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BEFORE THE
HOUSE OF REPRESENTATIVES'
COMMITTEE ON EDUCATION AND LABOR AND
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY

concerning
H.R. 700 – “CIVIL RIGHTS RESTORATION ACT OF 1985”

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To the honorable chairman and committee members, thank you for this opportunity to address to your attention aspects of the proposed legislation, “The Civil Rights Restoration Act of 1985,” which have seemed to me worthy of further deliberation. I am a professor of government at Harvey Mudd College in Claremont, California. I have also served as president of our Board of Education in the Claremont Unified School District. I serve presently on the National Council on the Humanities, and only recently I have assumed a membership on the California State Advisory Committee to the United States Commission on Civil Rights. I am also, finally, a member of the Board of Directors of Leroy’s Boys Home. My professional work has concentrated on principles of political philosophy, and above all on the founding principles and development of the United States Constitution. My civic involvements have to a considerable degree focussed on questions of education, civic and academic.

That said, permit me, I pray, to lay aside all claims of expertise. I prefer to recur to the grounds of our common citizenship. By addressing you from that higher ground, I would emphasize the importance I attach to the principles I hope to enunciate. At all events, I would hope that you would receive the opinions I offer as the candid reflections of a fellow citizen, an equal, who may express the opinions of many but who affects to represent only himself.

THE LAW

Section 5 of the Fourteenth Amendment grants Congress broad powers “to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion.” [*Ex Parte Virginia*, 100 U.S. 339, 346 (1879).] That large grant of authority produced principles to govern legislation throughout the United States, principles with which, virtually, we all now concur and which proscribe discrimination against all persons on the basis of race, religion, sex, etc. Stated positively, rather than in its usual negative listing, the principle calls for making United States citizenship the fundamental basis of such legitimate discriminations. touching persons as the *laws* of our states or federal government may be called upon to adopt.

THE POWER

The exercise of Congress' power in the era through which we have lived and now hope to bring to a close has yet to live up to the high, catholic standard enunciated in *Ex Parte Virginia*. The reason for this failure in our law seems to be grounded in the felt necessity to secure the civil rights of some citizens only, before searching for that expression of law which would guarantee the civil rights of all persons. We and our law-makers have felt this way, perhaps, because the era we have lived through was initiated by a grave judicial opinion which has had profoundly unfortunate consequences. The Supreme Court enunciated its own point of view on matters of civil rights in 1938, in the infamous *Carolene* footnote:

...prejudice against *discrete and insular* minorities may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and [which] may call for a correspondingly more searching judicial inquiry.

Over the years we have searched so diligently for "discrete and insular minorities," that what began as a supposedly necessary suspension of "the operation of ordinary political processes" has itself turned into the *ordinary*, nay traditional political procedure for our generations. The needs of "discrete and insular minorities" have turned into the demands of special interests, and our lawmakers seem to have lost all capacity to legislate in the common interest.

GROVE CITY

To consider fully the implications of the Grove City decision and the dangerous tendency of the legislation now pending before you, we should try to recapture a view of those "ordinary political processes" which were supposed only to have been temporarily suspended in 1938 and on which the American Constitution was designed to rely to safeguard the people's liberties. Our ability to understand the preferred constitutional alternative to the legislation about which you now deliberate may be related to our ability to see how extraordinary the present situation is: the Congress takes up legislation designed to overturn a Supreme Court decision, the substance of which was to enforce the will of Congress! It was Congress that wrote in the "program-specific" language of Title IX, and the Grove City opinion did no more than take that language literally. Ordinarily, we would expect Congress to react when the Court speaks in opposition to the will of the legislature. The present unique situation suggests that the will of the legislature is scarcely clear to Congress itself!

I believe that the reason for this confusion is that Congress instinctively yearns to rediscover those "ordinary political processes" which would assure the civil rights of all persons without turning the federal government into a cloying, oppressive overseer of all the most ordinary behaviors of the American people. By making the Title IX cutoff of federal funds program-specific rather than applying to entire institutions or governmental entities, Congress instinctively declined to intrude massively into realms where individual decisions and litigation ought to prevail. At the same time, however, the very existence of Title IX, the inclination to treat women as a "discrete and insular minority," reveals great uncertainty about the extent to which Congress is willing to trust private decisions in these matters. Accordingly, Congress has sought a regulatory instead of a judicial resolution of these difficulties, ignoring the caution of

Alexander Hamilton's gloss on the Constitution: "the words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice. They can never be referred to an act of the legislature."

