

4-1-2008

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Joshua Cristobal Alex

Tanene Allison

Genevieve Gazon

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Recommended Citation

Alex, Joshua Cristobal; Allison, Tanene; and Gazon, Genevieve (2008) "Why We Can't Wait: Reversing the Retreat on Civil Rights - An Introduction to the Civil Rights Section," *North Carolina Central Law Review*: Vol. 30 : No. 2 , Article 8.
Available at: <https://archives.law.nccu.edu/ncclr/vol30/iss2/8>

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WHY WE CAN'T WAIT: REVERSING THE RETREAT ON CIVIL RIGHTS¹

An Introduction to the Civil Rights Section

JOSHUA CRISTOBAL ALEX*
CAREY ALEXANDER**
TANENE ALLISON***
GENEVIEVE GAZÓN****
MARIANNE ENGELMAN LADO*****

1. The title of this piece was also the title of the conference, *Why We Can't Wait: Reversing the Retreat on Civil Rights*, designed to educate, raise awareness and build alliances to protect and preserve equal justice, fairness, and opportunity and to make sure our laws are in step with the country we want for ourselves and for future generations.

* Mr. Alex is the Coordinator for the National Campaign to Restore Civil Rights ("the Campaign") and is responsible for rolling out strategic campaigns in national and international forums, building alliances, and overseeing media and communication efforts. Before joining the Campaign, Mr. Alex practiced civil rights law with MacDonald Hoague & Bayless, focusing on police and governmental misconduct. He was the youngest president in the history of the Latina/o Bar Association following law school at the University of Washington School of Law, and has received the Outstanding Young Lawyer Award from El Centro de la Raza as well as the Mexican American Legal Defense and Education Fund Scholarship.

** Mr. Alexander is the web coordinator for the Campaign, which entails managing not only the Campaign website, but also its blog, *Our Rights, Our Future*, and its Facebook group. Mr. Alexander also acts as the weekend editor for the consumer advocacy blog *Consumerist.com*, where he chronicles tales of corporate excess and explains the consumer impact of government actions

*** Ms. Allison is the Media Campaign Coordinator. Her responsibilities include organizing outreach to media, serving as staff to a committee of media experts, collecting and disseminating research among partnering organizations, and developing and delivering campaign messages. Prior to joining the Campaign, Ms. Allison coordinated Think MTV, the on-air, on-line, and grassroots pro-social campaign. She has also worked as an organizer, educator, and advisor on a range of social justice issues. She has published several articles, has received a Women's World Leaders Fellowship to study in South Africa, and has received Certificates of Recognition from the U.S. Congress, the California State Assembly, the Mayor's Office of San Francisco, and the Governor's Office of California. Ms. Allison completed her Masters in Public Policy at Harvard's Kennedy School of Government and earned her B.A. in Political Science and the David Jenkins Award for student leadership and political activism from San Francisco State University.

**** Ms. Gazón is the Executive Assistant to the General Counsel to New York Lawyers for the Public Interest (NYLPI), Marianna Lado, and also the administrator for the National Campaign to Restore Civil Rights. In those roles Ms. Gazón supervises the two legal assistants on staff, addresses the clerical needs of the General Counsel and the Campaign, and participates in weekly Campaign meetings and conference calls. Ms. Gazón came to NYLPI from the music industry, is a published songwriter and has studied at the Tisch School of the Arts at NYU. She is also the band leader and vocalist for an acid jazz band called Heavy Merge.

***** Ms. Lado is General Counsel to NYLPI and oversees the litigation and advocacy programs for NYLPI. The programs include impact litigation, administrative advocacy, direct representation, community organizing and outreach, and intake on cases and issues of disability rights, environmental justice and access to healthcare. Prior to coming to NYLPI, Ms. Lado was

This conference, *Why We Can't Wait: Reversing the Retreat on Civil Rights*, is being convened by North Carolina Central University School of Law, the University of North Carolina School of Law, Duke University School of Law, the Leadership Conference on Civil Rights Education Fund and the National Campaign to Restore Civil Rights, in an effort to educate, raise awareness and build alliances to protect and preserve equal justice, fairness, and opportunity, and to make sure our laws are in step with the country we want for ourselves and for future generations.

