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Clint Bolick

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YONKERS REVISITED: DISCRIMINATION AND JUDICIAL POWER

*Clint Bolick**

INTRODUCTION

In *United States v. Yonkers Board of Education*,[1] the Reagan Administration Justice Department won perhaps its most significant civil rights law enforcement victory. The case was "unique in its conjoined attack on the actions of state and municipal officials with respect to segregation in both schools and housing"[2] and resulted in

* J.D., University of California at Davis, 1982. The author is director of the Landmark Legal Foundation Center for Civil Rights in Washington, D.C. As an attorney with the United States Department of Justice, Civil Rights Division (1986-87), he argued the subject case for the United States in the U.S. Court of Appeals for the Second Circuit and authored the sections of the government's brief on housing discrimination liability and remedy.

1. This litigation produced a number of judicial orders and opinions. The orders and opinions that are most relevant to this article are the district court's decisions regarding liability, reported at 624 F. Supp. 1276 (S.D.N.Y. 1985), and housing remedy, 635 F. Supp. 1577 (S.D.N.Y. 1986). These decisions were affirmed by the Second Circuit at 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

2. *Yonkers*, 837 F.2d at 1185.

far-reaching judicial orders to remedy a pattern and practice of intentional discrimination spanning more than 30 years.[3]

Despite its success, the Justice Department's efforts in *Yonkers* have come under attack. In this instance, however, the criticisms come mostly not from the political left, but from the right, and the critics contend not that the Department was insufficiently diligent in its law enforcement, but rather that it was overly zealous. Some conservatives[4] have accused the Justice Department of promoting, and the trial court of engaging in, "judicial activism,"[5] with respect both to the issue of the City of Yonkers' liability for housing discrimination[6] as well as the remedy for housing discrimination.[7] Roughly speaking, they make the following arguments:

1. the decision is based on a "right" to public housing;
2. the City acted merely to confine low-income housing to low-income residents, which is proper and does not amount to an intent to discriminate; and
3. the court's order that the City approve 200 units of subsidized housing in non-minority neighborhoods exceeds the judicial power.[8]

This article will argue, to the contrary, that the evidence demonstrated that the City deliberately and persistently used the coercive power of government to segregate blacks and limit their housing opportunities, and that, with one exception, the court acted prudently and properly in fashioning its remedy. It concludes with some

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3. *Id.* at 1186-1193.

4. The term "conservative" is used broadly to encompass those who favor limited government, individual liberty, and the free enterprise system.

5. This term is used to mean any overstepping of the constitutional powers assigned to the judiciary under Article III of the United States Constitution. Perhaps the clearest understanding of the proper role of the judiciary is expressed in THE FEDERALIST No. 78 (Hamilton), in which the judiciary is assigned a leading role in protecting fundamental individual rights but is otherwise deferential to the other branches of government.

6. The findings of liability with respect to school segregation and the resulting remedy, *see* United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), are less controversial and, therefore, are not considered here at great length.

7. For attacks on the *Yonkers* decision, *see* Crovitz, *Judge, Jury and Executioner*, NAT'L REV. Oct. 14, 1988, at 30 (arguing that the intent to discriminate was not proven in the *Yonkers* decision; that many middle class blacks from Yonkers also opposed the decision, and that the government was penalizing Yonkers for building housing for the poor). *See also* Seligman, *Sandbagged in Yonkers*, FORTUNE Sept. 12, 1988 at 169 (arguing that the white opposition to the public housing was based on concerns of decreasing property values and increasing crime).

8. *Id.*

observations about the ramifications of the *Yonkers* decision for the future direction of civil rights policy and law enforcement, particularly as they relate to conservatives.

