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RACIAL PROGRESS AND CONSTITUTIONAL ROADBLOCKS

JEREMY RABKIN*

I. INTRODUCTION

“Civil rights” has been a fierce political and ideological battleground over the past two decades. Advocates of a “color blind”¹ Constitution condemn group entitlements as subverting individual rights and national cohesion.² Defenders of racial preference policies, on the other hand, insist that only sustained government measures, including race-conscious remedial measures, can assure true equality in the long run.³ The Supreme Court in recent years has questioned overt set-aside policies⁴ and begun to look with more skepticism on the broad definitions of “discrimination” that invite such policies.⁵ Congress, on the other hand, has shown its readiness to resist judicial retrenchment with new legislation.⁶

No doubt the debate—with its attendant political and legal maneuvering on each side—will be with us for some time to come. The controversy already has attained a rather ritualistic quality, however. And the debate may turn out to be largely misdirected. To the extent that the Supreme Court figures importantly in coming debates on “civil rights,” those preoccupied with the minutia of

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1. See, e.g., Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318 (1986).

2. *Id.* at 1322-23.

3. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1503-05 (1989).

4. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

5. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that a statistical comparison demonstrating that whites are more greatly represented than nonwhites in better, higher paying jobs does not make out a prima facie disparate-impact case); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (reversing a decision that allowed a city fire department to lay off white employees before laying off black employees with less seniority than the white workers).

6. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (to be codified at 42 U.S.C. §§ 1981-2000e).

equal protection doctrine, or judicial glosses on "civil rights" legislation, may be looking in the wrong place.

II. WORSENING CONDITIONS

Almost none of those who urge a color-blind Constitution have taken the argument to its logical extreme by urging the repeal of the civil rights legislation of the 1960s. A truly color-blind government, one might argue, would not be concerned about the effects of private racial discrimination any more than it would be concerned about private discrimination on the basis of political opinion or differing standards in personal hygiene. Professor Richard Epstein of the University of Chicago has defended this view, which appeals to many libertarians.⁷ Most champions of a color-blind Constitution, however, seem to reject it. They do so, it appears, because they regard the effects of private discrimination—should they include large and continuing disparities between racial groups in economic and social outcomes—as morally or politically intolerable.⁸

The problem is that two decades of government-sponsored preference schemes have done little to ameliorate the most dramatic and intense disparities between the races—those due to the disproportionate representation of racial minorities in the underclass of the inner cities. Conservative commentators, most notably George Gilder⁹ and Charles Murray,¹⁰ argued this point with much force in the early 1980s. Their calls for a radical rethinking of welfare policy, widely derided at the time, seem to have attained more respectability in recent years.¹¹ At any rate, the underlying trends

7. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION* (1992).

8. David Strauss argued this point elaborately in *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99. In fact, the point was acknowledged in one of the first sustained attacks on racial preference schemes in its concluding section. See NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 196-221 (1975).

9. GEORGE F. GILDER, *WEALTH AND POVERTY* (1981) (arguing that the current welfare system will perpetuate poverty and lead to an increased social reliance on government assistance).

10. CHARLES MURRAY, *LOSING GROUND* (1984) (stating that the welfare system provides incentives to fail and offers no hope of success for those who are dependent on it).

11. See *THE NEW CONSENSUS ON FAMILY AND WELFARE: A COMMUNITY OF SELF RELIANCE* (Marquette Univ. Working Seminar on Family and Am. Welfare Policy ed., 1987) for a thorough treatment of the means to reduce welfare dependency. The Working Seminar con-

which they emphasized are no longer in serious dispute. Overall, the condition of blacks in America worsened during the 1970s and 1980s—the period in which affirmative action policies were most vigorously pursued.¹² Many blacks moved into the middle class in this period and many of them may well have benefitted by affirmative action policies.¹³ For many others, however, conditions of life continued on a terrible downward spiral.¹⁴

