FOREWORD

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The topics covered by authors contributing to this edition of the *Black Law Journal* address important concerns of domestic human rights, particularly those affecting blacks in the United States. The topics presented here have an almost eerie quality of timeliness. This issue of the *Journal* will be published shortly before the 1984 presidential nominating conventions of both major American political parties and in advance of the 1984 presidential election, the results of which will possibly govern for the next two decades the character of the United States Supreme Court. If Ronald Reagan wins the 1984 election, he may be able to appoint at least five Supreme Court justices, a court majority. If he does that, it is almost certain that for as long as two decades, and stretching into the twenty-first century, the Court will reflect the conservative philosophy of President Reagan on civil rights matters.

With that, gains so far made by the implementation of affirmative action will wither away and there will very likely be a return to pre-1964 Civil Rights Act discrimination practices. Many employers and education personnel will likely view the end of affirmative action as signaling a return to negative action by government and tacit approval of open policies of discrimination. Though none of the decisions of a Reagan Court would openly and directly convey that message, the cumulative effect of its decisions would produce that result. The approach will be subtle, sure and clever. It will parallel the reasoning of President Reagan's appointees to the United States Civil Rights Commission on a recent matter: the Commission will no longer investigate the effect of President Reagan's budget policies on minorities and the poor because the Commission believes that to be a "budget matter" rather than a civil rights matter.

If reelected, it will not be difficult for President Reagan to appoint to the Supreme Court lawyers who will employ that kind of devious reasoning in judicial opinions on civil rights. Legal literature is filled with seemingly sophisticated and equally illogical reasoning. For instance like the Supreme Court's decision that employers' denials of disability benefits for pregnancy, while covering almost every conceivable male-incurred disability, was not unlawful male-female discrimination on the basis of sex; rather, it was non-pregnant person-pregnant person discrimination having nothing to do with sex differences.[1]

The focus of civil rights conflict for the next decade or more will be in the courts rather than legislative arenas. The legacy of Martin Luther King, Jr. is the great legislation his activist movement encouraged by establishing

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1. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

the national mood for its passage. The Voting Rights Act of 1965, the Civil Rights Act of 1964, illegalizing discrimination in employment and places of public accommodation, among other things, might as well bear Dr. King's name. But the mood for new civil rights legislation is almost nonexistent today. Appropriately, civil rights groups now concentrate on the implementation of existing civil rights legislation, the full potential of which has not yet been realized. For example, twenty years after the passage of the 1964 Civil Rights Act we have not yet found a way to implement effectively the promises of that legislation, by solving the overpowering problems associated with delay in the processing of employment discrimination cases.

The moral power of Dr. King's activism was undeniable when there was virtually no legal recourse for any type of discrimination suffered by blacks. But as the scope of the law's protection against discrimination increased, the means of discriminating became increasingly subtle. Legal problems of proof and questions concerning the scope of remedial decrees in discrimination cases have taken the place of the moral issue of whether discrimination should end. Both statutory and constitutional discrimination law have become so bafflingly complex that legal scholars may make an academic career writing about discrimination law doctrine. In much of that literature, the moral issues seem to have become lost in the search for "elucidating doctrine," "supporting rationale" and "analytical framework." Any judge who wants to find legal scholarship for or against affirmative action, for example, will have no trouble finding it. A Supreme Court decision ending all affirmative action in hiring and in university and college admissions can easily be written in a scholarly and apparently neutral tone.

A Reagan Court of the mid-eighties (if that is what the Court is to be) will end affirmative action. President Reagan will appoint to the Court the kinds of lawyers who now make the Reagan Administration's Supreme Court arguments against affirmative action and against the denial of tax exemptions to private schools practicing discrimination.[2] When President Roosevelt finally had the opportunity to make appointments to the Supreme Court (he made none during his first term) he swept aside judicial precedents against his anti-depression legislation by appointing the most open advocates of those policies. His first two appointees were his Solicitor General, Stanley Reed, who had argued in the Supreme Court in defense of the President's legislation, and a Senator who had sponsored some of President Roosevelt's legislation in the Senate, Hugo Black.

Not since President Dwight Eisenhower's Administration has a President been able to place on the Supreme Court a majority of his own appointees. President Nixon came close with four appointments. Other post-Eisenhower presidents—Kennedy, Johnson, Ford and Carter—did not come close. Although, the Kennedy term was tragically shortened to less than a full term, he made two appointments to the Court. President Johnson also made two appointments during his five years as President. President Ford made one Supreme Court appointment during his less-than-full term in office, and President Carter made no appointments during his first and only term as President. During most of the time of the terms of the post-Eisenhower presidents, the Court was not primarily composed of justices in their

2. Bob Jones University v. United States, — U.S. —, 103 S. Ct. 2017 (1983).

seventies, as the Court was during most of President Roosevelt's first term, and as it is at this writing.

If one follows the conventional wisdom of the civics books, each justice appointed to the Supreme Court follows the straight-arrow path of interpreting the Constitution and federal statutes without fear, favor or personal bias. If we examine Supreme Court precedents, we know they are often developed slowly and that once developed they are only slowly and incrementally changed—when they are changed. We are thus taught that presidents of the United States are often surprised by what their Supreme Court appointees do once they are appointed to the Court and are protected by the constitutional guaranty of life tenure. President Eisenhower's reaction to the judicial liberalism of Chief Justice Earl Warren (". . . worst mistake I ever made . . .") is often cited as an example of such presidential surprise. However, President Reagan is too committed to ending affirmative action to make a "mistake" like President Eisenhower's.

Once affirmative action in hiring and education ends and the qualified are rejected on grounds of race, as they were for so many years before affirmative action, a whole new generation of young blacks will become imbued with the sense of hopelessness and despair that robs the spirit of initiative. True, laws will remain on the books making discrimination on grounds of race unlawful. But with pervasive disregard for the mandates of those laws (encouraged by strong signals from an anti-affirmative action judiciary), violations of anti-discrimination laws will become beyond the capacity of the law to enforce. Crippling delays in the handling of discrimination cases, combined with a sheer lack of will on the part of the Administration's discrimination-law enforcers, will defeat the objectives of the statutes. The effect will be the equivalent of a return to the pre-King-movement times of governmental acquiescence in discriminatory practices against blacks.

Measured in terms of a president's ability to have an immediate impact on domestic matters, the power to appoint United States Supreme Court justices is at the pinnacle. The president exerts domestic powers in other areas where presidential power is shared with other branches of government or is governed by market forces beyond a president's real control. A president's influence on the health of the economy, for example, is usually not nearly as great as the public seems to perceive. Current inflation rates and rates of unemployment may be governed uncontrollably by events of a decade or more ago. Even those economists who favor President Reagan's economic policies would probably agree that we need more time to test the real effects of "Reaganomics" on the health of the economy. But it will take very little time to shift dramatically the federal judiciary's course on affirmative action from acceptance to resounding rejection. The votes of Supreme Court justices on affirmative action issues have been so close that the vote of the next person appointed to the Court could trigger the turnabout.

The power to appoint Supreme Court justices and other federal judges is the power to make a direct and lasting impact. If President Reagan is reelected, blacks over the age of fifty may not live long enough to see another friendly United States Supreme Court.