How to Turn the Left Against Discrimination Laws

Regardless of political party, almost all Americans support discrimination laws. Moderates and conservatives support them out of a sense of basic fairness. Progressives support them out of fanatical zeal. Yet strangely, I suspect that one simple event could swiftly move progressives from ardent supporters of discrimination laws into ambivalence or even opposition.

What's the "one simple event"? Let's start with some background. In *United Steelworkers vs. Weber* (1979), the Supreme Court ruled that discrimination law allowed discrimination against whites (and, by extension, against males). The majority decision placed numerous restrictions on such discrimination; most notably, it has to be "temporary"! Forty three years later, these "temporary" measures are more prevalent than ever. Plenty of top firms now openly avow their intent to discriminate in the name of diversity and inclusion.

Yet in the *United Steelworkers* case, two Justices – Rehnquist, joined by Burger – dissented. The dissent didn't just reject anti-white discrimination; it invoked George Orwell's *1984*:

> *In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:*
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> *"It was almost impossible to listen to him without being first convinced and then maddened. . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .*

> *"[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax."*
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> *Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.*
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> *The operative sections of Title VII prohibit racial discrimination in employment simpliciter. Taken in its normal meaning and as understood by all Members of Congress who spoke to the issue during the legislative debates, this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white. (citations omitted)*

The dissent didn't merely argue that color-blindness was a better policy. It didn't just argue that color-blindness was the law of the land. It argued that the Justices who supported the majority decision were plainly using Orwellian doublethink.*

> *We have never wavered in our understanding that Title VII "prohibits all racial discrimination in employment, without exception for any group of particular employees."... In Griggs v. Duke Power Co. (1971), our first occasion to interpret Title VII, a unanimous Court observed that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed." And in our most recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." Furnco Construction Corp. v. Waters (1978) (emphasis in original).*
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> *Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title*

> *VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions… Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong. (citations omitted)*

By now, you can probably guess the "one simple event" I have in mind. The U.S. Supreme Court just needs to overturn the majority decision in *U.S. Steelworkers* in favor of Rehnquist's stern dissent. From that moment on, any firm that openly claimed to base any employment decision on race or gender would be a sitting duck for lawsuits. And every firm would have to constantly ponder, "Could this policy lead whites or males to sue us?" Even blatantly incompetent white males would have a scary threat point: "If you fire me, maybe I'll go to court and show that you retained equally incompetent women of color."

Pathological? Of course. That's one of the main reasons I've opposed discrimination laws for decades. Functional labor markets rest on "If you don't like it here, leave," not "How can we convince you not to sue us?" But I think something shocking would emerge from these pathologies. Once firms started getting sued for favoring non-whites and women, a chilling effect would set in. Many firms would quietly delete "diversity and inclusion" propaganda – and tell Human Resources to avoid placing their employer in legal danger. Left-wing activists would start looking over their shoulders – or doing a full visual 360 – before whispering their vow to disfavor white males to the bitter end.

Before long, I predict that many leftists will suddenly discover that actually-existing discrimination laws are arbitrary, unfair, and subject to severe abuse. Sure, they could insist, "The good these laws does far exceeds the bad." And from their own point of view, they'd probably still be right. But as the media overflows with stories of white males suing left-leaning businesses, schools, and the government itself, Action Bias will kick in. "We've got to do something" will readily give way to "Race and gender policies were better a few years ago, when institutions were free to experiment with progressive ideas."

Admittedly, top leftist activists will hope to simply rewrite U.S. discrimination law. But changing any fundamental U.S. federal law is now notoriously hard. Court-packing is even less likely. At least in the medium-term, activists will have to choose between two bitter stances: Either "Despite all the legal horror stories people keep sharing, existing discrimination laws are better than nothing" or "These laws have become too dysfunctional

to support.” Since the latter is more emotionally pleasing, I predict that in my scenario, it would prevail.

* An all-too-common feature of Supreme Court opinions. See its 1918 decision on conscription.