Congress persists in spite of this warning. The reason for this, it seems to me, is that to minds trained only to view their fellow citizens through the lenses of special interests, it is ultimately impossible to comprehend in what way private decisions can operate so as to assure a perfect equality of civil rights for all persons. Nevertheless, those ordinary political processes set aside by the Court in 1938 were designed to work in just that manner. The secret to them was that they were rooted in the people's firm attachment to the principles of the *Declaration of Independence*, the threefold relationship of the equality of all men, the natural rights to life, liberty, and the pursuit of happiness, and the only legitimate means of establishing and sustaining government, consent. The principle of consent is the practical realization of the equality of men and their inalienable rights. It confirmed the necessity of a form of government which would rely upon the judgments of the governed to attain effectiveness.

It would be a mistake to think that, because just government must repose in the voluntary acquiescence of the governed, such a government is unable to legislate broadly in defense of the liberties of its people. The government of the United States was designed to be just, not naive or utopian. The means it ordinarily relies upon to secure the objectives of its laws is the voluntary compliance of citizens. The means by which this is encouraged has ordinarily been a preference for laws which, whenever possible, hand over the tasks of enforcement to the citizens and their courts, through procedures of litigation. This is especially true in the area of civil rights, which generally pits citizen against citizen (even when one is clothed with the power of the state).

The question in this Grove City bill is whether we in this country are not yet ready to trust the citizens again to provide for themselves. We all know there have been times when the ordinary recourse to legal process has been unavailing (though perhaps never to so extreme a degree as some partisans imagine). For that reason Congress in the past has often undertaken to bring alternative means to the defense of civil rights. How many of us, however, continue to believe that this describes our situation now? And grant that it were. How many of us then would think it preferable to create instruments of regulatory coercion, such as the Department of Education, instead of empowering the Justice Department to enter the causes of individuals in order to vindicate their civil rights?

In the first case, Congress and its regulatory agencies create whole classes of lawbreakers, by mere definition and without due process of law. In the second case, not only do individuals take courage from the knowledge that their government interests itself in the immediate protection of their own liberties, but we all derive the advantage of reinforcing the sense of individual responsibility for obedience to the law. Under that regime, every act of voluntary compliance becomes a victory for the principles of our government, renewed testimony to the sufficiency of government by consent. Under the reign of regulatory coercion, by contrast, we never even have occasion to learn how far willing acceptance of the rule of equal opportunity may have gone. Instead of maintaining the immediate relationship between remedies and injuries, or between victims and their abusers, we create thereby generalized classes of victims and abusers, all of whom are in fact victimized by the arbitrariness of governmental power thus exercised.

Let me bring these principles to the specific case of the bill before you. How might it affect institutions such as those where I am employed, for example? Some of you will have heard of the Claremont Colleges, located in the city of Claremont, some thirty-five miles to the east of Los Angeles. Did you know that there were six colleges, with contiguous campuses, some common programs, and independent, autonomous administrations? Indeed, the Claremont Colleges represent a genuinely federal relationship, much like that of the United States under the Articles of Confederation. The legislation proposed *seems* to regard each of the colleges, such as Harvey Mudd College, as a separate entity. That would mean that Pomona College could become subject to Title IX coverage while Harvey Mudd College would not (provided it refused all federal monies). On the other hand, the colleges do administer certain central services through a central administrative body. Will that change the picture? If all programs at Pomona College are subject to regulation, up to and including Pomona's participation in central services, do not all central services, and with them the autonomous programs of the five other colleges, follow in train?

The purpose of these questions, the like of which you have so often heard before, is only to prepare a conclusion of principle. I do not recommend the amendment of this bill. I recommend its defeat, and that Congress subsequently take up the serious work of setting our civil rights house in order. It now stands divided by conflicting purposes and an overly casual attitude towards our liberties. The result has been to raise the image of nightmares, such as I have just drawn, to expand governmental powers so vastly and so unnecessarily that only one conclusion can follow: regulators will define innumerable classes of "law breakers," most of whom they will of necessity neglect. I do not concede that violations will occur everywhere this legislation aims to find them, but I say that, if they did, most such would go unremedied. You may say that this is also frequently the fate of general legislation which pinpoints particular crimes and leaves enforcement up to judicial processes. Individuals will neglect to pursue their rights. Perhaps that is so. But there is this important difference: governmental neglect and arbitrariness breeds general disrespect for law; whereas a citizen's failure to pursue a just cause reflects rather on himself than the law.

