A DISCUSSION

IS AFFIRMATIVE ACTION CONSTITUTIONAL?

William B. Allen, Drew S. Days III, Benjamin L. Hooks, and William Bradford Reynolds

JOHN CHARLES DALY, moderator of the forum: Few issues today so divide our nation as affirmative action, especially the numerical goals that are sometimes used to increase minority group opportunities in employment or college admissions. One side contends that such policies are necessary to ensure an equality of results, in order to achieve equality of opportunity. The other side argues that such preferences are unconstitutional reverse discrimination.

These remarks are adapted and abridged from a symposium sponsored by AEI's Constitution Project. A fuller text will appear in a forthcoming AEI booklet. It was held in Washington, D.C., on May 21, 1985, before the Senate Judiciary Committee blocked Mr. Reynolds's nomination for the post of associate attorney general.

Can we achieve equality of opportunity in America, without race-, sex-, or ethnic-conscious remedies for discrimination? Is it just and constitutional to deny a qualified person an equal chance for a job by giving someone else a preference, in order to redress past injustices or to eliminate present discrimination? Is there such a thing as group rights under the Constitution, or does that document require that individual rights predominate in every instance?

Let me start with some background. The constitutional provision that is chiefly relied upon to define equality and civil rights in America is the Fourteenth Amendment, which reads in part, "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment is one of the three so-called Reconstruction amendments passed after the Civil War, along with the Thirteenth Amendment, which abolished slavery, and the Fifteenth, which secured the right to vote. It was not until 1954 that the Supreme Court ended legal segregation of public school children by race, in the case of *Brown* v. *Board of Education.* Then, through the 1960s, there ensued a long train of legislation to secure civil rights.

Let me begin by asking each of you the same question: Do affirmative action policies that involve racial, sex, or ethnic classifications conform to the letter and the spirit of the Constitution? Mr. Reynolds?

WILLIAM BRADFORD REYNOLDS: The debates about the Fourteenth Amendment in the thirty-ninth and succeeding Congresses, and also the debates that surrounded the ratifi-

cation of that amendment by the state legislatures, make it clear beyond a doubt that the intent of the amendment was to command that government decisions be made on a race-neutral basis, that the amendment was meant to guarantee equal opportunity, not equal results, and that it would not permit any preferences by reason of race. That means that any action today that grants a preference by reason of race, whether called a quota or a goal or some other kind of affirmative action, is contrary to both the letter and the spirit of that amendment.

BENJAMIN L. HOOKS: Absolutely wrong. Article I, Section 2, Clause 3 of the Constitution itself starts off with a quota: black people were counted as three-fifths of white people for the purpose of determining how many members each state could send to the House of Representatives.

There is no question in the mind of any competent scholar that the Thirteenth, Fourteenth, and Fifteenth Amendments were written for one purpose, and that was to eliminate the practice of slavery and the possible perpetuation of segregation. The Thirteenth Amendment abolished slavery. White people did not need that. The Fifteenth Amendment guaranteed the right to vote regardless of color. White people did not need that. And the Fourteenth Amendment provided for equal protection under the law, and that amendment would not have been passed if not for the abolition of slavery.

In addition, the Nineteenth Amendment guaranteed women the right to vote. So the Constitution itself recognizes that there is color in this world, and there are sexes, and that from time to time you have to utilize those categories in order to achieve the Constitution's goals.

In short, the so-called Reconstruction amendments were written particularly and specifically to deal with questions of color. It seems to me that to interpret them otherwise is vain and foolhardy.

WILLIAM B. ALLEN: I would say at the outset that I think it is misleading to call affirmative action reverse discrimination, as we often do. There is no such thing, any more than the opposite of injustice, for example, is reverse injustice. Affirmative action *is* discrimination pure and simple and therefore incompatible with our Constitution.

James Madison thought that the most important test of American freedom would always be the system's ability to guarantee the rights of minorities without exceptional provisions for their protection. Whoever calls for affirmative action, it seems to me, declares at the same time that that constitutional design has failed and that we can no longer live with our Constitution.

DREW S. DAYS III: I want to try to bridge the gap between Brad Reynolds and Ben Hooks. Ben Hooks is, of course, correct that the Reconstruction amendments were ratified with the principal objective of alleviating discrimination against blacks. But as Brad Reynolds has indicated, the long-term objective was to create a society in which race and color and other characteristics would be irrelevant. The problem we face today is that we have not yet achieved either goal. We have not remedied discrimination. The consideration of race is something that has to take place in order to deal with that problem.

The Congress that ratified the Reconstruction amendments engaged in affirmative action. The Freedmen's Bureaus were explicitly designed to benefit blacks and used racial classifications. So from an historical standpoint, it is simply incorrect to say that those amendments were designed to frustrate efforts to remedy discrimination against people who had been the victims of injustice.

Reopening Consent Decrees

MODERATOR: To come down to the basic substance of much of today's debate, the Justice Department is trying to modify existing court orders in some fifty localities so as to limit affirmative action provisions requiring city governments to hire or promote minorities in specified ratios. The court orders had resulted from settlements of earlier lawsuits filed by the Justice Department itself during earlier administrations. In one instance, the city was to hire one black or Hispanic firefighter for every white firefighter hired; in another, it was required to hire police officers at the rate of 35 percent white males in each entering class, 34 percent minority males, and 31 percent females, and so forth. Mr. Reynolds, would you clarify why Justice seeks to change what earlier it sought?

REYNOLDS: Our recent requests that courts modify consent decrees to eliminate quota provisions flow from a 1984 Supreme Court decision that was based on statutory rather than constitutional interpretation. The specific statute is Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination on the basis of race, sex, religion, and ethnic or national origin.

In that 1984 decision, in *Memphis Fire Department* v. *Stotts* and another related lawsuit, the Supreme Court ruled that the statute forbids the imposition of quotas as an element of court-ordered relief. The Court said that remedies for discrimination must benefit the victims of that discrimination, and must seek to enjoin or stop the discriminatory conduct. So outreach and recruitment programs, for example, are permissible forms of affirmative action. But a court cannot use discrimination to fight discrimination; it cannot order a quota in order to try to undo the discrimination that has been charged. After the Supreme Court has spoken, the obligation of the Department of Justice is to return to the courts and ask for a review of existing decrees that contain quotas in order to bring them into line with the decision.

HOOKS: I wish it were that simple. On April 28, 1985, the U.S. Court of Appeals for the Eleventh Circuit in the case of *Turner* v. *Orr* reviewed the same *Stotts* decision and came up with exactly the opposite conclusion from Mr. Reynolds. The senior presiding judge in that case was one of the great and eminent judges of this country, Judge E. P. Tuttle.

