth in the Statutory Supplement.

The regional staff investigates the petition, in order to determine such questions as whether the employer and the union are covered by the National Labor Relations Act and whether the group of employees within which the election is sought constitute "an appropriate bargaining unit." In most cases, these issues—along with questions as to the eligibility of particular voters, as well as the date of the election—are resolved through the consent of the parties, either on their own initiative or after an investigation and conference in the Regional Office. The parties can, in a consent-election agreement, vest in the Regional Director final authority to rule on any disputes that may arise concerning the conduct of the election and to issue his or her determination as to the result. Much more frequently used is an alternative form of agreement ("stipulation for consent"), which provides that the Board itself will have the final word with respect to these questions. (See the Stipulation for Consent form in the Statutory Supplement.)

If the above matters are contested, they will be made the subject of a hearing conducted by a hearing officer from the Regional Office. The transcript of the hearing is then transferred to the Regional Director, who makes decisions on such issues as the Board's jurisdiction, the appropriate bargaining unit, and the eligibility of voters. A formal Direction of Election is issued by the Regional Director, ordering an election in the designated bargaining unit within a specified period (usually between 25 and 30 days).

The details of the election are arranged in the Regional Office. In general the procedure resembles any local election. A voting list is prepared, polling places and voting hours are designated, and notices are published in advance. Elections are almost invariably held at the employer's premises during working hours, to maximize voter turnout. The Board's agents supervise the election but employee observers may

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also be appointed and may challenge any ballot. The ballots are secret and in the first instance offer each employee an opportunity to vote for any union claiming the right to represent them or for "no union". At the close of the voting, the ballots are counted. Certain votes may be challenged, and if the challenges cannot be resolved informally the ballots will be set aside. If there are enough challenged votes to affect the outcome of the election, a ruling on the disputed ballots will be made by the Regional Director who will also pass upon any other objections which the parties may have taken to the election.

The decisions of the Regional Director—both before the election (e.g., appropriate bargaining unit) and after (e.g., objections)—are subject to review by the National Labor Relations Board, but the Board grants review only on the following grounds:

- (1) Where a substantial question of law or policy is involved.
- (2) Where the Regional Director's decision on a substantial factual issue is clearly and prejudicially erroneous.
- (3) Where the conduct of the hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) Where there are compelling reasons for reconsidering an important Board rule or policy.

Although most of the problems that arise in determining the eligibility of employees to vote are matters of detail (for example, whether a particular individual is a "supervisor" or is in some other bargaining unit), significant problems of eligibility may arise if an election takes place during the course of a strike, when the employer has kept the business going by hiring replacements for striking employees. In such cases, a determination must be made whether the strikers and/or their replacements are entitled to vote. If the strike has been precipitated or prolonged by the employer's unfair labor practices, it is well settled that the striking employees have the right to return to their jobs and to displace any replacements hired by the company subsequent to the commission of the unfair labor practice. Hence, in these situations, the strikers—but not the replacements—are eligible to vote. If, however, the strike is an "economic strike" rather than an "unfair labor practice strike," the law has been settled that persons hired as permanent replacements may keep their jobs and need not be "bumped" when strikers seek reinstatement. After a period of considerable wavering in the applicable principles, Congress in 1959 enacted Section 9(c)(3), which empowered the Board to accord voting rights to such economic strikers up to twelve months after the commencement of the strike.

The NLRB has formulated a number of principles to determine the eligibility of economic strikers and their permanent replacements. Unless strikers are found by the Board to be on strike over employer unfair labor practices, they will be presumed to be economic strikers and eligible to vote for up to one year. They will lose this status if, before the election,

they obtain permanent employment elsewhere (a mere showing that they have accepted other work will not be sufficient, for this is often done merely to tide an employee through the strike); or if they are discharged or denied reinstatement for serious misconduct; or if they have their job eliminated for economic reasons. Similarly, replacements for economic strikers are presumed to be permanent employees and eligible to vote. They will lose this status if the party challenging that vote can prove that the replacement was not permanent. All issues as to voting eligibility of strikers and replacements are to be deferred until after the election for disposition by way of challenges. See Note, Equal Access in NLRB Elections: Determining the Voting Eligibility of Economic Strikers, 58 Geo.Wash.L.Rev. 549 (1990).

It is a well-settled rule that a labor organization will be certified as bargaining representative even though less than a majority of all of the employees in the unit cast ballots in its favor. It is enough that the union be designated by a majority of the valid ballots, even though only a small proportion of the eligible voters participate. In an election in which only one union is competing, a tie vote will thus result in the union's loss. What disposition should be made when two or more unions are involved, and there is no majority on the first ballot for any single union although the unions collectively have received a majority of the votes cast? Congress answered this question in 1947 when it enacted Section 9(c)(3), which provides that a run-off election shall be conducted in which the two highest choices on the first ballot (which may include "no union") shall appear on the run-off ballot.

Requests to set aside an election may be based on allegations of interference with the employees' freedom of choice. As will be discussed shortly (see pp. 144-46, *infra*), an election may be set aside and a new one ordered even though no unfair labor practices have occurred. Thus, although in the majority of cases in which elections have been set aside it has been because of coercive conduct by the employer or the union, there have been instances in which a new election has been ordered by virtue of misconduct either by employees (not authorized to act on behalf of the employer or the union) or by other persons in the community, P.D. Gwaltney, Jr., 74 N.L.R.B. 371 (1947) (community hysteria and terrorism), or even by agents of the NLRB itself, Athbro Precision Engineering Corp., 166 N.L.R.B. 966 (1967) (Board agent seen drinking beer with union representative during balloting day; "tends to destroy confidence in the Board's election process").

Decisions made by the NLRB in representation proceedings can normally not be challenged directly by judicial review. The Labor Act in its terms provides for judicial review, in the courts of appeals, only of final orders in unfair labor practice cases. If a person is aggrieved by a Board decision in a representation case, the appropriate manner for precipitating court action is for that person to commit an unfair labor practice, challenge within the unfair labor practice proceeding the decision made by the Board in the representation case (which the Board

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will normally reaffirm in the unfair labor practice case), and only then seek review in a court of appeals. Most commonly, this is done by an employer—seeking review, for example, of a Board appropriate-unit decision—by refusing to bargain with a union recently certified after a Board election. The purpose of this seemingly circuitous review mechanism, contemplated under Section 9(d) of the Act, is to prevent obstructive recourse to the courts at various stages of the representation proceeding and long delay in the determination of employee preferences on the matter of unionization. In certain extraordinary cases, however—to be explored further in the materials below (pp. 311–17)—a federal district court may have jurisdiction directly to enjoin the Board or a Regional Director from implementing a decision in the context of a representation proceeding.

CHAPTER II

NLRB STRUCTURE AND PROCEDURE

A. Structure of the NLRB

The principal components of the National Labor Relations Board are five Board members, a General Counsel, regional directors, and administrative law judges (formerly called "trial examiners"). The five Board members are appointed by the President, with the advice and consent of the Senate. They serve five-year, staggered terms. One member is designated Chairman. Routine cases are decided by panels of three Board members, but cases of particular importance are decided by the entire Board. The Board members and their supporting staffs are housed in Washington, D.C.

The General Counsel is also appointed by the President, with the advice and consent of the Senate. The General Counsel is responsible for overseeing the investigation and prosecution of unfair labor practice charges. The General Counsel also represents the NLRB in the courts. Most unfair labor practice case work is done in the field, through regional offices. There are over thirty regional offices scattered throughout the country and each is headed by a regional director appoint-

ed by and responsible to the General Counsel in Washington. The General Counsel is supported by considerable staff in Washington.

The regional directors, in addition to their responsibility for prosecuting unfair labor practice cases, have been delegated considerable authority to act for the Board in representation cases—cases involving a decision of whether to designate a particular union as the exclusive bargaining representation for a group of employees.

While the Board has statutory jurisdiction over all enterprises whose activities "affect" interstate commerce, the Board in its discretion has refused to assert jurisdiction over employers not meeting a minimum volume of business. For example, before the Board will assert jurisdiction over a non-retail business, the business must have a minimum annual volume measured by inflow or outflow, direct or indirect, of at least \$50,000 across state lines. In the Landrum-Griffin Act of 1959, Congress added § 14(c)(1) to the NLRA which has the effect of prohibiting the Board from declining to assert jurisdiction over any labor dispute over which it would have asserted jurisdiction under the standards prevailing on August 1, 1959. Thus, the Board can expand, but can no longer contract, its jurisdiction. In cases falling outside of the Board's jurisdictional standards, the states are permitted to act.

B. Procedures in Unfair Labor Practice Cases

Each NLRB case, whether it involves an unfair labor practice or a matter of representation, must be initiated by a private party. In recent years the number of such cases of all types filed each year has been over 50,000. Of these, close to 40,000 were unfair labor practice charges. An unfair labor practice case is initiated when a private party (called the "charging party") files a "charge" that an unfair labor practice has been committed. The regional office where the charge is filed is responsible for investigating it, although in practice some regional offices are so clogged with cases that they do no more than demand that the charging party produce sufficient evidence to indicate a meritorious case. After investigation, the regional director decides whether to issue a "complaint" in the case. Only if a complaint is issued will the case be prosecuted and heard by the Board. Many factors may influence the choice of whether to issue a complaint, such as the strength of the evidence, the seriousness of the activity under attack, the case load of the regional office, and the clarity of Board precedent on the substantive issues raised. While an internal appeal to the General Counsel's office in Washington can be taken if the regional director refuses to issue a complaint, such appeals are almost always denied. No appeal to Board members or to the courts can be taken from the refusal to issue a complaint; the General Counsel's discretion is unreviewable. Ordinarily over 70 percent of the unfair labor practice charges

filed are either dismissed by the regional director or are withdrawn by the charging party upon being advised by the regional director that no complaint would be issued.

If the regional director issues the unfair labor practice complaint, an attorney from the regional office will prosecute the case for the charging party. Most complaints (over 80 percent) are settled by the regional office prior to any hearing. Information is often exchanged during settlement discussions but the Board neither requires nor has any mechanisms allowing pre-hearing discovery in unfair labor practice cases. The Supreme Court ruled in *NLRB v. Robbins Tire & Rubber Co.* (U.S.1978) that witnesses' statements in pending unfair labor practice proceedings are exempt from Freedom of Information Act disclosure at least until completion of the hearing.

If an unfair labor practice hearing is necessary, a regional staff attorney representing the General Counsel will control the case, but the charging party may intervene and present evidence. An unfair labor practice case is tried before an administrative law judge (ALJ). ALJs are selected by the Civil Service Commission and are housed in either Washington or San Francisco. They travel throughout the country to take evidence in unfair labor practice cases. After taking evidence and receiving briefs, an ALJ issues a recommended decision and order. These recommended decisions routinely recite the evidence in considerable detail,

make credibility resolutions when necessary, and discuss applicable Board precedent. The recommended order will either set out the appropriate remedy or dismiss the complaint.

If no party (respondent, General Counsel or charging party) files exceptions to this recommended decision and order, it automatically becomes final as an order issued by the Board. If exceptions are filed, the case file is transferred to the Board in Washington, briefs are filed (oral argument is very rare), and the Board issues a written decision and order. Thus the Board members hear no evidence, see no witnesses; in that sense, they are similar to an appellate tribunal. Board members have a large case load and rely heavily upon their staff in routine cases.

