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Current Issues in Civil Rights Law

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CURRENT ISSUES IN CIVIL RIGHTS LAW*

BY ELAINE R. JONES**

Thank you very, very much, Judge Henderson. What a generous, thorough introduction. With my graduation dates everyone can do the math and figure out just how old this woman is. It chronicled my experiences at the bar and elsewhere, and I do appreciate Judge Henderson's taking the time to explain to you who I am.

I want to thank you for inviting me to be with you today. In particular, I want to express my appreciation to Dean Pagano, to Professors Jon Sylvester and David Oppenheimer, the faculty organizers of the series, and to the Golden Gate Black Law Students Association and the Bar Association of San Francisco, the organizational co-sponsors of these important discussions.

Judge Henderson explained to you just what the NAACP Legal Defense Fund (LDF) is. We are a nation-wide civil rights law firm, headquartered in New York City, with offices in Los Angeles and Washington, D.C. as well. Founded by Thurgood Marshall in 1940, we were the first public interest law firm in the country. Thurgood had been general counsel of the NAACP and decided that there should be a separate organization to pursue the legal campaign against segregation and other forms of racism. An organization separate in law, separate in fact, separately incorporated, that could also have tax exempt status

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as a non-profit organization. The NAACP gave permission to use its initials, and the NAACP Legal Defense Fund was born. LDF has had a 56-year history, and we have been involved in more cases in the U.S. Supreme Court than any other legal organization in the country with the exception of the Solicitor General of the United States. At last count, we had participated in over 500 cases in the Court.

There's a lot of confusion, because when people hear the name NAACP Legal Defense Fund they make several assumptions. First, they assume that we are part of the NAACP. Second, they assume that we represent only African Americans. Third, they assume that the cases that we bring are limited to issues of race. However, all three assumptions are wrong.

As I've told you, we're not part of the NAACP; we're separate. When we first were incorporated we had interlocking boards. But when *Brown v. Board of Education*[1] was decided in 1954, Southern congressmen — many of whom spoke with this same twang with which I do — wrote to the Internal Revenue Service complaining there was an organization out there enjoying tax exempt status that had an interlocking board with an organization that did not. So in 1956 we had to sever the boards and thus became completely separate, not only separate in law as we had been before, but separate in fact as well.

Charitable contributions are a critical source of our funding, as are counsel fees. Unfortunately, we can no longer rely on counsel fees the way we once did. Historically, we initiated civil rights litigation as plaintiffs, thus entitling us — if we won — to recover attorney's fees under the fee-shifting provisions of the federal civil rights laws. However, increasingly — and particularly in the areas of affirmative action and voting rights — we find ourselves forced to intervene as defendants in order to fight to save programs or districting plans that are under attack by the right. One of the many unfortunate consequences of that defensive posture is that even when we win, we cannot recover attorney's fees. This change in posture has serious economic consequences for civil rights groups like our-

1. 347 U.S. 483 (1954).

selves.

Now, the second issue I mentioned — whether we represent only African Americans — is interesting. The first Title VII case that the Legal Defense Fund litigated in the High Court - in fact, the first case under Title VII decided by the Supreme Court - was actually a sex discrimination case: *Phillips v. Martin Marietta*[2] in 1971. A white woman from Atlanta, Georgia, with three preschool-aged kids applied for a job with the Martin Marietta Corporation. Martin Marietta said, "You have three preschool-aged children, you should be at home, not in the work place." We laugh at it now but companies did that all the time before Title VII was enacted. Employers had the right to do that — there was nothing that limited them. LDF took that case, and I asked Mrs. Phillips why she had come to us. And she said it was because we understood civil rights and that she was hoping we would agree to represent her. And so we did. And in a unanimous opinion, the Court reversed the ruling of the trial court that had dismissed her case. That was the first Title VII case. And so the race of the plaintiff does not determine whether the Legal Defense Fund becomes involved in a case. It's the issue that the case presents in terms of protecting the integrity of the law.

