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KEYNOTE SPEECH

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Thank you very much, and good afternoon to all of the participants in this interestingly named People of Color Conference. I am somewhat apprehensive about using the term "color" today since it is no longer considered an appropriate word to use. It is good that we are meeting to talk about a subject that I have been connected with for many years. A group of students came up to me the other day and said, "You're advocating diversity of this black school and we are pulling together a petition to demand your resignation." And I said, "Do you need any help?" It was interesting because they didn't even bring the petition back to me after they finished. Being a college chancellor, a president, is a lot of fun, but I had a lot more fun litigating cases.

I was asked to talk for a few minutes about the status of civil rights in the 1990s. Additionally, I presume that I was supposed to look into my little crystal ball and talk about civil rights in the future. After thirty-five years of litigation in civil rights, I should be overly optimistic about the progress we have made. After all, I have rejoiced with many decisions of the Supreme Court which directed improved opportunities for African-Americans in education, employment, housing, and health care. Occasionally, I have even rejoiced with the decisions of the Court in the areas of criminal law and voting rights. Indeed, we watched African-Americans move from segregated and inferior schools to better jobs, to better housing, and, now, to more than forty African-Americans in our highest legislative chamber. Why shouldn't we then rejoice at our progress, at the present status of civil rights, and even at the future of civil rights?

Developments since the mid-1970s have raised a frightening cloud on my optimism regarding civil rights. As the years have passed, we have become even more concerned about the progress of the past, and, in some cases, about whether that was really pro-

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gress at all. Before I continue, let me make clear that I believe we have made progress, substantial progress. However, I have some concerns, and they are appropriate concerns.

The changes written into our Constitution and into federal and state laws will never permit this country to return to the status of civil rights as it existed in the nineteenth century or the early part of the twentieth century. However, the trends that are apparent in more recent Supreme Court decisions, in Congress and in many of our state capitals are placing us in a kind of twilight zone of half-free and half-enslaved.

That is not an exaggerated characterization when we look at the nation's poor. I had hope, with *Swann v. Charlotte-Mecklenburg Board of Education*,[1] that we were at least writing an end to the segregated public schools as we had known them, and *Keyes v. School District No. 1*[2] opened up even more possibilities than *Brown v. Board of Education*,[3] and *Swann* would be applied nationwide. *Milliken v. Bradley*,[4] in Detroit, and *San Antonio Independent School District v. Rodriguez*,[5] in Texas, however, dampened our optimism. *Brown* would only be applied where schools were intentionally and purposely segregated by state action, and only within the confines of clearly established districts. No relief would be accorded where only poverty was to be the determining factor, placing children at a disadvantage, and that was true even though our poor, our minority poor, would suffer disproportionately. These decisions foreclose the possibility of many children even enjoying the benefits of *Brown*. They would remain in segregated and inferior schools with no constitutional relief.

Events in Oklahoma City, Oklahoma, Dekalb County, Georgia, Norfolk, Virginia, and Austin, Texas, made clear that the relief we had obtained after thirty-something years of litigation was only temporary. We watched with dismay as school district after school district abandoned these desegregation plans and returned to segregated schools. Norfolk, Oklahoma City, Austin, and Dekalb County are now as segregated as they were before *Brown*, with the exception of perhaps some mixing of teachers and administrative personnel. The same is true in many other school districts across the South and North that were desegregated during the 1960s and

1. 402 U.S. 1 (1971).
2. 413 U.S. 189 (1973).
3. 347 U.S. 483 (1954).
4. 418 U.S. 717 (1974).
5. 411 U.S. 1 (1973).

1970s. What do you tell an African-American child today who wants a better education? Is there any basis for that child to believe that the Constitution provides protection for him, just as it provides protection for a white kid across town?

If we extend *Brown* to higher education then the problem is equally dismal. Decisions leading up to *Brown* made clear that segregation in higher education would not be tolerated. In Mississippi, we were assured that *Brown* would indeed be applied in higher education.[6] States with formerly segregated colleges and universities began to look again at the Court's interpretation of the Constitution. But, here again, the bark was worse than the bite. Black children in Mississippi now face the possibility that they will never get a chance to complete a college degree. They, therefore, question whether *Brown* really provided any relief for them or whether it was simply an obstacle in their path to freedom.

The latest ruling in Mississippi directs historically black institutions to increase their white enrollment.[7] Five million dollars has been allocated for each black school for this purpose with no similar allocation for black children to attend any school. No directive was issued to the white schools to increase their minority enrollment. All schools will apparently have to adopt the same admission standards, despite the fact that the standards now being applied will disproportionately exclude eighty percent of black children.

In Alabama, black colleges and universities were condemned by the court because they had, as the court saw it, so few white students.[8] But nothing was said about the University of Alabama or Auburn. In Florida and North Carolina, state legislators are seriously considering eliminating funding of remedial programs in four-year institutions, and now in junior and community colleges as well. Where is the poor kid who can't pass the test to get into a four-year college going to go to college? The answer: Who cares? Moreover, in Texas, as well as California and across the nation, race based admission programs and scholarships are condemned as reverse discrimination. We are completing a cycle from *segregated* schools, to *no* school, to *no education*. This is not a pretty picture and certainly not one that permits us to rejoice today.