A Board order is not self-enforcing; that is, the Board has no coercive power to compel adherence to its order. Section 10(e) of the NLRA provides that the Board may petition specified United States Courts of Appeals for enforcement of a Board order. In addition, § 10(f) provides that any person aggrieved by a final Board order granting or denying relief sought may petition a Court of Appeals for review of the order. Both sections provide that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." In *Universal Camera Corp. v. NLRB* (U.S.1951), the Supreme Court construed this standard of review to mean that the courts of

appeals have authority to assess not only those facts supporting the Board's result, but also those pointing to an opposite conclusion. The findings of the ALJ are deemed a part of the record of which the Board is to take account; and the ALJ's findings may be given weight by the Court of Appeals: "Evidence supporting a [Board] conclusion may be less substantial when an impartial experienced [Administrative Law Judge] who has observed the witnesses and lived with the case has drawn conclusions different from the Board's...."

Generally Board cases in unfair labor practice proceedings have been affirmed in whole or in part by Courts of Appeals at a rate of over 80 percent. A party who fails to comply with a Court of Appeals enforcement order risks a contempt citation. A final review possibility is a writ of certiorari from the United States Supreme Court.

Delay is a major problem in prosecuting unfair labor practice cases. In recent years it has taken on the average 48 days to complete the investigative stage of an unfair labor practice case, and an average of 94 days from the close of an unfair labor practice hearing to receipt of the ALJ's decision. After receipt of the ALJ's decision, it took on the average 116 days for the Board to issue its order.

C. Procedures in Representation Cases

A major responsibility of the NLRB is to determine whether employees should be represented by a union. The hallmark of this selection process is

free employee choice consistent with certain employer interests in the proper functioning of its business.

Unions normally engage in campaigns for the allegiance of company employees prior to initiating NLRB representation procedures. A petition for an NLRB representation election can be filed by unions, employers, or by the employees themselves. A union petition alone is not sufficient to initiate the Board's election process; the petition must be supported by a substantial number of employees, currently required to be at least 30 percent of the employees in the bargaining unit designated by the petition. Support is usually shown by signed, dated cards authorizing the union to represent the signer in collective bargaining ("authorization cards"). This "showing of interest" is submitted to the regional director whose staff investigates and authenticates the cards. The employer is not permitted to see the cards, nor to challenge the results of this administrative investigation.

An employer can file an election petition only if a union has claimed to represent a majority of its employees and/or has sought to bargain with the employer on behalf of the workers. A petition by the employer is not warranted merely because a union is campaigning among the employees. Otherwise, the employer might thwart an organizing attempt by forcing a premature election.

Once a petition has been filed, the regional director will first investigate whether the NLRB

asserts jurisdiction over an employer of this sort and whether there are any bars to the election. If there are no obstacles to holding the election, the regional director will attempt to secure the agreement of the union (or unions) and the employer to the holding of a consent election. The union may not be seeking an election over every non-supervisory employee of the employer. In order to obtain a representation election the union must be seeking to represent all the employees in an "appropriate bargaining unit." If the regional director is unable to secure an agreement for a consent election, the director will order a representation hearing to be conducted by an employee of the regional office. At that hearing interested parties will litigate all issues relating to the appropriateness of holding the election, the identification of a proper bargaining unit, and the determination of which employees are eligible to vote. This hearing is labeled non-adversarial: the rules of evidence are relaxed, and the hearing officer makes no credibility resolutions. In practice, the hearings are often highly adversarial.

If the regional director orders the election to be held, it will be conducted by a secret ballot by a representative of the regional office. Following the election and tabulation of the result, the losing party may file objections contending that some error in the election process, or misconduct by the winning party, should cause the NLRB to set the election aside. The regional director will determine whether a hearing is necessary to resolve

these objections and either with or without a hearing will render a decision on whether the election results are valid.

In the early 1960s, the Board delegated to regional directors with respect to election petitions the power to determine whether there is a properly raised question concerning representation, the appropriateness of the requested bargaining unit, and the validity of challenged ballots and election objections. The Board itself only hears these matters on a discretionary, case-by-case basis. A regional director's decision on these matters is final and binding unless discretionary review is sought and obtained on one of several grounds. These include that a substantial question of law or policy is raised; that the regional director's decision on a substantial factual issue is erroneous and such error prejudicially affects the rights of a party; that error in the conduct of a hearing or any ruling made in connection with the hearing has resulted in prejudicial error; or that there are compelling reasons for reconsideration of an important Board rule or policy.

CHAPTER III

SELECTING A BARGAINING REPRESENTATIVE

A. The Meaning of Exclusivity

When a union is designated by the NLRB as the representative of a group of employees, or when an employer privately accords the union such recognition, the union enjoys the exclusive right to represent those employees. Section 9(a) of the NLRA states this exclusivity principle in general terms. Shortly after its passage, the NLRA was alleged to be unconstitutional because its effect was to interfere with the right of individual employees, and minority groups, to contract with employers on their own behalf. In upholding the constitutionality of the NLRA and the Railway Labor Act in *NLRB v. Jones & Laughlin Steel Corp.* (U.S.1937) and *Virginian Railway Co. v. System Federation* (U.S.1937), the Court avoided this issue by holding that the effect of the statutes was merely to prohibit the negotiation of labor contracts by anyone acting as the agent or representative of employees other than one duly authorized under the statutes but that the statutes did not preclude "such individual contracts as [the employer] may elect to make directly with individual employees."

Appoint
Bradley

The San Francisco Examiner

February 14, 1997, Friday; Second Edition

SECTION: NEWS; Pg. A-6

LENGTH: 774 words

HEADLINE: Former senator broadens political reach;
Bradley, in S.F. on a book tour, still involved in issues like race, welfare

SOURCE: OF THE EXAMINER STAFF

BYLINE: GREGORY LEWIS

BODY:

Bill Bradley left the confines of the U.S. Senate last year to delve into ... well, politics, or as he puts it, "to grapple with the thorniest issues" facing the country.

Instead of constituents, votes and lobbyists, Bradley these days thinks about race, economic transition for the middle class, campaign finance reform, media accountability and engaging people in the political process, he says.

"Politicians resist showing their core convictions," Bradley said of those holding office, "because you risk losing by showing what you believe in."

Bradley, whose best-selling memoir was published last year, is making a second book tour for "Time Present, Time Past," now out in paperback. He was scheduled to appear Friday afternoon at Stacy's in San Francisco and at 7:30 p.m. at A Clean Well Lighted Place for Books in Larkspur.

Bradley, a Hall of Fame pro basketball player, first gained prominence as a college hoops star at Princeton. He was elected in 1978 to the Senate from New Jersey as a Democrat in his first bid for office. He has long been considered a potential presidential candidate.

Now out of office, at least for the moment, Bradley has taken on the role of public intellectual, teaching, delivering speeches, writing and appearing on television.

In his writings, Bradley has continued to talk about race relations, a subject he visited often in his Senate career.

"President Clinton has done more than anyone since President Johnson (to promote racial harmony)," Bradley said Thursday in a telephone interview. "He has a deep commitment to racial justice. He has used the bully pulpit more than most, and that's good. He's powerful when he talks about something he cares about. That could be his legacy."

"I think he needs to use that bully pulpit more to try to educate people on the dynamics of race and urge them to take action," Bradley said.

Race is one of the issues Bradley has grappled with throughout his life, he writes in his memoir. He grew up in a small factory town in Missouri, where blacks and whites worked side by side and played together on athletic teams, but were segregated in their neighborhoods.

"There is no adequate remedy for discrimination," said Bradley, leaping into the history of the 1964 Civil Rights Bill.

Bradley said the bill that passed was much weaker than the original version, which spelled out remedies for job discrimination.

The current version gives the Equal Employment Opportunity Commission no teeth, he said.

"The EEOC has a backlog of 97,000 cases. The president could urge the passage of legislation to give the EEOC cease-and-desist authority like the National Labor Relations Board has. That's one clear thing he could do, aside from using his bully pulpit."

Bradley voted against the welfare reform bill signed by the president, thinking it was wrong to turn over welfare to the states.

Welfare needs fixing, Bradley said, but you don't change the circumstances of welfare by sending a pot of money to the states and letting them do what they want.

"More children will slip into poverty" as a result, he said. "I'm hoping the president will spend the next four years trying to make up for his mistake in judgment."

But it's not just race and welfare that challenge his mind. The changing economy and job market, and their effects on the middle class, worry him. "We've got to help people weather the storms rather than stop the process" of technological changes in a global society.

"It's a disorienting experience for people," said Bradley, who wrote his memoirs with a No. 2 pencil, but has taken computer lessons in the last year and is interested in grass-roots organizing on the Internet.

LANGUAGE: English

LOAD-DATE: February 15, 1997

Gannett News Service

May 12, 1997, Monday, FINAL EDITION

SECTION: ANOTHER VOICE

LENGTH: 695 words

HEADLINE: Clinton on race: Good intentions no substitute for good results

BYLINE: DeWAYNE WICKHAM; Gannett News Service

BODY:

Bill Clinton wants to talk about race relations.

The president is going to give several addresses in coming days about this nation's most intractable problem. The speeches, the first of which is expected this weekend at Morgan State University, are meant to ready the nation for a presidential initiative to do something about it.

Just what Clinton intends to say -- and do -- about our racial troubles is unclear. But in a White House meeting with a group of black columnists shortly after the Million Man March, he left himself little wiggle room around an aggressive response to our racial divide.

"The last thing I want to do is to study a problem that we already know about, and to give any of us, including the president, an excuse for inaction," Clinton said. "I don't want an excuse for inaction; I like to do things, and I like to see things move."

So what should the president say to the graduating class of the historically black Maryland school -- the alma mater of NAACP president Kweisi Mfume, writer Zora Neale Hurston and Parren Mitchell, the state's first black member of Congress?

To begin with, he should say he will do what is necessary to ensure that the backlash against affirmative action doesn't put college out of reach for future generations of black students. He should tell them that it's unfair to require historically black higher education institutions to have the same admission standards as white schools.

He should say that as long as majority-black public school districts lack the funding and resources of those dominated by whites, an affirmative effort must be made to open college doors to a broad cross-section of African- Americans.

Clinton should tell Morgan's graduates he will not allow states under pressure from the federal government to dismantle the segregated higher education systems they built to do so at the expense of black colleges and universities. The attempts by some states to merge black schools into white institutions -- and out of existence -- is a cynical response to

this legitimate demand, he should tell the school's graduates.

And at some point Clinton ought to assure them he will fight Congress for the funding needed to reduce the growing backlog of employment discrimination cases in the Equal Employment Opportunities Commission. Without such a commitment, some members of Morgan's class of '97 may see their dreams for a decent job turn into a long nightmare.

The word leaking out of the White House is that Clinton plans to create a commission, or convene a presidential conference, to grapple with the problems our racial division creates. It is said he wants this effort to be part of his political legacy.

"I've spent a lot more time with African-Americans than most politicians have -- most white politicians," the president said during his 1995 meeting with the black columnists.

Now it's time for him to show that he's learned something.

The president says he supports equal opportunity, but not equal results. Affirmative action opponents, on the other hand, demand equal results as proof of equal opportunity. In theory, it can be argued that both positions make sense. In practice, each has been used selectively to favor whites over African-Americans.

Clinton can't bring us together if he doesn't understand what it is that tears us apart. Whatever his plans for bridging the racial divide, he must begin by convincing African-Americans that he is an honest broker.

That won't be easy.

What he says to Morgan's graduating class will signal the direction he wants to take in this effort to heal our wounds. If, while extolling the accomplishments of the school's students, Clinton doesn't talk about the challenges to -- and the survival of -- black higher education, he will deal his cause a self-inflicted wound.

That the president wants to do something about that which divides us is commendable. It's been a long time since an occupant of the Oval Office has treated this issue as more than an annoyance.

But good intentions are no substitute for good results.