THE YONKERS CASE

The City of Yonkers is one of the five largest cities in New York. Located in Westchester County immediately to the north of New York City, the city's western boundary is formed by the Hudson River. As of 1980, the city's minorities comprised 18.8% of the populace. The minority population was heavily concentrated (80.7%) in southwest Yonkers, with most of the remainder living in a contiguous strip along the Hudson River in northwest Yonkers and in an isolated black enclave in east Yonkers called Runyon Heights.[9]

The Attorney General brought suit against the City of Yonkers and its Board of Education on December 1, 1980, in the waning days of the Carter Administration. The suit alleged that the defendants violated the fourteenth amendment and various federal statutes, including the Fair Housing Act,[10] by engaging in intentionally segregative practices with respect to public schools and public housing.[11] Throughout the litigation, numerous attempts were made to voluntarily settle the case, including the appointment by District Court Judge Leonard B. Sand of a Special Master whose sole responsibility was to try to bring the parties to a consensual resolution.[12] All efforts to voluntarily settle the case before trial were unsuccessful.[13]

Trial lasted nearly 100 days, with 84 witnesses and thousands of exhibits.[14] The resulting decision on liability alone encompasses 278 pages in the Federal Supplement.[15]

Judge Sand commenced his inquiry on the merits of the case with the recognition that the City and its schools were racially segregated.[16] He viewed his task as determining whether "actions taken by the [defendants], with respect to housing and public schools, were in whole or in part intentionally segregative" and he concluded that they were.[17]

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9. *Yonkers*, 624 F. Supp. at 1289-91.
10. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601-3631 (1982).
11. *Yonkers*, 624 F. Supp. at 1291-92.
12. *Id.* at 1289.
13. *Id.*
14. *Id.* at 1288.
15. *Id.* at 1276-1553.
16. *Id.* at 1288.
17. *Id.* at 1289. Judge Sand applied the most rigorous standard for proving discrimina-

The district court's finding of liability on the housing issues was based upon a series of actions taken by the city over the course of thirty-three years with respect to sites for public housing,[18] which the court concluded were intended to accomplish both residential[19] and school segregation.[20] The Court found that an extreme degree of segregation existed in Yonkers,[21] and held that it was unlikely that the City's "remarkably consistent and extreme" pattern of public housing site selection decisions that "so perfectly preserved" segregated residential patterns was unrelated to race.[22] In addition to the City's pattern and practice of segregative site selections, the court found evidence of intentional segregation based on racially influenced community opposition to housing projects outside minority neighborhoods;[23] evidence that the city government translated that animus into official policy;[24] the inconsistent application of procedural rules and the restriction of housing "vouchers" to areas of minority concentration.[25] Such actions, the court found, reflected "a thirty-year practice of consistently rejecting the integrative alternative in favor of the segregative — a practice that had the unsurpris-

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tion when he chose to require that a showing of intentional discrimination had to exist before the City of Yonkers could be found guilty of violating the Fair Housing Act. Other courts have not required such a rigorous standard. At least one court has found violations of the Fair Housing Act based solely on the segregative effects of housing policies. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). *But see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (requiring proof of intent to prove constitutional violations).

In the Yonkers case, the Justice Department argued in favor of an intent standard, *see* Brief for the United States in United States v. Yonkers Bd. of Educ., Nos. 86-6136, 86-6138, and 86-6156 (2d Cir., filed Nov. 26, 1986) [hereinafter U.S. Brief] at 81-83, and both the district court and court of appeals' decisions were based on findings of intent. *Yonkers*, 624 F. Supp. at 1289, and 837 F.2d at 1217.

18. *See infra* pp. 8-12.

19. *Yonkers*, 624 F. Supp. at 1373.

20. *Id.* at 1542-43.

21. *Id.* at 1291 n.8.

22. *Id.* at 1369.

23. *See infra* note 41.

24. The City, on appeal, argued that it was merely responding to the will of the people. However, the same could be argued for any racist policy imposed by the majority upon a minority through the coercive power of government. The equal protection clause was crafted precisely to prevent the arbitrary and unequal allocation of rights by government, even if that distribution is achieved through democratic processes. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* 93-133 (1990). Accordingly, the Supreme Court has consistently held that although "[p]rivate biases may be outside the reach of the law . . . the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

25. *See generally Yonkers*, 624 F. Supp. at 1295-1368.

ing effect of perfectly preserving, and significantly exacerbating, existing patterns of racial segregation in Yonkers."[26] The Court of Appeals for the Second Circuit affirmed these findings.[27]