DAYS: In fact, since the *Stotts* decision every court that has consid-

About the Participants

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DREW S. DAYS III is associate professor of law at the Yale Law School. From 1977 to 1980 he was assistant attorney general in charge of the Civil Rights Division, and before that he was first assistant counsel to the NAACP Legal Defense and Educational Fund.

JOHN CHARLES DALY, former ABC News Chief, served as moderator of the discussion.

AEI'S BICENTENNIAL PROJECT, A Decade of Study of the Constitution (Robert A. Goldwin, director), sponsored the forum. The project recently held a conference on "The Constitution, Slavery, and Its Aftermath," the proceedings of which are due to be published next year.

ered the Justice Department's argument has rejected it.

HOOKS: Most scholars I have talked with read the *Stotts* case narrowly. That is, where the original consent decree did not deal with the issue of seniority, the trial judge was wrong to modify a voluntary consent decree by placing affirmative action above seniority. Justices Sandra O'Connor and John Paul Stevens—who concurred, to make the majority of six—pointed out in their opinion that had the underlying decree contained a provision dealing with that seniority, the trial judge could have done what he did. And certainly the *Turner* v. *Orr* decision, which was handed down less than a month ago and is the law now in the Eleventh Circuit, unless it is overruled, comes to a position diametrically opposed to Mr. Reynolds's position.

As the assistant attorney general, Mr. Reynolds has the same right as any other lawyer to interpret that decision. There are about six or seven hundred thousand of us lawyers to draw our own interpretations. But it is wrong to imagine that this is what the Supreme Court said, because it did not.

Constitutional Principles

ALLEN: I think there is something highly unsatisfactory in our dancing attendance, as a panel or as a people, on eclectic court decisions in various jurisdictions in an attempt to arrive at clarity about fundamental principles. It is true that we need to inquire into court decisions in order to know what the present state of jurisprudence is. But the ultimate question is: does the Constitution tolerate principles such as affirmative action?

We need to have sufficient courage to say that the courts are wrong and that, in fact, they are not the last judges of this question. We have had court decisions that were radically flawed, recently as well as long ago. One was the *Dred Scott* decision in 1857, which in a way produced the very problem that we struggle with now, through its attempt to reinterpret the Declaration of Independence and the U.S. Constitution.

It is in the context of struggling with the *Dred Scott* decision's reinterpretation of citizenship that the civil rights amendments after the Civil War came face to face with the question of race. But they did so with this objective: to restore the status quo ante, prior to 1857, to get back on the solid ground of the Constitution and the Declaration.

HOOKS: Dr. Allen, the civil rights amendments were not to restore the Constitution before 1857. The first article of the Constitution counted black people as three-fifths of a person. That clause permitted and perpetuated slavery in this nation for a long, long time. The civil rights amendments did not try to reestablish this system. The Thirteenth Amendment was specifically designed to abolish slavery.

You quoted only a part of the Fourteenth Amendment, the part that deals with equal protection and due process. I agree with that, but there are some other very specific things in that amendment. It dealt with people who had taken oaths to other governments, people who had been in a state of insurrection. The amendment specified how they could qualify to hold office. It is obvious why that constitutional amendment was proposed and ratified. And the Fifteenth Amendment specifically dealt with the right to vote. It said, at the end, that Congress may pass appropriate legislation to effectuate this attempt. It was almost a hundred years before Congress got around to passing the Voting Rights Act, although the constitutional amendment provided for it.

Franklin Roosevelt made a profound statement on March 4, 1933, when he said that the Constitution has survived because it is an elastic document. The Constitution is very short. And the thing that makes it viable is the elasticity in its interpretation. One has only to look at the *Dred Scott* decision and the *Plessy* v. *Ferguson* decision of 1897 and the *Brown* v. *Board of Education* decision of 1954 to understand that the Constitution is not a static but an evolving document designed to deal with issues as they arise. The worst thing we can do to the

Constitution is to try to pretend that it is dead and has no elasticity to it.

Interpreting the Stotts Mandate

DAYS: What I find problematic about the current Justice Department's position is not that it takes a very ambitious and broad view of what the Supreme Court decided, but that it takes a case that is controversial, over which there can be some debate about its holding and its import, and uses that to seek to overturn consent decrees and voluntary agreements that have been made in scores of communities around the country. I should add that the Supreme Court did not touch the underlying consent decree in *Stotts*, which included a 50 percent hiring goal and a 20 percent promotion goal.

It seems to me that a public official has a responsibility to act only when the law is clear and the direction is apparent, not to extrapolate from Supreme Court decisions and use that to overturn approaches that have been taken by prior administrations of both parties.

REYNOLDS: When the Supreme Court speaks, especially in this area, it is probably fair to say that its decisions are always received with some controversy and lawyers will read the decisions in different ways. It is well, though, that the Department of Justice and others do not shy away from controversial cases in order to go after discrimination. *Brown* v. *Board of Education*, for that matter, was one of the most controversial decisions handed down by the Court and hardly a model of clarity when it was announced. In the face of considerable controversy, it was the Justice Department that went forward into states and cities and sought to overturn discriminatory schooling on the strength of *Brown*. Just as the Supreme Court has never handed down a decision in the civil rights area that I know of that has not been controversial, the Civil Rights Division has never failed to generate controversy when it has carried its fight against discrimination to new places.

The present-day Supreme Court has decided that quotas and remedial techniques that rely on racial preferences to advantage people who are not victims are discriminatory and unlawful. It is controversial, but it is our responsibility, once the Court has made its pronouncement, to proceed back to court to seek to have what we think are discriminatory features of existing orders removed in response to the Court's command.

DAYS: But your reading of the Supreme Court's commands, as you call them, is very selective. The Supreme Court decided in the *Bakke* case that, under some circumstances, race could be used in admissions decisions. It decided in the *Weber* case that voluntary race-conscious programs could be used for the purpose of training blacks and involving them in opportunities from which they have been excluded in the past. And the *Fullilove* decision upheld a statute enacted by the United States Congress that set aside 10 percent for minority contractors in public works programs. I do not know how one can adopt the *Stotts* decision, which as Ben Hooks has indicated deals with a matter of statutory interpretation, as the linchpin for a program of overturning decisions made by prior administrations, ignoring *Bakke* and *Weber* and *Fullilove*.

MODERATOR: Let me add a word to describe the cases that you are discussing. The *Bakke* case is *University of California Regents* v. *Bakke*, 1978. The Court split four to four over whether the University of California at Davis medical school's set-aside program for minority admissions was constitutional. Justice Powell cast the deciding vote. He held that, by making race alone the criterion for admission, Davis acted illegally, but added that if race had been used along with other factors in deciding admissions, the program would have been constitutional.

