

The Public Eye

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Moving Right On! Fairness, Family, and Faith

Colorblind: White-washing America

By Nikhil Aziz

"CIR's civil rights litigation is based on the principle of strict state neutrality: the state must not advantage some or disadvantage others because of their race.

Race, like religion, must be placed beyond the reach of the state. Our objections to racial preferences are legal, moral, and pragmatic. Preferences are almost always unconstitutional when used to achieve an arbitrary racial diversity; they are only legal when narrowly tailored to remedy past discrimination against identifiable individuals. As a moral matter, preferences are dehumanizing and reduce individuals to the color of their skin. And pragmatically, racial preferences almost always add to division and discord in society."

Introduction²

The Center for Individual Rights (CIR) describes itself as a "nonprofit public interest law firm dedicated to the defense of individual liberties."³ Founded in 1988 by Michael McDonald and Michael Greve, both previously at the rightist Washington Legal Foundation,⁴ CIR is now an established presence in the nation's capital, and its influence is felt across the country through various high-profile cases that it has fought and won in the U.S. Supreme Court. Over the last 14 years, CIR has grown from the 2 founders in a small nondescript space to a swanky office with administrators, in-house

counsel, interns, high-flying pro bono lawyers, a number of publications, and a sizeable and growing budget.

CIR is one of a number of conservative right-wing legal advocacy organizations founded to bring legal cases in support of rightist campaigns. It has been very successful in replicating liberal public interest law firms such as the American Civil Liberties Union (ACLU).⁵ CIR has concentrated on specific areas of concern, and within them zeroed in on cases that it felt would "change the law," as opposed to simply winning a victory. Changing the law has clearly been its goal in the area of affirmative action, particularly in higher education. (See sidebar page 4 on the main higher education affirmative action cases that CIR has brought). According to Terry Carter, CIR "does go where its plan works best"⁶ which allows it to "attack affirmative action at its weakest links . . . [and] rely in large measure on conservative judges who go beyond the facts of individual cases to proclaim things that have broader implications."⁷ CIR's lawyers contend that it has won before judges who are not conservative, but according to journalist W. John Moore, "they concede that the appointment of conservative judges by Presidents Reagan and Bush have made the courts more receptive to their arguments."⁸

As David Segal of the *Washington Post* reported, "[Michael] Greve searched hard for a test case that would land in the 5th U.S. Circuit Court of Appeals, widely considered to be a conservative bench. He then sought plaintiffs at the University of Texas Law School, which he had studied for months and thought was vulnerable to attack. And

he was meticulous about finding a lawyer to argue the case, recruiting [now Solicitor-General] Theodore Olson, a pricey Washington lawyer known for winning before the Supreme Court."⁹ For CIR, winning the war was more important than winning a battle. The strategic nature of CIR's modus operandi has also been noted by lawyer Idris Diaz, who writes that, "In all of CIR's university admissions cases, the lead plaintiffs have been White women, a strategic decision that in the court of public opinion undercuts arguments that affirmative action has primarily benefited this group. Yet CIR has hardly been an ally of the women's movement."¹⁰ In 2000, it successfully contested the constitutionality of parts of the Violence Against Women Act in the U.S. Supreme Court.¹¹ In two other cases, *Boulahanis v. Board of Regents, Illinois State University*, and *Miami University Wrestling Club v. Miami University*, CIR defended men's sports teams that had been eliminated to achieve participation proportional to the population of women and men at those universities.¹²

The pick and choose strategy CIR has employed with regard to cases is not new.

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From the President

By Jean Hardisty

For more than two decades, the contemporary political Right has built and consolidated its political apparatus. Now in control of the Executive Branch, it is stronger and enjoys wider public acceptance than at any time since the 1950s. In order to best oppose the Right's ideological and programmatic agenda, we need to know exactly how the Right is implementing that agenda. But for years the Right has specialized in obfuscation and stealth tactics, complicating the job of unmasking its methods.

In this issue of *The Public Eye*, Editor Nikhil Aziz has assembled several articles that illustrate how difficult it can be to see the Right's hand behind frighteningly reactionary political maneuvers that enjoy the support of the Bush Administration. In his own article, "Colorblind: White-washing America," he analyzes the work of the cleverly-named Center for Individual Rights. He describes how the rightist Center constructs cases against affirmative action after meticulously researching the best chances for victory, often in conservative judicial circuits. The public knows only that a named individual is bringing a case against a university for practicing affirmative action (often a woman is chosen, because women benefit from affirmative action and a woman's presence in the suit appears to contradict that fact).

Two of the articles in this issue address the Bush Administration's drive to satisfy its Christian Right base. George W. Bush understands that his political survival depends on the enthusiastic support of the Christian Right. Here, Jennifer Butler writes chillingly of the Christian Right's takeover of the U.S. delegation to the UN, especially in her own area of work, nongovernmental organizations (NGOs). And Bill Berkowitz writes about the Bush Administration's "faith-based initiative," which would divert millions of federal dollars to religious organizations in an attempt to "unleash armies of compassion" to deal with social problems. Though there is no research to support the efficacy of this approach and it violates separation of Church and State provisions, as well as antidiscrimination laws, it is directly responsive to the Christian Right's agenda.

And, in keeping with Political Research Associates' mission to monitor and expose antidemocratic and authoritarian trends, we asked Esther Kaplan to analyze the increase in conspiracy theories that blame Jews for September 11, as well as anti-Jewish violence, especially in European countries. She explores the relationship between Jews and Israel in the public mind and in the rhetoric of public discourse, in order to tease out the complex relationship between increased criticism of Israel and increased expressions of antisemitism, while not neglecting the increase in anti-Arab, anti-South Asian, and anti-Muslim violence in this country.

The challenge for all activists who work to counter the Right's agenda is to hone our tools of opposition. One tool is knowledge of the "architecture" of the Right, its ideological profile, and its stealth tactics. With this knowledge, we are better equipped to stop the Right and roll back its revolutionary agenda. We hope that this issue of *The Public Eye* leaves you, our readers, better equipped to do that critical work.

Editorial Note: In the Fall 2001 issue of *The Public Eye* we ran an article by Nikhil Aziz and Chip Berlet on "Nationalism." In that article Aziz and Berlet used Benedict Anderson's concept of the nation as an "imagined" community. We did not mean to imply that the nation, or nationalism, was "imaginary," but that the idea of a nation is socially constructed, i.e. it is not a fixed historical reality. Aziz and Berlet are currently working on a longer version of that article that makes this distinction clear, while addressing other concerns about the role nationalism played in anti-imperialist and anticolonial struggles, as well as in the contemporary context of corporate-driven neoliberal globalization. Please watch the PRA website <http://www.publiceye.org> for an update.

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Ironically, it mirrors the National Association for the Advancement of Colored People (NAACP) Legal and Educational Defense Fund's struggle—led by [later Justice] Thurgood Marshall—to overturn racial segregation and “separate but equal” laws in the 1940s and 50s, culminating at the U.S. Supreme Court in *Brown v. Board of Education*.¹³ CIR's staff has adopted, and adapted, that basic strategy to argue that the U.S. Constitution should allow only legislative policies and institutional practices that are “colorblind.” In an ideal world, colorblindness, if understood as “not discriminating on the basis of race,” is certainly a value that progressives would espouse. But our society and our system are far from approximating that ideal. Just because we have dismantled Jim Crow laws and apartheid-style legalized segregation does not mean that we have achieved genuine racial equality or justice. Racism is not manifest simply in the attitude or act of one individual toward another. It is deeply imbedded in our system and structures—giving rise to the concept of “institutional racism.”

In a society and system that is institutionally racist, and where simply being White means having privilege, being colorblind actually results in being “snowblind.” Journalist and Professor Robert Jensen notes that, “White privilege, like any other social phenomenon, is complex. In a white supremacist culture, all white people have privilege, whether or not they are overtly racist themselves. There are general patterns, but such privilege plays out differently depending on context and other aspects of one's identity.”¹⁴ White privilege does not ignore issues of class or gender. As activist Sharon Martinas reasons, “Non-ruling class white people are both oppressed and privileged. They are *oppressed* most significantly on the basis of class, gender and sexuality, and also on the basis of religion, culture, ethnicity, age, physical abilities and politics. At the same time, they are *privileged* in relation to peoples of color.”¹⁵

Snowblindness: Institutional Racism in the United States

Institutional racism is a term coined by progressives in the 1960s to capture the way in which “racial inequality is built into the structure of American politics and social arrangements. Institutional racism goes beyond individual racist ideology and acts. It pervades the ‘normal workings’ of

As Black lesbian feminist Writer and Activist Barbara Smith observes, “Racism is not primarily a set of negative attitudes or behaviors on the part of individual whites. These negative attitudes and behaviors are grievous and sometimes fatal, but they are in fact symptoms of a system whose purpose is not merely to make people of color feel badly, but to maintain white power and control.”

social, economic, political, religious, legal, and medical institutions, systematically placing people of color at a disadvantage. It is in the practices and procedures of these institutions that status and opportu-

nities for people of color are constructed unequally.”¹⁶ As Black lesbian feminist Writer and Activist Barbara Smith observes, “Racism is not primarily a set of negative attitudes or behaviors on the part of individual whites. These negative attitudes and behaviors are grievous and sometimes fatal, but they are in fact symptoms of a system whose purpose is not merely to make people of color feel badly, but to maintain white power and control.”¹⁷ Power and control are not always achieved or maintained through numerical strength but through the construction and preservation of a biased system. “For instance, Whiteness in the context of institutionalized racism affords members of the ‘White race’ dominance in settings as different as the contemporary United States and apartheid South Africa.”¹⁸

Institutional racism is certainly not unique to the United States, and is found in similar forms from Britain to Brazil. In other world regions, such as South Asia, institutional oppression takes different yet similar forms. In India, where institutional casteism is manifest in the systemic discrimination against Dalits¹⁹ and “lower” castes, religion also becomes a terrain for discrimination with the institutionalized oppression of Muslims and other religious minorities. It was institutional casteism that Bhimrao Ambedkar, the architect of India's Constitution, was concerned about while steering that document through the Indian Constituent Assembly:

“. . . we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we shall be recognizing the principle of one man, one vote, one value. In our social and economic life, we shall by reason of economic structure, continue to deny the principle of one man, one vote. How long shall we continue to deny equality in social and economic life? If we continue to deny it for long, we will do so by putting our democracy in peril.”²⁰

Ambedkar could as easily be talking

Affirmative Action Cases in Higher Education

By Margaret A. Burnham

The United States Supreme Court will likely soon have the chance to rule on if and when affirmative measures can be taken to obtain racially diverse student bodies in public universities. The Court last visited the issue in 1978. In *Regents of University of California v. Bakke*, 538 US 265 (1978), the Court considered whether a state university's affirmative action program violated the Equal Protection Clause of the 14th Amendment and a federal law forbidding racial discrimination in education. Absent a constitutionally permissible reason, a public entity like a state university may not make race-conscious decisions. Prior to *Bakke*, constitutional law provided that State decision-making based on race could only be sustained if the objective sought by the State was compelling and there was no alternative route to that objective. *Bakke* led the Court to examine whether this high standard of review for race-conscious decision-making, known as "strict scrutiny," should be applied even where, as with affirmative action, Whites are the class disadvantaged by the State's action.