On the eve of a historic presidential election, when the top two candidates for the Democratic nomination are Hillary Clinton and Barack Obama, many Americans have expressed a sense of security about the state of equality of opportunity in the United States, premised on assumptions about protections afforded by civil rights laws in the United States. Yet, a series of significant, but not highly publicized, Supreme Court decisions over the last decade has rolled back the reach and enforceability of many of the landmark laws designed to address discrimination against historically disenfranchised groups. The success of a well-organized effort to stack the federal judiciary with right-wing ideologues has led to a radical restructuring of constitutional principles that threatens our democracy. In an effort to raise public awareness, hundreds of stakeholders from across the Southeast joined together in Durham, North Carolina on October 19th and 20th, 2007 for the conference, *Why We Can't Wait: Reversing the Retreat on Civil Rights*.

Convened by the Schools of Law at the North Carolina Central University, University of North Carolina, and Duke University, as well as the Leadership Conference on Civil Rights Education Fund and the National Campaign to Restore Civil Rights, the conference was designed to increase the visibility of the rollback of civil rights in the courts, highlighting the very concrete ways that these court decisions affect our lives, and to involve local advocates and stakeholders in the development of strategy to reverse course. In this special edition of the North Carolina Central Law Review, we take a closer look at the rollback of civil rights in one particularly key area, voting rights, and also broadly examine the judicial assault on congressional power to protect civil rights, generally.

In the first article, Brian Sutherland examines the United States Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v.*

a staff attorney at the NAACP Legal Defense and Educational Fund. Ms. Lado has taught courses at the undergraduate and graduate level in public administration, health policy, and education law at Baruch College and has published several articles. She holds a J.D. from the University of California at Berkeley, an M.A. in politics from Princeton University, and a B.A. in government from Cornell University.

W.V. Dep't Health & Human Res.,² a fairly technical decision that restricted the award of statutory attorney's fees, and focuses on the very practical barriers it creates to the enforcement of voting rights. In the second article, Rochelle Bobroff reviews the rollback of civil rights during the years of the Rehnquist Court and then outlines how the first two terms of the Roberts Court provide ample reason for concern that remaining civil rights protections are at even greater risk. Although the decisions of the early Roberts Court have been couched in legalistic, technical language, rather than broad sweeping pronouncements, the import of these opinions is clear: the Court is posed to restrict the power of Congress to protect civil rights.

As these articles suggest, we are at a critical turning point in the struggle for equal opportunity in American life. Reverend Dr. William Barber, II, President of the North Carolina Conference of the NAACP, spoke at the conference in Durham about how justice requires both "critiques and correction of the systems of oppression . . . Justice requires putting the most vulnerable among us at the center-piece of every public policy discussion."³ Yet, instead of putting the most vulnerable at the center of our jurisprudence, the courts – indeed, the very institution we rely upon to protect civil rights – are curtailing the power of Congress to protect civil rights, restricting civil rights enforcement in court, and narrowing the language of civil rights laws beyond recognition and utility.⁴ The conference focused on how we have come to this difficult point in our nation's history, and how we might reclaim what has been lost.

DEVELOPMENT OF OUR NATION'S CIVIL RIGHTS LAWS

In his keynote speech, Reverend Barber reminded the gathering in Durham that the legal strategy to challenge segregation in the United

2. *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health and Human Res.*, 532 U.S. 598 (2001). In *Buckhannon*, the Court blocked off an avenue to court access by holding that attorney's fees are no longer recoverable under the Civil Rights Attorney's Fee Act where the plaintiff's claim is the "catalyst" for the defendant's changed behavior. The *Buckhannon* case severely curtails the private enforcement of important public policies.

3. Reverend Dr. William Barber, II, Notes for Keynote, "Why We Can't Wait: Reversing the Retreat on Civil Rights" (Durham, NC, Oct. 19, 2007) (notes on file at the National Campaign to Restore Civil Rights), at 2 (hereafter "Rev. Dr. Barber's Keynote").

4. In a series of three cases in 1999, for example, the Supreme Court held that mitigation measures, such as medication, must be considered in determining whether an individual meets the definition of a person with a disability under the American's with Disabilities Act (ADA). *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), leading to the absurd result that people with health conditions such as epilepsy or diabetes, who are able to work, may no longer be protected by the ADA, even if they can prove they were discriminated against. See also *Littleton v. Wal-Mart Stores, Inc.*, No. 05-12770, 2007 WL 1379986, at *4 (11th Cir. May 11, 2007) (exclusion of person with mental retardation from the protection of the ADA based on finding that there was insufficient evidence that he was substantially limited in a major life activity).