As its remedy, the district court, *inter alia*, enjoined further discriminatory acts, and ordered the City to provide acceptable sites for 200 units of public housing outside areas of minority concentration, as it had previously obligated itself to do as a condition for receiving funds from the U.S. Department of Housing and Urban Development ("HUD").[28] The court designated sites for such housing that would bind the city only if the government failed to select other appropriate sites within a specified period of time.[29] The remedy was likewise affirmed on appeal.[30]

Analysis of the Decision

As previously noted, conservative critics have characterized the *Yonkers* decision as unbridled judicial activism.[31] Such critics have attacked the theory and findings of liability[32] as unsound and the remedy as excessive.[33]

These criticisms are patently unwarranted. The evidence demonstrates without a doubt that the city deliberately segregated and limited the housing opportunities of its black citizens. Indeed, the city engaged in precisely the type of extreme and arbitrary governmental suppression of individual liberty that ordinarily invites — and ought to elicit in this case — condemnation, not only by conservatives, but by all Americans.

Evidence of Discriminatory Intent

Over a period of more than thirty years, the city confined the construction of all of its nearly 7,000 units of subsidized housing to areas with high minority concentration, with 96.6% of public hous-

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26. *Id.* at 1368.

27. *Yonkers*, 837 F.2d at 1219-26. The second circuit panel included Judge Kearse, a Carter appointee, and Judges Miner and Pratt, both Reagan appointees.

28. *See infra* note 61 and accompanying text. *But see* 837 F.2d at 1192 (City and HUD agreed to *100* units of subsidized housing).

29. *Yonkers*, 635 F. Supp. at 1577, 1580-81.

30. *Yonkers*, 837 F.2d at 1236-37.

31. *See supra* note 7 and accompanying text.

32. "Judge Sand used peculiar and circumstantial evidence to show that the opposition to periodic proposals to put public housing in middle-class neighborhoods was based on race and not on economics." Crovitz at 31.

33. Crovitz at 33.

ing units restricted to heavily black southwest Yonkers.[34] This pattern of site selections plausibly could be consistent with either of two scenarios: a policy to preserve property values and to promote urban renewal by restricting low-income neighborhoods, which is not unlawful under the fourteenth amendment or the Fair Housing Act; or a policy to segregate such housing within minority neighborhoods, which if effectuated by government violates the Constitution as well as the Fair Housing Act.

To determine if the finding of liability was correct, each of the city's actions with respect to public housing during the relevant period was compared with these two alternative scenarios. Many of the city's actions were consistent with either scenario. But while *some* of the city's actions were consistent with a policy of preserving property values and promoting urban renewal, *all* of its actions were consistent with a policy of discrimination. Stated another way, the bulk of the evidence was consistent *only* with a deliberate and persistent policy and practice of racial segregation.

Indeed, the evidence of racial animus was compelling. Between 1949 and 1982, the city approved three dozen public housing projects.[35] The city did not select sites based solely on the economic status of the surrounding neighborhoods — no public housing for families was constructed in poor white neighborhoods.[36] Nor were sites selected in light of population density considerations, since multi-family housing developments were approved in white neighborhoods on the same sites on which the city had previously rejected public housing.[37] Rather, the only perfect correlation was between public housing site selections and black neighborhoods. Of thirty-eight public housing projects, thirty-six were located in or adjacent to heavily black southwest Yonkers.[38] The only two exceptions were a senior citizens project occupied predominantly by whites, and a family project located in the black enclave of Runyon Heights,[39] which is literally sealed off by a strip of land owned by the neighborhood association of the white community that borders it.[40]

34. *Yonkers*. 837 F.2d at 1220, 1237.

35. *Yonkers*, 624 F. Supp. at 1290.

36. U.S. Brief at 16.

37. *Yonkers*, 624 F. Supp. at 1327 n.36.

38. *Id.* at 1290. Even within Southwest Yonkers, sites were approved in areas of heavy minority concentration but were rejected in predominately white areas. *See, e.g., id.* at 1306.

39. *Yonkers*, 837 F.2d at 1220.