And the third assumption — that our cases are limited to issues of race — is similarly wrong. Not only was our first Title VII victory in the Supreme Court won in a case that did not involve race, but our most recent one was as well. Just last year a case came to us from Tennessee: *McKennon v. Nashville Banner*.[3] It concerned the "after-acquired evidence" doctrine. Two courts below had ruled. The plaintiff's lawyer had lost both in the district court and in the Sixth Circuit. The plaintiff was a white female, 62 years old, who had sued under the Age Discrimination in Employment Act. She had been dismissed. She alleged it was because of age. Her lawyer brought the lawsuit and during the course of discovery it was disclosed that she had taken some documents home from work, which was strictly prohibited under the company rules and was grounds for dismissal. So when it came to light that she had taken

2. 400 U.S. 542 (1971).
3. 115 S. Ct. 879 (1995).

those documents home, the company said, "Well, even if we dismissed her unlawfully - although we do not admit that by any means - it was negated by her subsequent unlawful act, since she would have been fired anyway had we known about the documents." And the courts below had accepted this argument and had held that such after-acquired evidence could negate her age claim. Her lawyer came to us, LDF, and asked if we would take the case to the Supreme Court.

Now the mischief of a rule like that — which may not be obvious — is that it would allow any employer who has discriminated to escape liability, by digging through an employee's record and finding some infraction to justify its action retroactively. It would make bringing such a case very unappealing to an employee — even when it is clear that the employer had acted for discriminatory reasons, and it would allow employers to get away with a lot of discrimination.

Returning to the *McKennon* case, when she came to us, we took the case to the High Court, drafting the certiorari petition in a way that we hoped would intrigue the Court and lead it to see the importance of the issue. Once cert was granted, we brought the lawyer up to New York and spent time really mooting him because arguing in the district court and arguing in the court of appeals are quite different from standing up before the High Court. You stand up and they're right there in your face, and you've got to be able to get in and out of that argument, especially with Justices on the bench who are bound and determined to eat up your time. They're not going to vote for you, but you've got thirty minutes and they want to make sure that they use up 15 or 20 of them. So, you've got to know how to get in and out of the argument. There's a whole argument strategy you have to understand for the High Court. So, we moot-courted him several times, got him ready, and we second-chaired him at the argument.

We decided to take the case because of the interrelationship of the issues. Age, disability, gender, race and ethnicity — those are sister statutes and if you let a doctrine such as the after-acquired evidence rule seep into the law in an age case, we're going to look up and find it in race; it's going to be in gender; it's going to be there in disability cases as well. Some-

times you bring a gender or a race claim to the High Court and you have trouble getting through so that the Justices can really hear the issues that you're raising. Sometimes a race or gender claim can cloud the Court's understanding of what's going on. But I thought one thing they would understand is age. And they did. We won that case by a nine to zero vote.

It's interesting — when the case came down and the *Wall Street Journal* did their piece on *McKennon v. Nashville Banner*, they went right away to the Women's Legal Defense Fund. Because the plaintiff was a white woman, they assumed that the Women's Legal Defense Fund had represented her. But, it was the NAACP Legal Defense Fund (although that didn't stop the head of the Women's LDF, my friend Judith Lichtman, from obligingly providing the quote that was used in the story).

Let me share another example of this interrelationship and how we ought to be brought together by these issues rather than divided by them. LDF went to the Ford Foundation and got the first grant that gave birth to the Mexican-American Legal Defense and Education Fund (MALDEF). And the LDF Director-Counsels, beginning with Jack Greenberg and continuing with Julius Chambers and then myself, have all served on MALDEF's board. Interrelationships and solidarity are important. In New York you will find many of the legal defense funds in the same building. Several public interest law groups came together, got a building in New York, and worked out a consortium arrangement. That building, 99 Hudson Street, is now home to the Asian-American Legal Defense Fund, the Puerto Rican Legal Defense Fund, the NOW Legal Defense Fund, and the NAACP Legal Defense Fund. One bomb takes care of us all, but we're all right there.