LANGUAGE: ENGLISH

LOAD-DATE: May 13, 1997

July 26, 1994, Tuesday

SECTION: CAPITOL HILL HEARING TESTIMONY

LENGTH: 3891 words

HEADLINE: TESTIMONY JULY 26, 1994 LARRY LORBER ATTORNEY AT LAW
VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND HOUSE
EDUCATION/SELECT EDUCATION AND
CIVIL RIGHTS EEOC OVERSIGHT HEARING

BODY:

TESTIMONY OF LAWRENCE Z. LORBER ON THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION (EEOC) BEFORE THE SUBCOMMITTEE ON SELECT
EDUCATION AND CIVIL RIGHTS COMMITTEE ON EDUCATION AND LABOR, U.S.
HOUSE OF REPRESENTATIVES
TUESDAY

JULY 26, 1994, 10:00 A.M.

Mr. Chairman, members of the subcommittee, my name is Lawrence Lorber. I am pleased to be asked to participate in today's hearing regarding the EEOC and possible methods of improving its performance. My own background may be of some interest to the Committee. I am currently in private practice with the Law Firm of Verner, Liipfert, Bernhard, McPherson & Hand where my practice is heavily devoted to employment law issues. During the course of my career in private practice, I had significant involvement with some of the major legislative accomplishments in the equal employment area including the Americans with Disabilities Act and the Civil Rights Act of 1991. Prior to my private practice experience, I held a number of positions at the Department of Labor including that of Deputy Assistant Secretary and Director of the Office of Federal Contract Compliance Programs from 1975-1977. During that time, the regulations inaugurating the 503 program under the Rehabilitation Act were issued and the first effort to reformulate the regulations under E.O. 11246, as amended, commenced. In addition, a significant enforcement program was undertaken. Thus, it is with a long background and involvement in equal employment issues including administering a major agency and representing employers with respect to equal employment I come before you.

Almost 30 years to the day that the Civil Rights Act of 1964 was signed, and on the day that the coverage of the Americans with Disabilities Act is being expanded to include employers of 15 or more employees, this Committee is undertaking a necessary review of the structure of the EEOC to determine whether it can meet its mission. The short answer to this question is no. As currently structured, the Commission faces a growing backlog which

simply cannot be alleviated under the current conditions. The truth of this problem lies in the numbers. In February, the GAO issued its report and findings on the EEOC's administrative process. The data was startling. Since 1989, the number of charges filed with the EEOC has increased over 57% from 56,000 in 1989 to 88,000 in 1993. Similarly, the backlog of charges carried over from fiscal year 1993 to fiscal year 1994 increased 38% from almost 53,000 to over 73,000. And, based on an analytical method that both the EEOC and GAO admit is conservative, the backlog is expected to reach 171,000 charges by 1997. And, if the Federal Employee Fairness Act is enacted, the backlog will undoubtedly become greater.

While these numbers are cause for concern, the human dimension of thwarted expectation, wasteful responses, and the blatant unfairness to charging party and respondent alike of a system which encourages the filing of complaints and requires responses to those complaints only to have the process fall into the black hole of the EEOC's backlog cannot be underestimated. Think of the person who truthfully believes that he or she was unfairly denied promotion because of her race, sex, age, or physical condition. They must work with colleagues and supervisors knowing that they have a complaint pending somewhere which claims they were denied a promotion because of allegedly illegal actions by those same colleagues. And think of the employer which has to answer the charge, represents its position fully with explanations for the rationale behind the contested personnel decision and then waits for a year or two to get a response, which might be a request for additional information. Both parties are left in a cruel limbo with the employee putting his or her career on hold hoping for a favorable resolution and the employer spending its resources answering disjointed inquiries or putting its own personnel plans on hold until the complaint is resolved.



Nor does the process end at the administrative level. Regardless of the EEOC's administrative determination, the charging party may in any event take the next step and move the complaint to federal court, where the waiting process starts all over again. Only this time, both parties are spending a lot more of their own resources in a federal court suit, where, in some jurisdictions, the wait to get into court for a civil case is years.

This commentary should not be taken as a criticism of the EEOC or its personnel. Given its mission impossible, the EEOC attempts to move the process along as best as it can. Yet, the Commission's personnel must in some way envy the eternal plight of Sisyphus. In that myth, Sisyphus is condemned to push the rock to the top of the hill only to have it roll back to the bottom. The EEOC may consider itself lucky if it moves the rock at all.

The challenge then is to find another method to resolve the complaints of individuals who believe that their rights were violated and afford due process to employers who believe that they acted within the law. I believe that tinkering with the current system will not resolve the underlying problem. Nor is this a partisan issue which can be resolved in a Democrat or Republican solution. When Delegate Norton was Chair of the Commission, she instituted several initiatives to reduce the backlog. Her efforts met with criticism because it was alleged that complaints were dismissed merely to reduce the backlog. When Justice Thomas chaired the Commission, he spent considerable time attempting to streamline the system yet also promised that each complaint would be fully investigated. He was criticized for neglecting systemic cases and for burdening the complaints process. Both of these talented and

dedicated people spent much of their tenure attempting to get the EEOC to function. The data I cited at the beginning of this testimony stands as eloquent witness to the results of these efforts.

In dealing with the structure and enforcement authority of the EEOC, the focus must be on resolution of complaints, not encouragement of litigation. With all respect, congressional action promising all persons their day in court is an empty and cynical promise. In some jurisdictions, a plaintiff may have a better chance at winning the lottery than getting their charges heard promptly and effectively.

What then are the specific issues and possible means of resolving them:

1. The Current EEOC Structure Makes No Sense. The Agency is a bureaucracy in Commission form without a commission's function. It is unclear what purpose the four Commissioners serve except to stake out secondary issues and hope the Chairman supports their initiative. EEOC should either be restructured in the format of other regulator's functions or given a commission's purpose. As I will discuss, I think that the Commission form makes sense if properly utilized.

2. The Duplication of Agencies on the Federal, State and Local Level Makes No Sense. Plaintiffs get multiple bites at the apple, employers face the problem of responding at multiple levels. While the end result of multiple administrative reviews might be the same, the duplication of effort is a wasteful cost which takes time away from meaningful human resources management and keeps an individual in doubt as to the resolution of his/her charge. If the EEOC has jurisdiction, the state and local agencies should yield. If the EEOC sends a case to a state or local agency, the federal role should be concluded.

Too, review should be given to the multiple federal agencies. The EEOC handles private sector employment issues.

But so does the OFCCP with respect to federal contractors. That overlap and duplication should be examined. In particular, if the OFCCP is to be maintained, it should have no role with respect to individual complaints. The potential disruption of a federal procurement action because an individual may believe his or her employment was not advanced fairly makes no sense. If the OFCCP is to have a role, it is to work with the job training and employment data collection resources at the Department of Labor to enhance reasonable affirmative action. In our diverse and rapidly changing workplace, managing and enhancing diversity seems more important than another understaffed agency investigating charges on a random, ad hoc basis. If there are systemic problems which impact on the ability of a contractor to hire from the most diversified workforce, then the OFCCP might have a role. But as it is currently run, the OFCCP is basically a small shadow of the EEOC with a duplicative function and it is not performing its main mission as an agency whose job it is to promote workforce diversity.

The Department of Justice handles public employers. While there may be merit in having the Justice Department litigating against public jurisdictions, there is no merit in having that

agency disregard settled EEOC policy and strike out on its own. The very able and creative lawyers at Justice may cringe at taking direction from the EEOC, but they should have no license to act on the freewheeling basis they currently do. In fact, one issue which must be addressed is the policy at Justice of straitjacketing jurisdictions into endless extensions of consent decrees so that the Justice Department can maintain perpetual oversight over the employment practices of those jurisdictions. Some of those consent decrees are well into their second decade. This policy should end. Justice, if it is to maintain a role in employment matters, must follow the EEOC on a policy level, and there must be required sunset of its consent decrees.

3. The EEOC Review Process as Currently Applied is Without Meaning. Without a commission role, the EEOC spends its time and effort collecting statements, investigating charges, and issuing determinations. Yet those determinations are without legal impact. The vast majority of charges result in determinations of no probable cause. Yet, those determinations do not end the process. Plaintiffs can and do file a lawsuit and the process starts all over again. It is difficult to explain to an employer which diligently responds to a charge, presents its rationale, and then receives a determination of no probable cause, often a year or more later, that it can expect a federal lawsuit within 90 days. Thus, an interim step should be a jurisdictional prerequisite of a probable cause finding before a case can be pursued in court. This will add integrity to the process and force a discipline on complaining parties and responding employers as well as the EEOC. Complaining parties should not use the EEOC process as a means of building their case, as they currently do. If an intake officer believes that there is no case, that individual should be empowered to reject the complaint. In this manner, employers will not have to answer nonsensical complaints, such as that recently highlighted by Mike Royko regarding the talking molar implant and individuals can be told in the proper circumstances that being unhappy does not mean that a law may have been violated.

4. The Backlogs, Delays and Duplication are Unconscionable. The EEOC in its current format, and with a realistic expectation of future limited resources, will simply sink further into the backlog of charges. Thus, efforts should be made to look for expedited means of resolving employment complaints. After all, the idea behind Title VII and the other anti-discrimination laws was to get the individual back to work, not into court. The EEOC was created to be an agency of mediation and conciliation. Thus, the law included measured remedies to make the person whole. Since 1991, with the inclusion of punitive damages, complainants have every incentive to ignore conciliation, hoping instead for a jury awarded golden handshake. To attempt to break this litigation cycle, the Congress and the Commission should encourage the use of fair, alternative dispute resolution mechanisms. To address this issue comprehensively will require its own hearing, but I would like to offer some initial thoughts.

ADR means much more than arbitration. In fact, a workable ADR system which has credibility with employees and managers will resolve most cases at a stage much before the recourse to arbitration. Mediation, neutral fact finding, indeed simple dispute resolution mechanisms should solve the vast majority of complaints. Employers must understand that these systems have to be fair in fact and perception to employees. And employees must be

given fair notice of the existence of the ADR system. Those employers who have instituted such systems have a remarkable record of settling issues fairly and promptly. We jurisdictions, there is no merit in having that agency disregard settled EEOC policy and strike out on its own. The very able and creative lawyers at Justice may cringe at taking direction from the EEOC, but they should have no license to act on the freewheeling basis they currently do. In fact, one issue which must be addressed is the policy at Justice of straitjacketing jurisdictions into endless extensions of consent decrees so that the Justice Department can maintain perpetual oversight over the employment practices of those jurisdictions. Some of those consent decrees are well into their second decade. This policy should end. Justice, if it is to maintain a role in employment matters, must follow the EEOC on a policy level, and there must be required sunset of its consent decrees.

3. The EEOC Review Process as Currently Applied is Without Meaning. Without a commission role, the EEOC spends its time and effort collecting statements, investigating charges, and issuing determinations. Yet those determinations are without legal impact. The vast majority of charges result in determinations of no probable cause. Yet, those determinations do not end the process. Plaintiffs can and do file a lawsuit and the process starts all over again. It is difficult to explain to an employer which diligently responds to a charge, presents its rationale, and then receives a determination of no probable cause, often a year or more later, that it can expect a federal lawsuit within 90 days. Thus, an interim step should be a jurisdictional prerequisite of a probable cause finding before a case can be pursued in court. This will add integrity to the process and force a discipline on complaining parties and responding employers as well as the EEOC. Complaining parties should not use the EEOC process as a means of building their case, as they currently do. If an intake officer believes that there is no case, that individual should be empowered to reject the complaint. In this manner, employers will not have to answer nonsensical complaints, such as that recently highlighted by Mike Royko regarding the talking molar implant and individuals can be told in the proper circumstances that being unhappy does not mean that a law may have been violated.

