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Don't Write off the Reagan Social Agenda

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DON'T WRITE OFF THE REAGAN SOCIAL AGENDA

BY NEAL DEVINS

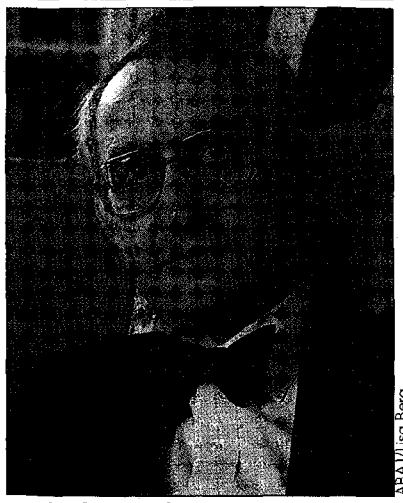
All presidents seek to further their own social policies through litigation. Unlike other administrations, however, Reagan's presidency has met a firestorm of criticism because its views on such divisive issues as civil rights, privacy and religion are a substantial departure from those of its predecessors.

In prior Supreme Court terms, the administration enjoyed some success in advancing its agenda. The Court approved administration arguments that civil rights laws extend only to actual recipients of federal funds; that Congress intended that discriminatory intent—not disparate impact—be shown to establish a violation of civil rights laws; and that Title VII employment discrimination remedies should extend only to actual victims of discrimination when layoffs are involved. The only significant setback in this area before 1986 was the Court's holding that racially discriminatory private schools are not entitled to tax-exempt status.

Last Term was crucial for the administration's social agenda. The Court ruled on abortion, affirmative action, and religion in the public schools. At first glance, the administration's social agenda did not fare well.

Despite the aggressive approach of Charles Fried, who replaced Rex Lee as solicitor general, the Court reaffirmed *Roe v. Wade*, validated some types of affirmative action, and ducked the religion-and-public school issue. The justices rejected the administration's Baby Doe initiatives (hospital care for handicapped newborns) and its narrow interpretation of the 1982 Voting Rights Act.

Still, it is difficult to measure the true success or failure of the administration's initiatives last Term. In contrast to Lee, who often sought narrow victories, Fried was willing to press the administration's social agenda: arguing that affirmative action is per se illegal and that *Roe v. Wade* should be overturned.



ABAJ/Lisa Berg

▲ Charles Fried

Consequently, although administration defeats were not sweeping—and on occasion the administration scored a victory—the 1985-86 Term was characterized as a strong rebuke to the administration's social agenda. Victory or defeat, therefore, tends to be measured not by what the Court holds, but by whether the solicitor's efforts were fully successful. Indeed, upon closer examination, the rulings of this past Term may pave the way for future administration victories.

ADMINISTRATION DEFEATS

Abortion. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986), the Court voted 5-4 that provisions of Pennsylvania's Abortion Control Act were unconstitutional. The act required physicians to inform women considering an abortion of associated "detrimental physical and psychological effects," and of the medical and other assistance that would be available if the pregnancy were carried to term.

Writing for the majority, Justice Blackmun said that "[t]he states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."

Thornburgh is important for several reasons. First, it extends *Roe* by narrowing the state's right to issue regulations associated with the abortion decision. Second, the dissenters were particularly harsh in their criticism of the majority. Justice White, for example, characterized the opinion as a "warped" and "defensive" response to the growing recognition that "many in this country [consider *Roe*] . . . to be basically illegitimate."

The solicitor's arguments before the Court exemplify both the importance of the abortion issue to the Reagan social agenda and the differences between Fried and Lee as solicitor general. Rather than seek a narrow ruling approving the Pennsylvania statute as a nonobtrusive state effort to advance its interest in childbirth, the United States for the first time argued that *Roe v. Wade* should be overruled.

Perhaps for this reason, Justice Stevens was especially contentious in his concurrence, citing articles written by then-law professor Charles Fried that emphasized the centrality of privacy and self-determination.

The justices' divisiveness on this issue indicates the fragility of the Court's abortion decisions. *Roe v. Wade* had already been cemented in three 1983 Court decisions, but only five members of the Court supported this decision. At the same time, considering the firmness of the Court's opinion, *Roe* is not likely to be overruled or severely limited until a member of the *Thornburgh* majority leaves the Court.

Baby Doe Regulations. The Department of Health and Human Services (HHS) promulgated regulations to ensure that handicapped newborns receive adequate medical treatment. The most controversial aspect of these regulations required hospitals to post notices that warn that medical treatment "should not be withheld from handicapped infants solely on the basis of their [condition]" and that provide a confidential telephone num-

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ber for reports of suspected noncompliance. The regulations also required state agencies to develop procedures for the discovery and review of medical neglect of handicapped infants.