The *Weber* case is *United Steelworkers* v. *Weber*, 1979. The Court held that the affirmative action plan worked out between Kaiser Aluminum and its principal employee union, under which half the openings for certain training programs would be reserved for racial minorities, did not violate the prohibition on racial discrimination of the 1964 Civil Rights Act.

In *Fullilove* v. *Klutznick*, 1980, the Public Works Employment Act of 1977 provided that a certain share of federal construction business be set aside for minority contractors. The Court held that Congress's use of a racial classification was not unconstitutional in that instance. The opinion held that benevolent racial discrimination by Congress was constitutional so long as it was carefully limited and tailored to remedy some past discrimination.

Do you find anything wrong with those encapsulations?

DAYS: Those are pretty good.

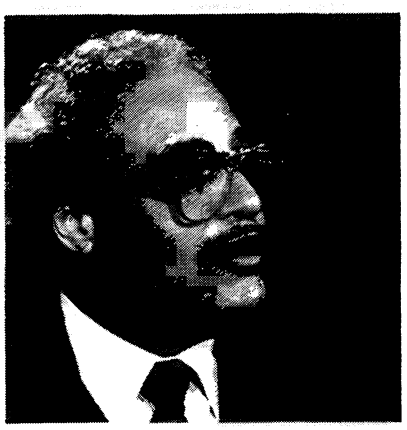
ALLEN: I would add that those cases, in a sense, only repeat the principle of "separate but equal" set forth almost a hundred years ago in *Plessy* v. *Ferguson* in 1896.

MODERATOR: Please encapsulate that case.

ALLEN: The issue in that case was segregation in railroad cars. The Supreme Court declined to read the Fourteenth Amendment as requiring that blacks have access to all public facilities and indeed, by implication, private facilities engaged in interstate commerce. It said all the Constitution really required was, in the phrase that became famous, separate but equal facilities. The Court reasoned that the mores, the habits, the customs of the people would not sustain government-imposed integration.

Before long the separate but equal language came to be applied to some very important public education cases. In the District of Columbia and elsewhere about this time, there were numerous attempts to integrate schools. By and large those attempts foundered upon the rock of the *Plessy* doctrine, separate but equal.

From *Plessy* to *Brown* we lived on the principle of separate but equal. The *Plessy* decision had been based on a finding of fact, namely, that you could make separate facilities equal. The *Brown* court looked at the facts and said separate is not



. . . in order to reach a colorblind society we may have to take into consideration color and sex to eliminate inequities, just as we took into consideration color and sex to build those inequities.

HOOKS

I just want to emphasize that while it is true that the objective in terms of contemporary policy is a colorblind society, there is a more important objective, and that is a free society.

ALLEN

equal. But it stopped there. It did not go on to say race consciousness in government is itself unconstitutional. So in principle, if there were some technology that could generate truly equal conditions under segregation, the courts might still give segregation their approval.

The application may have changed, but the principle is the same erroneous one—that the government can have recourse to race—that was established fully in *Plessy* and other cases of that era. It was an erroneous principle that we have had to contend against ever since.

In the Lincoln-Douglas debates, Abraham Lincoln says that people who try to read the black man out of the Declaration of Independence are blowing out the moral lights among us. When I speak of returning to the status quo ante in understanding the Constitution, I speak of returning to those moral lights that Lincoln tried to resist having blown out. To deny that those moral lights exist is to deny that there is any ground on which to stand to argue in behalf of the rights of blacks or anyone else.

REYNOLDS: Without getting into too legalistic a discussion, it also ought to be said that in *Fullilove* the Court reaffirmed that where there are victims of discrimination, programs can certainly be put in place that are geared to benefit those victims. The program that the Court reviewed in *Fullilove* was one that Congress had fashioned that went directly to identifiable victims of the discrimination who could prove that they were victims, not unlike the Freedmen's Bureau that Professor Days cited earlier.

The *Weber* case is not a constitutional but a statutory case. The Court's opinion in that case has very confined limits and really does not suggest any different view on the Constitution than the one that I took earlier.

In *Bakke*, Justice Powell said that one could take race into account in certain circumstances in the educational arena, but it is important to note that as he explained it the decision rested essentially on the fact that in the educational situation there was a First Amendment interest that was competing with the Fourteenth Amendment interest, and when two constitutional rights come head to head something has to give. In those circumstances, where there is balancing to be done, Justice Powell said you could give some recognition to race but certainly not as much as the University of California did.

All these cases, taken together, still leave the very firm conclusion that the Fourteenth Amendment and the Constitution as a whole is what the NAACP said it was in its brief in *Brown* v. *Board of Education*, a document that is colorblind, which at that time was the NAACP's "dedicated belief" (and I quote) as stated in its brief. I know no change in the Constitution or to the Fourteenth Amendment since the NAACP filed that brief that would explain why its dedicated belief should no longer be the same as it was then.

HOOKS: With regard to Mr. Reynolds's eloquent argument, let me make an analogy: no lie will stand long unless it has a little truth mixed up in it. That is the concrete that keeps it together.

He can cite what we said about a colorblind society, and he can make of it what he will, but I thought Justice Blackmun dealt most appropriately with the whole question of colorblindness in the *Bakke* case when he pointed out that in order to reach a colorblind society we may have to take into consideration color and sex to eliminate inequities just as we took into consideration color and sex to build these inequities. This problem did not come about through colorblindness; it came about through discrimination, through prejudice, through segregation, in a society with signs that said "Whites Only," with absolute white-only police departments all over this country, north and south, where blacks could not advance beyond the position of sergeant.

These are facts that have been proven in court time and time again. In a long list of cases all over this country, primarily white judges of varied backgrounds, conservative and liberal, came to similar conclusions in different places. It is almost redundant and silly to have to go over this again. If anybody wants

to say the world is flat, go ahead. But those things existed. They are facts, and they are the sort of things the civil rights acts were designed to eradicate.

Mr. Reynolds is right when he says the laws were intended to help the victims of discrimination, but let me do with his statement what he did with mine. I maintain, whether they know it or not, and most of us do know it, that all black people are victims of discrimination. We were all intended to be helped by those laws. The difference is that he only wants to help that one black man who was crazy enough to go to the Memphis fire department when it was white only and ask for a job and get whipped out of there or sent to the insane asylum.

To me, it just is not right to say the only way you can be helped, boy, is to prove you had enough sense to know that one day we were going to help you and you went down there and made a written application on April 8, 1964. If you bring that here, then we will help you. Otherwise, sorry.

ALLEN: I just want to emphasize that while it is true that the objective in terms of contemporary policy is a colorblind society, there is a more important objective, and that is a free society. That is to say, one has to get to a colorblind future in a way that preserves the freedom with which this country began.