4. The Backlogs, Delays and Duplication are Unconscionable. The EEOC in its current format, and with a realistic expectation of future limited resources, will simply sink further into the backlog of charges. Thus, efforts should be made to look for expedited means of resolving employment complaints. After all, the idea behind Title VII and the other anti-discrimination laws was to get the individual back to work, not into court. The EEOC was created to be an agency of mediation and conciliation. Thus, the law included measured remedies to make the person whole. Since 1991, with the inclusion of punitive damages, complainants have every incentive to ignore conciliation, hoping instead for a jury awarded golden handshake. To attempt to break this litigation cycle, the Congress and the Commission should encourage the use of fair, alternative dispute resolution mechanisms. To address this issue comprehensively will require its own hearing, but I would like to offer some initial thoughts.

ADR means much more than arbitration. In fact, a workable ADR system which has credibility with employees and managers will resolve most cases at a stage much before the recourse to arbitration. Mediation, neutral fact finding, indeed simple dispute resolution

established by law be realized, that the government assist this goal rather than be an impediment, and that employment issues be rationally, rapidly and fairly resolved. The Congress should not be in the business of keeping employment lawyers, whether they represent plaintiffs or defendants, busy. Rather, the Congress should try to assist in the maintenance of a workplace where employees believe that they can get a fair review, and employers don't get trapped in a bureaucratic maze of endless submissions and governmental irresolution.

LANGUAGE: ENGLISH

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Foreword

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The fading away of the cold war has brought an era of ideological conflict to an end. But it has not, as forecast, brought an end to history. One set of hatreds gives way to the next. Lifting the lid of ideological repression in eastern Europe releases ethnic antagonisms deeply rooted in experience and in memory. The disappearance of ideological competition in the third world removes superpower restraints on national and tribal confrontations. As the era of ideological conflict subsides, humanity enters—or, more pre-

cisely, re-enters—a possibly more dangerous era of ethnic and racial animosity.

The hostility of one tribe for another is among the most instinctive human reactions. Yet, the history of our planet has been in great part the history of the mixing of peoples. Mass migrations have produced mass antagonisms from the beginning of time. Today, as the twentieth century draws to an end, a number of factors—not just the evaporation of the cold war but, more profoundly, the development of swifter modes of communication and transport, the acceleration of population growth, the breakdown of traditional social structures, the flight from tyranny and from want, the dream of a better life somewhere else—converge to drive people as never before across national frontiers and thereby to make the mixing of peoples a major problem for the century that lies darkly ahead.

What happens when people of different ethnic origins, speaking different languages and professing different religions, settle in the same geographical locality and live under the same political sovereignty? Unless a common purpose binds them together, tribal hostilities will drive them apart. Ethnic and racial conflict, it seems evident, will now replace the conflict of ideologies as the explosive issue of our times.



On every side today ethnicity is the cause of the breaking of nations. The Soviet Union, Yugoslavia, India, South Africa are all in crisis. Ethnic tensions disturb and divide Sri Lanka, Burma, Ethiopia, Indonesia, Iraq, Lebanon, Israel, Cyprus, Somalia, Nigeria, Liberia, Angola, Sudan, Zaire, Guyana, Trinidad—you name it. Even nations as stable and civilized

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as Britain and France, Belgium and Spain and Czechoslovakia, face growing ethnic and racial troubles. "The virus of tribalism," says the *Economist*, "... risks becoming the AIDS of international politics—lying dormant for years, then flaring up to destroy countries."

Take the case of our neighbor to the north. Canada has long been considered the most sensible and placid of nations. "Rich, peaceful and, by the standards of almost anywhere else, enviably successful," the *Economist* observes: yet today "on the brink of bust-up." Michael Ignatieff (the English-resident son of a Russian-born Canadian diplomat and thus an example of the modern mixing of peoples) writes of Canada, "Here we have one of the five richest nations on earth, a country so uniquely blessed with space and opportunity that the world's poor are beating at the door to get in, and it is tearing itself apart. . . . If one of the top five developed nations on earth can't make a federal, multi-ethnic state work, who else can?"

The answer to that increasingly vital question has been, at least until recently, the United States.

Now how have Americans succeeded in pulling off this almost unprecedented trick? Other countries break up because they fail to give ethnically diverse peoples compelling reasons to see themselves as part of the same nation. The United States has worked, thus far, because it has offered such reasons. What is it then that, in the absence of a common ethnic origin, has held Americans together over two turbulent centuries? For America was a multiethnic country from the start. Hector St. John de Crèvecoeur emigrated

from France to the American colonies in 1759, married an American woman, settled on a farm in Orange County, New York, and published his *Letters from an American Farmer* during the American Revolution. This eighteenth-century French American marveled at the astonishing diversity of the other settlers—"a mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes," a "strange mixture of blood" that you could find in no other country.

He recalled one family whose grandfather was English, whose wife was Dutch, whose son married a Frenchwoman, and whose present four sons had married women of different nationalities. "From this promiscuous breed," he wrote, "that race now called Americans have arisen." (The word *race* as used in the eighteenth and nineteenth centuries meant what we mean by nationality today; thus people spoke of "the English race," "the German race," and so on.) What, Crèvecoeur mused, were the characteristics of this suddenly emergent American race? *Letters from an American Farmer* propounded a famous question: "What then is the American, this new man?" (Twentieth-century readers must overlook eighteenth-century male obliviousness to the existence of women.)

Crèvecoeur gave his own question its classic answer: "*He is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. The American is a new man, who acts upon new principles. . . . Here individuals of all nations are melted into a new race of men.*"

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E pluribus unum. The United States had a brilliant solution for the inherent fragility of a multiethnic society: the creation of a brand-new national identity, carried forward by individuals who, in forsaking old loyalties and joining to make new lives, melted away ethnic differences. Those intrepid Europeans who had torn up their roots to brave the wild Atlantic *wanted* to forget a horrid past and to embrace a hopeful future. They *expected* to become Americans. Their goals were escape, deliverance, assimilation. They saw America as a transforming nation, banishing dismal memories and developing a unique national character based on common political ideals and shared experiences. The point of America was not to preserve old cultures, but to forge a new *American* culture.

One reason why Canada, despite all its advantages, is so vulnerable to schism is that, as Canadians freely admit, their country lacks such a unique national identity. Attracted variously to Britain, France, and the United States, inclined for generous reasons to a policy of official multiculturalism, Canadians have never developed a strong sense of what it is to be a Canadian. As Sir John Macdonald, their first prime minister, put it, Canada has "too much geography and too little history."

The United States has had plenty of history. From the Revolution on, Americans have had a powerful national creed. The vigorous sense of national identity accounts for our relative success in converting Crèvecoeur's "promiscuous breed" into one people and thereby making a multiethnic society work.

This is not to say that the United States has ever fulfilled Crèvecoeur's ideal. New waves of immigration brought in people who fitted awkwardly into a society that was inescapably English in language, ideals, and institutions. For a long time the Anglo-Americans dominated American culture and politics. The pot did not melt everybody, not even all the white immigrants.

As for the nonwhite peoples—those long in America whom the European newcomers overran and massacred, or those others hauled in against their will from Africa and Asia—deeply bred racism put them all, red Americans, black Americans, yellow Americans, brown Americans, well outside the pale. The curse of racism was the great failure of the American experiment, the glaring contradiction of American ideals and the still crippling disease of American life.

Yet even nonwhite Americans, miserably treated as they were, contributed to the formation of the national identity. They became members, if third-class members, of American society and helped give the common culture new form and flavor. The infusion of non-Anglo stocks and the experience of the New World steadily reconfigured the British legacy and made the United States, as we all know, a very different country today from Britain.

The vision of America as melted into one people prevailed through most of the two centuries of the history of the United States. But the twentieth century has brought forth a new and opposing vision. One world war destroyed the old order of things and launched Woodrow Wilson's doctrine of the self-

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determination of peoples. Twenty years after, a second world war dissolved the western colonial empires and intensified ethnic and racial militancy around the planet. In the United States itself, new laws eased entry for immigrants from South America, Asia, and Africa and altered the composition of the American people.

In a nation marked by an even stranger mixture of blood than Crèvecoeur had known, his celebrated question is asked once more, with a new passion—and a new answer. Today many Americans disavow the historic goal of “a new race of man.” The escape from origins yields to the search for roots. The “ancient prejudices and manners” disowned by Crèvecoeur have made a surprising comeback. A cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot, to challenge the concept of “one people,” and to protect, promote, and perpetuate separate ethnic and racial communities.

The eruption of ethnicity had many good consequences. The American culture began at last to give shamefully overdue recognition to the achievements of minorities subordinated and spurned during the high noon of Anglo dominance. American education began at last to acknowledge the existence and significance of the great swirling world beyond Europe. All this was to the good. Of course history should be taught from a variety of perspectives. Let our children try to imagine the arrival of Columbus from the viewpoint of those who met him as well as from those who sent him. Living on a shrinking planet, aspiring to

global leadership, Americans must learn much more about other races, other cultures, other continents. As they do, they acquire a more complex and invigorating sense of the world—and of themselves.

But, pressed too far, the cult of ethnicity has had bad consequences too. The new ethnic gospel rejects the unifying vision of individuals from all nations melted into a new race. Its underlying philosophy is that America is not a nation of individuals at all but a nation of groups, that ethnicity is the defining experience for most Americans, that ethnic ties are permanent and indelible, and that division into ethnic communities establishes the basic structure of American society and the basic meaning of American history.

Implicit in this philosophy is the classification of all Americans according to ethnic and racial criteria. But while the ethnic interpretation of American history, like the economic interpretation, is valid and illuminating up to a point, it is fatally misleading and wrong when presented as the whole picture. The ethnic interpretation, moreover, reverses the historic theory of America as one people—the theory that has thus far managed to keep American society whole.

Instead of a transformative nation with an identity all its own, America in this new light is seen as preservative of diverse alien identities. Instead of a nation composed of individuals making their own unhampered choices, America increasingly sees itself as composed of groups more or less ineradicable in their ethnic character. The multiethnic dogma abandons historic purposes, replacing assimilation by fragmen-

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tation, integration by separatism. It belittles *unum* and glorifies *pluribus*.

The historic idea of a unifying American identity is now in peril in many arenas—in our politics, our voluntary organizations, our churches, our language. And in no arena is the rejection of an overriding national identity more crucial than in our system of education.

The schools and colleges of the republic train the citizens of the future. Our public schools in particular have been the great instrument of assimilation and the great means of forming an American identity. What students are taught in schools affects the way they will thereafter see and treat other Americans, the way they will thereafter conceive the purposes of the republic. The debate about the curriculum is a debate about what it means to be an American.

The militants of ethnicity now contend that a main objective of public education should be the protection, strengthening, celebration, and perpetuation of ethnic origins and identities. Separatism, however, nourishes prejudices, magnifies differences and stirs antagonisms. The consequent increase in ethnic and racial conflict lies behind the hullabaloo over "multiculturalism" and "political correctness," over the iniquities of the "Eurocentric" curriculum, and over the notion that history and literature should be taught not as intellectual disciplines but as therapies whose function is to raise minority self-esteem.

Watching ethnic conflict tear one nation after another apart, one cannot look with complacency at pro-

posals to divide the United States into distinct and immutable ethnic and racial communities, each taught to cherish its own apartness from the rest. One wonders: Will the center hold? or will the melting pot give way to the Tower of Babel?

I don't want to sound apocalyptic about these developments. Education is always in ferment, and a good thing too. Schools and colleges have always been battlegrounds for debates over beliefs, philosophies, values. The situation in our universities, I am confident, will soon right itself once the great silent majority of professors cry "enough" and challenge what they know to be voguish nonsense.

The impact of ethnic and racial pressures on our public schools is more troubling. The bonds of national cohesion are sufficiently fragile already. Public education should aim to strengthen those bonds, not to weaken them. If separatist tendencies go on unchecked, the result can only be the fragmentation, resegregation, and tribalization of American life.