Another illustration of how these issues are inclusive and not exclusive brings to mind a case that walked into our Washington, D.C. office a few years ago. The plaintiff was a white male manager of a chain of restaurants in Maryland. And the regional manager visited several of his restaurants and told him, "They're too many blacks in here." This sort of "smoking gun" evidence of discrimination is highly unusual. You seldom learn of such intentional discrimination because somebody has to tell you what went on and they rarely do. But the manager

who walked into our office reported being told there were "too many blacks." And the manager said, "Well, look, I am just hiring the people best qualified for the position based on the applicant pool that comes in the door. I've got the vacancies, so I'm hiring." But the regional manager said, "Well, do something about it." Two months later the regional manager came back and nothing had been done about it. The composition of his work force was the same. And so the local manager was fired and he came to the Legal Defense Fund. When he walked in the door, I had him come into the conference room and sit down in front of two lawyers. We took that case. And I'm happy to report that that restaurant manager will never have to work anywhere else ever again. Last I heard he was on a boat somewhere off of Florida. He doesn't have to worry about anything any more.

Before we discuss the question of affirmative action generally, I want you to know that we have an affirmative action plan at the Legal Defense Fund. We've got to make sure that our mix of lawyers is just that, a racially diverse, culturally diverse group. How can we in good faith fight to defend affirmative action if we don't embrace diversity ourselves? This is very important. The head of our office in Los Angeles is Asian-American; he's been with LDF over 20 years. The head of our office in Washington D.C. is a white woman. We have a staff of approximately 30 lawyers and, out of those 30, we have about 14 or 15 African Americans and then the rest are a mix of white, Hispanic, and Asian-American attorneys, both men and women. I keep that in mind when I'm doing my hiring because it's important, it adds value, it makes us a better civil rights law firm. There are lots of people out there who have the ability and talent to work with us, but decisions have to be made not only in terms of what a person brings with them and their experience, but also what they will add at any given point to the organization. We're not talking about a question of qualifications — all of our candidates are highly qualified. When you look at the whole question of affirmative action, qualifications really shouldn't come into play because affirmative action only concerns selection from among persons who have the necessary qualifications. This basic fact is frequently misunderstood.

I think about my admission to the University of Virginia

Law School. They still had not had a single black woman student as of 1967. The reason I made it through Virginia was because I had just come from a stint in the Peace Corps in Turkey. I went from one foreign country to another. When I arrived that was my approach. One thing we forget is that the University too had to do some things differently when I arrived. Most of the Southern states had had a policy of excluding African Americans. As a matter of law, if an African American qualified to go to the state university, the state would pay his or her tuition to go to school out of state rather than admit him or her to the segregated state university. That happened up until 1967. Take the case of Patricia King, who today is a distinguished law professor at Georgetown. I understand that my homegirl applied to UVA while I was still in the Peace Corps. She was a couple of years ahead of me, and I understand they would not admit her. Instead, Virginia paid her tuition at Harvard. So from Turkey I said, I'm going to apply to Virginia — and perhaps end up at Harvard. But Virginia fooled me: they said yes and admitted me.

I was fully qualified but there were many other similarly qualified applicants, the majority of them white. UVA could have continued to fill its class several times over just with white men, as it had done for many years. However, the university decided, "Well, we have been affirmatively excluding and discriminating for all these many years. It's time for us to do business differently." That's all affirmative action is.

As I think about what I have been asked to speak to you about — the civil rights laws and where we are — I see them as furthering the work of the founding fathers. When they came together in Philadelphia in May, 1787, they came from all over. Some were sober, some were not sober. Luther Martin, the Attorney General of Maryland fell off his horse — they don't tell us about that. Thomas Jefferson wasn't there. Everyone thinks he must have been since he wrote the Declaration of Independence; but he was not there at the Grand Convention. There were a total of 55 men. At that time there were three million people in the United States. Those in Philadelphia were the people who were propertied. They could have debated the issues in Latin as well as in English. They had rich and varied backgrounds. But they were all on one societal

level. We know what the country was like then. There were three million people, slavery was at its height, women were glued to the pedestal, and the Indians had no rights either.