The National Research Council of the National Academy of Sciences recently published a detailed survey on the condition of blacks in America entitled *A Common Destiny: Blacks and American Society*.¹⁵ It summarizes the overall experience of the last two decades—precisely the period of the most intense enforcement of antidiscrimination measures—in stark terms: “The greatest economic gains for blacks occurred in the 1940s and 1960s. Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated.”¹⁶ In the 1950s, for example, unemployment rates for young people ages sixteen to twenty-four were essentially the same for whites as for blacks. By the 1980s, young blacks were two and one-half times more likely to be unemployed than their white counterparts.¹⁷

Some scholars have attributed economic decline in the inner cities to broader changes in the American economy that have reduced demand for unskilled labor.¹⁸ The economic crisis, however, also seems to be associated with a wider array of social pathologies, which demoralizing economic conditions have aggravated greatly. The collapse of normal family life is perhaps the most alarming trend. As late as the mid-1960s, 75% of black households with chil-

cludes that welfare policy should impose on recipients the obligation to become self-sufficient. *Id.* at 120-21.

12. See generally Louis S. Richman, *Are You Better Off than in 1980?*, FORTUNE, Oct. 10, 1988, at 38 (discussing the effects of affirmative action and other economic policies implemented during the 1980s).

13. *Id.*

14. *Id.*

15. COMMITTEE ON THE STATUS OF BLACK AMERICANS, NAT'L RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter *COMMON DESTINY*].

16. *Id.* at 6.

17. *Id.* at 302-04.

18. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 39 (1987).

dren under age eighteen were headed by married couples;¹⁹ by 1986, more than half of such black families were headed by women on their own.²⁰ Similarly, at the start of the 1960s, less than 25% of the total births among black mothers were out of wedlock;²¹ by the mid-1980s, some 60% of black babies were born out of wedlock, compared to 12.5% among whites.²²

These are ominous trends. Not only are single mothers several times more likely than their married counterparts to be dependent on welfare or to be struggling to raise children on poverty-level incomes,²³ but, more importantly, the absence of fathers seems to make parental discipline much more difficult.²⁴ This is especially true for single mothers trying to discipline teenage boys to ensure that they stay in school and out of trouble with the police.²⁵

The collapse of family life in the inner cities has therefore resulted in a fearful upsurge in crime. The arrest rate for blacks soared from approximately eighteen arrests per thousand individuals in the early 1950s to over 100 by 1978.²⁶ Violent crime has become so common that homicide has emerged as the leading cause of death for young black men.²⁷ Drug use has also increased dramatically, stimulating not just violent crime but fearful diseases like AIDS. Intravenous drug use, a leading vector for the spread of the AIDS virus, is so disproportionately centered in black communities that by 1987 *half* of all AIDS victims under the age of fifteen were black, even though blacks form only twelve percent of the population.²⁸

19. COMMON DESTINY, *supra* note 15, at 528.

20. *Id.*

21. *See id.* at 518.

22. *Id.*

23. By 1978, 74% of all black families below the poverty line were headed by single women. WILSON, *supra* note 18, at 27. For a more general discussion of this correlation, see *id.* at 71-72.

24. *Cf.* JAMES Q. WILSON, THINKING ABOUT CRIME 229-30 (2d ed. 1983) (discussing how the loss of adult supervision resulted in lack of self-restraint among young men).

25. *Id.*

26. COMMON DESTINY, *supra* note 15, at 457-58. The comparable arrest rate for whites in 1978 was 35 per thousand. *Id.*

27. *Id.* at 415. In 1984, homicide rates among males aged 15 to 24 were 62 out of 100,000 for blacks, compared to 11 for whites. *Id.*

28. *Id.* at 419-20.

Improving educational opportunities for black youngsters offset some of this dreary news—but not much. Performance on standardized tests of educational achievement improved for blacks and whites during the 1970s and 1980s, but painfully large gaps remain between black and white median scores.²⁹ High school graduation rates improved for whites and blacks, yet black youngsters remain twice as likely as whites not to finish high school.³⁰ Black college enrollment rates actually peaked in the mid-1970s,³¹ displaying a precipitous decline thereafter, while “the college entry rates of whites rose almost continuously.”³² During the 1980s, blacks were still only half as likely to have completed four years of college as whites of the same age group.³³

These somber facts do not prove that the civil rights measures of recent decades have been counterproductive,³⁴ but surely they show that these efforts have been insufficient. The state of the inner cities demands attention, whatever the ethnicity of the people who live there. The fact that the social and economic devastation of the inner cities falls disproportionately on blacks means that all other talk about “integration,” “racial equality,” or “civil rights” has a hollow ring.