40. *See Yonkers*, 624 F. Supp. at 1410. Runyon Heights is the only area of heavy minority concentration outside of Southwest Yonkers, and is bounded by the Saw Mill River

Whenever public housing sites were proposed outside southwest Yonkers, they were bitterly opposed by community groups, sometimes explicitly on racial grounds.[41] Former city officials testified that this opposition was responsible for the City's failure to ever approve public housing outside the southwest quadrant.[42] Yet when black residents of Runyon Heights protested the construction of public housing in their east Yonkers neighborhood, their pleas were ignored and the project was approved.[43]

The city also selectively relied on or ignored its own procedural rules and planning board recommendations, depending on whether those rules or recommendations furthered or detracted from the pattern of segregation. Public housing projects in southwest Yonkers were swiftly approved, even if the sites did not meet governmental criteria; they were rejected outside the southwest quadrant even

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Parkway, Tuckahoe Road, and the New York Thruway on the west, south, and east sides respectively. *Id.*

41. When subsidized low-income housing was proposed in white communities, community civic and social groups "sent petitions and resolutions to the Planning Board and the Councilmen, contending that such projects in their areas would 'lead to the eventual deterioration of the surrounding community by the element which they attract.' " *Yonkers*, 837 F.2d at 1187.

In another instance where subsidized low-cost housing was to be built in two white areas, "[T]axpayer and civic groups [from those two areas] wrote their councilmen . . . describing their general opposition as follows:

> . . . what safeguards do we have against our having to absorb the overflow from Puerto Rico or Harlem?

The Council voted to reject the sites proposed for the white neighborhoods." *Id.* at 1188.

In yet another instance, "[a] Catholic Church group, led by their pastor, opposed use of [a predominantly white area] for family housing and urged that it be used for a senior citizen project instead. The group told [Yonkers Community Development Agency Director Walter] Webdale [that] they opposed family housing because they 'feared an influx of blacks in the neighborhood.' " *Id.* at 1190.

Most recently, in 1979, as soon as School 4, a school closed by the city that was located on prime real estate, "was mentioned as a possible site for low-income housing, the Council voted to remove it from the multifamily zoning category in order 'to give the community some peace of mind.' " *Id.* at 1192. Yet, when a developer desired to convert the site into luxury condominiums priced above $100,000, the committee recommended the sale because it attracted the kind of people they wanted in the area. The NAACP opposed this action, and a Council meeting was called. At the meeting, the discussion was emotionally charged, with frequent references to the character of the neighborhood. One speaker said that he did not want Yonkers ruined by blacks the way the Bronx was ruined. This drew a loud ovation from the largely white crowd. When one councilman said that the condominiums could not be built under present zoning laws, another responded, " 'we will change the zone when the concept fits the people, not before.' " *Id.* The zoning was subsequently passed to allow the development of the condominiums. *Id.*

For a different viewpoint of these instances, see Crovitz, *supra* note 7, at 31.

42. *Yonkers*, 624 F. Supp. at 1369-71.

43. *Id.* at 1298-1300.

where the sites plainly were the most appropriate available,[44] and even if it meant sacrificing federal housing funds for which the city had applied.[45]

The pattern of segregation continued even after construction of public housing ceased and the federal government moved to rental subsidies to meet the housing needs of the poor. The city largely confined the use of subsidies and voucher certificates to southwest Yonkers.[46] As of 1982, the city distributed only thirty-six out of 120 available family housing vouchers, despite a waiting list of 800; all of the vouchers in use in the southwest were allocated to blacks while all vouchers outside the southwest were allocated to whites. Due to concerns about the mobility that housing vouchers provided their recipients, city officials resisted attempts to obtain additional certificates despite a desperate need for public housing.[47] Since housing vouchers presented none of the logistical concerns which the city raised to justify its concentration of public housing sites in southwest Yonkers, the district court aptly concluded that the city's actions were "inexplicable except by reference to the anticipated race of the certificate holders."[48]

This brief recounting of the evidence of discriminatory motivation does not even include evidence of the relationship between the city's housing and school segregation policies.[49] Even absent such considerations, as the district court concluded, the evidence "clearly demonstrates that race has had a chronic and pervasive influence on decisions relating to the location of subsidized housing in Yonkers."[50]

The city government consistently manipulated the machinery of government to effectuate the racial bias of some of its constituents, and it did so in such a brazen and effective manner that it would have made the southern white supremacists of yesteryear proud. Yet

