

## THE SUPREME COURT'S PERVERSION OF THE 1964 CIVIL RIGHTS ACT

LINO A. GRAGLIA\*

Before 1964, the last piece of major federal civil rights legislation was the Civil Rights Act of 1875.<sup>1</sup> This Act prohibited race discrimination in public accommodations<sup>2</sup> until the Supreme Court, unfortunately, held it unconstitutional.<sup>3</sup> Thereafter, the combination of the Senate filibuster and Southern Democratic control of the Senate Judiciary Committee made the enactment of further civil rights legislation seemingly impossible. But, events such as the assassination of President John F. Kennedy, his replacement with President Lyndon B. Johnson, the arrests and marches of Dr. Martin Luther King, Jr., and Alabama Sheriff Bull Connor's use of police dogs and fire hoses against civil rights marchers—all displayed nightly on national television—made a federal response finally irresistible. The result was the enactment of the Civil Rights Act of 1964,<sup>4</sup> our greatest piece of civil rights legislation.

The purpose of the Act was, quite simply, to ratify, effectuate, and extend what Congress and everyone else understood to be the principle of *Brown v. Board of Education*<sup>5</sup>: the prohibition of all official race discrimination.<sup>6</sup> The meaning of *Brown* might be arguable, but what it was understood to mean at the

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\* A. W. Walker Centennial Chair of Law, University of Texas Law School.

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1. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 447 (2000).

2. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

3. *Civil Rights Cases*, 109 U.S. at 25–26.

4. Civil Rights Act of 1964, Pub. L. No 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2006)).

5. 347 U.S. 483 (1954).

6. See Civil Rights Act of 1964; Lino A. Graglia, Ricci v. DeStefano: *Even Whites Are a Protected Class in the Roberts Court*, 16 LEWIS & CLARK L. REV. 573, 586 (2012).

time is not. Congress understood it to prohibit racial discrimination—as did everyone else. On the same day that *Brown* was decided, the Court also decided *Bolling v. Sharpe*.<sup>7</sup> *Bolling* involved segregation in the District of Columbia, and the Court decided the case on strictly “no-race-discrimination” grounds.<sup>8</sup> Later cases, however, present an incredible history of judicial and administrative abuse of power, perhaps unequaled in the history of law—certainly American law. They completely reversed the major provisions of the Act so that, instead of prohibiting, they were made to require or permit race discrimination.<sup>9</sup>

The Act has four major sections: Title II, Title IV, Title VI, and Title VII.<sup>10</sup> Title II prohibits race discrimination by restaurants, hotels, and other public accommodations.<sup>11</sup> Title IV addresses public grade school education.<sup>12</sup> Title VI prohibits discrimination by institutions that receive federal funds,<sup>13</sup> and Title VII prohibits discrimination in employment.<sup>14</sup> Title II is of little current interest because it is not in the interest of businesses to turn away black customers, and they are glad to be prohibited from doing so. Each of the other three Titles, however, soon came to be seen by civil rights professionals not as a victory but as an obstacle to racial advance.<sup>15</sup>

Just as the movement to prohibit racial discrimination began with the schools, so did the movement to make racial discrimination a constitutional requirement. School racial segregation came to a quick and complete end as a result of the Act, but

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7. 347 U.S. 497 (1954).

8. *See id.* at 500.

9. It began with *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 441–42 (1968) (holding that eliminating race discrimination was no longer the constitutional requirement; the Board had to take steps to increase integration); *Raney v. Bd. of Educ.*, 391 U.S. 443, 447–48 (1968) (same); *Monroe v. Bd. of Comm’rs*, 391 U.S. 450, 458 (1968) (same).

10. Pub. L. No. 88-352, 78 Stat. 241.

11. *Id.* at §§ 201–07, 78 Stat. at 243–46.

12. *Id.* at §§ 401–10, 78 Stat. at 246–49.

13. *Id.* at §§ 601–05, 78 Stat. at 252–53.

14. *Id.* at §§ 701–16, 78 Stat. at 253–66.

15. *See* Lino A. Graglia, *The “Remedy” Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 569, 618 (1988).

school racial separation did not.<sup>16</sup> Nonracial neighborhood assignment in areas of residential racial concentration resulted in racially concentrated schools.<sup>17</sup> Civil rights leaders saw this as a problem, and the obvious remedy was compulsory integration.<sup>18</sup> This meant a return to racial assignment, this time to increase integration. *Brown's* prohibition of race discrimination thus quickly went from being a great achievement to being an obstacle to be overcome.