III. SOLUTIONS AND ROADBLOCKS

What should be done? It is foolish, of course, to suppose that any one program or measure can, by itself, make a dramatic difference in existing trends. The continued deterioration of life in the inner cities cries out for alternative approaches, but when one looks at various promising options, one encounters judicial precedents blocking the path. These precedents are, for the most part, decisions and doctrines from the same era that generated the failed

29. *Id.* at 348-49.

30. *Id.* at 338.

31. *Id.* at 339.

32. *Id.* Thirty-six percent of black high school graduates entered college in 1986, compared with 57% for whites. *Id.*

33. *Id.* at 340.

34. Some scholars do argue that these measures have been counterproductive insofar as they have reinforced a demoralizing message to racial minorities and encouraged schools not to hold minority students, or others, to appropriate standards. See MURRAY, *supra* note 10, at 172-75.

strategies of contemporary "civil rights" programs, yet they do not relate directly to civil rights in this conventional sense. Because the problems involved are by no means exclusive to blacks, remedial measures need not be race-specific, but they may require changes in existing doctrine. The underlying issue, then, is not whether courts will allow policies that take account of race but whether courts will allow policies that take account of reality.

Start with education. It is perfectly clear that big city school systems largely have failed in dealing with inner city youth.³⁵ Wide agreement exists that alternative education strategies are imperative: different schools, different kinds of schools, greater choice among schools for parents and students.³⁶ Entrenched interests, such as teachers' unions and education bureaucracies, resist greater choice as a threat to their own secure positions.³⁷

Other models of schooling exist, however, which could be adopted on a large scale in inner cities. For example, commentators have noted that parochial schools tend to do a much better job in imparting the discipline and self-respect needed for orderly learning.³⁸ The superiority of parochial schooling has proved to be true in this respect even with inner city children whose parents are not Catholics but nonetheless strive to enroll them in Catholic schools.³⁹ Yet, proposals for subsidizing parochial education—which might make it more widely available—were repeatedly struck down by the Supreme Court in the 1970s and 1980s on the grounds that such subsidies undermine the First Amendment guar-

35. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 8 (1990).

36. *Id.* at 199-215.

37. See, e.g., Jill Zuckman, *New Bill Kills Federal Money for Private School "Choice,"* CONG. Q., Feb. 29, 1992, at 471 ("Detractors [of a school choice bill], including the two main teachers' unions, the American Federation of Teachers (AFT) and the National Education Association (NEA), fear that sending public money to private schools will erode public education and ultimately risk their professional livelihoods."). The subtitle of this report on recent political clashes in Congress clearly summarizes the controversy: "Pressured by School Boards, Teachers' Groups, [House Education and Labor Committee Chairman William D.] Ford Scraps Compromise with White House." *Id.*

38. JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE SCHOOLS COMPARED* 186-91 (1982).

39. *Id.* at 194-96.

antee against establishment of religion.⁴⁰ A Court which was quite ready to embark on such bitterly divisive measures as mandatory busing programs for school integration claimed that aid to religiously affiliated schools would be too divisive.⁴¹

The Court may now be prepared to take a different view on the question of aid to religious schools, at least where the government aid goes directly to parents or students rather than schools.⁴² This different view will not necessarily end the problems, however. Many programs for expanding choice seek to operate through public schools, but doctrinaire advocacy groups have already succeeded in imposing a range of limitations on the discretion of public schools. For example, some educators think it may be helpful to separate boys and girls, at least in early years, because boys tend to be much more restless and aggressive, becoming frustrated and repelled by the orderly classroom routines to which girls adapt so readily. At the least, this experiment in separate-sex schools seems

40. *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that a program similar to that in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), led to excessive entanglement of church and state and violated Establishment Clause); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding that use of public school teachers to teach nonreligious subjects in nonpublic schools is violative of Establishment Clause); *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (holding that state provision of "books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services" is constitutional, and provision of "instructional materials and equipment and field trip services" is unconstitutional); *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding that state statute authorizing provision of "auxiliary services" of public schools to private school students and loans of public school textbooks and instructional materials to private schools is violative of Establishment Clause); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (holding that state support of both regular and standardized testing in nonpublic schools is unconstitutional); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that state statutes providing public money to supplement nonpublic school teacher salaries are violative of Religion Clauses).