Respect for law is the true casualty not only of the bill proposed but of our general approach to civil rights. How else can you interpret the situation in which Grove City College has been placed? By refusing to accept students bearing ADS Pell grants, Grove City announces to its own community and the country at large, every day that passes, that it considers the law governing our national life as fatally flawed and inconsistent with the happiness of members of the Grove City community. Such law not only merits disrespect but, pushed to the extreme, justifies resistance.

There is a better path to follow, than to punish innocent recipients of aid merely because some college's football coach refuses to accept Sara Brumble, who runs the 40 in 5 seconds, as a member of his team. If, as Sara might think and her trophies from the Pepper Mill Shakers might indicate, she has weight enough to hold down her end of the line, there can be no reason to punish anyone but the coach himself. And it is not true, as the perverse logic of Justice Powell's *Hogan* dissent suggests, that the rights ("mere convenience") of one man are simply not sexy enough for great statesmen to worry about. Even if Powell's logic were correct, his opinion was only a dissent; the majority opinion inescapably points in the opposite direction. The law must aim at either one of two objectives: to invalidate explicit policies and laws of discrimination or to rectify the actions of individuals which contravene the law. The error of our present approach,

placing regulation above litigation, seems to stem not simply from the mistake in Title IX but from the mistake in its model, Title VI.

Returning to the Claremont Colleges, I am mindful that the *Hogan* case against Mississippi University for Women produced a ruling which invalidated a single-sex nursing program under the Fourteenth Amendment and also ruled that Title IX's purported exemption of single-sex institutions from its control exceeded the power of Congress to grant (here relying on *Marbury v. Madison*, than which nothing could be more emphatic). Thus, present constitutional law calls into question the continued lawfulness of institutions such as our own Scripps College, whose students receive federal financial assistance in addition to other forms of direct federal aid to the institution. Unless Congress wishes explicitly to confine laws against sex discrimination to cases in which women are victims, thereby legitimating discrimination against males, and assuming the Court, following the ideas of Powell, would now buy that, the proposed regulations would seem to require either that Scripps College become co-educational or, following Grove City College, renounce federal assistance and therewith federal law.

A final example: What would happen to the nation's institutions of higher or secondary education which, on religious or moral principle, refused to provide counseling services in support of abortion for female students who chanced to become pregnant? As our law reads today, these students are free to demand abortion as a so-called right. If an educational institution, otherwise holding itself out as offering medical and psychological counseling, and also accepting direct or indirect federal monies for other programs (student aid, perhaps, from these very unfortunate ladies!), would it be impossible to imagine that this was a case of sex discrimination? Would the situation follow the rule of *Geduldig v. Aiello*, that to deny disability to pregnant women discriminates not between men and women but between pregnant and non-pregnant workers? Or would there seem to be no rational basis for the distinction in this case? In the latter eventuality, might the institution, again, be told to choose between its principles and federal aid?

My examples may seem to suggest that the difficulty of defining adequately the reasons for coercing an institution's programs or activities is the major defect in the proposed legislation. That has been the concern of many others before you. I aim, however, rather more to know what constitutes "federal financial assistance," on the one hand, and whether we are comfortable with our current notions of racial, religious, and sexual equality, on the other hand. In the first case, the question is whom do we intend to aid when we offer loans and grants for scholarships to needy students. Further, whom do we punish when we limit the accredited institutions at which they may expend these monies? Following the reasoning of *Hogan*, do we actually intend that women's colleges will no longer admit needy students? Or, do we prefer Powell's inclination to treat women as "a discrete and insular minority" and thus only to bar the admission of needy students into men's colleges? Closer still to home, am I to understand that, were I to die tomorrow, the social security benefits which my children would expend on their education should expose the institutions which admit them to a blanket of federal regulations? Is there never a point when monies received in the form of federal financial aid becomes truly our own to spend as we wish? Is it merely on loan from the government? Are we ourselves, ultimately, merely on loan from the government in the eyes of this bill's supporters?