In the 1968 *Green v. County School Board of New Kent County* case, Justice William J. Brennan, Jr., writing for a unanimous Supreme Court, decided to make the move from prohibiting segregation to requiring integration.<sup>19</sup> This move was extraordinarily ambitious and extraordinarily unwise. After fourteen years of litigation, the Southern school districts were finally brought into compliance with *Brown* only to be told that *Brown* was no longer the constitutional requirement if insufficient integration resulted. An openly admitted requirement of racial integration of schools, however, was not possible. It would have required the Court at least to qualify, if not overrule, *Brown*, and it would also have been applicable to the whole country—not just the South. It would have also required the Court to explain what compulsory integration was expected to accomplish. Justice Brennan cleverly avoided these obstacles by simply denying that *Green* required integration and insisting that it required only something quite different: “desegregation.”<sup>20</sup> Thus, instead of contradicting *Brown*, the Court was actually, we were told, enforcing *Brown* by imposing a requirement of racial discrimination in the name of enforcing a prohibition. Because it was “desegregation,” not integration, it would be required, it seemed, only in the South, which, in the

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16. See *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 888–89 (5th Cir. 1966); see also Alexander M. Bickel, *The Decade of School Desegregation Progress and Prospects*, 64 COLUM. L. REV. 193, 214 (1964).

17. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 222–23 (1973) (Powell, J., concurring); John E. Lee, *The Rise (and Fall?) of Race-Conscious Remedies and “Benign” Racial Discrimination in Public Education*, 30 SUFFOLK U. L. REV. 153, 164 (1996); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 62–63 (2002).

18. See Lino A. Graglia, *When Honesty Is “Simply . . . Impractical” for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153, 1157 (1987) (book review); Lee, *supra* note 17, at 164.

19. 391 U.S. 430 (1968).

20. *Id.* at 439.

opinion of the country, no doubt deserved whatever the Court was proposing to do to it.

The downside of the desegregation rationale for compulsory integration, however, is that it is both false and invalid. It is false, because the cause of school racial separation is the same in the South as in the North—residential patterns, not prior segregation.<sup>21</sup> It is invalid, because if compulsory integration is good policy in the South, there is no reason why it is not good policy in the North. As Justice Brennan once candidly explained, however, honesty, in this regard, was “simply . . . impractical.”<sup>22</sup> Changing the constitutional requirement from prohibiting segregation to requiring integration was exactly what Congress feared and meant to preclude in enacting Title IV, which could not be more clear. It defines “desegregation” as the “assignment of students to public schools . . . without regard to their race,” and repeats, in an excess of caution, that it “shall not mean assignment . . . to overcome racial imbalance.”<sup>23</sup> The Court, in an opinion by Chief Justice Burger, boldly asserted, however, that Congress meant that to apply only to Northern schools.<sup>24</sup>

When I was a participant in the busing wars—arguing in court and elsewhere against busing for compulsory integration—someone would invariably later inform me that he had found the answer to the busing problem, namely that busing was prohibited by the 1964 Civil Rights Act. I would have to disappoint him by saying I already knew that. The person would incredulously ask: “How, then, can the judges order it?” I would respond that American judges are not subject to law—that they make the law. When other government officials abuse their power you go to the judges, but when the judges do so, there is nowhere to go. “How then can we stop this insane busing?” he would ask. My reply was that we cannot, that we must protest only to register our protest.

If you have any doubt about the power of federal judges, consider that a federal district judge in Kansas City could order the State of Missouri to spend \$2 billion to attempt to lure

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21. See Graglia, *supra* note 18 at 1159.

22. See *id.* at 1174–75.

23. 42 U.S.C. § 2000c(b) (2006).

24. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16–18 (1971).

white students back to Kansas City schools.<sup>25</sup> These orders were totally futile and senseless. They did not aid education. They did not aid integration. But they were nonetheless obeyed.<sup>26</sup> How high would they have had to go—\$10 billion? \$100 billion?—before they would encounter resistance?