41. See *Lemon*, 403 U.S. at 622-23 ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . [Debate over religious issues would] tend to confuse and obscure other issues of great urgency.").

42. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation program even though a student used program aid money to finance religious studies). The Court's recent ruling in *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (holding that clergy's offering prayers at an official public-school graduation ceremony violated the Establishment Clause), suggests that predictions of an increasingly accommodationist approach to separation of church and state questions may be premature.

worth trying, but courts have held mandatory segregation based on sex unconstitutional.⁴³

Other reformers have sought to experiment with more restrictive dress codes or requirements for uniforms. These are logical ideas that encourage orderliness while eliminating distracting competition over styles of dress; private schools in the United States and public schools in other countries have long used them. Courts have held, however, that there is a constitutional right not to have schools impose student dress codes.⁴⁴

Similarly, court decisions in the 1970s insisted on restricting school discipline procedures so that public schools cannot readily suspend disorderly students.⁴⁵ This troublesome precedent would seem to apply as much to alternative or choice schools within the public system as to others, because it is grounded in abstract constitutional doctrines linking public education, *per se*, to the constitutional obligations of the state.⁴⁶

Even if choice programs open up opportunities to private education, such legal problems will not necessarily end. In the past two decades, courts have been intent on pursuing segregationist or discriminatory impulses in private schools, developing doctrines that make it difficult for any school to remain beyond the reach of government standardization. For example, the Supreme Court has held that receiving a tax exemption is enough to make a private school subject to equality standards.⁴⁷ Receiving eligibility for cashing student vouchers may be sufficient to do the same. Court decisions imposing standardized norms have therefore hobbled efforts to extend the range of choice and we are thus back to where we started.

43. In *Vorchheimer v. School Dist.*, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977) (4-4 decision), a voluntary program of single-sex high schools in Philadelphia was upheld against an Equal Protection challenge. At least one circuit, however, has held a mandatory segregation program unconstitutional. See *United States v. Hinds Sch. Bd.*, 560 F.2d 619 (5th Cir. 1977).

44. See, e.g., *Wallace v. Ford*, 346 F. Supp. 156 (E.D. Ark. 1972). In *Wallace*, the court held that a school administration bears the burden of establishing the necessity of infringing upon students' freedom to govern personal appearance. *Id.* at 161-62.

45. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring that due process be satisfied before student suspensions are allowed).

46. *Id.* at 576.

47. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

Similar problems exist in dealing with drugs and crime, the greatest scourges of inner city neighborhoods. Society cannot reduce drug dependency without driving out the drug dealers who make it so easy for new users to get started. Congress indeed has authorized vast sums of money and increasingly severe and draconian penalties to attack the drug trade.⁴⁸ Yet when faced with measures to protect the people most at risk from the pernicious consequences of drug dealing, courts have recoiled from enforcement efforts in the name of abstract due process doctrines from the sentimental 1960s.

To take the most telling example, Congress, in a 1984 measure, authorized federal officials to seize the assets of drug dealers even before trial,⁴⁹ to ensure that enforcement efforts would hit hard and quickly at their targets. Under the Bush administration, the Justice Department and the Department of Housing and Urban Development developed a program under this statute to go after drug dealers in federally funded housing projects.⁵⁰ This program targeted dealers who already had two prior convictions on drug offenses and faced accusations of continuing to deal drugs in their housing projects.⁵¹ The Fourth Circuit ruled recently that this program violates the due process rights of the drug dealers,⁵² who therefore have a right to stay in public housing—continuing to deal crack cocaine to teenagers and pregnant women—until given an opportunity to defend themselves in a formal hearing. Because tenants in such cases are eligible for federally funded Legal Services lawyers, and drug dealers can use the proceeds of their trade to secure much more extensive or aggressive legal assistance, eviction proceedings may continue to drag on, while the tenant stays in place, plying his death-dealing wares.