To argue that the Constitution established and perpetuated slavery is a fundamental mistake. When one chips away at it, one chips away at the structures through the years that gave the nation its only opportunity to abolish slavery.

If we are going to talk about the contemporary implications, I would like us to broaden the discussion to recognize that we are not talking merely about past victims who we may or may not be able to pinpoint. You cannot talk about victims without establishing who is guilty of the crime. And the problem with affirmative action is that there are a great many grandsons and great-grandsons whom you simply cannot call guilty of any crime, but who are nonetheless suffering at the hands of an unjust law. I would like to see someone justify the actual injustice done to the grandson of a Czech immigrant, who arrived in this country in 1919, when on the grounds of race, that grandson is treated as if he were guilty of some crime.

HOOKS: That is the most ridiculous statement Professor Allen has made today.

Which Remedies Work?

DAYS: I want to comment on a point that William Allen made about *Plessy* v. *Ferguson*. I think it is important to distinguish *Plessy* and its mode of analysis from what has been happening since *Brown*. And the distinction is that *Plessy* v. *Ferguson* was based on a lie. It was based on a false characterization of the society that existed at that time.

The *Plessy* Court said that racially segregated railroad cars provided a type of separation that both races wished, and that if some blacks felt it was a sign of inferiority, that was just a type of paranoia that they had. That was a lie. The important thing about *Brown* v. *Board of Education* and the other cases I mentioned is that they comport with reality—the reality of continued denial of opportunity to blacks, to other racial and ethnic minorities, to women. They are trying to give life to the constitutional document that, as Ben Hooks told us, is not written in stone, is not static.

The objective is therefore a very pragmatic one: how do we deal with the continuing disadvantages that groups suffer in this society that can be traced to slavery and a long period of institutional discrimination? Professor Allen talks about moral lights. I want to know what moral light he has in mind to deal with that practical problem that we face.

ALLEN: I think Professor Days is right that *Plessy* is false on the facts. What it is true to is the reigning opinion of the society of the time. The Court asked itself, how do people currently think about these things? What are their opinions?

It seems to me that a public official has a responsibility to act only when the law is clear and the direction is apparent, not to extrapolate from Supreme Court decisions....
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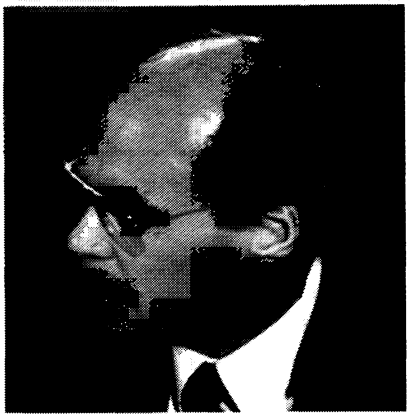

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REYNOLDS

Brown does the same thing, except that it uses sociological analyses and similar ways of collecting common opinion that were more or less a reflection of the time. I think both courts were accurate in judging the opinions of the time. But common opinion is not the same thing as true principle. The errors in *Plessy* arose not because the court misjudged the common opinion but because courts should strive to find a basis of principle on which to found and guide common opinion.

On Professor Days's second question—what can we do to achieve our common objective of overcoming segregation?—there are political processes available to us, ready to hand. I will mention just one.

There is a great paradox in what affirmative action tries to do. Mostly it asks the government to intervene in markets—primarily the labor market, though there are others too—in order to produce a certain result. But much of that effort is simply an effort to undo what the government has already done through the National Industrial Recovery Act and the National Labor Relations Act when it, in effect, gave to unions with government imprimatur the power to discriminate and restrict entry into the labor market.

During all the years since those labor laws were passed, those who were harmed by that policy have had an opportunity to call it what it was—to point out that labor unions, in complicity with government, had regulated the free market in labor out of existence with respect to black folks. But instead they have played along with the labor movement and sustained the edifice of discrimination by forming an explicit alliance between civil rights groups and labor for the purpose of preserving the political preeminence of the Democratic party. Civil rights leaders, I mean, have to that extent sold out their professed constituency and have played a primary role, not as defenders of the weak, but as yeomen for the Democratic party.

REYNOLDS: Let me add two things. First, I agree with Drew Days that *Plessy* v. *Ferguson* was grounded on a lie, and I think that Justice Harlan's dissent eloquently exposed the lie as the majority's reading of the Constitution as being other than colorblind. That dissent became the majority view in *Brown* and subsequent cases that established that we have a colorblind document.

I agree with Dr. Hooks that discrimination continues in this country and that we cannot rest until we have dealt to the fullest with the problem of the effects of past discrimination. I do not agree with the idea that if we disengage ourselves from quota remedies we are somehow leaving untouched or unattended the problem of discrimination, that there is no other way to deal with or remedy that discrimination.

There are ways to do it that do not buy into the same kind of evil that we condemn when we condemn the evil of discrimination. For the past four years we have used affirmative action in the form of an outreach and recruitment program that goes into communities to find minorities and women who are qualified and interested in jobs and brings them into the applicant pool. Employers then select people for hiring or promotion from that expanded pool on a nondiscriminatory basis. If you want to look at results, that kind of race-neutral regime has brought more minorities and women into the public work force where we have enforcement responsibility, more than one would have expected had the remedy been tied to some kind of an artificial quota.

So it can be done after *Stotts,* and especially in this day and age when these jurisdictions are all telling us: "We want to hire increased numbers of minorities and women. We're out looking for them. We're trying to do right by everybody in terms of equal opportunities."

That is the climate today. We do not have a climate in which one jurisdiction after another is digging in its heels against the effort to bring minorities and women into the workforce. With the current climate, it seems to me that we can expect even better results in the future.

HOOKS: Let me bring up two cases that arose in Alabama, one in 1970, the other in 1972. The NAACP filed *NAACP* v. *Allen* because in 1972, after thirty-seven years of existence, the Alabama highway patrol had never hired a single black patrolman. Not one. We had exhausted all of our administrative remedies. Finally we went to court seeking to have black patrolmen added to the Alabama highway patrol.

In that protracted litigation, the highway patrol's answer was always just what Mr. Reynolds talked about: "We've recruited. We've sought. We have advertised in the *Black Dispatch.* We've asked the NAACP and the Urban League and the SCLC to give us names. We've done all we knew how to do and nothing has worked." And finally Judge Frank Johnson, having been exasperated by their failure to hire a single black, directed that henceforth they would hire one black applicant for every white applicant.