In employment, the scenario is practically the same. I will

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6. *See* United States v. Fordice, 505 U.S. 717 (1992).

7. *See* Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995), *aff'd*, 99 F.3d 1136 (5th Cir. 1996).

8. *See* Knight v. Alabama, 801 F. Supp. 577 (N.D. Ala. 1992) (holding revised admissions policy acceptable).

never forget the time consuming and arduous process we followed in trying to implement Title VII,[9] Title VI,[10] and Section 1981.[11] That was, at first, protracted litigation with procedural issues followed by the more difficult task of giving meaning to the substantive provisions of Title VII. With *Griggs v. Duke Power Co.*[12] and *Albemarle Paper Co. v. Moody*,[13] and many other cases like that, we were able to establish how a victim of discrimination could get into court. We later were able to establish what a victim needed to prove in order to obtain relief.[14] Finally, we were able to establish what kind of relief would be appropriate once discrimination was established.[15] We didn't anticipate the vigorous assault that would be made against the standards for establishing liability or the appropriateness of the relief the court had been directing.

We thought *Griggs* had established a precedent that would be applied across the board. We thought that the relief that had been accorded in many Title VII cases for injunctive relief, back pay, or damages would be the best way for ruling out discrimination in employment across this country. We did not anticipate our Supreme Court ruling that Title VII, Section 1981, and Title VI would be interpreted the same way as the Equal Protection clause of the Fourteenth Amendment, despite the fact that these statutes were supposedly remedial legislation. We also did not anticipate the enormous and persistent assault on affirmative action and race-based remedies. With the 1989 decisions of the Supreme Court in *City of Richmond v. J.A. Croson Co.*,[16] *Price Waterhouse v. Hopkins*,[17] *Wards Cove Packing Co. v. Atonio*,[18] and *Martin v. Wilks*,[19] the Court basically completed a judicial repeal of Title VII by fiat. The Court skewed procedural rules that we had laboriously established. The Court rejected the standards we had established in a number of cases on how one proves liability. The Court rejected the limited relief that had been directed in cases for many years. In

9. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994).
10. §§ 2000d-2000d-7.
11. Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994).
12. 401 U.S. 424 (1971).
13. 422 U.S. 405 (1975).
14. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); *Moody*, 422 U.S. 405; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
15. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987); *International Bhd. of Teamsters*, 431 U.S. at 347-48.
16. 488 U.S. 469 (1989).
17. 490 U.S. 228 (1989).
18. 490 U.S. 642 (1989).
19. 490 U.S. 755 (1989).

Atonio, the majority of the Court simply ignored history and stare decisis. Nothing that Justice White could say in concurrence would eliminate the fact that this majority of the Court simply rejected precedent on how one establishes liability. Congress made a feeble attempt in 1991 to restore some meaning to Title VII and to Section 1981. Procedurally, victims of employment discrimination may be able to establish some liability, but they face enormous hurdles in trying to do so.

That plight has been made even more difficult with the way that we have interpreted Rule 11 of the Federal Rules of Civil Procedure. Anybody running into court these days with a civil rights claim may face a judge who doesn't like civil rights and who readily imposes sanctions to keep you out of his court. I know. I've got a $90,000 award against me to show for it. Civil rights lawyers across this country are now very apprehensive about going to court to litigate a civil rights claim.

Recent decisions in the voting rights area have been equally ominous. The 1982 amendments to the Constitution and to the Voting Rights Act were designed to put an end to the exclusion of minorities from the electoral process. Moreover, Congress sought, we thought, to ensure that minorities would have, at last, a meaningful vote and would be able to vote and elect a representative of choice. We fought vigorously with the Legal Defense Fund for favorable interpretation of the 1982 amendments and we had much success. We watched, together with the Joint Center for Political and Economic Studies, as the number of minorities in elected positions increased substantially. Now, in 1996, we have over forty African-Americans and many other minorities elected to Congress and able to play a role in preserving the rights of our people.

We are now witnessing, however, an assault on the Voting Rights Act. I tell you, today my fear is that the Court will re-write the Voting Rights Act just like it re-wrote Title VII, and we may watch the number of minorities and African-Americans in Congress dwindle from the forty who are there now to twenty or less. We already know that with the decisions of the Court in *Shaw v. Reno*,[20] there is a determined assault on local and state districts which sought to insure effective minority participation in state and city or local government. I argued *Shaw v. Hunt*,[21] a North Carolina re-districting case, in December, and was really amazed at the

20. 509 U.S. 630 (1993).
21. 116 S. Ct. 1894 (1996).

tenor of the Court. I was even more amazed reading some of the decisions of the Court in reacting to *Thornburg v. Gingles*,[22] and other voting rights cases. I don't know what the Court is going to do with the North Carolina and the Texas cases,[23] which were argued the same day, but it is appalling to me that we would be arguing this issue before the Court today. Is it unconstitutional to draw minority districts for Hispanic and African-Americans, but okay to draw districts for majority people? Why are we even arguing the issue? This question was raised with Justice O'Connor who vigorously denied that that is what she intended to do. We'll see. We'll see in Texas. We'll see in North Carolina. But we have seen it already in Georgia. In Georgia and Louisiana, the Court has rejected majority/minority districts and we are now losing legislators by the numbers.