The White plaintiff in the case, Alan Bakke, argued that he was wrongly denied admission to the University of California, Davis medical school because an affirmative action plan favored minority students. Bakke's claim was based on Title VI of the 1964 Civil Rights Act and the Constitution's Equal Protection Clause. The Davis plan set aside 16 out of 100 available places for 4 categories of minority group applicants. These applications were assessed by a special committee. Bakke argued his rights were violated because his numerical score was higher than that of some of the 16 students admitted under the plan.

The Court held the Davis plan was unlawful under Title VI. However, the justices expressed a wide range of opinions about whether this affirmative action program also violated the Constitution. The dispute within the Court concerned whether strict scrutiny should be applied to race-conscious programs designed to correct previous invidious societal discrimination. Five justices agreed that a state university could, in principle, employ a race-conscious admissions plan in some circumstances. But there was no agreement on whether such a program should be strictly reviewed or meet a less onerous constitutional standard.

The Davis plan, the majority of the justices agreed, could not pass muster. The Court's swing vote was Justice Powell, now deceased, whose opinion was joined in separate parts by two

groups of four justices each. Justice Powell wrote that the Constitution requires strict scrutiny review of all race-conscious decision-making, even where Whites as a class are disfavored. Powell rejected general societal discrimination as a basis for affirmative action by state universities. However, in a separate concurring opinion, Justice Powell found that promoting diversity in its student body constituted a compelling and constitutionally permissible reason for a state medical school to adopt a race-conscious admissions approach. Powell concluded that, even though affirmative action was not per se unconstitutional in the higher education setting, the Davis plan, reserving 16 places for minorities, was not sufficiently narrowly tailored to meet the test of strict scrutiny. Although diversity was a compelling, and therefore permissible, reason for the medical school's race-based admissions program, there were other less burdensome methods by which the school could have achieved a diverse student body.

Justice Brennan, supported by three other Justices, argued in one of the two plurality opinions that State efforts to remedy past discrimination should not be held to the tough strict scrutiny standard appropriate in other race discrimination cases. Arguing that Whites have not been historically the victims of discrimination, and that affirmative measures impose no stigma on them, Justice Brennan proposed a standard of review less than strict but nevertheless searching. The Davis program, he argued, should be sustained under a looser standard of review, because "minority under-representation [at Davis] is substantial and chronic, and the handicap of past discrimination is impeding access of minorities to the Medical School."

Justice Stevens, writing for the other four-justice plurality, declined to decide the constitutional question, relying instead on Title VI to declare the Davis plan an unlawful breach of that statute's "broad prohibition against the [educational] exclusion of any individual" based on race.

Justice Powell's opinion in *Bakke* has become the touchstone for review of affirmative action policies. To meet Justice Powell's test of "narrow tailoring" as expounded in *Bakke*, such plans must not have rigid quotas, or install dual admission systems, and race must be only one of several factors employed to achieve diversity. However, because the *Bakke* decision yielded six separate opinions and two four-justice pluralities, the circuit courts have split in applying it. The Supreme Court will likely review the circumstances, if any, under which race-conscious admissions can withstand constitutional scrutiny. In the meantime, the lower courts have expressed differing views of the constitutionality

of affirmative action in the educational setting.

In *Hopwood v. Texas*, 78 F. 3d. 932 (5th Cir. 1996), the Fifth Circuit struck down the affirmative action plan of the University of Texas Law School, rejecting the law school's claim that its plan was a permissible means of achieving student diversity. The law school admissions procedure considered separately minority applicants, comprising African-Americans and Mexican-Americans, and White applicants. The students were ranked based on their GPA and LSAT scores and then placed in three separate categories. Different admissions standards were applied to the categories. As in *Bakke*, the White plaintiffs were denied admission to the school although their numerical scores were higher than those of the minority students admitted under the Texas plan. The Fifth Circuit panel declared that the plan could not meet strict scrutiny despite the law school defendant's reliance on Justice Powell's opinion that race-conscious policies are in some circumstances permissible to achieve student body diversity. The *Hopwood* court argued that Justice Powell's endorsement of diversity as a compelling objective did not reflect a majority view of the *Bakke* court—on this point, Justice Powell wrote for himself—and was therefore without binding authority. The Fifth Circuit argued further that Supreme Court opinions subsequent to *Bakke* undermined the diversity rationale, and furthermore it held affirmative action measures at the law school could not be based on the present effects of past discrimination within the Texas public education system generally rather than a discriminatory history that could be specifically tied to the law school. In sum, the *Hopwood* court held that, despite Justice Powell's *Bakke* opinion, diversity could never be a compelling reason for an affirmative action program in public higher education.

In Michigan, two federal judges reached opposite conclusions on whether racial heterogeneity meets the compelling interest requirement of the Equal Protection Clause. In *Gratz v. Bollinger*, 135 F.Supp.2d 790 (E.D.Mich. 2001), White plaintiffs sued the University of Michigan, challenging the constitutionality of the college's race-conscious admissions policies. The district court ruled that the policies were motivated by a desire to achieve diversity, which, contrary to *Hopwood*, the court found to be a constitutionally permissible goal, but that some of the college's practices were not sufficiently narrowly tailored to overcome strict scrutiny. Since 1998, the college had given additional points to underrepresented minority group members in the admissions procedure. The *Gratz* court struck down the system employed by the college from 1995-1998, which created a special category of

“protected candidates” eligible for admission if too few minorities came in through the rolling admissions process. The court found this process to be the functional equivalent of a quota, which *Bakke* clearly invalidated. However the court sustained the post-1998 program, ruling that the college could consider race, and that its compelling interest in diversity meant that it could take steps to insure that its student body contained more than a token number of minorities.

The University of Michigan did not assert a remedial purpose for its affirmative action in admissions. Civil rights advocates have argued that although past discrimination may be a more promising rationale for affirmative action, university defendants hesitate to cite their exclusionary racial history as the basis for remedial measures.

In *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) a second Michigan district court struck down the University of Michigan Law School’s admissions policy, arguing, contrary to Justice Powell’s opinion in *Bakke* and contrary to the ruling in *Gratz*, that diversity is not a sufficiently compelling educational interest to warrant race-conscious selection.

In *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) the Ninth Circuit fully adopted Justice Powell’s view that diversity is a value sufficiently compelling to pass the constitutional test of strict scrutiny, even where there is no showing of a remedial purpose linked to the institution’s past practices.

The *Smith* case is back in the trial court, and in the Texas case, *Hopwood*, the Supreme Court denied review in 1996 and the case is no longer on appeal. It is therefore likely that the Supreme Court will consider the cases challenging race-conscious admissions policies at the University of Michigan’s college and its law school. In December 2001 the full bench of the Sixth Circuit Court of Appeals heard arguments in *Gratz* and *Grutter*. On May 14, 2002, the Sixth Circuit overturned Justice Friedman’s prior decision in *Grutter* ruling that the University of Michigan Law School’s admissions policy fulfilled the State’s compelling interest in diversity. A ruling on *Gratz* is expected shortly. Either one of the Circuit’s decisions will likely be the ones to reach the Supreme Court.

Margaret Burnham is Associate Professor of Law at Northeastern University. Her area of interest is civil rights and human rights.

about institutional racism in the United States. A classic example of institutional racism in the United States is “the contrast between an inner city public school, which tends to have a higher proportion of [usually lower income] students of color, with a suburban public school which is apt to have a majority of [usually higher income] white students. In an inner city school class sizes tend to be larger, textbooks are often unavailable or outdated and buildings tend to be older and in need of repair. In wealthier suburban schools, on the other hand, class size tends to be smaller, textbooks are usually up-to-date and available and the facilities are generally maintained. Meanwhile graduates are held to the same standard without regard for the unequal preparation that different educational environments create.”²¹ While in theory public education is the same for all, in reality—despite desegregation—it is anything but equal.

Rac[e]ing the Right

Institutional racism is purposefully located within the Right’s analytical blind spot. For the Right, colorblindness means a neutral and equalizing gaze that focuses on individuals and not on groups. In the United States, where individualism is a much-celebrated theme in the national myth, this focus on the individual extends beyond rightist libertarians to the Right as a whole. Yet, the emphasis on individualism also creates contradictions within the Right. The Christian Right celebrates collectivities such as the “family” or Christians, particularly in the context of its claims about declining morality. Similarly, the Extreme Right underscores race, and therefore racial groups.

Race does not occupy the same position in the worldview of different sectors of the Right, though it is always central to the racist Extreme Right. Scholars on the Right most often dismiss the very idea of institutional racism or treat it as having no merit, arguing that racial incidents and outcomes are always and merely a problem between individuals. Dinesh D’Souza, for example, writes that, “Institutional racism”

refers to merit standards of hiring and promotion that fail to produce proportional outcomes for minorities.”²² For the most part, groups on the Right allege that “racism is a thing of the past: specifically, that both legally-sanctioned (*de jure*) discrimination and the informal practices of *de facto* discrimination have been corrected.”²³ However, where the Old Right is overtly racist, the New Right in the post-Civil Rights era obscures its racism behind the coded language of “states’ rights” and “colorblindness.” Amy Ansell argues that the New Right’s racism is a “new racism,” which is characterized by “the abandonment of a commitment to equality and a redefinition of the principle of fairness.”²⁴ The Right argues that, because racism has been dealt with as a result of the Civil Rights Movement, race should not be a consideration for hiring in employment or for admission to educational institutions, and group identities other than “American” are immaterial.

According to the Right, identity politics and pluralism weaken American culture. Professor David Brudnoy, while acknowledging the multi-ethnic, multiracial, and multireligious character of the United States, finds that, “We barely retain our all-embracing values, owing to the multiculturalists’ ideological derision of Americanism, adoration of the exotic, and sneering of the unity that was our melting-pot goal. . . . Uni-culturalism is essential if we’re to remain recognizably America, but we’re in full retreat from it.”²⁵ There is usually no acknowledgement in such contentions that the Right’s construction of the archetypal “All-American” is White, heterosexual, and Christian.