Now, around the time the *Allen* suit was filed, a suit was filed against all the departments of the Alabama state government for failure to hire black applicants. But in that case, *U.S.* v. *Frazer,* the judge did not require any goals to be met. The state officials were told to recruit, and I suspect one could fill a room with all the things they planned to do to recruit. A strange thing happened: by the time a few months or years had passed, the Alabama highway patrol had hired more black people than all the other seventy-five departments of the Alabama government put together.

Promises of recruitment did not work then, and I would suggest very respectfully to Attorney General Reynolds that they will not work today. I have listened to Mayor Hudnut of Indianapolis, Mayor Washington of Chicago, Mayor Bradley of Los Angeles, Mayor Schaefer of Baltimore, and they have all said the same thing. The plans they have now are producing results in a way that we think is satisfactory. I think Mayor Hudnut used that old expression—if it ain't broke, don't fix it.

This country is in favor of goals and timetables. We do not tell Detroit, "We hope that by January 1, 1986, your cars will get thirty-two miles to the gallon. Now, we are not going to do anything to you if you

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do not do it but try, experiment." No, Congress told them, "By January 1, 1986, your cars will get that mileage, and if they do not, you are going to be fined several million dollars a year." When Congress enacted the 55-mile-per-hour limit under Gerald Ford, it did not say, "You are a great patriotic people. Study the impact theory. See how many people get killed." No, they said on a certain day if you go over 55, you are subject to arrest. I maintain that a law has to have some penalties, some deterrent value to work.

If Mr. Reynolds firmly, sincerely, believes in what he is saying I can give him a number of jurisdictions that are not doing anything, for him to try working with. Virgin, clean territory. Work with them and see if they will not do better, and then in ten years let us go back and see what he has accomplished voluntarily and what we have accomplished with goals, and I think you will agree with me.

ALLEN: No one is suggesting that there is no place for an active and energetic Justice Department in the civil rights area. I can think of many ways in which that activity can continue and expand consistent with the Constitution. The real question embedded in your Alabama examples is not whether a plan works, but whether it is right.

I could name several other remedies that would work very well in creating complete racial proportionality through the whole society. The question is, may we do those things? Ought we to do them? And the point is, of course, that we ought not to do them because they are inconsistent with the Constitution.

HOOKS: Professor Allen keeps raising this question of right and wrong, and he becomes so moral and takes such high ground—

ALLEN: Thank you.

HOOKS:—and it makes me look like a knave or a fool.

ALLEN: No. I do not think you look like a fool.

HOOKS: With all due respect, his objections do not have any practicality to them. Who is the judge of right? I am a Christian and so far as I am concerned, to judge from my Judeo-Christian heritage only God can decide right, and I do not ascribe that power to any of us here.

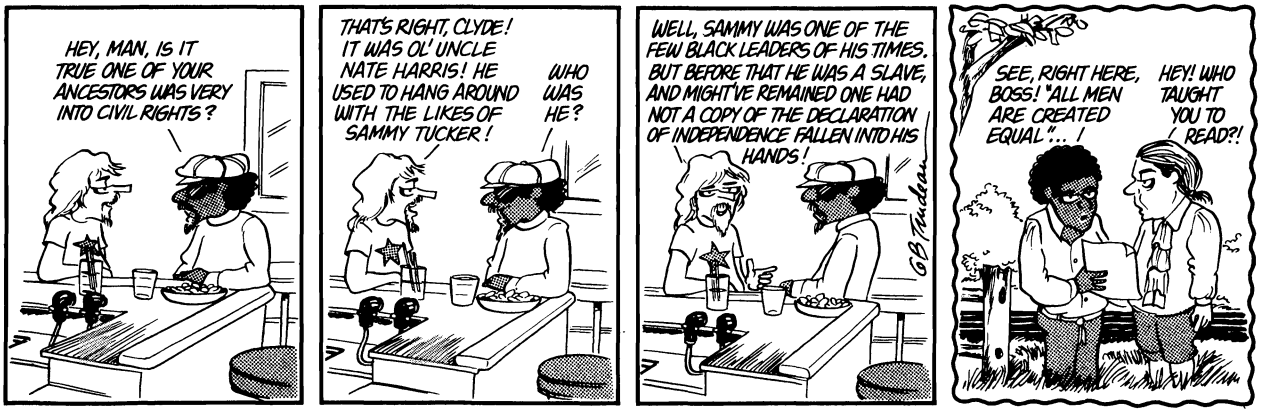
ALLEN: No. I think we, the people, can decide right and wrong, provided our opportunity to do so is not infringed by the elevation of a favored few, exercising the power of the state, on the theory that we are not fit to govern ourselves.

HOOKS: But while my heritage on rightness and wrongness still is applicable, as a lawyer I have to deal with the practical results of what achieves results. I do not know on what constitutional authority Professor Allen decides what is right and wrong, as he has been doing.

You hear it said that we need to use race to get beyond racism, but we do not use alcohol to get beyond alcoholism.
REYNOLDS

DAYS: I would like to put in a word about goals and timetables and quotas. We talk about these remedies as if they were used in every instance, but I think we all agree that the explicit use of race or sex as criteria is not appropriate in every circumstance. There is a range of remedies that one can use to respond to quite different situations.

As Dr. Hooks said, goals and timetables and numerical measure-



... goals and timetables and numerical measurements were instituted because year after year passed with good faith efforts and nothing changed.
DAYS

ments were instituted because year after year passed with good-faith efforts and nothing changed. It was more out of frustration than anything else that these techniques were developed. We hear the term "equality of result." I do not think that is a correct way to characterize the approaches that have been used. They are regarded as interim measures to bring an institution to the point where it is capable of acting in a colorblind and nondiscriminatory fashion.

If an employer's work force is all white or all male, the likelihood is, given the years of exclusion, that the institution will continue to function in exclusionary ways. The way to open up that institution, to give the sense that it really is committed to equality of opportunity, is to force some change in not the theory but the practice of that institution. Brad Reynolds can cite his studies and I can cite mine, but the truth is that goals and timetables have worked.

Finally, the consent decrees that have become the subject of so much controversy recently were the result of a conviction, which I think is borne out in the legislative background of the civil rights laws, that what Congress had in mind was not protracted litigation, not contention, not conflict, but attempts to solve these very difficult problems voluntarily. When we in the Carter administration developed enough evidence to win a case of employment discrimination against an all-white police department or an all-white fire department, we went to those jurisdictions and said, "Would you rather work this out amicably or would you like to fight? Because if you want to fight, we think we are going to beat you, and perhaps the results will be more difficult for you than resolving this voluntarily."

Looking at what has happened in recent months, I have begun to think that maybe my predecessors and I were remiss in this regard. What we should have done was nail them to the wall and establish who all the victims of discrimination were in those police and fire departments so that when this administration came along they would be actual names instead of just anonymous people buried in the graveyards of America.