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44. *Yonkers*, 837 F.2d at 1221-22.
45. *See, e.g.*, *Yonkers*, 624 F. Supp. at 1306.
46. *Id.* at 1336-37, 1345-46.
47. *Id.* at 1343-47.
48. *Id.* at 1347.
49. *Id.* at 1500-03.
50. *Id.* at 1376. Although the Supreme Court never reached the merits of the case, in a subsequent ruling on a contempt order, Chief Justice Rehnquist remarked that "[t]here can be no question about the liability of the city of Yonkers for racial discrimination . . . ." Spallone v. United States, _ U.S. _, 110 S. Ct. 625, 631 (1990)(5-4 decision). Dissenting from the procedural ruling, Justice Brennan similarly observed that "[f]or the past four decades, Yonkers officials have relentlessly preserved and exacerbated racial residential segregation throughout the city." *Id.* at 635 (Brennan, J., dissenting).

the Yonkers government is in a sense worse than its predecessors who were avowed racists, for it sought to hide its real motivations behind a facade of concern over property values and community well-being. Had it exercised its democratic mandate in good faith, the Yonkers government could have protected such legitimate values while honoring its obligation of nondiscrimination. Instead, it chose to attempt to sacrifice the interests of some of its citizens for the benefit of others; and in the process, it sacrificed everyone. The blame for the tragic saga of Yonkers resides not with the Justice Department or with Judge Sand, but with the elected representatives of the city itself, who violated their oaths to uphold and defend the laws that protect us all.

THE RIGHT TO PUBLIC HOUSING

A second criticism of the *Yonkers* decision is that it is allegedly premised on an affirmative right to public housing. Neither the district, nor the appellate court, nor the Justice Department made such an argument. On the contrary, the Justice Department stated that "there is no right to public housing, or to live in a particular neighborhood,"[51] and based its argument on a principle that is a cornerstone of antidiscrimination law dating back at least to *Brown v. Board of Education*:[52] housing, like education, is not a right in and of itself, but "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[53]

The city violated this principle in two distinct ways. First, it consciously manipulated sites for public housing for the purpose and with the effect of reinforcing racial concentration. This intentional segregation accomplished by the coercive power of government not only violates the fundamental principle of equality of law, but also adds to the physical isolation that has restricted many members of the largely minority "underclass" from full participation in our economic and political system.[54] Second, by thwarting the development of housing through arbitrary zoning and other coercive measures and by limiting the distribution of housing certificates, the city artificially restricted housing opportunities for individuals solely on ac-

51. U.S. Brief at 81.

52. 347 U.S. 483 (1954).

53. *Id.* at 493.

54. *See, e.g.*, W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

count of race.

Both the district and appellate courts applied this principle of nondiscrimination. As the Court of Appeals for the Second Circuit declared, "we know of no statutory or constitutional provision that imposes on a municipality a general obligation to construct subsidized housing;"[55] but the absence of such duty "does not give the municipality license to proceed discriminatorily once it has started down the road to construction."[56] The equal protection clause confers no positive entitlements, but rather operates as a constraint against arbitrary or discriminatory governmental action.[57]

This rule of law, as with the holding of *Yonkers* in its entirety, is unremarkable and unobjectionable. As was emphasized in the Justice Department's brief, the *Yonkers* decision is distinguished "not by the law it creates — for it creates none — but by the starkness of the City's violations."[58] The decision neither creates nor implies any right to public housing or to any other publicly provided benefit; nor does it question or disturb a municipality's ability to protect private property rights or voluntary personal associations. All that the *Yonkers* decision stands for is the rule that when government allocates burdens or benefits, it must do so in a rational manner. I hope that we are finally approaching the day on which all agree that decisions based on race — as were the decisions of the City of Yonkers — cannot survive such constitutional scrutiny.

THE REMEDY

A judicial order requiring the approval of 200 units of low-income housing may appear extraordinary, but in this case the order reflects a moderate and reasonable remedy for the city's extensive legal violations.