I remain optimistic. My impression is that the historic forces driving toward "one people" have not lost their power. For most Americans this is still what the republic is all about. They resist extremes in the argument between "unity first" and "ethnicity first." "Most Americans," Governor Mario Cuomo has well said, "can understand both the need to recognize and encourage an enriched diversity as well as the need to ensure that such a broadened multicultural perspective leads to unity and an enriched sense of what being an American is, and not to a destructive factionalism that would tear us apart."

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Whatever their self-appointed spokesmen may claim, most American-born members of minority groups, white or nonwhite, while they may cherish particular heritages, still see themselves primarily as Americans and not primarily as Irish or Hungarians or Jews or Africans or Asians. A telling indicator is the rising rate of intermarriage across ethnic, religious, even (increasingly) racial lines. The belief in a unique American identity is far from dead.

But the burden to unify the country does not fall exclusively on the minorities. Assimilation and integration constitute a two-way street. Those who want to join America must be received and welcomed by those who already think they own America. Racism, as I have noted, has been the great national tragedy. In recent times white America has at last begun to confront the racism so deeply and shamefully inbred in our history. But the triumph over racism is incomplete. When old-line Americans, for example, treat people of other nationalities and races as if they were indigestible elements to be shunned and barred, they must not be surprised if minorities gather bitterly unto themselves and damn everybody else. Not only must *they* want assimilation and integration; *we* must want assimilation and integration too. The burden to make this a unified country lies as much with the complacent majority as with the sullen and resentful minorities.

The American population has unquestionably grown more heterogeneous than ever in recent times. But this very heterogeneity makes the quest for unifying ideals and a common culture all the more urgent.

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And in a world savagely rent by ethnic and racial antagonisms, it is all the more essential that the United States continue as an example of a how a highly differentiated society holds itself together.

Arthur M. Schlesinger, Jr.

"A New Race"?

The civil rights revolution provoked new expressions of ethnic identity by the now long-resident "new migration" from southern and eastern Europe—Italians, Greeks, Poles, Czechs, Slovaks, Hungarians. The ethnic enthusiasm was reinforced by the "third-generation" effect formulated in Hansen's Law, named after Marcus Lee Hansen, the great pioneer in immigration history: "What the son wishes to forget the grandson wishes to remember."

Another factor powerfully nourished the passion for roots: the waning American optimism about the nation's prospects. For two centuries Americans had been confident that life would be better for their children than it was for them. In their exuberant youth, Americans had disdained the past and, as John Quincy Adams urged, looked forward to their posterity rather than backward to their ancestors. Amid forebodings of national decline, Americans now began to look forward less and backward more. The rising cult of ethnicity was a symptom of decreasing confidence in the American future.

VII

Ethnic as a word has had a long history. It originally meant "heathen" or "pagan" but soon came to mean anything pertaining to a race or nation. In this sense everyone, even the Lowells and the Cabots, were ethnics. By the time Henry James used the word in *The American Scene*, however, "ethnic" had acquired an association with foreignness. As applied since the

1960s, it definitely means non-Anglo minorities—a reversion to the original sense of being beyond the pale.

The noun *ethnicity* meanwhile made its modern debut in 1940 in W. Lloyd Warner's Yankee City series. From its modest beginning in that sociological study, "ethnicity" moved vigorously to center stage in popular discourse. The bicentennial of American independence, the centennial of the Statue of Liberty, the restoration of Ellis Island—all turned from tributes to the melting pot into extravaganzas of ethnic distinctiveness.

The pressure for the new cult of ethnicity came less from the minorities en masse than from their often self-appointed spokesmen. Most ethnics, white and nonwhite, saw themselves primarily as Americans. "The cravings for 'historical identity,' " Gunnar Myrdal said at the height of the ethnic rage, "is not in any sense a people's movement. Those cravings have been raised by a few well-established intellectuals, professors, writers—mostly, I gather, of a third generation." Few of them, Myrdal thought, made much effort to talk to their own ethnic groups. He feared, Myrdal added with a certain contempt, that this movement was only "upper-class intellectual romanticism."

Still, ideologues, with sufficient publicity and time, could create audiences. Spokesmen with a vested interest in ethnic identification repudiated the ideal of assimilation. The melting pot, it was said, injured people by undermining their self-esteem. It denied them heroes—"role models," in the jargon—from their own ethnic ancestries. Praise now went to "the unmeltable ethnics."

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In 1974, after testimony from ethnic spokesmen denouncing the melting pot as a conspiracy to homogenize America, Congress passed the Ethnic Heritage Studies Program Act—a statute that, by applying the ethnic ideology to all Americans, compromised the historic right of Americans to decide their ethnic identities for themselves. The act ignored those millions of Americans—surely a majority—who refused identification with any particular ethnic group.

The ethnic upsurge (it can hardly be called a revival because it was unprecedented) began as a gesture of protest against the Anglocentric culture. It became a cult, and today it threatens to become a counter-revolution against the original theory of America as "one people," a common culture, a single nation.

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The attack on the common American identity is the culmination of the cult of ethnicity. That attack was mounted in the first instance by European Americans of non-British origin ("unmeltable ethnics") against the British foundations of American culture; then, latterly and massively, by Americans of non-European origin against the European foundations of that culture. As Theodore Roosevelt's foreboding suggests, the European immigration itself palpitated with internal hostilities, everyone at

everybody else's throats—hardly the “monocultural” crowd portrayed by ethnocentric separatists. After all, the two great “world” wars of the twentieth century began as fights among European states. Making a single society out of this diversity of antagonistic European peoples is a hard enough job. The new salience of non-European, nonwhite stocks compounds the challenge. And the non-Europeans, or at least their self-appointed spokesmen, bring with them a resentment, in some cases a hatred, of Europe and the West provoked by generations of Western colonialism, racism, condescension, contempt, and cruel exploitation.

I

Will not this rising flow of non-European immigrants create a “minority majority” that will make Eurocentrism obsolete by the twenty-first century? This is the fear of some white Americans and the hope (and sometimes the threat) of some nonwhites.

Immigrants were responsible for a third of population growth during the 1980s. More arrived than in any decade since the second of the century. And the composition of the newcomers changed dramatically. In 1910 nearly 90 percent of immigrants came from Europe. In the 1980s more than 80 percent came from Asia and Latin America.

Still, foreign-born residents constitute only about 7 percent of the population today as against nearly 15 percent when the first Roosevelt and Wilson were worrying about hyphenated Americans. Stephan

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Thernstrom doubts that the minority majority will ever arrive. The black share in the population has grown rather slowly—9.9 percent in 1920, 10 percent in 1950, 11.1 percent in 1970, 12.1 percent in 1990. Neither Asian-Americans nor Hispanic-Americans go in for especially large families; and family size in any case tends to decline as income and intermarriage increase. “If today’s immigrants assimilate to American ways as readily as their predecessors at the turn of the century—as seems to be happening,” Thernstrom concludes, “there won’t be a minority majority issue anyway.”

America has so long seen itself as the asylum for the oppressed and persecuted—and has done itself and the world so much good thereby—that any curtailment of immigration offends something in the American soul. No one wants to be a Know-Nothing. Yet uncontrolled immigration is an impossibility; so the criteria of control are questions the American democracy must confront. We have shifted the basis of admission three times this century—from national origins in 1924 to family reunification in 1965 to needed skills in 1990. The future of immigration policy depends on the capacity of the assimilation process to continue to do what it has done so well in the past: to lead newcomers to an acceptance of the language, the institutions, and the political ideals that hold the nation together.

II

Is Europe really the root of all evil? The crimes of Europe against lesser breeds without the law (not to mention even worse crimes—Hitlerism and Stalinism—against other Europeans) are famous. But these crimes do not alter other facts of history: that Europe was the birthplace of the United States of America, that European ideas and culture formed the republic, that the United States is an extension of European civilization, and that nearly 80 percent of Americans are of European descent.

When Irving Howe, hardly a notorious conservative, dared write, "The Bible, Homer, Plato, Sophocles, Shakespeare are central to our culture," an outraged reader ("having graduated this past year from Amherst") wrote, "Where on Howe's list is the *Quran*, the *Gita*, Confucius, and other central cultural artifacts of the peoples of our nation?" No one can doubt the importance of these works nor the influence they have had on other societies. But on American society? It may be too bad that dead white European males have played so large a role in shaping our culture. But that's the way it is. One cannot erase history.

These humdrum historical facts, and not some dastardly imperialist conspiracy, explain the Eurocentric slant in American schools. Would anyone seriously argue that teachers should conceal the European origins of American civilization? or that schools should cater to the 20 percent and ignore the 80 per-

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ent? Of course the 20 percent and their contributions should be integrated into the curriculum too, which is the point of cultural pluralism.

But self-styled "multiculturalists" are very often ethnocentric separatists who see little in the Western heritage beyond Western crimes. The Western tradition, in this view, is inherently racist, sexist, "classist," hegemonic; irredeemably repressive, irredeemably oppressive. The spread of Western culture is due not to any innate quality but simply to the spread of Western power. Thus the popularity of European classical music around the world—and, one supposes, of American jazz and rock too—is evidence not of wide appeal but of "the pattern of imperialism, in which the conquered culture adopts that of the conqueror."

Such animus toward Europe lay behind the well-known crusade against the Western-civilization course at Stanford ("Hey-hey, ho-ho, Western culture's got to go!"). According to the National Endowment for the Humanities, students can graduate from 78 percent of American colleges and universities without taking a course in the history of Western civilization. A number of institutions—among them Dartmouth, Wisconsin, Mt. Holyoke—require courses in third-world or ethnic studies but not in Western civilization. The mood is one of divesting Americans of the sinful European inheritance and seeking redemptive infusions from non-Western cultures.

III

One of the oddities of the situation is that the assault on the Western tradition is conducted very largely with analytical weapons forged in the West. What are the names invoked by the coalition of latter-day Marxists, deconstructionists, poststructuralists, radical feminists, Afrocentrists? Marx, Nietzsche, Gramsci, Derrida, Foucault, Lacan, Sartre, de Beauvoir, Habermas, the Frankfurt "critical theory" school—Europeans all. The "unmasking," "demythologizing," "decanonizing," "dehegemonizing" blitz against Western culture depends on methods of critical analysis unique to the West—which surely testifies to the internally redemptive potentialities of the Western tradition.

Even Afrocentrists seem to accept subliminally the very Eurocentric standards they think they are rejecting. "Black intellectuals condemn Western civilization," Professor Pearce Williams says, "yet ardently wish to prove it was founded by their ancestors." And, like Frantz Fanon and Léopold Senghor, whose books figure prominently on their reading lists, Afrocentric ideologues are intellectual children of the West they repudiate. Fanon, the eloquent spokesman of the African wretched of the earth, had French as his native tongue and based his analyses on Freud, Marx, and Sartre. Senghor, the prophet of Negritude, wrote in French, established the Senegalese educational system on the French model and, when he left

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the presidency of Senegal, retired to France.

Western hegemony, it would seem, can be the source of protest as well as of power. Indeed, the invasion of American schools by the Afrocentric curriculum, not to mention the conquest of university departments of English and comparative literature by deconstructionists, poststructuralists, etc., are developments that by themselves refute the extreme theory of "cultural hegemony." Of course, Gramsci had a point. Ruling values do dominate and permeate any society; but they do not have the rigid and monolithic grip on American democracy that academic leftists claim.

Radical academics denounce the "canon" as an instrument of European oppression enforcing the hegemony of the white race, the male sex, and the capitalist class, designed, in the words of one professor, "to rewrite the past and construct the present from the perspective of the privileged and the powerful." Or in the elegant words of another—and a professor of theological ethics at that: "The canon of great literature was created by high Anglican assholes to underwrite their social class."