There was a woman who tried to make a difference. We read in the history books about Abigail Adams, how she wrote to John, her husband. Abigail was the wife of the second President of the United States, John Adams, and mother of the sixth, John Quincy Adams. But Abigail wrote John and she said, "John, don't leave the ladies out of this grand code of laws you're putting together. Please remember the ladies." And John wrote back and said "We knew the Indians were upset and we know the slaves were upset, but never did we know that a tribe more numerous than all of the others had grown upset." And she said, "Well, if you exclude us, we will throw your laws at your feet." They had a long marriage, but John did not listen. So when the founding fathers put together the Constitution and the preamble of the Constitution, what were the first three words? We the People. We the People. We the People was very narrowly defined. It did not include most of us in this room. If you were black, you were considered property. When they referred to property in their original Constitution, they were really talking about slaves most of the time. As for women, although the original document didn't say so explicitly, by the time the Fourteenth Amendment was ratified, inserting the word "male" into the Constitution for the first time, it was clear what was going on. We the People was a wonderful concept and the founding fathers had the right terminology. They knew what they were supposed to be doing, but they didn't quite do it.

They gave us a Constitution which could be amended. They gave us a wonderfully concise document and it's one of the finest ever crafted. But what saved us has been the amending process. More of us have been excluded than included. And so, what is it our job to do? It's to finish putting the "We" into "We the People." When someone asks me about the civil rights laws, I explain that what we're trying to do is make the "We" inclusive. We do it in fits and starts as a society. Sometimes we get on the right track and we almost make it, and then we turn around and we start back. But whenever they use it for political purposes, when politics comes in and intervenes,

almost inevitably it is in a very negative way.

Let me give an example involving a current civil rights issue. A fight for the survival of the Voting Rights Act of 1965 is being waged in the courts as we stand here today. December 5, 1995, was the shootout at the OK Corral at the Supreme Court of the United States. The Legal Defense Fund was up there and had the Court all morning in companion cases from Texas and North Carolina. The Court had to provide an additional half hour for each argument. We went on all morning. Then we broke for lunch and came back and went at it again. At one point, Justice Scalia said to one of the lawyers arguing for the Legal Defense Fund, "What is it that you people want?" To which, the lawyer responded, "We want what you want" - the opportunity to participate meaningfully in American democracy.

The popular media would have us think that blacks want to be treated differently from other groups in the political process. They say it's totally unnecessary and unfair to have the funny shaped districts. They would have you think that these funny shaped districts are all black and brown districts. Let me tell you a secret. Most districts are funny shaped and they're drawn funny shaped in order to protect incumbents. Republicans look after Democrats and Democrats look after Republicans in the state houses when they go down to the basement to draw their lines. Keep that in mind.

After the Civil War, it was necessary to amend the Constitution in order to end slavery and extend full rights to African Americans. Although Lincoln had issued the Emancipation Proclamation, it took the Thirteenth Amendment to outlaw slavery forever. Three years later, the Fourteenth Amendment made the newly freed slaves citizens and granted them the right to the equal protection of the laws. But African Americans still didn't have the right to vote until passage of the Fifteenth Amendment two years later in 1870.

These constitutional rights, they're wonderful to talk about and read, but they don't really have meaning and vitality until they are enforced and interpreted so that they include us. The federal courts' recent rulings interpreting the Fourteenth

Amendment to limit affirmative action are therefore particularly ironic. These decisions turn the Constitution on its head since the Fourteenth Amendment was passed by an affirmative action Congress. The Thirty-Ninth Congress of the United State was an affirmative action Congress. That was the post-Civil War Congress — the Congress that set up Howard University and the Freedmen's Bureau. Charles Sumner the great liberal senator from Massachusetts, was dying. That's why that amendment got passed. And to say now that the amendment inhibits full inclusion of African Americans is, on its face, ahistorical.