HOOKS: When you do a consent decree, you obviously shortcut some things. You say: let's not go through all the gory details, let's just admit the past discrimination and get it over with. So now we are stuck with incomplete records which allow this present Justice Department to maintain that there were no victims.

REYNOLDS: I think it is a mistake to say that something has worked by looking at some numerical balance. It works if we eliminate discrimination, and this is what we want to do in this country.

If you adopt a remedy that discriminates, and call it an interim measure, it is hard for me to see when the measure is suddenly supposed to cease. When do we disengage? The remedy does not move us in any direction that I can see that is positively going to eliminate discriminaton. If the government has balanced a work force, and we remove whatever official hand has accomplished that and then things start sliding out of equipoise, what do we do then? We may say such a remedy is only an interim measure, but it is reenforcing over and over and over again the very evil we want to get behind us. You hear it said that we need to use race to get beyond racism, but we do not use alcohol to get beyond alcoholism.

Defining Goals and Quotas

MODERATOR: Now it's time for the first question from the audience.

HYMAN BOOKBINDER, American Jewish Committee: All of you seem to be using the words "affirmative action," "goals," and "quotas" interchangeably when they really mean different things. I am terribly disturbed that in recent months the Reagan administration has sought to outlaw not only quotas that may conceivably lead to what is called reverse discrimination but also goals, which are different from quotas, which contain no dangers, and which have worked in government employment and other areas. Is it not true that we can have a system of goals and timetables without the obnoxious features of quotas?

REYNOLDS: I agree that the debate on this whole subject has suffered because the terms have not been well defined. The traditional meaning of "affirmative action" was solely in reference to outreach and recruitment programs of a race-neutral nature that were put in place in the early 1960s. That is the way I use the phrase "affirmative action."

Quotas are rigid or inflexible numbers defined by race or sex or national origin that different employers must reach. They run afoul of constitutional principles.

The term "goals" has been used variously by people on both sides of the debate. In my view, goals are permissible so long as they do not include or condone, in any way, a preference whose effect is to afford a benefit to any individual because of immutable characteristics, no matter how small that benefit might be. It matters not what label one attaches; such goals are really no different from quotas and run equally afoul of the Constitution and of Title VII. On the other hand,

it seems to me that one can utilize a goal in a sense that will not tolerate that kind of preference.

HOOKS: We have always known what a quota was. It was an absolute ceiling above which one could not rise, such as three seats for some racial group in the medical school, five positions on the police department, and no more. The NAACP historically is on record as being opposed absolutely to the use of rigid quotas.

Affirmative action, on the other hand, was designed to do at least one thing in addition to what Mr. Reynolds said. At some point there had to be some result. Why would we spend all this time in Congress and all this money and end up with no results?

The word "victims" is such a terribly difficult and dangerous word. When I went into the army every general in it was white save one, B. O. Davis. Now there are quite a few black generals. If there is one black or one woman general, I do not want to hear that every white colonel is a victim because he is not made a general too. There is a subliminal kind of arrogance in thinking that no women or blacks ever get to be generals unless they get preferential treatment—that standing on level ground, white males will always have every job in the country.

Suppose the Memphis police department had 700 policemen in 1949, all white and all male, and that in 1985, some of the 700 police people are black and some are female. It is obvious that some white male is a victim. But a victim of what? A victim of equality, fairness, and equity.

The supposition is that somehow if we just did not have to deal with women, if they were not so pushy and obnoxious, by God, we would still have 700 white males. If black folk would just go back to doing what they were doing before the Civil Rights Act and apply and get turned down, we would have this thing licked, and no white males would be discriminated against.

ALLEN: The question we are concerned with is not which individuals are in or out, but what is the legitimate power of the government. I frankly am sometimes just driven to distraction by this. When I served on a school board, we talked constantly about goals, timetables, quotas, affirmative action, guidelines, objectives. I kept saying to people, "Look, why can't you just let people go to school?" They kept coming back insisting we had to do something to pepper the whole district with all these little faces. Finally I got so exasperated that I said, "I want you people to understand something. There ain't enough of us to go around for every white man to own one." [Laughter.] To my mind, by jettisoning the equality of the Declaration in favor of equality of results, we are selling our birthright for a mess of pottage.

DAYS: On this question of definition, I find it almost impossible, given the fragility of words, to make meaningful distinctions among these terms. Certainly we do not want to bring back quotas in this society ever again. And I know of no affirmative action program that even comes close to the type of quotas that kept Jews in particular out of colleges and universities, not only in the United States but around the world.

Where good-faith efforts have failed and a court steps in to prescribe hiring practices, I am not denying that there may be some instances in which the objectives become so hard and fast that employers or school boards follow them irrespective of considerations of quality or merit. But I think that is the exception. What it does in the vast majority of situations, as in the case of the Alabama or Mississippi police, is bring in qualified people who were out there but simply could not be found until the court or agency forced the employer or school board to come back with something. Where an employer can demonstrate a good-faith effort to find and hire minorities or women that has fallen short of mandated goals, I know of no court that has insisted, nevertheless, that a fixed number be reached.

Mootness and Seniority

FRANK MATTHEWS, George Mason University, publisher of *Black Issues in Higher Education*: Could Professor Days please comment on the ironic contrast between the original *DeFunis* case, which the Supreme Court declared moot and refused to hear, and the *Stotts* decision, in which the minority opinion also argued that the issue was

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HOOKS

moot? What was the difference between those two cases?

DAYS: *DeFunis* was a predecessor to the *Bakke* case, except that it never happened. Marco DeFunis was a white student who challenged an affirmative action plan for minority students at the University of Washington Law School. The Supreme Court ultimately dismissed his case as moot because he had been admitted to and was soon going to graduate from another law school, so that there was no live controversy that the Court had to resolve.

In the *Stotts* case, there was a similar argument that, to the extent that there had been some harm to the laid-off white firefighters, it was insignificant as a matter of law because they had been restored to their positions in the meantime. The dissenters in *Stotts* suggested that the Court was reaching out to decide the case despite the evidence that the matter had been taken care of by the passage of time.

Lawyers can debate whether the Court's failure to dismiss *Stotts* was fair. But there is another crucial aspect of *Stotts* worth noting. The media, the public debate, and the Supreme Court itself have treated it as a case in which less-qualified junior black firefighters were kept on the job while senior and more qualified white firefighters were laid off. In fact, the seniority plan that was at issue in *Stotts* was merely a reverse alphabetical layoff plan. The Memphis fire department had decided that if layoffs were necessary they would occur among equally qualified persons based on reverse alphabetical order.