Courts have sanctioned the authority of the Food and Drug Administration to seize dangerous food or pharmaceutical products

48. See, e.g., 1991 Crime Bill, S. 1241, 102d Cong., 1st Sess. (1991) (proposing harsher penalties for drug-related crimes).

49. 21 U.S.C. § 881(b) (1988).

50. See Michael Isikoff, *Bennett Unveils Plan to Combat Washington Drug Crisis; Expanded U.S. Role Includes New Prisons, Additional Prosecutors*, WASH. POST, Apr. 11, 1989, at A1.

51. *Id.*

52. *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992).

immediately and reserve legal proceedings until after the fact⁵³ because speedy action may be required in such cases to save lives.⁵⁴ Do the lives of people—and their babies—in public housing projects not mean so much to federal judges as the health of ordinary consumers? At any rate, courts do not now see such disparities as “civil rights” issues.

A similar air of unreality exists in court doctrines inhibiting more general crime-control efforts. Because the problems in some areas are extremely severe, some dramatic coping measures have recently been proposed. James Q. Wilson, a political scientist and a leading authority on crime control, recently proposed that the government allow crime-ridden neighborhoods to experiment with “perimeter control” under which “through streets can be blocked off and guards placed at the entry points.”⁵⁵ The idea of the proposal is to provide decent people in very poor neighborhoods with some of the security that affluent people now purchase in gated private communities or guarded urban highrises. Wilson acknowledges that such neighborhood controls will “lessen the opportunity to move freely about the city,”⁵⁶ but he insists that “there is no other way to take guns out of the hands of those people most likely to use them, to end the control that street gangs have over neighborhoods, and to keep drug dealers from dominating the economy of a community.”⁵⁷

Alan Keyes, one of the few black candidates for the United States Senate in 1992, has argued for a more ambitious version of neighborhood self policing,⁵⁸ by which urban neighborhoods would

53. 21 U.S.C. §§ 334-335 (1984). In *Ewing v. Mytinger & Casselberry Ind.*, 339 U.S. 594 (1950), the Supreme Court allowed the FDA to make summary seizures of a food supplement that the FDA conceded was not immediately dangerous, but was still misbranded. For similar seizures of products not posing imminent danger to health, see *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784 (1969); *AMP, Inc. v. Gardner*, 389 F.2d 825 (2d Cir.), *cert. denied*, 393 U.S. 825 (1968).

54. *Ewing*, 339 U.S. at 601.

55. James Q. Wilson, *Human Nature and Social Progress* 16, Bradley Lecture, American Enterprise Institute (May 9, 1991) (transcript available at AEI).

56. *Id.* at 18.

57. *Id.* at 18-19.

58. Interview with Alan Keyes, Republican candidate for the United States Senate for the State of Maryland (Mar. 1992). Keyes has been urging this program in speeches throughout the state of Maryland, where he has been campaigning. At the time of publication, he had not yet issued a formal statement of his proposal.

be empowered to make ordinances for proper behavior in the streets, which could then be enforced by local "militias" of student volunteers and by locally appointed "justices of the peace" with power to punish misdemeanors with fines or service obligations.⁵⁹ The point of the plan is not so much to arm communities against dangerous criminals—Keyes concedes that regular police and courts will always be required for that⁶⁰—but to make neighborhoods less inviting targets or recruiting grounds for drug dealers and dangerous criminals. The underlying notion is that crime breeds most readily in neighborhoods already so full of vandalism, disorder, and hooliganism that the more vicious criminals can move about freely there without any fear of attracting attention. Keyes argues that his "militia" brigades, in the course of patrolling against ordinary delinquency, could be "spotters" to call in regular police against the most suspicious outsiders.⁶¹ At the least, he argues, they would rid patrolled neighborhoods of the open-air drug markets, where addicts and dealers brazenly congregate and are now so common in big cities like Baltimore.⁶²

Such proposals will encounter many political and practical obstacles and will not work everywhere. As Wilson argues, however, "doing these things for even a few people will save some lives and reclaim some streets"⁶³ and will provide valuable proving grounds to show which of these methods work.⁶⁴ Even where a willingness to experiment with such neighborhood "perimeters" or "patrols" exists, however, participants will encounter difficulties from the courts unless the Supreme Court modifies the approach it has maintained over the past twenty years. In the 1960s and 1970s, the Supreme Court struck down traditional vagrancy laws because they were excessively vague⁶⁵ and threatened the First Amend-

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Wilson, *supra* note 55, at 19.