Where racism exists in the form of individual prejudice, the Right often advocates “racial reconciliation.” So, groups within the Christian Right, such as the Promise Keepers, which has taken the lead in reconciling the races, call upon individual Whites to repent and discard their prejudice, and to embrace people of color as their fellow Christians. As Andrea Smith, a Native American progressive activist, writes, “The basis of race reconciliation is, of course, Christianity. White evangelicals

embrace race reconciliation only with those groups they see as sufficiently Christian.”²⁶

In the Right’s view, affirmative action and other programs designed to address institutional racism (and sexism and heterosexism) become both unnecessary (since racism doesn’t exist except in individual personal action or thinking), and unjust (since they do not discount race and consider individual merit alone).²⁷ Using polemical and divisive tactics, the Right attacks affirmative action as “racial quotas,” “preferential treatment,” and “reverse discrimination.”²⁸ It cynically takes the language of the Civil Rights Movement, including the words of Dr. Martin Luther King, Jr., himself, to argue that individuals should be judged by their merit and character and not by their skin color. It contends that since racism, when it does occur, is between individuals, any remedy should be aimed at those individuals who can be identified as having directly suffered an act of racism. And, it also warns that preferential treatment accorded to a particular ethnic or racial group will create resentment among others (read Whites). These arguments fleshed out early on by the neoconservative scholar Nathan Glazer in his 1975 book, *Affirmative Discrimination*,²⁹ are the foundation of CIR’s opposition to affirmative action; and also form the underpinnings of the attack on affirmative action by the Right as a whole. Legal challenges to affirmative action, diversity, and a progressive higher education are only one aspect of the Right’s concerted efforts to change the face of education. Scholar Ellen Messer-Davidow has researched the well-coordinated broader attack on campuses and higher education institutions across the United States, involving conservative student, alumni, and faculty groups, publications, financial support, influential columnists, intellectuals, and policy-makers.³⁰

Jerome Himmelstein, a scholar of the U.S. Right, has documented the development of the successful, although difficult, synthesis of traditional conservatism and libertarianism manifest in the emergence and triumph of the New Right in the last three decades of the 20th century.³¹ The

New Right blended “a militant anticommunism with a libertarian defense of pristine capitalism and a traditionalist concern with moral and social order.”³² This was a natural outcome of an “an ideological division of labor that had developed within conservatism that directed the traditionalist emphasis on moral order, community, and constraint to the social issues while the discussion of economic issues stressed mainly libertarian themes of individualism and freedom.”³³ Despite that division, “Right-wing libertarians are reactionaries who are vicious in their condemnation of liberal programs for social justice, sharing with the larger Right their abhorrence of liberalism.”³⁴

Libertarianism: Atomizing Society

CIR’s conservatism primarily stems from libertarian roots. In its self-description it acknowledges that, “Its name was chosen to underscore that its objective would be to defend individual liberties, broadly understood to encompass both civil and economic rights . . . [and that it] offered conservative, libertarian and moderate attorneys in for-profit firms an opportunity to bring about meaningful legal change and to contribute to the principled defense of individual liberty in court.”³⁵ Libertarianism—right-wing libertarianism in this case—accords the individual primacy over society and the State.³⁶ In so doing, it melds an antigovernment perspective with pro-free market fervor. The antipathy towards State intervention in the economy is matched by a rejection of State intervention in society. The State is simply required to maintain the minimum law and order that would allow the market free reign, and would enable individuals to exercise free will in society. Beyond that the State should not be in the business of regulating society or the economy.

Researcher Jean Hardisty has written previously in *The Public Eye* that, “Libertarians view all government programs as coercive and prefer existing inequality to government programs designed to decrease

that inequality.”³⁷ While government programs, and often government action, are regarded as coercive and harmful by many on the Right, what is not recognized by them is that “What constitutes ‘harm’ is . . . determined by the state and the law; and the state and the law . . . define harm in the shadow of the dominant ideology of power.”³⁸ Essentially, those who control the State make the laws, and it is they who define what harm (and therefore harmful) is, and what it is not.

In Hardisty’s words, “Libertarians are often criticized for a heartless indifference to the social contract, or any other civic-minded concern for the larger social good . . . [to which they] respond with their notion of ‘civil society,’ which they claim is nurtured by libertarianism more successfully than by any other political ideology.”³⁹ But in this “free-for-all competitive private sector they call civil society, libertarians show no concern for a level playing field.”⁴⁰ In this context, “equal before the law” means neither equal opportunity, nor equal results. The State must not actively discriminate against any individual—true. But neither should it be engaged in creating the exact same opportunity for all individuals, or in ensuring that all individuals get the exact same results. Libertarians would argue that individuals have free will, and with the government providing minimum law and order the freedom to avail of opportunity.

This is far less than the liberal definition of equal opportunity, in which the government has a role in ensuring that equal opportunity exists in fact, not simply in theory. Many progressives would argue for further strengthening the liberal equal opportunity concept, by adding feminist theorist Martha Nussbaum’s idea of “basic capability,” grounded in what Professor Jyl Josephson calls “equal respect.”⁴¹ Recognizing that there cannot be a completely level playing field unless one begins from a clean slate, a just society ensures that each individual has the basic capabilities to avail her/himself of equal opportunity. Such basic capabilities would include health care, adequate food and shelter, security,

freedom of movement, and freedom from discrimination.⁴²

Equal Protection: Unequal Causes, Unequal Effects

CIR, and the Right in general, invoke the Equal Protection Clause and civil rights laws while attacking affirmative action.⁴³ The Equal Protection Clause (Section 1 of the 14th Amendment to the U.S. Constitution) reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 14th Amendment, along with the 13th and 15th Amendments (which ended slavery and gave African-Americans the right to vote) was one of three post-Civil War additions to the U.S. Constitution. Over the years, the U.S. Supreme Court has elaborated three standards of review, under the Equal Protection Clause of the 14th Amendment, for determining the constitutionality of laws, policies, and programs.⁴⁴ First, the class or category of individuals being affected is examined. Race, ethnicity, and religion are considered inherently suspect classifications—because they are categories that historically have been the basis for discrimination. In cases where

these categories are involved, the Court uses “strict scrutiny” to determine that the law or policy serves a “compelling” government interest, and that it is “narrowly tailored” to serve that interest or to remedy actual discrimination.

Affirmative action policies, because they involve race, are reviewed under this standard.⁴⁵ CIR, in appealing the decision in *Smith v. University of Washington Law School* (see sidebar page 5 for case) asked the U.S. Supreme Court to consider whether, under the 14th Amendment’s Equal Protection Clause, diversity itself was “a compelling government interest sufficient to meet strict scrutiny,” with regard to affirmative action programs. The Supreme Court declined to hear that appeal in May 2001.⁴⁷ This does not imply that the



Rehnquist Court necessarily views diversity to be a compelling State interest; but it might simply be waiting for a more significant case, or a more opportune moment, before putting the issue on its docket. In fact, civil rights activists, fearful of how the majority on the Rehnquist Court might come down on the issue of diversity have at times moved to settle cases out of court to prevent them from reaching the bench.⁴⁸

One such case is *Board of Education of the Township of Piscataway v. Taxman*, which was accepted by the U.S. Supreme Court in 1997. In 1989, the Piscataway, NJ, school board eliminated a position, as a result of which Sharon Taxman (a White teacher) lost her job, while Debra Williams (an equally qualified Black teacher with the same seniority) kept hers. The school had cited diversity (Williams was the only minority teacher in her department) as the rationale for its decision. Taxman won the case in the lower courts, including the U.S. Court of Appeals for the Third Circuit. The school appealed the decision to the U.S. Supreme Court. The high-profile case roped in a number of supporters on both sides who filed *amicus curae* (friend of the court) briefs. Supporting Taxman were groups like the National Association of Scholars (an organization of rightist academics), and the first Bush Administration, which filed a brief at the lower court level, while the Clinton Administration filed a brief along with 25 higher education groups urging the Supreme Court not to issue a broad ruling on diversity applicable beyond that single case.⁴⁹

Equal protection does not mean that the government is required to treat all people equally, across the board.⁵⁰ Discrimination based on age (requiring someone to be a minimum age to be able to drink or drive for instance), social or economic status, fall within a “minimum” scrutiny range. A third standard, that of “heightened” scrutiny is used in cases of gender-based discrimination, where the government is required to show that the policy or law has a “substantial” relationship to an “important” government inter-

est.⁵¹ Author Carl E. Brody, Jr., writes that the Supreme Court “should understand the historical context motivating the enactments of the Fourteenth Amendment and the 1964 Civil Rights Act . . . [and] should affirm the underlying rationale for affirmative action programs and return to a more lenient level of scrutiny when analyzing these programs.”⁵² Justice Brennan and three other justices argued similarly in the *Bakke* case. (See sidebar page 4).

Critical Race Theorist Neil Gotanda also critiques the use of colorblind constitutionalism in the “strict scrutiny” employed by the Supreme Court (and advocated by the Right) with regard to affirmative action.⁵³ Colorblindness ignores the reality that, “While the social content of race has varied throughout American history, the practice of using race as a commonly recognized social divider has remained almost constant.”⁵⁴ Gotanda argues for a more nuanced view of race, including a three-fold definition that helps us understand better the substance of the racial classification. The first is “status-race,” which takes into consideration the different social status accorded to individuals based on their skin color. In the pre-Civil War era the inferior status of African-Americans was legal, but now the Court endures “the legacy of status-race only in the private sphere.”⁵⁵ What this means is that private citizens are free to interact or not with whom they choose, whereas the State cannot exclude people based on race. The illustrative case of status-race is the 1857 U.S. Supreme Court decision in *Dred Scott v. Sandford*, which found the inferior status of African-Americans to be implicit in the U.S. Constitution.⁵⁶

“Formal-race,” Gotanda’s second type, assumes that there is no connection between race as a classification and the social status or historical experience of racial groups.⁵⁷ The majority opinion in the 1896 U.S. Supreme Court decision *Plessy v. Ferguson* exemplifies formal-race thinking, wherein separate but equal segregation was deemed to be constitutional because it was considered racially neutral.⁵⁸ Gotanda

writes that formal-race is the category used by the current majority on the Supreme Court in cases ranging from affirmative action to voting rights.⁵⁹ Gotanda’s third type, “historical-race,” takes into account the vastly different historical experiences that racial groups have had in the United States, and in so doing accounts for the oppression and inequality suffered by African-Americans and other groups.⁶⁰ Justice Thurgood Marshall’s opinion, in his 1978 dissent in *Regents of the University of California v. Bakke*, acknowledged that racial classifications are not neutral and that they “describe relations of oppression and unequal power.”⁶¹

In the case of affirmative action, Gotanda points out, proponents of colorblindness “equate race with formal-race.”⁶² In a conservative perspective neither the historical experience of past discrimination against a group, nor the contemporary reality of institutional racism where discrimination continues in a different and more insidious fashion, is relevant. Thus, remedial programs like affirmative action are meaningless.

Affirmative Action on Trial

Affirmative action cases, particularly those pertaining to higher education, are the basis of CIR’s claim to fame. In the case of affirmative action in higher education, all roads lead to the *Regents of University of California v. Bakke*, 538 US 265 (1978). The *Bakke* decision, as it is known, remains controversial. Because the justices split in multiple ways to arrive at different decisions on various aspects of the case, it left Justice Powell’s views on diversity open to divergent interpretation by lower courts since then. This decision is at the root of CIR’s challenge to affirmative action programs, and to diversity as a compelling State interest in the four major cases it has fought on the issue. The cases are: *Hopwood v. Texas*, 78 F. 3d. 932 (5th Cir. 1996) against the University of Texas Law School; *Gratz v. Bollinger*, 135 F.Supp.2d 790 (E.D. Mich. 2001) against the University of Michigan; *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) against the

University of Michigan Law School; and *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) against the University of Washington Law School.