The black and white firefighters in the *Stotts* controversy actually had the same seniority date and were found to be equally qualified to do the job. But the three whites had names that began with, I believe, A, D, and D, whereas the blacks had names that began with H, J, and J. Under the terms of the seniority plan, that meant the blacks had to be laid off.

What the trial court said was that a fire department that had agreed to bring in blacks who claimed they had been the victims of discrimination should not be laying off blacks disproportionately. Yet, as I say, *Stotts* is often characterized as a case in which job qualifications were at issue. In too many instances the public debate fails to acknowledge the complexity of the issues and the degree to which there is quite a bit of justice on both sides.

HOOKS: The issue of alphabetical seniority does not sound like very much, but it is still a very fundamental issue in this world. Even if two people are hired on the same day at the same hour, there has got to be some seniority, and the one who gets the papers first gives the orders to the other fellow.

REYNOLDS: Exactly as Drew Days has said, the seniority situation in *Stotts* was really not much of a seniority situation at all. Precisely because seniority was so tangential an aspect of *Stotts*, the Court's opinion is much more important for what it implies about preferential treatment in all contexts, whether layoff or hiring or promotions. The Court went through passage after passage of the legislative history of Title VII. It found that the sponsors of that legislation on both sides of the aisle repeatedly said Title VII does not tolerate the use of quotas and the use of preferences based on race.

HOOKS: What is clear to Mr. Reynolds and the Justice Department is not clear to the majority of lawyers, to the circuit courts who have heard it since the *Stotts* decision, to the mayors, or to the municipalities who refuse to yield to it.

Busing and Race-Consciousness

RANDALL RADER, Senate Judiciary Committee: In *Brown*, it was decided that a student may not be deprived of the right to attend his neighborhood school based solely on race. Now, a few decades later, we find courts requiring students to be taken out of their neighborhood school on the basis of their race and bused across town to attend a distant school with some damage to their education. Is not the race-conscious remedy of mandatory busing violative of the principle set down in *Brown?*

HOOKS: It is always interesting to me that while more than 50 percent of all American school children are bused every school day, all the furor is about the 4 percent who are bused for purposes of racial desegregation. I have never heard anybody ask why kids are bused thirty miles in Montana, or why they are bused to private schools all over the South, because everybody understands why that happens.

In *Swann* v. *Mecklenberg*, one of the early busing cases, the county had 900 buses and spent $14 million a year to bus kids. This was in 1971, seventeen years after the *Brown* decision. And the court held that if they could spend $14 million and use all those buses to keep segregation intact, they could use the same buses and the same amount of money to achieve integration. After thirty-one years, this country still has a majority of segregated systems and busing is only one of the many, many remedies that have been used to try to fulfill the mandate of *Brown.*

DAYS: Busing is as American as the little red schoolhouse. The problem

has been that neighborhoods have often been defined by race so as to segregate schools. In a number of school desegregation cases that I have been involved in, the "neighborhood" ran from the center of town out into the country so as to encompass all the white children while leaving the black children in a different neighborhood.

There was an effort in the early days after *Brown* to allow students freedom of choice to decide whether they were going to remain in these segregated quasi-neighborhood schools or instead transfer to schools that were, in fact, closer to their homes than the schools to which they had been assigned under segregation. What the courts found and what blacks learned very quickly was that exercising this freedom of choice was about as foolhardy as applying for a job on the Memphis fire department during the time when blacks simply were not being hired. That is why the courts took the position that something had to be changed. One would hope that at some point in our history we would develop neighborhoods that were in fact reflective of freedom of choice, of personal decisions, and not the manifestations of deep-seated racism.

REYNOLDS: I think Mr. Rader's valid question is why race-conscious quota remedies are tolerable as a constitutional matter in the school context but intolerable in the employment context. The answer is that all the children in a de jure segregated school district are victims. It is constitutionally permissible to use a race-conscious remedy to make them whole, just as the courts have said you can give preference to victims of employment discrimination to make them whole by putting them into the job that they would have had had they not been discriminated against. What the court did in *Swann* and subsequent cases was to experiment with a remedy of forced busing in an effort to make those victims whole. What fell through the cracks is the other element of *Brown*, that of attending to the educational needs of the children in the system.

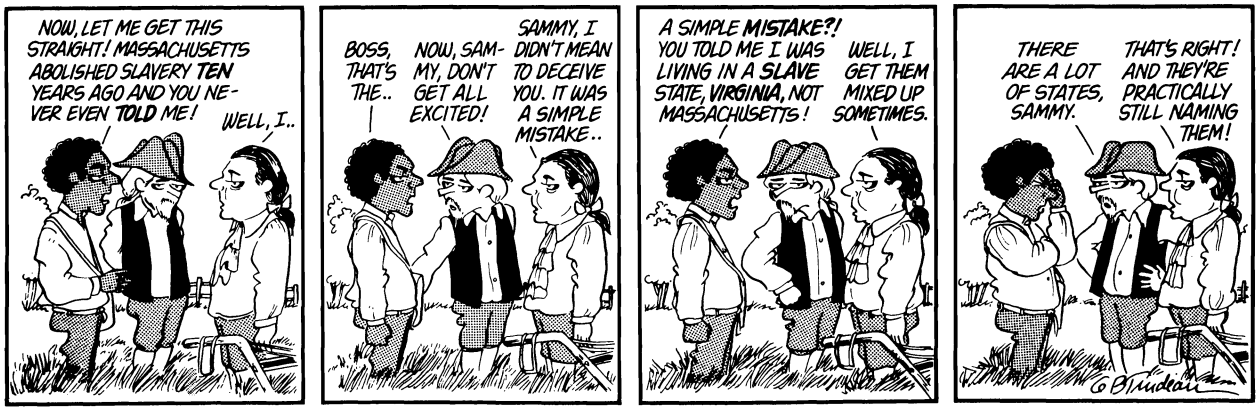
Too often, court-ordered busing formulas have essentially turned one-race schools into one-race school districts and paid little attention, if any, to the educational needs of the children in those districts. That is why this administration has sought to fashion an alternative remedy that leans heavily on the magnet school concept rather than on forced busing.

The difficulty with quotas is that a quota goes well beyond making whole to benefit those who are not victims, who may not even have been in the workforce or were in grade school at the time the discrimination went on. To me, separate employment lists that are supposed to translate into equal results is very close to the same principle of separate but equal that dates back to *Plessy* v. *Ferguson*.

ALLEN: I certainly agree with the other panelists that *Brown* achieved a remarkable political transition in this country by making apparent to all of us a general commitment to achieve a colorblind, fully integrated society. On the other hand, I cannot concur that the opinion in *Brown* was as free of taint as the questioner suggests it is. As I read it, *Brown* did not completely overturn *Plessy* v. *Ferguson*; in fact, it backed away from simply adopting Justice Harlan's *Plessy* dissent, probably because the Justices were somewhat hesitant to do without race-conscious remedies—now, of course, for putatively positive reasons.