A four-member plurality of the Court struck down this regulatory scheme in *Bowen v. American Hospital Association*, 106 S.Ct. 2101 (1986).

The plurality ruled that administration authority was limited under Section 504 of the 1973 Rehabilitation Act, which prohibits recipients of federal financial assistance from discriminating on the basis of handicap. While recognizing that antidiscrimination laws include handicapped newborns, the plurality ruled that Section 504 is violated only when a hospital denies medical treatment in contravention of the parents' expressed preference.

Moreover, noting that the solicitor failed to cite instances in which a hospital did in fact violate Section 504, the plurality concluded that the HHS regulatory scheme lacked a proper evidentiary basis.

The majority also invalidated state reporting requirements. It ruled that rather than ensuring equal treatment to handicapped and nonhandicapped infants, these requirements function as an "affirmative action" obligation that would improperly transform state agencies into "foot soldiers" in a federal campaign.

While severely limiting the administration's initiative to protect the handicapped newborn, *American Hospital Association* is a vulnerable precedent. In addition to the three dissenters, Chief Justice Rehnquist, who recused himself from this case, and Associate Justice Scalia might well approve a variation of these regulations. In the end, therefore, *Baby Doe* may be an initiative deferred, not defeated.

Affirmative Action. The soundest defeat of the administration's social agenda was its failure to discredit race-conscious affirmative action. The administration had launched a major initiative to follow up *Firefighters v. Stotts*, 467 U.S. 561 (1984), in which the justices rejected—as inconsistent with the letter and spirit of antidiscrimination laws—court-ordered affirmative action that undercut seniority rights.

Fifty-one municipalities were notified that their hiring policies—which grant preference on the basis of race—were under investigation. And regulations were drafted to limit a 1965 executive order that specifies that government contractors are expected to hire a certain percentage of minority employees.

ABAJ/Ken Heinen

▲ **Justice Harry Blackmun**

After the Supreme Court ruled that preference may be granted to nonvictims of discrimination, the administration appears to have abandoned these efforts, at least temporarily.

In *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986), the Court sent a mixed message on the constitutionality of affirmative action plans. On one hand, the Court found that the equal protection clause prohibited a school board from extending preferential protection against layoffs to nonsenior minority employees.

But all nine justices indicated that a public employer may respond to perceived discrimination by developing a "narrowly tailored" affirmative action plan that grants preferences to minority candidates in hiring and promotion decisions. The justices, emphasizing the desirability of voluntary compliance, indicated that a statistical imbalance—even without a finding of intentional discrimination "by a court or other competent body"—is a sufficient basis for a voluntary race-conscious remedial plan.

This ruling in effect permits public employers to use race-conscious hiring and promotion plans if their employee population is racially imbalanced. At the same time, however, the remedial plans must be "narrowly tailored" to address perceived actual discrimination, not societal discrimination.

In a little known summary order, *J.A. Crosson Company v. Richmond*, 106 S.Ct. 3327 (1986), the Court revealed that it was serious about its "narrowly tailored" requirement. In *Crosson*, the Court reversed the Fourth Circuit's approval of a Richmond, Va., minority set-aside plan for public contracts.

This plan was passed after a public hearing disclosed that despite Richmond's substantial minority population, less than 1 percent of construction contracts were awarded to minority-owned firms. It reserved 30 percent of each city construction contract to minority business enterprises. The Supreme Court, other than pointing to *Wygant*, did not offer any explanation for its ruling.

In *Local Number 93 v. Cleveland*, 106 S.Ct. 3063 (1986), the Court held that an employer (public or private) may develop an affirmative action hiring and promotion plan in settlement of a statutorily based employment discrimination (Title VII) lawsuit. Specifically, *Local 93* validated a court-approved settlement agreement between the city of Cleveland and an association of black and Hispanic firefighters.

The decree provided that minority and nonminority candidates were to be promoted on an alternating basis to fill 66 lieutenant positions. Following these promotions, the city, using out-of-turn promotions if necessary, was to promote 25 percent minority candidates to the lieutenant position.

The predominantly white firefighters union, along with the United States, challenged the decree as inconsistent with Title VII remedial provisions which provide, in part, that no court order shall extend relief to an individual "if such individual was refused admission, suspended, or expelled for any reason other than discrimination on account of race, color, religion, sex or national origin."