The poor old canon is seen not only as conspiratorial but as static. Yet nothing changes more regularly and reliably than the canon: compare, for example, the canon in American poetry as defined by Edmund Clarence Stedman in his *Poets of America* (1885) with the canon of 1935 or of 1985 (whatever happened to Longfellow and Whittier?); or recall the changes that have overtaken the canonical literature of American history in the last half-century (who

reads Beard and Parrington now?). And the critics clearly have no principled objection to the idea of the canon. They simply wish to replace an old gang by a new gang. After all, a canon means only that because you can't read everything, you give some books priority over others.

Oddly enough, serious Marxists—Marx and Engels, Lukacs, Trotsky, Gramsci—had the greatest respect for what Lukacs called “the classical heritage of mankind.” Well they should have, for most great literature and much good history are deeply subversive in their impact on orthodoxies. Consider the present-day American literary canon: Emerson, Jefferson, Melville, Whitman, Hawthorne, Thoreau, Lincoln, Twain, Dickinson, William and Henry James, Henry Adams, Holmes, Dreiser, Faulkner, O'Neill. Lackeys of the ruling class? Apologists for the privileged and the powerful? Agents of American imperialism? Come on!

It is time to adjourn the chat about hegemony. If hegemony were as real as the cultural radicals pretend, Afrocentrism would never have got anywhere, and the heirs of William Lyon Phelps would still be running the Modern Language Association.

IV

Is the Western tradition a bar to progress and a curse on humanity? Would it really do America and the world good to get rid of the European legacy?

No doubt Europe has done terrible things, not

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least to itself. But what culture has not? History, said Edward Gibbon, is little more than the register of the crimes, follies, and misfortunes of mankind. The sins of the West are no worse than the sins of Asia or of the Middle East or of Africa.

There remains, however, a crucial difference between the Western tradition and the others. The crimes of the West have produced their own antidotes. They have provoked great movements to end slavery, to raise the status of women, to abolish torture, to combat racism, to defend freedom of inquiry and expression, to advance personal liberty and human rights.

Whatever the particular crimes of Europe, that continent is also the source—the *unique* source—of those liberating ideas of individual liberty, political democracy, the rule of law, human rights, and cultural freedom that constitute our most precious legacy and to which most of the world today aspires. These are *European* ideas, not Asian, nor African, nor Middle Eastern ideas, except by adoption.

The freedoms of inquiry and of artistic creation, for example, are Western values. Consider the differing reactions to the case of Salman Rushdie: what the West saw as an intolerable attack on individual freedom the Middle East saw as a proper punishment for an evildoer who had violated the mores of his group. Individualism itself is looked on with abhorrence and dread by collectivist cultures in which loyalty to the group overrides personal goals—cultures that, social scientists say, comprise about 70 percent of the world's population.

There is surely no reason for Western civilization to have guilt trips laid on it by champions of cultures based on despotism, superstition, tribalism, and fanaticism. In this regard the Afrocentrists are especially absurd. The West needs no lectures on the superior virtue of those "sun people" who sustained slavery until Western imperialism abolished it (and, it is reported, sustain it to this day in Mauritania and the Sudan), who still keep women in subjection and cut off their clitorises, who carry out racial persecutions not only against Indians and other Asians but against fellow Africans from the wrong tribes, who show themselves either incapable of operating a democracy or ideologically hostile to the democratic idea, and who in their tyrannies and massacres, their Idi Amins and Boukassas, have stamped with utmost brutality on human rights.

Certainly the European overlords did little enough to prepare Africa for self-government. But democracy would find it hard in any case to put down roots in a tribalist and patrimonial culture that, long before the West invaded Africa, had sacralized the personal authority of chieftains and ordained the submission of the rest. What the West would call corruption is regarded through much of Africa as no more than the prerogative of power. Competitive political parties, an independent judiciary, a free press, the rule of law are alien to African traditions.

It was the French, not the Algerians, who freed Algerian women from the veil (much to the irritation of Frantz Fanon, who regarded de veiling as symbolic rape); as in India it was the British, not the Indians,

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who ended (or did their best to end) the horrible custom of *suttee*—widows burning themselves alive on their husbands' funeral pyres. And it was the West, not the non-Western cultures, that launched the crusade to abolish slavery—and in doing so encountered mighty resistance, especially in the Islamic world (where Moslems, with fine impartiality, enslaved whites as well as blacks). Those many brave and humane Africans who are struggling these days for decent societies are animated by Western, not by African, ideals. White guilt can be pushed too far.

The Western commitment to human rights has unquestionably been intermittent and imperfect. Yet the ideal remains—and movement toward it has been real, if sporadic. Today it is the *Western* democratic tradition that attracts and empowers people of all continents, creeds, and colors. When the Chinese students cried and died for democracy in Tiananmen Square, they brought with them not representations of Confucius or Buddha but a model of the Statue of Liberty.

V

The great American asylum, as Crèvecoeur called it, open, as Washington said, to the oppressed and persecuted of all nations, has been from the start an experiment in a multiethnic society. This is a bolder experiment than we sometimes remember. History is littered with the wreck of states that tried to combine diverse ethnic or linguistic or religious groups within a

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single sovereignty. Today's headlines tell of imminent crisis or impending dissolution in one or another multiethnic polity—the Soviet Union, India, Yugoslavia, Czechoslovakia, Ireland, Belgium, Canada, Lebanon, Cyprus, Israel, Ceylon, Spain, Nigeria, Kenya, Angola, Trinidad, Guyana. . . . The list is almost endless. The luck so far of the American experiment has been due in large part to the vision of the melting pot. "No other nation," Margaret Thatcher has said, "has so successfully combined people of different races and nations within a single culture."

But even in the United States, ethnic ideologues have not been without effect. They have set themselves against the old American ideal of assimilation. They call on the republic to think in terms not of individual but of group identity and to move the polity from individual rights to group rights. They have made a certain progress in transforming the United States into a more segregated society. They have done their best to turn a college generation against Europe and the Western tradition. They have imposed ethnocentric, Afrocentric, and bilingual curricula on public schools, well designed to hold minority children out of American society. They have told young people from minority groups that the Western democratic tradition is not for them. They have encouraged minorities to see themselves as victims and to live by alibis rather than to claim the opportunities opened for them by the potent combination of black protest and white guilt. They have filled the air with recrimination and rancor and have remarkably advanced the fragmentation of American life.

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Yet I believe the campaign against the idea of common ideals and a single society will fail. Gunnar Myrdal was surely right: for all the damage it has done, the upsurge of ethnicity is a superficial enthusiasm stirred by romantic ideologues and unscrupulous hucksters whose claim to speak for their minorities is thoughtlessly accepted by the media. I doubt that the ethnic vogue expresses a reversal of direction from assimilation to apartheid among the minorities themselves. Indeed, the more the ideologues press the case for ethnic separatism, the less they appeal to the mass of their own groups. They have thus far done better in intimidating the white majority than in converting their own constituencies.

"No nation in history," writes Lawrence Fuchs, the political scientist and immigration expert in his fine book *The American Kaleidoscope*, "had proved as successful as the United States in managing ethnic diversity. No nation before had ever made diversity itself a source of national identity and unity." The second sentence explains the success described in the first, and the mechanism for translating diversity into unity has been the American Creed, the civic culture—the very assimilating, unifying culture that is today challenged, and not seldom rejected, by the ideologues of ethnicity.

A historian's guess is that the resources of the Creed have not been exhausted. Americanization has not lost its charms. Many sons and daughters of ethnic neighborhoods still want to shed their ethnicity and move to the suburbs as fast as they can—where they will be received with far more tolerance than they

would have been 70 years ago. The desire for achievement and success in American society remains a potent force for assimilation. Ethnic subcultures, Stephen Steinberg, author of *The Ethnic Myth*, points out, fade away "because circumstances forced them to make choices that undermined the basis for cultural survival."

Others may enjoy their ethnic neighborhoods but see no conflict between foreign descent and American loyalty. Unlike the multiculturalists, they celebrate not only what is distinctive in their own backgrounds but what they hold in common with the rest of the population.

The ethnic identification often tends toward superficiality. The sociologist Richard Alba's study of children and grandchildren of immigrants in the Albany, New York, area shows the most popular "ethnic experience" to be sampling the ancestral cuisine. Still, less than half the respondents picked that, and only one percent ate ethnic food every day. Only one-fifth acknowledged a sense of special relationship to people of their own ethnic background; less than one-sixth taught their children about their ethnic origins; almost none was fluent in the language of the old country. "It is hard to avoid the conclusion," Alba writes, "that ethnic experience is shallow for the great majority of whites."

If ethnic experience is a good deal less shallow for blacks, it is because of their bitter experience in America, not because of their memories of Africa. Nonetheless most blacks prefer "black" to "African-Americans," fight bravely and patriotically for their country, and would move to the suburbs too if income and racism would permit.

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As for Hispanic-Americans, first-generation Hispanics born in the United States speak English fluently, according to a Rand Corporation study; more than half of second-generation Hispanics give up Spanish altogether. When *Vista*, an English-language monthly for Hispanics, asked its readers what historical figures they most admired, Washington, Lincoln, and Theodore Roosevelt led the list, with Benito Juárez trailing behind as fourth, and Eleanor Roosevelt and Martin Luther King Jr. tied for fifth. So much for ethnic role models.

Nor, despite the effort of ethnic ideologues, are minority groups all that hermetically sealed off from each other, except in special situations, like colleges, where ideologues are authority figures. The wedding notices in any newspaper testify to the increased equanimity with which people these days marry across ethnic lines, across religious lines, even, though to a smaller degree, across racial lines. Around half of Asian-American marriages are with non-Orientals, and the Census Bureau estimates one million interracial—mostly black-white—marriages in 1990 as against 310,000 in 1970.

VI

The ethnic revolt against the melting pot has reached the point, in rhetoric at least, though not I think in reality, of a denial of the idea of a common culture and a single society. If large numbers of people really accept this, the republic would be in serious trouble. The question poses itself: how to restore the balance between *unum* and *pluribus*?

The old American homogeneity disappeared well over a century ago, never to return. Ever since, we have been preoccupied in one way or another with the problem, as Herbert Croly phrased in 80 years back in *The Promise of American Life*, "of preventing such divisions from dissolving the society into which they enter—of keeping such a highly differentiated society fundamentally sound and whole." This required, Croly believed, an "ultimate bond of union." There was only one way by which solidarity could be restored, "and that is by means of a democratic social ideal. . . ."

The genius of America lies in its capacity to forge a single nation from peoples of remarkably diverse racial, religious, and ethnic origins. It has done so because democratic principles provide both the philosophical bond of union and practical experience in civic participation. The American Creed envisages a nation composed of individuals making their own choices and accountable to themselves, not a nation based on inviolable ethnic communities. The Constitution turns on individual rights, not on group rights. Law, in order to rectify past wrongs, has from time to time (and in my view often properly so) acknowledged the claims of groups; but this is the exception, not the rule.

Our democratic principles contemplate an open society founded on tolerance of differences and on mutual respect. In practice, America has been more open to some than to others. But it is more open to all today than it was yesterday and is likely to be even more open tomorrow than today. The steady movement of American life has been from exclusion to inclusion.

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Historically and culturally this republic has an Anglo-Saxon base; but from the start the base has been modified, enriched, and reconstituted by transfusions from other continents and civilizations. The movement from exclusion to inclusion causes a constant revision in the texture of our culture. The ethnic transfusions affect all aspects of American life—our politics, our literature, our music, our painting, our movies, our cuisine, our customs, our dreams.