Let's turn next to the Fifteenth Amendment. Everyone is supposed to have the right to vote. We were all so proud last year when South Africa got the right to vote. And people stood in line for hours and hours waiting patiently to vote. We thought it was wonderful. That's not just South Africa. That happened here in this country in 1870 when black males got the right to vote. Now, black women didn't get it. No women could vote, and there was a big fight then because Congress was willing to give the vote to African-American men, but not to all women. Women got to vote 50 years later. Black and white, brown and yellow, together. Sojourner Truth had some decisions to make: "I'm black, I'm a woman, where do I go?" And so she and Frederick Douglass had to have some long conversations over that, which they did.

Black men were first permitted to vote in 1870 — these were the newly freed slaves, most of whom were in the South. They voted freely from 1870 to 1890. During that period, Congress for the first time become desegregated and nearly 40 blacks were elected. We made progress, but what happened? We then took several steps back. We said, "Wait a minute. We adopted that Fifteenth Amendment but we really didn't mean for it to work this well." And so what happened was that between 1890 and 1900, many state constitutions were amended to put restrictions on the right to vote. That's when they came up with the poll taxes, literacy tests, and grandfather clauses. The purpose and effect of these measures was, of course, to deny the vote to African Americans. By 1900, most of the African-American (male) voters who had been granted the vote during Reconstruction were once again disenfranchised. In

1901, the last black to leave the Congress, George Henry White from North Carolina, stood up on the floor of the House of Representatives and said, "You have excluded us. You have taken away the right to vote and so I'm the last one to leave. But, we too, are a part of this democracy and we shall rise again like the Phoenix." That was 1901.

When did the next African American come to the Congress from one of the states of the old Confederacy? Not until seventy-one years later with Barbara Jordan from Texas. As we stand here now, of the 36 million African Americans in this country, a third are located in the South, 12 million. From 1901 to 1972, no blacks served in Congress from the South. But then Barbara Jordan (from Texas) and Andy Young (from Georgia) arrived together in 1972. Now, why? Because the Voting Rights Act had been passed in 1965. Whenever a civil rights law passes, it's never enforced right away. It's nearly always tested first in the Supreme Court. So the Voting Rights Act went up to the Supreme Court. It took two or three years to get to the Court and for the Court to hold it constitutional. And then we saw its effects for the first time in the 1970 redistricting. But progress was still in fits and starts. It was the 1982 amendments to the Voting Rights Act that put real teeth into the law. And those amendments too went up to the Supreme Court. The Supreme Court reviewed them in *Thornburg v. Gingles*[4] in 1986 and held them valid. That was 1986. 1990 was our first redistricting pursuant to the 1982 amendments to the Voting Rights Act. The first elections under the 1990 redistricting were in 1992, because the census was in 1990. What happened? Forty African Americans came to the Congress. This was the first time we had had that number since the 1870s and 1880s. Folks come in from the deep South for the first time this century. Eva Clayton and Mel Watt were elected from North Carolina. Cynthia McKinney and Sanford Bishop came from Georgia — John Lewis had been there from Atlanta, but two more were added. From Texas there was a new Hispanic legislator. In Barbara Jordan's old district, her successor, Mickey Leland, died and was replaced by Sheila Jackson Lee. They also added Cleo Fields from Louisiana.

4. 478 U.S. 30 (1986).

Now what happens? When that election takes place, it's almost as if it's a repeat of what happened in 1890. We say oh, oh, all of these black people. You know, we mean for the laws to work but, my goodness, we don't mean for all of this. So what do you do? At that point now, we challenge the Voting Rights Act.

