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FOREWORD: CIVIL RIGHTS IN 1995

Barry Sullivan¹

In August 1963, the March on Washington captured the attention of many white Americans who had been indifferent to the progress of the Civil Rights Movement. That new display of interest was due in large part, of course, to the presence in Washington of the marchers themselves, and to the press coverage that the march received, but it also was due to the substance and style of the speeches that were delivered that day. In that regard, it would be hard to over-estimate the importance of the prophetic keynote address that Dr. Martin Luther King, Jr. delivered from the steps of the Lincoln Memorial, where he stood in the shadow of the Great Emancipator. Dr. King's words — and the image of America they sought to portray — were powerful then, and they have lost none of their power in the intervening years. Indeed, the idea of America that Dr. King portrayed in his speech has come to represent the ideal to which most Americans think this country should aspire:

The marvelous new militancy which has engulfed the Negro community must not lead us to a distrust of all white people, for many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny and they have come to realize that their freedom is inextricably bound to our freedom. This offense we share mounted to storm the battlements of injustice must be carried forth by a biracial army. We cannot walk alone.

And as we walk, we must make the pledge that we shall always march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality.

We can never be satisfied as long as our bodies, heavy with fatigue of travel, cannot gain lodging in the motels of the highways and the

hotels of the cities. We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one.

We can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating "for whites only." We cannot be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream. . . .

So I say to you, my friends, that even though we must face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed — we hold these truths to be self-evident, that all men are created equal.

I have a dream that one day on the red hills of Georgia, sons of former slaves and sons of former slave-owners will be able to sit down together at the table of brotherhood. . . .

I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by content of their character. I have a dream today!

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, that one day, right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today! . . .

This is our hope. This is the faith that I go back to the South with.

With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our nation into a symphony of brotherhood.²

It is not an inauspicious time to reflect on the continuing significance of Dr. King's words, and on our progress as a nation in giving effect to the vision manifested in those words. To be sure, most of us now believe without reservation in Dr. King's vision of a nation dedicated to brotherhood, but that common belief has not produced common agree-

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² Martin Luther King, Jr., "I Have A Dream," in *Testament of Hope: The Essential Writings of Martin Luther King, Jr.*, 218-19 (James M. Washington ed. 1986).

ment as to where we are now, where we should be going, or how we should get there. Do we live in a society where "little black boys and black girls . . . [are] able to join hands with little white boys and white girls as sisters and brothers," for example? Are we closer than we were? How will we draw closer still to achieving that ideal?

During the past several weeks, the media have reported extensively on efforts to cut back on affirmative action.³ During the past several years, the courts have struggled with the concept of racial gerrymandering to assure minority representation in legislative bodies.⁴ The Supreme Court is once again considering the constitutionality of affirmative action programs, just as it is considering anew the proper scope of remedial actions in school desegregation cases in the face of decreasingly diverse inner-city populations.⁵

Many would say that the time has passed for our society to take note of a person's race for any reason — that now is the time for us to make good on that long-unfulfilled promise that the management of our public business be governed by the principle that the law is colorblind.⁶ Others would say that our society is in shambles, that we continue to be a nation divided by race, and that pretending to be colorblind today would be a cruel joke, perpetuating discrimination under the guise of evenhandedness.⁷ The central meaning of the Equal Protection Clause, they remind us, is the Aristotelian notion that like cases should be treated alike, while dissimilar cases are to be treated dissimilarly.⁸ But what is material in determining the similarities and the differences of cases?

If the past forty years have been our second Reconstruction, should we now declare that period to be behind us? And, if we do, will it be because

³ See, e.g., Kevin Merida, *Study Finds Little Evidence of Reverse Discrimination*, The Washington Post, March 31, 1995, at section A, A2; Richard Morin, *Americans Vent Anger at Affirmative Action*, The Washington Post, March 24, 1995, at A section, A1.; Ann Denroy, *Clinton Defends Programs Vows Fairness to All*, The Washington Post, March 24, 1995, A1; Steven A. Holmes, *Past Haunts Republicans on Set-asides*, The New York Times, March 19, 1995, at section 1, 1; Steven A. Holmes, *Programs Based on Sex and Race Are Challenged*, The New York Times, section A, 6; Peter T. Kilbourne, *For Many In Work Force, 'Glass Ceiling' Still Exists*, The New York Times, March 16, 1995, section A, p. 1; R. Richard Banks and Jennifer L. Eberhardt, *Rutgers Race and Reality*, The New York Times, March 11, 1995, section A, p. 4; David K. Shipler, *My Equal Opportunity, Your Free Lunch*, The New York Times, March 5, 1995, p. 1; Brant Staples, *The Presumption of Stupidity*, The New York Times, March 5, 1995, section 4, p. 1; Steven A. Holmes, *Defending Affirmative Action, Liberals Try To Plan The Debates Focus on Women*, March 2, 1995, section B, p. 1; Shelby Steele, *Affirmative Action Must Go*, The New York Times, March 1, 1995, section A, p. 1; Staff Writer, *Clinton Plans a Revision of Affirmative Action Programs*, The New York Times, February 24, 1995, section A, p. 3; B. Drummond Ayres, Jr., *Conservatives Forge New Strategy to Challenge Affirmative Action*, The New York Times, February 16, 1995, section A, p. 1; Steven A. Holmes, *Backlash Against Affirmative Action Troubles Advocates*, The New York Times, February 7, 1995, section B, p. 13.

⁴ See, e.g., *Holder v. Hall*, 114 S.Ct. 2581 (1994); *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994); *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Chisom v. Roemer*, 111 S.Ct. 2354 (1991); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁵ See *Adarand v. Peña*, 790 F.Supp. 240 (D. Colorado 1992), cert. granted, 115 S.Ct. 896 (U.S. 1995); *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994), cert. granted, 115 S.Ct. 633 (U.S. 1994).

⁶ See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting) ("But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class among citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law"); See also, Owen M. Fiss, *Troubled Beginnings of The Modern State, 1888-1910*, (1993).

⁷ See *Regents of University of California v. Bakke*, 438 U.S. 265, 400-403 (1978) (Marshall, J. dissenting). ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past impermissible.")

⁸ Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949) (footnote omitted) ("The Constitution does not require that things different in fact be treated in law as if they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.")

our work is done, or simply because we have grown tired of our work and wish that it were done? If we have failed in what we set out to do, should we choose new means to accomplish our ends, or should we rethink those ends? These are important questions that must be considered, and considered seriously, both in our public conversations and in our

private consciences. My own sense is that our conversations about these issues are not over, and in fact have only begun. For that reason, we should be grateful to the editors of the *Race and Ethnicity Ancestry Law Digest* for the work they have done in collecting and offering us the challenging papers that follow.