States was developed over generations, and the brilliance of civil rights lawyers Charles Hamilton Houston and Thurgood Marshall included both their grounding of theory in fundamental principles of justice and also their ability to take the long view of change. Rather than relying on what Barber calls the “politics of the moment,” Houston and Marshall were committed to the development of a movement over time.⁵ This effort to challenge systems of oppression led to extraordinary legal victories, including the landmark U.S. Supreme Court decision in *Brown v. Board of Education*,⁶ which put an end to state-mandated racial segregation in our public schools.

Laws born from the civil rights movement led over time to civil rights protections for countless individuals, regardless of race, ethnicity, gender, age, or disability. Beginning in the mid-1960s, Congress created a legal framework for civil rights enforcement by enacting a series of statutes including, among others, the Civil Rights Act of 1964,⁷ Title IX of the Education Amendments of 1972,⁸ the Voting Rights Act of 1965,⁹ the Civil Rights Attorney’s Fees Act of 1976,¹⁰ and, later, the Americans with Disabilities Act (ADA) of 1990.¹¹

Despite the hard won victories, tremendous disparities in opportunity continue to exist. Enforcement of civil rights law became an essential element of strategies to address inequality, but the urgent need to address gaps – in educational opportunity, access to decent and affordable housing, health status, employment and income – continues today.¹²

SUPREME COURT’S DISMANTLING OF OUR NATION’S CIVIL RIGHTS LAWS

Judicial limitations on the recognition of civil rights reach far back in the nation’s history and by the mid-1970s the federal courts were already focusing less on the need to protect the most vulnerable and, instead, evidencing discomfort with the breadth and application of civil rights law. In *San Antonio v. Rodriguez*,¹³ the Court held both that the Justices interpreted the U.S. Constitution as neither affording a fundamental right to education nor protecting individuals against

5. Rev. Dr. Barber’s Keynote at 3-4.

6. *Brown v. Board of Education*, 347 U.S. 483 (1954).

7. 42 U.S.C. § 2000e (establishing protections from discrimination in public accommodations and employment, and barring discrimination in federally-funded programs on the basis of race, sex, and national origin).

8. 20 U.S.C. §§ 1681–88 (prohibiting gender discrimination in education).

9. 42 U.S.C. § 1973.

10. 42 U.S.C. § 1988.

11. 42 U.S.C. § 12101.

12. See *The State of Opportunity in America*, Opportunity Agenda (2007).

13. *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

government discrimination on the basis of class or poverty. In *Washington v. Davis*,¹⁴ the Court interpreted the anti-discrimination principle at the core of the Fourteenth Amendment to the Constitution – that is, the mandate that “no state shall deny to any person . . . the equal protection of the laws . . .” – as prohibiting only behavior that is motivated by racial animus. In other words, the Court ruled that plaintiffs can prove a violation of the Equal Protection Clause only if they demonstrate that defendants intended to discriminate, a very high evidentiary burden. In *Milliken v. Bradley*,¹⁵ the Court stopped school desegregation efforts, particularly in the North, by requiring that African American or Latino children provide proof of intent to segregate by suburban school districts before a metropolitan area-wide desegregation remedy could be imposed.

As Rochelle Bobroff’s article describes, beginning in the 1990s, the Supreme Court moved from what might be characterized as an ambivalent posture toward civil rights – for example, rejecting opportunities to interpret the Constitution in a manner consistent with a more expansive notion of justice – and began to issue 5-4 decisions that pulled the threads from the fabric of civil rights laws. The Court restricted the power of Congress to enact laws to remedy civil rights violations,¹⁶ shielded the states from liability under federal anti-discrimination suits,¹⁷ and restricted access to courts for individuals who suffered violations of their rights.¹⁸ The cumulative effect of these decisions is disastrous for civil rights enforcement.

REVERSING THE RETREAT ON CIVIL RIGHTS

Conference participants heard from two individuals deeply affected by discrimination on the basis of sex, race and poverty. Lilly Ledbet-

14. *Washington v. Davis*, 426 U.S. 229 (1976).