As in most cases arising under the fourteenth amendment[59] or federal civil rights statutes, the remedial objective is "make-whole"

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55. *Yonkers*, 837 F.2d at 1218.
56. *Id.*
57. *See* Bolick, *Unfinished Business*, *supra* note 24.
58. U.S. Brief at 93.
59. U.S. Const. amend. XIV, § 1 states:

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.

relief, which seeks to place victims in the position they would have occupied absent the discrimination.[60] In employment cases, this typically means providing jobs to those who were excluded. In *Yonkers*, where public housing was restricted to minority neighborhoods *and* where the city actually limited housing opportunities for reasons of race, this meant allowing the construction of new housing outside southwest Yonkers.

The district court acted cautiously because it would be difficult to determine precisely how many units would have been constructed outside southwest Yonkers absent the city's race-based public housing policies. The requirement of 200 units reflected the number to which the city had earlier committed itself in its HUD grant contract, but which it had abandoned in accord with its policy of discrimination.[61] Thus, this requirement constituted a reasonable starting point, with site selection and further housing development committed initially to the city's discretion within a general remedial framework.[62]

The court's remedy thus did not stray beyond undoing past wrongs, nor did it supplant the city's legislative powers. In 1988, the court did breach the line between judicial remediation and judicial lawmaking when it held individual city council members in contempt for refusing to vote to implement remedial aspects of a consent decree entered into earlier that year, but the Supreme Court subsequently overturned the contempt order.[63] The contempt order was inappropriate because the court actually assumed the legislative

60. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

61. "In June 1980, HUD advised the City that continued receipt of federal funding [of Community Development Block Grants (hereinafter "CDBG")] would be conditioned on the City's taking 'all actions within its control' to construct *100* units of subsidized housing for families 'outside of areas of minority concentration.'" *Yonkers*, 837 F.2d at 1192 (emphasis added). ***But see*** note 28 and accompanying text.

During the subsequent two years, the city only proposed three sites that met with HUD's approval. However, the Council thwarted the use of these sites for low-income housing by zoning actions. *Yonkers*, 837 F.2d at 1192. The first site became a shopping center after the Council approved a zoning change; for the second site, the Council refused to rezone it to make the site consistent with subsidized housing development; and as to the third site, it was rezoned to exclude multifamily zoning. *Id.* Thus, the City rendered itself unable to live up to its agreement with HUD, and it was willing to forfeit its right to the CDBG funds. United States v. Yonkers Bd. of Educ., No. 80-6761 (S.D.N.Y., May 28, 1986) (Westlaw, Allfeds).

62. *Yonkers*, 635 F. Supp. at 1577-83.

63. *Spallone, supra* note 50. *See* Note, *The Yonkers Case: Separation of Powers as a Yardstick for Determining Official Immunity*, 17 FORDHAM URB. L.J. 217 (1989)(arguing that the court did not exceed its bounds in holding the council members in contempt).

function. Nonetheless, other remedies which do not involve the court directly in the legislative function, such as fines and contempt orders generally, are appropriate in cases, like *Yonkers*, in which recalcitrant government officials refuse to comply with judicial orders designed to halt and remedy constitutional violations.

Certainly, numerous instances exist of overzealous courts violating principles of federalism and separation of powers by taking on the lawmaking function. In *Missouri v. Jenkins*,[64] for example, the Supreme Court upheld judicial authority to require tax increases to finance a "sweetheart" deal between civil rights plaintiffs and the defendant school district that provided for new programs and facilities.[65] *Jenkins* differed dramatically from *Yonkers* in that the underlying remedy in *Jenkins* far exceeded the scope of the violation, and involved the court directly in the legislative process. However, in *Yonkers* the remedy was restricted to make-whole relief, and the court left democratic processes intact to remedy the violation except to the extent noted above. Considering the magnitude of the violation and nearly a decade of recalcitrance by city officials, the court's remedy was fairly remarkable for its moderation and restraint.[66]

CIVIL RIGHTS AND CONSERVATIVES

The *Yonkers* decision comes at a time of both challenge and opportunity for conservatives with respect to civil rights issues. On the one hand, a growing consensus from the left and right supports conservatives' claims that twenty-five years of civil rights policies comprised of racial quotas, forced busing, minority set-asides, and welfare entitlements have done little to aid those most disadvantaged by past discrimination.[67] Forward-looking conservatives are advocating policy alternatives geared toward empowering individuals to control their own destinies. Such empowerment policies include school choice, urban homesteading, urban enterprise zones, criminal victims' rights, and freedom from arbitrary barriers to entrepreneurial opportunities.[68] Such ideas are continually gaining credibility and

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64. _ U.S. _, 110 S. Ct. 1651 (1990).