Professor Margaret Burnham explains, in the sidebar on page 4, the decisions in the *Bakke* case and the four CIR cases, with

reference to the issue of diversity in higher education as a compelling government interest. In *Bakke*, Justice Powell had ruled that diversity was a compelling interest, within the limits of “strict scrutiny.” Further, his opinion was that while the University of California/Davis plan did not meet “strict scrutiny,” affirmative action in

higher education per se *was not* unconstitutional. The *Hopwood* decision in Texas rejected Justice Powell’s opinion, and argued that it did not reflect the majority view. The Michigan cases fell on either side of the diversity debate, with *Gratz* agreeing and *Grutter* disagreeing with Justice Powell. In May 2002, the full bench of the Sixth Circuit Court of Appeals overturned *Grutter* in a 5-4 ruling with the majority agreeing that diversity was a compelling interest. In the state of Washington, *Smith* completely agreed with Justice Powell. This divergence on diversity is bound for the U.S. Supreme Court, where the Court most likely will decide if diversity in higher education is a compelling State interest.

THE LAW ARM OF THE RIGHT

The following is a list of some of the prominent, and well-funded right-wing conservative or libertarian legal organizations. The Federalist Society, established in 1982, has lawyer and student chapters across the country, as well as issue-oriented practice groups. Some of the leading conservative and libertarian legal luminaries (including many who are now on the federal courts) are or have been members of the Federalist Society.

While the Federalist Society is a membership organization, the others in this list are law firms that bring cases at the state and federal level arguing the Right’s perspective on property rights, free speech and first amendment issues, equal protection, affirmative action, and religion. The Center for Individual Rights is the focus of this article. The Mountain States Legal Foundation is a Denver-based law firm that brought two lawsuits on behalf of its client Adarand Constructors Inc., on the issue of affirmative action in federal contracting. The Southeastern Legal Foundation in Atlanta filed an *amicus curae* brief on behalf of the Boy Scouts of America in their case against James Dale, a gay scoutmaster. The Landmark Legal Foundation (outside of DC) has been active against teachers’ unions including the National Education Association. The American Center for Law and Justice, in Virginia Beach, focuses on Church-State issues, and has been involved in cases defending antichoice protestors (what it calls “sidewalk counselors”), and against the City of Louisville’s (KY) ordinance extending protected status in employment to the categories of sexual orientation and gender identity.

We urge you to visit their websites and see what they are up to.

The Federalist Society for Law and Public Policy Studies, 1015 18th St., NW, Suite 425, Washington, DC 20036 <http://www.fed-soc.org>

The Center for Individual Rights, 1233 20th St., NW, Suite 300, Washington, DC 20036 <http://www.cir-usa.org>

Institute for Justice, 1717 Pennsylvania Ave., NW, Suite 200, Washington, DC 20006 <http://www.ij.org>

Washington Legal Foundation, 2009 Massachusetts Ave., NW, Washington, DC 20036 <http://www.wlf.org>

Atlantic Legal Foundation, 150 East 42nd St., New York, NY 10017 <http://www.atlanticlegal.org>

New England Legal Foundation, 150 Lincoln St., Boston, MA 02111 <http://www.nelfonline.org>

Southeastern Legal Foundation, 3340 Peachtree Rd., NE, Suite 2515, Atlanta, GA 30326 <http://www.southeasternlegal.org>

Mountain States Legal Foundation, 707 17th St., Suite 3030, Denver, CO 80202 <http://www.mountainstateslegal.com>

Pacific Legal Foundation, 10360 Old Placerville Rd., Suite 100, Sacramento, CA 95827 <http://www.pacificlegal.org>

Landmark Legal Foundation, 445-B Carlisle Dr., Herndon, VA 20170 <http://www.landmarklegal.org>

American Center for Law and Justice, P.O. Box 64429, Virginia Beach, VA 23467 <http://www.acfj.org>

Extracurricular Activities

Theodore Cross, editor of the *Journal of Blacks in Higher Education*, notes that, CIR’s zeal in whipping up support for its anti-affirmative action crusade raises “serious questions of legal ethics.”⁶³ In January 1999, CIR took out full-page advertisements in 14 major college and university student newspapers, claiming “Almost Every University in the Country Violates Federal Law.”⁶⁴ The advertisements went beyond this claim and “urged students to sue their colleges for racial discrimination.”⁶⁵ They also mentioned free handbooks on how students could begin a lawsuit, told them how to research their claims, how to look for lawyers who might help them, and urged them to file suits even without proof of discrimination.⁶⁶

Cross contends that, “the most reprehensible of the new extralegal tactics of the CIR was its publicized charges that *private* universities were violating federal law. The CIR created this false impression by planting its charges of university lawbreaking in student newspapers at some of the nation’s most prestigious private universities such as Columbia, . . . and the University of Chicago.” Yet, as Idris Diaz notes, “CIR officials also assert that they do not object to consideration of race by private institutions, such as Harvard.”⁶⁸

Curiously, while CIR’s ads implied that private universities might be engaged in dis-

crimination, it filed an *amicus curae* brief in another significant case defending the right of a private organization to do exactly that.⁶⁹ James Dale, an openly gay man who filed suit against the Boy Scouts for discrimination when the organization dismissed him as a scoutmaster, had won his case in the New Jersey Supreme Court. CIR joined the Boy Scouts' appeal at the U.S. Supreme Court along with conservative and libertarian right-wing groups such as the Eagle Forum, the Independent Women's Forum, the Cato Institute, the Texas Justice Foundation, the Southeastern Legal Foundation, and the Association of American Physicians & Surgeons. In June 2000, a 5-4 majority on the U.S. Supreme Court agreed that the Boy Scouts organization was within its 1st Amendment rights to exclude Dale.⁷⁰

In his opinion written for the dissent, Justice Stevens stated:

"It is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters. . . . Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse."⁷¹

Justice Stevens went on to recall the words of Justice Brandeis: "We must be ever on our guard, lest we erect our prejudices into legal principles."⁷¹

CIR's challenge to affirmative action has

gone beyond universities. It has also contested affirmative action in the area of federal government contracts on behalf of its corporate client in *DynaLantic Corp v. U. S. Department of Defense*, which is pending in the D.C. circuit, and in an *amicus curae* brief in the *Adarand Constructors Inc., v. Mineta* case which was dismissed by the U.S. Supreme Court last November. The Adarand issue first came before the U.S. Supreme Court in *Adarand Constructors Inc., v. Peña* in 1995, when a 5-4 majority ruled that affirmative action in federal contracting must meet "strict scrutiny." The Court had then sent the case back to the lower courts to determine if the Department of Transportation's highway program met those standards. The Tenth Circuit ruled that it did, following changes initiated by the Clinton Administration. The Mountain States Legal Foundation and its client Adarand Constructors Inc., appealed that decision to the Supreme Court, which dismissed the appeal.⁷³

"Show Me the Money!" Strategic Support for Conservative Causes

Fighting such high-profile cases in federal courts is expensive, even when the lawyers do it pro bono. The funds, however, have been pouring in. By its own account, "CIR's budget was a modest \$220,000 during its first year of operation, mostly in grants from a handful of conservative foundations."⁷⁴ Grants and contributions rose from little less than \$500,000 in 1992 to almost \$900,000 in 1996.⁷⁵ CIR's 1998-1999 annual report showed income from grants and contributions in 1998 to be over \$1.5 million; while in 1999 it also received a one-time bequest of \$1.4 million in addition to contributions and grants of over \$1.3 million.⁷⁶ Some of the conservative foundations that have contributed to CIR are the Lynde and Harry Bradley Foundation, the Carthage Foundation, the Smith Richardson Foundation, the Randolph Foundation, the John M. Olin Foundation, the Adolph Coors Foundation, and the Scaife Family Foundation.⁷⁷ In 1997 almost half of CIR's budget was cov-

ered by the first five, with Olin alone accounting for \$200,000.⁷⁸ All of these foundations are major donors to a variety of right-wing causes and institutions.

CIR has also received funds from the racist Pioneer Fund in New York that has funded "leading Anglo-American race scientists such as Linda Gottfredson, J. Philippe Rushton, and Arthur Jensen."⁷⁹ The Institute for Democracy Studies reports that Pioneer's grantees have included "Florida State University psychology professor Glayde Whitney, who has sought to 'prove' that blacks are genetically inferior."⁸⁰ Journalist Courtney Leatherman observes that the \$30,000 Pioneer gave to CIR is listed in CIR's financial disclosure statement as a donation from the fund's president, Harry F. Weyher.⁸¹ According to Leatherman, "That is the only gift from a foundation listed that way. Mr. Greve says the omission of the foundation's name was an oversight, not an effort to hide anything."⁸²

In the 1990s particularly, right-wing foundations targeted a broad range of institutions and groups that are involved in policy research, advocacy, and implementation in the areas of education, economics, foreign affairs, media, and the law. Commenting on the strategic funding by conservative foundations in a report for the National Center for Responsive Philanthropy, Sally Covington observes, "The foundations provided substantial support, much of it on an unrestricted basis, to build and sustain strong institutions. . . . [with] the percentage of grants awarded as general operating support [being] the highest among nonprofit law firms, with 62 cents out of each dollar awarded to support their general operations."⁸⁴ Strategic funding also has meant that awards have been concentrated among a small number of rightist recipients and "heavily directed to national policy and advocacy institutions in recognition that the *national* policy framework greatly affects conditions, issues and decisions at the state, local and neighborhood level."⁸⁵ Additionally, funders "targeted grants across the institutional spectrum in recognition that a variety of

institutions and reform strategies are required for broad-based social transformation and policy change.”⁸⁶ And the changes across the board have been far-reaching, as they have in the legal arena.

Conclusion: “Death by a Thousand Cuts”

In 1995 CIR’s Michael Greve wrote: “I’m vastly more optimistic than I was even five years ago. The debate and the law have moved much, much faster than we had any reason to hope, and I’m fairly sanguine that the momentum will continue to go in our direction. It will be the death by a thousand cuts.”⁸⁷ CIR’s goal, ultimately, is to effect policy change that would put societal attitudes on the “right” track towards a “colorblind” America. And it has chalked up an impressive record in the areas in which it has concentrated its efforts and resources. However, its successes in some high profile cases, including those on the issue of affirmative action, cannot be divorced from the larger social and political reality progressives confront in 2002. It is now commonplace to observe that the United States as a society has moved rightwards. What is debatable, though, is how much and why.