15. *Milliken v. Bradley*, 433 U.S. 267 (1977).

16. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court struck down sections of the Violence Against Women Act that provided remedies to victims of gender-based civil rights discrimination, reasoning that the statute could not be sustained as remedial legislation under the Fourteenth Amendment. The Court also held that the Act could not be sustained under Congress’s Commerce Clause authority because it concluded that violence against women had too attenuated an effect on interstate commerce.

17. In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), the Court held that pursuant to the Eleventh Amendment, states have immunity from claims of retroactive relief in cases of discrimination against the aging and people with disabilities, despite the fact that neither the 11th Amendment nor any other provision of the Constitution compels this conclusion.

18. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court closed the courthouse doors to countless people by ruling that individuals had no private right of action with which to enforce the disparate impact regulations under Title VI of the Civil Rights Act of 1964. This decision effectively barred many race and national origin claims, challenges to discriminatory educational practices, and environmental justice claims. See also *Buckhannon Bd. & Care Home, Inc. v. W. V. Dep’t. of Health & Human Serv.* 532 U.S. 598 (2001).

ter was the manager of a tire plant who found out after years on the job that her employer, Goodyear Tire & Rubber Company, was paying her significantly less than her male counterparts, without regard to seniority or any merit-based factor. The Supreme Court threw her case out of court, deciding that she could not challenge the ongoing effects of discriminatory pay decisions that had occurred years ago, even if she had received no information from the company that would have given her timely notice of the disparity in pay levels.¹⁹ The Reverend Lois Dejean spoke about her experience as the Director of the Gert Town Revival Initiative in New Orleans and, particularly, the struggle to address the needs of low-income communities of color in New Orleans for safe and affordable housing and community development. Though Title VI of the Civil Rights Act of 1964 and the regulations passed to give meaning to the law and define its terms should provide protection against discriminatory actions on the basis of race, recent Supreme Court decisions have limited its reach so Rev. Dejean can no longer go to court to challenge environmental injustice or discriminatory housing patterns.²⁰ Both women expressed optimism and called on participants, in the words of Reverend Dejean, to: "Keep your eyes on the prize and hold on."

Despite the shredding of the fabric of civil rights in the courts, speakers and participants at the conference were optimistic and called for actions to strengthen our ability to build a more just community in the 21st century. Speakers discussed reform efforts in Congress, including what are now called the Fair Pay Restoration Act,²¹ which would allow workers who are victims of pay discrimination their day in court, providing a correction to the *Ledbetter* decision; the ADA Restoration Act,²² which would clarify the definition of a person with a disability under the Americans with Disabilities Act; and the Civil Rights Act of 2008,²³ which would restore the right to challenge practices with unjustified disparate impact on the bases of race, color or national origin, among other factors. They discussed ways to bring to

19. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

20. *Alexander v. Sandoval*, 532 U.S. 275 (2001) (plaintiffs have no private right of action pursuant to Title VI absent evidence of intent to discriminate); see also *Gonzaga University v. John Doe*, 536 U.S. 273 (limiting application of 42 U.S.C. 1983 to enforce federal rights); *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001), *reh'g denied* Env't Rep. (BNA) (3d Cir. Jan. 15, 2002) (challenge to actions with unjustified disparate racial impact not actionable pursuant to section 1983).

21. S. 1087 ("A bill to amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.").

22. H.R. 3195 ("To restore the intent and protections of the Americans with Disabilities Act of 1990.").

23. H.R. 2159, S. 2554 ("To restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes.").

life the importance of the judicial selection process, so that more stakeholders will pay attention to judicial nominees and weigh in when controversial candidates are moved forward. Speakers discussed creative ways to communicate about civil rights, to bridge information gaps and to make inequalities in opportunity visible. Toward the conclusion of the conference, speakers talked about building advocacy strategies using international human rights laws to challenge discriminatory practices in international forums; as part of local and state legislative strategies; and, also, as material for breathing new life into the interpretation of local, state and federal laws.

In the end, the prevailing note of the conference was set by Reverend Barber, who cautioned against losing sight of the need for action: "The question," he suggested, "is not what injustice will do." Instead, the relevant inquiry for each of us is "What will the believers in justice do?"