What the Supreme Court did to Title IV in *Green and Swann*, it then did to Title VII in *Griggs v. Duke Power*<sup>27</sup> in 1971. A unanimous Court, in an opinion again by Chief Justice Burger, converted Title VII's requirement that employers make employment decisions without regard to race into a requirement that they make *no* employment decisions without regard to race.<sup>28</sup> Chief Justice Burger explained that when Congress prohibited employers from racially discriminating, it meant also to prohibit them from preferring high school graduates to high school dropouts, and persons without a criminal record to persons with a criminal record if the result is to disproportionately disqualify blacks, unless the employer shows that the preference is a "business necessity."<sup>29</sup> The Chief Justice neglected to cite the congressional record in support of his assertion—which, of course, is a complete fabrication. The congressional record could not be clearer that Congress explicitly meant to preclude that result.<sup>30</sup> This was not a mistake by Burger and the Justices who joined the unanimous opinion. It was a deliberate falsehood. In *United Steelworkers of America v. Weber*,<sup>31</sup> the Court, in an opinion by Justice Brennan, made it explicit that Title VII does not prohibit discrimination against whites.<sup>32</sup>

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25. PAUL CIOTTI, CATO, MONEY AND SCHOOL PERFORMANCE: LESSONS FROM THE KANSAS CITY DESEGREGATION EXPERIMENT 2–3 (Mar. 16, 1998), <http://object.cato.org/sites/cato.org/files/pubs/pdg/pa-298.pdf>; see also *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 495 U.S. 33 (1990) (holding that federal courts could require school district to levy taxes in excess of limits set by state statute in order to fund school desegregation plan).

26. See CIOTTI, *supra* note 25, at 2–3.

27. See 401 U.S. 424 (1971).

28. See *id.* at 429–31.

29. *Id.* at 430–31.

30. *Id.* at 434 n.10 (acknowledging the extensive evidence in the congressional record of Senators against Title VII having this result).

31. 443 U.S. 193 (1979).

32. See *id.* at 201–02 (holding that Title VII was enacted with the primary concern of "the plight of the Negro in our economy") (internal citation omitted).

Finally, in the 1978 case *Regents of the University of California v. Bakke*,<sup>33</sup> the Court did to Title VI what it did in *Green* to Title IV and in *Griggs* to Title VII. Title VI prohibits race discrimination by any institution that receives federal funds.<sup>34</sup> The University of California at Davis School of Medicine received federal funds and was racially discriminating.<sup>35</sup> There could be no doubt that this was a violation of Title VI, but only four Justices were willing to decide the case in good faith.<sup>36</sup> The statutory violation being clear, they correctly pointed out in an opinion by Justice Stevens, there was no need to consider any constitutional question.<sup>37</sup> Four other Justices, however, led by Justice Brennan, found Title VI's prohibition of race discrimination to be "cryptic."<sup>38</sup> The ninth Justice—Justice Lewis Powell—found it to be, on the contrary, "majestic."<sup>39</sup> For these five Justices, Title IV did not mean what it said. Following the theory that a falsehood gains credibility by being stated boldly, Justice Powell found it useful to insist not merely that the Title did not mean what it said, but that the contrary meaning was "the clear legislative intent,"<sup>40</sup> despite four Justices' insistence on the opposite.<sup>41</sup>

Regarding the constitutional question, the "Brennan four" took the position that discrimination in favor of blacks should not be subject to "strict scrutiny" and was therefore permissible

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33. 438 U.S. 265 (1978).

34. See 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

35. See *Bakke*, 438 U.S. at 289.

36. See *id.* at 408, 412–14.

37. *Id.* at 411–12 (Stevens, J., concurring in part) ("Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground.").

38. *Id.* at 340 (Brennan, J., concurring in part) ("The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination.").

39. *Id.* at 284 ("The language of [Title VI], like that of the Equal Protection Clause, is majestic in its sweep.").

40. See *id.* at 287.

41. See *id.* at 418 (Stevens, J., concurring in part) ("In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. . . . In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race.").

as a “remedy” for “societal discrimination.”<sup>42</sup> Justice Powell, however, insisted that all race discrimination is subject to strict scrutiny and that “societal discrimination” is too vague a concept to be a compelling interest.<sup>43</sup> He naively believed, however, that Harvard had found the answer: race discrimination is permissible in higher education to achieve a racially diverse student body.<sup>44</sup> Harvard argued that because it could prefer a student from Montana to just another student from New York, there was no reason why it could not prefer a black student to a white student.<sup>45</sup> Harvard had apparently never heard of the Fourteenth Amendment.