While the reasons for this rightward shift are far too complex to analyze fully in this article, it is clear that in part it is a reaction to the achievements of progressive sociopolitical movements including the Civil Rights Movement, the Women’s Movement, and other struggles for gender and sexuality rights, economic and racial justice, and the environment. Additionally, corporate-led globalization and the economic uncertainties that have come with it, and the cultural globalization of the United States through demographic change, have been factors in allowing right-wing ideas to gain popularity. For instance, various sectors of the Right have actively recruited support using nativist, jingoist, and anti-immigrant arguments.⁸⁸ All of the above are particularly true vis-à-vis the resurgence of right-wing populism, a common thread in the various sectors of the political Right in the United States.⁸⁹ Since September 11th, the United States has wit-

nessed a resurrection of nativism and nationalism that both reflects and contributes to this move to the right.⁹⁰

The rightward march is also evident in the legal arena (See sidebar page 9). The emergence and rapid growth of the Fed-

If we are not to be snowed under by the dominant discourse of colorblindness, it is imperative that progressives understand the way race is appropriated and used by the Right to further its agenda. In this context, we must pay particular attention to the manipulation of the law, the institutions that administer laws, and the people and dynamics that make and define both. That includes groups like CIR.

eralist Society for Law and Public Policy Studies, which has gained enormous influence in conservative administrations like the current Bush Administration, for whom it has handpicked many judicial candidates, is an important feature;⁹¹ especially now in light of reports that the Bush White House is eliminating the traditional consultative

role played by the nonpartisan American Bar Association in the selection and nomination of judges for the federal judiciary.⁹² Ronald Reagan’s two terms as president, followed by former President George Bush, saw the large-scale appointment of conservative judges at all levels of the federal judiciary in the United States.⁹³ President Clinton’s two terms were marked by his inability to appoint judges to many vacancies in the federal courts—in part because of his administration’s preoccupations in other areas, and in part because many of his appointments were blocked by the Republican-controlled Senate.⁹⁴

George W. Bush now has the opportunity to continue where Reagan left off, including possibly ensuring a comfortable conservative majority on the Supreme Court.⁹⁵ Another factor in the move to the right is the enormous financial resources being granted by right-wing foundations and moneyed individuals to ensure that conservative ideas and policy prescriptions are implemented. Cass Sunstein, writing in the *New York Times*, notes that, “In the last 30 years, one glaring difference between Republicans and Democrats has been that Republicans, unlike Democrats, have been obsessed with the composition of the federal judiciary.”⁹⁶ CIR is but one political instrument in the Right’s toolkit to make the most of an increasingly hospitable judiciary.

It is important to recognize, however, that the move to the right is not inevitable. Although the Right has mobilized resentment against government, liberalism, and all progressive movements, it can, and must, be countered. In challenging this right-wing resurgence, progressive and liberal groups and individuals need to simultaneously bridge the divides of class, gender, sexuality, age, and ability, along with the chasm of race. Further, if as progressives, and as a society, we are to overcome racial, gender, and other forms of social injustice, then we cannot ignore or cover up race, gender, sexuality and other identifiers that are the basis for oppression and injustice. Scholars Lani Guinier and Gerald Torres propound a “concept of political race [that]

captures the association between those who are raced black—and thus often left out—and a democratic social movement aimed to bringing about constructive change within the larger community.”⁹⁷

Comparing race to a miner’s canary that warns the miner of impending danger through its death, Guinier and Torres write that the canary’s death diagnoses the necessity for a more systemic critique. Their concept of political race they contend, however, goes beyond diagnosis in being “aspirational and activist,” and in attempting to “construct a new language to discuss race, in order to rebuild a progressive democratic movement led by the people of color and joined by others.”⁹⁸

If we are not to be snowed under by the dominant discourse of colorblindness, it is imperative that progressives understand the way race is appropriated and used by the Right to further its agenda. In this context, we must pay particular attention to the manipulation of the law, the institutions that administer laws, and the people and dynamics that make and define both. That includes groups like CIR. This means that the Progressive Movement must also support its legal sector with more financial resources, more advocacy organizations, and more committed lawyers, while working to ensure that the rightward tilt in the judiciary is reversed.

End Notes

- ¹ See “Civil Rights” within the Mission section of CIR’s website. http://www.cir-usa.org/civil_rights_theme.html
- ² The author would like to thank Chip Berlet, Margaret Burnham, Pam Chamberlain, Jean Hardisty, and Faith Smith for comments and suggestions, and Betty Furdon for help with obtaining research materials.
- ³ See the Mission section of CIR’s website. http://www.cir-usa.org/mission_new.html
- ⁴ The Washington Legal Foundation is also a conservative public interest law firm that emphasizes the free market. Its advisory board includes (or has included) Ted Olson (George W. Bush’s solicitor-general, who was his lawyer in the Florida ballot case against Al Gore), Haley Barbour (former chair of the Republican National Committee), Former Governors Tommy Thompson (R-WI), George Allen (R-VA), and William Weld (R-MA), Dick Thornburgh (George Bush’s attorney-general), and Rep. Tom Campbell (R-CA). See Derk Arend Wilcox, *The Right Guide: A Guide to Conservative, Free-Market, and Right-of-Center Organizations* (Ann Arbor, MI: Economics America, 2000), pp. 343-344.

- ⁵ See the section “A Brief History of CIR” on its website. <http://www.cir-usa.org/history.html>
- ⁶ Terry Carter, “On A Roll(ack),” *American Bar Association Journal*, vol. 84 (February 1998), pp. 54-58, 56.
- ⁷ *Ibid.*, p. 57, citing Elliot Mincberg, legal director, People for the American Way.
- ⁸ W. John Moore, “The Influence Game: A Little Group Makes Big Law,” *National Journal*, vol. 29, no. 46 (November 15, 1997), p. 2323.
- ⁹ David Segal, “Putting Affirmative Action on Trial; D.C. Public Interest Law Firm Scores Victories in War on Preferences,” *Washington Post*, February 20, 1998, p. A1.
- ¹⁰ Idris M. Diaz, “Mischief Makers: The Men Behind All Those Anti-Affirmative Action Lawsuits,” *Black Issues in Higher Education*, vol. 14, no. 2 (December 25, 1997), pp. 14-19, 15.
- ¹¹ In this case, *United States v. Morrison*, the Supreme Court ruled in May 2000 that Congress had overstepped its authority with regard to the tort remedy in VAWA, whereby women could sue their attackers in federal courts under the Commerce Clause. The Commerce Clause gives Congress power to regulate inter-state commerce. The Court ruled that gender-based violence against women did not adversely affect inter-state commerce thereby disallowing Congress the use of the Commerce Clause to justify the tort remedy. Many states rights’ champions on the Right, who emphasize the Tenth Amendment, see the Commerce Clause as an intrusion on the sovereignty of the states, and as a means for the federal government to enact laws that violate states’ sovereignty.
- ¹² See the section “Cases” on its website. <http://www.cir-usa.org/cases.html>. CIR lost the Illinois State University case, while the Miami University case is pending. CIR also challenged the disbursement of \$3 million by the University of Minnesota to female faculty members to resolve gender disparities in salary. The case, *Maitland v. University of Minnesota*, is pending.
- ¹³ See Carter, “On A Roll(ack),” op. cit., pp. 56-57.
- ¹⁴ Robert Jensen’s article on White privilege first appeared in the *Baltimore Sun* on July 19, 1998. See http://www.utexas.edu/coc/journalism/SOURCE/faculty/facul/jensen’s_article.html
- ¹⁵ See Sharon Martinas, “Shinin’ the Lite on White Privilege: Defining the Problem, Why Can’t We Just Get It Together?” 1998. Emphases in the original. See <http://www.prisonactivist.org/cws/sharon.html>
- ¹⁶ Jean V. Hardisty, “Affirming Racial Inequality: The Right’s Attack on Affirmative Action,” *The Public Eye*, vol. 13, no. 4 (Winter 1999), pp. 1-16, 4.
- ¹⁷ Barbara Smith, “The Tip of the Iceberg,” *Sinister Wisdom: A Journal for Lesbians*, no. 52 (Spring/Summer 1994), pp. 54-56, 54. On colorblindness and the law see, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995). See especially, Part 4, the section on Critical Race Theory and Legal Doctrine, pp. 201-312.
- ¹⁸ Chip Berlet, “Hard Times on the Hard Right: Why Progressives Must Remain Vigilant,” *The Public Eye*, vol. 16, no. 1 (Spring 2002), pp. 1-22, 17.
- ¹⁹ Dalit, meaning broken or downtrodden, is the name chosen and preferred by the Dalit people in India who were formerly called “untouchable.”
- ²⁰ Cited in Upendra Baxi, “Law, Democracy and Human Rights,” in Smitu Kothari and Harsh Sethi, eds., *Rethinking Human Rights: Challenges for Theory and Action* (New Delhi: Lokayan, New York: New Horizons Press, 1989), pp. 101-117, 102. The concept and practice of

one person, one vote, while certainly a foundational feature of political equality, does not amount to political equality. Particularly so in a society that is institutionally racist, sexist, and casteist, or that is skewed in terms of wealth and control over resources.

- ²¹ Hardisty, “Affirming,” op. cit., p. 4.
- ²² D’Souza claims that the “charge of institutional racism and the expectation of proportional representation arise directly out of cultural relativism.” See Dinesh D’Souza, *The End of Racism: Principles for a Multiracial Society* (New York: The Free Press, 1995), pp. 289-290.
- ²³ Hardisty, “Affirming,” op. cit., p. 4.
- ²⁴ Cited in *Ibid.* See Amy Ansell, *New Right, New Racism* (New York: New York University Press, 1997).
- ²⁵ See David Brudnoy, “It’s time to end the bi-lingual ed scam,” *Boston Metro*, March 26, 2002, p. 6. Interestingly, Brudnoy, who is also an openly gay radio talk show host, was recently invited to emcee an event announcing the Boston scout group’s newly created diversity awareness award, that recognizes scouts, scout leaders, and organizations that promote diversity on the basis of race, ethnicity, religion, and sexual orientation. See, Tony Giampetruzzi, “Boston Scout group sends strong message of gay-inclusiveness,” in *newsweekly*, vol. 11, issue 43, June 19, 2002, p. 37.
- ²⁶ Andrea Smith, “Devil’s in the Details,” *Colorlines: Race Culture Action*, vol. 5, no. 1 (Spring 2002), pp. 4-6, 6.
- ²⁷ Hardisty, “Affirming,” op. cit., p. 4.
- ²⁸ *Ibid.*, p. 5.
- ²⁹ Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York: Basic Books, 1975). Glazer has since changed his position on some of these issues. See Nathan Glazer, *We Are All Multiculturalists Now* (Cambridge, MA: Harvard University Press, 1997).
- ³⁰ Ellen Messer-Davidow, “Manufacturing the Attack on Liberalized Higher Education,” *Social Text*, no. 36 (Fall 1993), pp. 43-80; “Who [Ac]Counts and How,” *MMLA: The Journal of the Midwest Modern Language Association*, vol. 27, no. 1 (Spring 1994), pp. 26-41.
- ³¹ Jerome L. Himmelstein, *To the Right: The Transformation of American Conservatism* (Berkeley: University of California Press, 1990). Especially, pp. 55-60.
- ³² *Ibid.*, p. 88.
- ³³ *Ibid.*, p. 89.
- ³⁴ Jean V. Hardisty, “Libertarianism and Civil Society: The Romance of Free Market Capitalism,” *The Public Eye*, vol. 12, no. 1 (Spring 1998), pp. 1-18, 5.
- ³⁵ “A Brief History,” op. cit.
- ³⁶ Hardisty draws a distinction within right-wing libertarianism between the paleolibertarians who subscribe to Old Right ideology and the rightist libertarians who are more moderate. See Hardisty, “Libertarianism and Civil Society,” op. cit., p. 6. There is also left-wing libertarianism which informs the American Civil Liberties Union’s (ACLU) perspective and policies.
- ³⁷ Hardisty, “Libertarianism and Civil Society,” op. cit., p. 6.
- ³⁸ Upendra Baxi, “From Human Rights To The Right To Be Human: Some Heresies,” in Kothari and Sethi, eds., *Rethinking Human Rights*, op. cit., pp. 151-166, 159.
- ³⁹ Hardisty, “Libertarianism and Civil Society,” op. cit., p. 9.
- ⁴⁰ *Ibid.*
- ⁴¹ See Jyl J. Josephson, “Liberal Justice and the Political Economy of Children’s Well-being,” *New Political Science*, vol. 23, no. 3 (2001), pp. 389-406. Josephson uses Martha Nussbaum’s theory of basic capabilities to ground, what she terms, equal respect, 397-398.