65. Although the Supreme Court upheld the judicial authority to require tax increases, it struck down the district court's order directly implementing such increases. *Id.*

66. *See* Note, *United States v. Starett City Associates and United States v. Yonkers Board of Education: Can More Be Done to Remedy Housing Discrimination?*, 4 ST. JOHN'S J. OF LEGAL COMMENTARY 1 (1988)(stating that the remedy of fines was not onerous).

67. *See, e.g.*, Wilson, *supra* note 54; C. Murray, *Losing Ground* (1984).

68. See, e.g., C. Bolick & S. Nestleroth, *Opportunity 200: Creative Affirmative Action Strategies for a Changing Workforce* (U.S. Dep't of Labor, 1988); C. Bolick, *Changing*

support.

But conservatives have a problem — a self-inflicted problem — and the reaction of many conservatives to the *Yonkers* decision exemplifies that problem.

Conservatives consistently have supported the principle of racial neutrality — the belief that government may not take race into account in apportioning benefits and burdens.[69] For many years, liberals also adhered to this principle, but during the past quarter century many have abandoned it.[70]

But conservatives have often pursued this principle selectively, focusing on cases involving "reverse discrimination" against whites. Empowerment activist Robert Woodson complains that "[t]here must be a conservative legal foundation supporting every single aggrieved white fireman. Black Americans just want to know where these conservatives were when millions of blacks were facing brutal repression."[71] "[C]onfidence [in the commitment by conservatives to civil rights] is not engendered by conservative attorneys chasing firetrucks to see if any members of the Teamsters Union are upset about affirmative action."[72]

Racial quotas and other departures from the principle of equality under the law present important civil rights issues, but certainly they are not the only ones. Abstract invocations of constitutional color blindness ring hollow if unaccompanied by a sincere commitment to eradicate arbitrary and discriminatory barriers that prevent individuals from participating fully in the American system.

Conservatives need not mimic the liberals' game plan. Indeed, conservatives quite fruitfully can concentrate on challenging government regulations that disproportionately restrict opportunities for minorities, such as occupational licensing laws, the government education monopoly, the Davis-Bacon Act, and restrictive zoning ordinances.[73]

Course: Civil Rights at the Crossroads (1988); R. Woodson, *On the Road to Economic Freedom* (1987); Butler, *Razing the Liberal Plantation*, NAT'L REV., Nov. 10, 1989 at 27.

69. *See* Plessy v. Ferguson, 163 U.S. 537, 554-59 (1896)(Harlan, J., dissenting).

70. *See* Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986).

71. Butler, *supra* note 68, at 28.

72. *Id.*

73. *See, e.g.*, Bolick, *supra* note 68; Williams, *The State Against Blacks* (1982). For an example of this type of litigation, *see* Brown v. Barry, 710 F. Supp. 352 (D.C. Cir. 1989)(striking down a prohibition on bootblack stands in public as violative of the fourteenth amendment).

Any viable civil rights strategy, however, starts with the vigorous enforcement of our nation's civil rights laws. The *Yonkers* case, like many civil rights cases, raises important questions of the interpretation of civil rights laws and the proper role of courts. I certainly do not mean to disparage anyone who does not share my conclusions about this case. But I do want to sound a note of caution to my conservative friends: you must take care in choosing your allies. Those who oppose the court's rulings in *Yonkers* place themselves in the posture of siding with an oppressive and racist regime. The government of Yonkers deserved everything it got and more; unfortunately, those who shoulder the burden for the government's misdeeds are the citizens of Yonkers, both black and white.

Conservatives have a great deal to offer in the quest to make good on America's commitment to civil rights — a commitment on which our nation's moral claim is staked. Before they can make progress, however, they must establish their credibility and their commitment. The Reagan Administration's vigorous and principled prosecution of the government of Yonkers was a step in the right direction.