Black Americans in particular have influenced the ever-changing national culture in many ways. They have lived here for centuries, and, unless one believes in racist mysticism, they belong far more to American culture than to the culture of Africa. Their history is part of the Western democratic tradition, not an alternative to it. Henry Louis Gates Jr. reminds us of James Baldwin's remark about coming to Europe to find out that he was "as American as any Texas G.I." No one does black Americans more disservice than those Afrocentric ideologues who would define them out of the West.

The interplay of diverse traditions produces the America we know. "Paradoxical though it may seem," Diane Ravitch has well said, "the United States has a common culture that is multicultural." That is why unifying political ideals coexist so easily and cheerfully with diversity in social and cultural values. Within the overarching political commitment, people are free to live as they choose, ethnically and otherwise. Differences will remain; some are reinvented; some are used to drive us apart. But as we renew our allegiance to the unifying ideals, we provide the solvent that will prevent differences from escalating into antagonism and hatred.

One powerful reason for the movement from exclusion to inclusion is that the American Creed facilitates the appeal from the actual to the ideal. When we talk of the American democratic faith, we must understand it in its true dimensions. It is not an impervious, final, and complacent orthodoxy, intolerant of deviation and dissent, fulfilled in flag salutes, oaths of allegiance, and hands over the heart. It is an ever-evolving philosophy, fulfilling its ideals through debate, self-criticism, protest, disrespect, and irreverence; a tradition in which all have rights of heterodoxy and opportunities for self-assertion. The Creed has been the means by which Americans have haltingly but persistently narrowed the gap between performance and principle. It is what all Americans should learn, because it is what binds all Americans together.

Let us by all means in this increasingly mixed-up world learn about those other continents and civilizations. But let us master our own history first. Lamentable as some may think it, we inherit an American experience, as America inherits a European experience. To deny the essentially European origins of American culture is to falsify history.

Americans of whatever origin should take pride in the distinctive inheritance to which they have all contributed, as other nations take pride in their distinctive inheritances. Belief in one's own culture does not require disdain for other cultures. But one step at a time: no culture can hope to ingest other cultures all at once, certainly not before it ingests its own. As we begin to master our own culture, then we can explore the world.

Our schools and colleges have a responsibility to

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teach history for its own sake—as part of the intellectual equipment of civilized persons—and not to degrade history by allowing its contents to be dictated by pressure groups, whether political, economic, religious, or ethnic. The past may sometimes give offense to one or another minority; that is no reason for re-writing history. Giving pressure groups vetoes over textbooks and courses betrays both history and education. Properly taught, history will convey a sense of the variety, continuity, and adaptability of cultures, of the need for understanding other cultures, of the ability of individuals and peoples to overcome obstacles, of the importance of critical analysis and dispassionate judgment in every area of life.

Above all, history can give a sense of national identity. We don't have to believe that our values are absolutely better than the next fellow's or the next country's, but we have no doubt that they are better *for us*, reared as we are—and are worth living by and worth dying for. For our values are not matters of whim and happenstance. History has given them to us. They are anchored in our national experience, in our great national documents, in our national heroes, in our folkways, traditions, and standards. People with a different history will have differing values. But we believe that our own are better for us. They work for us; and, for that reason, we live and die by them.

It has taken time to make the values real for all our citizens, and we still have a good distance to go, but we have made progress. If we now repudiate the quite marvelous inheritance that history bestows on us, we invite the fragmentation of the national community into a quarrelsome spatter of enclaves, ghet-

tos, tribes. The bonds of cohesion in our society are sufficiently fragile, or so it seems to me, that it makes no sense to strain them by encouraging and exalting cultural and linguistic apartheid.

The American identity will never be fixed and final; it will always be in the making. Changes in the population have always brought changes in the national ethos and will continue to do so; but not, one must hope, at the expense of national integration. The question America confronts as a pluralistic society is how to vindicate cherished cultures and traditions without breaking the bonds of cohesion—common ideals, common political institutions, common language, common culture, common fate—that hold the republic together.

Our task is to combine due appreciation of the splendid diversity of the nation with due emphasis on the great unifying Western ideas of individual freedom, political democracy, and human rights. These are the ideas that define the American nationality—and that today empower people of all continents, races, and creeds.

"What then is the American, this new man? . . . Here individuals of all nations are melted into a new race of men." Still a good answer—still the best hope.

1



“A New Race”?

At the beginning America was seen as a severing of roots, a liberation from the stifling past, an entry into a new life, an interweaving of separate ethnic strands into a new national design. “We have it in our power,” said Thomas Paine for the revolutionary generation, “to begin the world all over again.” The unstated national motto was “Never look back.” “The Past is dead, and has no resurrection,” wrote Herman Melville. “. . . The Past is the text-book of tyrants; the Future the Bible of the Free.”

I

And the future was America—not so much a nation, Melville said, as a world. “You can not spill a drop of American blood without spilling the blood of the whole world. On this Western Hemisphere all tribes and people are forming into one federated whole. . . .” For Ralph Waldo Emerson too, like Crèvecoeur, like Melville, America was the distillation of the multifarious planet. As the burning of the temple at Corinth had melted and intermixed silver and gold to produce Corinthian brass, “a new compound more precious than any,” so, Emerson wrote in his journal, in America, in this “asylum of all nations, the energy of Irish, Germans, Swedes, Poles, & Cossacks, & all the European tribes—of the Africans, & of the Polynesians, will construct a new race . . . as vigorous as the new Europe which came out of the smelting pot of the Dark Ages. . . .”

Melville was a novelist, Emerson an essayist; both were poets. But George Washington was a sternly practical man. Yet he believed no less ardently in the doctrine of the “new race.” “The bosom of America,” Washington said, “is open . . . to the oppressed and persecuted of all Nations and Religions.” But immigrants who nestled as clannish groups in the national bosom retained the “Language, habits and principles (good or bad) which they bring with them.” Let them therefore settle as individuals, prepared for “intermixture with our people.” Then they would be

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“assimilated to our customs, measures and laws: in a word, soon become *one people*.”

John Quincy Adams, another sternly practical man, similarly insisted on the exclusiveness of the new American identity. When a German baron contemplating emigration interviewed Adams as secretary of state, Adams admonished his visitor that emigrants had to make up their minds to one thing: “*They must cast off the European skin, never to resume it. They must look forward to their posterity rather than backward to their ancestors. . . .*”

But how could Crèvecoeur’s “promiscuous breed” be transformed into a “new race”? How was Emerson’s “smelting pot” to fuse such disparate elements into Washington’s “one people”? This question preoccupied another young Frenchman who arrived in America three quarters of a century after Crèvecoeur. “Imagine, my dear friend, if you can,” Alexis de Tocqueville wrote back to France, “a society formed of all the nations of the world . . . people having different languages, beliefs, opinions: in a word, a society without roots, without memories, without prejudices, without routines, without common ideas, without a national character, yet a hundred times happier than our own.” What alchemy could make this miscellany into a single society?

The answer, Tocqueville concluded, lay in the commitment of Americans to democracy and self-government. Civic participation, Tocqueville argued in *Democracy in America*, was the great educator and the great unifier.

How does it happen that in the United States, where the inhabitants have only recently immigrated to the land which they now occupy, and brought neither customs nor traditions with them there; where they met one another for the first time with no previous acquaintance; where, in short, the instinctive love of country can scarcely exist; how does it happen that every one takes as zealous an interest in the affairs of his township, his country, and the whole state as if they were his own? It is because everyone, in his sphere, takes an active part in the government of society.

Immigrants, Tocqueville said, become Americans through the exercise of the political rights and civic responsibilities bestowed on them by the Declaration of Independence and the Constitution.

Half a century later, when the next great foreign commentator on American democracy, James Bryce, wrote *The American Commonwealth*, immigration had vastly increased and diversified. Bryce's European friends expected that it would take a very long time for America to assimilate these "heterogeneous elements." What struck Bryce, on the contrary, was what had struck Tocqueville: "the amazing solvent power which American institutions, habits, and ideas exercise upon newcomers of all races . . . quickly dissolving and assimilating the foreign bodies that are poured into her mass."

A century after Tocqueville, another foreign visi-

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tor, Gunnar Myrdal of Sweden, called the cluster of ideas, institutions, and habits "the American Creed." Americans "of all national origins, regions, creeds, and colors," Myrdal wrote in 1944, hold in common "the *most explicitly expressed* system of general ideals" of any country in the West: the ideals of the essential dignity and equality of all human beings, of inalienable rights to freedom, justice, and opportunity.

The schools teach the principles of the Creed, Myrdal said; the churches preach them; the courts hand down judgments in their terms. Myrdal saw the Creed as the bond that links all Americans, including nonwhite minorities, and as the spur forever goading Americans to live up to their principles. "America," Myrdal said, "is continuously struggling for its soul."

II

The American Creed had its antecedents, and these antecedents lay primarily in a British inheritance as recast by a century and a half of colonial experience. How really new then was the "new race"? Crèvecoeur's vision implied an equal blending of European stocks, and Emerson's smelting pot generously added Cossacks, Africans, and Polynesians. In fact, the majority of the population of the 13 colonies and the weight of its culture came from Great Britain.

Having cleared most of North America of their French, Spanish, and Dutch rivals, the British were free to set the mold. The language of the new nation,

its laws, its institutions, its political ideas, its literature, its customs, its precepts, its prayers, primarily derived from Britain. Crèvecoeur himself wrote his book not in his native French but in his acquired English. The "curse of Babel," Melville said, had been revoked in America, "and the language they shall speak shall be the language of Britain."

The smelting pot thus had, unmistakably and inescapably, an Anglocentric flavor. For better or worse, the white Anglo-Saxon Protestant tradition was for two centuries—and in crucial respects still is—the dominant influence on American culture and society. This tradition provided the standard to which other immigrant nationalities were expected to conform, the matrix into which they would be assimilated.

But as the nineteenth century proceeded, non-Anglo immigration gathered speed. European peasants who may never have dared go twenty miles from their birthplaces now undertook the unimaginable adventure of a journey across perilous seas to a strange land in search of a new life. The land was indeed strange; and they could not but feel a need for reassurance and security. So at first they tended to cling to their compatriots and to the language, schools, churches they brought with them. These ethnic enclaves served as staging areas for regrouping and basic training before entry was made into the larger and riskier American life.

These immigrants came principally from western and northern Europe. The Anglos often disliked the newcomers, disdained their uncouth presence, feared

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their alien religions and folkways. Germans and Scandinavians were regarded as clannish in their fidelity to the language and customs of the old country. The German fondness for beer gardens and jolly Sundays excited puritanical disapproval. The Irish were regarded as shiftless and drunken; moreover, they were papists, and their fealty to Rome, it was said, meant they could never become loyal Americans. They were subjected to severe discrimination in employment and were despised by genteel society. W. E. B. Du Bois, the black scholar, testified that when he grew up in Great Barrington, Massachusetts, in the 1870s, “the racial angle was more clearly defined against the Irish than against me.”

As the flow of immigrants increased, so did resentment among the old-timers. By the 1850s immigrants made up half the population of New York and outnumbered native-born Americans in Chicago. Nativist organizations sprang up, like the Supreme Order of the Star-Spangled Banner and its political front, the American Party, calling for a lengthened naturalization process and curtailment of the political rights of the foreign-born. They were referred to as Know-Nothings because members of the Supreme Order, when asked about their secret oaths and rituals, would reply, “I know nothing.”

In 1856 the Know-Nothings even ran a former president, Millard Fillmore, as their presidential candidate. “Our progress in degeneracy appears to me to be pretty rapid,” observed Abraham Lincoln. “As a nation, we began by declaring that ‘*all men are created equal*.’ We now practically read it ‘all men are

created equal, *except negroes.*' When the Know-Nothings get control, it will read 'all men are created equal, except negroes, *and foreigners, and catholics.*' "

But the Know-Nothing party fell as quickly as it rose. In the century and a half since, despite recurrent xenophobic outbursts, no nativist political party has appeared to take its place. However prejudiced white Anglo-Saxons were in practice, they were ashamed to endorse nativism in principle. Equally important, an expanding economy in an underpopulated country required a steady influx of new hands. Immigration alleviated the labor shortage, and economic need overpowered moral and aesthetic repugnance.