- ⁴² Nussbaum's basic capabilities (first worked out together with Amartya Sen) that are essential for humans to function are a combination of inherent individual capacities and external conditions that enable the utilization of those capacities. See Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000).
- ⁴³ For instance a CIR press release states, "The lawsuit contends that such disparities were a consequence of racial preferences in the admissions process that violate the 14th Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964." See "CIR begins second lawsuit against University of Michigan," http://www.cir-usa.org/press_releases/grutter_v_bollinger_pr.html. Title VI of the Civil Rights Act states that: 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.
- ⁴⁴ See <http://www.constitutioncenter.org/sections/work/educlinks.asp>
- ⁴⁵ *Ibid.*
- ⁴⁶ See http://www.cir-usa.org/legal_docs/smith_v_washington_certpet.PDF
- ⁴⁷ Curt A. Levey, "Diversity on Trial," *National Review*, June 11, 2001. See http://www.cir-usa.org/articles/levey_pro_filing_nro.html
- ⁴⁸ See Nicholas deB. Katzenbach and Burke Marshall, "Not Color Blind: Just Blind," *New York Times*, February 22, 1998, reprinted in Faye J. Crosby and Cheryl VanDeVeer, eds., *Sex, Race, & Merit: Debating Affirmative Action in Education and Employment* (Ann Arbor: University of Michigan Press, 2000), pp. 48-55.
- ⁴⁹ See Matt McGann, "Late-Breaking: MIT Involved in Brief to Supreme Court Supporting Affirmative Action," <http://web.mit.edu/afs/athena.mit.edu/activity/o/observer/www/1-1/articles/mm3.html>. One of the most ringing endorsements of diversity in higher education is a study by the former presidents of Princeton (William G. Bowen) and Harvard (Derek Bok) universities. See William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton: Princeton University Press, 1998).
- ⁵⁰ See <http://www.constitutioncenter.org/sections/work/educlinks.asp>
- ⁵¹ *Ibid.*
- ⁵² See Carl E. Brody, Jr., "A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court." See <http://www3.uakron.edu/lawrev/brody.html>
- ⁵³ See Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'," in Kimberlé Crenshaw et al., eds., *Critical Race Theory*, op. cit., pp. 257-275. Critical Race Theory emerged in the 1980s as a field of legal scholarship distinct from both liberal and conservative legal theory. It built on both the work of the Civil Rights Movement of the 1960s and Critical Legal Studies that initially radicalized legal theory in the 1970s. See "Introduction," in Kimberlé Crenshaw, et al., eds., *Critical Race Theory*, op. cit., pp. xiii-xxxii.
- ⁵⁴ Gotanda, "A Critique," op. cit., p. 258.
- ⁵⁵ *Ibid.*, pp. 262-263.
- ⁵⁶ *Ibid.*
- ⁵⁷ *Ibid.*, p. 263.
- ⁵⁸ *Ibid.*
- ⁵⁹ *Ibid.*, p. 264.
- ⁶⁰ *Ibid.*, pp. 263-264.
- ⁶¹ *Ibid.*, p. 264.
- ⁶² *Ibid.*
- ⁶³ See Theodore Cross, "African-American Opportunities in Higher Education: What are the Racial Goals of the Center for Individual Rights?" *Journal of Blacks in Higher Education*, no. 23 (Spring 1999), pp. 94-99, 95-96.
- ⁶⁴ *Ibid.*
- ⁶⁵ *Ibid.*
- ⁶⁶ *Ibid.*
- ⁶⁷ *Ibid.* Emphasis in the original.
- ⁶⁸ Diaz, "Mischief Makers," op. cit.
- ⁶⁹ See the *amicus curae* brief filed by CIR at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/94.pdf. The Boy Scouts were claiming the right to association under the First Amendment to exclude Dale.
- ⁷⁰ See CIR's press release on the ruling at http://www.cir-usa.org/press_releases/dale_v_boy_scouts_pr2.html
- ⁷¹ See the dissent at <http://supct.law.cornell.edu/supct/html/99-699.ZD.html>
- ⁷² *Ibid.*
- ⁷³ See http://www.mediatransparency.org/court_watch.htm
- ⁷⁴ "A Brief History," op. cit.
- ⁷⁵ *CIR Annual Report 1995-1996* (Washington, DC: CIR, 1996) and *CIR Annual Report 1996-1997* (Washington, DC: CIR, 1997).
- ⁷⁶ *CIR Annual Report 1998-1999* (Washington, DC: CIR, 1999). In 2000, the gifts and contributions amounted to over a million dollars. *CIR Annual Report 1999-2000* (Washington, DC: CIR, 2000).
- ⁷⁷ See Sally Covington, *Moving a Public Policy Agenda: The Strategic Philanthropy of Conservative Foundations* (Washington, DC: National Committee for Responsive Philanthropy, July 1997). Covington's report lists CIR as having received over \$1.2 million in 13 grants from these conservative foundations between 1992-94. See p. 29. See also the mediatransparency.org website for details on CIR funding sources. http://www.mediatransparency.org/search_results/info_on_any_recipient.asp?57. Michael Greve was also a program officer at the Smith Richardson Foundation. See, Peggy Walsh-Sarnecki, "The Men who would End Affirmative Action: U-M is next Target for Outspoken Crusaders," *Detroit Free Press* August 25, 1998, p. 1A.
- ⁷⁸ Diaz, "Mischief Makers," op. cit., p. 18.
- ⁷⁹ Lee Cokorinos, Connie Montoya, et al., *The Assault on Diversity: Behind the Challenges to Racial and Gender Remedies* (New York: Institute for Democracy Studies, 2000), p. 14. For CIR coverage, see pp. 12-15. *Assault on Diversity* looks at both the political and the legal battle against diversity. Groups such as Ward Connerly's American Civil Rights Institute and Linda Chavez's Center for Equal Opportunity are in the political battle, while CIR is one of the main arms of the legal battle. On Pioneer funding see also Cross, "African-American Opportunities," op. cit., pp. 97-99. Cross writes that CIR has received Pioneer grants on three occasions.
- ⁸⁰ Cokorinos, et al., op. cit., *Assault on Diversity*, p. 14.
- ⁸¹ Courtney Leatherman, "Bashing Sacred Policies: A Public-Interest Law Firm Aims to Defend the Politically Incorrect," *The Chronicle of Higher Education*, vol. 41, no. 13, November 23, 1994, pp. A18-19, 19.
- ⁸² *Ibid.*
- ⁸³ See Covington, *Moving a Public Policy Agenda*, op. cit., and also David Callahan, *\$1 Billion for Ideas: Conservative Think Tanks in the 1990s* (Washington, DC: National Committee for Responsive Philanthropy, March 1999).
- ⁸⁴ Covington, *Moving a Public Policy Agenda*, op. cit., pp. 31-32.
- ⁸⁵ *Ibid.*, p. 32. Emphasis in the original.
- ⁸⁶ *Ibid.*, p. 33.
- ⁸⁷ Michael Greve, "Segregation, 90s Style, and How to Fight It," *Weekly Standard*, December 25, 1995, p. 31. Cited in Cokorinos, et al., *Assault on Diversity*, op. cit., p. 13.
- ⁸⁸ See Doug Brugge, "Pulling Up the Ladder: The Anti-Immigrant Backlash," *Defending Immigrant Rights: An Activist Resource Kit* (Somerville, MA: Political Research Associates, 2002), pp. 1-17. This is an updated version of the original article that appeared in *The Public Eye*, vol. 9, no. 2 (Summer 1995), pp. 1-10.
- ⁸⁹ See Chip Berlet and Matthew N. Lyons, *Right-Wing Populism in America: Too Close For Comfort* (New York: Guilford Press, 2000). See also, Berlet, "Hard Times on the Hard Right," op. cit.
- ⁹⁰ See the Fall 2001 issue of *The Public Eye*, vol. 15, no. 3. This was a special issue after September 11, 2001, dealing with nationalism and nativism in the United States.
- ⁹¹ The Federalist Society was founded in 1982 and is based in Washington, D.C. See Lee Cokorinos and Julie R. F. Gerchik, *The Federalist Society and the Challenge to a Democratic Jurisprudence* (New York: Institute for Democracy Studies, 2001). See also the mediatransparency.org website an article on the Federalist Society that first appeared in the March 2000 issue of the *Washington Monthly*; <http://www.mediatransparency.org/Stories/fed-dies.htm>; Neil Lewis reports that 17-20 of the 70 candidates interviewed until April 2001 were recommended directly by the Federalist Society's headquarters. See Neil A. Lewis, "Bush to Reveal First Judicial Choices Soon," *New York Times*, April 24, 2001.
- ⁹² See the press release by Nan Aron, president of the Alliance for Justice, criticizing the Bush Administration for excluding the ABA. <http://www.afj.org/jsp/news/abarelease.html>
- ⁹³ See the Alliance for Justice's Judicial Selection Project report on judicial nominations. <http://www.afj.org/jsp/report2000/home.html>
- ⁹⁴ *Ibid.* The report also notes that while Clinton appointed more non-White and female judges than all of his predecessors combined, his appointments did not necessarily restore the ideological balance in the judiciary as most of his nominees were moderate centrists.
- ⁹⁵ On some of George W. Bush's earliest nominees who are neither moderate nor centrist see the People for the American Way website http://www.pfaw.org/issues/judiciary/reports/bush_judic/nominees.html
- ⁹⁶ Cass R. Sunstein, "Tilting the Scales Rightward," *New York Times*, April 26, 2001, p. A23.
- ⁹⁷ Lani Guinier and Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, MA: Harvard University Press, 2002), p. 12.
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“New Sheriff in Town”: The Christian Right Shapes U.S. Agenda at the United Nations

By Jennifer Butler

Introduction

At the beginning of 2001, Christian Right leader Austin Ruse of the Catholic Family and Human Rights Institute (C-Fam) rejoiced, “There’s a New Sheriff in Town,” a victory cry picked up by other Christian Right organizations like Concerned Women for America.¹ A new U.S. Administration that showed clear signals of its willingness to advance Christian Right views at United Nations (UN) meetings has enabled the Christian Right to dominate the U.S. agenda at many UN meetings, in particular the Preparatory Committee Meetings (PrepComs) for the UN General Assembly Special Session on Children. The Right won some symbolic victories at the Special Session on May 8-10, 2002. It has also managed to influence in smaller but significant ways UN meetings on women, population, and the AIDS pandemic. At one time “profamily” organizations, having newly arrived at the UN, complained of being excluded from UN meetings and ignored by the U.S. State Department. Now their views are espoused by U.S. delegations, and Christian Right leaders from organizations like the Family Research Council are even invited to join the official government delegation to UN meetings.