The Court did not decide whether the settlement agreement was outside the bounds of permissible court-ordered Title VII relief. Instead it ruled that for Title VII purposes, the consent decree was identical to a pri-

Frontline/Scott Craig

▲ Carl Stotts

vate out-of-court settlement.

The Court concluded that *Local 93* was indistinguishable from *Steelworkers v. Weber*, 442 U.S. 927 (1979), in which it held that a private employer may voluntarily adopt a race-conscious plan to increase minority employment. The Court flatly rejected the solicitor's argument that a consent decree cannot provide greater relief than a court could decree after a trial.

While *Local 93* ducked the knotty issue of permissible Title VII relief, the Court squarely confronted it in *Local 28 of The Sheet Metal Workers v. Equal Employment Opportunity Commission*, 106 S.Ct. 3019 (1986).

In *Sheet Metal Workers* the justices, by a 4-1-4 vote, rejected the solicitor's position that Title VII relief is limited to the actual victims of discrimination. A plurality of the Court held that Title VII "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination."

Noting the union's "contemptuous racial discrimination and successive attempts to evade all efforts to end that discrimination," the plurality upheld the lower court's order that it adopt a membership goal to reflect the area's minority population (29.23 percent).

But the plurality limited the use of such relief to instances "where an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."

As a whole, *Wygant*, *Crosson*, *Local 93*, and *Sheet Metal Workers* are not a resounding defeat of the administration's agenda. *Wygant* and *Crosson* only recognized the propriety of "narrowly tailored" race-conscious remedial programs designed to eradicate perceived actual discrimination, not affirmative action programs designed to address societal discrimination. Moreover, while racial imbalance may serve as the basis for a remedial plan, the Court will closely scrutinize the appropriateness of the plan.

Indeed, both *Wygant* and *Crosson* rejected the plans at issue. *Local 93*, although its consequences are far-reaching, did not rule on the substantive civil rights question presented, but spoke generally of judicial standards governing the entry of consent decrees. And the *Sheet Metal Workers'* plurality limited court-ordered affirmative action relief to instances of intractable, outrageous discrimination.

Despite the Court's insistence on "narrowly tailored" remedies and its general approval of victim-specific relief, these cases might prove the death knell to the administration's initiatives in affirmative action. This result may be due, in part, to the fact that Solicitor General Fried sought a knockout, rather than a victory on points (as his predecessor Lee might have done). Consequently, instead of these cases being viewed as a severe limitation on the use of race-conscious devices, they have been characterized as a defeat of the administration's absolutist demand for victim-specific relief.

SOME VICTORIES

The administration did prevail on some issues. In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), the Court validated Georgia's anti-sodomy statute, and narrowly viewed the right to privacy—the cornerstone of *Roe v. Wade* and decisions limiting state authority over an individual's sexual behavior.

The *Hardwick* majority, echoing Attorney General Meese's statements on judicial activism, commented that "[T]he court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

In *Bethel School District No. 401 v. Fraser*, 106 S.Ct. 3159 (1986), the Court approved a school official's decision to suspend a student for making a sexually suggestive speech before a school assembly. The Court emphasized that the "inculcation of values is truly the 'work of the schools' " and that students only have limited constitutional rights.

The administration also scored a superficial victory in *Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986), a case that promised much more than it delivered. *Bender* arose when a school district refused to let a voluntary student religious group meet on school premises.

The administration strongly supported the student group, claiming that permitting such meetings is wholly consistent with—indeed required by—the religion and speech clauses of the First Amendment. But rather than resolve the substantive issue, the Court decided the case on standing grounds.

The Court ruled that because a school board member—not the school board—appealed a district court judgment against the school system, the district court judgment must be preserved.

Justices Burger, Powell, Rehnquist and White dissented, claiming that the substantive issue should have been resolved in favor of the student group. Opinions by Justices Brennan and O'Connor in related cases indicated that they might well side with the dissenters on the merits.

Whether 1985-86 was a good year for the Reagan social agenda may not be determined for some years to come. The Court is not yet prepared to embrace the Reagan social agenda. Unless there is further change in the Court's personnel, the administration's primary initiatives in school prayer, abortion and affirmative action will not be fully successful.

But, perhaps more importantly for the long term, the Court's rulings on these agenda items were far more narrow than is commonly understood.

And the true measure of the administration's success should not be limited to this Term's results: Attention must be paid to the changing composition of the Court. In this respect, 1985-86 could be the year of the administration's greatest success. William Rehnquist has become chief justice and Antonin Scalia an associate justice. ■