The pre-Civil War immigrants steadily turned into Americans. "The frontier," in the words of its great historian, Frederick Jackson Turner, "promoted the formation of a composite nationality. . . . In the crucible of the frontier the immigrants were Americanized, liberated, and fused into a mixed race, English in neither nationality nor characteristics." In the crucible of the cities too assimilation proceeded apace. Even "the Irish immigrant's son," Bryce reported in 1888, "is an American citizen for all other purposes, even if he retain, which he seldom does, the hereditary Anglophobia."

III

After the Civil War came the so-called "new" immigration from southern and eastern Europe. Over 27

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million arrived in the half-century from Lee's surrender at Appomattox to America's entry into the First World War—more than the total population of the country in 1850. The new immigrants—Italians, Poles, Hungarians, Czechs, Slovaks, Russians, Jews—settled mainly in the cities, where their bizarre customs, dress, languages, and religions excited new misgivings.

Yet the old faith in the power of Bryce's “amazing solvent” to fulfill Washington's conception of Americans as “one people” held fast. However much they suffered from social prejudice, the newcomers were not barred from civic participation, and civic participation indoctrinated them in the fundamentals of the American Creed. They altered the ethnic composition of the country, but they preserved the old ambition to become Americans.

The fastidious Henry James, revisiting his native land in 1904 after many years abroad, was at first dismayed by the alien bustle of Ellis Island. But he soon understood and appreciated “the ceaseless process of the recruiting of our race, of the plenishing of our huge national *pot-au-feu*, of the introduction of fresh . . . foreign matter into our heterogeneous system.” Though he wondered at times what immigration would do to Americans “ethnically, and thereby physiognomically, linguistically, *personally*,” though he saw at times “the ‘ethnic’ apparition” sitting like a skeleton at the feast, he was more impressed by the “colossal” machinery that so efficiently converted the children of immigrants into Americans—the political and social habit, the common school, the newspaper,

all so reliably producing what James called "the 'ethnic' synthesis." He spoke with something like awe about "the cauldron of the 'American' character."

New race, one people, smelting pot, *pot-au-feu*, cauldron—the original faith received its most celebrated metaphor a few years after James's visitation. In 1908 a play by Israel Zangwill, an English writer of Russian Jewish origin, opened in Washington. *The Melting-Pot* tells the story of a young Russian Jewish composer in New York. David Quixano's artistic ambition is to write a symphony expressing the vast, harmonious interweaving of races in America, and his personal hope is to overcome racial barriers and marry Vera, a beautiful Christian girl. "America," David cries, "is God's crucible, the great Melting-Pot where all the races of Europe are melting and reforming! . . . Here you stand in your fifty groups, with your fifty languages . . . and your fifty blood hatreds. . . . A fig for your feuds and vendettas! Germans and Frenchmen, Irishmen and Englishmen, Jews and Russians—into the Crucible with you all! God is making the American."

The climactic scene takes place on the roof garden of a lower-Manhattan settlement house. In the background the Statue of Liberty gleams in the sunset. The composer, alone with Vera, gestures toward the city:

There she lies, the great Melting-Pot—listen! Can't you hear the roaring and the bubbling? Ah, what a stirring and a seething! Celt and Latin, Slav and Teuton, Greek and Syrian,—black and yellow—

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VERA (*softly nestling to him*): Jew and Gentile—

DAVID: Yes, East and West, and North and South, the palm and the pine, the pole and the equator, the crescent and the cross. . . . Here shall they all unite to build the Republic of Man and the Kingdom of God. Ah, Vera, what is the glory of Rome and Jerusalem where all nations and races come to worship and look back, compared with the glory of America, where all races and nations come to labour and look forward! . . . (*Far back, like a lonely, guiding star, twinkles over the darkening water the torch of the Statue of Liberty. From below comes up the softened sound of voices and instruments joining in ‘My Country, ‘tis of Thee.’ The curtain falls slowly.*)

When the curtain fell in Washington and the author walked onstage, President Theodore Roosevelt called from his box: “That’s a great play, Mr. Zangwill, that’s a great play.” “I’m not a Bernard Shaw man or Ibsen man, Mrs. Zangwill,” T. R. later told the playwright’s wife. “No, *this* is the stuff.” Zangwill subsequently dedicated the printed play to Roosevelt. *The Melting-Pot* played before rapt audiences across the country. Jane Addams of Hull-House in Chicago observed that Zangwill had performed “a great service to America by reminding us of the high hopes of the founders of the Republic.”

IV

Yet even as audiences cheered *The Melting-Pot*, Zangwill's metaphor raised doubts. One had only to stroll around the great cities, as Basil March did in William Dean Howell's *A Hazard of New Fortunes*, to see that the melting process was incomplete. Ethnic minorities were forming their own *quartiers* in which they lived in their own way—not quite that of the lands they had left but not that of Anglocentric America either: Little Italy, Chinatown, Yorkville, Harlem, and so on.

Nor was the WASP culture showing great inclination to ease their access into Anglo-America. And when it did, when barriers fell, when new immigrants gained acceptance through money or celebrity, there loomed the prospect of intermarriage. In having his drama turn on marriage between people of different races and religions, Zangwill, who had himself married a Christian, emphasized where the melting pot must inexorably lead: to the submergence of separate ethnic identities in the new American race.

Was such a result desirable? Many immigrants doubtless thought so. In the early twentieth century, most of their children certainly did. But soon ethnic spokesmen began to appear, moved by real concern for distinctive ethnic values and also by real if unconscious vested interest in the preservation of ethnic constituencies. Jewish reviewers castigated Zangwill: "All the worse for you and me, brother," wrote one,

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“who are to be cast into and dissolved in the crucible.” Even some of Anglo-Saxon descent deplored the obliteration of picturesque foreign strains for the sake of insipid Anglocentric conformity.

The impression grew that the melting pot was a device to impose Anglocentric images and values upon hapless immigrants—an impression reinforced by the rise of the “Americanization” movement in response to the new polyglot immigration. Americanization programs, benign in intent, sought to expedite assimilation by offering immigrants special education in language, citizenship, and American history. The outbreak of war in 1914 gave Americanization a more coercive edge. Even presidents as friendly to immigrants as Theodore Roosevelt and Woodrow Wilson worried whether in crisis “hyphenated” Americans might not be more loyal to the old country than to their adopted land.

Three days after a German submarine sank the *Lusitania*, Wilson addressed an audience of recently naturalized citizens in Philadelphia. “You cannot become thorough Americans,” he told them, “if you think of yourselves in groups. America does not consist of groups. A man who thinks of himself as belonging to a particular national group in America has not yet become an American.”

“We can have no ‘fifty-fifty’ allegiance in this country,” Theodore Roosevelt said two years later. “Either a man is an American and nothing else, or he is not an American at all.” He condemned Americans who saw the world from the standpoint of another nation. “We Americans are children of the crucible,”

T. R. said. "The crucible does not do its work unless it turns out those cast into it in one national mould."

V

"One national mould"? Not everyone agreed. In 1915 Horace Kallen, a Jewish-American philosopher, wrote an essay for *The Nation* entitled "Democracy Versus the Melting-Pot." The melting pot, Kallen argued, was valid neither as a fact nor as an ideal. What impressed him was, on the contrary, the persistence of ethnic groups and their distinctive traditions. Unlike freely chosen affiliations, Kallen said, the ethnic bond was both involuntary and immutable. "Men may change their clothes, their politics, their wives, their religions, their philosophies, to a greater or lesser extent: they cannot change their grandfathers. Jews or Poles or Anglo-Saxons, in order to cease being Jews or Poles or Anglo-Saxons, would have to cease to be. . . ."

Ethnic diversity, Kallen observed, enriches American civilization. He saw the nation not as one people, except in a political and administrative sense, but rather "as a federation or commonwealth of national cultures . . . a democracy of nationalities, cooperating voluntarily and autonomously through common institutions . . . a multiplicity in a unity, an orchestration of mankind." This conception he came to call "cultural pluralism."

Kallen was unclear on the question of how to encourage ethnic separatism without weakening the

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original ideal of a single society. One critic warned that cultural pluralism would "result in the Balkanization of these United States." But Kallen made his attack on Anglo-centered assimilation at a time when critics of the melting pot could reasonably assume the solidity of the overarching framework. Because he considered political unity a given, he put his emphasis on the protection of cultural diversity.

The gospel of cultural pluralism was at first largely confined to academics, intellectuals, and artists. The postwar years saw much popular disenchantment with Europe, a Red Scare directed largely against aliens, the rise of the anti-Catholic Ku Klux Klan, and a campaign, realized in the Immigration Act of 1924, to freeze the ethnic composition of the American people. The new law established quotas on the basis of the national origins of the population in 1890, thereby drastically reducing the flow from southern and eastern Europe.

The xenophobic nationalism of the 1920s was followed in the 1930s by crises that, on some levels divisive, nevertheless strengthened the feeling that all Americans were in the same boat and might as well pull together. The Great Depression and the Second World War showed the desperate necessity of national cohesion within the frame of shared national ideals. "The principle on which this country was founded and by which it has always been governed," Franklin D. Roosevelt said in 1943, "is that Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race and ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy."

VI

Gunnar Myrdal in 1944 showed no hesitation in declaring the American Creed the common possession of all Americans, even as his great book *An American Dilemma* provided a magistral analysis of America's most conspicuous failure to live up to the Creed: the treatment by white Americans of black America.

Noble ideals had been pronounced as if for all Americans, yet in practice they applied only to white people. Most interpretations of the national identity from Crèvecoeur on were for whites only. Even Horace Kallen, the champion of cultural pluralism, made no provision in his "democracy of nationalities" for black or red or brown or yellow Americans.

Tocqueville was an exception in factoring persons of color into the American equation. With his usual prescience, he identified racism as the irremediable flaw in American democracy. This "most grasping nation on the globe" had doomed the red man to extinction; and the presence of a black population was "the most formidable of all the ills that threaten the future of the Union." The more optimistic Emerson and Zangwill had thrown nonwhite nationalities into their smelting or melting pots, but Tocqueville saw racist exclusion as deeply ingrained in the national character.

History supported this judgment. White settlers had systematically pushed the American Indians back, killed their braves, seized their lands, and se-

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questered their tribes. They had brought Africans to America to work their plantations and Chinese to build their railroads. They had enunciated glittering generalities of freedom and withheld them from people of color. Their Constitution protected slavery, and their laws made distinctions on the basis of race. Though they eventually emancipated the slaves, they conspired in the reduction of the freedmen to third-class citizenship. Their Chinese Exclusion acts culminated in the total prohibition of Asian immigration in the Immigration Act of 1924. It occurred to damned few white Americans in these years that Americans of color were also entitled to the rights and liberties promised by the Constitution.

Yet what Bryce had called "the amazing solvent power" of American institutions and ideas retained its force, even among those most cruelly oppressed and excluded. Myrdal's polls of Afro-America showed the "determination" of blacks "to hold to the American Creed." Ralph Bunche, one of Myrdal's collaborators, observed that every man in the street—black, red, and yellow as well as white—regarded America as the "land of the free" and the "cradle of liberty." The American Creed, Myrdal surmised, meant even more to blacks than to whites, since it was the great means of pleading their unfulfilled rights. Blacks, new immigrants, Jews, and other disadvantaged groups, Myrdal said, "could not possibly have invented a system of political ideals which better corresponded to their interests."

The Second World War gave the Creed new bite. Hitler's racism forced Americans to look hard at their