Two years and a change of government in the United States have put Christian Right or “profamily” organizing at the UN far ahead of where it was when this author first exposed these efforts in *The Public Eye*, in Fall 2000.² In 2000, while “profamily” organizations had reached a new level of organizing at the United Nations and showed surprising strength by slowing negotiations at the UN review of the Fourth World Conference on Women

known as Beijing+5, they did not have a significant impact on international agreements made at Beijing+5.

Christian Right groups at the UN continue to strengthen their interfaith ties and globalize their message through regional conferences and their newfound political power in the international arena.³ Their shared commitment to opposing lesbian, gay, bisexual, and transgender (LGBT), women’s and children’s rights, abortion, and international cooperation has enabled them to overcome centuries of divisive sectarianism. In addition, Christian Right groups continue to strengthen their ties to social conservatives in other religions, including Muslims, Jews, and the Church of Jesus Christ of Latter Day Saints (Mormons). Many would consider C-FAM to be the leader of “profamily” efforts at the UN. However, of equal importance is the World Family Policy Center based at the Brigham Young University Law School, a Mormon institution. The Family Research Council (FRC), one of the flagships of the Christian Right has also thrown its weight behind these efforts. Other groups include Concerned Women for America, United Families International, Real Women of Canada, and the American Life League, to name a few.

Appeasing the Christian Right

How did a president who ran on a platform of “compassionate conservatism” and bipartisan cooperation hand over U.S. delegations to the UN to the Christian Right? George W. Bush is acutely aware of the fact that his father may have lost his bid for re-election because he failed to win support from the Christian Right.⁴ The UN Special Session on Children provides the Bush Administration an opportunity to win points with Christian Right voters without losing moderate votes, since news media pay little attention to UN meetings. While many moderate Republicans would actually be appalled to hear that a world meeting on the well being of children had been politicized, the Bush Administration could bank on that constituency not catching wind of this. The U.S. State

Department advocated the agenda of the Christian Right at Preparatory Committee meetings for the Special Session.⁵ Christian Right leaders were appointed to the U.S. delegation for the Third Preparatory Committee meeting for the Special Session. These included William Saunders of the Family Research Council, Bob Flores of the National Law Center for Children and Families, and Paul Bonicelli, executive director of the National Center for Home Education. These individuals oppose children’s and women’s rights and the U.S. ratification of UN treaties.⁶ Saunders and Bonicelli, were joined by Janice Crouse of Concerned Women for America and John Klink, an experienced UN negotiator who once worked for the Holy See, on the U.S. delegation to the Special Session. Charles MacCormack, the president of Save the Children Federation, Inc., was the only nongovernmental representative from a moderate NGO.

The U.S. delegation also included right-wing members of the Bush Administration such as Wade Horn, assistant secretary for family support in the Department of Health and Human Services. Horn is a founder and former president of the National Fatherhood Initiative and a key leader in the conservative Fatherhood Movement.⁷ The Special Session enabled Christian Right leaders to further establish and cement relationships with their counterparts and supporters in the Administration.

Why Oppose Children’s Rights?

Conservatives have long viewed the UN as a beachhead for communism and have been fearful of internationalism.⁸ White conservative evangelical fiction portrays the UN as the end time world government of the antichrist. These fears intensified as the Cold War ended, the millennium neared, and the UN organized a series of international conferences during the 1990s to mobilize political will to address the world’s most pressing issues.⁹ Christian Right fears about the UN reached a new peak during the 1994 International Conference on Population and Development (Cairo) and then the 1995 UN

Fourth World Conference on Women (Beijing) as they witnessed the impact of international agreements on women's rights and abortion.

Adopted before the Cairo and Beijing Conferences, the UN Convention on the Rights of the Child (1989) and the Plan of Action of the 1990 UN Summit for Children were drafted primarily under the Reagan Administration and signed under his successor President George Bush without conservative protest.¹⁰ Ironically many of the articles of the Convention on the Rights of the Child (Children's Convention) now opposed by "profamily" groups were heavily influenced by these two Administrations and represented U.S. Cold War victories.¹¹ For instance, Article Fourteen on freedom of religion was aimed at addressing the Soviet Union's violations of religious freedom. Still, aroused by the Cairo and Beijing conferences, the Christian Right began to direct its wrath at the Children's Convention, convinced that the concept of children's rights was a conspiracy by liberals to undermine the traditional family by destroying parental authority and unleashing the powers of government to intervene in the family. Although nearly every article of the Children's Convention calls on state parties to respect or protect the rights of parents as part of strengthening children's rights, many White conservative evangelicals are convinced of rumors propagated by Christian Right groups. They have been led to believe, for instance, that the Convention would give the UN the power to take away their children or encourage children to sue their parents.¹²

In fact, a significant percentage of the U.S. population learns about UN conferences primarily or only through a far-reaching Christian Right media network, a situation intensified by the fact that the mainstream media in the United States seldom covers UN conferences. The Christian Right has developed an impressive media network of radio programs, websites, and listserves that reaches not just millions of conservative evangelicals and mainstream Americans, but a growing global network as

well.¹³ Christian Right opposition to the UN social agenda complements the tendency of U.S. conservatives to mistrust international cooperation and the UN.

Sadly, conservative opposition to U.S. ratification of the Children's Convention and the concept of children's rights, and now their disruption of progress at the UN

Clearly what has changed is not how the Christian Right views the UN, but its strategy for undermining the UN's work. Many of these organizations that do not support the UN or its principles have managed to slide through the UN committee of member nations that reviews NGO applications for consultative status.

Special Session on Children actually undermine international progress on issues many conservatives care deeply about. The "rights-based approach," as it is often called, moves governments from viewing children as property, to treating them as human beings with rights protected by a legal system. Human rights activists around the world use the Children's Convention to push reluctant governments to improve the situation of children. The strength of

the Convention lies partially in the fact that its nearly universal ratification makes it a norm. When the world's lone superpower claims to base its foreign policy on human rights and the rule of law, yet undermines the treaty and very concept of children's rights, it both weakens the resolve of the international community and diminishes its own position as a world leader.

A Shift in Christian Right Strategy: Trojan Horses and Strange Bedfellows

The Christian Right's realization that UN meetings have a tremendous impact on social issues led to a surprising change in their organizing strategies. Prior to 2000, the Christian Right primarily opposed the United Nations by calling on Congress to decrease funding, engaging in campaigns to "get the US out of the UN," and using their extensive media network to convince its constituency that the UN and its treaties, especially on women and children, sought to undermine the family and the nation. The failure of the Children's and Women's Conventions to reach the Senate floor for a vote on ratification were due in large part to the Christian Right and Senator Jesse Helms (R-NC), who served as chair of the Senate Foreign Relations Committee when Republicans controlled the Senate.¹⁴

Today, rather than critique the system from the outside, a number of Christian Right and conservative organizations have decided to use a Trojan Horse strategy. By infiltrating the system of an organization they oppose, they hope to stall, influence, and even undermine its work from within. In March 2000, Austin Ruse of C-Fam addressed the Cardinal Mindszenty Foundation in Anaheim, CA: "Should the US get out of the UN? That's a question I always steer clear of, principally because to participate in the UN in the way that I do, you must at least have a veneer of supporting the UN."¹⁵ Clearly what has changed is not how the Christian Right views the UN, but its strategy for undermining the UN's work. Many of these organizations that do not support the UN or its principles have managed to slide

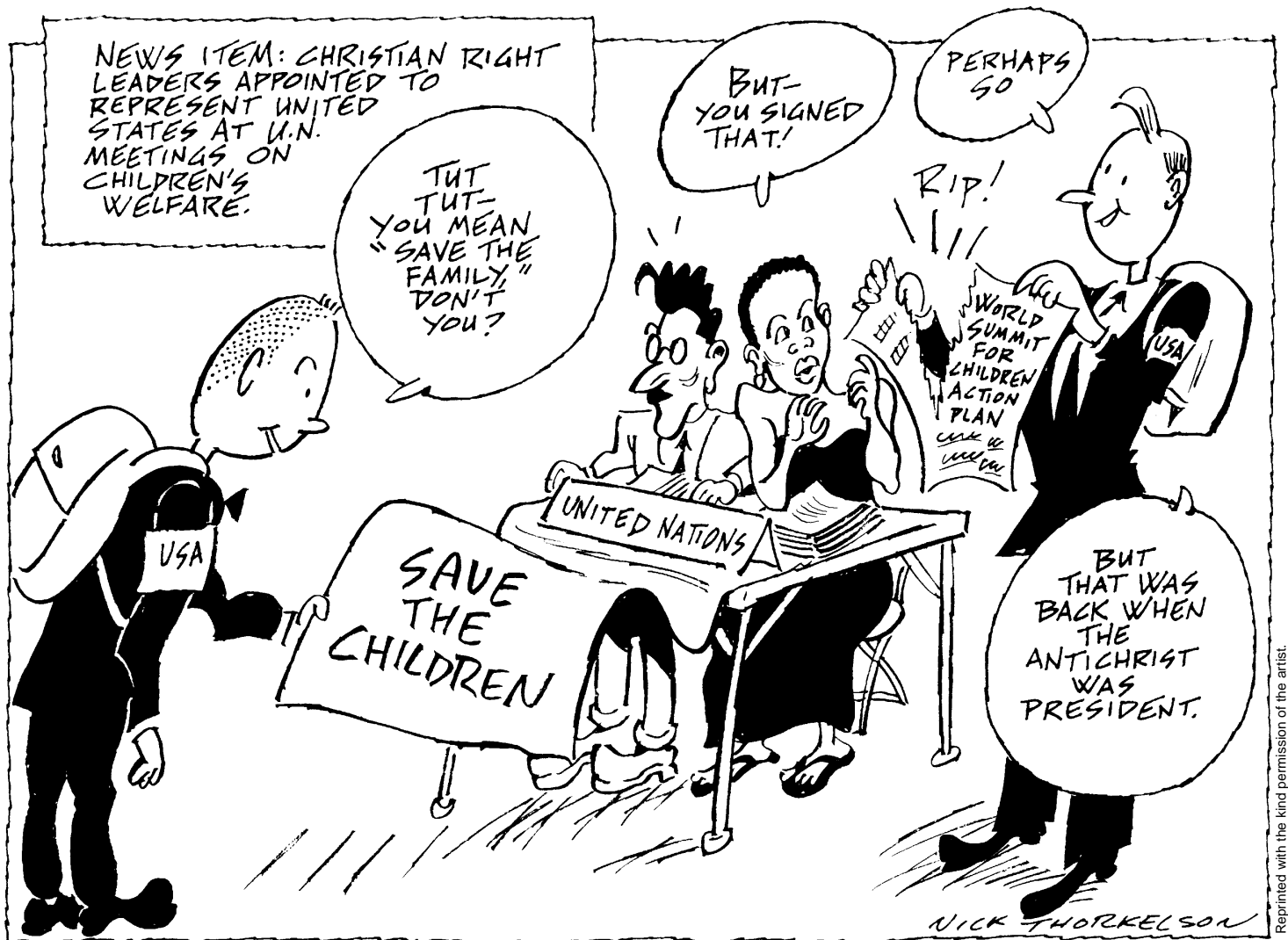
through the UN committee of member nations that reviews NGO applications for consultative status.¹⁶ Many smaller, less known Christian Right and anti-abortion organizations have already been granted consultative status, including United Families International, the International Right to Life Federation and American Life League. Other “profamily” organizations applying for consultative status are Family Research Council, the Heritage Foundation, and Concerned Women for America.