Studies have shown and courts have found that racially polarized voting is sadly pervasive throughout much of our nation. Regrettably, whites all too often will not vote for a person of color. Because of this unfortunate reality, majority-minority districts are the sole means by which we have been able to achieve a truly desegregated Congress. And if we lose the voting rights cases that we argued in the High Court last December,[5] I'm afraid the day may arrive when the members of the Congressional Black Caucus will be able to fit into the back seat of a taxicab.

So, we have got to understand the interrelationship of these issues. In all parts of the country, you don't need the same remedies. But you do need remedies when unfair racial block voting consistently prevails in a region. The Voting Rights Act is an issue across the country and not just with respect to federal elective offices, but also school boards, state legislatures, and city councils.

America is a democracy. When race rears its ugly head, when African Americans, Hispanics, and other people of color cannot elect candidates of their choice because of entrenched, racially polarized voting, the Voting Rights Act kicks in. It's then and only then that it kicks in. We're in danger now of this Court saying that that Act runs afoul of the Constitution. They've been tinkering around with it for the last two years, trying to figure out what it is they want to say about this Act. Meanwhile, we are in jeopardy as a nation of suffering a major set-back in opportunities for people of color to have a meaningful voice in our political system.

5. Editor's note: The voting rights cases referred to were decided by the Supreme Court on June 13, 1996. *See Shaw v. Hunt*, 135 L. Ed. 2d 207 (1996); *Bush v. Vera*, 135 L. Ed. 2d 248 (1996).

Let me now move on to affirmative action and the issue of scholarships for African Americans and other historically excluded people of color at American universities. The case is *Podberesky v. Kirwan*[6] and it concerns the University of Maryland. If there has ever been a place that has discriminated on the basis of race and ethnicity, it's the University of Maryland. The institution has a sad history, which the University of Maryland acknowledges. Thurgood Marshall was denied admission to the University of Maryland, back in 1930. He attended Howard University instead. After receiving his degree he then went on to sue the University of Maryland over its discriminatory policies, in the case *Maryland v. Murray*.[7] Decades later in the 1970s, the situation for African Americans remained bleak in Maryland's public institutions of higher education. The state was sued as part of the multi-state higher education desegregation litigation known as the *Adams*[8] case. Maryland had been recalcitrant. Finally, after *Adams* and a little pressure from what was then the U.S. Department of Health, Education and Welfare, the University of Maryland decided it needed to do something about its image after all of those years of excluding African Americans.

In 1979, Maryland adopted a scholarship program under which it would spend less than 1% of its overall scholarship monies to encourage high achieving African-American young people to matriculate at the University of Maryland — less than 1%. The plan worked. Maryland started being competitive. They had scholarship money available, and an institution that had had a clear history of exclusion had African Americans start coming and achieving. They started talking to others and the word got around: "It's not a bad place to come. Let's give it a chance."

Ironically, the very program that caused Maryland to make progress was then challenged in court as being constitutionally impermissible. The plaintiff said that race-based schol-

6. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

7. 169 Md. 478, 182 A. 590 (1935).

8. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *aff'd in part and modified in part*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

arships violated the Fourteenth Amendment. The judge who heard the case was a Reagan appointee, Judge Frederick Motz. And Judge Motz, after a six week trial, wrote one of the finest opinions that I have ever read. He went in with his mind open and listened to the facts: he was a judge. Isn't that nice — you run into those sometimes. I recommend to you his opinion.[9]

The judge framed the question as whether a public university, racially segregated by law for almost a century and actively resistant to integration for at least 20 years, after confronting the injustice of its past — whether that university may voluntarily seek to remedy the lingering present effects of that discrimination by spending 1% of its financial aid budget to provide scholarships to approximately 30 high achieving African-American students each year. He concluded, after looking at all of the evidence, that the program was necessary to remedy the present effects of past discrimination and that it was narrowly tailored. He ended that opinion by saying that few issues are more philosophically divisive than the question of affirmative action. He said it strikes at our very souls as individuals and as a nation. It lays bare the conflict between our ideals and our history. He said the answers we give to it today cannot be cast in stone. All that we can ask of those entrusted with the responsibility of running our institutions, both public and private, is that they approach the issue intelligently, sensitively and self-critically, without bias or self-interest. He said that the University of Maryland at College Park had done that in establishing this modest scholarship program as part of its commitment to erasing the vestiges of its past discrimination. And its judgment withstands the scrutiny to which the Constitution properly subjects it.