Already we can not measure how many needy students have failed to apply to Grove City College because of its catalog declaration that they cannot bring their ADS Pell grants with

them. That would be very well indeed, if the question of federal grants did not exist. I believe, as Grove City has shown even in the present discouraging environment, that those very funds would even now be contributing to educate needy students at Grove City and elsewhere if they were not engrossed by the federal government. But the government does have the money, and I can see nothing we gain by using it to punish not only needy students but, in this proposal, even broader classes. I know of nothing we gain, but of a great deal we lose—the very least of which stems from an arbitrary and unjust narrowing of the range of choices available to our citizens.

The President of Grove City College came before you to plead, understandably, that you leave *some* institutions of higher education free. He pleaded for diversity, but I must say to you that I think he is mistaken. “Some of us” can not be free, unless we are all free. The passage of the Reconstruction Amendments closed forever the period in our history when the idea could be entertained that we had to suffer as a necessary evil the slavery of a part of the people. There is no threat to any American in this legislation which does not operate against the freedom of Grove City College, just as there is no threat to Grove City College which does not endanger the liberty of every American.

Abraham Lincoln in 1858 accused Senator, Douglas of “blowing out the moral lights around us.” In our time, working up purported exceptions to the universal command of our constitutional principles, we have dulled our sensitivity to the moral truth that just law is no respecter of persons. We have regressed to the point that Senator Trumbull’s defense of the Civil Rights Act in 1866 might now apply inversely to us: “the trumpet of freedom that we have been blowing throughout the land has given an ‘uncertain sound,’ and the promised freedom is a delusion.” Congress initially legislated Title IX’s program-specific language out of a legitimate concern not to be overbearing and intrusive on flimsy pretexts. They seemed to recognize with Edmund Burke that “liberty is a good to be improved, not an evil to be lessened.” But this legislation fears liberty. It fears the free and willing compliance of informed citizens. It has been seduced by the false allure of the overseer, in complete control and adapting to every exigency. But, I remind you, the overseer’s career is a treacherous one, subject to continuous pressure, low status, and high turnover. Further, the overseer rules by his will, not by law, for he presumes those subject to him to be hostile to his rule. The proposed legislation should seek higher ground. I remember an ancient complaint: “Is it Law? Is it Liberty? Is it Government? Or is it Tyranny and Oppression? If it is LAW, where is LIBERTY? If it is not LAW, where is the voice of LIBERTY?” I believe I know the answer to that query. In every era there have been those who imagined that freedom lay dying on her couch. But the tide has never moved against freedom in this land. Instead, freedom’s deathless tread paces the hours of our national existence. The question has never been when will freedom no longer sustain us, but rather, whether we will not sooner grow weary of the responsibility of freedom.

Let me conclude with a prayer. I have laid aside claims of expertise and spoken to you as you fellow citizen. In that guise I pray you to hear the wail of your countrymen: “It is time to let go!” The nation cannot remain permanently in the thrall of an activist government which seeks to restrain the will of the society to paths of abstract social policy. It is time to let go, that we may govern ourselves, freely contracting with one another, defining for ourselves the means whereby we pursue legitimate ambitions, restrained only by our mutual regard to preserve to one another a freedom no less complete than that we demand for ourselves. Not by law but by self-exertion and morality can we achieve the blessings of liberty. By law we safeguard our liberty, to be sure, but the uses to which we put it, the results of our liberty, must be the work of the people

themselves, acting through countless individual decisions. Congress cannot ordain a suitable result for the exercise of our liberties. By legislating in such a manner as to prescribe the most minute details of our social and business interactions, Congress grips in a stranglehold that freedom we claim as a birth-right. It is time to let go, while the government of this country is still free to let go.

I bid the honorable chairman and the committee Godspeed.

POSTSCRIPT

After I concluded my testimony, Representative Hayes, from the Committee, and Representative Dixon, who sat in with them, questioned me about the language in the closing paragraph. It seemed to them to echo the rhetoric of 1964, which inspired the passage of civil rights legislation. How can you use such language in testimony like *this*? I told them that the rhetoric of equality and liberty is always in order in this country. Some people seem to me to think that when it comes to equality and liberty, there's a sign hung out, reading "only minorities need apply." Well, it's time for a reappraisal, for the cause of this country today, my cause and your cause, is the cause of the equality and liberty of *all* citizens, no matter how one describes them. So I use the language of equality and liberty; I use it because it belongs to me, as a human being, as an American. It belongs to you, too. And if you want to keep it, you'd better get in the habit of using it.