The 2003 *Grutter v. Bollinger*<sup>46</sup> decision, written by Justice Sandra Day O’Connor, raised Justice Powell’s one-man idiosyncrasy to the status of a majority opinion.<sup>47</sup> That is how, although few people believe it, diversity became a compelling interest. None of the arguments for affirmative action before *Bakke* included anything about diversity. There is little disagreement that someone who has overcome difficulties should be given a break, but the problem with using socioeconomic status as a proxy for race is that although blacks are disproportionately of low socioeconomic status, the number of low-status white applicants is much larger. Thus, assisting those who have overcome such difficulties does not achieve the goal of affirmative action programs, which is simply to enroll more black students.

If the egregious abuses of power characteristics of this area of law had been committed by elected officials rather than by Supreme Court Justices, they would have been subject to censure and sanction from which the Supreme Court Justices are immune. Impeachment, which Hamilton saw as a “complete security”<sup>48</sup> against judicial misbehavior, turned out to be, as Jefferson said, “not even a scarecrow.”<sup>49</sup> The Justices’ actions

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42. *Id.* at 357 (Brennan, J., concurring in part).

43. *Id.* at 307–10.

44. *Id.* at 316–17 (referring to the Harvard College program as an “illuminating example” of a university admissions program that considers a combination of applicant characteristics, including race).

45. *Id.* at 321–24.

46. 539 U.S. 306 (2003).

47. *See id.* at 328.

48. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

49. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905).

exemplify Lord Acton's dictum about the corrupting effects of uncontrolled power.<sup>50</sup> As the government officials least subject to popular or political control, and as lawyers skilled in the manipulation of language to achieve desired results, it is hardly surprising that they are the least to be trusted and most to be feared of all political officials.

Our current system amounts to rule by judges, despite the constitutional guarantee of a republican form of government.<sup>51</sup> The Guarantee Clause provides for lawmaking by elected representatives—that is, the right of the people of Texas, for example, to determine through their elected representatives Texas's policy on abortion, capital punishment, prayer in the schools, sodomy, pornography, term limits, flag burning, and so on. But under our current system, these policies are not made by the people of Texas. They have been made for all Americans by the Supreme Court. President Obama contends that the people of California should not determine whether same-sex marriage should be permitted within their state but should leave it to the Court.<sup>52</sup>

Justice Anthony Kennedy—who, as a practical matter, has the final word on social policy—performs for us the function the Ayatollah performs in Iran. Congress cannot regulate corporate campaign contributions,<sup>53</sup> the states cannot put term limits on their federal representatives,<sup>54</sup> and we have a constitutional right to own a gun,<sup>55</sup> for examples, only because Kennedy voted that way. This is a far cry from the system of government the Founders thought they were creating. Benjamin Franklin legendarily responded to the question: “Well, Doctor what have we got a republic or a monarchy?”, by saying: “A

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50. See Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), in 1 LIFE AND LETTERS OF MANDELL CREIGHTON (Louise von Glehn Creighton ed., 1906).

51. U.S. CONST. art. IV, § 4.

52. See generally Brief for the United States as Amicus Curiae Supporting Respondents, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769326 (arguing that the democratically passed amendment to the California Constitution providing that “[o]nly marriage between a man and a woman is valid or recognized in California” violates the Equal Protection Clause).

53. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

54. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

55. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).



republic . . . if you can keep it.”<sup>56</sup> Today, I am afraid that we have to admit that we have not kept it.

We rightly protest that our rights have been taken from us by the federal government, but the primary culprit is the Supreme Court, not Congress. To complain of alleged abuses of power by Congress, whose members we vote into and can vote out of office, and to accept the much greater and more serious abuses of power by Supreme Court Justices, whose members are unelected, life-tenured, and unremovable, is to strain at the gnat and swallow the camel. To fail not only to protest the Justices’ usurpation of legislative power, but also to plead with them to protect us from Congress is to sharpen our executioner’s axe. We do not need the Court to protect us from Congress; we need Congress to protect us from the Court.

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56. Papers of Dr. James McHenry on the Federal Convention of 1787, in 11 THE AMERICAN HISTORICAL REVIEW 595, 618 (1906).