The average U.S. citizen is unfamiliar with the impact of NGOs on the United Nations, especially on issues like human rights, racism, the environment, and disarmament. NGOs can register to have consultative status with the United

Nations Economic and Social Council (ECOSOC).¹⁷ Over 2,000 NGOs have consultative status with the UN, enabling them to attend most UN meetings to monitor the negotiations, share information, and advocate their positions with ambassadors and government delegations. NGOs have been very influential at the UN, and have often been at the forefront of encouraging the UN to initiate or move forward on efforts to address the world’s problems. NGOs were instrumental in getting the UN to establish the office of the UN High Commission on Human Rights in 1994, in advancing the concept of the International Criminal Court to try war crimes, and in getting the UN to address women’s advancement and global racism through world conferences.¹⁸ UN conferences and human

rights treaties bring international pressure to bear on governments and are used by human rights activists worldwide to effect change. Another sign of the growing influence of NGOs is the fact that they are often invited to serve in an advisory capacity on government delegations at UN meetings to share their expertise and help facilitate communication between governments and NGOs.

“Profamily” NGOs lobby conservative governments, including majority Catholic and Muslim nations such as Nicaragua, Pakistan, Iran, Sudan, Libya, Algeria, and Egypt. They also work through the Holy See/Vatican, which has observer state status at the UN and participates fully in UN conferences. Thanks to the lobbying of “profamily” groups, the United States is



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now included in this conservative block that opposes women's and children's rights. Governments and NGOs normally at odds with one another have become strange bedfellows in their opposition to women's rights, abortion, homosexuality, and children's rights. The United States finds itself cozy with Iran, Sudan, and Libya. Once accused by Christian evangelicals of being a dangerous cult, Mormons have not only been included in conservative evangelical advocacy efforts but actually lead the initiative.

Attacks on UN Agencies

While Christian Right NGOs claim they support UN principles and should have consultative status, they continue to misinform their networks about the UN's work and spread rumors about UN agencies. Throughout the winter as UNICEF (the UN Children's Fund) mobilized to assist children in Afghanistan, they also found themselves fighting a wearying public relations campaign against rumors circulated by Christian Right groups.¹⁹ In March 2002, based on an unsubstantiated, fantastic rumor propagated by Population Research International that UNFPA supports forced abortions in China, Congressman Chris Smith prevailed on President Bush to withhold \$34 million allocated by the Senate for the UN Population Fund. The United States contribution represents approximately 14 percent of UNFPA's budget. Despite the fact that the U.S. State Department has closely monitored UNFPA programs in China and annually given them good reviews, and the fact that UNFPA's programs have lowered the incidence of coercive family planning in China, and despite the lack of any evidence, these funds continue to be withheld. Congressional and White House faxes and phone lines were inundated with messages from conservatives. Progressives and moderate Christians could not compete. Ironically, the withholding of these funds will only increase maternal and infant deaths, abortion, and the spread of STDs, especially in countries, like China, where

multilateral funding is the only form of aid acceptable to national governments.

UN Special Session on Children: Chair of Negotiations calls United States "Impossible"

The goal of the UN Special Session on Children was to review progress made on the Plan of Action of the World Summit for Children and to strengthen international attention to emerging issues, including the sexual exploitation and sale of children, use of child soldiers, and the devastating impact of the AIDS pandemic on youth and children. Many of these issues can be solved only through international cooperation, and conservative opposition to international agreements can slow progress on the mobilization of resources for resolution.

Negotiations were grueling. In informal briefings and conversations delegates confessed that they feared that the United States would walk out of the proceedings as it did in Durban at the UN World Conference on Racism in September 2001. Adding to this fear, just before the Special Session the United States announced it would "unsign" the International Criminal Court treaty, removing itself further from the international community. In addition, during negotiations the United States threatened that it would opt out of the traditional consensus building process, and force a vote on certain paragraphs of the Outcome Document if it did not get its way with child rights, reproductive services, and the death penalty. Most UN documents are adopted by consensus for the sake of diplomacy. Having demonstrated the lengths to which it was willing to go, the United States left other countries little negotiating room. Any country can register a "reservation" on issues that represent the consensus of the international community but that they are unable or unwilling to subscribe to. NGOs implored the U.S. delegation to "use the recognized process for reservations and not to further impede the progress of nations on the Outcome Document."²⁰ Their pleas were ignored.

The European Union (EU), a negotiating block which often has enough power to stand up to the United States (as it did in negotiations on the International Criminal Court), surprisingly played a weak role in the negotiations, angering many other UN member states and negotiating blocks.²¹ Many delegates and NGOs observed that the EU lacked experienced negotiators and a clear strategy. The delegation from Spain leading the EU negotiations was often accused of taking positions that did not represent the EU. President Bush had visited Spain just before the Special Session, and members of Opus Dei, a right-wing Catholic group, were on the Spanish delegation. In the end, both the EU and the coordinator of the final negotiations, Ambassador Hanns Schumacher from Germany, bowed to U.S. intransigence in an apparent effort to prevent a U.S. walk out and possibly even a withdrawal of funding from UNICEF (the United States funds a significant portion of UNICEF's budget). Many government delegates, especially the Rio group of Latin American countries which took a progressive stance on many of the controversial issues complained bitterly to NGOs and in their closing statements that they had negotiated openly and in good faith, only to be excluded and ignored while the EU and the United States cut a deal behind the scenes.²²

Towards the end of the negotiations, NGOs watched the Rio group and the Like Minded Group (industrialized nations not in the EU) angrily marching out of negotiations to regroup, stating they felt betrayed by the process. Defending himself from allegations that he had been biased towards the United States, and that he had struck a deal with it without consulting other delegations, Ambassador Schumacher at the end of the Special Session let it be known privately that the United States had been "impossible."²³ Indeed, while the United States allied itself with the Holy See and conservative Muslim nations (Sudan, Libya, Iran) on reproductive health issues, and abstinence-only approaches to sex education, most of these delegations were willing to accept compromise proposals

where the United States did not.

Surprisingly, no NGOs were allowed to observe most of the negotiations, which took place mainly in small, private informal meetings rather than in the Preparatory Committee for the Special Session. Governments attended informal negotiations at the end of April and beginning of May to try to work out sticking points before the Special Session convened, but to no avail. By Thursday, May 10, delegates were forced to negotiate the entire night and into the morning. NGO leaders found themselves waiting outside conference room doors to hear about the state of negotiations from delegates willing to brief them. NGO representatives on both ends of the political spectrum—progressive and Christian Right—kept vigil outside the negotiation rooms. As delegates filed out of sensitive negotiations, some clearly angry and a few near tears, both groups of NGOs sought to encourage delegates and get up-to-date information on the proceedings. U.S. delegates always stopped to debrief with the Christian Right NGOs before moving on to take their break.

Under the influence of the Christian Right, the U.S. delegation, until the final hours of negotiations, remained unwilling to compromise its conservative positions on the most hotly debated issues, which included child rights, reproductive services, the family, and the death penalty. Throughout the preparatory process and in the final negotiations, the United States successfully opposed any reference in the Outcome Document to the centrality of the Convention or child rights.²⁴ The Convention on the Rights of the Child is the most universally ratified UN convention in history—the United States is the only country that has not ratified it (during the Special Session, Somalia signed the treaty and announced it would ratify immediately). United States insistence on imposing its opposition to the Children's Convention on the rest of the world infuriated government delegates, whose governments have relied heavily on the Children's Convention as a tool to strengthen children's rights. The Outcome

Document for the Special Session, which is supposed to set the pace for the next five to ten years, does not affirm the centrality of the Children's Convention or the rights-based approach to children's issues.

While the Christian Right opposes the Convention on the basis of fears about compromising national sovereignty and family privacy, the U.S. government may in fact resist the Convention for even more significant reasons. The Children's Convention, unlike many other international human rights treaties, combines elements of political and civil rights with economic and social rights. The United States has been a strong supporter (at least in its rhetoric, if not always in its actions) of political and civil rights, but has generally opposed economic and social rights, which it identifies with socialist and communist values.²⁵ While the United States has a bad track record on domestic and international economic policies (even under the Clinton Administration), the current Administration is known for its adamant opposition to antipoverty measures and its sympathies with corporate interests. The Children's Convention threatens the hegemony of the neoliberal capitalist economic model that eschews the notion that governments should be required to provide basic economic entitlements to citizens, even the most vulnerable among them. Economic justice issues, however, are too often conveniently obscured by the more dominant national sovereignty rhetoric of the Right used during negotiations and captured in the media.

Mind Your Language

The United States also undermined language on reproductive health, although surprisingly it was less successful on this issue. Efforts on the part of negotiators to seek consensus failed as the United States rejected all compromise language, even language that the Holy See supported. In the world of UN negotiations, one word can make or break an agreement. The United States adamantly advocated for the words reproductive health “care” as opposed to “services.” The word “services” is impor-

tant to progressives because it connotes the importance of empowering people to be proactive in making choices about their health. Care is considered to be more reactive, referring to caring for people after they are sick. The United States however claimed that the word reproductive services included abortion. The word “services” technically includes abortion services only if a UN member state defines it as such. Previous consensus language around reproductive services does not call for the legalization of abortion, but only insists that where abortion is legal, it be safe. The United States capitalized on a misstep of a Canadian delegate at a PrepCom for the Session. The delegate stated that “services” did include abortion (meaning in his country). The United States, under pressure from Christian Right groups,²⁶ used this misunderstanding to insist that the international community was trying to trick others into unwittingly agreeing to legalize abortion. In the end, the word “services” was dropped, but governments did commit to make reproductive health care consistent with the Cairo and Beijing conference agreements, which do contain strong language on reproductive rights. Additionally, the United States, with some conservative Muslim governments, helped torpedo efforts to strengthen government commitments to sex education, by inserting an abstinence-only approach to sex education. The paragraph was finally removed all together when governments could not reach a compromise.

In the paragraph on the family, the United States failed to block language affirming that “various forms of the family exist,” and were unable to insert family values language, including language that would exclude LGBT families. The United States did register an explanation of its position in the official Session records, clarifying that with regard to the phrase “various forms of the family exist,” the United States understood that to “include single parent and extended families.”

Although little mention of this was made in the media, the United States,