Judge Motz's decision was appealed to the Fourth Circuit and a very conservative panel just threw the program out. They paid no attention to the judge's findings of fact or to the history of discrimination, saying simply that it was too long ago and that there was no compelling interest to justify action taken today. They ignored the findings of fact and disposed of the case, and the Supreme Court denied review.

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9. *See Podberesky v. Kirwan*, 838 F. Supp. 1075 (D. Md. 1993), *rev'd*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

Viewing the court's decision in its real world context further illustrates how deeply troubling it is. As a society we spend $75,000 a year for an inmate in solitary confinement. We spend $20,000 a year for an inmate in the general prison population, eating three meals a day, watching television. This scholarship is $4,000 a year for high-achieving African-American kids. Now, something's wrong. We take a few steps forward, we take so many back.

Let's now turn to the proposed California Civil Rights Initiative (CCRI). What this law would do to California state law in terms of the rights, not only of minorities, but of women too is simply unconscionable. Unlike the federal Constitution which is still read as subjecting gender-based discrimination only to a form of intermediate scrutiny, the California Constitution currently affords women broader protection, subjecting gender-based discrimination to strict scrutiny. CCRI would strip California's women of this important protection. If you look at the language of the initiative, it says "nothing in this section should be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting." In other words, a reasonable basis is all that would be necessary to justify gender-based exclusions. It repeals the California Equal Rights Amendment protections as they have been construed by the California Supreme Court since 1971[10] and women will be lucky to have the protection of a rational basis standard if this initiative is passed. It's as broad as anything that I've ever seen. Not once does it mention the words affirmative action — which shows that they had a good public relations person putting it together. Instead, it talks about preferential treatment and preferential treatment gets everybody up in arms. But what they're really talking about is ending affirmative action because that would be the effect and impact of the legislation.

When you look at how women, as well as minorities, have been able to move forward, not in giant steps, but making modest but real progress, I would hate to see California be-

10. *See* Cal. Const., art I, § 8; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971).

come like Louisiana. California should not be in the same boat at Louisiana, where the state Supreme Court just handed down a decision that essentially outlaws all types of affirmative action by the state and by local governments.[11]

There are a lot of issues — the whole issue of environmental justice and what it does to people of color and to poor people. As you know all too well, there is no statute that allows us to go to court to challenge the many forms of discrimination that are based not on race or ethnicity but simply on poverty. You've got to base challenges in terms of gender or ethnicity or race or disability or age because those are the categories that are protected. Concerning environmental justice, they're dumping toxic waste in black and brown communities. And there is so much red-lining by banks and insurance companies. It's unconscionable. You can't get a mortgage to buy a house because you can't get the insurance — it destabilizes the neighborhood. You can't get the insurance to start a business in the inner city so workers there are forced to look for work in the suburbs — although there too, like everywhere, all too many new jobs pay only minimum wage. Then there's a circle drawn around the inner city and you have transportation problems. The bus won't stop there; the transportation system is inadequate. That's what's going on now in Los Angeles. Bus fares are going through the roof, with the result that black and brown people who rely on public transportation are subsidizing the cost of a shiny new massive rail system that serves a group of commuters that is overwhelmingly wealthy, white, and suburban. These are basic issues about what kind of society we are going to become.

You've been very patient with me and I want to leave you with the words of Thurgood Marshall, who said, "You know, they called us agitators. But what is an agitator? That's the thing in the washing machine that gets the dirt out." We must keep on agitating. Thank you very much.

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11. *See Louisiana Assoc. Gen'l Contractors, Inc. v. La.*, 669 So. 2d 1185 (La. 1996).