64. *Id.*

65. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *see also Palmer v. City of Euclid*, 402 U.S. 544 (1971) (holding that a "suspicious person ordinance" was unconstitutionally vague).

ment's right of assembly.⁶⁶ More recently, the Court displayed hostility to laws authorizing the police to require loiterers to identify themselves.⁶⁷ Lower courts following this lead have struck down local laws banning panhandling in the subways⁶⁸ and "annoying" readers in public libraries,⁶⁹ and they have been unsympathetic to laws that prohibit loitering for the purpose of begging.⁷⁰ Courts still working with the whimsical imagery of the 1960s—the Supreme Court invoked the example of poets like Walt Whitman, wandering idly through city streets, to explain its opposition to vagrancy laws⁷¹—can make it impossible for neighborhoods to cope with the daily assaults on their basic security. On which side is the cause of "civil rights"?

IV. CONCLUSION

No one suggests that the First Amendment or the Due Process Clause of the Fourteenth Amendment should cease to apply in crime-ridden or poverty-stricken neighborhoods. The question is: with what spirit or attitude will courts interpret existing constitutional guarantees? Thirty years ago, almost all lawyers and legal scholars would have been surprised to think that a single federal district judge could be authorized, in the name of the Constitution, to take over the routine management of the Boston public

66. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); see also *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking down an ordinance which made it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passersby).

67. See *Kolender v. Lawson*, 461 U.S. 352 (1983).

68. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y.), *rev'd on other grounds*, 903 F.2d 146 (2d Cir. 1990). The reversal stressed the special circumstances of the subway. *Young*, 903 F.2d at 158.

69. *Kreimer v. Bureau of Police*, 765 F. Supp. 181, 195 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992). Apparently going against the trend, the Third Circuit stated that "[t]he district court's opinion unduly restricts the Library's authority to circumscribe admission to and expulsion from its facility and gives short shrift to its significant interest in achieving the optimum and safest use of its facilities." *Kreimer*, 958 F.2d at 1246.

70. *Loper v. New York City Police Dep't*, 766 F. Supp. 1280 (S.D.N.Y. 1991) (refusing to grant a summary judgment motion to the city and thereby uphold the constitutionality of the begging law). The court saw many First Amendment issues at stake, as indeed there were if the precedents cited above remain fully binding and generously interpreted.

71. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

schools⁷² or to impose racial hiring quotas on the Alabama police force.⁷³ Courts sharply modified traditional constitutional norms during the 1970s to accommodate what they then viewed as the cause of "civil rights" or "racial progress." No one now expects courts to remedy the failures of that era by ordering the establishment of a comprehensive school voucher policy or by cordoning off neighborhoods and mobilizing neighborhood militias to patrol them. The question is simply whether courts can bear to drop the edifying but wildly unrealistic doctrinal extensions of an earlier era. The question, in short, is not whether courts will help but whether they will get out of the way.

Because the doctrines of past decades have strong, organized supporters,⁷⁴ however, getting the courts out of the way will entail much debate. Such debates will be more to the point if we recognize that the outcomes have much bearing on the future of life in the inner cities, and, in that sense, on what is now called "civil rights."

72. For a comprehensive history of the federal judiciary's involvement in the administration of the Boston public schools' desegregation and affirmative action policies, see *Morgan v. O'Bryant*, 671 F.2d 23, 24-25 (1st Cir. 1982).

73. *United States v. Paradise*, 480 U.S. 149 (1987).

74. See, e.g., Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991) (interpreting the First Amendment and Supreme Court cases to mean that begging would be a fully protected form of speech); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 U.C.L.A. L. REV. 295 (1991) (arguing that traditional concepts of freedom and property rights should be modified to protect the interests of society's homeless and destitute).