It is clear that despite the barriers we have raised for African-Americans and other minorities in the voting rights area, if we provide some kind of relief, we can expect them to get involved and help determine their own future. Using these three areas—education, employment and voting rights—one can conclude that civil rights today isn't where we would like to see it; but contrary to what some of my friends believe, civil rights isn't dead.

I would like to raise with you some of the concerns I have about the future and some steps I hope you will take to help us ensure a better America for all people. From the vantage point of director counsel of the NAACP, Legal Defense Fund, and now a Chancellor of an historically black college, I have watched as America slowly began to appreciate that there are many races and ethnic groups in this country. We have previously viewed America in terms of black and white, but there are Hispanics and Asians and Native Americans and many other divisions, all of them yearning for an equal chance in life. Race continues to disadvantage African-Americans and, as Dr. John Hope Franklin tells us, it will continue to do so through the twenty-first century and probably even beyond.[24]

I believe that African-Americans and other minorities must begin to think of relief in terms of the opportunities provided for all people. We must ensure that everybody will be able to enjoy the benefits we are trying to obtain for ourselves. For example, there

22. 478 U.S. 30 (1986).

23. *See* Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996).

24. *See* JOHN HOPE FRANKLIN, THE COLOR LINE (1994).

are 24% Hispanic people in New York, and 26% African-Americans. We haven't yet been able to develop relief that would ensure that Hispanics in New York would have an equal and fair chance to elect congressional representatives of choice. How do we justify four African-American congressmen and one Hispanic?

I can carry this example even to California, to Texas, and to Chicago, because we are involved in a fight, and I understand the sensitivities of people. I understand the legitimacy of the aspirations of all people. I sincerely believe that part of the problem we are encountering today is because we have not yet focused on a remedy with broad appeal that would ensure that all people enjoy the benefits that we are seeking for ourselves.

I was involved with affirmative action employment litigation in Chicago, and we had a major problem trying to figure out what kinds of goals we could set, not only for African-Americans, but also for Hispanics and women. Many people feared that if we included goals for women we would defeat opportunities for African-Americans. That fight unfortunately is still going on.

Moreover, some of us question whether integration has been good or bad. I hear the argument. And people make a good argument, at times, that we lost something in trying to integrate the public schools. They do not remember, as I do, what segregation was like in the 1930s, 40s, 50s, and 60s. They don't remember, or maybe do not care to remember, what it was like trying to ensure that even African-Americans would be able to get a better educational opportunity.

During the past two weeks, students at my college, North Carolina Central in Durham, have argued that our historically black university should not actively recruit white students. We have a cultural heritage they tell me we must preserve. And we must remain majority if not all black. I have taken a firm position that this school, our school, is one that must be open to all people and we are going to recruit everybody to that institution. We are going to develop an academic program that we think will be second to none and everybody is going to want to go there. With today's market and with today's budget, nobody can maintain an all black, an all white, an all Hispanic, an all Asian *anything* that is publicly supported. At the same time, I strongly advocate that, as an integrated institution, we can admit and support individuals and students and promote their cultural heritages.

I was at a meeting yesterday and we were discussing Clarence

Page's recent book.[25] I don't know if you read it, but you might if you get a chance. A question was posed that was really interesting and I don't know if you really thought about that much yourself. What do you think society would look like if it was truly colorblind? What do you think the world would look like if we integrated our institutions and programs? Would we eliminate racial identities of various programs within that society? Then the question was put—maybe we've already reached the millennium of a colorblind society. Maybe we reached the beginning of that kind of society. I raise this question because I think that, as we talk about the civil rights of the future, we have to help define the kind of world we are seeking. We haven't done that, none of us, neither you nor I.

I don't know how we can blame the Supreme Court for having trouble today in trying to decide the type of relief to accord. I was arguing a case in court three or four years ago and a Justice asked me, "Are you sure this is the kind of relief you want? Have you thought about it? What kind of school do you want? What kind of voting district do you want? What kind of job opportunity do you want?" We haven't formulated the answers to these questions. Not in the sense that we are guaranteeing that all people, men and women, black and white, will be accorded equal protection. It's a serious challenge.

Nor have we, unfortunately, reached out to ensure protection for the poor. I've been disturbed for the last fifteen years with *Rodriguez*[26] and how little all of us have done to convince the court that Justice Powell was simply wrong. Why don't we have a *Brown v. Board*,[27] that overrides *Rodriguez* and guarantees that every person is entitled to equal protection, whatever his or her economic status? The time has come to focus our efforts and energies to resolve these crucial issues. Only by defining our goals can we hope to attain them.

25. *See* CLARENCE PAGE, SHOWING MY COLOR: IMPOLITE ESSAYS ON RACE IN AMERICA (1996).

26. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

27. Brown v. Board of Educ., 347 U.S. 483 (1954).