HOOKS: But without those remedies there arises another problem. If we eliminate all references to race and sex, you get the perfect world for those who are entrenched in positions of authority and power. There is no way to measure whether or not you are making progress. To come up now talking reverently about colorblindness and sex blindness as if they are a new thing just discovered will not eliminate historic discrimination in places where segregation and discrimination has been a way of life, where there have been de jure and de facto signs that have kept certain people back. As Judy Goldsmith of the National Organization for Women so eloquently put it, if it took hundreds of years to get here, we are not going to eliminate it in twenty years.

ALLEN: It is far from the case that colorblindness has only just been discovered. Between roughly 1946 and the *Bakke* decision there was no more frequently cited dissenting opinion than the Harlan opinion. It showed up in sixty-four cases and



also appeared very frequently after that period as well as, of course, before. This is not new. It is the story of America. It formed the backbone of the policy Washington labored so mightily to establish for relations with the Indians.

Let me give you an example of how it is possible to come to the defense of minorities without race-conscious remedies. During the debate over the Reconstruction amendments, one of the grave concerns was that in many southern communities back then the sheriff would go out, having secured from a compliant judge a warrant to search and seize people's weapons. After the sheriff had taken the weapons away from the blacks, the Klan would come back in the dead of night when they were defenseless to assault them. It happened on a very wide scale. Congress was deeply concerned to enforce the Second Amendment of the Constitution to prevent that happening, and saw it as appropriate to incorporate in its expectations of the amendments the idea of a full integration of the ex-slaves within the established protections of the Constitution.

It is wrong to suggest that goals, quotas, timetables are the only recourse. The American Constitution is a resilient, a rich, and expansive document, not evolving but, as all the founders said, there to serve us as long as we were worth it.

The Stroke of a Pen

WALTER WILLIAMS, George Mason University: I have a particular question for Benjamin Hooks, who has said so many complimentary things about President Reagan. Much of affirmative action is based on Executive Order 11246. Now, President Reagan can rescind that order with the stroke of a pen. Would you care to speculate why he does not?

HOOKS: I would like to think, happily, that Mr. Reagan realizes that he is president of all the people and that that executive order is necessary and that he is going to keep it in place, and I respect and admire him for doing it.

WALTER WILLIAMS: In progressing toward what all of us agree should be the objective of equality, how effective is it to keep stressing goals and timetables in employment and college admissions while allowing the public schools to destroy black education on a day-to-day basis, as evidenced by the 47 percent illiteracy rate among black seventeen-year-olds and black failure rates on SAT scores, GRE scores, and LSAT scores?

REYNOLDS: The point is exceedingly well taken. One of the things that has most impressed me since I have been in this job is the overreliance many of us put on the Civil Rights Act of 1964 and its companion laws to label all conceivable ills as due to discrimination of some sort and then to try to cure them by invoking one of the laws that are on the books.

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Public education is a good example. It seems to me that we attend much less to many of the educational problems that face all students and are content instead to suggest that if we can somehow make the numbers work on racial balance we will not have to worry too much about the rest of the educational process. But when a young person gets to the employment door without a good education, because that part of the problem has been neglected, there may be some reason other than employment discrimination why he is not chosen. We have to take a hard look at some very definite core problems that occur much earlier than the employment decision itself, rather than just heaping all our problems on the shoulders of the 1964 Civil Rights Act.

DAYS: It is not an either/or situation. I do not know anyone who really embraces goals and timetables as a full solution to the problem. And it was not the Carter administration or its predecessors that cut educational funds 25 percent or raised questions about Title I, a program that has been shown to be effective in bringing poor children up to the educational level where they ought to be.

Certainly there must be a concern for educational quality. But what do we do while we wait for the millenium? One of the things about this society has been that we pitch in and try to deal with the world as we find it and solve as much of the problem as we can now while looking to these long-term and institutional solutions. I certainly hope that by the next century we really will have made some advances and will not still be talking about goals and timetables throughout the society. But I must admit, looking at the situation today, that I am somewhat depressed at the outlook.

Civil Rights and the Founders: The Historical Perspective

GAYLE BRADLEY STARKES, Appalachian Regional Commission: I would like Professor Allen to clarify his opinion that the Constitution was for everyone and did not perpetuate slavery prior to the Reconstruction amendments. When the Constitution was written, and for some time thereafter, black people were in slavery. Also, could he explain what he means by moral lights, and enumerate some of them?

ALLEN: Let me start with the second point. "Moral lights" was Abraham Lincoln's own phrase. He was referring to the influence of the principle stated in the Declaration of Independence that all men are created equal, that they are endowed by their creator with certain natural rights, among which are life, liberty, and the pursuit of happiness.

Those are moral lights in the deep sense that the life of the people of this country has been and is still governed by those principles. That leads to the answer to your first question about the Constitution, as it responds to Mr. Hooks's question about what authority I depend on in order to discuss what's right and wrong.

Yes, slavery existed at the time the Constitution was adopted. It existed before. It existed afterwards. What we have to recognize is that although slavery continued to exist, the Founders did not place a stamp of approval upon it. They went as far as they could, in fact, to place a stamp of disapproval upon it. None of the other provisions in the Constitution mention the word "slave." They said that they intentionally wanted to avoid staining the document with that word because they looked to the day when slavery would be gone from this country.

The very first constitutional debate in the House of Representatives was a debate over slavery. In that debate, it was James Madison, the father of the Constitution, who was most eloquent of all in saying that ultimately he and his allies hoped to rid the country of this sin, this stain of slavery. Later, during the Lincoln-Douglas debates, Stephen Douglas tried to read blacks out of the Declaration of Independance. His formula was that, because the Declaration was written by white Anglo-Saxons, it was written for that group. Lincoln would travel through the Midwest, which was heavily populated by immigrants at that time, reminding all the continental immigrants what that meant for them.

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ALLEN

The question has been with us ever since the beginning. We are still living with its consequences, continually having to make decisions in light of the possibilities that are there for us. But those possibilities arise from an historical context that shows slavery, in effect, being driven out by the guiding principles of the nation itself, of the Constitution.

The end of slavery and the Reconstruction amendments did not come about simply because at a certain moment in history there was a sudden fantastic revelation and what had been all dark suddenly turned bright and shiny. We have it because the educative effect of these principles was there working, fermenting to produce the reaction that not only would abolish slavery but would lead us all ultimately to adopt the principles of the American founding as our own and make possible the genuine national life in which we forget about group rights and respect the rights of human beings, which pertain to individuals rather than to groups. ■